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Briefing note

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- Recent Clifford Chance briefings: Benchmarks; Anti-Bribery and Corruption; and more. Follow this link to the briefings section.

MiFID2/MIFIR: ESMA submits opinions on draft RTS 2 and 21 on non-equity transparency and position limits to Commission

The European Securities and Markets Authority (ESMA) has published two opinions proposing amendments to draft regulatory technical standards (RTS) 2 and 21 under MiFID2 and MiFIR in response to amendments proposed by the EU Commission.

In relation to the proposed amendments to draft RTS 2, ESMA is supportive of the more cautious transparency regime suggested by the Commission but, for the implementation of the phase-in, ESMA has proposed an alternative automatic phase-in approach, which would include annual transition to the next stage included in the RTS accompanied by monitoring the impact of the pre-trade transparency regime. ESMA also proposes to adjust the liquidity status of newly issued corporate and covered bonds by increasing issuance size thresholds.

ESMA's opinion on the proposed amendments to draft RTS 21 is supportive of most of the proposals and ESMA has revised the position limits regime in response to the Commission's concerns about speculation and possible impacts on food prices.

In an accompanying letter, ESMA has also noted that it is currently finalising the remaining opinion on criteria for establishing when an activity is to be considered ancillary to the main business (draft RTS 20), which ESMA intends to submit later in May 2016.

MiFID2/MIFIR: ESMA publishes amended draft RTS on reporting obligations

ESMA has published its final report on amended draft RTS under Article 26 MIFIR (draft RTS 22), which relate to reporting obligations. An earlier draft of RTS 22, submitted to the Commission on 28 September 2016, contained an unintended omission. The final report of the amended draft RTS resolves the omission and includes a list of instances that are not considered to be reportable transactions and relates, in particular, to the use of financial instruments as collateral.

The final report has been submitted to the EU Commission.

EMIR: ESMA publishes results of CCP stress test

ESMA has published the results of its first EU-wide stress test exercise regarding central counterparties (CCPs). The test focused on the counterparty credit risk which CCPs would face as a result of multiple clearing member (CM) defaults and simultaneous market price shocks.

17 European CCPs holding over EUR 150 billion worth of default resources with more than 900 CMs union-wide were tested using combinations of CM default and market stress scenarios. ESMA has issued an accompanying questions and answers document setting out the overall scope of the exercise and methodologies applied.

The results of the test shows that the system of EU CCPs can overall be assessed as resilient to the stress scenarios used to model extreme but plausible market developments.

CRR: EBA amends historical look-back approach method for calculating additional collateral outflows

The European Banking Authority (EBA) has published an opinion on the EU Commission's proposed amendment to the draft RTS on additional collateral outflows under the Capital Requirements Regulation (CRR). The Commission informed the EBA on 3 December 2015 that it did not intend to endorse the draft RTS as it was concerned the EBA's historical look-back approach (HLBA) could have a significant impact on credit institutions and international derivative markets. The Commission noted that it would be open to endorsing a version amended to include the HLBA calculation method provided by the Basel Committee on Banking Supervision (BCBS), which focuses on the largest net difference in collateral posted instead of the largest gross difference. The EBA has amended the draft RTS in accordance with the suggestions made by the Commission and included them in the annex of the opinion.

EBA consults on use of consumer data by financial institutions

The EBA has published a discussion paper on the use of consumer data by financial institutions, in line with its mandate to monitor financial innovation. The paper identifies risks and potential benefits that the innovative

uses of consumer data may bring for both consumers and financial institutions. The EBA has requested feedback in order to inform its decision on which, if any, further actions may be required to mitigate the risks arising from the uses of consumer data.

Comments are due by 4 August 2016.

Capital Markets Union: EU Commission publishes report on crowdfunding sector

The EU Commission has published a report on the EU crowdfunding sector as part of its work on the Capital Markets Union (CMU) action plan.

