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Briefing note

# International Regulatory Update

## 18 - 22 December 2017

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**EU Commission adopts legislative proposals to amend prudential rules for investment firms**

The EU Commission has adopted a proposal for a regulation and a proposal for a directive to amend the current EU prudential rules for investment firms. The two pieces of legislation would amend the existing prudential framework set out in the Capital Requirements Regulation (CRR) and Directive (CRD 4) and in MiFID2 and MiFIR.

The Commission is concerned that the services provided by investment firms and the risks they can create are, to a large extent, not covered by existing rules. Under MiFID, only dealing on own account and underwriting or placing instruments on a firm commitment basis have corresponding requirements under the CRR. For other investment services, such as portfolio management, investment advice and execution of orders, such requirements are missing and result in approximate coverage of the risks in involved.

The proposals aim to address the problems of the existing model for investment firms by differentiating the prudential regime according to the size, nature and complexity of investment firms. Under the proposals:

- the largest firms would remain under the prudential regime of CRR and CRD 4 by treating these firms as credit institutions, in line with developments in other jurisdictions; and
- smaller firms (non-systemic firms) would be subject to a bespoke regime with dedicated prudential requirements. These would, in most cases, be different to banks. Investment firms would be divided into three classes depending on their risk profiles. Class 1 firms (systemic investment firms) would include investment firms with total assets above EUR 30 billion which provide underwriting services and dealing on own account. Class 2 firms would be any firms above set size thresholds, including but not limited to:
- asset under management under both discretionary portfolio management and non-discretionary arrangements higher than EUR 1.2billion;
- client orders handled of at least EUR 100 million per day for cash trades and and/or at least EUR 1 billion for derivatives;
- balance sheet total higher than EUR 100 million; and
- total gross revenues higher than EUR 30 million.

**MiFID2: EU Commission adopts decision on equivalence of Swiss stock exchange framework**

The EU Commission has adopted a Commission Implementing Decision on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with MiFID2.

The decision sets out that the Commission will recognise trading venues in Switzerland as eligible for compliance with the trading obligation for shares under MiFID2 and MiFIR. The decision is time limited until 31 December 2018, taking into account the conclusions of the General Affairs Council in February 2014, which stated that no further market access should be granted to Switzerland until the institutional agreement with Switzerland is in place. The institutional agreement is expected to be concluded by the end of 2018. The Commission intends to monitor the impact of the decision and consider the broader political context.

The decision will enter into force on the day after its publication in the Official Journal.

**Recovery and resolution of CCPs: EU Council Presidency publishes compromise proposal**

The EU Council Presidency has published a compromise text on the proposal for a regulation on a framework for the recovery and resolution of central counterparties (CCPs).

**MiFID2: ITS on passporting published in Official Journal**

A Commission Implementing Regulation (2017/2382) laying down implementing technical standards (ITS) on passporting under MiFID2 has been published in the Official Journal.

The ITS set out common standard forms, procedures and templates for the submission of information required when investment firms, market operators, and, where required by MiFID2, credit institutions wish to provide investment services and perform activities in another Member State under the freedom to provide services or under the right of establishment.

The ITS entered into force on 21 December 2017 and applies from 3 January 2018.

**Capital Markets Union: ESMA consults on draft technical standards for securitisation**

The European Securities and Markets Authority (ESMA) has published three consultation papers on draft technical standards under the Securitisation Regulation, which is expected to be published in the Official Journal soon.

The Securitisation Regulation, part of the Capital Markets Union (CMU) project, establishes a general framework for securitisation and creates a specific framework for simple, transparent and standardised (STS) securitisation. The Regulation includes a number of mandates for ESMA to develop technical standards and, as such, ESMA is consulting on:

- draft regulatory technical standards (RTS) and implementing technical standards (ITS) on securitsation disclosure requirements (document number ESMA33-128-107), which covers the contents and format of underlying exposures and investor report templates, as well as operational standards for providing these reports to securitisation repositories, and for accessing this information from repositories;
- draft ITS on content and format of STS notifications to ESMA (ESMA33-128-33); and
- draft RTS on authorisation applications for third parties verifying STS compliance (ESMA33-128-108).

Comments on all three consultations are due by 19 March 2018.

**Capital Markets Union: EBA consults on RTS for securitisation**

The European Banking Authority (EBA) has published two consultation papers on draft RTS under the Securitisation Regulation as part of the CMU.

The first draft RTS specify the requirements for originators, sponsors and original lenders related to risk retention with the aim of reducing the risk of moral hazard and aligning interests. As the new Securitisation Regulation sets out requirements on the retention of material net economic interest in relation to exposures to securitisations, which will replace the requirements currently set out in the CRR, these draft RTS will replace the current Delegated Regulation on risk retention under the CRR. Various new provisions have been added in the draft RTS including when an entity shall be deemed not to have been established or to operate for the sole purpose of securitising exposures, transfers or hedging of the retained interest, circumstances under which the retainer should be changed and adverse selection of assets.

