

# International Regulatory Update

30 July – 3 August 2012

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#### **EMIR: ESAs confirm postponement of deadline for regulatory technical standards on risk mitigation techniques for OTC derivatives not cleared by CCPs**

The EBA, EIOPA and ESMA have published a [press release](#) confirming that the deadline for the submission of the joint regulatory technical standards covering risk mitigation techniques for OTC derivatives not cleared by central counterparties (CCPs) under the regulation on OTC derivatives and market infrastructures will be postponed. On 7 June 2012, the Joint Committee of the European Supervisory Authorities (ESAs) addressed a request to the European Commission for a postponement of the deadline. The rationale behind the request is to enable consistency of the European rules with the on-going global development of international standards by the Working Group on Margining Requirements of the Basel Committee on Banking Supervision and IOSCO, which are expected to be delivered by end 2012.

The current deadline to deliver the joint draft regulatory technical standards is 30 September 2012, but the Commission shares the views of the ESAs that the present deadline is inconsistent with the achievement of a global approach. A new deadline should be set by the Commission once the present deadline has expired.

#### **CRD 4: EBA announces delay of draft implementing technical standards on supervisory reporting requirements; FSA issues statement**

The EBA has [announced](#) that the finalisation and publication of its draft implementing technical standards on supervisory reporting requirements for institutions has been pushed back pending the adoption by EU legislators of the Capital Requirements Regulation (CRR).

As currently foreseen, the CRR is expected to apply from 1 January 2013, but the EBA has noted that financial institutions may face challenges to comply immediately with all of the reporting requirements included in the implementing technical standards. The EBA believes that, to address those challenges, some flexibility will need to be given through phase-in provisions, or on the implementation date of the new requirements. The EBA

has indicated that similar practical provisions for phase-in arrangements, or elements of flexibility, may be considered in the implementation of other technical standards on a case-by-case basis and also depending on the final date of entry into force of the CRD 4/CRR package.

With respect to the first submission of data to competent authorities, the EBA has confirmed that competent authorities have the obligation to check institutions' compliance with the new regulatory framework as of the date of application of the CRR and that the submission of relevant data needs to be aligned with the regulation requirements. Therefore, institutions will need to comply with CRR requirements as of the regulation's application date and will need to adapt their systems beforehand. However, the EBA envisages a phase-in of data items not directly used to assess compliance with specific CRR requirements as a solution for easing the implementation burden while safeguarding tasks to be performed by competent authorities.

In addition, the FSA has published a [statement](#) noting that, while the European Parliament, European Commission and Council had originally aimed to finalise an agreed position by end June 2012 enabling adoption by the Parliament plenary session in early July 2012, it now appears that the legislation will not be adopted earlier than autumn 2012. On this basis, the FSA believes that it is not feasible that the legislation can enter into force in line with the implementation date of 1 January 2013 as included in the original Commission proposal of July 2011. The FSA further notes that no alternative date has yet been communicated by the EU institutions.

In light of these developments, the FSA intends to keep the situation under active review and it will continue to undertake all preparatory work that is possible in the absence of a finalised legislative text, in the expectation that the EU legislation will follow the Basel III implementation timetable, and that it expects all firms in scope of CRD to do likewise.

#### **LIBOR review: HM Treasury sets out terms of reference**

HM Treasury has set out the [terms of reference](#) of the review of the operation of the LIBOR regime. The government has asked Martin Wheatley, the Chief Executive designate of the Financial Conduct Authority, to review the current framework for setting and governing LIBOR. In particular, the Wheatley review will formulate policy recommendations with a view to reforming the

current framework for setting and governing LIBOR. The Treasury has indicated that this work should consider:

- whether participation in the setting of LIBOR should be brought into the regulatory perimeter under the Financial Services and Markets Act 2000 as a regulated activity;
- how LIBOR is constructed, including the feasibility of using of actual trade data to set the benchmark;
- the appropriate governance structure for LIBOR;
- the potential for alternative rate-setting processes; and
- the financial stability consequences of a move to a new regime and how a transition could be appropriately managed.

