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Briefing note

International Regulatory Update

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IN THIS WEEK'S NEWS

- ECB consults on amendments to SIPS Regulation
- PRIIPs Regulation: Regulation amending application date published in Official Journal
- FCA identifies themes from ongoing consultation on its mission
- Law to reorganise duties of German Federal Agency for Financial Market Stabilisation published in German Federal Gazette
- BaFin consults on draft circular on safe keeping of guarantee assets
- BaFin publishes general decree on own funds coverage of interest rate risks in trading books of less significant institutions
- BaFin consults on draft circular on use of derivative financial instruments and investments in structured products by small direct insurance undertakings and domestic pension funds
- Decree law on support for Italian banking system published
- Bank of Italy publishes amendments to regulation on collective asset management
- Market abuse law published in Luxembourg Official Journal
- Market abuse: CSSF issues circular on ESMA guidelines on delay in disclosure of inside information
- New bill on payment accounts submitted to Luxembourg Parliament
- MAS responds to feedback on proposed market conduct rules for marketing and distribution arrangements of financial institutions and issues guidelines on standards of conduct
- SFC issues further guidance on suitability obligations
- SFC issues supplemental circular on leveraged and inverse products
- HKEX announces launch date for VCM in derivatives market
- HKMA publishes list of designated domestic systemically important authorised institutions for 2017
- HKMA issues final draft of SPM on margin and risk mitigation standards for non-centrally cleared OTC derivatives

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- Revised disclosure rules and amendment notice under Banking Ordinance gazetted
- Application process for 2017 medium- and long-term foreign debt quota for foreign-invested banks launched
- People's Bank of China issues new LVR and STR regulation
- AMAC issues detailed guidance for private fund management WFOEs and JVs
- Recent Clifford Chance briefings: The EU-Singapore FTA; Dutch bonus cap rules; and more. Follow this link to the briefings section.

ECB consults on amendments to SIPS Regulation

The European Central Bank (ECB) has launched a consultation on a proposed ECB Regulation amending the Regulation on oversight requirements for systemically important payment systems (Regulation (EU) No 795/2014 – the SIPS Regulation). The proposal follows a review of the SIPS Regulation by the ECB's Governing Council and the findings of the first comprehensive assessment of SIPS.

The SIPS Regulation implements the principles for financial market infrastructures, which were published by the predecessor of the Committee on Payments and Market Infrastructures (CPMI), the Committee on Payment and Settlement Systems (CPSS), and the International Organization of Securities Commissions (IOSCO) in 2012 as well as subsequent CPMI-IOSCO guidance on the principles. Among other things, the ECB has sought to clarify requirements on liquidity risk mitigation and the proposed Regulation includes new requirements on cyber resilience. The consultation also covers a draft Decision on the methodology to be used for calculating sanctions in cases of non-compliance with the Regulation.

Comments are due by 20 February 2017.

PRIIPs Regulation: Regulation amending application date published in Official Journal

Regulation (EU) 2016/2340 amending Regulation (EU) 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs Regulation) as regards the date of its application has been published in the Official Journal.

The Regulation entered into force on 24 December 2016 and delays the application date of the PRIIPs Regulation to 1 January 2018.

FCA identifies themes from ongoing consultation on its mission

The Financial Conduct Authority (FCA) has provided an update on the responses it has received so far to its consultation on the FCA's mission, which was launched in October 2016. The FCA has identified the early themes to emerge and, in particular, firms have commented on the need for:

- greater clarity in relation to FCA decision making;
- clearer definitions of vulnerable customers; and
- greater engagement with firms in order to share lessons learned and best practice.

The FCA has also identified that respondent firms are currently divided over whether they favour clear sets of principles for business rather than prescriptive rules, whereas others would like greater clarity on rules.

The deadline for comments on the consultation is 26 January 2017.

Law to reorganise duties of German Federal Agency for Financial Market Stabilisation published in German Federal Gazette

The law to reorganise the setup and the duties of the German Federal Agency for Financial Market Stabilisation (FMSA) has been published in the German Federal Gazette. FMSA's duties as the competent national resolution authority (NRA) are taken over by the German Federal Financial Supervisory Authority (BaFin) as a separate department.

