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Briefing note

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- Recent Clifford Chance briefings: Singapore – Retail fund managers – how the enhanced regulatory regime impacts you; and more. Follow this link to the briefings section.

European Commission consults on benchmarks and market indices

The European Commission has issued a consultation paper on possible new rules for the production and use of indices serving as benchmarks in financial and other contracts. The Commission believes that the proposed changes to its market abuse and criminal sanctions proposals alone will not improve the way benchmarks are produced and used, and that broader work is required to assess if and what regulation may be required to improve the functioning and governance of benchmarks.

The consultation covers all benchmarks, not just interest rate benchmarks such as LIBOR but also commodities and real estate price indices, and it seeks to identify possible shortcomings at every stage in the production and use of benchmarks. The Commission has indicated that all options are on the table, but that any solution should guarantee that benchmarks are not subject to conflicts of interest, reflect the economic reality that they are intended to measure and are used appropriately.

Comments are due by 15 November 2012.

FSA consults on changes to client money and custody assets regime

The FSA has published a combined consultation paper and discussion paper (CP12/22) that proposes a number of changes to the client money and custody assets regime for firms that undertake investment business.

In addition to some changes required by the regulation on OTC derivatives and market infrastructures (EMIR), the FSA is proposing to introduce a change in the client money rules applicable to investment firms that could lead to a radical shift in how firms protect client money. The FSA also seeks comment on some wider issues in relation to its fundamental review of the client assets regime with the aim of producing better results in the insolvency of an investment firm.

Part I outlines the segregation and porting measures in Articles 39 and 48 of EMIR and consequential changes to the client assets sourcebook (CASS). Part II sets out the FSA's proposals for introducing multiple pooling. Part III is a discussion paper on the wider client assets review currently underway, which is focused on getting a better result in the context of client assets in a firm's insolvency.

Comments on Part I are due by 16 October 2012. Comments on Part II and III are due by 30 November 2012.

OTC derivatives and market infrastructures: ESMA's Securities and Markets Stakeholder Group publishes advice on draft regulatory technical standards

ESMA's Securities and Markets Stakeholder Group has published its advice on ESMA's draft regulatory technical standards under the Regulation on OTC derivatives, central counterparties and trade repositories (EMIR).

Amongst other things, the advice warns that deviations from international standards will increase the cost of clearing in Europe and create a competitive disadvantage for European market participants as well as a higher administrative burden for non-financial end users such as SMEs. The advice also states that recognition of third country CCPs without an ESMA assessment may harm investor protection in Europe and creates room for regulatory arbitrage. Finally, the advice warns that prescriptive and inflexible standards for risk management deviate from international standards and can hamper further development of state-of-the-art approaches.

MiFID Review: EU Council Presidency publishes compromise texts

The Cyprus EU Council Presidency has published a new compromise text for the proposed regulation on markets in financial instruments and amending the regulation on OTC derivatives, central counterparties and trade repositories (MiFIR) and a new compromise text for the proposed directive on markets in financial instruments repealing Directive 2004/39/EC (MiFID 2).

Market abuse regulation: EU Council Presidency publishes compromise text

The Cyprus EU Council Presidency has published a new compromise text for the proposed regulation on insider dealing and market manipulation, which updates the existing framework provided by the Market Abuse Directive.

Martin Wheatley discusses initiative to address risks to customers from financial incentives

Martin Wheatley, managing director of the FSA and chief executive officer designate of the Financial Conduct Authority (FCA), has given a speech during which he announced a new initiative to tackle flawed sales incentives that encourage mis-selling. Mr. Wheatley discussed the

findings of a review of 22 firms' financial incentive schemes, which encompassed banks, building societies, insurers, and investment firms, and uncovered a range of serious failings.

The FSA has also published proposed guidance for all authorised firms to consider when setting up and managing incentive schemes in future. The proposed guidance marks the start of a programme of work to reduce the risks to consumers from poorly managed incentive schemes, which will be taken forward by the FCA. It applies to all firms that deal with consumers and have sales staff or advisers who are part of an incentive scheme.

The FSA expects firms to consider carefully whether they have incentive schemes that increase the risk of mis-selling, review whether their governance and controls are adequate, and address any inadequacies – including changing the scheme where necessary and paying redress to customers that may have been mis-sold.

Comments are due by 31 October 2012.

