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Briefing note

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EMIR: ESAs publish final draft RTS on margin requirements for non-centrally cleared derivatives

The European Supervisory Authorities (ESAs), comprising the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA), have published final draft regulatory technical standards (RTS) on margin requirements for non-centrally cleared

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derivatives under the European Market Infrastructure Regulation (EMIR).

The draft RTS cover risk mitigation techniques related to the exchange of collateral to cover exposures arising from non-centrally cleared over-the-counter (OTC) derivatives. They also specify the criteria concerning intragroup exemptions and the definitions of practical and legal impediments to the prompt transfer of funds between counterparties.

The draft RTS set out:

- the requirement that counterparties have to exchange both initial and variation margins for OTC derivatives not cleared by a central counterparty (CCP);
- a list of eligible collateral for the exchange of margins, the criteria to ensure the collateral is sufficiently diversified and not subject to wrong-way risk, as well as methods to determine appropriate collateral haircuts;
- the operational procedures related to documentation, legal assessments of the enforceability of the agreements and the timing of the collateral exchange; and
- the procedures for counterparties and competent authorities related to the treatment of intragroup derivative contracts.

MAR: EU Commission adopts three sets of regulatory technical standards and Commission Implementing Regulation on insider lists published in Official Journal

The EU Commission has adopted three Commission Delegated Regulations under MAR, which specify RTS relating to:

- the conditions that buy-back programmes and stabilisation measures must meet, including conditions for trading, restrictions regarding time and volume, disclosure and reporting obligations, and price conditions;
- technical arrangements for objectively presenting investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest; and
- determining appropriate arrangements, systems and procedures as well as notification templates to be used by persons to comply with requirements on preventing, detecting and reporting abusive practices or suspicious orders or transactions to competent authorities.

The Commission Delegated Regulations will enter into force the day following their publication in the Official Journal and will apply from 3 July 2016.

A Commission Implementing Regulation (2016/347) laying down implementing technical standards (ITS) on the precise format of insider lists and keeping insider lists up to date has been published in the Official Journal. The ITS relate to requirements under Article 18 MAR for issuers, emission allowance market participants, auction platforms, auctioneers and auction monitor, or any other persons acting on their behalf or on their account, to draw up insider lists, which should identify specific pieces of inside information and should be submitted to competent authorities through specific electronic formats.

The Implementing Regulation entered into force on 12 March 2016 and shall apply from 3 July 2016.

CRR: Commission Implementing Regulations published in Official Journal

Two Commission Implementing Regulations which amend Implementing Regulation 680/2014 under the Capital Requirements Regulation (CRR) have been published in the Official Journal.

Commission Implementing Regulation 2016/322 lays down ITS with regard to supervisory reporting of institutions of the liquidity coverage requirement (LCR) and includes new templates and instructions to assist credit institutions to capture the necessary LCR items and to ensure proper supervisory reporting of the LCR. The Regulation enters into force on 30 March 2016 and will apply from 10 September 2016.

Commission Implementing Regulation 2016/313 amends Implementing Regulation 680/2014 with regard to additional monitoring metrics for liquidity reporting. The Regulation follows publication of an opinion by the EBA, which set out the EBA's acceptance of the proposed amendments with the exception of those relating to the reporting of liquid assets and expected cash outflows and inflows (the maturity ladder). Having assessed the EBA's opinion, the Commission has decided to proceed with amending the ITS to be aligned with the definitive approach set out in Commission Delegated Regulation 2015/61. The Commission has called on the EBA to update the maturity ladder to align with Delegated Regulation 2015/61 as soon as possible. In the interim, where justified, supervisors may seek additional reporting not provided for by the Implementing Regulation. The Regulation enters into force on 25 March 2016.

CRR: EBA publishes final draft ITS on supervisory reporting and consults on reporting of prudent valuation information

The EBA has published final draft ITS on supervisory reporting under the CRR, which set out proposals for minor amendments to Commission Implementing Regulation 680/2014 in relation to reporting templates and instructions, which were deemed necessary to reflect published answers to the Single Rulebook Q&As, to align with disclosure requirements for capital buffers as well as to correct legal references and other clerical errors. The EBA has not conducted an open public consultation on the proposals as the changes do not involve significant changes in substantive terms. Given the scope of the changes, the EBA has replaced the relevant Annexes in their entirety and has published the final draft versions in the draft ITS. The EBA expects the amendments to be applicable for the reporting reference date of 31 December 2016.

