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If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

Chris Bates +44 (0)20 7006 1041
Gareth Old +1 212 878 8539
Marc Benzler +49 69 7199 3304
Steven Gatti +1 202 912 5095
Paul Landless +65 6410 2235
Mark Shipman + 852 2826 8992
Donna Wacker +852 2826 3478

International Regulatory Update Editor

Joachim Richter +44 (0)20 7006 2503

To email one of the above, please use firstname.lastname @cliffordchance.com

Clifford Chance LLP,
10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

Basel Committee publishes sixteenth progress report on Basel III adoption

The Basel Committee on Banking Supervision (BCBS) has published its sixteenth progress report on the adoption of Basel III standards for each member jurisdiction as of end-March 2019, including the Basel III post-crisis reforms, published in December 2017, and the finalised market risk framework, published by the Committee in January 2019.

The report notes member jurisdictions' further progress in implementing standards for which the deadlines have already passed, including in among other areas:

- the revised securitisation framework; and
- the leverage ratio based on the existing exposure definition.

The report also discusses limited progress in implementing other standards, including the Net Stable Funding Ratio (NSFR).

French National Assembly adopts new regime for digital assets services providers and crypto-assets

The French National Assembly has adopted the PACTE draft Bill (Action Plan for Business Growth and Transformation). Once enacted, this law will establish a framework for digital assets services providers (DASPs) and fundraising via the issuance of virtual tokens (Initial Coin Offerings – ICO). It will strengthen the Autorité des Marchés Financiers' (AMF's) powers to provide investors with guarantees and reliable information.

Article 26 bis A of this law provides the following in relation to DASPs:

- a list of services regarding digital assets;
- the principle of compulsory registration for two services (service providers who wish to provide digital assets custody services to third parties or to purchase/sell digital assets in exchange for legal tender);
- the opportunity to be licensed and placed under the supervision of the AMF for all digital asset services;
- common conditions for the provision of all services (e.g. fit and proper requirements, provisions related to conditions for outsourcing, etc.);
- conditions specific to the provision of each of these services;
- liability of these service providers in relation to the requirements regarding AML-FT / KYC obligations; and
- criminal law provisions.

As soon as the PACTE law is enacted, provisions and outlines of each service regarding digital assets should be set out by both a Decree and amendments to the General Regulation of the AMF (by re-creating Book VII, organised in two titles – the first one on issuance of virtual tokens and the second one on digital assets services providers).

German Bundestag Finance Committee approves draft law on further implementation of EU Prospectus Regulation and amendment of financial market legislation

The Finance Committee of the German Bundestag has approved an amended version of the draft law on the further implementation of the EU Prospectus Regulation and the amendment of financial market legislation (Gesetz zur weiteren Ausführung der EU-Prospektverordnung und zur Änderung von Finanzmarktgesetzen) proposed by the German Federal Government.

The draft law provides for changes to the exemptions from the prospectus requirement for securities issues that were adopted last year. Until now, the securities prospectus requirement did not apply to public offers of securities up to a volume of EUR 8 million and for banks up to a volume of EUR 5 million. The exemption threshold will now be standardised at EUR 8 million. Furthermore, the threshold for the prospectus requirement exemption for crowdfunding projects has been raised to EUR 6 million from the EUR 2.5 million proposed in the Federal Government draft. In addition, further harmonisations and improvements have been adopted, particularly for new forms of financing.

BaFin publishes guidance note on section 46f of German Banking Act

Following a consultation process earlier this year, the German Federal Financial Supervisory Authority (BaFin) has published a guidance note on section 46f of the German Banking Act (Kreditwesengesetz, KWG) regarding the treatment of certain liabilities of CRR institutions under insolvency law.

The guidance note updates the previous interpretation guidelines on the treatment of certain liabilities of CRR institutions under insolvency law in light of amendments to section 46f KWG. With effect from 21 July 2018, section 46f KWG was revised to implement Article 108 paragraph 2 of the Bank Recovery and Resolution Directive (BRRD) as amended by Regulation (EU) 2017/2399 and allows CRR credit institutions and CRR investment firms to issue two types of senior unsecured debt obligations, senior preferred and senior non-preferred debt.

BaFin consults on draft circular on determination of high-risk exposure types under CRR

BaFin has published a consultation on a draft circular adopting the European Banking Authority guidelines (EBA/GL/2019/01) on the determination of high-risk exposure types under Article 128 para 3 of the Capital Requirements Regulation (CRR) into its administrative practice.

