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Briefing note

International Regulatory Update

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If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

Chris Bates +44 (0)20 7006 1041

Nick O'Neill +1 212 878 3119

Marc Benzler +49 69 7199 3304

Steven Gatti +1 202 912 5095

Mark Shipman + 852 2826 8992

Donna Wacker +852 2826 3478

International Regulatory Update Editor

Joachim Richter +44 (0)20 7006 2503

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street, London, E14 5JJ, UK
www.cliffordchance.com

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- Recent Clifford Chance briefings: Capital requirements for MiFID investment firms; and more. Follow this link to the briefings section. Follow this link to the briefings section.

Prospectuses: EU Council agrees negotiating stance

The Permanent Representatives Committee (Coreper) has, on behalf of the EU Council, agreed a negotiating stance on new rules on prospectuses for the trading of securities. The draft Prospectus Regulation sets out to simplify administrative obligations related to the publication of prospectuses in a manner that still ensures that investors are well informed. The Council will confirm the Coreper's agreement at a meeting on 17 June 2016, before negotiations with the EU Parliament.

MiFID2: EU Parliament plenary adopts amendments

The EU Parliament's plenary session has approved the EU Commission's proposal to delay the application of MiFID2/MiFIR by one year. The Parliament has also adopted amendments to the Level 1 MiFID2 text in relation to:

- a specific transparency regime for packaged transactions;
- a clarification for the own account exemption; and
- exempting securities financing transactions from MiFID2 transparency rules.

The adopted text still needs to be approved by the EU Council before it is published in the Official Journal.

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

Commission Implementing Regulation (EU) 2016/892 extending 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 Implementing Regulation extends the transitional period for a further six months. It now expires on 15 December 2016.

The Implementing Regulation entered into force on 11 June 2016.

BRRD: Commission Implementing Regulation on description of group financial support agreements published in Official Journal

Commission Implementing Regulation (EU) 2016/911 laying down implementing technical standards with regard to the form and the content of the description of group financial support agreements in accordance with the Bank Recovery and Resolution Directive (BRRD) has been published in the Official Journal.

The BRRD sets out rules on group financial support agreements to allow transfers of funding in a situation where a group entity is in severe distress. The Implementing Regulation sets out the information to be disclosed in relation to group financial support agreements, such as the maximum amount of support, the principles for calculation of the consideration for the provision of the support, a general description of the maturity profile and the maximum term of loans provided as support.

The Implementing Regulation will enter into force on 30 June 2016.

MiFID2: EU Commission adopts RTS

The EU Commission has adopted four Delegated Regulations under MiFID2 setting out regulatory technical standards (RTS) on:

- requirements to ensure fair and non-discriminatory co-location services and fee structures. These RTS are based on the final draft RTS 10 published by the European Securities and Markets Authority (ESMA) in September 2015 and specify, among other things, requirements for fair and non-discriminatory treatment in terms of services, fees and transparency requirements and also specify prohibited fee structures, which by their nature are considered to be conducive to disorderly trading conditions;
- the level of accuracy of business clocks (RTS 25). Article 50(1) of MiFID2 requires Member States to oblige all trading venues and those accessing the venues to trade to synchronise the business clocks they use to record the date and time of any reportable event. The draft RTS specify the level of accuracy to be used for clock synchronisation across all trading venues and their members or participants in the EEA according to international standards;
- the data to be published by execution venues on the quality of execution of transactions in order to provide investment firms and investors with relevant metrics to

help them determine the best way to execute client orders (RTS 27); and

- standards for the annual publication by investment firms of information on the identity of execution venues and on the quality of execution, including the content and the format of information to be published in relation to client orders executed on trading venues, systematic internalisers, market makers or other liquidity providers or entities that perform a similar function to those performed by any of the foregoing in a third country (RTS 28).

EMIR: EU Commission adopts Delegated Regulation on clearing obligation

The EU Commission has adopted a draft Delegated Regulation under EMIR determining the classes of the interest rate swaps (IRS) in several non-G4 European currencies (Norwegian Krone, Swedish Krona, and the Polish Zloty) OTC derivative contracts that are subject to the clearing obligation and different categories of counterparties for which different phase-in periods apply. The Delegated Regulation also lays down the minimum remaining maturities for the purposes of the frontloading requirement as well as the dates on which the frontloading should start.

