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Briefing note

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IN THIS WEEK'S NEWS

- BRRD: EU Commission calls on 11 Member States to apply rules
- BRRD: EBA publishes guidelines on triggers for resolution
- CRD 4: EBA updates guidelines on interest rate risk arising from non-trading activities
- Deposit guarantee schemes: EBA publishes guidelines on contributions and payment commitments
- FSB publishes review on supervisory frameworks and approaches for systemically important banks
- PRA consults on contractual stays in financial contracts governed by third-country law
- Ring-fencing: PRA issues policy statement on implementation
- FCA consults on capital requirements for personal investment firms
- CSSF issues press release on end of exemption under Article 30(6) of Luxembourg Transparency Law
- Polish Financial Supervision Authority adopts resolution on complaints-handling by financial institutions
- Dutch Minister of Finance issues bill to implement BRRD
- MAS publishes Banking (Credit Card and Charge Card) (Amendment) Regulations 2015
- Australian Government and ASIC consult on central clearing obligations for certain OTC derivatives
- FINRA publishes new guidance on rules governing communications with public
- Recent Clifford Chance briefings: European bank and bond restructurings; and more. Follow this link to the briefings section.

BRRD: EU Commission calls on 11 Member States to apply rules

The EU Commission has requested Bulgaria, the Czech Republic, France, Italy, Lithuania, Luxembourg, the Netherlands, Malta, Poland, Romania and Sweden to fully implement the Bank Recovery and Resolution Directive (BRRD).

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The deadline for the transposition of the BRRD into national law was 31 December 2014, but according to the Commission these 11 countries have failed to implement the rules into their national law.

The Commission's request takes the form of a reasoned opinion, the second stage of the EU infringement procedures. If these countries fail to comply within two months, the Commission may decide to refer them to the EU Court of Justice.

BRRD: EBA publishes guidelines on triggers for resolution

The European Banking Authority (EBA) has published its final guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under the BRRD. The guidelines, which are addressed to supervisors and resolution authorities, are intended to promote convergence of EU supervisory and resolution practices in relation to how resolution should be triggered.

They will apply from 1 January 2016.

CRD 4: EBA updates guidelines on interest rate risk arising from non-trading activities

The EBA has published an updated version of the Committee of European Banking Supervisors (CEBS) guidelines on technical aspects of the management of interest rate risk arising from non-trading activities under the supervisory review process, published on 3 October 2006. The updated guidelines apply to the interest rate risk arising from non-trading activities (IRRBB), one of the Pillar 2 risks specified in the Capital Requirements Directive (CRD 4).

The guidelines are addressed to competent authorities and will apply from 1 January 2016. The CEBS guidelines on technical aspects of the management of interest rate risk arising from non-trading activities under the supervisory review process, dated 3 October 2006, are repealed with effect from 1 January 2016.

Following the publication of the English version, the EBA will make available the translations of the guidelines in all EU languages. The EBA expects competent authorities to confirm their compliance status within two months from the publication of the translated guidelines.

Deposit guarantee schemes: EBA publishes guidelines on contributions and payment commitments

The EBA has published its final guidelines on contributions to deposit guarantee schemes (DGSs) and on payment commitments. Both guidelines aim to help ensure consistent application of the new funding mechanisms provided for in the new Deposit Guarantee Schemes Directive (DGSD).

DGSs and designated authorities should implement the guidelines by incorporating them in their practices by 31 December 2015. Following the publication of the English version, the EBA will make available translations in all EU languages. Within two months from the publication of the translated guidelines, supervisors and resolution authorities need to confirm to the EBA their compliance status, which will be disclosed on the EBA website.

FSB publishes review on supervisory frameworks and approaches for systemically important banks

The Financial Stability Board (FSB) has published a thematic peer review on supervisory frameworks and approaches for systemically important banks (SIBs).

The review, which was conducted in collaboration with the Basel Committee on Banking Supervision (BCBS), assesses progress towards enhancing supervisory frameworks and approaches for SIBs since the financial crisis, in particular for global systemically important banks (G-SIBs). It notes that:

- national authorities have taken significant steps to enhance supervisory effectiveness within their institutional frameworks;
- authorities are using a broader and more sophisticated range of supervisory tools, which in turn contributes to a more forward-looking supervisory approach capturing both current and emerging risks;
- the scope of supervision has been expanded to incorporate macroprudential and resolvability considerations;
- the noted changes are underpinned by enhanced dialogue between supervisors and the board and senior management of SIBs, both in terms of level of seniority and frequency;
- corporate governance and the development of recovery and resolution plans are common areas of focus across many jurisdictions; and
- one of the outstanding challenges to further progress supervisory effectiveness is the need for authorities to

effectively manage the volume of regulatory and supervisory changes, including by having sufficient budgetary resources and building and maintaining a skilled, capable, and experienced workforce.