The report assesses national regimes, identifies best practice, and presents the results of the Commission's monitoring of the evolution of the crowdfunding sector. The report finds that, while small, the crowdfunding market in the EU is developing rapidly, and, if properly regulated, has the potential to be a source of financing for small-to-medium enterprises (SMEs).

While EU Member States have begun to implement national frameworks to support the growth of the sector and protect investors, they are normally tailored to local markets and domestic regulatory approaches. The EU Commission believes that, as crowdfunding remains largely local, there is no strong case for an EU level framework at this time, although it plans to keep developments in the sector under review by meeting twice yearly with regulators and the sector.

ISDA publishes 2016 Credit Support Annex for Variation Margin

The International Swaps and Derivatives Association (ISDA) has published the 2016 Credit Support Annex for Variation Margin for use with English law (2016 CSA). The 2016 CSA is an updated version of the 1995 ISDA Credit Support Annex (Title Transfer - English Law) that is limited to variation margin and allows for arrangements that meet the requirements of new regulations on margin for uncleared swaps.

This English law document is the second in what will be a series of publications to help firms implement the non-cleared derivatives margin rules. ISDA will be publishing Japanese law versions of the variation margin document, CSAs for initial margin and a Protocol to facilitate the amendment of existing contracts to comply with the new requirements.

The 2016 CSA is available on the ISDA Bookstore.

UK Parliament passes Bank of England and Financial Services Act 2016

The UK Parliament has passed the Bank of England and Financial Services Act 2016, which is intended to strengthen the Bank of England's (BoE's) governance and accountability and to ensure it is better equipped to fulfil its role of overseeing the UK's monetary policy and financial stability.

The Act includes the following measures:

- ending the subsidiary status of the Prudential Regulation Authority (PRA) and moving its functions fully within the BoE under a new Prudential Regulation Committee;
- allowing the National Audit Office to undertake value for money reviews of the BoE;
- updating resolution planning and crisis management arrangements between the BoE and Treasury;
- giving the Treasury new powers to help challenge illegal money lending;
- extending the Senior Managers and Certification regime to all authorised persons, to ensure senior managers can be held accountable for failings;
- reducing the number of monetary policy committee meetings from twelve to eight a year, in line with the frequency of the Federal Reserve and the European Central Bank meetings; and
- promoting diversity in the banking sector by seeking to ensure that regulators take into account different business models as part of their competition objectives.

Dutch Ministry of Finance consults on tightened rules for corporate services providers

The Ministry of Finance has issued for consultation a draft legislative proposal which, once adopted in final form, would replace the current Dutch Trust Offices Supervision Act. The draft proposal aims to further regulate the corporate services sector, by setting stricter compliance standards for corporate services providers (known in the Netherlands as 'trust offices' (trustkantoren)), and providing for a greater array of supervisory tools. The broader goal is contributing to the battle against money laundering. The proposed amendments follow new insights from daily supervisory practice, but also changes in the international and European frameworks, such as the recommendations from the Financial Action Task Force (FATF) and the fourth Anti-Money Laundering Directive.

The main changes include:

- that the standards on sound and controlled operations are brought in line with standards for other regulated entities (e.g. banks and insurance companies); and
- a requirement for at least two day-to-day policy makers.

The consultation document also provides for the introduction of a legal basis to prohibit services rendered in connection with certain specific structures. The proposed changes will in principle have to be elaborated through lower regulations; these will be subject to consultation in a later stage.

Comments are invited by 30 May 2016.