The administration and winding up of the German Single Resolution Fund are taken over by the privately organised Financial Agency of Germany (Bundesrepublik Deutschland – Finanzagentur GmbH).

BaFin consults on draft circular on safe keeping of guarantee assets

The German Federal Financial Supervisory Authority (BaFin) has launched a consultation on a draft circular on the safe keeping of guarantee assets. The draft circular is addressed to direct insurance undertakings subject to provisions for small insurance undertakings and to domestic pension funds. The circular is intended to replace circulars 4/2011, 1/2002 and 7/2004 currently in use.

Comments on the draft will be published on BaFin's homepage and can be made until 31 January 2017.

BaFin publishes general decree on own funds coverage of interest rate risks in trading books of less significant institutions

BaFin has published a general decree on own funds coverage of interest rate risks in trading books of less significant institutions not directly supervised by the ECB. The general decree is intended to ensure that interest rate risks are adequately covered by the institution's own funds. The general decree is not applicable to institutions which have already been subject to SREP capital determination.

BaFin consults on draft circular on use of derivative financial instruments and investments in structured products by small direct insurance undertakings and domestic pension funds

BaFin has launched a consultation on a draft circular on the use of derivative financial instruments and investments in structured products. The draft circular is addressed to direct insurance undertakings subject to provisions for small insurance undertakings and to domestic pension funds. The circular is intended to replace the predecessor circulars R 3/2000 and R 3/1999 currently in use.

Comments on the draft will be published on BaFin's homepage and can be made until 31 January 2017.

Decree law on support for Italian banking system published

Decree law no. 237/2016 (also known as the 'Salva Risparmio') has been published in the Official Gazette. The decree allows the Ministry of Economy and Finance to adopt a number of measures in support of the Italian banking system, subject to certain conditions. These measures include, in particular, a State guarantee over newly issued liabilities, as well direct State intervention to strengthen a bank's capital structure. These measures will have to be evaluated, before being adopted, in light of the Bank Recovery and Resolution Directive (BRRD) framework, and will be subject to compliance with the European framework on State aid.

The decree is divided into the following four Titles:

- Title I, State guarantee on newly issued liabilities – the Ministry of Economy and Finance is allowed to grant State guarantees to Italian banks in accordance with the provisions of this Title and the European framework on State aid;
- Title II, Capital strengthening intervention – the Ministry of Economy and Finance is allowed to subscribe and buy shares issued by Italian banks until 31 December 2017 subject to the conditions laid out in this Title;
- Title III, Financial rules – a public fund is established, with resources amounting to EUR 20 billion for the year 2017, in order to fund the measures respectively established in Titles I and II; and
- Title IV, Emergency measures for the banking sector, which contains final provisions, such as additional rules regarding the contribution to the national resolution fund.

Bank of Italy publishes amendments to regulation on collective asset management

The Bank of Italy has made available the final version of the amended regulation on collective asset management dated 19 January 2015. This new regulation is the result of a public consultation.

Among other things, the new regulation is intended to:

- align the regulation to the provisions governing depositories of undertakings for the collective investment in transferable securities as set out in Directive 2014/91/EU (UCITS V);
- implement Article 46-ter of the Italian Financial Act (Legislative Decree no. 58/1998), which lays down the general conditions under which EU credit funds may engage in the business of financing in Italy;
- simplify certain regulations relating to sub-threshold operators mainly active in the private equity and venture capital sectors; and
- clarify the scope of certain provisions of the regulation.

The new set of provisions will enter into force on the day following publication in the Official Gazette of the Italian Republic.