The review recommends that supervisory authorities:

- clearly define their supervisory strategy and priorities, establish a formal process for evaluating supervisory effectiveness against the stated strategy and priorities, and make further progress in attracting and retaining skilled supervisory resources;
- further strengthen their engagement with banks, particularly at the board level and with senior management, with the objective of informing supervisory risk assessments through enhanced understanding of G-SIBs' business models;
- press banks to improve their information technology and management information systems to provide robust and timely information on the institutions' risk on an enterprise-wide basis; and
- continue to ensure that data requests are effectively targeted and evaluated for purpose and intent, including via coordination between home and host authorities.

The report also includes recommendations addressed to the standard-setting bodies (SSBs).

PRA consults on contractual stays in financial contracts governed by third-country law

The Prudential Regulation Authority (PRA) has launched a consultation (CP19/15) on a proposed new rule for the PRA Rulebook requiring the contractual adoption of UK resolution stays in certain financial contracts governed by the law of a jurisdiction outside the European Economic Area (EEA).

The proposed rule would apply to UK banks, building societies and designated investment firms as well as their qualifying parent undertakings in respect of financial contracts (such as for derivative, repo/reverse repo or securities financing transactions) governed by the law of a non-EEA jurisdiction. It would prohibit firms from creating new obligations or materially amending an existing obligation under such a financial contract without the required counterparty agreement. The prohibition applies unless the counterparty has agreed in writing to be subject to similar restrictions on termination, acceleration, close-out, set-off and netting as would apply as a result of the firm's entry into resolution, or the write-down or conversion of the firm's regulatory capital at the point of non-viability, if the contract were governed by the laws of the UK (and, where the relevant firm is not a credit institution or investment firm, as if it were one).

Firms would also be obliged to ensure that, where their subsidiary credit institutions, investment firms and financial institutions trade in these products under third-country law, the subsidiaries, regardless of location, also obtain agreement to the stay from their counterparties.

Comments on CP19/15 are due by 26 August 2015.

Ring-fencing: PRA issues policy statement on implementation

The PRA has issued a policy statement (PS10/15) providing feedback on the responses received to its October 2014 consultation paper (CP19/14) on the implementation of ring-fencing. PS10/15 also sets out amendments to the draft rules and supervisory statements included in CP19/14. The policy statement covers three areas:

- legal structure arrangements of banking groups subject to ring-fencing;
- governance arrangements of ring-fenced bodies; and
- arrangements to ensure continuity of services and facilities to ring-fenced bodies.

The PRA does not consider that the responses to the consultation necessitate major changes to its proposed approach to implementing ring-fencing, but it has made a number of amendments to the draft rules and supervisory statements published in CP19/14, mainly to add clarity and certainty. Updated 'near final' versions of the rules and supervisory statements are included in the policy statement.

The Government has stated its intention for ring-fencing to take effect from 1 January 2019. The PRA intends to undertake a further consultation during 2015, and to publish final rules and supervisory statements covering the policy proposed in these two consultations during H1 2016.

FCA consults on capital requirements for personal investment firms

The Financial Conduct Authority (FCA) has launched a consultation on capital requirements for personal investment firms (PIFs).

Holding adequate capital resources is intended to ensure that otherwise well-run PIFs do not immediately go out of business should they face a normal number of redress claims relative to the scale of their business. According to

the FCA, a modest capital requirement would provide a surplus for PIFs to absorb these losses.

The current capital requirements will be replaced on 31 December 2015 by rules published in FSA Policy Statement PS09/19 unless those rules are revoked. The FCA is consulting on an alternative approach and associated rule changes with the intention of issuing a Policy Statement and Handbook changes sometime in autumn 2015 and implementing the new requirements from 30 June 2016.

Comments on the consultation are due by 7 September 2015.

CSSF issues press release on end of exemption under Article 30(6) of Luxembourg Transparency Law

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financer (CSSF), has issued a press release informing issuers for which Luxembourg is the home Member State pursuant to the Law of 11 January 2008 on transparency requirements (Transparency Law) that the exemption from publication of half-yearly financial reports set out under Article 30(6) of the Transparency Law for issuers of debt securities admitted to trading on an EU regulated market prior to 1 January 2005 ended on 1 January 2015.

Issuers who have benefited from the exemption will now be required to publish half-yearly financial reports in accordance with Article 4 of the Transparency Law for financial years starting on or after 1 January 2015. According to Article 4 of the Transparency Law, an issuer of shares or debt securities is required to publish its half-yearly financial report covering the first six months of the financial year at the latest two months after the end of the relevant period. The half-yearly financial reports include short-form financial statements, an interim management report, and statements made by the persons responsible within the issuer. If the half-yearly financial report has been audited or reviewed by auditors, the relevant report must also be published. If no audit or review has been conducted, this should be noted in the half-yearly financial report.

Failure to publish the annual financial report or half-yearly financial report in accordance with Article 3 or Article 4 of the Transparency Law will result in inclusion of those Luxembourg issuers subject to the Transparency Law on a public 'name-and-shame' list available on the CSSF's website.

Polish Financial Supervision Authority adopts resolution on complaints-handling by financial institutions

The Polish Financial Supervision Authority (PFSA) has adopted a resolution on the rules on complaints-handling by financial institutions. The purpose of the resolution is to standardise the rules according to which financial institutions supervised by the PFSA handle complaints. The rules adopted by the PFSA contain the PFSA's existing guidelines on handling complaints and the guidelines issued by the European Supervisory Authorities (ESAs).