Ministerial order on amendments to AMF General Regulation published

A Ministerial order dated 6 April 2016 and approving the following five main amendments to Books II, III and IV of the General Regulation of the Autorité des marchés financiers (AMF) has been published in the French Journal Officiel:

- finalising the implementation in France of Directive 2014/91/EU on undertakings for collective investment in transferable securities (UCITS V) by aligning the regime applicable to depositories of UCITS, remuneration policies for UCITS management companies and information to investors in relation thereto, with that applicable under the Alternative Investment Fund Managers Directive (AIFMD);
- coordinating provisions in Book III with Delegated Regulation (EU) No 241/2014 of 7 January 2014 supplementing the CRR with regard to regulatory technical standards for own funds requirements for institutions, and specifying own funds requirements for management companies;
- allowing professional specialised investment funds, real estate collective investment undertakings and professional private equity funds which are authorised as European Long-Term Investment Funds (ELTIF) under Regulation (EU) 2015/760 of 29 April 2015, to be open to retail investors;
- defining 'money market' and 'short-term money market' UCITS and AIFs; and
- clarifying article 221-1 by deleting reference to article L. 233-7, III of the French Commercial Code, and specifying the scope of regulated information regarding thresholds which applies only to information relating to the shareholding threshold which must be transmitted to the AMF.

CNMV issues circular on accounting rules, annual accounts, public financial statements and statistical information of securitisation funds

The Spanish Securities Exchange Commission (CNMV) has issued Circular 2/2016, of 20 April, on the accounting rules, annual accounts, public financial statements and statistical information of securitisation funds.

Pursuant to Law 5/2015, of 27 April, on Business Financing Promotion and in order to comply with the information requirements established in that law, the CNMV is authorised to determine the form, content and conditions for the elaboration and publication of the information to be published by a securitisation fund. Likewise, the CNMV may establish an additional obligation to include other relevant information in annual reports and may establish and amend the accounting rules and templates to be used in financial statements.

Circular 2/2016 develops the content, form and conditions of elaboration and publication of the information requirements according to the Commerce Code (Código de Comercio) and the General Accounting Plan (Plan General de Contabilidad) approved by Royal Decree 1514/2007.

Among other measures, the Circular:

- repeals CNMV Circular 2/2009 of 25 March on the accounting rules, annual accounts, public financial statements and statistical information of securitisation funds;
- includes a more detailed breakdown of the information, incorporating determined charts providing additional data complementing the necessary information framework for investors; and
- incorporates the ECB initiatives for better supervision and control of securitisation funds, including statistical information to be sent quarterly by the management companies of such funds.

CNMV circular on fees information booklets and content of standard form contracts published

The CNMV has issued a Circular amending CNMV Circular 7/2011 on fees information booklets and on the content of standard form contracts. The purpose of the Circular is to amend the regulation of transfer fees in Circular 7/2011 by amending its calculation base and by enabling the possibility of charging the transfer fees charged by the registry and liquidation systems.

The Circular entered into force on 1 May 2016. Fees information booklets adapted to this Circular shall be delivered to CNMV before 1 September 2016 and shall enter into force on or before 1 October 2016.

CSSF and Luxembourg Resolution Board issue circular on raising of 2016 ex ante contributions to Single Resolution Fund

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF) and the Luxembourg Resolution Board (Conseil de Résolution) have issued Circular 16/1, providing information on and announcing the raising of the 2016 ex ante contributions required to be transferred under Article 69 and 70 of the Single Resolution Mechanism (SRM) Regulation (EU) No 806/2014 to the Single Resolution Fund (SRF).

Pursuant to the Luxembourg law of 18 December 2015 implementing the agreement on the transfer and mutualisation of contributions to the SRF, all credit institutions subject to the SRM Regulation have to transfer, upon instruction by the CSSF, the amounts determined by the Single Resolution Board (SRB) for each credit institution concerned to an account of the Luxembourg Resolution Fund (Fonds de résolution Luxembourg) (LRF). The LRF will in turn transfer the collected amounts to the SRF. The amounts are due by 6 June 2016. Individual invoices are sent out by the CSSF to the relevant credit institutions.

The circular further provides technical details on the computation of the amounts due and the use of irrevocable payment commitments upon request by an institution in lieu of cash contributions.

HKEX consults on proposed revision to stock option position limit model

Hong Kong Exchanges and Clearing Limited (HKEX) has published a consultation paper on the proposed revision of the stock option position limit (SOPL) model for its derivatives market. The proposal is intended to address the technical deficiency in the existing SOPL regime and improve the efficiency of the market. HKEX believes the implementation of the proposal would align Hong Kong's SOPL regime with international practices and ensure the relevance of individual position limits in the long run.