The review will also seek to determine the adequacy and scope of sanctions to appropriately tackle LIBOR abuse. This work will consider the scope of the UK authorities' civil and criminal sanctioning powers with respect to financial misconduct, particularly market abuse and abuse relating to the setting of LIBOR and equivalent rate-setting processes, and the FSA's approved persons regime and investigations into market misconduct. Finally, the review will assess whether similar considerations apply with respect to other price-setting mechanisms in financial markets, and provide provisional policy recommendations in this area.

As outlined by the Chancellor, the review will report by the end of the summer in order to enable the government to consider recommendations with a view to taking legislative changes forward through the Financial Services Bill, which is currently being scrutinised in the House of Lords. A discussion paper will be published on 10 August 2012. Stakeholders will have four weeks to submit written responses to the review. The review will aim to publish its conclusions by the end of September 2012.

#### **SEPA migration regulation: European Payments Council publishes guidance**

The European Payments Council (EPC) has published the Payments Regulatory Expert Group's [guidance](#) on the implementation of Regulation 260/2012/EU establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation 924/2009/EC, which sets out EU-wide end-dates for the migration of the old national credit transfers and direct debits to the Single Euro Payments Area (SEPA) instruments.

The guidance is intended to provide assistance to banks and their clients in relation to both the interpretation and

practical application of the regulation. The Payments Regulatory Expert Group intends to maintain a supplemental list of FAQs based on the ongoing dialogue with the market, plus information on individual Member States' implementation approaches as these become clear.

#### **ESAs strengthen supervisory cooperation for anti-money laundering supervision of payment institutions**

The Joint Committee of the European Supervisory Authorities (ESAs) has published a [protocol](#) for supervisory cooperation in the field of anti-money laundering (AML). The protocol aims to facilitate the cross-border exchange of information between national (home and host) supervisors overseeing agents and branches of payment institutions.

The protocol is a non-binding set of guidance designed to ensure cooperation and coordination amongst AML supervisors. In particular, the protocol includes provisions regarding passport notification and registration processes to facilitate effective AML supervision of agents and branches of payment institutions operating throughout the EU. It has been developed by the Joint Committee of the ESAs to address certain supervisory issues relating to the AML obligations under the Third Anti-Money Laundering and the Payment Services Directive.

#### **IOSCO and CPSS consult on recovery and resolution of financial market infrastructures**

IOSCO and the Committee on Payment and Settlement Systems (CPSS) have published a [consultative report](#) on the recovery and resolution of financial market infrastructures. The report outlines the issues that should be taken into account for different types of financial market infrastructures when putting in place effective recovery plans and resolution regimes in accordance with the CPSS-IOSCO 'Principles for financial market infrastructures' and the Financial Stability Board's 'Key Attributes of Effective Resolution Regimes for Financial Institutions'.

As part of this exercise, the report also sets out how the specific key attributes apply to financial market infrastructures, identifying where relevant those elements that do not apply or require specific interpretation in some or all types of financial market infrastructures. Finally, the report seeks views on a number of technical issues related to the way in which recovery and resolution measures should be applied.

Comments are due by 28 September 2012.

### **UK Undertakings for Collective Investment in Transferable Securities (Amendment) Regulations 2012 published**

The [Undertakings for Collective Investment in Transferable Securities \(Amendment\) Regulations 2012](#) have been published. The regulations are intended to correct defects in other legislation resulting from minor errors in the transposition of Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

The regulations will enter into force on 24 August 2012.

#### [Explanatory memorandum](#)

### **Simple financial products: Steering group publishes recommendations**

The independent simple financial products steering group chaired by Carol Sergeant has published its [interim report](#). The report sets out the rationale for simple products, analyses the target market, proposes a set of products to be taken forward for development, and suggests a structure for the governance of the 'simple products' standard.

The full set of initial recommendations set out in the report will now be open for further consultation, ahead of publication of the final report in February 2013. Comments on the proposals in the interim report are due by 12 October 2012.

### **HM Treasury consults on resolution of non-bank financial institutions**

HM Treasury has published a [consultation paper](#) setting out proposals and questions on enhancing the mechanisms available for dealing with the failure of systemically important non-bank financial institutions and financial market infrastructures. The consultation paper covers the following four broad groups: (1) investment firms and parent undertakings; (2) central counterparties (CCPs); (3) non-CCP financial market infrastructures (such as payments systems); and (4) insurers.

