

Financial Regulatory Developments Focus



In this week's newsletter, we provide a snapshot of the principal US, European and global financial regulatory developments of interest to banks, investment firms, broker-dealers, market infrastructure providers, asset managers and corporates.

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Bank Prudential Regulation & Regulatory Capital

European Central Bank Recommends Insufficiently Capitalized Eurozone Banks Not To Make a Dividend Distribution

On December 30, 2015, a European Central Bank Recommendation on dividend distribution policies for Eurozone banks was published in the Official Journal of the European Union. The Recommendation is aimed at significant supervised entities (i.e. significant banks) and significant supervised groups (each as defined in the Single Supervisory Mechanism Framework Regulation) as well as national regulators. Under the SSM Regulation, the ECB is responsible for the direct prudential supervision of significant Eurozone banks. The Recommendation states that banks must use conservative and prudent assumptions when establishing dividend policies so that any applicable capital requirements, for example minimum capital requirements or countercyclical capital and systemic buffers, are still met after any distribution. The Recommendation also makes suggestions for different categories of banks paying dividends for the 2015 financial year in 2016: (i) banks that satisfy the applicable capital requirements and have reached their fully loaded (i.e. calculated without applying the transitional provisions as set out in the Capital Requirements Regulation) capital ratios as at December 31, 2015 should distribute net profits in dividends conservatively; (ii) banks that satisfy the applicable capital requirements, but have not reached their fully loaded ratios as at December 31, 2015 should distribute net profits in dividends conservatively and in principle should only pay out dividends if a linear path to the required loaded capital requirements is secured; and (iii) banks that do not satisfy the applicable capital requirements should not distribute dividends. The Recommendation also states that should a bank not be able to comply with the ECB's Recommendation due to a legal obligation to pay out dividends, it should contact its supervisory team immediately.

The Recommendation is available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.C_.2015.438.01.0001.01.ENG.

Compensation

European Banking Authority Consults on Guidelines for Compensation for Sales Staff of Retail Banking Services and Products

On December 22, 2015, the European Banking Authority published proposed Guidelines on compensation policies and procedures related to the sale and provision of retail banking products and services. The EBA is seeking to address the issues arising out of the recent cases on misconduct and mis-selling by staff in financial institutions where poor remuneration policies and practices have been identified as a root cause. The proposed Guidelines apply to the remuneration paid to staff employed by banks, credit intermediaries, payment institutions and electronic money institutions when selling mortgages, personal loans, deposits, payment accounts, payment services and/or electronic money. The proposed Guidelines set out the design of remuneration policies and practices, including prevention of conflicts of interest, using quantitative and qualitative criteria for determining variable remuneration and how the rights and interests of consumers should be taken into account. The EBA also proposes that remuneration policies and practices should be documented, and that such documentation should be retained for five years, be accessible to staff and made available to national regulators on request. Responsibility for complying with the Guidelines would rest with the management body of a firm. The consultation closes on March 22, 2016.

The consultation paper is available at: <http://www.eba.europa.eu/documents/10180/1317073/EBA-CP-2015-29+%28CP+on+the+GL+Remuneration+of+sales+staff%29.pdf>.

Financial Market Infrastructure

Final EU Revised Payment Services Directive Published

On December 23, 2015, the revised EU Payment Services Directive, known as PSD2, was published in the Official Journal of the European Union. The aims of PSD2, which focuses on electronic payments and payment services within the EU, include making payments between Member States as secure, easy and efficient as those made within a Member

State, regulating new types of payment services and payment services providers which are currently unregulated and stimulating competition in the electronic payments market. Member States must transpose PSD2 into their national laws by January 13, 2018 and apply those laws from that date, subject to certain exceptions and transitional measures. PSD2 will repeal the current Payment Services Directive with effect from January 13, 2018.

The PSD2 is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:LJOL_2015_337_R_0002&from=EN.