Market abuse law published in Luxembourg Official Journal

The law of 23 December 2016 on market abuse, supporting the Market Abuse Regulation (EU) No 596/2014 (MAR) and implementing the Criminal Sanctions for Market Abuse Directive 2014/57/EU, as well as Commission Implementing Directive (EU) 2015/2392 as regards reporting to competent authorities of actual or potential infringements, has been published in the Luxembourg Official Journal (Mémorial A). The law repeals the Luxembourg market abuse law of 9 May 2006, which implemented the Market Abuse Directive 2003/6/EC in Luxembourg.

The law entered into force on 31 December 2016, subject to a transitional regime.

Market abuse: CSSF issues circular on ESMA guidelines on delay in disclosure of inside information

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF) has issued a new circular 16/646 to implement the ESMA guidelines on the delay in the disclosure of inside information in accordance with MAR.

The circular is addressed to all concerned issuers of financial instruments and entered into force on 20 December 2016.

New bill on payment accounts submitted to Luxembourg Parliament

A new bill on payment accounts has been submitted to the Luxembourg Parliament. The bill would implement Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features and modify the Luxembourg law of 15 December 2000 on postal financial services (as amended).

The publication of the bill constitutes the start of the legislative procedure.

MAS responds to feedback on proposed market conduct rules for marketing and distribution arrangements of financial institutions and issues guidelines on standards of conduct

To address problems that may arise if the marketing and distribution activities conducted by financial institutions at retailers and public places are not properly managed, the Monetary Authority of Singapore (MAS) proposed in its July 2015 public consultation on the proposed market conduct rules for marketing and distribution arrangements of financial institutions at retailers and public places to require financial institutions to comply with a set of market conduct guidelines when conducting such activities.

The MAS has now published its responses to the feedback it received on the July 2015 public consultation and published the Guidelines on Standards of Conduct for Marketing and Distribution Activities. The guidelines apply to all financial institutions which conduct marketing and distribution activities that target retail customers, as well as their representatives.

Amongst other things, the guidelines set out:

- the safeguards that financial institutions should put in place and adhere to when they market and sell financial products and services to retail customers at retailers and public places;
- the objectives and intended outcomes of each safeguard; and
- the MAS' expectations that the board and senior management of financial institutions are accountable and responsible for ensuring that there are proper controls in place for their financial institution's marketing and distribution activities.

The guidelines will take effect on 1 April 2017.

SFC issues further guidance on suitability obligations

The Securities and Futures Commission (SFC) has issued further guidance in the form of two circulars on the existing suitability obligations of licensed or registered persons when recommending or soliciting investments. Under the Code of Conduct for Persons Licensed by or Registered with the SFC, a licensed or registered person, when making a recommendation or solicitation, is required to ensure that the suitability of the recommendation or solicitation for the client is reasonable in all the circumstances, having regard to information about the client of which the licensed or registered person is or should be aware through the exercise of due diligence.

One circular, containing frequently asked questions (FAQs) on triggering of suitability obligations, seeks to clarify what may trigger the suitability obligations. The circular explains that posting an advertisement for an investment product or disseminating a research report may not trigger the suitability obligations in the absence of a direct communication with a client. The circular also provides examples of when the suitability obligations may be triggered and provides guidance on how they are discharged when providing discretionary account services.

Another circular, containing FAQs on compliance with suitability obligations, updates guidance on complying with the suitability obligations and clarifies that the suitability obligations are relevant to all licensed or registered persons making a recommendation or solicitation. The circular also provides, among other things, guidance on product due diligence as well as the documentation of investment recommendations which are to be maintained in audio or written form. The updated set of FAQs on compliance with suitability obligations will replace its previous version issued by the SFC on 8 May 2007.

The SFC plans to launch a consultation in the first quarter of 2017 on proposed guidelines on online distribution and advisory platforms which aim to provide more tailored guidance to the industry in complying with the applicable conduct and other regulatory requirements, including the suitability obligations.

SFC issues supplemental circular on leveraged and inverse products

The SFC has issued a circular supplemental to its circular on leveraged and inverse products (L&I products) issued on 5 February 2016. The February 2016 circular set out the requirements under which the SFC would consider authorising L&I products for public offering in Hong Kong under the Securities and Futures Ordinance (SFO). The February 2016 circular required the underlying indices of L&I products to be liquid and broadly based non-Hong Kong, non-Mainland China foreign equity indices. Further, the February 2016 circular stated that the SFC would conduct a review six months after the launch of the initial batch of L&I products, to consider extending eligible indices to include liquid and broadly based Hong Kong equity indices.

