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Briefing note

International Regulatory Update

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EU Commission publishes initiative on prudential framework for loans that become non-performing

The EU Commission has published an impact assessment on an initiative to explore the possibility of creating a prudential framework applicable to EU banks for the treatment of potential under-provisioning for new loans that become non-performing.

The Commission has highlighted that due to a lack of common prudential rules on provisioning, capital coverage for non-performing loans (NPLs) may vary across banks, limiting the comparability of capital ratios and undermining their reliability. As such, the Commission has decided to explore the potential harmonisation in prudential terms at EU level to ensure sufficient and timely provisioning levels for NPLs across Member States and banks, which will also help ensure a level playing field for banks in the Banking Union.

The Commission has proposed the initiative following a request from the EU Council, which published its Action Plan on NPLs in July 2017. The Council invited the Commission to take steps to reduce the risk to financial stability by addressing the existing stock of NPLSs and to prevent the future emergence and accumulation of NPLs.

The purpose of the initiative on statutory prudential backstops would be to prevent the build-up of future NPLs with insufficient provision coverage by setting a common minimum provisioning level for NPLs across Member States and banks. In particular, the Commission is proposing two policy options and is seeking feedback from stakeholders on the proposals.

Comments are due by 7 December 2017.

EuVECA and EuSEF funds: amending Regulation published in Official Journal

Regulation (EU) 2017/1991 amending the European Venture Capital Funds (EuVECA) Regulation and the European Social Entrepreneurship Funds (EuSEF) Regulation has been published in the Official Journal.

The Regulation will enter into force on 30 November 2017 and will apply from 1 March 2018.

PSD2: EBA publishes guidelines on authorisation and registration of payment institutions

The European Banking Authority (EBA) has published its final guidelines (EBA/GL/2017/09) on the information to be provided for the authorisation of payment institutions and e-money institutions and for the registration of account information services providers under the recast Payment Services Directive (PSD2).

The EBA published its final report on the guidelines on 11 July. The guidelines specify the detailed documentation that applicants are required to submit to national competent authorities for the purpose of authorisation as payment institutions or registration as account information service providers (AISPs).

Competent authorities must notify the EBA whether they comply or intend to comply with the guidelines by 8 January 2018. The guidelines will apply from 13 January 2018.

CRR: EBA publishes consultation on proposed RTS on prudential consolidation and opinion on issues relating to OFIs

The EBA has published a consultation on draft regulatory technical standards (RTS) under the Capital Requirements Regulation (CRR) specifying the different methods of prudential consolidation.

Under Article 18(1) of the CRR, for prudential consolidation purposes, institutions shall fully consolidate all credit institutions, investment firms, and financial institutions that qualify as their subsidiaries, or if relevant, the subsidiaries of their parent financial holding company. Under certain circumstances, Article 18 of the CRR allows the application of a different method of consolidation other than full consolidation for the purposes of prudential consolidation.

The draft RTS specify the criteria, indicators and conditions that institutions must meet for the application of different methods of consolidation or, if consolidation is not appropriate, the equity method. Comments to the consultation are due by 9 February 2018.

The EBA has also published an opinion and report on regulatory perimeter issues relating to the Capital Requirements Directive (CRD4) and CRR. The EBA carried out an EU-wide assessment of issues relating to the regulatory perimeter and to other financial intermediaries (OFIs), which are entities carrying out credit intermediation activities that are not credit institutions or other specified type of financial entity. The results of the EBA's analysis are set out in the opinion and accompanying report.

MiFID2: ESMA consults on amendments to RTS 1

The European Securities and Markets Authority (ESMA) has launched a consultation on proposed amendments to Commission Delegated Regulation (EU) 2017/587 as regards regulatory technical standards (RTS 1) under MiFID2.

RTS 1 specify requirements on transparency for trading venues and investment firms in respect of shares, depositary receipts, exchange traded funds and other similar financial instruments and the obligation for investment firms to execute transactions in certain shares on a trading venue of a systematic internaliser (SI).