The consultation ends on 24 May 2019.

AFM and DNB contact Dutch financial institutions regarding transition from IBORs to alternative risk-free benchmark rates

The Netherlands Authority for the Financial Markets (AFM) and the Dutch Central Bank have jointly written to the CEOs of large Dutch banks, insurers and pension funds to request information on their level of progress in preparing for the transition from critical IBOR benchmarks (such as EURIBOR and LIBOR) to alternative risk-free rates (RFRs) by 2022. In a letter dated 24

April, the regulators urge these financial institutions to switch to using suitable RFRs once they become available and to take timely and appropriate action to ensure that they are well prepared for the transition and its risks. They also encourage market participants to contribute to the reform efforts of those working groups involved in the design of the RFRs.

The final part of the letter asks the recipients to inform the regulators of their level of preparedness for the transition, by responding to a series of questions by 17 June 2019. These questions can be broadly grouped into three categories:

- identification of those benchmarks that the financial institution is currently using and possible alternatives for these;
- relevant risks in transitioning to RFRs and the actions they have already taken, and will be taking, to mitigate these; and
- whether the financial institution is already in contact with third parties such as legal advisors, benchmark providers and clients.

The regulators also ask for the contact details of the responsible person(s) within each organisation.

Once the regulators have received the responses, they will publish their findings by mid-September 2019 on a sector wide basis (in an aggregated and anonymous form). This will also include information regarding the process of the reforms and the possibility of further discussions.

Polish Financial Supervision Authority publishes bulletin on public offerings of securities conducted without obligation to prepare issue prospectus and addressed to retail investors

The Polish Financial Supervision Authority (PFSA) has published a bulletin to potential investors, stating that securities offered by issuers conducting a public offering without the obligation to prepare an issue prospectus carry an above-average investment risk. The issuer of securities being offered, if it is not at the same time an issuer of securities admitted to trading on the regulated markets, is not an entity supervised by the Polish Financial Supervision Authority and is not subject to the information requirements applicable to issuers of securities admitted to trading on the regulated market.

Australian regulators urge financial institutions to plan for LIBOR transition

The Australian Securities and Investments Commission (ASIC) has written to the chief executive officers (CEOs) of several major Australian financial institutions regarding their preparations for the end of the London Interbank Offered Rate (LIBOR). This initiative is supported by the Australian Prudential Regulation Authority (APRA) and the Reserve Bank of Australia (RBA).

LIBOR is deeply embedded in financial markets globally and is used by many Australian financial institutions in their contracts and business processes. The UK Financial Conduct Authority (FCA) has stated that it will no longer use its powers to sustain LIBOR beyond 2021.

ASIC intends to gain a better understanding of how major Australian financial institutions are preparing to transition away from LIBOR to alternative benchmarks. ASIC, APRA and RBA are seeking assurance that the senior

management in these institutions fully appreciates the impact and risks and is taking appropriate action ahead of the end of 2021. More broadly, the financial regulators expect all institutions that currently rely on LIBOR to consider the impact of LIBOR transition on their business. In particular, users of LIBOR should:

- be aware of the size and nature of their exposures to LIBOR;
- put in place robust fall-back provisions in contracts referencing LIBOR; and
- be taking action to transition to alternative rates.

ASIC announces problem-solving regulatory technology events for financial services industry

ASIC has launched three regulatory technology (regtech) events in conjunction with industry and other stakeholders to promote regtech adoption among Australian financial services organisations. The events are an opportunity for regtech start-ups, scaleups and financial services organisations' in-house development teams to demonstrate how their solutions can:

- monitor, identify and analyse financial advertising promotions to determine compliance (Monitoring Financial Promotions: Demo and Symposium in Sydney on Friday 2 August);
- improve the detection of problematic financial advice in datasets (Financial Advice Files: Demo and Symposium in Sydney on Thursday 22 August); and
- demonstrate the capabilities, benefits and costs of applying Voice Analytics & Voice-to-Text (VA&VT) Research and Analysis to regulatory activities (VA&VT Symposium in late 2019).
- ASIC believes that regtech has the potential to help organisations build a culture of compliance, identify learning opportunities and save time and money relating to regulation.

