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C H A N C E

Briefing note

International Regulatory Update

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Exposures to CCPs: Implementing Regulation extending transitional periods for own funds requirements published in Official Journal

A Commission Implementing Regulation to extend the transitional periods related to own funds requirements for exposures to central counterparties (CCPs) under the Capital Requirements Regulation (CRR) and the European Market Infrastructure Regulation (EMIR) has been published in the Official Journal.

The CRR provides for a transition period before higher own funds requirements are applied to ensure a level playing field for all EU CCPs while the process of authorisation and recognition takes place. As the authorisation process for existing CCPs established in the Union is ongoing but will not be completed by 15 December 2015, when the transitional period was set to expire, the Commission Implementing Regulation extends the transitional period for a further six months until 15 June 2016.

The Implementing Regulation entered into force on 15 December 2015.

CRR: EU Commission publishes proposal for amendment as regards exemptions for commodity dealers

The EU Commission has published a proposal for a regulation to amend the CRR as regards exemptions for commodity dealers. Articles 493(1) and 498(1) of the CRR exempt commodity dealers from large exposures requirements and from own funds requirements respectively. The exemptions were originally included in the CRR in order to allow time for regulators to determine a prudential regulation adapted to the risk profile of commodity dealers and are due to expire on 31 December 2017.

Under the CRR, the Commission was required to prepare reports on a draft proposal for a regulation adapted to the risk profile of commodity dealers and a report for an appropriate regime for the prudential supervision of investment firms in general. The Commission chose to undertake a single investment firms review and prepare a single report instead.

The investment firms review will not be completed in 2015, and the Commission finds it unlikely that any legislative proposal arising from the review would be drafted, adopted, and applied before 31 December 2017 when the current exemptions expire. If no specific prudential framework from the review is in place by then, commodity dealers would be subject to the full CRR/Capital Requirements Directive (CRD) requirements from 1 January 2018.

To avoid this, the Commission proposes extending the existing exemptions in the CRR to 31 December 2020 to take into account the amount of time that will be necessary to conclude the investment firms review and to prepare, adopt and apply any legislation that may result from that review.

MiFID2: ESMA publishes final report on assessment of knowledge and competence

The European Securities and Markets Authority (ESMA) has published its final report on guidelines for the assessment of knowledge and competence under MiFID2. The guidelines are intended to enhance investor protection by increasing the knowledge and competence of natural persons giving investment advice or providing information about financial instruments, investment services or ancillary services to clients on behalf of investment firms.

The guidelines specify the criteria for the assessment of the necessary knowledge and competence requirements of investment firms' staff. ESMA has developed these guidelines to enable firms to fulfil their obligations under Articles 24 and 25 of MiFID2, such as meeting general conduct of business principles, information and reporting to clients, and suitability and appropriateness requirements, through the attainment of appropriate qualifications and appropriate experience by their staff.

The final guidelines will be translated into the official EU languages and published on the ESMA website. The publication of the translations will trigger a two month period during which national competent authorities (NCAs) must notify ESMA whether they comply or intend to comply with the guidelines.

The guidelines will come into effect on 3 January 2017.

UCITS: EU Commission adopts Delegated Regulation on obligations of depositaries

The EU Commission has adopted a Delegated Regulation with regard to obligations of depositaries under the Undertakings for Collective Investment in Transferable Securities Directive (UCITS IV Directive).

The Delegated Act seeks to address issues in UCITS IV with respect to the duties and liabilities of UCITS depositaries. Specific provisions include:

- particulars that need to be included in the written contract;
- duties regarding subscription and redemptions;
- duties regarding the valuation of units;
- cash monitoring; and
- due diligence duties of depositaries.

The EU Council and the EU Parliament will now consider the Delegated Act and, providing there are no objections, it will be published in the Official Journal. It will enter into force twenty days following its publication and apply six months after the date of its entry into force.

BRRD: EBA publishes final draft RTS on records of financial contracts, derivative liabilities and business reorganisation plans

The European Banking Authority (EBA) has published three sets of final draft regulatory technical standards (RTS) and one set of guidelines under the Bank Recovery and Resolution Directive (BRRD). The final draft RTS set out:

- the minimum set of information to be contained in detailed records of financial contracts, which is intended to ensure that institutions and relevant entities collect necessary information on contracts that are likely to be subject to an application of resolution actions in advance, in accordance with the institution's resolution plan;
- the methodology for the valuation of derivative liabilities for the purpose of bail-in in resolution, which includes the statutory valuation tools to be used by resolution authorities to have the effective power to bail-in liabilities resulting from the close-out of derivative contracts without having to follow the methodology laid down in each and every contract. However, derivative counterparties will be given the opportunity to provide evidence of commercially reasonable replacement trades within a certain deadline; and
- the content of complete and prudent business reorganisation plans that identify and address the causes of an institution's failure and details of how the institution will be restored to long-term viability. Alongside the final draft RTS, guidelines defining how to assess plans have also been published.

The draft RTS will be submitted to the EU Commission for endorsement. The Guidelines on assessing reorganisation plans will enter into force three months following their publication in all the official languages of the EU.

CRD 4: EBA reports to EU Commission on cooperation with third countries, net stable funding requirements and sound prudential regime for investment firms

The EBA has published three reports addressed to the EU Commission under the Capital Requirements Directive (CRD 4) and Regulation (CRR).

The EBA report on cooperation between the EU and Member States and third countries is annexed to an opinion, dated 10 December 2015, in which the EBA has identified no major concerns with regard to cooperation with third country supervisory authorities but has set out areas for further work to enhance cooperation and information sharing in relation to:

- a clear legal mandate on equivalence assessments in the CRD and CRR to clarify the EBA's role and enable coordinated, consistent and continued equivalence assessments; and
- the EBA proposes to align CRD 4 and the Bank Recovery and Resolution Directive (BRRD) texts to explicitly provide reference to the status of observers for third country supervisory authorities participating in colleges.

