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EBA advises EU Commission on Basel III implementation

The European Banking Authority (EBA) has published its response to the EU Commission's call for advice on the implementation of the Basel III framework. The response includes a quantitative analysis of the estimated impact based on data from 189 banks, as well as four policy advice documents on securities financing transactions, operational risk, the output floor and credit risk.

From its study, the EBA concludes that the impact of full implementation is diverse across banks. Under conservative assumptions, it will increase the minimum capital requirement (MRC) by 25% for large banks, 11.3% for medium banks and 5.5% for small banks. Overall the MRC will increase by an average of 24.4%, implying an aggregate shortfall in total capital of around EUR 135.1 billion. The shortfall would reduce to EUR 58.7 billion if banks were to retain profits throughout the transition period.

The EBA makes a number of recommendations regarding the implementation of the Basel III framework, including:

- the newly agreed revisions on credit risk should be implemented, maintaining a prudential framework based on external ratings and the loan-splitting approach to exposures secured by real estate;
- any EU-specific supporting factors for small and medium enterprises and infrastructure lending exposures should not be retained;
- all newly agreed revisions on securities financing transactions should be implemented, with the exception of the minimum haircuts floor framework, which the EBA believes requires further analysis;
- the new standardised approach to operational risk should be implemented, preferably with a phase-in period, and should be based on the institution-specific historical loss component; and
- the output floor should be introduced and applied at all levels of consolidation. Where applicable it should be used to compute all capital requirements.

Deposit Guarantee Schemes Directive: EBA publishes first of three opinions on implementation

The EBA has published an opinion on the implementation of the Deposit Guarantee Schemes Directive (DGSD) in the EU, proposing a number of changes to strengthen depositor protection, enhance financial stability and improve operational effectiveness.

The opinion covers the eligibility of deposits, coverage level and cooperation between deposit guarantee schemes. It proposes changes in relation to the current provisions on transfers of DGS contributions between DGSs, DGSs' cooperation with various stakeholders, the current list of exclusions from eligibility, current provisions on eligibility, depositor information, the approach to third country branches' DGS membership, the implications of the recent review of the three European Supervisory Authorities (ESAs), and cross-references to other EU regulations and EU directives. The opinion proposes no changes, for example, to the current coverage level of EUR 100,000, provisions on home-host cooperation, cooperation agreements, or the cooperation between the EBA and the European Systemic Risk Board (ESRB).

The EBA is planning to publish two further opinions later in 2019.

ESMA ceases renewal of product intervention measures relating to CfDs

The European Securities and Markets Authority (ESMA) will not renew the temporary restriction on the marketing, distribution or sale of contracts for differences (CfDs) to retail clients in the EU.

ESMA had taken a series of product intervention measures relating to CfDs, with the current applicable measure expiring on 31 July 2019. ESMA recognises that permanent product intervention measures introduced by national competent authorities (NCAs) are at least as stringent as ESMA's measures and as a result has not renewed the current temporary restriction.

ESMA will continue to monitor the market to determine whether any further measures are needed.

FCA reports on Senior Managers and Certification Regime in banking sector

The Financial Conduct Authority (FCA) has published the findings of its review into the embedding of the Senior Managers and Certification Regime (SM&CR) in the banking sector.

The SM&CR was introduced for deposit-taking firms and dual-regulated investment firms (the banking sector) in March 2016. To understand better how the SM&CR has been embedded, the FCA interviewed 45 individuals who have worked with the SM&CR at fifteen banking sector firms and trade associations, the Banking Standards Board, the FCA and the Prudential Regulation Authority (PRA).

The review covers:

- senior manager accountability;
- certification;
- regulatory references;
- conduct rules;
- impact on culture;
- unintended consequences; and
- embedding and overcoming initial implementation issues.

The FCA has found that the industry has made a concerted effort to implement the regime and that most firms are taking actions to move away from basic rules-based compliance and towards embedding the regime in the organisation.