The second draft RTS set out criteria for the underlying exposures in securitisation to be deemed homogeneous. The homogeneity requirement aims to facilitate the assessment of underlying risks by investors, enabling them to perform robust due diligence, and is one of the key requirements for simple, transparent and standardised (STS) securitisation. The draft RTS will apply to both asset-backed commercial paper (ABCP) and non-ABCP securitisations. The draft RTS define a set of criteria according to which the underlying exposures are deemed homogeneous and provide a non-exhaustive list of asset

categories, as well as lists of the risk factors to be generally considered for each of these asset categories.

Comments on both consultations are due by 15 March 2018.

**Transparency Directive: ESMA publishes final report on European Single Electronic Format**

ESMA has published its final draft RTS setting out the digital format which issuers in the EU must use to report their company information under the Transparency Directive from 1 January 2020. In addition to the RTS on the European Single Electronic Format (ESEF), ESMA has also published a reporting manual and detailed instructions on implementation.

The RTS require that Inline Extensible Business Reporting Language (XBRL) is the technology used for issuers to report their annual financial reports in a single electronic format as it enables both machine and human readability in one document. This digital format allows users such as investors, analysts and auditors to carry out software supported analysis and comparison of large amounts of financial information.

**MiFID2: ESMA updates opinions on post trade transparency and position limits**

ESMA has updated its opinions on post trade transparency and position limits under MiFID2 and MiFIR.

Following publication of the opinions in May 2017, ESMA has received requests to assess more than 200 third-country trading venues under criteria in the two opinions. ESMA has not been in a position to assess all of the venues ahead of 3 January 2018 and, as such, ESMA will carry out the determination of third-country trading venues and publish the results in the course of 2018. Pending that assessment, the opinions state that transactions on third-country trading venues do not need to be made post-trade transparent and/or positions held in those third country venue contracts are not considered to be economically equivalent over-the-counter (EEOTC) contracts.

**MiFID2: ESMA revises trading halts reporting procedure and templates**

ESMA has published a document formalising a revised common procedure and template for national competent authorities (NCAs) to adhere to in reporting the parameters to halt or constrain trading used by trading venues under their jurisdiction to ESMA under Article 48(5) of MiFID2.

The document sets out a procedure and harmonised format to be used by NCAs in reporting. The template has been revised to reduce the number of fields with free text and replace them with hard-coded input. There is no legal mandate to determine the format of the reports, but ESMA views it as necessary to ensure consistency and comparability of the notifications. The revised procedure postpones the delivery of the first report to ESMA by six months to the end of June 2018.

**MiFIR: RTS on trading obligation for derivatives published in Official Journal**

A Commission Delegated Regulation (2017/2417) with regard to RTS on the trading obligation for certain derivatives under MiFIR has been published in the Official Journal.

The RTS set out which derivatives should only be traded on an EU trading venue or a non-EU trading venue covered by a Commission equivalence decision. EU trading venues include regulated markets, multilateral trading facilities (MTFs), and organised trading facilities (OTFs). Specifically, the RTS identify certain fixed-to-float IRS denominated in EUR, GBP and USD and two Index CDS that should be subject to the trading obligation.

The RTS entered into force on 23 December 2017.

**EMIR: ESAs publish draft RTS amending margin requirements for non-centrally cleared OTC derivatives**

The Joint Committee of the European Supervisory Authorities (ESAs), which comprises the EBA, ESMA and the European Insurance and Occupational Pensions Authority (EIOPA), has published draft RTS amending the framework of the European Market Infrastructure Regulation (EMIR) with regard to physically settled FX forwards.

The requirement to exchange variation margin (VM) for physically settled FX forwards is part of a globally agreed framework which aims to ensure safer derivatives markets by limiting the counterparty risk from derivatives trading partners. The ESAs have developed the draft amendments after undertaking a review of the RTS on risk mitigation techniques for OTC derivatives not cleared by a CCP.

The draft amendments to the RTS are intended to align the EU's treatment of variation margin for physically-settled FX forwards with the supervisory guidance applicable in other key jurisdictions, implying that the requirement to exchange VM for physically settled FX forwards should only target

transactions between institutions (credit institutions and investment firms).

The ESAs acknowledge that the amended RTS will probably not enter into force before 3 January 2018, when the requirement to exchange VM for physically settled FX forwards is due to enter into force. Consequently, the ESAs are of the view that, for institution-to-non-institution transactions, the competent authorities should apply the EU framework in a risk-based and proportionate manner until the amended RTS enter into force.

The ESAs have submitted the draft amended RTS to the EU Commission, which has three months to decide whether to adopt them.

**Short Selling Regulation: ESMA submits technical advice on possible amendments**

ESMA has published its final technical advice on the evaluation of certain elements of the Short Selling Regulation (236/2012 – SSR). The advice has been issued under a mandate from the EU Commission and follows a consultation launched in July 2017.