The EBA has also launched a consultation on further proposed amendments to Implementing Regulation 680/2014 relating to the inclusion of prudent valuation into the Guidelines on Common Reporting (COREP), in particular:

- new requirements as regards the reporting of information on prudent valuation; and
- supplementary requirements as regards the reporting of credit risk information.

Comments to the consultation close on 30 March 2016.

CRR: ECB publishes opinion on proposed commodity dealer exemption

The European Central Bank (ECB) has issued an opinion on proposed exemptions to the CRR for commodity dealers, following requests from the EU Council and EU Parliament. A proposed Regulation would exempt commodity dealers from certain CRR requirements in relation to large exposures and own funds from 1 January 2018.

In its opinion, the ECB considers potential systemic risks posed by commodity dealers but does not identify any concrete indications of systemic risk created by commodity dealers that would make an exemption strictly necessary. The ECB highlights a proposed comprehensive review of the prudential regulation of investment firms by the EU Commission and sets out its view that an exemption for commodity dealers should be confined to the avoidance of significant regulatory changes before the review, which should be carried out as soon as possible.

SFT Regulation: ESMA consults on Level 2 measures

ESMA has issued a discussion paper on Level 2 measures under the Securities Financing Transactions Regulation (SFTR). The Regulation requires financial and non-financial market participants to report details of their securities financing transactions (SFTs). Details to be reported include the composition of the collateral, whether the collateral is available for reuse or has been reused, the substitution of collateral at the end of the day and the haircuts applied.

The discussion paper sets out ESMA's proposals for implementing the reporting framework under the SFTR and the registration requirements for those trade repositories (TRs) which want to accept reports on SFTs.

Comments to the discussion paper close on 22 April 2016.

Basel Committee consults on operational risk capital framework

The Basel Committee on Banking Supervision has published a consultation paper on proposed revisions to the operational risk capital framework. The new Standardised Measurement Approach (SMA) for operational risk builds on the Committee's earlier consultation paper issued in October 2014.

The SMA addresses a number of problems with the current framework. The key changes proposed include:

- the SMA replacing the three existing standardised approaches for calculating operational risk capital as well as the Advanced Measurement Approach (AMA), simplifying the regulatory framework;
- revised methodology combining a financial statement-based measure of operational risk, the 'Business Indicator' (BI), with an individual firm's past operational losses; and
- the option to use the AMA, an internal model-based approach for measuring operational risk, being removed from the operational risk framework.

The Committee expects that these proposals will have a relatively neutral impact on capital for most banks but that minimum capital requirements will increase for some.

Comments are due by 3 June 2016.

PRA publishes revised approaches to banking and insurance supervision

The Prudential Regulatory Authority (PRA) has updated its approach documents to banking and insurance supervision.

The documents set out how the PRA carries out its role as the prudential regulator for deposit-takers, insurance companies and designated investment firms.

The documents were last revised in June 2014, and include changes reflecting amendments to legislation and the PRA's supervisory approach since June 2014. The approach to banking supervision has been updated to reflect developments involving the Senior Managers regime (SMR), the EU Liquidity Coverage Requirement (LCR), and the leverage ratio framework, and the approach to insurance now reflects the implementation of Solvency II.

Special Administration Regime: HMT and FCA respond to Bloxham report

The Government introduced the Investment Bank Special Administration Regime (SAR) in 2011 in response to the failure of Lehman Brothers in 2008. HM Treasury (HMT) commissioned Peter Bloxham to carry out an independent review of the SAR, and in January 2014 the Bloxham final report was published, which recommended that the SAR should be retained and proposed 72 reforms to strengthen the regime. The recommendations related to changes to the SAR Regulations and insolvency rules made by HMT and rules in the Financial Conduct Authority (FCA) Handbook Client Assets Sourcebook (CASS). As such, HMT and the FCA have published papers to respond to the Bloxham report, which are intended to be read together.

HMT has published a consultation paper on certain technical changes to speed up and simplify the process of SAR administration. The proposals relate to:

- a package of measures to enable administrators to carry out transfers of the business of an investment firm, and consequently of client assets, more quickly and easily;
- extending and strengthening the SAR bar date mechanism;
- effective interaction between SAR and CASS rules; and
- improving the procedural and administrative process in the SAR in practice, including an enhanced role for the Financial Services Compensation Scheme (FSCS).

HMT has also published a summary of lessons learned, which sets out the Government's approach in light of various court cases. Alongside the paper, HMT has published the draft Investment Bank (Amendment of Definition) and Special Administration (Amendment) Regulations 2016. Comments on the consultation are due by 20 April 2016.