Regulatory reporting: PRA publishes policy statement on EBA Taxonomy 2.9

The PRA has published a policy statement containing final rules amending the PRA Rulebook to reflect the EBA's Taxonomy 2.9. The new rules amend the requirements for ring-fenced bank and Capital+ reporting, as well as the scope of financial reporting (FINREP) required of firms that do not currently fall under the Capital Requirements Regulation (CRR) FINREP reporting requirements.

The PRA published the amendments for consultation in CP19/18. Its proposals included the following changes to the regulatory reporting and glossary parts of the PRA Rulebook:

- updates to the content of ring-fenced bank template RFB004 to reflect selected changes that the EBA has proposed to FINREP;
- updates to the content of templates PRA101, PRA102, and PRA103 to reflect selected changes that the EBA is proposing to common reporting (COREP); and
- the addition of new non-performing loan (NPL) templates to the scope of FINREP reporting required from firms that are not currently required under the CRR to report FINREP.

The PRA did not receive any responses to CP19/18 but has made some minor amendments to the rules as consulted upon in order to reflect the changes that the EBA has made to FINREP and COREP following its consultation on amendments to the implementing technical standards on supervisory reporting.

The changes to templates PRA101, PRA102 and PRA103 will take effect on 1 March 2020. The changes to RFB004 and the new NPL templates will take effect on 1 June 2020.

Brexit: Consob updates communication on no-deal scenario

The Italian securities regulator Consob has published amendments to its Communication No. 7 of 26 March 2019 providing for the steps to be taken by British intermediaries operating in Italy and by Italian intermediaries operating in the United Kingdom, also pursuant to Law Decree no. 22/2019, which has been adopted by the Italian government in case of a no-deal Brexit.

The amendments follow the publication in the Official Gazette of Law 41 of 20 May 2019, which converted, with amendments, Law Decree No. 22/2019.

The update clarifies that the existing rules of conduct should continue to be applied throughout the temporary regime, but it does not introduce any new specific requirements to be met by intermediaries providing investment services and activities and does not make changes to the forms attached to Communication No. 7. Therefore, notifications, applications for authorisation and notices which have already been submitted remain valid. Intermediaries must only submit any changes and/or updates to the information and data previously disclosed and keep their clients informed.

Prospectus Regulation: Consob amends its Issuer's Regulation

Consob has approved amendments to its Issuers' Regulation following a consultation with the market on the proposed amendments necessary to adapt the provisions of the Issuers' Regulations with the provisions of Regulation (EU) 2017/1129 on prospectuses to be published for public offer or admission to trading of securities on a regulated market.

Regulation (EU) 2017/1129 replaces the previous Prospectus Directive and has been applicable from 21 July 2019.

The consultation was launched on 20 June and ended on 10 July 2019.

AMLD 4: Bank of Italy publishes new rules on customer due diligence

The Bank of Italy has issued new rules on customer due diligence to combat money laundering and terrorist financing.

These rules are intended to implement:

- Legislative Decree No. 231 of 21 November 2007, as amended by Legislative Decree No. 90 of 25 May 2017, transposing Directive (EU) 2015/849; and
- the joint guidelines of the European Supervisory Authorities (ESAs) issued on 26 June 2017 pursuant to Articles 17 and 18(4) of Directive (EU) 2015/849 (AMLD 4), on simplified and strengthened customer due diligence measures and on the factors that credit institutions and financial institutions should take into account when assessing the risks of money laundering and terrorist financing associated with individual continuous relationships and occasional transactions.

The new rules will apply from 1 January 2020. With regard to clients onboarded before their entry into force, the Bank of Italy expects any missing data and identification documents to be collected at the earliest opportunity, and in any case by 30 June 2020.