The key proposed changes for the SOPL model are:

- a three-tier framework to address the de facto single position limit issue – a contract equivalent number will be calculated for each stock option class based on the underlying stock's market capitalisation and liquidity and other factors. Each stock option class will be assigned to one of three tiers comprising limits of 50,000, 100,000 and 150,000 contracts based on the contract equivalent number; and
- regularly scheduled reviews – the position limits for all stock option classes will be reviewed annually and adjusted when necessary to ensure they remain in line with the market's development.

Comments on the consultation paper are invited by 3 June 2016.

MAS launches consultation on proposed legislative amendments to enhance resolution regime for financial institutions in Singapore

The Monetary Authority of Singapore (MAS) has published its responses to the feedback it received on its June 2015 consultation on proposed enhancements to the resolution regime for financial institutions in Singapore. Also, to effect the policy proposals set out in its June 2015 consultation paper, the MAS has launched a further consultation on the draft legislative amendments for enhancing the resolution regime.

The MAS will be amending the Monetary Authority of Singapore Act (MAS Act) to strengthen its powers to resolve distressed financial institutions while maintaining continuity of their critical economic functions. To complement the exercise of resolution powers under the MAS Act, the MAS will be issuing a Notice, as well as Guidelines, on recovery and resolution planning for banks.

The key amendments to the MAS Act include:

- consolidating the MAS' powers to impose recovery and resolution planning (RRP) requirements on pertinent financial institutions and insurers that have been notified by the MAS;
- empowering the MAS to temporarily stay the termination rights of counterparties to financial and non-financial contracts entered into with a pertinent financial institution or insurer over which the MAS has exercised its resolution powers;
- as part of the MAS' statutory bail-in powers, empowering the MAS to write down or convert into equity, all or part of unsecured subordinated debt and unsecured subordinated loans issued or contracted after the effective date of the MAS (Amendment) Bill;

- a framework for the MAS to recognise all or part of a foreign resolution action or to deny cross-border recognition;
- a compensation framework for creditors and shareholders who do not receive under the resolution of a financial institution at least what they would have received had the financial institution been liquidated; and
- empowering the MAS to establish resolution funding arrangements and set out in regulations the mechanics by which a resolution fund will be established and will operate.

The MAS also proposes amendments to the Monetary Authority of Singapore (Control and Resolution of Financial Institutions) Regulations 2013 to include safeguards to ensure that set-off and netting arrangements will not be affected by the exercise of resolution powers under the MAS Act.

Comments on the consultation paper are due by 30 May 2016.

CMA announces changes to its QFI Rules in 2017

The Saudi Capital Market Authority (CMA) has announced that it will make it easier for smaller asset management companies/investment funds to buy, and hold ownership of, Saudi listed shares. At present, a near USD 5 billion assets under management test has been a requirement for qualifying as an Approved Qualified Foreign Financial Institution Client. The rules will be changed before mid-2017 to allow those with as little as one fifth of the current asset test to be approved. Certain asset managers, previously out of scope, such as sovereign wealth funds and university endowments will be allowed to rely on the QFI Rules for the first time.

Foreign investors will be allowed to own greater percentages of single issuers – up to 10% (currently 5%) of their issued share capital with an overall cap of 49% for foreigners. An issuer can prescribe a lower level than 49% in its own bylaws.

The full text of the changes and their effective date will not be published until as late as 30 June 2017.

CMA announces move from T+Zero to T+2 for Tadawul's securities settlement system

The CMA has approved a proposal from the Tadawul (the Saudi Stock Exchange) to move in the first half of 2017 from its current T+0 settlement cycle to the preferred global standard of T+2. This step aims, in due course, to improve the status of the Saudi stock market for inclusion in key financial market indices.