Short selling: FSA provides update on market maker and authorised primary dealer exemptions notification procedures

The FSA has published an update on the market maker and authorised primary dealer exemptions notification procedures under the EU regulation on short selling. Under the regulation, which will be directly applicable in the UK from 1 November 2012, firms are able to notify their intention to employ the market maker exemption and the authorised primary dealer exemption in relation to specific financial instruments at least 60 days before the regulation comes into effect. This means that firms have been able to notify the FSA from 3 September 2012 of their intention to use these exemptions. However, the FSA has indicated that, as ESMA is due to publish a consultation paper on guidelines on this process in mid-September, it intends to publish the UK procedure for making such notifications, including the forms that it will require to be completed, at that time.

The FSA wants to ensure that the UK approach to assessing notifications is closely aligned with the ESMA guidelines (likely to be finalised during November 2012) so that it does not need to reassess the exemptions if the guidelines diverge significantly from the UK approach. The FSA therefore wants to wait for the consultation draft of the guidelines before it starts to receive and process notifications, and has asked firms not to submit their notifications before it has published its procedures.

BIS consults on early implementation of ban on above cost payment surcharges

The Department for Business, Innovation and Skills (BIS) issued a consultation paper on proposals for the early implementation of a ban on above cost payment surcharges.

The consultation paper sets out the government's proposal for early implementation of a provision of the Consumer Rights Directive. This will put in place legislation to ban businesses from imposing excessive payment surcharges on consumers. Businesses will remain able to add a charge only so far as it covers the actual costs of processing any particular form of payment. The consultation paper seeks views on the timing of the implementation of this legislation and how best to define the scope and application of the provision.

Comments are due by 15 October 2012. The implementation in the UK of the remaining provisions of the Consumer Rights Directive is subject to a separate consultation which was launched on 20 August 2012.

Short selling: BaFin issues guidelines on notification requirements for market-making and primary market operations

The Federal Financial Supervisory Authority (BaFin) has published guidelines on the notification requirements for market-making and primary market operations under Article 17 of the EU regulation on short selling and certain aspects of CDS, which will apply from 1 November 2012.

Under Article 17 of the regulation, market making activity and primary market operations may be exempt from certain limitations on naked short selling and transparency requirements relating to short selling positions. Entities wanting to take advantage of the available exemption need to notify BaFin. There is a 30-day waiting period after giving notice to BaFin until entities may start to rely on the exemption.

Dutch Minister of the Interior issues new policy rules on use of derivatives by social housing corporations

The Dutch Minister of the Interior has issued new policy rules (available in Dutch only) on the use of derivatives by social housing corporations. The new rules, which become effective on 1 October 2012, will not only be relevant for social housing corporations but also for their counterparties in derivatives transactions. Social housing corporations will be restricted in their use of derivatives in that they may only conclude interest rate caps and payer swaps. The term of

payer swaps will be limited to the term of the related loan that is to be hedged, with a maximum of 10 years.

The new rules require social housing corporations to maintain sufficient liquidity buffers to be able to fulfil potential payment obligations under derivatives contracts following a 2% drop in interest rates. The maintenance of this buffer will be monitored by the Central Fund for Social Housing. Additionally, social housing corporations are only allowed to enter into derivative transactions with a bank if they are categorised as retail clients by the bank.

The policy rules only affect new derivative transactions, with one exception. Current derivative contracts which contain clauses that may impede the supervision of social housing corporations by the competent authorities should be phased out and terminated by them within a reasonable period. The policy rules also require social housing corporations to use a new master agreement that is to be based on the ISDA standard form for new derivative transactions. The new model agreement still has to be added as an annex to the policy rules. Therefore, the provisions regarding its mandatory use will not enter into effect on 1 October 2012 but at a later time.

Spanish Royal Decree Law on restructuring and resolution of credit institutions published

Royal Decree Law 24/2012 of 31 August on the restructuring and resolution of credit institutions has been published in the Official Journal. The approval of this Royal Decree Law is part of the assistance programme for the recapitalisation of the financial sector Spain agreed on with the Eurogroup, which has led, amongst other things, to the approval of a memorandum of understanding dated 20 July 2012.

The Royal Decree Law entered into force on 31 August 2012.

HKEx consults on proposed changes on board diversity

Hong Kong Exchanges and Clearing Limited (HKEx) has published a consultation paper on proposed changes to the Corporate Governance Code and the corporate governance report concerning board diversity. Under the proposals, the code's principle for 'board composition' will be revised to include 'diversity of perspectives'.