Each section of the report summarises the relevant provisions of the SSR, identifies the main issues and concerns and explores possible ways to address them. ESMA has proposed a number of amendments on controversial areas of the SSR, with the intention to improve its relevance, effectiveness, coherence, and efficiency. The amendments relate to:

- the exemption for market making activities, including proposals to change the definition of 'market making activities' to include the different types of on-venue market making activities described in MiFID2, and introducing market maker reporting obligations;
- short-selling bans, including a proposal to change bans on short selling into a ban on entering into or increasing net short positions, as well as new rules on competent authorities adopting short-term bans; and
- transparency of net short positions, including a proposal for a centralised notification and publication system across Europe.

**AMLD 4: EU Parliament and Council reach agreement on proposed revisions**

The EU Parliament and EU Council have reached a political agreement on the EU Commission's proposed revisions to the fourth Anti-money Laundering Directive (AMLD 4). The new measures are intended to:

- increase transparency around the real owners of companies and trusts through the establishment of public and accessible beneficial ownership registers;
- prevent risks associated with the use of virtual currencies for terrorist financing;
- restrict the anonymous use of pre-paid cards;
- improve the safeguards for financial transactions to and from high-risk third countries; and
- enhance Financial Intelligence Units' access to information, including through centralised bank and payment account registers.

The agreement will now be submitted to the EU Parliament and EU Council for formal endorsement, at which point Member States will have 18 months to transpose the new rules in their national legislation.

**Capital Markets Union: EU Commission consults on regulatory barriers to SME listings**

The EU Commission has published an inception impact assessment and consultation on an initiative aimed at reviving small and medium-sized enterprises (SMEs) initial public offerings (IPOs) and bond listings as part of the CMU project.

The consultation, which is focused on SME Growth Markets as created by MiFID2 and the companies that can be listed on those trading venues, is split into two parts. The first is broadly framed and seeks views on the main challenges SME-dedicated markets are currently facing. It is hoped responses will help identify, and estimate the scale of, the drivers behind a downward trend of SME IPOs and bond issuances, and help determine the priorities for policy actions.

The second part is more narrow and divided into three sub-sections. First, whether MiFID2 rules on SME Growth Markets as currently framed are sufficiently well-calibrated to achieve their intended objectives. Secondly, whether the administrative burden on listed SMEs can be alleviated while maintaining a high level of investor protection and market integrity. Thirdly, how to foster local ecosystems and liquidity on SME-dedicated markets.

The consultation period is ten rather than twelve weeks, closing on 26 February 2018. The shorter timeframe is justified on the basis that the consultation is focused on issues relating to SME listing that have been the subject of sustained dialogue with both stakeholders and Member States.

Feedback is also sought on the inception impact assessment on building a proportionate regulatory environment to support SME listing. The feedback period ends on 15 January 2018.

**BRRD: EBA publishes report and final draft RTS on simplified obligations and waivers in recovery and resolution planning**

The EBA has published a report on the application of simplified obligations and waivers in recovery and resolution planning and its final draft RTS specifying the eligibility criteria to determine whether institutions could be subject to simplified obligations when drafting such plans.

The report shows that across the EU, significantly divergent practices apply. Differences have been identified both in the assessment of institutions' eligibility for simplified obligations, as well as in determining the reduced scope of the recovery and resolution planning requirements laid down in the Bank Recovery and Resolution Directive (BRRD). The EBA hopes the final draft RTS on simplified obligations will address most of these divergences by introducing a common two-stage eligibility assessment methodology. This is intended to increase the convergence of practices and ensure a level playing field.

The EBA intends to monitor the identified differences in relation to the scope of application of simplified obligations and waivers as well as to the impact of the final draft RTS.

**CRR2: EBA publishes discussion paper on implementation of revised market and counterparty credit risk frameworks**

The EBA has published a discussion paper (EBA/DP/2017/04) on the implementation of the Fundamental Review of the Trading Book (FRTB) and the Standardised Approach for Counterparty Credit Risk (SA-CCR) in the EU.

The discussion paper is intended to provide preliminary views on the EU Commission's legislative proposal to amend the Capital Requirements Regulation (CRR2), specifically its proposal to transpose the FRTB and SA-CCR developed by the Basel Committee on Banking Supervision (BCBS) into EU law.

The discussion paper outlines a roadmap for the development of the regulatory deliverables included in the current CRR2 proposal, and sets out potential implementation issues. In respect of the FRTB, these include:

- trading book boundary;
- treatment of non-TB positions subject to FX or commodity risk;
- residual risk add-on;
- internal model approach (IMA) liquidity horizons;
- backtesting and profit and loss (P&L) attribution requirements; and
- non-modellable risk factor stress scenario risk measure.

In respect of the SA-CCR, the issues identified include:

- mapping of derivative transactions to risk categories; and
- corrections to supervisory delta.

Views are sought on the issues set out above, and on any additional matters stakeholders may have identified. The deadline for submissions is 15 March 2018.