The supplemental circular sets out the way forward after the six-month review and the resulting changes to the February 2016 circular. Based on the results of the six-month review, the SFC is prepared to accept authorisation applications for L&I products tracking liquid and broadly based Hong Kong and non-Mainland China foreign equity indices, and on a case by case basis, non-equity indices, provided that the indices meet the relevant requirements in the Code on Unit Trusts and Mutual Funds, and subject to the full implementation of the measures set out in the February 2016 circular.

The SFC has indicated that it will continue to keep in view the eligible indices of L&I products but, at this stage, it has no plan to accept applications for L&I products tracking Mainland China indices.

The SFC began accepting applications for L&I products tracking Hong Kong equity indices and non-equity indices on 9 January 2017.

HKEX announces launch date for VCM in derivatives market

Hong Kong Exchanges and Clearing Limited (HKEX) has announced that it will implement the Volatility Control Mechanism (VCM) in its derivatives market on 16 January 2017.

The rollout was deferred on 13 November 2016 when a technical issue was identified during the final preparation. All necessary analysis and follow-up to resolve the technical issue have been completed.

HKEX's VCM is designed to prevent extreme price volatility arising from trading incidents (such as a 'Flash Crash' or bad algorithms) and is being implemented following consultation with market participants. The VCM in HKEX's securities market was introduced on 22 August 2016.

HKMA publishes list of designated domestic systemically important authorised institutions for 2017

The Hong Kong Monetary Authority (HKMA) has completed its annual assessment of the list of domestic systemically important authorised institutions (D-SIBs). Based on the assessment results, the list of authorised institutions designated as D-SIBs remains unchanged compared to the list of D-SIBs published by the HKMA on 31 December 2015. The list of D-SIBs is set out in the Annex to the press release.

Under the D-SIB framework, each of the authorised institutions designated as a D-SIB will be required to include a Higher Loss Absorbency (HLA) requirement into the calculation of its regulatory capital buffers within a period of twelve months after the formal notification of its designation. In line with the phase-in arrangements in the frameworks issued by the Basel Committee on Banking Supervision (Basel Committee) for assessing D-SIBs and global systemically important banks (G-SIBs), the full amount of the HLA requirement will be phased-in from 2016 to 2019 in parallel with the Capital Conservation Buffer and Countercyclical Capital Buffer. Ultimately, the HLA requirement applicable to a D-SIB (expressed as a ratio of an authorised institution's Common Equity Tier 1 capital to its risk-weighted assets as calculated under the Banking (Capital) Rules) will range between 1% and 3.5% (depending on the assessed level of the D-SIB's systemic importance). Under the phase-in provisions (set out under the Banking (Capital) Rules), the levels of HLA requirement for 2018 will be increased to the range of 0.75% to 2.625% (from a range of 0.50% to 1.75% in 2017).

HKMA issues final draft of SPM on margin and risk mitigation standards for non-centrally cleared OTC derivatives

The HKMA has published the final draft version of the supervisory policy manual (SPM) module on margin and risk mitigation standards for non-centrally cleared over-the-counter (OTC) derivatives. The HKMA is currently working to prepare the Chinese language version of the module and it intends to issue the module (in the form enclosed in

English and in Chinese) in January 2017 by notice in the Gazette under the Banking Ordinance.