The report on net stable funding requirements has been prepared under Article 510 of the CRR, which mandates the EBA to report to the EU Commission on whether it would be appropriate to ensure that institutions use stable sources of funding, the impact of a stable funding requirement and methodologies and definitions for determining the amount of stable funding available to and required by institutions.

The net stable funding ratio (NSFR) was finalised by the Basel Committee on Banking Supervision (BCBS) in October 2014 and has a time horizon of one year, requiring banks to maintain a stable funding profile in relation to the composition of their assets and off-balance sheet activities. Among other things, the EBA report includes a description of the current levels of the Basel NSFR for a representative sample of EU banks and recommends the introduction of the NSFR in the EU to ensure an appropriate stable funding structure in relation to the degree of asset liquidity in order to mitigate funding risk in banks. The EBA's final report contains a proposal for the definition and calibration of a stable funding requirement.

The report sets out an analysis of proportionality in response to a call for advice from the EU Commission issued in June 2015 and discusses the impact of introducing a stable funding requirement on:

- the business and risk profiles of institutions;
- trade finance; and
- investment in financial assets, different funding markets, secured funding, market making, investment banking activities and the risk capacity of a financial system.

Overall, the report does not identify strong statistical evidence of any significant detrimental effects of the NSFR other than some adjustment of prices, although the EBA highlights that it will provide, where needed, further advice on the potential impact of the NSFR on derivatives in the context of possible developments at international level. The EU Commission will assess whether to submit a legislative proposal to the co-legislators on a requirement concerning stable funding by 31 December 2016.

The EBA has also published recommendations for the sound prudential regime for investment firms, which have been published in response to the EU Commission's call for advice on the suitability of certain aspects of the prudential regime for investment firms. The recommendations presents the joint findings of the EBA and ESMA and lists recommendations intended to provide a more proportionate and less complex prudential regime based on appropriate risk sensitivity parameters.

The report identifies a lack of risk sensitivity in the CRD 4 regime for investment firms as a primary issue to be addressed. Recommendations made in the report include:

- a new categorisation of investment firms that would distinguish between systemic and 'bank-like' investment firms to which full CRD4/CRR requirements should apply, and other investment firms that are considered 'not systemic' or 'not interconnected', where the requirements would not apply;
- the development of a prudential regime for 'non-systemic' investment firms; and
- a suggested extension to the waiver for commodity trading firms until 31 December 2020, to allow regulators to assess whether a more proportionate framework is suitable for these firms.

CRR: EBA consults on draft RTS for Internal Model Approach for market risk assessment methodology

The EBA has launched a consultation on draft RTS on the assessment methodology for the Internal Model Approach (IMA) for market risk under the CRR. The draft RTS are intended to provide objective criteria to be applied by competent authorities when assessing the significance of positions included in the scope of market risk internal models and propose two different methodologies for general and specific risk categories, both based on the standardised rules for market risk.

The draft RTS also set out:

- the standards for competent authorities' assessments of compliance with IMA requirements by institutions when an institution initially applies to use the IMA for one or more of the risk categories listed in Article 363(1) of the CRR or introduces any material changes or extensions to the IMA approach; and
- details of the assessment of whether institutions meet minimum IMA requirements on an ongoing basis following the regular review of the internal model.

Comments are due by 13 March 2016.

EBA consults on draft guidelines on collection of information related to ICAAP and ILAAP

The EBA has published draft guidelines on the collection of information related to the internal capacity adequacy assessment process (ICAAP) and the internal liquidity adequacy assessment process (ILAAP) for public consultation. The draft guidelines aim to facilitate a consistent approach to the supervisory assessment of ICAAP and ILAAP frameworks as well as the assessment of reliability of institutions' own capital and liquidity estimates as part of the supervisory review and evaluation process (SREP).

In particular, the guidelines specify:

- general information about ICAAP and ILAAP frameworks, business model and strategy, and governance arrangements;
- ICAAP- and ILAAP-specific methodological, policy and operational information; and
- management conclusions on ICAAP and ILAAP and quality assurance information.

The guidelines will be finalised following the completion of the consultation in the first half of 2016 and are expected to apply from 30 June 2016.

Comments are due by 11 March 2016.

CSDR: EBA publishes final report on draft RTS on prudential requirements

The EBA has published its final report on draft RTS on prudential requirements for central securities depositories (CSDs) under the Central Securities Depositories Regulation (CSDR). These RTS will define a prudential framework for CSDs and harmonise calculations for their capital requirements which currently vary across Member States. The RTS have been developed to increase the safety and efficiency of securities settlement and settlement infrastructures.

PSD 2: EBA consults on draft RTS on exchange of information for passporting

The EBA has launched a consultation on draft RTS relating to cooperation and exchange of information for passporting under the recast Payment Services Directive (PSD 2). The draft RTS are intended to ensure the consistency of information exchanged between national competent authorities (NCAs) on authorised payment institutions carrying out business in one or more Member States, which will be required to inform their home Member State NCA of the intention to do so.

The draft RTS specify the scope of the information to be submitted, a common terminology and templates and details of the cross-border cooperation between NCAs in the context of passport notifications for payment institutions. In relation to information to be exchanged between NCAs, the draft RTS distinguish notifications for branch establishments, agent's engagement and free provision of services and provide details of certain specific features that all notifications should have.

