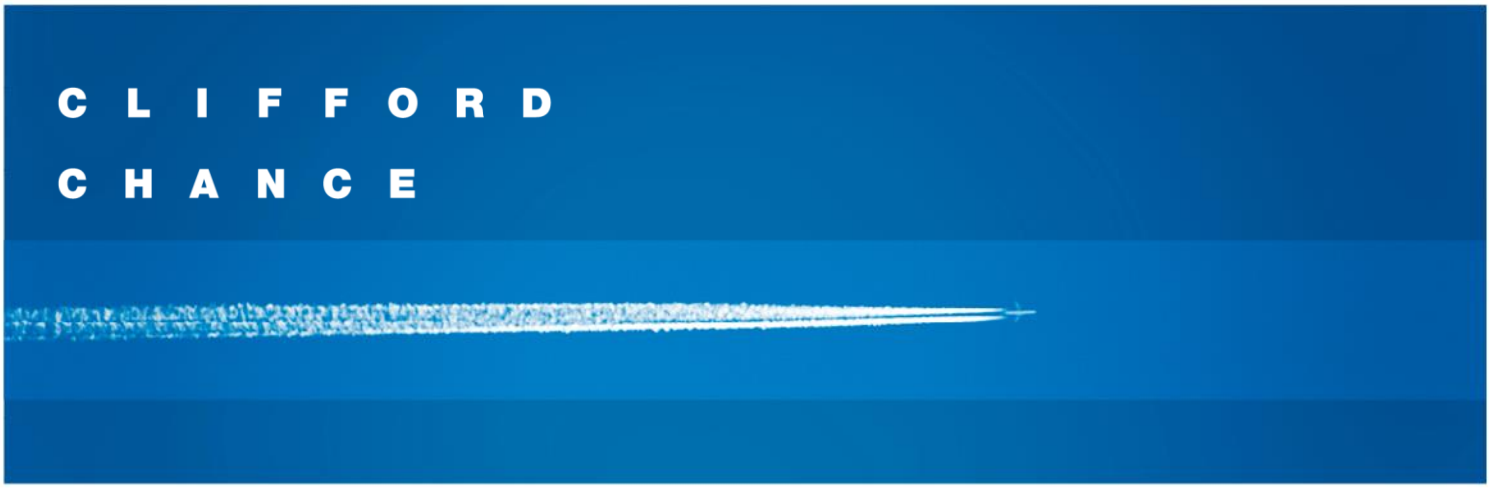

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Capital Markets Union: EBA publishes draft RTS on homogeneity of underlying exposures and risk retention for securitisations

The European Banking Authority (EBA) has published two final draft regulatory standards (RTS) under the Simple, Transparent and Standardised (STS) Securitisation Regulation.

The first draft RTS set out criteria for the underlying exposures in securitisation to be considered homogeneous. In order to assess homogeneity, the draft RTS specify asset categories as well as lists of the homogeneity factors available for the majority of the asset categories, reflecting the market practice. These draft RTS apply to both asset-backed commercial paper (ABCP) and non-ABCP securitisations.

The second draft RTS, developed according to Article 6 of the STS Regulation, specify the requirements for originators, sponsors and original lenders related to risk retention ensuring that they retain at least 5% of material net economic interest in each securitisation. These draft RTS replace the current Delegated Regulation on risk retention under the Capital Requirements Regulation (CRR).

PSD2: EBA publishes final draft technical standards on home-host cooperation

The EBA has published the final draft regulatory technical standards (RTS) specifying the framework for cooperation and the exchange of information between competent authorities under the revised Payment Services Directive (PSD2).

The RTS clarify the type of information and the templates to be used by payment institutions when reporting to the competent authorities of the host Member States on the payment business activities carried out in their territories.

The EBA's proposed cooperation framework is designed to ensure consistent and efficient supervision of payment institutions operating across borders by specifying the procedure for the requests and replies for cooperation and exchange of information between competent authorities, including single contact points, language, standardised forms and timelines.

The RTS also set out the periodical reporting requirements which host competent authorities can request from payment institutions operating in their territories via agents or branches.

The draft RTS will be submitted to the EU Commission for endorsement and then to the Parliament and the Council for scrutiny. The RTS will enter into force on the twentieth day following that of their publication in the Official Journal.