It has come to ESMA's attention that the concept of 'prices reflecting prevailing market conditions' set out in RTS 1 may require further clarification, particularly as to whether, under certain circumstances, SI quotes should reflect the same minimum price increments as orders and quotes submitted to trading venues trading for the same financial instrument. ESMA is consulting on a proposal to amend Article 10 of RTS 1 to clarify that, for equity instruments subject to the minimum tick size regime under MiFID2 RTS 11, SI quotes would only be considered to reflect the prevailing market conditions where those quotes reflect price increments applicable to EU trading venues trading the same instruments.

Comments to the consultation are due by 25 January 2018. ESMA will consider the responses it receives when finalising its proposal to amend RTS 1 before submitting a final report to the EU Commission for endorsement.

IOSCO and FSB reports on implementation of G20/FSB recommendations on securities markets

The International Organization of Securities Commissions (IOSCO) and Financial Stability Board (FSB) have published separate reports on the implementation of the G20/FSB post-crisis recommendations designed to strengthen securities markets. Both reports are based on responses to the FSB Implementation Monitoring Network (IMN) survey.

The FSB report includes an overview of the implementation status by recommendation and jurisdiction and covers following areas:

- hedge funds;
- securitisation;
- enhancing supervision;
- building and implementing macroprudential frameworks and tools;
- improving oversight of credit rating agencies (CRAs);
- enhancing and aligning accounting standards;
- enhancing risk management;
- strengthening deposit insurance;
- safeguarding the integrity and efficiency of financial markets; and
- enhancing financial consumer protection.

The IOSCO report seeks to provide further clarity on the recommendations and the role of regulators in implementing the reforms. Overall, IOSCO reports that most responding jurisdictions have taken steps to implement the G20/FSB recommendations in each of the designated areas. In particular, the survey has identified the most advanced implementation with respect to hedge funds, structured products and securitisation, and the oversight of CRAs. Further work is required on safeguarding the integrity and efficiency of markets, although jurisdictions reported that they have undertaken some work to harmonise and strengthen their rules.

FATF announces outcomes of plenary meeting

The Financial Action Task Force (FATF) has announced the outcomes of its plenary meeting in Buenos Aires on 1-3 November 2017.

Following the meeting, the FATF issued a public statement identifying jurisdictions with strategic deficiencies in relation to anti-money laundering (AML) and combating the financing of terrorism (CFT). In particular, the Democratic People's Republic of Korea is subject to a FATF call on its members and other jurisdictions to apply counter-measures to protect the international financial system from the on-going and substantial money laundering and terrorist financing risks emanating from it. In addition, the FATF has issued a call on its members and other jurisdictions to apply enhanced due diligence measures proportionate to the risks arising from Iran.

The FATF has also published an updated list of other jurisdictions with strategic AML/CFT deficiencies for which they have developed an action plan with the FATF.

Among other things, delegates also adopted:

- a supplement to the 2013 FATF guidance on AML/CFT measures and financial inclusion, with a supplement on customer due diligence, to encourage countries to make use of the FATF recommendations' flexibility to

provide sound financial services to the financially excluded; and

- guidance on private sector information sharing.

Benchmarks: BoE publishes summary of responses to SONIA White Paper

The Bank of England (BoE) has published a report summarising responses received to the White Paper on approaches to the adoption of the Sterling Overnight Index Average (SONIA) as a risk-free reference rate (RFR). The White Paper, by the Working Group on Sterling Risk-Free Reference Rates, was published in June 2017.

The report indicates that there is broad support for SONIA as the BoE's choice of RFR.

FCA consults on its future approach to consumers

The FCA has published a paper discussing the FCA's approach to regulating for retail consumers. The paper forms the first in a series that seeks to explain the FCA's approach to regulation in more depth following publication of the FCA's mission in April 2017.

Among other things, the paper sets out initial views on how the FCA expects to diagnose and remedy actual and potential harm, and sets out the FCA's proposed approach to consumers, based around the following themes:

- firm and consumer responsibility;
- regulating for vulnerable consumers;
- keeping pace with a changing environment;
- access to financial services and tackling exclusion; and
- delivering better outcomes for all consumers.

The approach has been published for consultation and comments are due by 5 February 2018.

PSR reports on tackling authorised push payment scams

The Payment Systems Regulator (PSR) has published a report on its work on mitigating the impact of authorised push payment (APP) scams, which also sets out a consultation on a contingent reimbursement model that could be introduced to compensate victims in certain circumstances.