Financial Services

US Securities and Exchange Commission Issues Advanced Notice of Proposed Rulemaking Regarding Regulation of Transfer Agents

On December 22, 2015, the US Securities and Exchange Commission issued: (i) an advanced notice of proposed rulemaking, seeking public comment for new requirements for transfer agents; and (ii) a concept release on the SEC's broader review of transfer agent regulation. Among other requirements, the ANPR proposes to impose on transfer agents revised registration and annual reporting requirements, and revised requirements relating to the safeguarding of funds and securities, antifraud requirements in connection with the issuance and transfer of restricted securities, and to impose new guidelines relating to cybersecurity and information technology. The SEC concept release addresses a broader range of other issues and it is possible that the various proposals will be acted on separately by the SEC. Issues addressed in the concept release include the processing of book entry securities, recordkeeping issues, administration of issuer plans, outsourcing, the role of transfer agents to mutual funds, and crowdfunding. Comments on both the ANPR and the concept release must be submitted within 60 days of publication in the Federal Register.

The text of the SEC ANPR and concept release is available at: <http://www.sec.gov/rules/concept/2015/34-76743.pdf>.

US Financial Crimes Enforcement Network Requests Comment on Impact Assessment of Proposed Rule on Customer Due Diligence Requirements

On December 23, 2015, the US Financial Crimes Enforcement Network issued a notice requesting public comment on two related regulatory impact assessments prepared in connection with proposed new customer due diligence requirements for financial institutions initially published by FinCEN on August 4, 2014. The proposed rule would amend existing Bank Secrecy Act regulations to clarify and strengthen customer due diligence requirements for banks, broker-dealers, mutual funds and futures commission merchants and introducing brokers in commodities primarily by imposing a new requirement under the BSA to identify the beneficial owners of legal entity customers, subject to certain exemptions. The regulatory impact assessment states that, to justify the anticipated compliance costs of the proposed rule, the rule would need to reduce the estimated annual flow of illicit proceeds (which FinCEN reports as approximately \$300 billion) by 0.45% per year from 2016-2024. In addition, the initial regulatory flexibility analysis concludes that the proposed rule would not have a significant economic impact on the small entities that would be required to comply with the rule. Comments are due by January 25, 2016.

The full text of the FinCEN notice published in the Federal Register is available at: <https://www.gpo.gov/fdsys/pkg/FR-2015-12-24/pdf/2015-32378.pdf>.

MiFID II

European Securities and Markets Authority Consults on Guidelines under MiFID II

On December 23, 2015, the European Securities and Markets Authority launched a consultation on proposed Guidelines on transaction reporting, reference data, order record keeping and clock synchronization. ESMA is required to prepare the guidelines under the Markets in Financial Instruments Regulation and the revised Markets in Financial Instruments Directive, together known as MiFID II. The proposed Guidelines are based on ESMA's final draft Regulatory Technical Standards relating to transaction reporting, reference data, order record keeping and clock synchronization which are

still due to be endorsed by the European Commission. The proposed Guidelines may therefore need to be amended, depending on the adopted version of the RTS. The proposed Guidelines aim to assist investment firms, approved reporting mechanisms, trading venues and systematic internalizers in complying with the provisions of the RTS, focusing on the preparation of transaction reports and order data records for various scenarios. Responses to the consultation are due by March 23, 2016 and ESMA aims to publish the final Guidelines in the second half of 2016. MiFID II will apply directly across the EU from January 3, 2017.

The consultation paper is available at: <https://www.esma.europa.eu/press-news/esma-news/esma-consults-transaction-reporting-reference-data-record-keeping-and-clock>.

Shadow Banking

Final EU Regulation on the Reporting and Transparency of Securities Financing Transactions and of Reuse Published

On December 23, 2015, the EU Regulation on the Reporting and Transparency of Securities Financing Transactions and of Reuse, known as the SFTR, was published in the Official Journal of the European Union. The aim of the SFTR is to improve the transparency of securities lending, repurchase transactions, reverse repurchase transactions, buy-sell back or sell-buy back transactions and margin lending transactions which will help reduce the likelihood of banks seeking to avoid rules applicable to them by moving certain of their activities to the shadow banking sector. The SFTR requires: (i) all securities financing transactions, subject to certain exceptions for central banks and similar bodies, to be reported to EU recognized trade repositories; (ii) investment funds to disclose their use of SFTs to investors in regular reports and pre-investment documents; and (iii) minimum conditions to be met on the reuse of collateral, such as disclosure of risks and the need to obtain prior consent. The SFTR also makes certain amendments to the European Market Infrastructure Regulation, including inserting provisions through which equivalence decisions for third country trading venues for the purpose of OTC derivatives can be made and adding a number of authorities to the list of authorities to which trade repositories must provide trade reporting information. The SFTR will apply directly across the EU from January 12, 2016 subject to certain exceptions which will apply at a later date, including the reporting obligation (which is being phased in according to counterparty type), the transparency obligations on management companies and Alternative Investment Fund Managers, and the restrictions on rehypothecation.