The consultation does not assume that a resolution regime is required for all categories, but consults on the most effective way to deal with the institutions and infrastructures, the failure of which is most likely to have systemic implications. The proposals are intended to complement the ongoing work the government is carrying out to reform the UK's banking sector.

Comments are due by 24 September 2012.

### **FSA consults on data collection on remuneration practices**

The FSA has published a [consultation paper \(CP12/18\)](#) on remuneration data reporting requirements for BIPRU firms and third country BIPRU firms. In particular, it looks at two data items: the Remuneration Benchmarking Information Report and the High Earners Report. Amendments to the Capital Requirements Directive (CRD 3) introduced requirements for data collection on remuneration practices by Member State competent authorities and for transmitting such data to the EBA. In the UK, the Capital Requirements (Amendment) Regulations 2012 require the FSA to provide the EBA with remuneration data, as set out in CRD3.

In July 2012, the EBA published guidelines setting out its expectations on the contents of two remuneration data sets to be submitted by firms annually. CP12/18 sets out the FSA's proposed approach to data collection on remuneration practices and the reporting requirements for FSA-regulated firms, including the draft data templates that firms will be required to complete.

Comments are due by 30 September 2012.

### **Contractual schemes for collective investment: HM Treasury consults on revised draft regulations**

HM Treasury has published a revised set of [draft regulations](#) for technical comment following the consultation on contractual schemes for collective investment that was issued in January 2012. The revisions build on comments received during the consultation and further discussions with stakeholders including the FSA and expert advisory bodies. They are intended to ensure that the proposed schemes can be commercially attractive.

HM Treasury has invited written technical comments on these regulations until 3 September 2012. The government will then take these comments into account in its formal response to the consultation exercise. The Treasury has indicated that revisions to these regulations will continue in response to comments received from industry experts. The ongoing reviews will, in particular, focus on the provisions in relation to insolvency set out in the schedules of the revised regulations.

In conjunction with this, HMRC has issued three sets of [draft tax regulations](#) for technical comment, also by 3 September 2012. The regulations aim to implement the tax policy as set out in chapter 4 of the consultation document after taking into account responses received to the consultation.

## [Notice](#)

### **Decree on monitoring of public entities' director compensation by French State published**

[Decree n° 2012-915](#) of the Ministry of Economy, dated 26 July 2012, relating to the monitoring of public entities' director compensation by the French State has been published in the Journal Officiel. The decree amends decree n° 53-707, dated 9 August 1953, relating to the monitoring by the French State of national public enterprises and some entities which have an economic or social business purpose. Amongst other things, it covers companies in which more than 50% of the share capital is held directly or indirectly by the French State and companies which benefit from French State guarantees.

In particular, the decree provides that the total amount of directors' variable and non-variable remuneration (including any benefit in kind, golden parachutes or board attendance fees) is capped at EUR 450,000 a year. The cap can be modified by decree. The compensation limits apply to the directors, the chairman of the board, the chief executive officer, the deputy chief executive officer and any other person, whatever their title is, having similar functions. The decisions of the Ministry of Economy as regards executive directors' remuneration will be made public.

The decree entered into force on 28 July 2012.

### **German Federal Ministry of Finance publishes draft Act on high-frequency-trading**

The Federal Ministry of Finance (BMF) has published for consultation a [draft Act](#) to prevent risks and misuse of high-frequency trading.

In particular, the draft Act includes:

- an extension of the definition of proprietary trading to cover high-frequency-trading, which will make high-frequency traders subject to the supervision of the Federal Financial Supervisory Authority;
  - the introduction of information requirements to regulators on the strategies of various algorithmic traders – high-frequency traders have to take responsibility for their trading systems to prevent market disruptions;
  - a clarification of the scope of market manipulation to include non-transaction-related trading activities if they impair or delay trading systems or deceive other market participants;
- rights for exchange operators to charge a fee in case of excessive use of the exchange trading systems;
  - limitation of the order per transaction ratio, on how many orders per transaction participants can place;
  - minimum limits for sizes by which prices may rise or fall ('tick size'); and
  - an extension of these rules to multilateral trading systems.

