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Briefing note

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BRRD: RTS on business reorganisation plans and on valuation of liabilities arising from derivatives published in Official Journal

The following Level 2 Acts under the Bank Recovery and Resolution Directive (BRRD) have been published in the Official Journal:

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- Commission Delegated Regulation (EU) 2016/1400 on regulatory technical standards specifying the minimum elements of a business reorganisation plan and the minimum contents of the reports on the progress in the implementation of the plan; and
- Commission Delegated Regulation (EU) 2016/1401 on regulatory technical standards for methodologies and principles on the valuation of liabilities arising from derivatives.

Both Delegated Regulations will enter into force on 12 September 2016.

FSB reports on implementation of reforms to OTC derivatives market and on removal of barriers to trade reporting

The Financial Stability Board (FSB) has published two reports on the derivates market and trade reporting.

The report on the OTC derivatives market reviews the implementation of reforms agreed by the G20. Trade reporting requirements for OTC derivatives and higher capital requirements for non-centrally cleared derivatives (NCCDs) are mostly in force and central clearing frameworks are being implemented. The report finds however, that most jurisdictions will not have margin requirements for NCCDs in force in accordance with the internationally agreed implementation schedule, and platform trading frameworks are relatively undeveloped in most jurisdictions.

The FSB's report on planned actions to remove legal barriers to reporting complete transaction information to trade repositories and accessing OTC derivatives transaction data finds that significant work still remains to be done across member jurisdictions. The report found that concrete plans to address the barriers had yet to be prepared in some cases. Further planning and implementation will be needed in order to meet the agreed June 2018 deadlines.

The FSB plans to publish further progress reports on both topics in time for the G20 leaders' summit in July 2017.

Correspondent banking: FSB reports to G20

The FSB has published a progress report to the G20 on the FSB action plan to assess and address the decline in correspondent banking, which is being submitted to the G20 leaders' summit in Hangzhou on 4-5 September 2016. The report sets out progress in taking forward the four-point action plan published by the FSB in November 2015, including the progress made by the Correspondent Banking Coordination Group (CBCG), which was established in March 2016.

Among other things, the FSB discusses work by:

- the Committee on Payments and Market Infrastructures (CPMI) on a report setting out recommendations for correspondent banking and identifies that the number of active correspondents has decreased;
- the International Monetary Fund (IMF) on a paper on the withdrawal of correspondent banking relationships; and
- CBCG, which has designed a survey to address remaining data gaps, proposed areas where regulatory expectations should be clarified and is working with affected jurisdictions on conducting risk assessments and developing effective anti-money laundering and countering the financing of terrorism (AML-CFT) frameworks.

The FSB intends to publish a more comprehensive progress report by the end of 2016.

IOSCO publishes report on good practices for collective investment scheme fees

The International Organization of Securities Commissions (IOSCO) has published its final report on good practice for fees and expenses of collective investment schemes (CIS) (FR09/16). The report aims to identify common international examples of good practice that can be applied to CIS fees and expenses.

Regulators believe that high standards of transparency and conduct in the area of fees and expenses should help encourage competition among CIS operators and lead to a more efficient market.

In 2004 IOSCO published a set of standards with respect to CIS fees and expenses to be regarded as good or best practice. In 2015 IOSCO reviewed these standards, covering a wider range of regulatory approaches towards markets at differing stages of maturity and taking into account recent developments in its member jurisdictions.

The 23 examples of good practice set out in the report are not intended to serve as comprehensive requirements for the regulation of fees and expenses, but as examples to help promote greater fairness and transparency in the industry. IOSCO expects that continuing change in the markets will require the examples of good practice to be reviewed and enhanced in the future.

FSMA publishes frequently asked questions on approval of marketing materials

The Belgian Financial Services and Markets Authority (FSMA) has published a set of frequently asked questions (FAQs) about the approval of marketing materials. The FAQs are intended to supplement the existing guidance provided in Circular FSMA_2015_16 on marketing materials.