Brexit: CSSF announces opening of notification portal

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a press release announcing the opening of the dedicated 'Brexit Notification' portal. First announced in CSSF Press Release 19/33 of 15 July 2019, the 'Brexit Notification' portal was set up to permit UK firms (currently authorised in the UK and passported under CRD, MiFID2, PSD2 or EMD) to apply to become eligible to benefit from the 12-month transitional regime – regulated under the law of 8 April 2019 on Brexit (Brexit Law) and further detailed by Press Release 19/33 – in respect of existing activities (further details regarding what is meant by this term are provided in the Brexit Law and Press Release 19/33).

The portal and relevant forms are available at https://www.cssf.lu/edesk.

Applications must be made no later than 15 September 2019. Failure to do so will result in an inability to benefit from the transitional regime.

According to Press Release 19/33, the CSSF will assess each notification received with respect to the existence of the passporting rights and the information provided on the activities and inform firms individually as to whether they can benefit from the transitional regime or not.

China unveils measures to further liberalise financial sector

The Office of the Financial Stability and Development Committee of China's State Council has announced eleven new measures intended to provide a clearer roadmap and timeframe for the next stage of PRC financial market liberalisation.

In particular, the measures include:

- easing market entry requirements;

- expansion of investment scope for foreign investors:
- acceleration of implementation of existing liberalisation commitments; and
- opening of China's bond market to foreign investors.

MAS consults on requirements on controls against market abuse

The Monetary Authority of Singapore (MAS) has launched a public consultation setting out new requirements it proposes to impose on financial institutions in Singapore that undertake the regulated activity of dealing in capital markets products. The new requirements are intended to improve controls and facilitate investigations into cases of market abuse such as market manipulation and insider trading to maintain a fair, orderly and transparent market.

The MAS and the approved exchanges conduct market surveillance of trading activities to detect misconduct that may affect the orderliness and integrity of the market. Early detection of misconduct is an important part of the MAS' enforcement approach. The absence of information or the delay associated with the retrieval of information, on the identity of persons who are the beneficial owners and/or who exercise control over trading accounts have impeded investigations into market abuse.

The MAS has identified four areas where requirements will be enhanced:

- ultimate beneficial owners (UBOs) of orders and trades (O&T) executed in omnibus accounts (known as 'the client identification rule');
- record-keeping of instructions received for broker-assisted O&T;
- unique client device identifier for O&T executed via mobile trading applications; and
- cash payments and payments by third parties (i.e. non-account holders) for the funding of customers' accounts.

The MAS has clarified that the proposed requirements, which will be set out in a new Notice on controls against market abuse, will be applicable to licensed and exempt financial institutions in Singapore that undertake the regulated activity of dealing in capital markets products. The proposed Notice will take effect 6 months from the date of issuance.

Comments on the consultation are due by 5 September 2019.

Contributed by Clifford Chance Asia, a Formal Law Alliance in Singapore between Clifford Chance Pte Ltd and Cavenagh Law LLP.

MAS launches Sandbox Express for faster market testing of innovative financial services

The MAS has launched Sandbox Express, taking into account the feedback it received on its November 2018 consultation paper.

The Sandbox Express regime comprises a set of pre-defined sandboxes that provide firms with a faster and less resource-intensive option to test innovative financial products and services in the market. Eligible applicants that meet the assessment criteria will now be able to market test their products and services within 21 days of applying to the MAS.

Amongst other things, the MAS has clarified that:

- as Sandbox Express relies on standard disclosures and pre determined rules (e.g., on boundaries, regulatory reliefs and expectations), it will only be suitable for low-risk products and services that are well-understood by the market and can be reasonably contained within pre-defined and standardised parameters;
- Sandbox Express will complement the existing FinTech Regulatory Sandbox (established in 2016), which is still open to applicants with more complex business models or where the MAS requires more time to understand the risks of the activities;
- for the time being, Sandbox Express will only be available to insurance brokers, recognised market operators and remittance businesses;
- firms in the sandbox must comply with all conditions of approval (e.g., by providing clear and proper customer disclosures and submitting regular progress reports to the MAS); and
- the sandbox period can be as long as nine months, providing more time for firms to overcome business and technical challenges during experimentation as well as better prepare for exiting the sandbox and deploying their innovation on a larger scale, and for the MAS to address potential regulatory challenges.