The proposals include a new code provision stating that the nomination committee (or the board) should have a policy concerning diversity in the boardroom, and should disclose the policy or a summary of the policy in the corporate governance report. HKEx will be issuing a new note to clarify what is meant by diversity. The HKEx has also proposed that, if the issuer has a policy concerning diversity, it should disclose any measurable objectives that it has set for implementing the policy and the progress on achieving the objectives. The new provision will apply on a 'comply or explain' basis.

Comments are due by 9 November 2012.

CSRC consults on principles of corporate governance for securities companies

The China Securities Regulatory Commission (CSRC) has published a consultation draft of its 'Principles of Corporate Governance for Securities Companies', which are intended to further improve the corporate governance of securities companies and are generally applicable to all securities companies registered in China.

Amongst other things, the consultation draft sets out detailed requirements on remuneration systems, stricter requirements on the performance of duties by directors and supervisors, and other amendments to align the principles with the relevant laws, including company law and securities law.

Comments are due by 14 September 2012.

CBRC consults on administrative measures on eligibility requirements for directors and senior officers of financial institutions

The China Banking Regulatory Commission (CBRC) has issued the draft 'Administrative Measures on the Eligibility Requirements for Directors and Senior Officers of Financial Institutions in the Banking Industry' for consultation. The measures are intended to reinforce the supervision of the eligibility requirements for directors and senior officers of financial institutions in the banking industry, which are generally applicable to all financial institutions in China, including foreign bank branches and wholly foreign owned banks.

Comments are due by 30 September 2012.

Australia considers intergovernmental agreement with US for FATCA compliance

The Australian government has launched a consultation on the advantages and disadvantages of an intergovernmental agreement with the United States to reduce the compliance burden and expense for Australian financial institutions affected by the Foreign Account Tax Compliance Act (FATCA).

The intergovernmental agreement between Australia and the United States would be based on the Model Intergovernmental Agreement published by the United States Department of Treasury on 26 July 2012. This is a framework agreement for reporting certain financial account information by foreign financial institutions to local tax authorities, followed by the automatic exchange of that information with the United States under existing bilateral tax treaties or information exchange agreements. In particular, it is designed to address some of the conflicts of laws issues created by FATCA which may have prevented some foreign financial institutions from complying with both FATCA and domestic law.

An intergovernmental agreement between Australia and the United States would remove the need for Australian financial institutions to enter into individual agreements with the US Internal Revenue Service.

Comments are due by 28 September 2012.

Reserve Bank of Australia proposes new financial stability standards for CCPs and securities settlement facilities

The Reserve Bank of Australia (RBA) is consulting on a proposal to revoke the existing Financial Stability Standards (FSSs) and determine new FSSs for both central counterparties and securities settlement facilities.

The proposed FSSs aim to align the Australian regime with the 'Principles for Financial Market Infrastructures' developed by the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO). Both the RBA and the Australian Securities and Investments Commission (ASIC) propose to implement the principles within their respective regulatory mandates to ensure that central counterparties and securities settlement facilities licensed to operate in Australia conduct their affairs in accordance with international best practice.

The proposed FSSs also implement key elements of the Council of Financial Regulators' framework released in July 2012 for ensuring that Australian regulators have appropriate influence over cross-border central counterparties and securities settlement facilities.

Comments are due by 19 October 2012.

Council of Financial Regulators – Supplementary Paper to the Review of Financial Market Infrastructure Regulation (July 2012)

RECENT CLIFFORD CHANCE BRIEFINGS

Streamlining the reports and documents needed for mergers and de-mergers

On 7 June 2012, the Council of Ministers approved legislative decree No. 123 of 22 June 2012, which streamlines the reporting obligations in the context of corporate mergers and de-mergers, implementing Directive 2009/109/CE that amends Directives 77/91/CEE, 78/855/CEE, 82/891/CEE and 2005/56/CE. The Decree was published in the Italian Official Gazette No. 180 of 3 August 2012 and entered into force on 18 August 2012, i.e., fifteen days after publication.

The Decree allows: (i) a company to publish the merger or de-merger project on its website, as an alternative to depositing it with the register of companies; (ii) a company to publish the documents relating to the merger or de-merger on its website as an alternative to depositing them at its registered office; (iii) a company, subject to unanimous approval of the shareholders, to waive preparation of the ad-hoc statements of assets and liabilities of the companies involved in the merger and of the reports of the respective management bodies; (iv) a company listed on a regulated market to use its interim six-month report, rather than the ad-hoc statements of assets and liabilities; and (v) for a merger by absorption of a company owned for at least 90% or for proportional de-mergers, an exemption from the obligation to prepare the ad-hoc statements of assets and liabilities and the report of the management body.