PSD 2 has not yet been published in the Official Journal, but the EBA has decided to launch its consultation on the basis of the text signed by the EU Council on 16 November 2015 in order to give stakeholders an indication of regulatory requirements as early as possible.

Comments on the consultation are due by 11 March 2015.

Shadow banking: EBA publishes final guidelines on institutions' exposures to shadow banking entities

The EBA has published its final guidelines regarding limits on institutions' exposures to shadow banking entities that carry out bank-like activities outside a regulated framework. The guidelines introduce an approach that allows EU institutions to set internal limits for their exposures to shadow banking entities, aiming to proportionately address the risks that these exposures pose to the EU banking sector. The guidelines were informed by an accompanying report on the exposures of a sample of EU institutions to shadow banking entities and the impact of setting limits.

The guidelines are designed to support institutions and banking supervisors in the EU in minimising risks arising from exposures to entities that carry out bank-like activities outside regulated frameworks. The guidelines aim to ensure institutions have sufficient information about their shadow banking counterparties so they can make an informed risk assessment of their exposures and also detail the requirements for institutions to set limits to both individual and aggregate exposures to shadow banking entities. The EBA requires a fallback approach, involving a fixed limit to all or some of these aggregate exposures where institutions do not have sufficient information on their exposures to shadow banking counterparties.

The guidelines will apply from 1 January 2017, and with the report will inform the EU Commission's work relating to its upcoming report on the appropriateness and impact of imposing limits on exposures to shadow banking entities.

EMIR: ESMA consults on trade repositories data access

ESMA has published a consultation paper on proposed enhancements to the functionalities offered by trade repositories (TRs) for data access under EMIR. ESMA's proposed changes to the current rules are intended to ensure direct and immediate access to data by national competent authorities (NCAs) and facilitate the aggregation and comparison of data across trade repositories.

The proposals include:

- standardised output format of the TR data, based on International Organization for Standardization (ISO) standards, allowing better comparison and aggregation of data across repositories;
- minimum types of data queries that need to be available for the authorities;
- standardised and secure data exchange, based on ISO standards, between TRs and NCAs;
- standard frequencies for the provision of direct and immediate access to TR data; and
- secure machine-to-machine connection and use of data encryption protocols.

Comments are due by 1 February 2016.

AIFMD: ESMA updates Q&A

ESMA has published updates to its questions and answers (Q&As) on the Alternative Investment Fund Managers Directive (AIFMD). This update includes a new question on the depositary liability regime.

The Q&A document is intended to promote common supervisory practices in the application of the AIFMD and is aimed at competent authorities under the Directive. Answers are also intended to help alternative investment fund managers (AIFMs) by clarifying certain aspects of the rules.

Prospectuses: ESMA updates Q&A

ESMA has published an updated version of its Q&A document on the Prospectus Directive (2003/71/EC) and its implementing measures.

Rating agencies: ESMA publishes market share calculation

The ESMA has published its annual market share calculation for EU-registered credit rating agencies (CRAs).

ESMA is required under Article 8d of the CRA Regulation to publish the calculation, which is designed to increase awareness of the different types of credit ratings offered by each registered CRA and to help issuers and related third parties considering appointing smaller CRAs. The calculation is based on revenues from 2014.

ESMA is also considering whether further information would help issuers and related third parties to assess CRAs' experience and has requested feedback on the information it should present in future.

Basel Committee reports on adoption of risk reporting and data aggregation principles

The Basel Committee on Banking Supervision (BCBS) has published its third progress report on banks' adoption of the BCBS principles for effective risk data aggregation and risk reporting, which become effective from 1 January 2016 for global systemically important banks (G-SIBs).

The BCBS notes that assessing banks' compliance with the framework is challenging because the principles do not provide objective or qualitative benchmarks and instead indicate that the banks' capabilities should be scaled to their business model and risk profile. However, the BCBS report identifies noticeable gains, indicates the lessons learned and key recommendations for further implementation, including that:

- there should be more specialised examinations by supervisors on data aggregation requirements to evaluate weaknesses;
- banks should have governance arrangements in place for manual processes; and
- banks' compliance with the principles should be independently evaluated in early 2016.

Shadow banking: Basel Committee consults on identification and measurement of step-in risk

BCBS has published a consultation paper on identifying and measuring step-in risk. Step-in risk refers to the risk a bank will provide financial support to an entity beyond, or in the absence of, its contractual obligations should the entity experience financial stress. The proposal would form the basis of an approach for identifying, assessing and addressing step-in risk potentially embedded in banks' relationships with shadow banking entities.

The focus of the proposals is on the identification of unconsolidated entities to which a bank may nevertheless provide financial support, in order to protect itself from reputational risk stemming from its connection to the entities. The proposals also include potential approaches that could be used to reflect step-in risk in prudential measures. The BCBS plans to conduct a quantitative impact study in the first half of 2016 to collect evidence on the nature and extent of step-in risk, so as to inform its deliberations on the final framework.

Comments are due by 17 March 2016.

MiFID2: FCA launches first implementation consultation

The Financial Conduct Authority (FCA) has launched its first consultation on the implementation of MiFID2 in the UK (CP15/43). The FCA has decided to consult in stages, as the FCA considers there is insufficient clarity on the MiFID2 implementing measures, in particular the delegated acts, to consult on the full changes required to the Handbook.

The FCA's first consultation mainly covers secondary trading of financial instruments and sets out proposed changes to the FCA Handbook in relation to:

- trading venues, including issues around regulated markets (RMs), multilateral trading facilities (MTFs) and organised trading facilities (OTFs);
- changes to the regime for systematic internalisers (SIs);
- expanded transparency requirements;
- market data, including the Data Reporting Services Providers (DRSP) category of firms and transaction reporting;
- algorithmic and high frequency trading (HFT) requirements;
- passporting and UK branches of non-EEA firms;
- the extension of some conduct of business obligations set out in the Principles for Business sourcebook (PRIN); and
- changes to the scope in the Perimeter Guidance Manual (PERG).