APP scams occur when consumers are tricked into authorising a transfer of money to an account that they believe belongs to a legitimate payee but is actually controlled by a scammer. The PSR's work on the issue responds to a super-complaint received in September 2016.

Overall, the report highlights that good progress is being made across a wide range of initiatives and areas. The report highlights new initiatives that are being developed including improvements to data sharing to help banks work together to respond to scams and, from 2018, measures to introduce:

- guidelines for identity verification, authentication and risk assessment, which are intended to make it harder for accounts to be opened to be used for scams;
- confirmation of payee to allow customers to verify that they are paying the intended recipient; and
- transaction data analytics to enable banks and other payment organisations to shut down accounts taken over by criminals for fraudulent activity (mule accounts) and spot potential fraudulent payments.

Additionally in 2020, the PSR intends to develop Know Your Customer (KYC) data sharing for banks. Alongside the PSR, the FCA has reviewed the way in which banks handle APP scams and identified inconsistent procedures and data collection policies, but considers that industry initiatives underway will help to tackle these issues.

The consultation on introducing a contingent reimbursement model sets out the PSR's proposals, including details on which bank or payment organisations should pay in circumstances when victims are eligible for reimbursement. The PSR proposes that reimbursement would depend on whether the banks and payment organisations had met required standards and whether the victim had also taken an appropriate level of care in protecting themselves.

Comments on the consultation are due by 12 January 2018.

PRA adjusts regulated fees and levies for 2017/18

The Prudential Regulation Authority (PRA) has published a policy statement setting out feedback to responses to its consultation paper (CP17/17) on adjustments to the rates for 2017/18 of its regulated fees and levies.

The consultation set out proposed corrections the rates for the 2017/18 fee year (1 March 2017 to 28 February 2018), which were originally published in policy statement PS17/17. The appendix to the policy statement sets out an instrument updating Table III of the Periodic Fees Schedule in the Fees Part of the PRA Rulebook. The table sets out the final periodic fee rates applicable to PRA fee blocks other than the minimum and transition costs fee blocks for the fee year 2017/18.

BaFin publishes circular on regulatory requirements for IT systems

The German Federal Financial Supervisory Authority (BaFin) has published a circular (in German) on regulatory requirements for IT systems, Bankaufsichtsrechtliche Anforderungen an die IT (BAIT).

BaFin intends to specify the requirements set out in its circular on minimum requirements for risk management (MaRisk) with respect to IT systems and to outline the minimum requirements for IT systems with a particular emphasis on IT security and contingency planning.

In addition, the circular specifies the requirements for the outsourcing of IT services to external service providers.

The BAIT is applicable from 6 November 2017.

Consob consults on implementation of whistleblowing legislation

The Commissione Nazionale per le Società e la Borsa (Consob) has launched a consultation (in Italian) on a set of second-level regulatory provisions aimed at implementing Article 4-undecies(4) of the Italian Financial Act (Legislative Decree no. 58/1998), as recently amended, on whistleblowing.

The proposed provisions will amend Consob Regulation no. 16190 of 29 October 2007 on intermediaries, Consob Regulation no. 16191 of 29 October 2007 on markets and Consob Regulation no. 18592 of 26 June 2013 on equity crowdfunding. Among other things, the new provisions will provide for a different regime between 'internal' and 'external' whistleblowing.

Comments on the consultation are due by 24 November 2017.

China commits to further open-up of its financial industry to foreign investors

The Deputy Minister of the Ministry of Finance, Mr. ZHU Guangyao, has made a series of commitments at a press conference of the State Council Information Office (SCIO), including further opening-up China's financial industry. The commitments were made during President Trump's visit to China and echo the market opening-up policy announced in the 19th Congress of the Communist Party of China.

Among other things, it has been announced that:

- a single foreign investor or multiple foreign investors in aggregate may hold directly or indirectly up to 51% shares in a securities company, mutual fund management firm or futures brokerage company. The current foreign cap is 49%. This foreign investment cap will be entirely lifted after three years upon implementation;
- the current cap on shareholding by a single foreign investor (i.e. 20%) and by multiple foreign investors in aggregate (i.e. 25%), in a domestic commercial bank or a financial asset management company will be lifted; and
- the current cap (i.e. 50%) on shareholding in a life insurance company held by a single foreign investor or multiple foreign investors in aggregate will be increased to 51% in three years, and this foreign investment cap will be entirely lifted after five years.