ASIC is undertaking a regtech trial to explore how it can communicate the application of its financial services and credit licensing requirements via a Licensing Technology-Assisted Guidance (TAG) Tool (AusTender now closed, findings to be shared at a fourth symposium later in 2019). Details for the VA&VT and TAG Tool symposiums will be released closer to the date. Both symposiums will be based on trials ASIC is currently running with regtech companies selected via AusTender.

Additionally, ASIC has encouraged entities with innovative regtech to apply for a position in the Monitoring Financial Promotions and Financial Advice Files demonstrations to showcase regtech solutions to representatives from government, finance, technology, media and other stakeholders all at the same time.

SAFE issues administrative measures on foreign exchange business of payment institutions to facilitate cross-border e-commerce

The PRC State Administration of Foreign Exchange (SAFE) has issued the Administrative Measures on the Foreign Exchange Business of Payment Institutions, which are intended to facilitate cross-border e-commerce. The

Measures supersede and replace the previous SAFE Circular on the Cross-border Foreign Exchange Payment Business of Payment Institutions (Pilot) issued by SAFE on 20 January 2015.

Amongst other things, the following points are worth noting:

- payment institutions (which also include commercial banks satisfying certain conditions) may, based on the relevant electronic transaction information, provide e-commerce merchants and consumers with electronic payment services for current account transactions, such as foreign exchange (FX) settlement/sale and payment services. In relation to such services:
  - a payment institution needs to apply to and register with its competent SAFE local bureau to provide such FX services;
  - a successful registration is effective for five years;
  - a payment institution can appoint in principle up to two qualified banks to process the relevant businesses (cooperative banks); and
  - a payment institution shall open one dedicated FX reserve account with each cooperative bank;
- payment institutions may provide FX payment services to domestic individuals with respect to cross-border shopping, offshore education and tourism etc. The amount may not exceed USD 50,000 per transaction, unless the payment institution obtains SAFE's exceptional consent; and
- payment institutions must establish a sound risk management system and strengthen transaction authenticity and compliance reviews as follows:
  - payment institutions must carry out due diligence on e-commerce merchants and consumers to review and verify their authenticity and legality;
  - payment institutions must collect and process transaction information as per SAFE's requirements; and
  - cooperative banks must review the authenticity and compliance of the payment institution's FX business, carry out random inspections and may require the payment institution to provide underlying documents in relation to suspicious transactions.

HKMA introduces measures on sustainable banking and green finance

The Hong Kong Monetary Authority (HKMA) has introduced the following three sets of measures under its strategic framework on green finance to support and promote Hong Kong's green finance development:

- green and sustainable banking – the HKMA will issue guidance to banks in Hong Kong on a three-phased approach to be taken to promote green and sustainable banking in Hong Kong:
  - Phase I – during this phase, the HKMA will seek to raise the banking industry's awareness of green finance, strengthen banks' management of climate change risks in their loans and other businesses, and develop an assessment framework and baseline in line with international standards;

  - Phase II – upon completion of the baseline assessment of banks in Phase I, the HKMA will consult the industry to set tangible deliverables on green and sustainable finance and promote green finance reform in the Hong Kong banking industry; and
  - Phase III – during this phase, the HKMA will implement relevant measures, and continuously monitor and evaluate the green progress of banks;
- responsible investment by the Exchange Fund – as the manager of the Exchange Fund, the HKMA will adopt a principle that priority can be given to green and environmental, social and governance investments if the long-term return is comparable to other investments on a risk-adjusted basis; and
- establishment of the Centre for Green Finance (CGF) – the HKMA will set up a new CGF under the Infrastructure Financing Facilitation Office, which will serve as a platform for technical support and experience sharing for the green development of the Hong Kong banking and finance industry. Meanwhile, the CGF, together with the International Finance Corporation, will co-organise the next Climate Business Forum in Hong Kong in early 2020.

HKMA issues circular on use of personal data in fintech development

The HKMA has issued a circular to encourage authorised institutions to adopt and implement the Ethical Accountability Framework for the collection and use of personal data issued by the Office of the Privacy Commissioner for Personal Data (PCPD).

The HKMA notes that, as fintech development in the banking sector gathers pace, authorised institutions will be collecting and using an increasing amount of personal data of customers in order to provide them with tailored financial services. In view of this development, the HKMA, in collaboration with the Hong Kong Association of Banks (HKAB), has been engaging with the PCPD to provide more guidance to authorised institutions on the proper use of personal data in the online environment.