BoE publishes Enforcement Decision Making Committee procedure

The Bank of England (BoE) has published its procedures for, and policy statement on, the Enforcement Decision Making Committee (EDMC).

The procedures cover the scope, operation and procedures of the EDMC, which is the BoE's new, final administrative decision-making body in contested prudential regulation, financial market infrastructures (FMIs) and resolution enforcement cases.

The policy statement sets out feedback to responses to its 2016 consultation on the EDMC, and makes final amendments to the statement of policy on the Prudential Regulation Authority's approach to enforcement, and to the statements of procedure in respect of the BoE's supervision of FMIs.

The BoE has also published a press release alongside the publications announcing the appointment of the first EDMC members: Sir William Blair (EDMC Chair); Baroness Kishwer Falkner; Anne Heal; Mark Hoban; Philip Marsden (EDMC Deputy Chair); and, Edward Sparrow.

CRR: PRA consults on Rulebook changes on definition of default

The Prudential Regulation Authority (PRA) has launched a consultation on its proposed approach to implementing certain products set out in the EBA's roadmap of regulatory products which relate to the definition of default in the CRR.

Specifically, the consultation relates to implementation of the EBA's RTS for the materiality threshold for credit obligations past due and the guidelines on the application of the definition of default. The PRA proposes to implement these by amending:

- its expectations set out in the supervisory statement on the internal ratings based (IRB) approach (SS11/13); and
- the Credit Risk Part of the PRA Rulebook to set thresholds for determining whether a credit obligation is material for the purposes of the CRR's definition of default.

The PRA also intends to consult on the PRA's proposed implementation of the remaining products of the EBA roadmap after the EBA has finalised the relevant regulatory products. The PRA intends to implement the proposals set out in the consultation from 31 December 2020, in line with the EBA's expectations.

Comments on the consultation are due by 29 October 2018.

FCA issues statement on selling high-risk speculative investments to retail clients

The Financial Conduct Authority (FCA) has issued a statement supporting temporary measures enacted by the European Securities and Markets Authority (ESMA) to restrict the sale, marketing and distribution of contracts for difference (CFDs) to retail clients.

The FCA is concerned that firms may consider evading ESMA's measures by selling other similarly complex products to retail clients. The FCA reminds firms that ESMA's Q&A document on product intervention under MiFIR makes

clear that for products with comparable features to CFDs, such as turbo certificates, firms should pay particular attention to the leverage made available to retail clients and consider whether the product is offered on terms that act in the best interests of the client.

The FCA will continue to work with ESMA and other European regulators to monitor and assess the sale of alternative, speculative products to retail clients and, where necessary, support further action to extend the scope of ESMA's intervention.

The FCA reminds any firms considering marketing, selling or distributing alternative products to pay close attention to conduct of business requirements and to consider carefully whether they can satisfy their own relevant product governance obligations.

FCA consults on standards and communication rules for payment services and e-money

The FCA has published a consultation (CP18/21) on general standards and communication rules for payment service providers (PSPs) and e-money issuers.

The consultation broadly concerns the exercise of the FCA's new rulemaking powers under the Payment Services Regulations 2017 and seeks to address differences in the regulatory treatment of FSMA and non-FSMA firms operating in the payment services and e-money sectors. Key proposals include:

- extending the application of the Principle of Business to payment services and e-money activities (where not already a regulated activity), and to payment institutions (PIs), electronic money institutions (EMIs), registered account information service providers (RAISPs) and credit institutions providing payment services not connected to a regulated activity;
- extending the application of Chapter 2, Banking Conduct of Business Sourcebook (BCOBS 2) to communication with payment service and e-money customers; and
- introducing new rules and guidance in BCOBS 2 on currency exchange transfer services, applicable to payment services and the issuance of e-money involving a currency conversion.

Comments are due by 1 November 2018.

FCA consults on authorisation of third party verification agents under Securitisation Regulation

The FCA has launched a consultation (CP18/22) proposing new application and periodic fees for the authorisation of third party verification agents (TPVs).

The FCA Handbook will reflect the proposed change so it is consistent with the Securitisation Regulation and the related amendment to the Capital Requirements Regulation (CRR).

TPVs are used by a sponsor, originator and securitisation vehicle to check whether a securitisation complies with the simple, transparent and standardised (STS) criteria. Firms can apply to become a TPV as long as they met the conditions set out in article 28 of the Securitisation Regulation with the exception of:

- insurance firms;
- credit institutions;
- investment firms; and
- credit rating agencies.