This briefing sets out the main provisions of the Decree.

http://www.cliffordchance.com/publicationviews/publications/2012/09/streamlining_thereportsanddocumentsneededfo.html

The 'Growth Decree' is now law – New funding opportunities for non-listed companies

On 7 August 2012, the Italian Parliament converted the urgent measures to implement growth in Italy set forth in Decree Law No. 83 of 22 June 2012 into Law No. 134. Law No. 134 became effective as from 12 August 2012, following publication in the Gazzetta Ufficiale on 11 August 2012.

This briefing outlines the main provisions of the law.

http://www.cliffordchance.com/publicationviews/publications/2012/08/the_growth_decreeisnowlawnewfundin.html

The RF Supreme Arbitrazh Court rules on the validity of dispute resolution clauses with a unilateral option

On 19 June 2012 the Presidium of the Supreme Arbitrazh Court of the Russian Federation issued a decree in case No. VAS-1831/12 in which it examined the validity of an optional jurisdictional clause. The full text of the decree setting out the rationale for the decision was published on 1 September 2012.

This briefing discusses the decree.

http://www.cliffordchance.com/publicationviews/publications/2012/09/the_rf_supreme_arbitrazhcourtrulesonth.html

Retail fund managers – how the enhanced regulatory regime impacts you

The Monetary Authority of Singapore (MAS) announced on 6 August 2012 that the implementation of the enhanced regulatory regime for fund management companies (FMCs) would take effect from 7 August 2012. This marks the end of a series of public consultations undertaken by the MAS since April 2010, the developments of which have been closely watched by the fund management industry.

This briefing focuses on the impact of the enhanced regulatory regime for existing licensed retail FMCs which intend to continue their fund management business in Singapore, operating under the enhanced regulatory regime (this accordingly assumes that such FMCs do not carry out any regulated activities other than fund management).

http://www.cliffordchance.com/publicationviews/publications/2012/09/retail_fund_managers-howtheenhance.html

Why Singapore business trusts are proving popular with Indian sponsors

Reliance Communications' proposed initial public offering (IPO) of Global Telecommunications Infrastructure Trust on the Singapore Stock Exchange (the SGX) and the reported upcoming IPO of Religare Healthcare Trust by Fortis Healthcare mark a renewed interest in Singapore business trusts. This relative rise in popularity demonstrates that companies in India are reconsidering Singapore business trusts as potential capital-raising vehicles. Thus far two business trusts with assets in India have listed on the SGX: Ascendas India Trust (listed in 2007) and Indiabulls Properties Investment Trust (listed in 2008). In a typical business trust structure, a sponsor company transfers its cash-generating assets into the business trust, which pays for the assets using proceeds raised from the IPO of its units.

Singapore is the only jurisdiction in Asia that currently has a regulatory framework for business trusts under the Business Trusts Act of 2004. Currently, there are nine business trusts listed on the SGX. The first business trust, Pacific Shipping Trust, listed on the SGX in May 2006 and subsequently delisted on 8 March 2012. In fact, the largest IPO in Singapore's history to date includes the listing of Hutchison Port Holdings Trust on 18 March 2011, which raised approximately SGD 7 billion.

This briefing describes the basic characteristics and structures of a business trust, highlighting key structural issues faced by Indian sponsors, and discusses important considerations in structuring a business trust in the Singapore context.

http://www.cliffordchance.com/publicationviews/publications/2012/09/why_singapore_businesstrustsareprovingpopula.html

Delaware Supreme Court affirms award of more than USD 2 billion in damages (including interest) and USD 304 million in attorneys' fees

In December 2011, Chancellor Strine awarded USD 2.03 billion in damages, including interest (believed to be the largest single monetary award by the Chancery Court) in a stockholder action challenging the acquisition by Southern Peru Copper Corporation of Minera México, S.A. de C.V. from Americas Mining Corporation (AMC), for USD 3.05 billion in Southern Peru stock. Grupo México, S.A.B. de C.V. was the parent company of AMC, which owned both a 99.15% stake in Minera and a controlling interest in Southern Peru. The minority stockholders of Southern Peru brought a derivative action against defendants AMC, the Grupo México affiliated directors of Southern Peru and members of the Southern Peru Special Committee alleging that the transaction was entirely unfair to Southern Peru and its minority stockholders.

This briefing discusses the case.

http://www.cliffordchance.com/publicationviews/publications/2012/09/delaware_supremecourtaffirmsawardofmoretha.html