The FAQs offer practical answers to the most frequently asked questions on the approval process of marketing materials. For instance, the FSMA confirms that for investment funds it is possible to request the approval of templates of marketing material per type of fund (instead of submitting the marketing materials of each compartment or type of fund to the FSMA). The FAQs clarify the circumstances under which marketing materials must be submitted to the FSMA for prior approval. Finally, the FAQs also address other topics such as requirements applicable to purely informational websites and documents provided in the context of investment advice.

FINMA consults on amendment to disclosure of interests regime

The Swiss Financial Market Supervisory Authority (FINMA) has launched a consultation to amend the disclosure of interests regime regarding parties with power to exercise voting rights.

The Financial Market Infrastructure Act (FMIA) and the FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA), which entered into force on 1 January 2016, contained disclosure rules which stipulate that beneficial owners delegating voting rights and parties who have the discretionary power to exercise the relevant voting rights delegated to them (e.g. within the scope of an asset management mandate) are subject to a notification duty. Under the rule, anyone who controls a legal entity either directly or indirectly is deemed to have the discretionary power to exercise voting rights and is therefore also subject to the notification duty.

Stakeholders affected by the notification duty under the rule have reported practical problems with its implementation since its coming into force on 1 January 2016, claiming that it is very laborious for individuals who control financial groups but do not perform any operating function to fulfil the notification duty.

FINMA proposes to amend the rule and reinstate the original wording which was suggested in its 2015 consultation, stipulating that only parties who actually have the discretionary power to exercise voting rights are subject to the notification duty.

The consultation period will end on 3 October 2016.

Asset Management Fund of Turkey established

The Asset Management Fund of Turkey has been established in accordance with the Law on the Establishment of Türkiye Varlık Yönetimi Anonim Şirketi and Amendment of Certain Other Laws for the purposes of contributing to the diversity of capital market instruments, introducing public assets into the economy, outsourcing of resources, managing the fund and other sub-funds for collaborating in large scale investments.

The Asset Management Fund of Turkey has been established under the Prime Ministry with a capital of TRY 50 million to be funded by the Privatisation Fund (Özelleştirme Fonu). The Asset Management Fund of Turkey 's main scope of activity includes:

- sale and purchase of (i) shares of domestic and foreign companies, (ii) debt instruments that are established in Turkey or outside of Turkey, (iii) capital market instruments that are issued based on precious metals and commodities, (iv) fund shares, (v) derivative instruments, (vi) lease certificates, (vii) real estate certificates, (viii) foreign investment instruments that are issued for special purposes, and (ix) other instruments;
- all kinds of transactions within the money market;
- evaluation of real estate and real estate rights and all kinds of non-material rights;
- any kind of project development, providing loans for foreign projects and procurement of resources by other means; and
- any other kinds of commercial and financial activities in primary and secondary national and international markets.

The Asset Management Fund of Turkey can participate in investments to be undertaken by other countries and/or foreign companies in national and international arenas.

MAS publishes Securities and Futures (Amendment) Act 2012 (Commencement) Notification 2016

The Monetary Authority of Singapore (MAS) has published the Securities and Futures (Amendment) Act 2012 (Commencement) Notification 2016. The notification designates 19 August 2016 as the commencement date of

the following sections of the Securities and Futures (Amendment) Act 2012:

- Sections 52 to 55, which relate to the establishment of clearing facilities;
- Sections 57 to 65, which relate to the obligations of approved clearing houses (ACHs);
- Section 66, which relates to the business rules of ACHs;
- Section 71, which relates to the requirement to obtain MAS approval to appoint the chairman, chief executive officer, director or key person of an ACH;
- Section 73, which relates to MAS' additional powers in respect of auditors of an ACH;
- Section 75, which relates to the general obligations of recognised clearing houses (RCHs);
- Section 76, which relates to an RCH's obligation to notify MAS of certain matters; and
- Section 77, which relates to an RCH's obligation in relation to customers' money and assets held by it.

The Securities and Futures (Amendment) Act 2012 was passed in 2012 and has been effected in stages.