HM Treasury intends to name the FCA as the responsible authority for approving TPVs via a statutory instrument (SI) for securitisation that is expected to be laid in December 2018.

Comments are due by 1 October 2018.

FCA consults on new rules for loan-based crowdfunding platforms

The FCA has launched a consultation (CP18/20) on proposed changes to the rules for loan-based crowdfunding firms. The FCA last reviewed the sector in December 2016 and feels that, since then, loan-based crowdfunding models have grown increasingly varied and complex.

To address these changes, the FCA is proposing a set of rules which aim to:

- ensure investors receive clear and accurate information about potential investments and the related risks;
- ensure investors are adequately remunerated for the risks they take;
- maintain transparent and robust systems for assessing the risk, value and price of loans;
- promote good governance and orderly business practices;
- extend the marketing restrictions currently imposed on investment-based crowdfunding platforms to loan-based platforms; and
- protect customers who buy a mortgage or take out a home finance product through loan-based crowdfunding, by extending the rules which normally apply to home finance providers to peer-to-peer (P2P) platforms where at least one of the investors is not an authorised home finance provider.

Comments are due by 27 October 2018.

BaFin announces amendment of supervisory requirements for IT in financial institutions

The German Federal Financial Supervisory Authority (BaFin) has announced the amendment of supervisory requirements for IT in financial institutions (BAIT). BAIT provides a flexible framework for institutions' technical and organisational resources. It will soon be supplemented by a module concerning critical infrastructure in the banking and insurance sector (KRITIS).

KRITIS will provide a description of additional requirements which have to be considered in order to provide proof to the annual auditor pursuant to section 8a para 3 Act on the Federal Office for Information Security (BSI).

AMLD 4: Bank of Italy consults on second-level provisions regarding use of data and record-retention requirements

The Bank of Italy has issued a public consultation document containing a set of second-level regulations intended to amend the existing regulatory framework on the use of data and record-retention requirements pursuant to article 34, paragraph 3, of Legislative Decree No. 231 of 21 November 2007, as amended by Legislative Decree No. 90 of 25 May 2017 (which implemented AMLD 4 in Italy).

In accordance with the principles of simplification and efficiency, the specific provisions introduce standard criteria for the submission of recorded data to the competent authorities and to harmonise the regime for the collection and use of information and/or data on clients.

The consultation ends on 30 September 2018.

Luxembourg law implementing Bank Creditor Hierarchy Directive published

A new law of 25 July 2018 implementing the Bank Creditor Hierarchy Directive (EU) 2017/2399 and amending the law of 18 December 2015 on the failure of credit institutions and certain investment firms and various provisions of the financial sector law of 5 April 1993 has been published in the Luxembourg official journal (Mémorial A).

The objective of the law and the underlying directive is to provide clarity on and establish the eligibility criteria for subordinated liabilities which may be used to comply with MREL and TLAC requirements. Accordingly, the law sets out provisions on the ranking of unsecured debt instruments in insolvency for the purpose of the recovery and resolution framework and aims to improve the efficiency of the bail-in tool.

The law also amends the financial sector law of 5 April 1993. Amongst other things, these amendments reflect the changes brought about by the corrigendum to the Capital Requirements Directive (CRD 4) dated 25 January 2017.

The law entered into force on 3 August 2018.

SFC implements open-ended fund companies regime

The Securities and Futures Commission (SFC) has announced the implementation of the new open-ended fund companies (OFCs) regime with effect from 30 July 2018. The new regime is intended to enable investment funds to be established in corporate form in Hong Kong, in addition to the current unit trust form.

The Code on OFCs and relevant forms for the implementation of the OFC regime have been gazetted and took effect on 30 July 2018. Following the completion of the legislative process, the following four pieces of legislation for OFCs came into effect on the same day, i.e. 30 July 2018:

- Securities and Futures (Amendment) Ordinance 2016 - the Ordinance provides a legal framework for the OFC regime and empowers the SFC to issue codes and guidelines in relation to the regulation of OFCs;

- Securities and Futures (Open-ended Fund Companies) Rules - the Rules set out detailed statutory requirements concerning an OFC;
- Securities and Futures (Open-ended Fund Companies) (Fees) Regulation - the Regulation sets out the fees charged by the SFC for privately offered OFCs and by the Registrar of Companies for all OFCs; and
- Inland Revenue (Amendment) (No. 2) Ordinance 2018 - the Ordinance extends the profits tax exemption to privately offered OFCs. From the effective date of the regime, all OFCs (privately or publicly offered) can enjoy profits tax exemption under the Inland Revenue Ordinance.