BRRD: EU Commission adopts RTS on detailed records of financial contracts

The EU Commission has adopted a draft Delegated Regulation setting out RTS on requirements for a minimum set of information on financial contracts and the circumstances in which the requirement should be imposed under the BRRD.

In particular, the RTS specify that an institution or relevant entity shall be required to maintain detailed records of financial contracts where, pursuant to the applicable resolution plan or the group resolution plan, it is foreseen that resolution actions would be applied to the institution or entity concerned should the relevant conditions for resolution be satisfied.

The RTS are intended to ensure that the necessary information is collected in advance for institutions likely to be subject to an application of the resolution actions and made available to competent authorities and resolution authorities if needed.

EU Commission consults on evaluation of Financial Conglomerates Directive

The EU Commission has launched a public consultation on the Financial Conglomerates Directive (FICOD) and its implementation to date. The consultation is part of the evaluations the Commission is carrying out under its Regulatory Fitness and Performance Programme (REFIT).

The evaluation will look at whether the current FICOD regulatory framework is proportionate and fit for purpose, and delivering on its objective to identify and manage group risks, and in particular whether FICOD has:

- contributed to enhanced financial stability;
- safeguarded creditors' and policyholders' interests; and
- promoted the competitiveness of financial conglomerates within the EU and at international level.

The evaluation will assess the relevance, effectiveness, efficiency, coherence and EU added value of the legislation, but will not consider possible future changes to the legislation. If required, this would be done in a separate impact assessment.

Comments are due by 20 September 2016.

ELTIF Regulation: ESMA publishes draft RTS

The European Securities and Markets Authority (ESMA) has published its final report on draft RTS under the European Long-term Investment Fund (ELTIF) Regulation. ESMA's key proposals include:

- criteria to determine the circumstances in which the use of financial derivative instruments solely serves hedging purposes;
- that the life of an ELTIF should be determined with reference to the individual asset within the ELTIF portfolio which has the longest investment horizon;
- the criteria for the valuation of the ELTIF assets ahead of their divestment, which specify the timing of the valuation and allow for valuations made under the Alternative Investment Fund Managers Directive (AIFMD) to be taken into account; and
- a grandfathering provision which allows ELTIFs one year after the RTS come into force to comply with the rules.

ESMA's delivery of its RTS on the cost disclosure information which must be included in the ELTIF's prospectus has been postponed following discussion with the EU Commission in order to take into account the work being done on cost disclosures under the Packaged Retail

and Insurance-based Investment Products (PRIIPs) Regulation.

The RTS set out in the final report have been submitted to the EU Commission for endorsement. A decision by the EU Commission on whether to endorse the RTS should be taken within three months from the date of submission.

EMIR: ESMA and CFTC conclude memorandum of understanding on CCPs

ESMA and the US Commodity Futures Trading Commission (CFTC) have concluded a memorandum of understanding (MoU) regarding CCPs in the United States that have applied or may apply for recognition under EMIR. The signed MoU has been published on ESMA's website.

EMIR provides for cooperation arrangements between ESMA and the relevant non-EU authorities whose legal and supervisory framework for CCPs have been deemed equivalent to EMIR by the EU Commission.

The MoU is effective from 2 June 2016.

EMIR: ESMA publishes updated Q&A

ESMA has published an updated questions and answers document on the implementation of EMIR. This update includes new answers in relation to the clearing obligation, specifically on the self-categorisation that is necessary in order to establish which counterparties belong to which categories, and clarifications on how counterparties should manage situations where some of their counterparties have not provided the information on the category they belong to.

Polish Ministry of Finance presents bill on mortgage loans

The Ministry of Finance has presented a bill on mortgage loans, the main purpose of which is to implement the Mortgage Credit Directive. The bill provides for comprehensive regulation in respect of loans relating to residential immovable property and, at the same time, it amends the Consumer Credit Act.