Further particulars on Sandbox Express can be found in the Sandbox Express Guidelines, also published on 7 August 2019, which provide guidance on its objectives, the manner of application, and ongoing requirements for firms admitted to the sandbox.

MAS revises guidelines on applications for approval of arrangements under Financial Advisers Regulations

The Financial Advisers Regulations 2002 (FAR) were amended by the Financial Advisers (Amendment No. 4) Regulations 2019 in connection with the ASEAN Capital Market Professional Mobility Framework. The framework is intended to facilitate greater mobility of ASEAN capital market professionals undertaking the activity of investment advice within the ASEAN region. The MAS published revised guidelines on applications for approval of arrangements under regulation 32CB of the FAR on the same day that the amendments to the FAR became effective.

Under regulation 32CB, the MAS may approve arrangements between a Singapore entity (the host entity) and an entity supervised by an authority of an ASEAN country (each, a relevant entity) in relation to the provision of financial advisory services. Amongst other things, the FAR and guidelines have been amended to:

- clarify the types of arrangements and financial advisory services which the MAS considers for approval under regulation 32CB, in particular in relation to arrangements between a hosting platform operator and a relevant entity under the cross-border publication of research reports concerning any specified ASEAN capital markets products;
- clarify the assessment criteria for relevant entities;
- clarify the responsibilities of a Singapore entity under the ACMF pass, as well as to the validity period of ACMF Pass;

- set out the requirements with regard to cross-border publication of research report, which provide that the MAS may impose:
  - conditions and restrictions under an approval granted by the it to a cross-border publication of research report arrangement; and
  - other conditions and restrictions upon the approval granted, as it deems fit, taking into account the particular arrangements proposed by the applicants; and
- revise the application process for the approval under regulation 32CB.

In addition to the changes in relation to the framework, the FAR was revised to clarify the scope of activities that would constitute distribution of a direct purchase insurance product.

The Financial Advisers (Amendment No. 4) Regulations 2019 and the revised guidelines have been effective since 1 August 2019.

MAS revises notices on liquidity and liquidity disclosure requirements for banks

The MAS has revised the following notices relating to liquidity and liquidity disclosure requirements for banks:

- MAS Notice 651 - Liquidity Coverage Ratio Disclosure;
- MAS Notice 653 - Net Stable Funding Ratio Disclosure;
- MAS Notice 652 - Net Stable Funding Ratio; and
- MAS Notice 649 - Minimum Liquid Assets and Liquidity Coverage Ratio.

Amongst other things, the Notices have been revised to:

- clarify their scope of application;
- implement a required stable funding add-on of 5% for derivative liabilities;
- introduce proportionality to the disclosure requirements; and
- implement other technical revisions.

The amendments to the Notices are effective from 1 October 2019.

MAS issues new rules to strengthen cyber resilience of financial industry

Taking into account the feedback received on its September 2018 consultation paper on the proposed Notice on Cyber Hygiene, the MAS has finalised the Notice on Cyber Hygiene and issued a set of legally binding requirements to raise the cyber security standards and strengthen cyber resilience of the financial sector. The Notice sets out the measures that financial institutions must take to mitigate the growing risk of cyber threats.

The Notice sets out compulsory key elements in the existing MAS Technology Risk Management Guidelines. Specifically, it is mandatory for financial institutions to comply with the following requirements:

- establish and implement robust security for information technology systems;
- ensure updates are applied to address system security flaws in a timely manner;

- deploy security devices to restrict unauthorised network traffic;
- implement measures to mitigate the risk of malware infection;
- secure the use of system accounts with special privileges to prevent unauthorised access; and
- strengthen user authentication for critical systems as well as systems used to access customer information.

The MAS has stated that financial institutions have 12 months to put these measures in place before the requirements set out in the Notice come into effect on 6 August 2020.