Comments are due by 17 August 2012. The Federal Government will discuss the draft Act after the summer recess.

### **CONSOB extends temporary measures on net short positions**

CONSOB has issued Resolution No. 18298 extending the ban on naked short selling introduced by Resolution No. 18283 on 23 July 2012 until 14 September 2012.

[Resolution no. 18298 \(Italian\)](#)

[Resolution no. 18283 \(Italian\)](#)

[FAQs on naked short selling ban \(Italian\)](#)

[Resolution no. 18283 \(English\)](#)

[FAQs on naked short selling ban \(English\)](#)

### **Luxembourg law on squeeze-out and sell-out of securities published**

The [law of 21 July 2012](#) on the right of squeeze-out and the right of sell-out of securities admitted or being admitted to trading on a regulated market or offered to the public and amending the law dated 23 December 1998, as amended, on establishing a financial sector supervisory commission, has been published. The purpose of the law is to create a legal framework regarding mandatory squeeze-out and sell-out of listed voting securities and, under certain conditions, previously listed voting securities in case a person holds 95% of such voting securities of an issuer.

Amongst other things, the law specifies: (1) the price to be paid in respect of the sale or purchase of the voting securities (the 'fair price'); (2) the relevant rules governing the price determination; and (3) the appropriate procedure of information and notification. In addition, the new law determines the duties and powers of the Commission de surveillance du secteur financier (CSSF) as competent authority in the context of the new law.

### **Polish Financial Supervision Authority consults on draft new recommendation on management of operational risk in banks**

The Polish Financial Supervision Authority has published for consultation a draft of the new [Recommendation M](#) concerning the management of operational risk in banks, which will replace the Recommendation M introduced in 2004. The purpose of the new Recommendation M is to improve the management of operational risk in banks and to promote good practices associated with this risk in all banks, regardless of the complexity of their structures and processes, but taking into account the proportionality rule.

### **HKEx publishes guide on enhancing regulation of listed structured products market**

The Hong Kong Exchanges and Clearing Limited (HKEx) has published a [guide](#) on enhancing regulation of the listed structured products market. The guide is intended to foster high standards across structured products issuers, enhance service levels of liquidity providers, and promote the healthy long-term development of Hong Kong's listed structured products market. The guide covers a number of regulatory enhancement measures in three main areas:

(1) enhancement of issuers' internal controls and standardisation of listing documents; (2) improvement of liquidity provision standards; and (3) management of issuers' credit risks.

The guide also includes the Industry Principles on Liquidity Provision for Listed Structured Products, which were developed jointly by a working group of listed structured products issuers, the Securities and Futures Commission (SFC) and HKEx. The principles were formulated to enhance service levels for investors, in particular, through the introduction of active quote standards for listed structured products with a local index or an actively traded stock as underlying instrument in most market situations. HKEx has indicated that, in general, issuers will proactively provide quotes to save investors from the inconvenience of making quote requests. The bid-offer spreads for active quotes will also be tighter than the current quote request standards.

### **ASIC revises financial requirements for issuers of OTC derivatives to retail clients**

The Australian Securities and Investments Commission (ASIC) has issued new rules for the financial requirements to be met by issuers of OTC derivatives, such as contracts for difference (CFDs) and margin foreign exchange, that are provided to retail clients. The requirements,

implemented through Class Order [CO 12/752] 'Adequate financial resources for financial services licensees that issue OTC derivatives to retail clients' and outlined in [Regulatory Guide 239](#) 'Retail OTC derivative issuers: Financial requirements' (RG 239) build on the general guidance in [Regulatory Guide 166](#) 'Licensing: Financial requirements' (RG 166), by addressing the particular operational risks and characteristics of the retail OTC derivatives sector.

Under the changes, retail OTC derivatives issuers must meet a net tangible asset (NTA) requirement, which will require them to hold NTA the greater of: (1) from 31 January 2013, AUS 500,000 or 5% of average revenue; and (2) from 31 January 2014, AUS 1,000,000, or 10% of average revenue.