The SFC has also published a set of frequently asked questions (FAQs) relating to OFCs to provide further guidance to the industry.

SFC issues circular to licensed corporations on internal models approach for calculating capital requirements for market risk

The SFC has issued a circular announcing its intention to facilitate the adoption of an internal models approach by licensed corporations where appropriate to calculate the capital requirements for market risk for proprietary investments.

In July 2015, the SFC proposed introducing the internal models approach as part of its amendments to the Securities and Futures (Financial Resources) Rules (FRR) to better align the FRR with international capital standards and to respond to the industry's need for a more risk-sensitive approach to the calculation of regulatory capital. The proposed changes were supported by the industry and the SFC concluded in July 2017 that the internal models approach would be introduced into the FRR in a manner which reflects the latest Basel standards.

Given the volume and complexity of the proposed amendments to the FRR, the legislative process will take time to complete. Separately, the Basel Committee on Banking Supervision (BCBS) announced an extended implementation timeline for its new standards on minimum capital requirements for market risk (commonly known as the FRTB).

Recognising the need for further guidance under the current circumstances, the SFC in the interim may use its existing supervisory power in considering the need to adopt the internal models approach for market risk on a case-by-case basis. The SFC will benchmark its requirements to the Revisions to the Basel II Market Risk Framework (Basel II.5 standards), pending an update to the FRTB. Under this framework, the SFC will assess the readiness of a licensed corporation to adopt the internal models approach for market risk by focusing on the following areas:

- fulfilment of principles-based general criteria including appropriateness of risk management system and models, adequacy and competence of staff, and soundness of stress testing programme;
- compliance with qualitative standards in relevant areas including board and senior management oversight, market risk management processes, and other controls and infrastructure related to market risk management; and
- adherence to quantitative standards for the calculation of market risk capital charges based on individual components, namely value-at-risk (VaR), stressed value-at-risk and incremental risk charge.

The SFC will also consider each licensed corporation's unique circumstances, for example, a history of proven use of the models by the licensed corporation's overseas parent or group company. In addition to the areas listed in the circular, licensed corporations may refer to Basel II.5 standards for further information or engage the SFC for a discussion of the detailed requirements.

HKMA extends local implementation timeline of revised exposure limits rules for banks

The Hong Kong Monetary Authority (HKMA) has issued a circular to all locally incorporated authorised institutions informing them of its decision to extend the implementation date of the amended Banking (Exposure Limits) Rules (BELR) by six additional months to 1 July 2019.

The HKMA is currently working on amendments to the BELR which will include its local implementation of the 'Supervisory framework for measuring and controlling large exposures', issued by the Basel Committee on Banking Supervision (BCBS) in April 2014, and some other local exposure limits currently comprised under Part XV of the Banking Ordinance.

While industry associations were informed about and consulted on the detailed proposals to amend the BELR on 28 May 2018, the HKMA anticipates the negative vetting of the amendments by the Legislative Council to be completed only around the end of 2018. By then the HKMA also expects to have published the announced details on the grouping of linked counterparties, including operational guidance for the identification of links between counterparties due to economic dependence.

HKMA concludes consultation on rules prescribing loss-absorbing capacity requirements for authorised institutions

The HKMA has published the conclusions of its January 2018 public consultation relating to rules prescribing loss-absorbing capacity (LAC) requirements for authorised institutions proposed to be made as subsidiary legislation under the Financial Institutions (Resolution) Ordinance (Ordinance).

The core of the HKMA's LAC policy proposal is that authorised institutions whose failure could pose a risk to the financial system in Hong Kong should be required to have sufficient LAC in order to facilitate the orderly failure of such entities, should they reach the point of non-viability. To this end, requiring authorised institutions to maintain sufficient LAC is a pre-requisite to enabling the HKMA, as resolution authority for the banking sector, to use the powers under the resolution regime established by the Ordinance to manage any future failure of an authorised institution in an orderly manner that avoids disruption to financial stability and minimises the risk to public funds.