At a seminar entitled 'Use of Personal Data in the Digital Era', jointly organised by the HKMA and the HKAB in April 2019 under the Banking Made Easy initiative, the PCPD outlined the framework to the industry and shared a number of good practices including the adoption of 'privacy by design' and 'privacy by default' when developing fintech initiatives. Further, the concept of data ethics and stewardship was introduced, and the 'Data Stewardship Accountability, Data Impact Assessments and Oversight Models' supporting the framework were explained. The HKMA found that these models can assist authorised institutions in addressing the privacy concerns of customers and enhance their trust in using fintech services.

Securities and Futures (Organised Markets) (Amendment) Regulations 2019 gazetted

The Singapore Government has gazetted the Securities and Futures (Organised Markets) (Amendment) Regulations 2019.

The Amendment Regulations amend Regulation 6 of the Securities and Futures (Organised Markets) Regulations 2018 by deleting paragraph (2),

which provides that, for the purposes of section 9(7) of the Securities and Futures Act, the Monetary Authority of Singapore must not recognise an applicant that is a Singapore corporation as a recognised market operator unless the applicant is able to maintain a base capital of SGD 500,000.

The Amendment Regulations are effective from 26 April 2019.

MAS consults on proposed implementation of final Basel III reforms in Singapore

The Monetary Authority of Singapore (MAS) has launched a public consultation on proposed revisions to the risk-based capital requirements and leverage ratio requirements for Singapore-incorporated banks. The consultation paper sets out the MAS' policy proposals for the implementation of specific aspects of the final Basel III reforms in Singapore. The MAS proposes to implement the revisions from 1 January 2022.

Amongst other things, the MAS is seeking comments on the proposals:

- relating to the scope of exposures to banks;
- to continue allowing banks to use external ratings which incorporate assumptions of implicit government support for the purpose of risk-weighting bank exposures under the standardised approach for credit risk (SA(CR));
- to set the new large corporate asset class threshold at SGD 750 million, and to set the new corporate small medium enterprise (SME) threshold under the SA(CR) at SGD 100 million;
- to allow banks to substitute total assets for total sales in calculating the corporate SME threshold for the application of the firm-size adjustment under the internal ratings-based approach for credit risk (IRBA), in cases where total sales are not a meaningful indicator of firm size;
- to require banks to risk-weight residential real estate (RRE) and commercial real estate (CRE) exposures that meet operational requirements and are not materially dependent exposures, based on the loan-to-value ratio of the exposure and apply the risk weight to the entire amount of the exposure;
- to exercise the national discretion to require banks to revise the property value downwards to reflect property valuations, and to cap any subsequent upward adjustments at the value measured at origination;
- to require banks to treat an exposure secured by income-producing RRE to an individual with mortgages on more than two income-producing RRE units with the bank as a materially dependent exposure, and apply the risk weight for materially dependent exposures, where the servicing of the loan materially depends on the cash flows generated by the CRE portfolio owned by the obligor, except where the CRE portfolio owned by the obligor is sufficiently diversified;
- for a land acquisition, development and construction exposure to RRE to be subject to a risk weight of 100%;
- to require banks to classify an exposure secured by income-producing RRE to an individual with mortgages on more than two income-producing RRE units with the bank under the corporate asset sub-class;

- to adopt BCBS's phase-in arrangement for the new equity risk weights under the SA(CR), and new definition of commitment in full;
- to expand the list of 'eligible protection providers';
- relating to the default risk charge under revised standardised approach for market risk;
- regarding considerations in assessing whether to grant approval for a bank to use the simplified standardised approach for market risk;
- to exclude internal loss data in the capital calculation, and to set the operational risk capital requirement equal to the business indicator component;
- regarding calculation of exposures to cash pooling transactions in the leverage ratio exposure measure; and
- relating to the requirement for derivative exposures to be measured in the leverage ratio exposure measure using the modified standardised approach for measuring counterparty credit risk (SA-CCR) exposures from 1 January 2022, and the option for banks to adopt the modified SA-CCR earlier than 1 January 2022.

Comments on the consultation are due by 8 July 2019.

Federal Reserve Board proposes to apply netting protections to broader range of financial institutions

The Board of Governors of the Federal Reserve Board is seeking public comment on a rulemaking proposal intended to reduce risk and increase efficiency in the financial system by applying netting protections to a broader range of financial institutions.