CMA announces introduction of regulations to permit securities lending and covered short selling of Saudi listed shares

To facilitate T+2 settlement on the Tadawul, the CMA has announced that it will publish regulations in the first half of 2017 governing securities lending and covered short selling of Saudi listed shares.

PBoC expands macro-prudential management of cross-border financing nationwide

On 25 January 2016, the People's Bank of China (PBoC) started to apply a macro-prudential management system for cross-border financing (MP Financing Management System) on a pilot basis to non-financial enterprises registered in four free trade zones (FTZs) in Shanghai, Tianjin, Guangzhou and Fujian respectively, as well as 27 designated banks (see Circular Yin Fa [2016] No. 18).

With the issuance of the new 'Circular on Implementing Overall Macro-prudential Management System for Nationwide Cross-border Financing, the PBoC has expanded the MP Financing Management System nationwide as of 3 May 2016. The new Circular is mainly consistent with the Circular Yin Fa [2016] No. 18, but includes the following new developments:

- in addition to the same 27 banks and FTZ enterprises, the new Circular expanded the MP Financing Management System to all non-financial enterprises (exclusive of government financing platforms and real estate enterprises) and other financial institutions in China;
- it is clarified that the calculation of risk-weighted cross-border financing cap limit is based on the net assets (for non-financing enterprises), on Tier 1 capital (for banking financial institutions), or on paid-in capital plus capital reserves (for non-banking financial institutions); and
- the product-type risk factor for calculating risk-weighted cross-border financing balance of off-balance-sheet financing or contingent debt has been changed to 1 (0.2 or 0.5 under Circular Yin Fa [2016] No. 18). However, the fair value should be used for certain contingent debts (i.e. Nei Bao Wai Dai or derivatives for client hedging) and contingent debts arising from transactions in the international financial market by financial institutions.

Federal Reserve approves proposed joint agency notice implementing incentive compensation provisions of Dodd Frank Act

The Federal Reserve Board (FRB) has approved a notice of proposed rulemaking to implement the incentive compensation provisions of section 956 of the Dodd Frank Wall Street Reform and Consumer Protection Act.

This is a re-proposal of a joint proposed rule to implement Section 956 published on 14 April 2011. Section 956 generally requires the issuance of joint regulations or guidelines:

- prohibiting incentive-based payment arrangements that encourage inappropriate risks by certain financial institutions by providing excessive compensation or that could lead to material financial loss; and
- requiring those financial institutions to disclose information concerning incentive-based compensation arrangements to the appropriate Federal regulator.

The proposal will be issued jointly by the FRB, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Agency (FHFA), the National Credit Union Administration (NCUA), and the Securities and Exchange Commission (SEC). Publication in the Federal Register of the preamble and proposed rule will be deferred to allow all of the agencies to review the proposal.

Federal Reserve approves net stable funding rule for biggest banks

Following the 26 April 2016 approval by the FDIC and the OCC of a proposal to implement a net stable funding ratio (NSFR) requirement for large and internationally active banking organizations, the FRB has also approved the proposal.

The NSFR requirement would apply to banking organizations with more than USD 250 billion in assets and USD 10 billion in foreign exposures. Under the NSFR requirement, a covered banking organization would calculate a weighted measure of its available stable funding amount (ASF amount) over a one-year time horizon. The proposed rule would require a covered banking organization's ASF amount to be greater than or equal to a minimum level of stable funding calculated based on the liquidity characteristics of its assets, derivative exposures, and commitments over the same one year time horizon.

The Federal Reserve Board Notice has been published in the Federal Register. Comments on the proposed rulemaking must be received by 5 August 2016.

Federal Reserve proposes rule to require inclusion of contractual resolution stays in qualified financial contracts

The FRB has proposed a rule that would require US global systemically important banking institutions (GSIBs) and the US operations of non-US GSIBs to include provisions in their financial contracts meant to prevent the immediate cancellation of the contracts if the firm enters bankruptcy or a resolution process. The proposed rule would apply to so-called qualified financial contracts (QFCs), which generally include swaps, repo and reverse repo transactions, securities lending and borrowing transactions, commodity contracts, and forward agreements to which a covered entity is a party. A QFC that is modified by the International Swaps and Derivatives Association (ISDA) 2015 Resolution Stay Protocol would satisfy the requirements of the proposed rule.