MAS postpones implementation of margin requirements for non-centrally cleared derivatives

The MAS has, in consultation with the Hong Kong Monetary Authority, re-considered the timeline for implementation of the margin requirements for non-centrally cleared over-the-counter derivative trades (uncleared derivatives).

Previously the MAS had, in its Policy Consultation on Margin Requirements for Non-Centrally Cleared OTC Derivatives published in October 2015, proposed to phase in the margin requirements for uncleared derivatives from 1 September 2016.

Taking into account cross-border coordination issues as well as the level of industry preparedness, the MAS has concluded that deferring the implementation of margin requirements for uncleared derivatives beyond 1 September 2016 is the most practical way forward at this point in time.

The MAS will issue the final rules on the margin requirements for uncleared derivatives in the coming months and expects financial institutions to continue their preparation for the exchange of margins on uncleared derivatives. The MAS will continue to monitor progress in the implementation schedules of other major markets, and will announce a revised phase-in schedule for Singapore in due course.

MAS sets out strategies for electronic payments in Singapore

The MAS has published a 'Singapore Payments Roadmap', which is a collaborative effort by the MAS and KPMG. In a speech at the Sin Kee Boon Institute for Financial Economics, Ravi Menon, the Managing Director of the MAS, also described ongoing initiatives for swift, simple and secure payments, and enhancing convenience for customers and productivity for businesses.

The Roadmap recommends that the following steps be taken to improve Singapore's payment landscape:

- streamline and strengthen the regulatory framework – the current regulatory regime governing payments and remittances should be streamlined to create a single and modular regime that will be applied on an activity basis, rather than specific payment systems. This would provide the MAS with the flexibility to address emerging risk areas like cyber security and consumer protection, and help promote innovation and encourage non-traditional FinTech players to access the Singapore market and provide a wider spectrum of payment solutions;
- establish a new governance model for payments – the governance model should be strengthened by creating a national payments council, comprising representatives from both users and providers of payment solutions. The payments council would foster innovation, competition and collaboration in the payments industry, including leveraging FinTech, as well as coordinate key initiatives, such as promoting interoperability and adopting common standards; and
- enhance the adoption of electronic payments – several key infrastructure projects being undertaken by the industry have the potential to transform the payment landscape for recurring, retail and peer-to-peer payments, through the implementation of interoperable solutions. These include enabling payments to be made more conveniently through a centralised addressing system and creating a seamless consumer experience with unified point-of-sale payment terminals.

The MAS will be conducting a public consultation on the review of the payments regulatory framework and the proposed payments council shortly.

Revised rules for direct investment by foreign institutional investors in Saudi equities listed on Tadawul to take effect from 4 September 2016

The Capital Market Authority has announced that its revised rules for direct investment by foreign institutional investors in Saudi equities listed on the Saudi Stock Exchange (Tadawul) will take effect from 4 September 2016. The revised rules follow the form of the draft rules published on 21 June 2016 and the substance of the initial announcement of changes made by the Capital Market Authority on 3 May 2016.

Please see our May 2016 briefing paper 'Saudi CMA announces further liberalisation of the Saudi equity market in 2017' for a description of the rules.

Chinese rules on online P2P lending business officially published

Having considered the public comments on a consultation draft released on 28 December 2015, the China Banking Regulatory Commission (CBRC), together with the Ministry of Industry and Information Technology, the Ministry of Public Security and the Cyberspace Administration of China, has promulgated the 'Interim Administrative Measures on Business of Online Lending Information Intermediaries', setting out the regulatory regime for online lending activities (also known as online P2P lending). Among other things, the key aspects of the Measures include the following:

- an online lending intermediary (P2P intermediary) should only engage in lending information intermediary business, such as the collection and publication of lending information, credit evaluation and lending matching, rather than any credit intermediary activities;
- the CBRC and its local bureaus will be supervising online P2P lending business activities, and the local financial services offices will be regulating the P2P intermediaries in their respective jurisdictions and reviewing the registration applications by the P2P intermediaries and their branches;
- a P2P intermediary is strictly forbidden, among other things, to finance the P2P intermediary itself, accept deposits from the public, set up cash pools, offer guarantee or promise principal or interest return to lenders, securitise debt interests, issue or distribute financial products, or provide information services to lenders with high-risk lending purposes (e.g. for shares, futures and derivatives trading);
- client funds intermediated by a P2P intermediary should be custodised by a commercial bank for safekeeping. In order to manage the risk, a borrower's outstanding debt balance through each P2P intermediary and all P2P intermediaries in aggregate should comply with the mandatory upper limits respectively; and
- a P2P intermediary should take measures to protect lenders by carrying out suitability assessments based on risk tolerance and providing proper risk disclosure and risk warnings . The Measures also emphasise data security and information protection. In addition, a P2P intermediary should engage an accounting firm for external auditing, as well as law firms, IT system security rating agencies and other external parties to carry out necessary assessments.

The Measures took effect as of their issuance date (24 August 2016). Existing P2P intermediaries have been granted a transitional period of 12 months to remediate the gap between the current business model and the requirements under the Measures.

Australia delays implementation of margin rules for uncleared derivatives

Margin rules for uncleared derivatives were meant to commence in Australia for all entities regulated by the Australian Prudential Regulation Authority (APRA) other than private health insurers on 1 September 2016 and phased in until September 2020.

APRA has now published a letter addressed to all authorised deposit taking institutions noting that even though it will soon be releasing the final margin rules, the implementation of margin is delayed beyond 1 September 2016 and that APRA will not at this stage set a new commencement date.

The delay is due to the delay in implementation in other major derivatives markets.

OCC proposes mandatory contractual stay requirements for qualified financial contracts

The Office of the Comptroller of the Currency (OCC) has proposed a rule that would require the financial institutions that it regulates (covered banks) to ensure that a covered qualified financial contract:

- contains a contractual stay-and-transfer provision analogous to the statutory stay-and-transfer provision imposed under Title II of the Dodd Frank Wall Street Reform and Consumer Protection Act and in the Federal Deposit Insurance Act (FDIA); and

- limits the exercise of default rights based on the insolvency of an affiliate of the covered bank.

Qualified financial contracts (QFCs) for purposes of this rule would include swaps, other derivative contracts, repurchase agreements, reverse repurchase agreements, and securities lending and borrowing agreements.

The rule would clarify the applicability of US special resolution regimes to all counterparties, including non-US counterparties. Specifically, it would require covered banks to condition the exercise of default rights in covered QFCs on the stay provisions of the Orderly Liquidation Authority and the FDIA. A covered QFC could also permit the exercise of a default right if amended by the ISDA 2015 Universal Resolution Stay Protocol (including the Securities Financing Transactions Annex and Other Agreements Annex, published as of 16 May 2016).

The proposal also includes conforming amendments to the OCC's Capital Adequacy Standards and the Liquidity Risk Measurement Standards.

The OCC intends for the proposed rule to complement and work in tandem with a substantively identical rule proposed by the Federal Reserve Board in May 2016 pursuant to Section 165 of the Dodd-Frank Act.

Public comments on the proposal will be accepted until 18 October 2016.

CLIFFORD CHANCE BRIEFINGS

The regulatory landscape of Brexit for CLOs – where to from here?

The UK's vote to leave the EU has raised questions across the financial markets and answers are only beginning to trickle through. For CLO market participants – and UK-based collateral managers in particular – the biggest legal concerns are regulatory, mainly around MiFID authorisation and risk retention.

This briefing reviews the issues facing the CLO market as a result of the Brexit vote and discusses why, for the moment, the best bet is probably to wait and see.

https://www.cliffordchance.com/briefings/2016/08/the_regulatory_landscapeofbrexitforclos.html

Coming in force of the Insurance Act 2015

The Insurance Act 2015 came into force on 12 August 2016 and brings about the most significant changes to insurance contract law in England and Wales in more than a century.

This briefing highlights some of the key changes brought about by the Act.

https://www.cliffordchance.com/briefings/2016/08/coming_in_force_oftheinsuranceact2015.html