Dutch Minister of Finance issues bill to implement BRRD

The Dutch Minister of Finance has submitted a bill to Parliament which, once enacted, would implement the BRRD in the Netherlands.

Through minimum harmonisation, the BRRD creates new supervisory tools and instruments to address problems an ailing financial institution might have. The bill would amend the Dutch Financial Supervision Act and provide the Dutch Central Bank with extensive powers and instruments to intervene with ailing banks. The BRRD forms part of the EU Banking Union, which seeks to integrate the European financial system, maintain financial stability in the market and keep the costs of liquidation of banks as low as possible.

The bill also provides for the instruments necessary for implementing the Single Resolution Mechanism (SRM) within the Banking Union. The SRM is a communal resolution mechanism which incorporates the same procedure for the liquidation of ailing banks throughout the European Union.

MAS publishes Banking (Credit Card and Charge Card) (Amendment) Regulations 2015

The Monetary Authority of Singapore (MAS) has published the Banking (Credit Card and Charge Card) (Amendment) Regulations 2015. The key amendments set out in the Regulations include changes to the following:

- the definitions of 'guaranteed charge card' and 'guaranteed credit card';
- the meaning of references in relation to credit cards or charge cards;
- the meaning of references in relation to credit limits;

- the provisions on the issuance of a partially or fully secured credit card or charge card to an individual who is a citizen of Singapore or a permanent resident;
- the provisions on increasing credit limits; and
- the provisions on credit checks with credit bureaus.

The amendments above come into effect on 1 June 2015. Additional amendments to regulations 9 and 14 come into operation on 1 September 2015.

Australian Government and ASIC consult on central clearing obligations for certain OTC derivatives

The Australian Securities & Investments Commission (ASIC) has proposed draft rules to implement mandatory central clearing requirements for certain over-the-counter (OTC) derivatives. It is proposed that the clearing requirements start in January 2016.

It is proposed that only financial entities with AUD 100 billion or more gross notional outstanding in OTC derivatives measured on a rolling basis will be subject to mandatory clearing for trades with each other and foreign-internationally active dealers. It is also proposed that only certain OTC interest rate derivatives will be required to be cleared.

In addition, the Australian Government is consulting on a draft determination and regulations to implement a central clearing mandate in Australia. ASIC's draft rules would implement the Government's proposed central clearing mandate, which would cover trades between internationally-active dealers.

Submissions to the Government on the draft Ministerial determination and regulations close on 26 June 2015, whilst submissions to ASIC close on 10 July 2015.

FINRA publishes new guidance on rules governing communications with public

The US Financial Industry Regulatory Authority (FINRA) has issued Regulatory Notice 15-17, which announces the publication of new Frequently Asked Question (FAQ) guidance on communications with the public.

The new FAQs relate to FINRA Rule 2210 (Communications with the Public) and address topics including:

- the filing of retail communications with FINRA in various factual scenarios;
- social media posts in online interactive electronic forums;
- inadvertent transitions of institutional communications to retail communications; and
- expense reimbursement arrangements in mutual fund performance advertising.

The new guidance follows a 2014 retrospective review by FINRA of its communications rules to assess their effectiveness and efficiency. In December 2014, FINRA published a report on the assessment phase of the review, which concluded that the rules could benefit from updating to better align investor protection benefits and economic impacts.

RECENT CLIFFORD CHANCE BRIEFINGS

European bank and bond restructurings – a practical guide

With European high yield default rates at historic lows, the structures that have developed over the last few years have been subject to only limited review in the context of a European restructuring. A number of European high yield transactions, however, have recently been and now are being carefully analysed from a restructuring perspective, both by existing creditors and new investors looking for opportunities.

This briefing paper helps clients to navigate the increasingly complex area of restructurings when both high yield and loans are present and discusses European high yield's idiosyncrasies and how those might play out in the event of a credit problem.

http://www.cliffordchance.com/briefings/2015/05/european_bank_andbondrestructurings.html

Amendments to Civil Code on Obligations

As of 1 June 2015, the next set of changes to the Russian Civil Code, which were adopted in the course of the first reform of the Civil Code in several years, will come into force. This time the changes affect the law of obligations (including performance, security and termination of obligations, as well as liability for breach of obligations) and general contractual provisions (including entering into, amending and terminating contracts).

This briefing paper discusses the general changes to the Russian Civil Code.

http://www.cliffordchance.com/briefings/2015/05/amendments_to_civilcodeonobligationseng.html

SEC Proposes Amendments to Form ADV and Rules under the Investment Advisers Act with Important Implications for Private Fund Advisers

The staff of the US Securities and Exchange Commission (SEC) proposed amendments last week designed, among other things, to permit multiple private fund advisers operating a single advisory business to register with the SEC on a single registration form and to collect more information about investment advisers and their affiliates.

This briefing paper discusses the proposed amendments.

http://www.cliffordchance.com/briefings/2015/05/sec_proposes_amendmentstoformadvandrule.html