Implementation of the announced commitments will require amendments to the relevant regulations and rules, which are expected to be brought forward shortly.

PBoC issues procedures for CIBM investment by overseas commercial institutional investors

The People's Bank of China (PBoC) has issued Operating Procedures for overseas institutional investors (OIIs) to enter China's inter-bank bond market (CIBM). Among other things, the detailed guidance set out in the Procedures cover executing and filing of settlement agency agreements, foreign exchange registration and cross-border remittance, networking connection and account opening, investment and settlement and taxation policies.

The Procedures specify that:

- in order to trade bond repo, OIIs need to execute the Master Agreement on Bond Repo Transactions in China's Inter-bank Market (2013 version) issued by the National Association of Financial Market Institutional Investors (NAFMII); and
- for OTC financial derivative transactions such as bond forwards, RMB interest rate swap and forward rate contracts, OIIs need to enter into the Master Agreement on Financial Derivative Product Transactions in China's Inter-bank Market (2009 version) with their counterparties.

The Procedures also include:

- a checklist of related normative documents, which sets out the applicable regulations and rules relating to market access registration, transaction, custody, settlement, clearing and foreign exchange administration; and

- clarifications on the tax treatment relating to OIIs' investment in the CIBM, in particular for holding and trading treasury bonds and local government bonds in the CIBM, the interest income and capital gains are temporarily exempted from enterprise income tax (EIT) and VAT, and for other types of bonds the interest income is subject to EIT at 10% and VAT at 6%, while the capital gains from trading such bond is temporarily exempted from EIT and VAT.

HKEX consults on review of Corporate Governance Code and proposed changes to documentary requirements for listed issuers

The Stock Exchange of Hong Kong Limited (SEHK), a wholly owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEX), has published two consultation papers.

The consultations set out proposed changes to:

- the Corporate Governance Code and Corporate Governance Report, as well as related amendments to its Listing Rules; and
- documentary requirements relating to listed issuers and other minor Rule amendments.

The consultation on corporate governance is intended to raise the overall standard of corporate governance amongst issuers and directors, and to address a number of corporate governance concerns relating to independent non-executive directors (INEDs), overboarding by some INEDs, the responsibility of the nomination committee and board diversity.

The consultation on minor rule amendments has been published to elicit views and comments on the SEHK's proposed documentary requirements and other minor rule amendments to simplify and streamline the procedures involved in the submission and collection of documents to enhance procedural efficiency.

Comments on the consultations papers are due by 8 December 2017.

Moneylenders (Amendment) Bill 2017 moved for first reading

The Moneylenders (Amendment) Bill 2017 has been moved for its first reading in the Singapore Parliament.

The Amendment Bill will amend the Moneylenders Act and, among other things, the changes are intended to:

- empower the Minister to prescribe the amount of deposit required as security before the Registrar of Moneylenders issues or renews a licence, or approves a new place of business for moneylending in relation to a licensee;
- require that every licensee be a company limited by shares under the Companies Act with a minimum prescribed paid up share capital amount;
- empower the Registrar to refuse to issue or renew a licence, or to revoke or suspend a licence, if any assistant employed or engaged by a licensee does not meet certain criteria;
- empower the Registrar to revoke or suspend a licence if the licensee does not carry on the business of moneylending within an applicable period after the issue of the licence;
- require every licensee to obtain the Registrar's written approval before employing or engaging any assistant, permitting any person to take part in the management of the licensee's business or to become a director or partner of the licensee, or changing the business name of the licensee;
- require a person to obtain the Registrar's written approval before becoming a substantial shareholder of a licensee or increasing that person's substantial shareholding in a licensee;
- penalise a licensee, where it makes any note of contract for a loan in which the principal, rate of interest or late interest or any permitted fee payable, is not stated or truly stated, charges under a contract for a loan a sum other than or in excess of the permitted fees, or interest or late interest that exceeds the maximum rate that may be prescribed;
- impose document retention and annual auditing requirements on licensees; and
- insert a new Part IIIA to empower the Registrar to designate a company as the designated credit bureau, set out the obligations and duties of the designated credit bureau and every licensee in the collection, use or disclosure of borrower information and data, and allow the Registrar to disclose to a public agency any borrower information obtained from a licensee or any data obtained from the designated credit bureau, or to direct the disclosure of data by the designated credit bureau to a public agency, for the purpose of policy formulation or review by that public agency.