Considering the feedback received, the HKMA has adopted appropriate changes in developing the draft Rules. The HKMA intends to consult industry on the text of the draft Rules before introducing the Rules as subsidiary legislation under the Ordinance into the Legislative Council for negative vetting later in 2018.

ASIC approves new Banking Code of Practice

The Australian Securities and Investments Commission (ASIC) has announced that it has approved the Australian Banking Association's (ABA's)

new Banking Code of Practice. ASIC's approval of the Code follows extensive engagement with the ABA, following a comprehensive independent review and extensive stakeholder consultation. The new Code will commence operation from 1 July 2019.

Amongst other things, the new Code:

- provides for improved protections for small business borrowers and expands the reach and impact of legal protections against unfair contract terms; and
- expands protection for consumers, including provisions for inclusive and accessible banking, protections relating to the sale of consumer credit insurance (CCI), protections for guarantors of loans and enhanced processes for assisting customers in financial difficulty and processes for resolving complaints.

All ABA member banks will be required to subscribe to the Code as a condition of their ABA membership and the relevant protections in the Code will form part of the banks' contractual relationships with their banking customers.

The Code will be administered and enforced by an independent monitoring body, the Banking Code Compliance Committee (BCCC). Any person will be able to report a breach of the Code to the BCCC, and consumers and small businesses with disputes about the Code protections will be able to have those disputes heard by the new Australian Financial Complaints Authority.

ASIC notes the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry may make findings relevant to the Code. ASIC may review its approval of the Code in light of the Royal Commission findings.

ASIC updates guidance for funds management industry

ASIC has published the following seven new and updated regulatory guides to provide comprehensive guidance to the funds management industry:

- Regulatory Guide 131 Funds management: Establishing and registering a fund (RG 131);
- Regulatory Guide 132 Funds management: Compliance and oversight (RG 132);
- Regulatory Guide 133 Funds management and custodial services: Holding assets (RG 133);
- Regulatory Guide 134 Funds management: Constitutions (RG 134);
- Regulatory Guide 136 Funds management: Discretionary powers (RG 136);
- Regulatory Guide 137 Constitution requirements for schemes registered before 1 October 2013 (RG 137); and
- Regulatory Guide 138 Foreign passport funds (RG 138).

The regulatory guides have been updated for changes arising from the Asia Region Funds Passport and to update all of ASIC's funds management policies. ASIC says that the updates are comprehensive, including both administrative and substantive issues and designed to help the funds

management industry to access the Asia Region Funds Passport. Inclusions that may be particularly helpful to the funds management industry include:

- providing information on ASIC's decision-making process for registering a managed investment scheme or passport fund; and
- providing good practice examples and case studies on a range of compliance issues, including previous ASIC decisions on relief.

The updates do not include changes arising from corporate collective investment vehicles (CCIVs), as the legislation has not yet passed through the Parliament. ASIC has indicated that it will review and re-release the seven regulatory guides to include material for the CCIVs after this regime is implemented into Australian law. In addition, ASIC will make a range of less substantive amendments to other regulatory guides. These amendments will reflect the consequential amendments that will be made to the Corporations Act to accommodate these new regimes.

ASIC simplifies disclosure requirements in response to new financial adviser professional standards reforms

ASIC has announced changes to reporting dates for a number of notification requirements in the transition to the new financial adviser professional standards reforms. The reforms - commenced on 15 March 2017 as the Corporations Amendment (Professional Standards of Financial Advisers) Act 2017 - introduce new requirements for advisers who provide personal advice to retail clients on more complex financial products.

The revised schedule of notification requirements is intended to simplify licensees' disclosure obligations and enable ASIC to implement the required systems changes more effectively. A key change is that ASIC will push back the timing for licensees to notify of new advisers who are joining the industry for the first time after 1 January 2019. As a result, new 'provisional relevant providers' can only be added to the Financial Advisers Register (FAR) from 15 November 2019. ASIC has underlined that the FAR notification changes do not affect advisers' and licensees' substantive obligations under the professional standards reforms.