The new financial requirements bring Australia's rules into line with Singapore and the United Kingdom and are designed to ensure that licensees have sufficient financial resources to conduct their financial services business in compliance with the Corporations Act, there is a financial buffer that decreases the risk of a disorderly or non-compliant wind-up if the business fails, and there are incentives for owners of the business to comply with the Corporations Act through risk of financial loss.

## **UPCOMING CLIFFORD CHANCE EVENT**

### **Annual Global Funds Conference**

We cordially invite you to attend Clifford Chance's Annual Global Funds conference, which will take place at Clifford Chance's offices in 31 West 52 Street New York, NY 10019, 4th Floor Conference Centre from 3:00 pm on 12 September 2012.

Regulatory and compliance issues remain the number one priority in the funds and investment management sector. Significant changes to both US and EU legislation are having a profound effect on the way in which funds industry practitioners in all four corners of the globe will operate in the future.

In light of the extra-territorial nature of much of the new regulation, we are once again bringing together experts from Europe, the US and Asia who will consider these issues comparatively, looking at the challenges fund industry participants face in developing approaches and policies to achieve global compliance, as well as some of the opportunities arising from regulatory change. We will also be focusing on the current fundraising landscape, with

a panel featuring leading placement agents from the industry, as well as a session on accessing the Chinese market.

Topics that we will be addressing include:

- an update on the current regulatory environment from the perspective of experts in Europe, the US and Asia;
- a panel discussion on the current fundraising environment, featuring leading US placement agents;
- a discussion on accessing China's public and private funds market; and
- an update on OTC derivatives reforms in the US and the EU and their impact on the funds industry globally.

To register yourself and any interested colleagues for this seminar please click on the link below.

If you have any questions, please do not hesitate to contact Fiona Grafton at [fiona.grafton@cliffordchance.com](mailto:fiona.grafton@cliffordchance.com). We look forward to seeing you on 12 September.

[Registration page](#)

## RECENT CLIFFORD CHANCE BRIEFINGS

### Is FATCA now workable for Europe's financial institutions?

FATCA – the Foreign Account Tax Compliance Act – imposes US withholding taxes and compliance obligations on banks and financial institutions worldwide. Since it was enacted in 2010, FATCA has been widely criticised as over-broad and unworkable – with compliance potentially unlawful in many jurisdictions. On Thursday 26 July 2012, France, Germany, Italy, Spain, the United Kingdom and the United States published a model intergovernmental agreement with the aim of simplifying FATCA compliance for non-US financial institutions in those jurisdictions.

This briefing provides an initial look at whether this aim has been achieved, and whether FATCA is now workable for financial institutions in the G5.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/is\\_fatca\\_now\\_workableforeuropesfinancia.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/is_fatca_now_workableforeuropesfinancia.html)

### Antitrust Review for May – June 2012

Clifford Chance has published the May – June 2012 issue of Antitrust Review, with commentary on the main developments in national and international antitrust law and policy.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/antitrust\\_reviewmay-june2012.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/antitrust_reviewmay-june2012.html)

### Liability Management – Exit Consents and Oppression of the Minority

In a significant recent judgment, the English Court has analysed the legal basis for the 'exit consent' technique that has formed an important part of recent liability management exercises and provided a timely reminder that the English courts will not uphold structures that seek to impose unfair or punitive outcomes on dissenting or non-participating Noteholders.

This briefing discusses the judgment of the High Court in Assenagon Asset Management S.A. and Irish Bank Resolution Corporation Limited (Formerly Anglo Irish Bank Corporation Limited), which was handed down on 27 July 2012.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/liability\\_managementexitconsentsan.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/liability_managementexitconsentsan.html)

### Good news for debt capital markets

The latest amendment to the Czech Act on Bonds becomes effective on 1 August 2012. The amendment ushers in several new instruments called for by market participants and introduces several positive changes that should lessen the transactional costs and administrative burden connected with the issue and administration of bonds.