The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) provides certainty that netting contracts will be enforced, even in the event of the insolvency of one of the parties. If adopted, the proposal would expand the definition of 'financial institution' for the purposes of FDICIA's netting provisions to include the following:

- swap dealers and security-based swap dealers;
- major swap participants and major security-based swap participants;
- nonbank systemically important financial institutions;
- certain financial market utilities;
- foreign banks;
- bridge institutions; and
- Federal Reserve Banks.

The proposal would also clarify how a related activities-based test in Regulation EE applies following a consolidation of legal entities.

Comments are due within 60 days of the publication of this proposal in the Federal Register.

RECENT CLIFFORD CHANCE BRIEFINGS

US DOJ publishes updated 'guidance document' on 'evaluation of corporate compliance programs'

On 30 April 2019, the US Department of Justice, Criminal Division, published an updated 'guidance document' on 'evaluation of corporate compliance programs'.

The guidance provides prosecutors, and thereby companies, with specifics around requirements for corporate compliance programs which DOJ will evaluate when conducting an investigation of a corporation. This evaluation will inform charging decisions and the form of resolution of a matter, and factor into the determination of the appropriate monetary penalty and compliance obligations. DOJ helpfully notes that its guidance is not intended as a 'one size fits all' for developing a corporate compliance program, but nonetheless provides companies with a helpful 'checklist' to consider when both designing a program and, importantly, when presenting the program to DOJ in connection with an investigation or settlement negotiation.

This briefing paper discusses the guidance.

https://www.cliffordchance.com/briefings/2019/05/us_doj_publishesupdatedguidancedocumento.html

A framework for OFAC compliance commitments

Last year, OFAC signalled that it would be issuing much-anticipated guidance for companies on building sanctions compliance programs and, on 2 May 2019, OFAC delivered. 'A Framework for OFAC Compliance Commitments' sets forth OFAC's view of the elements of an effective compliance program. In the build-up to publishing the framework, OFAC increasingly had included compliance-related guidance in its public settlement documents and enforcement notices, much of which is reproduced and highlighted in the framework as 'root causes' of sanctions violations.

This briefing paper discusses the framework.

https://www.cliffordchance.com/briefings/2019/05/a_framework_for_ofaccompliancecommitments.html

OCIE risk alert highlights key Regulation S-P requirements for SEC registered entities

Last month, the US Securities & Exchange Commission's Office of Compliance Inspections and Examinations (OCIE) released a risk alert highlighting the most common privacy-related issues that OCIE staff have observed in recent examinations of investment advisers and broker-dealers. Coupled with the recently-publicized cybersecurity sweep, the risk alert is a timely reminder of the importance of instituting strong policies and procedures – and customer disclosures – that satisfy Regulation S-P, particularly those requirements highlighted by OCIE.

This briefing paper discusses the risk alert.

https://www.cliffordchance.com/briefings/2019/05/ocie_risk_alert_highlightskeyregulations-.html

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US antiboycott laws – they're not for everyone (but they may be for you)

Honestly, it is understandable if companies may have missed that the recently-passed Export Control Reform Act (ECRA) included permanent statutory authority for the Antiboycott Regulations (ABR). These regulations, codified in Part II of ECRA as of 13 August 2018, prohibit US companies from complying with some aspects of other countries' boycotts that the United States does not support.

However, aside from adding an unnecessary hyphen to 'Antiboycott' in the title and raising the penalties for violations to USD 300,000, the Anti-Boycott Act of 2018, does nothing to expand, narrow, or clarify coverage of the ABR. Historically and to this day, the ABR have only been applied to the Arab League boycott of Israel, to US persons and entities, and transactions in US commerce.

And yet, despite this seemingly narrow scope, antiboycott restrictions can ensnare unsuspecting companies who do not understand their particular nuances and global reach. Every year, there are non-US branches of US companies, shipping companies, and banks that are charged with violating the ABR. Fortunately, the agency that enforces this law and regulations, the Office of Antiboycott Compliance (OAC), within the Department of Commerce Bureau of Industry and Security, continuously monitors its advice line to help companies deal with the 84-pages of complex regulations.

This briefing paper discusses who and what the Act covers, and what it doesn't.

https://www.cliffordchance.com/briefings/2019/05/u_s_antiboycott_lawstheyrenotforeveryon.html

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Clifford Chance, 10 Upper Bank Street, London, E14 5JJ