Payment and Settlement Systems (Finality and Netting) (Amendment) Bill moved for first reading

The Payment and Settlement Systems (Finality and Netting) (Amendment) Bill 2017 has been moved for its first reading in the Singapore Parliament.

The Payment and Settlement Systems (Finality and Netting) Act (FNA) was enacted in 2002 to designate systemically important payment systems, and protect transactions netted and settled in a designated systems (DS) from the application of insolvency law. The key proposed amendments under the Amendment Bill include amendments to:

- improve the protection of payment transactions by extending the timeframe within which protection is conferred on transactions in DSs in a liquidation event;
- extend insolvency protection to DSs that utilise collateral as part of their netting and settlement processes;
- set out clear criteria for the Monetary Authority of Singapore (MAS) to designate a DS;
- strengthen the MAS' administrative powers over a participant, operator, settlement institution and collateral holder of a DS;
- introduce a requirement for the rules of a DS to be approved by the MAS; and
- confer protection from liability where an operator, settlement institution, collateral holder of a DS, or an officer or employee of such an entity, does an act or omission with reasonable care and in good faith in the execution of any relevant function, duty or power under the FNA.

The amendments are intended to take into account foreign and domestic developments since 2002, in the areas of insolvency protection, finality and netting certainty, and regulatory controls for DSs.

MAS (Sanctions and Freezing of Assets of Persons — Democratic People's Republic of Korea) (Amendment No. 2) Regulations 2017 gazetted

The Monetary Authority of Singapore (MAS) has gazetted the MAS (Sanctions and Freezing of Assets of Persons - Democratic People's Republic of Korea) (Amendment No. 2) Regulations 2017, which amend the MAS (Sanctions and Freezing of Assets of Persons - Democratic People's Republic of Korea) Regulations 2016.

Among other things, the amendment regulations amend the MAS regulations to incorporate references to the UN Security Council Resolutions 2371 (2017) and 2375 (2017) and introduce a new regulation 8A, which prohibits a financial institution from establishing, maintaining, or operating any joint venture or cooperative entity, with any person in, or national of, the Democratic People's Republic of Korea.

The Regulations are effective from 4 November 2017.

Australia and China announce fintech cooperation

The Australian Securities and Investments Commission (ASIC) and the China Securities Regulatory Commission (CSRC) have announced that they have entered into a fintech cooperation agreement.

The Information Sharing Co-operation Agreement provides a framework for information sharing between the two regulators on emerging market trends and developments, as well as regulatory developments pertaining to innovation in financial services. The agreement also specifically provides that ASIC and CSRC will collaborate through sharing information on regulatory technology (regtech) trials.

ASIC's announcement on the agreement noted opportunities develop its understanding of China's large consumer fintech sector, including payments and lending, and share its insights and experience on regtech.

SEC Chairman discusses governance, transparency and concerns about ICOs

The US Securities and Exchange Commission (SEC) Chairman, Jay Clayton, has delivered the keynote address at the Practicing Law Institute's 49th Annual Institute on Securities Regulation during which he described a focus on governance, transparency, and the rulemaking process.

Chairman Clayton explained that the SEC distinguishes between near-term and long-term rulemaking, and set out that next near-term regulatory agenda will be shorter than in the past. The SEC is also applying a similar streamlining approach to its five-year strategic plan, which will be released early next year.

Chairman Clayton's other remarks focused largely on topics relevant to retail investors. A portion of his remarks were dedicated to initial coin offerings (ICOs), raising concern at the lack of information about many online platforms that list and trade virtual coins or tokens, and the potential for price manipulation and other fraudulent trading practices. Chairman Clayton emphasized that the SEC had recently warned that instruments such as 'tokens', offered and sold in ICOs, may be securities, and that those who offer and

sell securities in the United States must comply with the federal securities laws. The speech highlighted that the SEC will continue to seek clarity for investors on how tokens are listed on these exchanges and the standards for listing; how tokens are valued; and what protections are in place for market integrity and investor protection.