Among other things, the following amendments should be emphasised:

- under the bill, it will be possible to grant consumer credit in a foreign currency, but only on condition that the greater part of the client's income or assets is also denominated in that currency;
- it will be possible for a credit institution granting mortgage loans to carry out activity only in the form of a limited liability company (spółka z ograniczoną odpowiedzialnością) or a joint-stock company (spółka akcyjna). The share capital must be no lower than PLN 5 million and it may not be contributed solely in cash;
- activity as a lending institution granting mortgage loans will be regulated and will require authorisation from by the Polish Financial Supervision Authority; and
- it is proposed to prohibit tying lending with the sale of other financial services, with the exception of opening a payment or savings account operated free of charge, but only for purposes related to the loan.

The bill has been submitted for public consultation.

Polish Council of Ministers adopts amendment to Act on Payment Services

The Council of Ministers has adopted the draft Act Amending the Act on Payment Services, the aim of which is to adapt the national regulations concerning payment transactions completed with the use of payment cards to the provisions of the EU Regulation on interchange fees for card-based payment transactions.

The amended Act will set out the basic rules of the functioning of the domestic market for payment transactions completed using payment cards and the rules of the functioning of payment schemes and supervision over those schemes.

Pursuant to the draft Act, supervision over the functioning of payment schemes (excluding supervision over issuers of payment instruments and paying agents, who are supervised by the PFSA) will be carried out by the President of the National Bank of Poland.

The draft Act also introduces sanctions for non-compliance with the provisions of the Regulation.

MAS consults on FinTech regulatory sandbox guidelines

The Monetary Authority of Singapore (MAS) has launched a consultation on proposed guidelines for a 'regulatory sandbox' that will enable financial institutions as well as non-financial players to experiment with financial technology (FinTech) solutions.

The regulatory sandbox will enable financial institutions or any interested firms to experiment with innovative FinTech solutions in an environment where actual products or services are provided to the customers but within a well-defined space and duration. For the duration of the regulatory sandbox, the MAS will relax specific regulatory

requirements which an applicant would otherwise be subject to.

The MAS proposes that applications for solutions to be tested in the regulatory sandbox be assessed on criteria such as the extent of innovativeness of the FinTech solution, whether the applicant has the intention and ability to deploy the solution in Singapore on a broader scale, as well as whether the solution brings benefits to consumers and/or the industry.

Interested firms are encouraged to approach the MAS to discuss how their innovative FinTech solutions can be launched in the regulatory sandbox, even while the proposed guidelines are being consulted on and finalised.

Comments on the consultation are due by 8 July 2016.

MAS to improve access to crowdfunding for start-ups and SMEs

The MAS has published its responses to the feedback received on its February 2015 consultation on facilitating securities-based crowdfunding, and has announced that it will make it easier for start-ups and small and medium enterprises to access securities-based crowdfunding (SCF) in two ways.

First, the MAS will make it easier for SCF platform operators to rely on the existing regulatory framework for small offers, to raise funds through SCF including from retail investors. For such platform operators, the MAS will simplify the pre-qualifications that currently allow issuers raising less than SGD 5 million within twelve months to do so without having to issue a prospectus. As a safeguard for investors, the MAS will require these SCF platform operators to document and disclose the key risks of SCF investments and obtain investors' acknowledgement that they have read and understood these risks.

Secondly, the MAS will reduce the financial requirements for SCF platform operators who want to raise funds through SCF only from accredited and institutional investors. The MAS will ease the financial requirements for these platform operators to be licensed as dealing intermediaries, as long as they do not handle or hold customer monies, assets or positions, and do not act as principal against their customers. Both the base capital requirement and minimum operational risk requirement for such intermediaries will be reduced from SGD 250,000 to SGD 50,000. The requirement for a SGD 100,000 security deposit will also be removed. According to the MAS, this will allow more qualifying SCF platform operators to operate in this restricted space and takes into account the limited systemic and business conduct risks posed by such intermediaries.

Amendment to Bankruptcy Act allowing small to medium sized enterprises to enter into business rehabilitation announced

An amendment to the Thai Bankruptcy Act B.E. 2483 (1940) has been announced. The amendment creates a new section in the Bankruptcy Act which permits small to medium sized enterprises (SMEs) to enter into business rehabilitation. SMEs which conduct SME business in accordance with the SMEs Promotion Act, B.E. 2543 (2000) are eligible. The eligible SMEs may be operated by individuals, partnerships (both registered and non-registered), private limited companies as well as groups of persons. The debt threshold for SMEs to enter rehabilitation is Baht 2,000,000 for individuals and Baht 3,000,000 for others compared with the debt threshold of Baht 10,000,000 for normal rehabilitation. The process for SMEs should be faster as the rehabilitation plan must be accomplished within 3 years which, generally, cannot be amended or extended.