The module, which reflects the margin requirements for non-centrally cleared derivatives issued by the Basel Committee on Banking Supervision and the International Organization of Securities Commissions (IOSCO) in 2013 and the risk mitigation standards for non-centrally cleared OTC derivatives issued by IOSCO in 2015, is intended to set out the minimum standards that the HKMA will expect authorised institutions to adopt in respect of margin and other risk mitigation standards for non-centrally cleared OTC derivatives transactions. The key sections of the module:

- cover margin standards including, amongst other things, the exchange of variation margin (VM) and initial margin (IM) with covered entities, segregation standards for IM, the timing for the exchange of margin, eligibility of assets for margin, haircuts, and the approaches for calculating IM amounts;
- cover risk mitigation standards such as trading relationship documentation, trade confirmation, valuation with counterparties, portfolio reconciliation, portfolio compression, and dispute resolution; and
- outline the HKMA's supervisory approach to margin and other risk mitigation standards for non-centrally cleared derivatives transactions and its expectations regarding authorised institutions' related governance arrangements.

The HKMA expects authorised institutions to make reasonable and continuous progress in completing the relevant documentation with their counterparties such that the exchange of margin can begin as soon as possible after 1 March 2017. As and when the necessary documentation and arrangements with respect to a given counterparty are in place during the transitional period, authorised institutions are expected to start exchanging margin for non-centrally cleared derivatives entered into with that counterparty from that point on. The HKMA will closely monitor the progress made by authorised institutions during the transitional period and expects authorised institutions to maintain adequate documentary evidence to demonstrate their continuous progress towards achieving full compliance by the end of the period.

Revised disclosure rules and amendment notice under Banking Ordinance gazetted

The Hong Kong Government has gazetted the Banking (Disclosure) (Amendment) Rules 2016 and the Banking (Specification of Class of Exempted Charges) (Amendment) Notice 2016 to implement, or facilitate the implementation of, recent international standards for banking regulation in Hong Kong.

The Banking (Disclosure) (Amendment) Rules 2016 seek to enhance the regulatory disclosure made by authorised institutions in terms of its comprehensiveness, user-relevance and comparability (both between institutions and across jurisdictions), and require disclosure of certain key regulatory metrics on a quarterly basis.

The Banking (Specification of Class of Exempted Charges) (Amendment) Notice 2016 provides a degree of exemption from existing limitations imposed under the Banking Ordinance on the creation of charges by authorised institutions in order to facilitate the implementation of the latest international standards on exchange of margin and risk mitigation for over-the-counter (OTC) derivative transactions.

The Rules and the Amendment Notice will be tabled before the Legislative Council at its sitting on 11 January 2017 for negative vetting. The Rules and the Amendment Notice will come into operation on 31 March 2017 and 3 March 2017 respectively.

Application process for 2017 medium- and long-term foreign debt quota for foreign-invested banks launched

The National Development and Reform Commission (NDRC) has announced that foreign-invested subsidiary/joint venture banks and foreign bank branches in China can apply to the local provincial development and reform commissions (PDRCs) for medium- and long-term foreign debt quota for 2017 (April 2017 – March 2018) by submitting the prescribed application documents. PDRCs are required to forward to the NDRC the applications submitted by foreign-invested banks within their respective jurisdiction by 15 February 2017.

The NDRC has announced that it might increase the foreign debt quota granted to foreign-invested banks in 2017, aiming to further facilitate cross-border financing based on economic and financing conditions. The NDRC has explicitly stated that in assessing the medium- and long-term foreign debt quota to be granted, it will mainly consider an applicant's actual utilisation of foreign debt in the past three years, the demand of foreign exchange arising from loans for fixed asset investment projects and medium- and long-term working capital loans. Foreign-invested banks are encouraged to utilise foreign debt more for the real economy and support China's national policies and strategies.

A foreign-invested bank may also apply to increase its 2017 foreign debt quota before 31 December 2017. A foreign bank can allocate the granted quota freely among its branches within China subject to a filing with the NDRC.

