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Briefing note

International Regulatory Update

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MiFID2: EU Commission proposes to delay application by one year

The EU Commission has published a proposal to extend the application date of MiFID2 by one year to 3 January 2018. The proposal takes the form of a draft Directive amending MiFID2 and draft Regulation amending MiFIR as regards certain dates. The proposed Regulation also sets out measures to address the consequences of changing the date of application of MiFID2 on the Market Abuse Regulation (MAR) and Central Securities Depositories Regulation (CSDR).

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The proposals are intended to address exceptional technical implementation challenges faced by the European Securities and Markets Authority (ESMA), national competent authorities (NCAs) and market participants in relation to data collection, reporting and the transparency threshold calculation. They are also intended to avoid legal uncertainty and potential market disruption. The proposals set out an extension of the application for the entire MiFID2/R package, rather than a staggered approach, which the Commission views as necessary and justified in order to avoid possible confusion and costs to stakeholders.

EU Commission and CFTC announce common approach for transatlantic CCPs

The EU Commissioner for Financial Stability, Financial Services and Capital Markets Union, Jonathan Hill, and the US Commodity Futures Trading Commission (CFTC) Chairman Timothy Massad have announced a common approach regarding requirements for central clearing counterparties (CCPs).

The EU Commission and CFTC have indicated that the steps needed to implement this agreement will be put into place as soon as practicable. In particular, the Commission intends to adopt an equivalence decision with respect to CFTC requirements which will allow ESMA to recognise US CCPs as soon as is practicable. Once recognised, US CCPs will be able to continue to provide services in the EU whilst complying primarily with their own local requirements.

Meanwhile, the CFTC will propose a determination of comparability with respect to EU requirements, which will permit EU CCPs to provide services in the US whilst complying primarily with their own local requirements. The CFTC also intends to streamline the registration process for EU CCPs wishing to register with them.

EU Commission to propose resolution regime for CCPs by end of 2016

Commissioner Hill has announced that the Commission intends to submit a proposal for a recovery and resolution regime for CCPs towards the end of 2016. He emphasised the importance of aligning this work with work being taken forward as part of the G20 agenda.

Commissioner Hill also indicated that the Commission is not planning to legislate on resolution and recovery plans for insurers or asset managers at this time.

MREL: EBA expresses dissent over EU Commission proposals to amend RTS

The European Banking Authority (EBA) has published an opinion addressed to the EU Commission expressing dissent over some of its proposed amendments to the EBA final draft regulatory technical standards (RTS) on the criteria for setting the minimum requirement for own funds and eligible liabilities (MREL), which were developed under Article 45(2) of the Bank Recovery and Resolution Directive (BRRD) and were submitted to the Commission for endorsement on 3 July 2015. On 18 December 2015, the Commission informed the EBA of its intention to amend the final draft RTS.

In particular, the EBA dissents from EU Commission proposals to:

- amend the reference to the burden-sharing requirement by shareholders and creditors of institutions of significant importance due to its view that legal clarity is needed when setting MREL for a systemic institution which may need to access resolution funds; and
- remove several specific provisions relating to the criteria for setting MREL for systemic institutions, which in the EBA's opinion may reduce the effectiveness of the RTS in promoting smooth cooperation and convergence when setting MREL.

ESMA publishes first supervisory convergence work programme

The European Securities and Markets Authority (ESMA) has published its first supervisory convergence work programme (SCWP). The 2016 work programme sets out details of the activities and tasks that ESMA intends to carry out to ensure consistent supervision across the EU and expands on high-level objectives outlined in ESMA's annual work programme 2016. It is also intended to fulfil commitments set out in ESMA's strategic orientation document for 2016-2020 on refocusing its resources from single rulebook to supervisory convergence work.

In particular, the work programme highlights priorities for 2016 on:

- preparing for MiFID2 and finalising data and IT infrastructures required to support the implementation and supervision of MiFID2 and the Market Abuse Regulation (MAR);
- sound and consistent supervision of OTC derivatives markets;

- supporting the EU Commission's Capital Markets Union (CMU) plan; and
- supporting the work of national competent authorities (NCAs).

Implementation of the 2016 SCWP will be monitored during the year and progress made will help inform SCWPs in future years.