Korean Government announces measures for recapitalisation of state-run banks

The Korean Government and the Bank of Korea (BoK) have announced their decision to boost capital at two state-run banks – the Korea Development Bank (KDB) and the Export-Import Bank of Korea (KEXIM) – to fund restructuring of shipping and shipbuilding companies. The government estimates that the amount of additional capital that state lenders would need ranges from KRW 5 to 8 trillion. The estimation has been made on the assumption that KDB and KEXIM would meet the BIS capital ratios of 13% and 10.5% respectively under Basel III and simulated various scenarios for restructuring of cyclically sensitive sectors including shipping and shipbuilding industries.

The government has outlined a basic framework for recapitalisation, in which the government will directly inject KRW 1 trillion of capital into KEXIM, and the government and the BoK will jointly create a Recapitalisation Fund of KRW 11 trillion. The Recapitalisation Fund, which consists of KRW 10 trillion from the BOK and KRW 1 trillion from the IBK, will purchase contingent convertible bonds from KDB and KEXIM. The Recapitalisation Fund is scheduled to launch in July 2016 and run by the end of 2017.

NDRC implements pilot programs to further reform foreign debt administration

The National Development and Reform Commission (NDRC) has implemented two pilot programs with a view to further reforming the foreign debt administration regime, which covers 21 selected pilot enterprises and six provinces/cities where the four free trade zones are located.

As a pilot programme, the NDRC has allocated an annual quota for each pilot enterprise which can be used for the group companies of the pilot enterprise. Within the annual quota, pre-filing with NDRC is no longer required, and a pilot enterprise can have more discretion to borrow foreign debts (including bonds and loans with a term of more than one year) in terms of both timeframe and financing amount. However, the NDRC requires post-filing of the relevant information in a timely manner. Among other things, the NDRC also requires pilot enterprises to use financial derivatives prudently to manage risk exposures in an effective manner.

The NDRC has also implemented another pilot programme in Shanghai, Tianjin, Fujian, Guangdong, Xiamen and Shenzhen (i.e. where the four free trade zones are located). Within the regional aggregate quota, an enterprise registered in these six provinces/cities, except for central state-owned enterprises (including financial institutions), should complete the foreign debt (including bonds and loans with a term of more than one year) filing with the corresponding local branch of the NDRC, which will issue the foreign debt filing certificate. The corresponding local branches of the NDRC are required to formulate implementing rules for this pilot programme together with local financial regulators.

Under both pilot programmes, the NDRC encourages onshore entities to borrow foreign debt directly and utilise the proceeds onshore to support the real economy in line with China's industrial policies.

Securities and Futures (Amendment) Ordinance 2016 gazetted

The Hong Government has gazetted the Securities and Futures (Amendment) Ordinance 2016, which enables the introduction of a new open-ended fund company (OFC) structure in Hong Kong. Currently, an open-ended investment fund may be established under the laws of Hong Kong in the form of a unit trust, but not in corporate form due to various restrictions on capital reduction under the Companies Ordinance.

The Amendment Ordinance mainly amends the Securities and Futures Ordinance (SFO) to provide for a legal framework for the registration and incorporation of OFCs and the regulation of such companies and their businesses. Its main provisions will commence operation on a date to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

An OFC is an open-ended collective investment scheme set up in the form of a company, but with the flexibility to create and cancel shares for investors' subscription and redemption in the funds, which is currently not enjoyed by conventional companies. Also, OFCs will not be bound by restrictions on distribution out of share capital applicable to companies formed under the Companies Ordinance, and instead may distribute out of share capital subject to solvency and disclosure requirements.

Given that OFCs are set up as an investment fund vehicle, the Securities and Futures Commission (SFC) will be the primary regulator responsible for the registration and regulation of OFCs under the SFO. The Companies Registry will be responsible for the incorporation and statutory corporate filings of OFCs.

The detailed operational and procedural matters will be set out in a new piece of subsidiary legislation, the OFC Rules, to be made by the SFC under the SFO.