The FCA has published a discussion paper ahead of a consultation later in 2016, once legislative changes to the SAR have been finalised. The discussion paper seeks feedback on a number of aspects of the client assets regime, in particular regarding the CASS 7A rules and their interaction with the SAR and general insolvency provisions, as well as rules on client money (CASS 7), custody assets (CASS 6) and the CASS resolution pack (CASS 10). The discussion paper also sets out a summary of the FCA's 'speed proposal', which was consulted on in CP13/15, which the FCA has decided not to implement.

Comments on the FCA consultation are due by 9 May 2016.

Senior managers regimes come into force

The Senior Managers Regime (SMR) and Senior Insurance Managers Regime (SIMR) have come into force. The regimes implement recommendations made by the Parliamentary Commission for Banking Standards (PCBS) in June 2013. To coincide with the entry into force of the new regimes, the FCA, PRA and Payment Systems Regulator (PSR) have published documents setting out how the regulators will be applying the regime internally, which set out the core responsibilities for those carrying out senior management functions.

Banking Standards Board publishes first annual review

The Banking Standards Board (BSB) has published its first annual review. The BSB was established in 2015 to help raise standards of behaviour and competence across the banking sector and the findings of the first pilot assessment of ten firms in 2015 will inform the key themes of the BSB's work in 2016.

The BSB assessed participating firms' performance against objectives on behaviour, competence and culture, with individual findings provided to and discussed with each board. The assessment is also intended to provide evidence over time from across the banking sector, to help raise standards, benchmark performance and share good practice across the industry.

Following the review, in 2016 the BSB will prioritise work on:

- the 2016 assessment exercise, which will be scaled up to include a wider number of member firms;
- promote professionalism across all parts of the banking sector and at all levels;
- explore the relationship between law, regulation and ethics, and what this means in the specific context of banking and banking culture; and

- develop voluntary standards on service provision.

PSR publishes interim findings on market review into supply of indirect access to payment systems

The PSR has published an interim report on its market review into the supply of indirect access to payment systems.

Payment service providers (PSPs), such as banks and building societies, can have either direct or indirect access to interbank payment systems. The PSR's report covers its work to promote better choice in access services so that PSPs can choose between direct or indirect access. The report notes that it is vital for PSPs to move money between accounts, and therefore a key enabler of competition and innovation in both the payments and banking sectors. Indirect access – the ability to send and receive payments though a third party, such as another bank – is one way smaller PSPs access payment systems.

The PSP concludes that work to open up access to payment systems has yielded positive results, and that while there are concerns about the supply of indirect access, it expects that these will be addressed by changes the industry is making.

Specific concerns raised include:

- industry responses to financial crime regulation have meant that some indirect access providers are less willing to offer access to small PSPs, leaving these companies with a limited choice of indirect access provider;
- the ability of current technical solution for real-time payments to meet the required quality of service; and
- barriers to switching indirect access providers faced by PSPs reduces competition.

The report identifies a number of current and anticipated developments that should alleviate concerns and help deliver access for PSPs. The PSR proposes supporting these developments, but has indicated it will take regulatory action if its concerns are not sufficiently addressed in the next 12 months.

The PSR has invited feedback on its interim conclusions. Comments to the paper close on 5 May 2016.

Italy implements DGSD 2

The legislative decree intended to implement the revised Deposit Guarantee Schemes Directive (Directive 2014/49/EU – DGSD 2) in Italy – namely, Legislative Decree no. 30 of 15 February 2016 – has been published in the Official Gazette (Gazzetta Ufficiale).

The Decree came into force on 9 March 2016, except for Article 1 comma 3, let. A), which will come into force on 1 July 2018.

Amongst other things, the Decree amends Legislative Decree no. 385 of 1 September 1993 (Italian Banking Act) and:

- establishes that the maximum amount of reimbursement to depositors is EUR 100,000. This level of coverage has been harmonised by the Directive and is applicable to all deposit guarantee schemes;
- lays down the minimum financial budget that national guarantee schemes should have;
- details intervention methods of the national deposit guarantee scheme; and
- harmonises the methods of reimbursement to depositors in case of insolvency of a credit institution.

Royal Decree on regulation of activities and operation of State-owned Fund for Foreign Investment and Fund for SME Foreign Investment Operations published

Royal Decree 72/2016, which was approved by the Council of Ministers on 19 February 2016, has been published in the Spanish Official Gazette.