**CRD 4: EBA consults on amended ITS on benchmarking portfolios**

The EBA has published a consultation paper on draft ITS on benchmarking of internal models, which would replace in whole the relevant annexes and consolidate the benchmarking portfolios ITS as an updated package. Under CRD 4, competent authorities are required to conduct an annual assessment of the quality of internal approaches used for the calculation of own funds requirements, for which the EBA distributes benchmark values against which individual institutions' risk parameters can be compared based on data submitted under the CRR.

The consultation is intended to update market and credit risk portfolios as well as make minor changes to reporting templates and instructions, in order to keep the portfolios up to date and the reported data relevant for the assessments. In relation to market risk, the EBA proposes a new set of market risk benchmarking portfolios in response to feedback received from institutions during interviews held as part of benchmarking exercises. For credit risk, the main changes that the EBA proposes relate to:

- separation of on-balance sheet and off-balance sheet exposures;
- replacement of RWA* and RWA** with confidence intervals;
- separation of specialised lending exposures and other credit risk exposures;

- making consistent the use of economic sector classification for portfolios covering exposures to sovereigns and institutions; and
- refinement of the split by collateral type.

The revised benchmarking portfolios and reporting requirements are expected to be applicable for the submission of initial market valuation data in Q3 2018 and for other market and credit risk data in 2019.

Comments on the consultation are due by 31 January 2018.

**MREL: SRB publishes second policy statement**

The Single Resolution Board (SRB), together with Banking Union national resolution authorities (NRAs), has published the 2017 report on minimum requirements for own funds and eligible liabilities (MREL), which constitutes a second policy statement.

The report sets out that for the 2017 resolution planning cycle, the SRB will:

- move away from informative targets and will set bank-specific binding consolidated MREL targets under single point-of-entry (SPE) or multiple point-of-entry (MPE) for all global systemically-important institutions (G-SIIs) and banks with resolution colleges under its remit;
- establish bank-specific transition periods to allow banks to implement the requirement by progressively building up their MREL capacity;
- broaden the 2016 default approach to include a number of bank-specific adjustments, enhancing requirements for eligible liabilities and expecting a minimum level of subordination;
- introduce a subordination benchmark for other systemically important institutions (O-SIIs); and
- prepare for future implementation of MREL on an individual basis.

The SRB has also announced that in 2018 it intends to focus on:

- enhancing the MREL targets based on the outcome of the SRB's resolvability assessment;
- refining its location policy within groups and developing a framework for individual and internal MREL; and
- developing a policy for transfer strategies.

**SRB: Delegated Regulation on final system of contributions to administrative expenses published in Official Journal**

A Commission Delegated Regulation (2017/2361) on the final system of contributions to the administrative expenditures of the Single Resolution Board (SRB) has been published in the Official Journal.

The Regulation introduces the final system of contributions to the administrative expenditures of the SRB, and repeals the provisional system laid down in Commission Delegated Regulation (EU) No 1310/2014.

The Regulation will enter into force on 8 January 2018.

**Basel Committee issues proposed technical amendment to Net Stable Funding Ratio**

The Basel Committee on Banking Supervision (BCBS) has launched a consultation on its first proposed technical amendment, which is related to the treatment of extraordinary monetary policy operations in the Net Stable Funding Ratio.

Technical amendments are defined as changes to standards that are not substantial in nature but that cannot be unambiguously resolved based on the current text.

The technical amendment proposes to allow reduced required stable funding factors for central bank claims with maturity of more than six months to provide greater flexibility in the treatment of extraordinary central bank liquidity-absorbing monetary policy operations.

Comments are due by 5 February 2018.

**Brexit: Chancellor and UK regulators set out planning for financial services**

The Chancellor of the Exchequer, The Rt Hon Philip Hammond MP, has issued a written statement to the House of Commons on the Government's plans for financial services in relation to Brexit. The statement notes that it is the responsibility of the Government, Bank of England (BoE) and Financial Conduct Authority (FCA) to plan for all possible outcomes, including the possibility of 'no deal'.

The Government will bring forward secondary legislation to ensure that UK authorities are able to carry out functions currently undertaken by EU authorities and will give:

- the BoE powers in relation to non-UK CCPs and non-UK central securities depositories (CSDs); and
- the FCA powers in relation to UK and non-UK credit rating agencies (CRAs) and trade repositories. In a

separate statement, the FCA has announced that it will work closely with the Government and UK CRAs and trade repositories to ensure a smooth transition to the new regime.

As requested by the BoE and FCA, the Government will also, if necessary, bring forward legislation to:

- establish a temporary permissions regime for EEA firms and funds operating in the UK to continue their activities for a limited period after withdrawal; and
- ensure that contractual obligations not covered by the regime can continue to be met.

The FCA statement anticipates that firms would be able to continue to benefit from passporting during an implementation period, and welcomes the intention to provide a period of transition. It also welcomes the Government's announcement on a possible temporary permissions regime, and sets out the implications for firms and funds solely regulated in the UK by the FCA, which would need to notify the FCA before exit day of their desire to benefit from the regime under a process to be announced in 2018.

The FCA also calls on firms based in the UK servicing clients in the EEA to continue to prepare for a range of scenarios and to discuss these arrangements and the implications of an implementation period with the relevant EU regulator.