In addition, ASIC has clarified the process for recognising advisers as 'existing providers'. According to the clarification, financial advisers who are listed on the FAR between 1 January 2016 and 1 January 2019 will be recognised as an 'existing provider' under the new professional standards. Therefore, financial advisers who are currently authorised to provide personal advice to retail clients on more complex financial products are advised to make sure they are on the FAR. Without recognition as an 'existing provider' an adviser must pass an exam and complete an approved qualification by 1 January 2019 to work as a financial adviser. They must also undertake a year of work and training. If a person is an 'existing provider', they have until 1 January 2021 to pass the exam, and 1 January 2024 to complete an approved qualification. In the meantime, they can continue to work as a financial adviser.

According to ASIC, financial advisers can demonstrate that they are an 'existing provider' if they are:

- 'current' on the FAR at any time between 1 January 2016 and 1 January 2019; and

- not banned, suspended or disqualified as at 1 January 2019.

ASIC shares findings of exchange traded products market review

ASIC has published a report setting out the findings and recommendations from its review of the exchange traded products (ETPs) market in Australia. The large and growing investment in ETPs in Australia by retail and self-managed superannuation fund (SMSF) investors prompted ASIC to look at a number of the key premises and functions of the ETP market.

The review found that the market is generally performing well, and ETPs are meeting the relatively low cost and liquidity expectations of investors. However, the review identified a range of risks that require monitoring by issuers and oversight by market operators. The key concern identified was the potential for the bid/offer spread to temporarily widen, leading to investors paying a spread that would be considered too high, and undermining the relatively low-cost proposition of some ETPs. Further, ASIC considers that market operators and issuers should play a more proactive role in monitoring the performance of ETPs, including liquidity in the market, and where they observe spreads widening unreasonably, they should take appropriate action. ASIC also recommends that ETP issuers publish the indicative net asset value (iNAV) with a frequency that enables investors and financial advisers to make more informed decisions.

Another area of concern identified in the report was market maker concentration, as although there are an increasing number of new entrants in Australia that serve a growing market, most liquidity is still provided by only two entities. ASIC expects issuers and market operators to be aware of this risk and incorporate a means of managing it into their risk management framework.

While not many ETPs have closed in Australia to date, ASIC encourages issuers and market operators to develop policies for reviewing, and where necessary remove from quotation with an orderly wind down, ETPs that may not meet ongoing suitability for quotation, such as very small ETPs that may be uneconomical to operate.

RECENT CLIFFORD CHANCE BRIEFINGS

Implementing Brexit in the UK – The EU (Withdrawal Agreement) Bill

The UK Government has published a White Paper on its proposals for a European Union (Withdrawal Agreement) Bill to implement the UK's Withdrawal Agreement with the EU into UK domestic law. The White Paper details how the UK will implement the planned transition period, as well as the UK Government's proposals for dealing with the protections for citizens' rights after Brexit and the administration of the UK's proposed financial settlement with the EU.

This briefing discusses the White Paper.

https://www.cliffordchance.com/briefings/2018/07/implementing_brexitintheukteeuwithdrawa.html

Luxembourg Goes 'Green' – Introduction of a New Luxembourg Renewable Energy Covered Bond Regime

The Luxembourg law provisions on covered bond banks (banques d'émission de lettres de gage) and covered bonds (lettres de gage, Pfandbriefe) have been amended by a new law of 22 June 2018 modifying the financial sector law of 5 April 1993 (FSL) to introduce renewable energy covered bonds (the RECB Law).

This briefing discusses the new regime.

https://www.cliffordchance.com/briefings/2018/07/client_briefing_-luxembourggoesgreen.html

Second Circuit Leaves Door Open for Client Documents to be Subpoenaed from Law Firms

On 10 July 2018, the Second Circuit ruled that a US-based law firm was not required to turn over documents it had obtained from an overseas client to defend that client in US litigation that was ultimately dismissed for lack of subject matter jurisdiction. The decision reversed the district court, which had granted a petition for the documents by a plaintiff preparing to sue the client in the Netherlands. The Second Circuit agreed with the district court that it had jurisdiction over client documents in a law firm's possession. But the district court's order failed to recognize, the Second Circuit held, that requiring disclosure would impede clients' ability to engage in open communication with their attorneys and undermine confidence in protective orders. While US-based counsel can take some comfort in the protection the ruling affords to documents placed in their hands by foreign clients, such documents should be kept confidential and, to the extent possible, only be produced under confidentiality orders, lest the protection be lost.

This briefing discusses the decision.

https://www.cliffordchance.com/briefings/2018/07/second_circuit_leavesdooropenforclien.html

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