Royal Decree 72/2016 is intended to modify Royal Decree 1226/2006, of 27 October, on the regulation of activities and operation of the State-owned Fund for Foreign Investment (FIEX) and Fund for SME Foreign Investment Operations (FONPYME) in order to:

- implement the changes included in Law 18/2014, of 15 October, on the FONPYME creation; and
- foster the international activity of SMEs and, in general, of the Spanish economy through temporary, minority and direct participations in the share capital of Spanish SMEs regarding their internationalisation or, companies located abroad, through any participative financial instrument available.

Both Royal Decree 72/2016 and Royal Decree 1226/2016 develop the instruments of financial support introduced by Law 14/2003, of 27 September, on the support of entrepreneurs and their internationalisation, which sought to improve the availability of public financial instruments for Spanish companies.

The Royal Decree 72/2016 came into force on 11 March 2016.

Federal Reserve proposes single-counterparty credit limits for large banking organisations

The Federal Reserve Board has proposed limits for credit exposures of large banking organisations to a single counterparty. These proposed limits vary depending on the systemic footprint of the financial institution:

- a global systemically important bank would be restricted to a credit exposure of no more than 15% of the bank's tier 1 capital to another systemically important financial firm, and up to 25% of the bank's tier 1 capital to another counterparty;
- a bank holding company with USD 250 billion or more in total consolidated assets, or USD 10 billion or more in on-balance-sheet foreign exposure, would be restricted to a credit exposure of no more than 25% of the bank's tier 1 capital to a counterparty; and
- a bank holding company with USD 50 billion or more in total consolidated assets would be restricted to a credit exposure of no more than 25% of the bank's total regulatory capital to another counterparty.

Bank holding companies with less than USD 50 billion in total consolidated assets would not be subject to any such restrictions.

Public comments on the proposal will be accepted through 3 June 2016.

RECENT CLIFFORD CHANCE BRIEFINGS

Alternative financing structures in the oil, gas and mining sectors

Against a backdrop of falling commodity prices, access to finance has become one of the key challenges facing many industry participants in the oil, gas and mining sectors. Solutions in the form of innovative financing structures and new sources of funding are becoming more and more prevalent.

This briefing paper examines recent trends and several transactions where novel strategies were employed.

http://www.cliffordchance.com/briefings/2016/03/alternative_financingstructuresintheoilga.html

'Snowball' swaps enforced

The English court has decided that 'snowball' swaps entered into by Portuguese public transport entities with a Portuguese bank but governed by English law can be enforced. The fact that the swaps were subject to ISDA's Master Agreement was a key part of the court's conclusion that Portuguese mandatory laws could not override the English governing law chosen by the parties.

This briefing paper discusses the decision.

http://www.cliffordchance.com/briefings/2016/03/_snowball_swaps_enforced.html

Enforcing foreign court judgments in Dubai – the DIFC Courts confirm a new avenue

The DIFC Court of Appeal has held in the recent case of DNB Bank ASA v Gulf Eyadah Corporation & Gulf Navigation Holding PJSC (CA-007-2015) that the DIFC Courts can be used as a conduit jurisdiction to enforce a foreign money judgment onshore in Dubai even when neither party has any assets in the DIFC.

This is a significant judgment as it opens up an alternate avenue for parties seeking enforcement of foreign court judgments or orders against parties' assets based onshore in Dubai (ie outside the DIFC) whereby judgment creditors might not have to satisfy the stringent conditions for enforcement of foreign judgments that apply in the non-DIFC Dubai courts.

This briefing paper discusses the decision.

http://www.cliffordchance.com/briefings/2016/03/enforcing_foreigncourtjudgmentsindubaith.html

APRA consults on margin requirements for non-centrally cleared OTC derivatives

On 25 February 2016, the Australian Prudential Regulation Authority (APRA) published a discussion paper on proposals to implement margin requirements and risk mitigation standards for non-centrally cleared OTC derivatives. Concurrently with the Discussion Paper, APRA released for public-consultation a new prudential standard, Prudential Standard CPS 226 Margining and risk mitigation for non-centrally cleared derivatives (CPS 226), which contains the proposed margin and risk mitigation requirements for APRA regulated entities. The largest APRA regulated entities will need to exchange initial margin and variation margin with covered counterparties starting in September 2016.

This briefing paper summarises key issues as they apply to Australia and provides some comparison of the proposals with equivalent proposals in Singapore and Hong Kong.

http://www.cliffordchance.com/briefings/2016/03/apra_consults_onmarginrequirementsfo.html