The Prudential Regulation Authority (PRA) has launched consultations on branch authorisation and supervision of both international banks and international insurers.

The consultation paper on international banks (CP29/17) is relevant to all PRA-authorised deposit-takers and designated investment firms operating in the UK that are part of non-UK headquartered groups and international banks that may seek PRA authorisation in the future. It proposes a new approach to authorising and supervising international banks, which include those that undertake wholesale banking activities in the UK via branches. At present international banks can operate in the UK either through subsidiaries or branches, including EEA branches operating under passporting arrangements. The PRA takes the view that branching, when done safely, is an important component of an open world economy that benefits the UK economy. As such, the consultation paper and accompanying draft supervisory statement set out the PRA's proposals for a new approach to branch authorisation and supervision, which introduces three key elements that focus on wholesale banking:

- the systemic importance of a branch;
- the PRA's expectation for a greater degree of supervisability of systemic wholesale branches, focussing on an appropriate degree of visibility and influence over the supervisory outcomes for the firm as a whole and the wider group; and
- where the PRA is unable to gain sufficient assurance over the supervisability of systemic wholesale branches, the likelihood that the PRA would impose specific regulatory requirements at branch level on a case-by-case basis.

The PRA expects to apply its new approach, to be set out in a final supervisory statement after the consultation period, when assessing applications from those EEA firms intending to apply for PRA authorisation to continue operating in the UK after the UK's withdrawal from the EU.

The consultation paper on international insurers (CP30/17) is relevant to all existing and prospective insurance firms carrying out regulated activities but not headquartered in the UK that are not able to benefit from passporting rights, excluding Swiss General Insurers. The consultation sets out proposals for a supervisory statement on factors that would be considered relevant when considering authorisation as a third-country branch or a subsidiary. In addition to current requirements and a considerable weight placed on the extent and quality of cooperation with the home supervisor, the PRA proposes additional consideration of the:

- scale of UK branch activity covered by the Financial Services Compensation Scheme (FSCS) and satisfaction that the protected amount can be absorbed by insurers liable to contribute to the FSCS; and
- impact of the failure of a firm with a UK branch on the wider insurance market and financial system.

Comments on both consultations are due by 27 February 2018.

Alongside the consultations, the PRA has also published two Dear CEO letters:

- Sam Woods, Deputy Governor and CEO of the PRA, has written to banks, insurers and designated investment firms setting out planning assumptions for firms' preparations for Brexit. Among other things, the PRA has set out that in the absence of continued

passporting rights post-Brexit, firms currently exercising those rights as inbound firms will need to seek authorisation. As set out in the consultation papers, the PRA's approach is based on assessing that the degree of equivalence of the home state regime in meeting international standards is consistent with the PRA's objectives and, in light of the progress to date in the Brexit negotiations, for the present firms may plan on the assumption that they may apply for authorisation as branches, unless they are conducting material retail business. The letter highlights that firms planning to establish or grow subsidiary operations in the EU should note proposals in the consultation that where there are significant interconnections between entities in the UK and the EU these should be capable of being effectively managed both in business-as-usual and in the event of resolution. The PRA also notes that the authorisation process may take up to twelve months from the point of application; firms may submit applications for authorisation from January 2018. The planning assumptions will be regularly reviewed and updated as necessary; and

- Sir John Sutcliffe, Deputy Governor Financial Stability, has written to CCPs recognised by ESMA to operate in the EU under EMIR, on the BoE's plans for a recognition regime for CCPs after Brexit. The letter sets out that UK domestic law requirements for recognition of non-UK CCPs will in essence by the same as the current requirements under Article 25 of EMIR, which is intended to provide certainty to non-UK CCPs and their users for the period immediately following withdrawal. As such, non-UK CCPs satisfying the Article 25 criteria will be recognised and able to operate without discontinuity of service. The Deputy Governor notes that the BoE will review the framework at a later stage. The letter sets out the steps that non-UK CCPs will need to take to be recognised.

**FCA publishes policy statement on application of EU Benchmarks Regulation**

The FCA has published a policy statement (PS17/28) setting out near final rules to accompany the application of the EU Benchmarks Regulation.

PS17/28 contains near-final draft rules to ensure the FCA Handbook is consistent with the EU Benchmarks Regulation, which applies from 1 January 2018. It also provides the FCA's responses to the feedback it received to its consultation (CP17/17) on the proposed changes to the FCA Handbook.

The FCA intends to make the final rule changes to the FCA Handbook once it has the legislative authority to do so.

**AIFMD: FCA publishes Q&A and summary of obligations on reporting transparency information**

The FCA has published a questions and answers (Q&A) document and a communication on obligations relating to transparency reporting obligations for UK alternative investment fund managers (AIFMs) under the Alternative Investment Fund Managers Directive (AIFMD).

The Q&As provide information on what transparency information must be reported, who is required to report it, how the FCA will collect the information and how AIFMs should use Gabriel, the FCA's regulatory reporting system, to submit their reports.