The FCA has also confirmed that where provisions are directly applicable through regulations, the FCA does not intend to copy rules into the Handbook unless necessary and will instead include references to them and update the Reader's Guide accordingly. Where rules are directly applicable, the FCA will not consult on the rules.

The FCA intends to launch at least one further consultation on MiFID2 issues not covered in this consultation paper in the first half of 2016, which will include the conduct issues covered in the FCA's discussion paper (DP15/3), which was launched in March 2015. The FCA has also highlighted ongoing discussions between the EU Commission, EU Parliament and EU Council on a possible delay to the MiFID2 application date and notes that if there is a change to the legislated timetable, the FCA's implementation plans will take that into account.

Alongside the proposed changes to the FCA Handbook, the FCA is consulting on a prototype of its MiFID2 Handbook Guide for trading venues and data reporting service providers, which is intended to clarify how the FCA's approach to implementing MiFID2 is addressed through the sourcebook and will be expanded to coincide with issues dealt with in future consultations.

Comments on the consultation are due by 8 March 2016.

BRRD: HM Treasury consults on implementation

HM Treasury (HMT) has launched a consultation on a number of changes intended to clarify and strengthen the UK's transposition of the Bank Recovery and Resolution Directive (BRRD).

In particular, the proposed new measures include:

- new powers for the Bank of England and the Treasury to ensure the effectiveness of contractual write-down and conversion provisions by preventing them from being 'switched off' by the Banking Act rules on default event rights, where appropriate;
- two new specific early intervention powers for the Prudential Regulation Authority (PRA) and the FCA:
- the power to require the removal and replacement of directors and senior managers; and
- the power to appoint a temporary manager. In addition, there would be new powers for the PRA and FCA to call a shareholder meeting if the management body had been required to call a meeting, and had failed to do so; and
- new powers for the Bank of England to resolve a branch of a third country institution, independently of

the third country resolution authority, where the relevant conditions are met.

In addition to these measures, the government intends to make further technical changes to clarify the measures transposing the BRRD.

The Treasury has also published a draft statutory instrument containing the new contractual write-down and conversion provisions, the new early intervention powers, and the other changes summarised in chapter 5 of the consultation paper.

Comments are due by 25 February 2016.

Payment Accounts Regulations 2015 published

HMT has made the Payment Accounts Regulations 2015 (SI 2015/2038), which implement the Payment Accounts Directive (2014/92/EU – PAD) in the UK.

Among other things, PAD requires payment service providers (PSPs) to offer account switching services between payment accounts that meet criteria specified in PAD, except in cases where the switching service has been designated as an alternative arrangement by a competent authority. The Regulations enable the Payment Systems Regulator (PSR) to exercise its power to designate an account switching service as an alternative arrangement ahead of the Regulations coming into force. Moreover, the Regulations enable HM Treasury to exercise its power to designate those credit institutions to which the duty to offer a payment account with basic features will apply before the Regulations come into force.

The Regulations will come into force on or after 18 September 2016.

Senior Managers and Certification Regime: PRA and FCA publish final rules on UK branches of non-EEA banks

The PRA and FCA have published policy statements setting out the final rules on the application of the Senior Managers and Certification Regime (SM&CR) to UK branches of non-EEA banks and PRA-designated investment firms. Both the PRA and FCA published near-final rules in August 2015, but were unable to clarify the rules until Parliament approved an HM Treasury order extending the definition of relevant authorised persons under s.71A of the Financial Services and Markets Act 2000 (FSMA) to incoming branches. The order came into force on 9 November 2015.

The PRA policy statement (PS29/15) confirms the final rules for non-EEA branches, which are identical to those set out in the PRA's policy statement published in August 2015 (PS20/15). The rules cover the certification regime and grandfathering arrangements for non-EEA branches. Alongside the policy statement, the PRA has updated its supervisory statement on strengthening individual accountability in banking (SS28/15), which sets out the PRA's expectations of how relevant firms should comply with the SM&CR, assessment of fitness and propriety and conduct rules.

The FCA policy statement (PS15/30) clarifies the near-final rules set out in its feedback statement in August 2015 (FS15/3), which have been revised, and the reasons for the changes made. The FCA has sought to tailor the rules to reflect the differences between incoming branches and UK relevant firms, and the differing powers that the FCA has over these different types of firm. In particular, amendments have been made in response to the FCA's consultation on removing the territorial limitation for material risk takers (MRTs) in the application of the certification regime and conduct rules (CP15/22), which closed on 7 September 2015, to clarify their territorial scope. The FCA intends to publish its feedback to CP15/22 and final rules in early 2016 and the FCA has highlighted that any further changes to the final rules on incoming branches that might occur in light of that policy statement will be set out clearly in that policy statement.

The final rules will come into effect on 7 March 2016.

The PRA and FCA have also jointly published a policy statement on amendments to various forms (PRA PS30/15 and FCA PS15/32) for use by PRA and FCA-authorised firms and individual candidates for approval as approved persons, key function holders, credit union non-executive directors and notified non-executive directors.

PRA publishes fourth policy statement on PRA Rulebook

The PRA has published a policy statement (PS28/15) on the PRA Rulebook: Part 4. The policy statement sets out the final rules following two consultations on the PRA Rulebook: Part 4 (CP28/15), published in August 2015, and Chapter 1 of the PRA's occasional consultation paper (CP41/15), published in November 2015.