SEC requests comments on FAST Act amendment that permits 10-K summary

The Securities and Exchange Commission (SEC) has adopted an interim final rule to implement a FAST Act amendment permitting issuers to include a summary within Form 10-K, as long as each item on the summary includes a cross-reference and hyperlink to the related material in Form 10-K.

The interim final rule amends Part IV of Form 10-K to add new Item 16, which will expressly allow an issuer, at its option, to include a summary in its Form 10-K, as long as each summary topic is hyperlinked to the related, more detailed disclosure item in the Form 10-K.

Issuers can decide whether to include a summary and may also be selective in choosing which items to summarize, as long as the information is presented fairly and accurately. Issuers electing to prepare a Form 10-K summary that discusses information that is incorporated by reference into the Form 10-K, and for which an exhibit is filed with the form, must include a hyperlink from the summary to the discussion in the accompanying exhibit.

In addition, an issuer choosing to include a summary can only summarize information that is included or incorporated by reference in the Form 10-K at the time it is filed. The issuer cannot summarize and need not update the summary to reflect information required by Part III of Form 10-K that the registrant incorporates by reference from a proxy or information statement filed after the Form 10-K, but must state in the summary that the summary does not include Part III information because that information will be incorporated by reference from a later filed proxy or information statement involving the election of directors.

The interim final rule takes effect upon its publication in the Federal Register. The SEC is accepting comments on the rule until 30 days after publication in the Federal Register.

SEC adopts rules on trade acknowledgment and verification for security-based swap transactions

The SEC has adopted a final version of rules intended to establish timely and accurate trade acknowledgment and verification requirements for security-based swap (SBS) entities that enter into SBS transactions. Under the new rules, SBS entities must provide a trade acknowledgment that contains all of the terms of the transaction. SBS entities will be required to:

- provide a trade acknowledgment electronically to their transaction counterparty promptly, and no later than the end of the first business day following the day of execution;
- promptly verify or dispute with their counterparty the terms of a trade acknowledgment it receives; and
- have written policies and procedures in place that are reasonably designed to obtain verification of the terms outlined in any trade acknowledgment that they provide.

In addition, an exemption from the requirements of Exchange Act Rule 10b-10 may be provided for broker-dealers who are SBS entities and who satisfy the trade acknowledgment and verification requirements in the final rules. The rules also address the potential availability of substituted compliance in connection with these requirements.

The rules will become effective 60 days after publication in the Federal Register, which is expected shortly.

CLIFFORD CHANCE BRIEFINGS

New product documentation for Wiqayah Min Taqallub As'aar Assarf (Islamic Foreign Exchange Forwards)

6 June 2016 marked the latest step in the development of standardised documentation for the Islamic finance industry with the publication by the International Swaps and Derivatives Association, Inc. (ISDA) and the International Islamic Financial Market (IIFM) of two template product documents for Wiqayah Min Taqallub As'aar Assarf (Islamic Foreign Exchange Forwards), each designed to be used with the ISDA/IIFM Tahawwut Master Agreement.

The ISDA/IIFM Tahawwut Master Agreement (TMA) was published in early 2010, followed by templates for Mubadalatul Arbaah (profit rate swaps) and Himaayah Min Taqallub As'aar Assarf (Islamic cross currency swaps). 6 June 2016 saw the publication of two template product documents for Wiqayah Min Taqallub As'aar Assarf (Islamic Foreign Exchange Forwards) (IFXs), thereby responding to the needs identified by market participants to facilitate access to and hedging in respect of foreign currencies.

This briefing discusses the new templates.

https://www.cliffordchance.com/briefings/2016/06/new_product_documentationforwiqayahmi.html

Capital requirements for MiFID investment firms – all change?

In a December 2015 report the European Banking Authority (EBA) recommended significant changes to the EU's regulatory capital rules for MiFID investment firms. The proposed changes are relevant to asset managers and a wide range of other non-bank investment firms. The report criticised the current legal framework as overly complex and recommended replacing it with a simpler, more proportionate system that better reflects the different risk profile of investment firms compared to banks. The report's main focus was on the framework for establishing prudential requirements for investment firms rather than the eligibility of different instruments to satisfy those requirements.

This briefing discusses the report's recommendations.

https://www.cliffordchance.com/briefings/2016/06/capital_requirementsformifidinvestmentfirms.html

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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