The communication sets out information on transparency reporting requirements and procedures, and the FCA's approach to missed or late reporting, under Annex IV of the AIFMD.

**Companies Act 1989 (Financial Markets and Insolvency) (Amendment) Regulations 2017 laid before Parliament**

The Companies Act 1989 (Financial Markets and Insolvency) (Amendment) Regulations 2017 (SI 2017/1247) have been laid before Parliament.

The Regulations make amendments to Part 7 of the Companies Act 1989, which provides for the disapplication of relevant insolvency law requirements in specified circumstances for the purpose of safeguarding the operation of certain financial markets. The amendments relate to amendments made to Commission Delegated Regulation (EU) No. 149/2013 by revised RTS under EMIR on indirect clearing arrangements (Commission Delegated Regulation (EU) 2017/2155) and RTS on indirect clearing arrangements under MiFIR (Commission Delegated Regulation (EU) 2017/2154).

Under the RTS new segregated account structures should be provided by a CCP and the clearing members of a CCP for indirect clients for both OTC and exchange traded derivative transactions. The Regulations amend Part 7 provisions which facilitate the segregation of indirect client accounts at a clearing member and the transfer of indirect client accounts on the failure of a client providing indirect clearing services.

The Regulations came into force on 3 January 2018.

**BaFin provides information on licence requirements for participants and members of German stock exchanges**

The German Federal Financial Supervisory Authority (BaFin) has published an information letter on licence requirements. As of 3 January 2018, anyone who conducts proprietary business (Eigengeschäft) as a participant or member of a German stock exchange, a multilateral trading facility or other trading venue, i.e. trades financial instruments in their own name and on own account without providing any service to a third party, requires a licence pursuant to section 32 para. 1a sentence 2 of the German Banking Act (KWG).

In addition to entities located in Germany, the new rule will also affect foreign entities from both the EEA and third countries that wish to conduct operations cross-border in Germany. Pursuant to the transitional provision of section 64x para. 8 sentence 1 KWG, third-country companies which are in scope of the licence requirement are considered – temporarily – exempt from the requirement to obtain a licence if they submit an application for exemption to BaFin pursuant to section 2 para. 5 KWG by 2 July 2018.

**Reporting: BaFin consults on revised FinaRisikoV**

BaFin has published a revised draft of the German Regulation on Financial Information and Information on the Risk-Bearing Capacity (FinaRisikoV) and launched a consultation.

The background of the revision is to adjust the frequency of the reporting to the requirements imposed by Regulation (EU) 2015/534 of the European Central Bank which applies as of 30 June 2017 also to less significant entities and groups.

Comments on the draft FinaRisikoV may be submitted to BaFin until 17 January 2017.

**Liquidity stress tests: BaFin publishes report with guidelines for asset management companies**

BaFin has published a report with guidelines for liquidity stress tests for asset management companies (Kapitalverwaltungsgesellschaften). The guidelines describe what BaFin considers to be an appropriate design for liquidity stress tests in the context of liquidity risk management.

According to BaFin, the liquidity risk facing investment funds is difficult to determine as these funds hold assets with different liquidity levels while at the same time offering investors short-term redemption. BaFin views stress tests as an important tool for measuring and controlling this risk, on the basis that they can help to improve portfolio and risk management and reduce liquidity risk at the level of the individual investment fund. Whether the design of a stress test is appropriate depends on the business model and the size of the investment company. However, BaFin clarifies that reporting channels and responsibilities should always be clearly defined. BaFin further outlines that the design of stress test scenarios as well as their frequency should be tailored to the individual investment funds as far as possible. In this respect, the guidelines do not contain generally applicable provisions for liquidity stress tests, but rather assign responsibility for finding the most suitable risk management tools to the asset management companies.

**BaFin to apply position limits in commodity derivatives**

As of 4 January 2018, the German Federal Financial Supervisory Authority (BaFin) intends to apply position limits in the following commodity derivatives:

- French Power Future (Base) contracts and French Power Option (Base) contracts;
- French Power Future (Peak) contracts;
- illiquid commodity contracts;
- Italian Power Future (Base) contracts and Italian Power Option (Base) contracts;
- Phelix Power Future DE/AT (Base) contracts and Option DE/AT (Base) contracts;
- Phelix Power Future DE/AT (Peak) contracts;
- Spanish Power Future (Base) contracts and Option (Base) contracts; and
- Swiss Power Future (Base) contracts.

**Bank of Spain maintains countercyclical capital buffer at 0%**

The Bank of Spain (Banco de España) has issued a press release that it will maintain the value of the countercyclical capital buffer applicable to credit exposures in Spain at 0% in the first quarter of 2018.

**CNMV issues circular on obligations of investment firms regarding online disclosure of corporate governance and remuneration policies**

The Spanish National Securities Market Commission (CNMV) has issued Circular 3/2017, of 29 November, on the obligations of investment firms in terms of disclosure on their websites in relation to corporate governance and

remuneration policies and amending Circular 7/2008, of 26 November.