Among other things, the policy statement sets out final rules relating to certain aspects of:

- financial conglomerates;

- group risk systems for CRR firms; and
- regulatory reporting.

Following CP41/15 the policy statement also sets out final rules to consolidate the Lloyd's: Actuaries, Auditors and Financial Services Compensation Scheme (FSCS) Part and the Lloyd's Part of the PRA Rulebook into a single Part.

The PRA has made no amendments to any of the instruments as a result of feedback received to CP28/15 and no responses were received to Chapter 1 of CP41/15.

The rules will come into force on 1 January 2016, except for the Handbook (Rulebook Consequentials) Instrument 2015, which will come into force on 7 March 2016.

FCA consults on regulatory barriers to social investments

The FCA has published a paper calling for input on potential regulatory barriers to social investments. Social investments aim to provide a wider social benefit than an investment where the primary purpose is for a purely financial benefit. However, social investors are also different from donors, in that they generally either expect to get back their initial investment or expect the organisation to use the investment for its work and provide a return to investors where it can.

The call for input is a follow up to the FCA's earlier policy statement on its regulatory approach to crowdfunding. The call for input:

- aims to explain the different structures a social enterprise in the UK can have and how FCA rules may apply; and
- asks for views about specific rules and policies which may be hindering investment for social purposes.

The FCA aims to clarify how and when its rules apply to social enterprises and retail investors, and expects any responses to provide a better understanding of the barriers social enterprises may face in establishing themselves and raising capital.

Comments are due by 14 March 2015.

New bill of law on reserved alternative investment funds deposited with Luxembourg Parliament

Bill of law No 6929 relating to 'Reserved Alternative Investment Funds' (RAIFs) has been deposited with the Luxembourg Parliament.

The purpose of Bill 6929 is to allow the creation of a new type of Luxembourg alternative investment fund (AIF) that will always be managed by an external authorised alternative investment fund manager (AIFM) located either in Luxembourg, in another EU Member State, or in a third country once the AIFMD passport is available for third countries. As the RAIF is an AIF managed by an authorised AIFM, it may benefit from the European passport granted by the AIFMD for marketing to professional investors in the EU.

The new RAIF vehicle will combine the characteristics and structuring flexibilities of Luxembourg regulated specialised investment funds (SIFs) and investment companies in risk capital (SICARs) qualifying as AIFs managed by an authorised AIFM, except that the RAIF will be a non-regulated investment fund. Thus, in contrast to a SIF-AIF or SICAR-AIF, the RAIF will not be subject to prior authorisation by the Luxembourg Supervisory Authority of the Financial Sector (CSSF) before it can be launched and carry out its activities, nor to ongoing prudential supervision by the CSSF. However, an indirect supervision of the RAIF will nevertheless be ensured by the competent supervisory authority of its authorised AIFM, which shall in particular ensure that the relevant RAIF complies with the AIFMD product rules applicable to it, including, among others, the appointment of the RAIF's depositary and independent auditor, the content of the RAIF's annual report and the valuation of the RAIF's assets.

Other than that, the new RAIF vehicle will have the same characteristics as a SIF/SICAR-AIF, including the different legal corporate and contractual forms available for its creation, the type of its eligible investors (i.e. well-informed investors only), the possibility to have multiple compartments and classes of shares/units and the flexibility as regards its eligible assets and investment policies. In this respect, an RAIF will, in principle, remain subject to the principle of risk diversification applicable to a SIF-AIF, unless the RAIF's constitutive documents restrict its investment policy to investments in risk capital only, in which case the RAIF will not be obliged, like a SICAR-AIF, to comply with the principle of risk diversification. To the same extent, the RAIF will either be subject to the SIF-AIF's tax regime or to the SICAR-AIF's tax regime depending on whether it decides to invest only in qualifying risk capital investments.

Although the full legislative process is still to be completed, it is anticipated that Bill 6929 will be passed into law by mid-2016. This means that the new RAIF regime should be available over the course of 2016.

CSSF regulation on marketing foreign AIFs to retail investors in Luxembourg published

The Luxembourg Supervisory Authority of the Financial Sector (CSSF) has adopted Regulation 15-03 outlining the modalities of application of Article 46 of the Luxembourg law of 12 July 2013 on alternative investment fund managers (AIFM Law) concerning the marketing of non-Luxembourg based alternative investment funds (Foreign Law AIFs) to retail investors in Luxembourg.

According to Regulation 15-03, an authorised AIFM established in Luxembourg, in another EU Member State or in a third country, can market to retail investors in Luxembourg the units/shares of the Foreign Law AIFs it manages subject to the CSSF's prior approval, which will be granted if the following conditions are complied with:

- the notification procedure required for the marketing of the relevant Foreign Law AIF to professional investors as provided for in the relevant dispositions of the AIFM Law and the AIFMD must be completed, which also includes the communication to the CSSF of all relevant information and documents required within the framework of the notification procedure;
- a specific application for authorisation to market the relevant Foreign Law AIF to retail investors must be sent to the CSSF together with the mandatory information and documentation set out in Regulation 15-03;
- the Foreign Law AIF must determine at fixed and sufficiently close intervals, and in any case at least once a month, the issue and redemption price of its shares/units;
- the Foreign Law AIF must ensure sufficient risk diversification of its investments, which will be deemed to be the case if it complies with the investment restrictions and limits laid down in Regulation 15-03;
- the Foreign Law AIF must appoint a credit institution to ensure that facilities are available in Luxembourg for making payments to unitholders/shareholders and ensuring subscription and redemption for shares/units in Luxembourg; and
- the AIF must take necessary measures to ensure that the information and documents to be made available to retail investors in Luxembourg are provided in French, German, English or Luxembourgish, it being understood that such information and documents may be provided by means of a website.