The MAS has also published a set of frequently asked questions on the Notice on Cyber Hygiene to provide guidance on the requirements set out in the Notice.

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SEC adopts permanent exemption for regulated rating agencies related to offshore offerings of structured finance products by non-US issuers

The US Securities and Exchange Commission (SEC) has codified a previously temporary exemption to Rule 17g-5 under the US Exchange Act of 1934, as amended. Rule 17g-5 generally requires a regulated rating agency to maintain on a password-protected website a list of each structured finance product for which it currently is in the process of determining an initial credit rating and to provide free and unlimited access to any other regulated rating agencies that, among other things, certify that they will access the website solely for the purpose of determining and monitoring credit ratings.

Rule 17g-5(a)(3), as amended, will provide that its requirements will not apply to a regulated rating agency when issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed securities transaction, if:

- the issuer of the security or money market instrument is not a US person; and
- the regulated rating agency has a reasonable basis to conclude that all offers and sales of the security or money market instrument by any issuer, sponsor, or underwriter linked to the security or money market instrument will occur outside the United States.

In addition, the SEC has adopted amendments to Exchange Act Rules 17g-7(a) and 15Ga-2. Rule 17g-7(a) requires a regulated rating agency, when taking a rating action, to publish an information disclosure form containing specified information about the related credit rating. Rule 15Ga-2 requires the issuer or underwriter of an asset-backed security that is to be rated by a regulated rating agency to furnish a form to the Commission containing the findings and conclusions of any third-party due diligence report obtained by the issuer or underwriter. Both of these rules include an exemption with respect to securities offered and sold outside the United States. The SEC's amendments conform the exemptive conditions of these rules to the conditions of the permanent exemption to Rule 17g-5(a)(3).

In addition, the SEC has adopted an amendment to Rule 17g-7(a) to clarify that the application of the conditions to the exemption applies differently in the case of rated obligors than it does in the case of rated securities or money market instruments.

These amendments will become effective 30 days after publication in the Federal Register.

RECENT CLIFFORD CHANCE BRIEFINGS

Decrypting crypto-funds – the key questions

Many of the world's largest asset management firms are exploring the potential of crypto-funds, but what are they, what are the risks, how are they regulated, how do you set one up and who has custody of the assets? These were some of the questions discussed recently at the Clifford Chance Global Investment Management Group conference.

This briefing paper examines some of the key questions around crypto-funds and the issues that can arise for fund managers in this emerging area.

https://www.cliffordchance.com/briefings/2019/08/decrypting_crypto-fundsthekeyquestions.html

Provision of MiFID investment services in Romania – is the establishment of a branch required?

As part of the process for the implementation of the MiFID2 framework in Romania, the Financial Supervisory Authority (FSA) issued Regulation no. 5/2019 on certain requirements related to the provision of investment services and activities under the Romanian law implementing MiFID2, i.e. Law no. 126/2018 on markets in financial instruments.

The regulation deals, amongst other things, with cross-border operations performed by investment firms and credit institutions from EU Member States or from third countries providing specific criteria, which trigger the requirement for notification under article 34 (freedom to provide services), article 35 (freedom of establishment) or authorisation under article 39 (branch authorisation for third country firms) of MiFID2.

This briefing paper discusses the regulation.

https://www.cliffordchance.com/briefings/2019/08/provision_of_mifidinvestmentservicesinromani.html

The US imposes additional sanctions on Russia in response to the UK 'novichok' incident

On 2 August 2019, the US announced that new sanctions will be imposed on Russia as required under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 in response to the March 2018 'novichok' nerve agent incident against Sergei and Yulia Skripal in the UK. The additional sanctions relate to US bank loans to the Russian government, US opposition to multilateral development bank assistance, and further US Commerce Department licensing restrictions on exports to Russia.

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This briefing paper discusses the second round of sanctions that will be imposed on Russia.

https://www.cliffordchance.com/briefings/2019/08/the_us_imposes_additionalsanctionsonrussiai.html