Article 31 ter of the Royal Decree 217/2008, of 15 February, on the legal regime for investment firms (Real Decreto 217/2008, de 15 de febrero, sobre régimen jurídico de las empresas de servicios de inversión y de las demás entidades que prestan servicios de inversion) sets out the obligations of investment firms in terms of disclosure on their websites in relation to corporate governance and remuneration policies. Circular 3/2017, of 29 November, on the obligations of investment firms in terms of disclosure on their websites in relation to corporate governance and remuneration policies and amending Circular 7/2008, of 26 November, further develops those obligations.

Circular 3/2017 establishes that the information must be complete, clear, comprehensible and up to date, as well as easily accessible from the website's homepage. Furthermore, it sets out the content to be included in the section regarding corporate governance and remuneration policies, which includes articles of association, regulations, organisational structure, risk control procedures, internal control mechanisms, the composition of the board and total remuneration paid. It also states that the access to such information must be free of charge and it must be possible to download and print it. Investment firms have three months from the date of publication of the circular to implement these measures.

Additionally, the circular amends Circular 7/2008, of 26 November, which covers the accounting standards applicable to investment firms and collective investment scheme management companies, in order to incorporate the new accounting treatment applicable to intangible assets. As a consequence of the amendment, the useful life of such assets becomes definite and, accordingly, they are amortisable. When their useful life cannot be reliably estimated, they will be amortised over a period of 10 years.

**FINMA revises circular on risk diversification of banks**

The Swiss Financial Market Supervisory Authority (FINMA) has published a revised Circular 2019/1 'Risk diversification – banks'. The revisions reflect amendments to the Capital Adequacy Ordinance adopted by the Federal Council on 22 November 2017, which impose a maximum limit on the size of individual loans by banks.

Following the consultation, several relaxations of the limit have been introduced for smaller institutions. For example, the current exemption for domestic residential mortgage lending will continue. In addition, the rules have been simplified to account for Lombard and repo transactions.

The revised circular entered into force on 1 January 2019.

**FINMA consults on Financial Market Infrastructure Ordinance**

FINMA has launched a consultation on the revised draft FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA).

Standardised interest rate and credit derivatives traded over the counter (OTC) will be subject to an obligation to clear trades through a central counterparty authorised or recognised by FINMA. The categories of derivatives subject to this clearing obligation are set out in the draft Annex 1 of FMIO-FINMA. Transitional periods will range from 6 to 18 months beginning from the date of entry into force of the revised FMIO-FINMA.

The consultation remains open until 12 February 2018.

**SFC issues circular to licensed corporations on liquidity risk management**

The Securities and Futures Commission (SFC) has issued a circular to licensed corporations providing guidance on liquidity risk management practices for client money, liquidity and the concentration risks of funding sources within group-affiliated entities.

The circular follows a fact-finding exercise conducted by the SFC on selected licensed corporations with group-affiliated entities. The exercise identified the protection of client money kept with affiliated banks and the reliance on funding from affiliated group entities as two major risk areas. To safeguard client assets, the SFC advises licensed corporations to keep client money in segregated accounts at all times.

In particular, licensed corporations are advised to safeguard client money by:

- setting out effective policies and procedures to manage concentration exposure to an affiliated banking group or connected financial institutions;
- regularly reviewing concentration exposure to an affiliated banking group and connected financial institutions; and
- determining appropriate arrangements and procedures to reduce exposure to an affiliated banking group or connected financial institutions on an ongoing basis.

On funding sources, the SFC advises that licensed corporations should not rely on a single source of funding from within their group, to properly manage the risks associated with the licensed corporations' businesses and to ensure the contingent funds available to licensed corporations are adequate to address liquidity shortfalls in a volatile market situation. Licensed corporations are advised to formulate a diversification strategy which provides for more than one source of funding, conduct regular reviews of existing funding sources including external sources and intragroup support and, where appropriate, obtain additional sources of contingent liquidity from non-affiliated financial institutions.

**SFC consults on OTC derivatives and conduct risks**

The SFC has launched a public consultation on its proposals to refine the OTC derivatives regime and to require licensed corporations to manage financial exposures to connected persons.

The SFC proposes to refine the scope of regulated activities to provide more clarity about the OTC derivatives licensing regime, for example, to narrow the scope of certain regulated activities so that they do not capture corporate treasury activities of non-financial groups and certain portfolio compression services.

The consultation also includes proposals related to risk mitigation, client clearing, record keeping and other conduct requirements for OTC derivatives transactions, as well as licensing fees, insurance, competence and training requirements under the new OTC derivatives licensing regime.

More broadly, the SFC proposes to require licensed corporations to properly manage their financial exposures to group affiliates and other connected persons according to the same risk management standards they would apply to independent third parties.

Comments on the consultation paper are due by 20 February 2018.

**SFC proposes amendments to Code on Unit Trusts and Mutual Funds**

The SFC has launched a public consultation on proposed amendments to its Code on Unit Trusts and Mutual Funds (UT Code). The proposed amendments are intended to update the regulatory regime for SFC-authorised funds and address risks posed by financial innovation and fast-moving market developments.