CPMI-IOSCO publish statement on clearing of FX instruments

The International Organization of Securities Commissions (IOSCO) and the Committee on Payments and Market Infrastructures (CPMI) have published a joint statement on the clearing of deliverable FX instruments by CCPs. The statement has been issued in response to industry developments with respect to CCP clearing of deliverable FX instruments and the associated models for effecting their settlement.

In the statement, CPMI-IOSCO set out their expectations concerning the clearing of deliverable FX instruments and the way in which CCPs should meet their obligations under the CPMI-IOSCO Principles for financial market infrastructures (PFMI). In particular, irrespective of the settlement model used, CPMI-IOSCO expect CCPs to:

- ensure the same level of confidence in the completion of same day settlement of obligations on the originally specified settlement date, irrespective of whether a potential liquidity shortfall on default relates to the obligation of the CCP itself or to obligations of one participant to another; and
- conduct appropriate due diligence on their participants' ability to understand, quantify and manage the associated contingent liquidity obligations under their rules, and identify the point at which other qualifying liquid resources would be exhausted and any rules-based arrangements would need to be invoked.

FCA publishes policy statement on access to regulated benchmarks

The Financial Conduct Authority (FCA) has published a policy statement on fair, reasonable and non-discriminatory (FRAND) access to regulated benchmarks (PS16/4), following a consultation launched in June 2015. The policy statement sets out responses to consultation feedback and the final rules.

The FCA launched its consultation to address the possibility that a benchmark administrator of an industry standards benchmark may have market power as users of an industry benchmark may not be able to easily switch to an alternative. The FCA observed that the possession of market power is not in itself anti-competitive, but there may be the risk of anti-competitive behaviour if this market power was exploited. As such, the FCA proposed introducing FRAND requirements to limit the ability of benchmark administrators to exploit their market power in a way that might hinder effective competition.

In light of comments received, the FCA has made some modifications to its proposals. The FCA has decided to effectively bring forward to 2016 the implementation of MiFIR Article 37 in order to apply FRAND provisions that cover benchmark users who are central counterparties, multilateral trading facilities (MTFs) and regulated markets, although the FCA does not propose to include all categories of venue covered by the MiFIR provisions at the current time. Proposals relating to FRAND requirements for all users are not being taken forward at the current time until the EU Benchmarks Regulation has been finalised in order to ensure appropriate consistency between the FCA's rules and the longer-term regulatory requirements applying to each set of users.

The final FCA rules are set out in the policy statement and come into force on 1 April 2016.

FCA launches call for input on current payment services guidance

The FCA has issued a call for input on its approach to the current payment services regime under the UK transposition of the Payment Services Directive (2007/64/EC - PSD 1). In particular, the FCA is seeking views on the existing guidance provided by the FCA to assist firms in complying with the requirements, which include the Payment Services Approach Document and the Perimeter Guidance Manual (PERG 15).

The FCA has issued its call for input in preparation for the recast Payment Services Directive (2015/2366 - PSD 2), which must be transposed by Member States into their national law by 13 January 2018, the date from which the rules will apply. PSD 2 will require changes to the FCA's regulation of payment firms and the FCA intends to assess views from stakeholders on existing documentation before beginning to update its guidance in line with PSD 2.

Responses are due by 23 March 2016.

PRA, BoE and FCA consult on complaints against regulators

The Prudential Regulation Authority (PRA), Bank of England (BoE) and FCA have published a consultation paper (CP5/16) which sets out changes to the Complaints Scheme to implement new legislative requirements.

The proposed amendments to the Complaints Scheme reflect the requirement, introduced by new subsections of section 87 of the Financial Services Act 2012, for the Complaints Commissioner to produce an annual report on his or her investigations of the regulators.

Comments are due by 9 March 2016 and the regulators aim to publish a policy statement in March 2016.

CRR/CRD 4: Bank of Spain issues circular completing Spanish implementation

The Bank of Spain has published its Circular 2/2016, which aims to complete the implementation of the Capital Requirements Directive 2013/36/EU (CRD 4) in relation to credit entities and develops some aspects of the Financial Conglomerates Directive 2011/89/EU in relation to the additional supervision of financial entities forming a financial conglomerate.