Regulation 15-03 does not apply to the marketing of AIFs to professional investors in Luxembourg, including well-informed investors as defined in the SIF Law and SICAR Law and eligible investors under the EuVECA, EuSEF and ELTIF Regulations.

Regulation 15-03 has now been published in the Luxembourg Official Gazette (Mémorial A) and will come into force in January 2016.

CSSF issues circular providing guidance on countercyclical capital buffers

The CSSF has issued circular 15/625 dated 1 December 2015 providing guidance on the countercyclical capital buffer (CCyB).

The circular provides guidance with respect to, amongst other things, the calculation of the institution-specific CCyB rates for exposures to counterparties in more than one jurisdiction, the geographical distribution of relevant credit exposures, as well as the disclosure requirements of key elements of the calculation of the CCyB.

The circular entered into force with immediate effect and the CCyB regime is fully applicable in Luxembourg as of 1 January 2016. The circular is addressed to all Luxembourg credit institutions and investment firms subject to capital buffer requirements as referred to in article 59-1(1) of FSL, as well as to Luxembourg branches of equivalent institutions incorporated in a third country. Pursuant to CSSF Regulation 15-05 dated 30 November 2015, investment firms which qualify as small and medium-sized enterprises are excluded from the CCyB requirements.

CSSF issues circular on collection of data for calculation of 2016 ex-ante contributions to Single Resolution Fund

The CSSF, has issued circular 15/626 dated 1 December 2015 on the information requested by the Single Resolution Board (SRB) for the calculation of the 2016 contribution to the Single Resolution Fund (SRF) according to Articles 4 and 14 of the Commission Delegated Regulation (EU) 2015/63.

The circular is addressed to all credit institutions incorporated under Luxembourg law. Luxembourg branches or foreign (EU or non-EU) credit institutions do not fall within the scope of the circular.

The circular provides a link to the template developed by the SRB which must be used for the purpose of data gathering. The completed template has to be sent to the

CSSF at the latest by 1 February 2016. In case not all required information is transmitted correctly by that date, the SRB shall use estimates or its own assumptions for the calculation of the 2016 contribution of the concerned credit institution to the SRF (Article 17 (1) of the Delegated Regulation). In specific cases, the SRB may assign the credit institution concerned to the highest risk adjusting multiplier for the calculation of the institution's contribution to the SRF (Article 17 (2) Delegated Regulation).

The circular also sets out certain requirements on the file's format and name which must be complied with when sending the completed template to the CSSF.

Finally, the circular sets out the obligation for each credit institution to make available to the resolution department of the CSSF (which will ensure transmission to the SRB) a document certifying that the submitted template complies with the general instructions. For this purpose, the circular provides a link to a template which has to be (i) completed, (ii) signed by at least one of the members of the banks' authorised management and (iii) sent to the CSSF also at the latest by 1 February 2016, either by mailing a hard copy or by e-mailing a scanned copy to the addresses provided in the circular.

BaFin sets countercyclical capital buffer for Germany

The German Federal Financial Supervisory Authority (BaFin) has published the first countercyclical capital buffer for Germany. It is zero and is valid from 1 January 2016. BaFin will review this figure on a quarterly basis.

Dutch Central Bank sets countercyclical capital buffer

The Dutch Central Bank has announced that the countercyclical capital buffer (CCyB) that will be introduced on 1 January 2016 will be set at 0%.

Currently, the Dutch Central Bank sees no reason to activate the CCyB for The Netherlands and the ratio will therefore be set at 0%.

From 2016 onwards, the Dutch Central Bank will publish the CCyB add-on on a quarterly basis, in accordance with applicable rules and regulations.

BRRD: Polish Council of Ministers accepts draft Implementing Act

The Polish Council of Ministers has accepted the draft Act on the Bank Guarantee Fund, Deposit Guarantee System and Compulsory Restructuring, which implements the BRRD and Deposit Guarantee Schemes Directive (2014/49/EU - DGSD) into Polish law.

The draft act introduces, amongst other things, legal frameworks enabling compulsory restructuring and regulates in detail the course of the compulsory restructuring process, including the rules under which the compulsory restructuring authority (Bank Guarantee Fund) cooperates with the regulatory authority (Polish Financial Supervision Authority) and other financial security authorities (Minister of Finance and the National Bank of Poland) and the compulsory restructuring authorities of other states with regard to conducting proceedings concerning banking groups.

The draft is currently waiting to be sent to the Sejm.

Polish Financial Supervision Authority sets out position on dividend policy in banks in 2016 for 2015 dividends

The Polish Financial Supervision Authority (PFSA) has set out its position on the dividend policy of banks in 2016 for 2015 dividends.

The PFSA recommends that banks adopt a dividend policy that will further strengthen their capital base and adjust it to the levels in other EU countries.

Based on the financial results of banks as at 31 December 2015, banks will receive individual recommendations as to the dividend policy, in the form of a letter from the chairman of the PFSA.

MOF issues interim measures for management of government investment funds in China

The Chinese Ministry of Finance (MOF) has issued interim measures for the management of government investment funds. The Measures comprise eight chapters that cover the establishment, operation and risk control, termination and exit, budget management, and other matters in respect of government investment funds. Among others, the following key aspects of government investment funds are worth noting:

- the finance departments at all levels shall control the number of government investment funds set up, which shall not be set up repetitively within the same industry or field;
- government investment funds shall be set up in four areas of interest including the 'support for innovation and entrepreneurship' and the 'support for the development of small and medium-sized enterprises';
- a government investment fund, in its operation, shall not engage in seven types of activities including

'guarantees, mortgages, or entrusted loans other than financing guarantees'; and

- a government investment fund shall generally terminate upon the expiry of its prescribed term of existence, and if it does need a renewal of term, it shall apply to the government of the same level for approval and, subject to the approval, shall go through, along with other stakeholders of the fund, the procedures specified in its articles of association.