The key proposals include:

- strengthening requirements for key operators (management companies, trustees and custodians);
- providing greater flexibility and enhanced safeguards for funds' investment activities (particularly in relation to derivatives, securities lending, and repo and reverse repo transactions); and
- introducing new fund types including active exchange traded funds (ETFs) to provide investors with more investment choices.

Consequential amendments are also proposed to relevant provisions of the SFC Code on Mandatory Provident Fund (MPF) Products, the Code on Pooled Retirement Funds and the Code on Investment-Linked Assurance Schemes.

Comments on the consultation paper are due by 19 March 2018.

**ABS and Singapore Foreign Exchange Market Committee consults on proposals to enhance SIBOR**

The Association of Banks in Singapore (ABS) and the Singapore Foreign Exchange Market Committee have launched a public consultation to seek feedback on proposals to enhance the Singapore interbank offered rates (SIBOR).

The proposals are intended to anchor the SIBOR to market transactions to the extent possible and enhance the robustness and integrity of the SIBOR. In developing these proposals, the ABS and the Singapore Foreign Exchange Market Committee have taken into consideration recent global benchmark reform initiatives and international standards.

The key proposed enhancements are:

- to anchor reliance on market transactions by calculating the SIBOR using the following waterfall methodology to provide greater clarity and facilitate consistency across panel banks that submit input for the calculation of the SIBOR:
  - transactions in the underlying market;
  - transactions in related markets;
  - expert judgment;
- in line with other jurisdictions, to expand the underlying reference market from interbank to include other wholesale funding transactions. Given that the SIBOR is intended to reflect banks' unsecured funding costs, the inclusion reflects the structural shift in banks' funding sources after the global financial crisis; and

- to discontinue the 12-month SIBOR due to a lack of underlying market transactions and as this benchmark tenor is not widely referenced.

The proposed SIBOR waterfall methodology is projected to be implemented by 2019.

Comments on the consultation paper are due by 5 February 2018.

**MAS consults on strengthening process for determining SGS and MAS Bills closing prices**

The Monetary Authority of Singapore (MAS) has launched a public consultation proposing a framework to strengthen the process of determining the Singapore Government Securities (SGS) and the MAS Bills end-of-day prices (closing prices). This is in line with the MAS' broader efforts to enhance the integrity of the processes for setting financial benchmarks.

The proposed framework is intended to enhance the robustness of pricing inputs and methodology to calculate closing prices, and to strengthen governance and procedures in determining closing prices. The new framework will take reference from the Principles for Financial Benchmarks developed by the International Organization of Securities Commissions (IOSCO).

The key proposals include the following:

- enhancing the closing prices methodology (e.g. by incorporating transacted and executable prices, where available);
- improving the governance and controls of the closing prices determination process; and
- providing guidance to the primary dealers on their obligations in the closing prices determination process.

The proposed framework is expected to be implemented around the end of 2018, after a period where the new methodology will be tested, and to allow sufficient time for processes to be put in place.

Comments on the proposed framework are due by 19 January 2018.

## RECENT CLIFFORD CHANCE BRIEFINGS

**Contentious Commentary — Hong Kong January 2018**

The January 2018 edition of Contentious Commentary: Hong Kong provides a summary of recent developments in litigation and dispute resolution. This edition covers:

- Extensive discovery ordered against solicitors' firm
- Court of Appeal rejects appeal against insider dealing verdict
- Broadband provider falls short in fibre challenge
- Court chides plaintiff for delay in commencing arbitration
- More mediation, less litigation for financial disputes?
- Court of Appeal split on availability of defamation damages
- Court considers shareholders' right to company documents
- Court appoints single joint expert against the wishes of the parties
- Is a foreign default judgment "final and conclusive" in an action for enforcement?
- Competition Tribunal considers admissibility of employee statements
- Court decides appropriate interest rate in share scam

https://www.cliffordchance.com/briefings/2017/12/contentious_commentaryhongkongjanuary2018.html

**US tax reform — who comes out ahead?**

On 20 December 2017, Congress voted to enact the most sweeping US tax reform bill in decades. The Tax Cuts and Jobs Act will permanently reduce the US federal corporate income tax rate, reduce tax rates for a variety of business structures, and make broad changes to the United States' international tax rules.

This briefing paper provides an overview of the Tax Cuts and Jobs Act, and discusses the implications for US companies with significant US operations, US companies investing abroad, and non-US companies investing in the United States.

https://www.cliffordchance.com/briefings/2017/12/us_tax_reform_whocomesoutahead.html

**Delaware Supreme Court further clarifies appraisal principles applicable to public company buy-outs**

This briefing paper analyses the Delaware Supreme Court decision clarifying the extent to which the Chancery Court

can or should rely on pre-transaction stock trading prices and the negotiated buy-out price when determining the fair value of the acquired company's shares.

https://www.cliffordchance.com/briefings/2017/12/delaware_supremecourtfurtherclarifie.html