The Regulation is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2015_337_R_0001&from=EN.

Upcoming Events

January 13, 2016: EBA Public Hearing on Disclosure of Confidential Information in Summary or Collective Form under the Bank Recovery and Resolution Directive (registration closed).

January 18, 2016: EBA Public Hearing on Common Procedures for Information Exchange between National Regulators on Proposed Acquisitions and Increases of Qualifying Holdings (registration closed).

January 25, 2016: ESMA Open Hearing on Validation and Review of Credit Rating Agency Methodologies (registration closes: January 26, 2016).

January 25, 2016: EBA Public Hearing on Assessment Methodology on Use of Internal Models for Market Risk (registration closes: January 11, 2016).

February 16, 2016: EBA Open Hearing on Guidelines on Collection of Information for the Internal Capital Adequacy Assessment Process and Internal Liquidity Adequacy Assessment Process (registration closes: January 26, 2016).

Upcoming Consultation Deadlines

- January 6, 2016: European Commission Consultation on EU Covered Bond Framework.
- January 6, 2016: European Commission Consultation on EU Venture Capital Investment Funds Regulation and European Social Entrepreneurships Funds Regulation.
- January 13, 2016: EBA Consultation on Draft RTS on Cross Border Intragroup Liquidity Flows.
- January 14, 2016: European Commission Consultation on Impact of Maximum Remuneration Ratio between Variable to Fixed Remuneration and Overall Efficiency of Remuneration Rules.
- January 15, 2016: Prudential Regulation Authority Consultation on Implementation of Ring Fencing for Core UK Financial Services and Activities.
- January 18, 2016: ESMA Consultation on RTS for the European Single Electronic Format under the Transparency Directive.
- January 18, 2016: PRA Consultation on Identifying Other Systemically Important Institutions.
- January 22, 2016: EBA Consultation on Draft Guidelines on Application of Definition of Default under the CRR.
- January 22, 2016: European Supervisory Authorities Consultation on Anti Money Laundering Guidelines.
- January 27, 2016: EBA Consultation on Draft Guidelines for Disclosure of Confidential Information under the BRRD.
- January 28, 2016: EBA Consultation on Draft Guidelines on Treatment of Credit Valuation Adjustment Risk under the Supervisory Review and Evaluation Process.
- February 1, 2016: Federal Reserve Board Total Loss-Absorbing Capacity and Related Requirements Proposal.
- February 1, 2016: ESMA Consultation on Revised RTS on Data Access and Operational Standards for Comparison and Aggregation of Data.
- February 1, 2016: ESMA Consultation on CCP Time Horizon for Liquidation Period.
- February 4, 2016: Financial Conduct Authority Consultation on Implementation of Market Abuse Regulation.
- February 5, 2016: Basel Committee Consultation on Capital Requirements for Simple, Transparent and Comparable Securitizations.
- February 8, 2016: EBA Discussion Paper on RTS for Strong Customer Authentication and Secure Communication under PSD2.
- February 10, 2016: EBA Consultation on Common Procedures for Information Exchange between National Regulators on Proposed Acquisitions.
- February 12, 2016: Basel Committee Consultation on TLAC Holdings.
- February 19, 2016: ESMA Discussion Paper on Validation and Review of CRA Methodologies.
- February 19, 2016: US Federal Reserve Board Framework for Implementing the Basel III Countercyclical Capital Buffer.
- February 20, 2016: FCA Consultation on Amending Guidance on Delaying Disclosure of Inside Information.
- February 23, 2016: CPMI and IOSCO Consultation on Cyber Resilience.
- February 25, 2016: UK Government Proposed Changes for Implementation of BRRD.

This newsletter is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. If you wish to receive more information on the topics covered in this publication, you may contact your usual Shearman & Sterling representative or any of the following:

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