RECENT CLIFFORD CHANCE BRIEFINGS

Greening the financial system

The need to mobilise green, climate smart, environmentally friendly financing is racing at speed up the agenda of regulators, governments and the institutional investor and financial communities globally. Whilst the commitment in the Paris Agreement to hold global average temperature increases well below 2°C above pre-industrial levels has been extensively reported, less well known is the commitment to "making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient developments". Governments and regulators are responding to this commitment, enlisting a wide variety of bodies to explore options to create an enabling policy environment.

This briefing outlines developments in green financing in local markets across the globe and focuses on notable green financing products that show great future promise, as well as innovative growth areas ahead.

https://www.cliffordchance.com/briefings/2017/11/greening_the_financialsystem.html

Trading places – recent developments in international trade

Events over the past 18 months have put trade at the centre of international economic diplomacy and may potentially lead to dramatic shifts in the global trade order.

This briefing reviews some of the current dynamics in international trade and developments that could lead to significant changes in how cross-border trade is conducted.

https://www.cliffordchance.com/briefings/2017/11/trading_places_-recentdevelopmentsi.html

Blockchain, trade finance and sanctions issues

Blockchain is the technology that underpins digital currencies such as Bitcoin, but it has far wider applications and is being used in a growing number of areas. The blockchain has the potential to drastically alter the global financial system. Trade finance is one of the areas likely to benefit from the technology first by becoming cheaper, faster and more accessible. However, developers and market participants should be mindful to consider the sanctions implications given the extraordinary reach of sanctions and the magnitude of the penalties for breach.

This briefing outlines how blockchain may help trade finance transactions and the impact of economic sanctions on blockchain and trade finance.

https://www.cliffordchance.com/briefings/2017/11/blockchain_tradefinanceandsanctionsissues.html

Emissions trading – EU and UK seek to mitigate Brexit 'cliff edge'

EU Institutions and the UK Government have made separate proposals in relation to the EU Emissions Trading System for dealing with the immediate consequences of the UK leaving the EU in March 2019 and minimising the impact of a "cliff edge departure".

This briefing discusses and comments on the proposals.

https://www.cliffordchance.com/briefings/2017/11/emissions_tradingeuandukseektomitigat.html

'Contentious Commentary' – a review for litigators

Produced by lawyers in the litigation and dispute resolution practice, the latest edition of 'Contentious Commentary' provides a summary of recent developments in litigation before the English courts.

https://www.cliffordchance.com/briefings/2017/11/contentious_commentary.html

PRA and FCA publish regulatory framework for insurance special purpose vehicles

On 1 November 2017 the Prudential Regulation Authority and the Financial Conduct Authority published their final approach and expectations in relation to the authorisation and supervision of Insurance Special Purpose Vehicles which will be used to issue Insurance Linked Securities in the UK.

This briefing outlines key aspects of the PRA and FCA's final approach.

https://www.cliffordchance.com/briefings/2017/11/pra_and_fca_publishregulatoryframeworkfo.html

New Belgian insolvency rules

On 13 July 2017, the Belgian parliament adopted a new insolvency bill. The bill, which is set to enter into force on 1 May 2018, abolishes and replaces the former bankruptcy

law and the law on the continuity of enterprises, and brings together all relevant provisions in a new Book XX of the Code of Economic Law. Although the Bill does not change a number of fundamental principles applicable to Belgian insolvency procedures, it modernises and streamlines these procedures and brings them in line with EU standards.

This briefing outlines the key elements of the bill.

https://www.cliffordchance.com/briefings/2017/11/new_belgian_insolvencyrules.html

Growing the sandbox – Australia's enhanced fintech regulatory sandbox

After 10 months of operation, Australia's regulatory sandbox is entering a new phase. The sandbox provides a "lighter touch" regulatory environment to allow fintech businesses additional flexibility when they are still at the stage of testing their ideas. As flagged in its 2017-18 Budget, the Australian Government has released new draft legislation and regulations to create an enhanced regulatory sandbox to support innovation in financial services.

This briefing discusses the enhanced regulatory sandbox, and compares some of its key features with the regulatory sandboxes in Hong Kong and Singapore.

https://www.cliffordchance.com/briefings/2017/11/growing_the_sandboxaustraliasenhance.html