This proposal is meant to improve the orderly resolution of a GSIB by limiting disruptions to a failed GSIB through its financial contracts with other companies.

Public comments on the proposal will be accepted until 5 August 2016.

CLIFFORD CHANCE BRIEFINGS

European Parliament adopts text of EU benchmarks regulation

The European Parliament has now adopted the text of the proposed Regulation on indices used as benchmarks in financial instruments and financial contracts. The new Regulation aims to curb conflicts of interest in setting benchmarks and will impose new requirements on firms that provide, contribute to or use a wide range of interest rate, currency, securities, commodity and other indices.

This briefing paper discusses the next steps in the legislative process and the timing for implementation and comments on significant changes made by the text approved by the Parliament compared to the final compromise text published in December 2015.

http://www.cliffordchance.com/briefings/2016/05/european_parliamentadoptstextofeubenchmark.html

Anti-Bribery and Corruption Review

Prosecutions for bribery and corruption continue to attract media headlines around the world and, in response, international companies continue to review what they have to do to address the risks to their business, and to their reputation. Fundamental to this is staying on top of relevant legislative developments and enforcement trends in the countries in which they operate. Some national authorities have even highlighted this information gathering as a regulatory requirement for directors and senior corporate officers.

The Anti-Bribery and Corruption Review looks at recent developments in some of the jurisdictions around the world where we have offices, focusing particularly on changes to legislation, both recent and proposed, and on prosecutions and enforcement trends. We intend to produce updates at regular intervals.

http://www.cliffordchance.com/briefings/2016/05/anti-bribery_andcorruptionreview-may20160.html

Italian Government launches new urgent measures aimed at boosting access to financing for Italian businesses and improving bankruptcy and enforcement proceedings in Italy

Following the 2015 reforms introducing key amendments to shorten the length of Italian enforcement procedures and other relevant changes to Italian insolvency law, in its press release issued on 29 April 2016, the Italian Government announced further measures aimed at supporting Italian businesses and reducing the length of time required to satisfy creditors' claims, as well as introducing a new type of 'Italian floating charge' and other improvements to Italian insolvency law.

This briefing paper discusses relevant provisions based on the information available from the press release. Further details will become clearer once the decree approved by the Italian Government is published in the Italian Official Gazette.

http://www.cliffordchance.com/briefings/2016/05/italian_governmentlaunchesnewurgentmeasure.html

BGH – Third pillar of advisor liability

Swap case law at the German Federal Court of Justice (Bundesgerichtshof, BGH) is on the move again and is establishing a system of liability for banks providing investment advice that now rests on three pillars. The familiar obligations to provide investor-oriented and investment-specific advice have been joined by a third obligation to disclose concealed conflicts of interest on the part of the advisor (integrity-oriented advice). An obligation of this nature had already been postulated in the 'kickback case law' (case references XI ZR 56/05, XI ZR 204/12, XI ZR 147/12); the BGH is now generalising it in its third swap judgment (XI ZR 278/13) and fourth swap judgment (XI ZR 425/14).

However, the BGH is squandering the legal certainty that was probably its objective in making this generalisation due to a lack of a practicable definition of concealed conflict of interest. It is therefore obvious to assume that the BGH is pursuing a legislative policy by, as it were, banning some derivatives transactions through excessive protection of bank customers from speculation. At any rate the BGH's third swap judgment excludes 'connective' swaps that provide protection against an existing risk to the customer from the disclosure obligation regarding the initially negative market value of the swap contract. The fourth swap judgment finally specifies what the BGH understands by such 'connective' swaps.

This briefing paper discusses the new BGH decisions on swaps.

http://www.cliffordchance.com/briefings/2016/05/bgh_third_pillarofadvisorliability.html