One of the most notable changes brought about by the amendment is that the special treatment of holders of mortgage bonds under the Act on Bonds and Czech insolvency law will apply not only to mortgage bonds governed by Czech law but also to mortgage bonds issued by Czech banks as securities governed by foreign law. Other positive changes outlined by the amendment include the elimination of the need for Czech National Bank approval of the terms and conditions of bonds and for publication of the terms and conditions as well as the possibility to hold meetings of bondholders by electronic means.

This briefing discusses these and other changes brought about by the amendment.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/good\\_news\\_for\\_debtcapitalmarkets.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/good_news_for_debtcapitalmarkets.html)

### CSRC New Rules to Buck Up the QFII Program

Ever since the Qualified Foreign Institutional Investors (QFII(s)) initiative started in 2002, the China Securities

Regulatory Commission (CSRC), the People's Bank of China (PBOC) and the State Administration of Foreign Exchange (SAFE) have taken a step-by-step approach to promote the program by lowering barriers for QFIIs' entry and expanding the universe of permissible investments available to QFIIs. China remains keen to continue to deepen the opening of its domestic capital markets, and in that context CSRC and SAFE have looked to issue more QFII licenses and quota. At present, 172 institutions have obtained QFII licenses, of which 147 have been granted a total quota of USD 28.533 billion.

In light of the still smaller market share of QFIIs, following a public consultation from 20 June 2012 to 5 July 2012, CSRC issued the Provisions on the Issues Related to Implementing the Administrative Measures for Domestic Securities Investment by Qualified Foreign Institutional Investors on 27 July 2012, which came into effect on the same day. The new provisions should permit the easier participation by a wider group of QFIIs.

This briefing discusses the major changes as a result of the new QFII provisions.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/csrf\\_new\\_rules\\_tobuckupthefqfiiprogram.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/csrf_new_rules_tobuckupthefqfiiprogram.html)

#### **UAE Investment Funds Regulation implemented**

The UAE Securities and Commodities Authority (SCA) has implemented its eagerly awaited Investment Funds Regulation. The Investment Funds Regulation transfers regulatory responsibility for the licensing and marketing of investment funds and for a number of related activities from the UAE Central Bank to the SCA.

The Investment Funds Regulation applies to all matters relating to domestic investment funds and to the promotion and offering of foreign funds in the UAE. The Investment Funds Regulation prohibits an entity from establishing a domestic investment fund without first obtaining approval from the SCA. With respect to the promotion of foreign funds in the UAE, this may only be done through a locally

licensed placement agent with the approval of the SCA (or in some cases, through the local representative office of the fund manager).

This briefing discusses the regulation.

[http://www.cliffordchance.com/publicationviews/publications/2012/08/uae\\_investment\\_fundsregulationimplemented.html](http://www.cliffordchance.com/publicationviews/publications/2012/08/uae_investment_fundsregulationimplemented.html)

#### **Changes to capital raising provisions of ASX Listing Rules**

The Australian Securities Exchange's (ASX) amendments to the ASX Listing Rules relating to capital raisings by small to mid cap listed entities came into effect on 1 August 2012. The amendments follow industry feedback on proposals released for comment by ASX in April 2012. According to ASX, the amendments have been implemented to strike a more complete balance between protecting shareholder interests and facilitating timely capital raisings and to ensure the capital raising competitiveness of ASX.

This briefing discusses the changes.

[http://www.cliffordchance.com/publicationviews/publications/2012/08/changes\\_to\\_capitalraisingprovisionsofas.html](http://www.cliffordchance.com/publicationviews/publications/2012/08/changes_to_capitalraisingprovisionsofas.html)

#### **Changes to admissions requirements of ASX Listing Rules**

The Australian Securities Exchange (ASX) has advised that amendments to the admission requirements under the ASX Listing Rules will come into effect on 1 November 2012. The announcement allows a three-month transition period for entities currently in the process of applying for admission under the existing regime. The amendments to the Listing Rules follow industry feedback on proposals released for comment by ASX in April 2012.

This briefing discusses the amendments.

[http://www.cliffordchance.com/publicationviews/publications/2012/08/changes\\_to\\_admissionsrequirementssofaslisting.html](http://www.cliffordchance.com/publicationviews/publications/2012/08/changes_to_admissionsrequirementssofaslisting.html)

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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.

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