The Measures took effect immediately.

FSC approves amendments to Korean regulations on supervision of banking business and financial holding companies

The Korean Financial Services Commission (FSC) has approved certain amendments to the Regulation on Supervision of Banking Business and the Supervisory Regulation on Financial Holding Companies. The amendments are intended to implement the Basel Committee recommendations regarding domestic systematically important banks (D-SIBs) and countercyclical capital buffers and ease capital requirements for internet-only banks in their early years.

The key amendments include the following:

- banks identified by the FSC as D-SIBs will be required to set aside additional capital of 1% if deemed necessary, by 0.25% per year over the next four years from 2016 to 2019 – the FSC will be naming D-SIBs by the end of December 2015;
- considering domestic economic conditions, the FSC will need to decide on a quarterly basis whether to impose a countercyclical capital buffer and, if so, levels of such capital requirements (ranged from 0% to 2.5%);
- the FSC may require banks falling behind the evaluation of risk management by the Financial Supervisory Service (FSS) to hold additional capital under the Basel II; and
- internet-only banks will be subject to the Basel I rules by 2019, while the Basel III rules are to be phased in for them from 2020 to full implementation on 1 January 2023. The liquidity coverage ratio (LCR) applied to internet-only banks will be raised by 10 percentage points every year from 70% for 2016 to 100% for 2019.

The amendments regarding additional capital requirements for D-SIBs and countercyclical capital buffers are effective from 1 January 2016. The eased capital rules for internet-only banks are effective immediately.

MAS publishes responses to consultation on liquidity coverage ratio disclosure requirements and finalised Notice 651

The Monetary Authority of Singapore (MAS) has published its responses to the feedback it received on its October 2015 consultation paper on the proposed liquidity coverage ratio (LCR) disclosure requirements, as well as the finalised MAS Notice 651 on Liquidity Coverage Ratio Disclosure, which applies to all domestic systemically important banks (D-SIBs) incorporated in Singapore (whether or not headquartered in Singapore).

The Notice requires that a D-SIB disclose quantitative and qualitative information about its LCR:

- in the case of a D-SIB incorporated in Singapore that is headquartered in Singapore, at the banking group level;
- in the case of a D-SIB incorporated in Singapore that is not headquartered in Singapore and which has not obtained the approval of the MAS pursuant to paragraph 4 of MAS Notice 649 on Minimum Liquid Assets and Liquidity Coverage Ratio to comply with the requirements set out in that Notice on a country-level group basis, at the bank standalone (solo) level; and
- in the case of a D-SIB incorporated in Singapore that is not headquartered in Singapore and which has obtained the approval of the MAS pursuant to paragraph 4 of Notice 649 to comply with the requirements set out in that Notice on a country-level group basis, at country-level group level.

The Notice also sets out guidance on additional disclosures of non-mandatory quantitative and qualitative information by D-SIBs.

The Notice will take effect on 1 January 2016 and D-SIBs shall comply with the Notice from the date of their first reporting period after 1 January 2016.

Clearing regime in Australia for OTC derivatives implemented

Following a consultation process earlier in 2015, the Australian Securities & Investments Commission (ASIC) has released the final clearing rules implementing Australia's mandatory central clearing regime for over-the-counter (OTC) derivatives of financial institutions. The final rules follow the draft rules save for a few minor amendments.

SEC proposes new derivatives rules for registered funds and business development companies

The US Securities and Exchange Commission (SEC) has proposed a new rule to increase the supervision of the use of derivatives by registered investment companies, including mutual funds, exchange-traded funds (ETFs) and closed-end funds, as well as business development companies. The proposed rule would limit funds' use of derivatives and require them to put risk management measures in place.

The proposed rule would require a fund to comply with one of two alternative portfolio limitations designed to limit the amount of leverage the fund may obtain through derivatives and certain other transactions. In addition, a fund would have to regulate the risks associated with its derivatives transactions by segregating certain assets in an amount designed to enable the fund to meet its obligations, including under stressed conditions.

The proposal will have a comment period of 90 days after publication in the Federal Register.

CFTC approves final rule on swap margin requirements

The US Commodities Futures Trading Commission (CFTC) has approved a final rule establishing minimum margin requirements for over the counter derivative transactions. This rule will apply to swap dealers and major swap participants that are not regulated by any other US prudential regulator (such as the Federal Reserve Board or the Office of the Comptroller of the Currency). The minimum margin requirements will not apply to commercial end users.

The rule will be phased in beginning September 2016.

CLIFFORD CHANCE BRIEFINGS

The role of directors in a restructuring – is it getting tougher?

Challenging economic times have generated innovative techniques and solutions for restructuring companies. At the same time, legislation focused on preservation rather than insolvency of financially troubled companies continues to evolve across Europe.

This briefing paper considers the role played by the directors of struggling companies, and whether recent developments make their jobs even harder.

http://www.cliffordchance.com/briefings/2015/12/the_role_of_directorsinarestructuringisi.html

The EU FTT – what is the effect of Estonia's exit?

At the ECOFIN meeting on 8 December, ten Member States issued a statement confirming they would proceed with the EU financial transaction tax (FTT). Estonia, which had previously been part of the FTT process, no longer wishes to be involved.