The Circular is divided into nine chapters that mainly comprise: rules on capital buffers, corporate governance and remuneration, internal capital adequacy assessment and supervisory review by the competent authority, risk treatment, supervision of financial conglomerates, transparency and reporting obligations.

The Circular:

- includes a definition of competent authority, which will be the ECB or Bank of Spain depending on the allocation and distribution of competences set out by the Single Supervisory Mechanism Regulation (EU) No 1024/2013 (SSM Regulation);
- regulates the regime governing branches and free provision of services in Spain by institutions domiciled in non-European Union countries; and
- establishes the option to treat the exposure to public sector entities as exposure to the relevant administration foreseen by Article 116.4 of the Capital Requirements Regulation (EU) No 575/2013 (CRR).

Indonesian government eases restrictions on foreign investment in various sectors

As part of President Jokowi's Economic Stimulus Package, the Indonesian government has issued a press release setting out proposed revisions to Indonesia's Negative List (the list which spells out the sectors to which foreign investment restrictions apply).

These changes relax restrictions on foreign investment in various sectors including e-commerce, distributorship, warehousing, tourism and the film/motion pictures industry. The last changes to the Negative List were made in 2014.

It is not clear when the new regulation will come into effect.

SEC adopts cross-border security-based swap rules for activity in the US

In accordance with provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Securities and Exchange Commission (SEC) has voted to adopt rules that require a non-US company that uses personnel located in a US branch or office to arrange, negotiate, or execute a security-based swap transaction (SBS) in connection with its dealing activity to include that transaction in determining whether it is required to register as a security-based swap dealer.

According to a related SEC Release and Fact Sheet, the final rules would require a non-US person using personnel located in a US branch or office to arrange, negotiate, or execute a transaction to include such transaction in its de minimis threshold calculations even if the transaction was executed anonymously and cleared. The final rules also contain protections for certain international organizations from the requirement that non-US persons include in their dealer de minimis threshold calculations transactions that they arrange, negotiate, or execute using personnel located in a US branch or office.

If approved for publication by the SEC, the rules will be published on the SEC website and in the Federal Register. They will become effective 60 days after publication in the Federal Register, but compliance will not required until the latest of either 12 months following publication in the Federal Register or the SBS Entity Counting Date, which was specified in the SBS Entity Registration Adopting Release.

CLIFFORD CHANCE BRIEFINGS

Clifford Chance Corporate Treasury Financing Series – Issue 1

We are pleased to introduce our new Treasury Financing series, a monthly bulletin intended to help finance professionals stay on top of market developments and

identify the funding opportunities that are right for their businesses. In each edition, we will seek to combine macroeconomic and market updates with specific features on the current financing trends from our market-leading experts.

Financing options are impacted by a myriad of micro- and macroeconomic factors, and through this series we will seek to address some of the key issues affecting the markets. For example, uncertain interest rate moves by central banks, a struggling Eurozone and economic slowdown in China are just some of the destabilising factors affecting a global economy already struggling with the aftermath of the financial crisis and the burden of public debt. In times of political and economic uncertainty, the ability to execute the right funding strategy, with precise timing, will help differentiate those borrowers who are best placed to succeed. Critical to making the right choice will be having a broad understanding of the financing options available, and being able to navigate the complexity of rapidly changing markets.

http://www.cliffordchance.com/briefings/2016/02/corporate_treasuryfinancingseries-issue1.html

Asia Pacific Anti-Corruption Rankings for 2015

The Corruption Perceptions Index (CPI) for 2015, published by Transparency International (TI) on 27 January, showed an improvement rather than a decline in scores globally, but a generally static position in Asia Pacific. Of the 27 Asia Pacific countries featured in the CPI 2015, only nine achieved a 'passing score' of 50, with the other 18 again scoring below 40. This statistic remains the same as in 2014, indicative of a lack of progress in the region.

The CPI for 2015 examines the perception of public sector corruption in 168 countries (compared with 175 in 2014). The lower number of countries included in the 2015 CPI makes trend analysis more complicated. Accordingly, companies operating in the region may find that a country's score is a more accurate indicator of perceived levels of corruption than its relative rankings.

This briefing paper discusses the CPI for 2015.

http://www.cliffordchance.com/briefings/2016/02/asia_pacific_anti-corruptionrankingsfor2015.html