People's Bank of China issues new LVR and STR regulation

The People's Bank of China (PBOC) has issued the Administrative Measures for Large-value Transaction Reporting and Suspicious Transaction Reporting by Financial Institutions, which will take effect from 1 July 2017. The key objective of the new measures is to strengthen the monitoring of fund remittances and underlying transactions in order to combat money laundering and terrorist financing activities, as well as aligning the measures with global standards. Compared to the existing large-value transaction reporting (LVR) and suspicious transaction reporting (STR) rules, the new measures will introduce the following key changes:

- expanding the scope of financial institutions subject to LVR and STR obligations to cover insurance agencies/brokers, consumer financing companies and private lending companies – however, it remains unclear whether private fund managers or distributors would be covered;
- lowering the LVR threshold for cash transactions from RMB 200,000 to RMB 50,000;
- specifying the LVR threshold for cross-border remittances as RMB 200,000;
- extending the STR obligations to any transactions subject to 'reasonable doubt' at the discretion of financial institutions; and
- requiring financial institutions to submit STRs to the PBOC as long as there is an obvious sign of money laundering or terrorist financing activities.

AMAC issues detailed guidance for private fund management WFOEs and JVs

The Asset Management Association of China (AMAC) has announced that Fidelity International's wholly-owned onshore private fund management subsidiary (PFM WFOE), FIL Investment Management (Shanghai) Company Limited, completed its registration with AMAC as a private fund manager on 3 January 2017, becoming the first AMAC-registered PFM WFOE in China. This qualification will allow a PFM WFOE to create onshore private securities investment products in China for eligible Chinese institutional and high net worth individual investors. AMAC has indicated that it would welcome and support more registrations from other qualified PFM WFOEs and joint venture enterprises (PFM JVs) in the future.

Following the announcement, AMAC has issued the 'Registration and Filing Guidance for PFM WFOEs and PFM JVs', to provide detailed instructions for the registration by PFM WFOEs / PFM JVs as private fund managers and the filing procedures for their private fund products. Among other things, the guidance covers the following key aspects:

- to complete the registration as a private fund manager, each PFM WFOE / PFM JV should submit the required information and documents via AMAC's online system, including information about the PFM WFOE / PFM JV itself, the licensing status of its offshore affiliate, its shareholder(s), actual controller(s) (if applicable), senior management, its financial information, as well as the required legal opinion issued by a PRC counsel; and
- after registration with AMAC, the PFM WFOE / PFM JV shall file with AMAC the information for each private fund product managed by it within 20 working days after the fund raising of such product is completed.

CLIFFORD CHANCE BRIEFINGS

The EU-Singapore FTA – a mixed agreement?

On 21 December 2016, the Advocate General of the Court of Justice of the European Union issued an Opinion that the EU does not have exclusive competence to conclude its free trade agreement with Singapore because it is a 'mixed agreement'. This means that the agreement must be entered into by the EU and by each Member State in accordance with its own domestic processes. This Opinion, if followed by the Court, will have implications for any trade agreement that might be reached between the UK and the EU following Brexit.

This briefing paper discusses the Opinion and its impact.

https://www.cliffordchance.com/briefings/2016/12/the_eu-singaporeftaamixedagreement.html

Brexit – Dutch bonus cap rules

Since the outcome of the Brexit referendum, there has been a lively debate on whether there will be an exodus of the financial industry from the City of London and, if that were to be the case, what the new primary European centre for the financial industry would be. In that context, Amsterdam is often mentioned as one of the options, along with Dublin, Paris and Frankfurt.

In view of the above, the debate on the Dutch bonus cap rules is taking place again. This briefing paper is intended to provide clarity on the Dutch bonus cap rules and also focuses on the exceptions to these rules.

https://www.cliffordchance.com/briefings/2017/01/brexit_dutch_bonuscaprules.html

New liquidation processes under the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016

On 15 December 2016, the involuntary liquidation provisions in the Insolvency and Bankruptcy Code 2016 (the IBC) came into effect. Along with this, the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016 were published and came into effect. The Regulations seek to improve the liquidation process with a view to spending less time and costs in the execution and maximising creditor recoveries. They set out the procedural aspects of the new liquidation processes including: the appointment, remuneration, powers and functions of a liquidator; details on how creditors can make claims; and information about the realisation and distribution process.

This briefing paper discusses the Regulations.

https://www.cliffordchance.com/briefings/2017/01/new_liquidation_processesundertheinsolvenc.html