This briefing paper which considers the legal effect of Estonia leaving: is it merely that the FTT (if agreed) will no longer apply to Estonia? Or is it instead that the FTT process has now failed? And, if the latter, what is the legal effect if the participating Member States proceed regardless?

http://www.cliffordchance.com/briefings/2015/12/the_eu_ftt_what_istheeffectofestoniasexit.html

Delaware Supreme Court affirms damages award against target company's banker

Last week, in its decision in the Rural Metro case, the Delaware Supreme Court upheld a $75.8 million damages award against the financial adviser to the target company in an all-cash third party buyout. The Court found the financial adviser liable for aiding and abetting breaches of fiduciary duties by the target company's directors, even though the directors themselves could not have been liable in damages for those breaches because of standard statutorily-authorized exculpatory clauses in the target company's charter.

This briefing paper discusses the findings from the Rural Metro case.

http://www.cliffordchance.com/briefings/2015/12/delaware_supremecourtaffirmsdamagesawar.html

Climate Change Conference – What is the real substance of the Paris Agreement?

The Agreement reached at the Paris Climate Change Conference on 12 December was immediately acclaimed as a great achievement both by politicians and much of the media. The success of the conference from a political perspective, in securing agreement from 195 countries (both developed and developing) to a way forward on climate change action, should not be underestimated. However, this success lies beyond the fairly limited substantive obligations placed on the Parties by the Agreement itself. This briefing considers the detail of the Agreement and offers some thoughts on its wider implications. Key elements:

- the Agreement requires all Parties to prepare and submit emission reduction contributions with new common accounting and estimation requirements to ensure transparency;
- these are not enforceable but political pressure to adopt and implement them will be considerable;
- a floor of USD100 billion / year finance to developing countries has been set; and
- a new carbon mitigation mechanism will be designed – most likely a broader form of CDM and facilitation of links between emissions trading schemes.

This briefing paper considers the details of the Agreement and offering some thoughts on its wider implications.

http://www.cliffordchance.com/briefings/2015/12/climate_change_conferencewhatistherea.html

Revisions to LMA Trading Documents To Go Live 16 December 2015

The Loan Market Association (LMA) has published revised versions of its Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank Debt/Claims), forms of Trade Confirmations and Participation Agreements, and Secondary Debt Trading Documentation Users Guide. The revised documents are available on the LMA website and will 'go live' beginning 16 December 2015.

The most important revisions to these documents are:

- the 'Allocation of Interest and Fees' condition in the Standard Terms and Conditions has been revised in light of the case Tael One Partners Limited v Morgan Stanley & Co International plc [2015] UKSC 12;
- new terms have been added to clarify market uncertainty regarding responsibility for notarial fees;
- express language has been supplemented to the Standard Terms and Conditions to make it clear that neither party to a trade is a custodian for, or owes any fiduciary duties to, the other party thereto;
- the User Guide has been updated to explain how negative interest rates would impact the calculation of delayed settlement compensation; and
- the concept of 'ticking fees' has now been included within the defined term 'Recurring Fees'.

This briefing paper summarises these main changes and discusses why they are important to the secondary market loan trading community.

http://www.cliffordchance.com/briefings/2015/12/revisions_to_lmatradingdocumentstogolive1.html

A capital outcome – CoCos can be redeemed

The Court of Appeal has decided that, on the interpretation of the relevant terms, a bank is entitled to redeem convertible contingent securities if those securities cease to help the bank to pass the Prudential Regulation Authority's stress tests. In reaching this conclusion, the Court drew heavily on the function of regulatory capital and the changing rules surrounding capital, rejecting the argument that these complex matters were beyond the knowledge of retail investors. Regulatory capital instruments are for sophisticated investors only, who are presumed to understand the function of the instruments they buy and to be able to correct obvious mistakes in the terms and conditions.

This briefing paper discusses the judgment.

http://www.cliffordchance.com/briefings/2015/12/a_capital_outcomecocoscanberedeemed.html

Clifford Chance Comment: New method of calculating statutory interest

The beginning of 2016 heralds major changes to the method of calculating interest on all civil law transactions in Poland. The amended provisions come into force on 1 January 2016. First and foremost, they change the method of calculating statutory interest, distinguishing between the calculation of default interest and interest on principal and, in the case of default interest, between the calculation of such interest in transactions between businesses or between businesses and certain public entities (i.e. transactions between professionals) and transactions between other types of parties. They also introduce a new method of calculating maximum interest.

Clifford Chance has prepared a briefing paper discussing the changes. To view a copy of this briefing paper, please click on the PDF link below. Alternatively, you can access the briefing via the Clifford Chance website at the link below.

http://www.cliffordchance.com/briefings/2015/12/new_method_of_calculatingstatutoryinterest.html

SFC proposes amendments to regulation of automated trading services guidelines

On 20 November 2015 the Securities and Futures Commission (SFC) published its Consultation Paper on Proposed Amendments to the Guidelines for the Regulation of Automated Trading Services. The original Guidelines for the Regulation of Automated Trading Services were first published in 2003 to complement the regulation of automated trading services (ATS) under the Securities and Futures Ordinance (SFO).

The proposed changes do not constitute a wholesale change of the existing regime, but are necessary to accommodate the new over-the-counter (OTC) derivatives regulatory regime being introduced in Hong Kong. Comments to the Consultation Paper are due by 31 December 2015.

This briefing paper discusses the proposed amendments.

http://www.cliffordchance.com/briefings/2015/12/sfc_proposes_amendmentstoregulationo.html

Angola – New Private Investment Law

On 11 August 2015, Angola adopted a new private investment law to make the private investment regime more attractive to investors and to simplify the investment procedure.

This briefing paper summarises the key changes

http://www.cliffordchance.com/briefings/2015/12/angola_new_privateinvestmentlaw.html