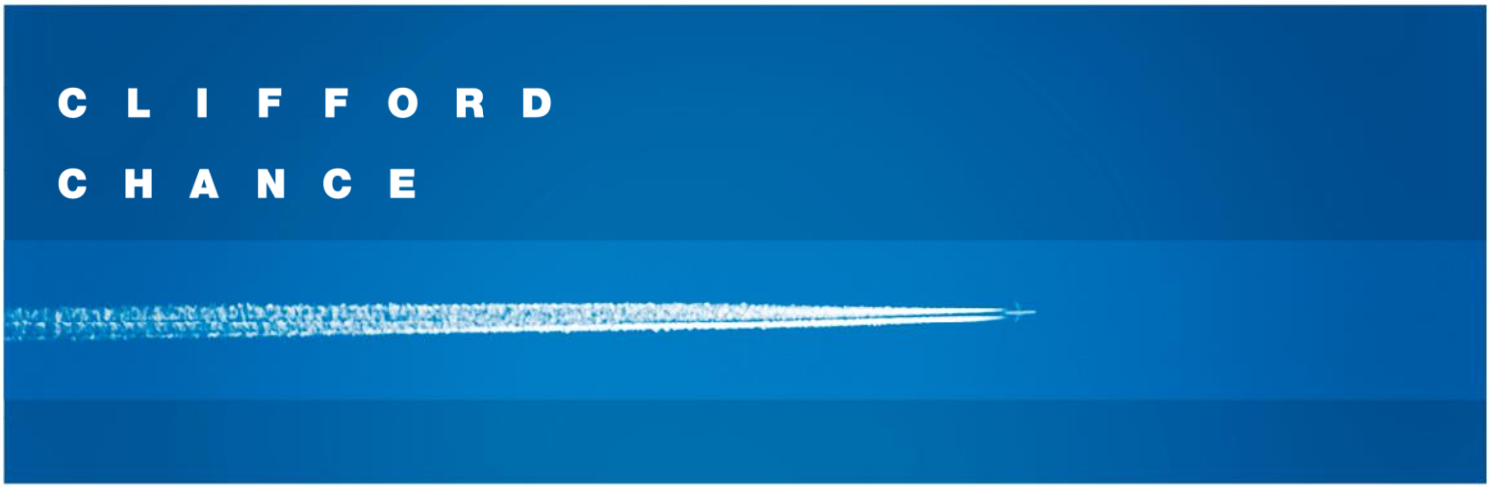

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If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

Chris Bates +44 (0)20 7006 1041
Nick O'Neill +1 212 878 3119
Marc Benzler +49 69 7199 3304
Steven Gatti +1 202 912 5095
Paul Landless +65 6410 2235
Mark Shipman + 852 2826 8992
Donna Wacker +852 2826 3478

International Regulatory Update Editor

Joachim Richter +44 (0)20 7006 2503

To email one of the above, please use firstname.lastname @cliffordchance.com

Clifford Chance LLP,
10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

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CRR: Commission Delegated Regulation on materiality thresholds published in Official Journal

Commission Delegated Regulation (EU) 2018/171, which sets out regulatory technical standards (RTS) on the conditions for setting the materiality threshold for credit obligations past due for the purposes of identifying a default under the Capital Requirements Regulation (CRR), has been published in the Official Journal.

The RTS specify that the materiality threshold set by the competent authorities should consist of two components: an absolute component, which is the absolute amount, and a relative component, which is the percentage of the overall credit obligation that the amount past due represents. When both these are exceeded, the past due credit obligation should be considered material.

The conditions also distinguish between retail and other exposures, and allow for differences in the levels of thresholds applicable in different jurisdictions.

The Delegated Regulation will enter into force on 26 February 2018 and apply from 7 May 2018. The deadline for competent authorities to apply the materiality threshold is 31 December 2020.

EMIR: ECON Committee publishes draft report on proposal on authorisation of CCPs and recognition of third-country CCPs

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has published its draft report on the proposal for a regulation amending the European Market Infrastructure Regulation (EMIR) as regards the procedures and authorities involved for the authorisation of central counterparties (CCPs) and requirements for the recognition of third-country CCPs.

EMIR: ESMA publishes guidelines on CCP conflict of interest management

The European Securities and Markets Authority (ESMA) has published final guidelines on the management of conflicts of interest for CCPs.

The guidelines set out details on circumstances where conflicts of interest may occur and specify the policies and organisational arrangements to be implemented including in the case when a CCP is part of a group structure.

ESMA will translate the final guidelines into the official EU languages, following which competent authorities will have two months to confirm whether they comply or intend to comply with the guidelines.

Money market funds: EU Commission confirms ESMA's stance on use of reverse distribution mechanism

The EU Commission has written a letter to ESMA on the use of the reverse distribution mechanism (RDM) under the Money Market Funds (MMF) Regulation.

In November 2017, ESMA submitted draft implementing technical standards under the MMF Regulation to the EU Commission. In its cover letter, ESMA questioned the use of the RDM, raising the need for legal clarity. The Commission agrees with ESMA's views, finding that the RDM is not compatible with the MMF Regulation.

As a consequence of the current divergent practices in Member States before the application date of the MMF Regulation, the Commission has requested that ESMA take action to ensure consistent application of the regulation and consider issuing guidance to market participants.

MAR: ESMA publishes draft ITS on cooperation and information exchange

ESMA has published a final report on draft implementing technical standards (ITS) on the application of the Market Abuse Regulation (MAR).

The ITS are intended to clarify how national competent authorities (NCAs) and ESMA should cooperate with each other and with other EU authorities, entities and public bodies for the purposes of MAR. They also set out procedures and forms for information exchange and assistance between NCAs and ESMA and other EU entities.

ESMA has submitted the final draft ITS to the EU Commission, which now has three months in which to approve or reject them.

AIFMD: EU Commission launches survey on functioning

The EU Commission has launched a survey on the functioning of the Alternative Investment Fund Managers Directive (AIFMD), seeking stakeholder views on how the Directive has worked in practice and to what extent its objectives have been met. Amongst other things, the survey requests stakeholders' feedback on:

- the AIFMD's requirements;
- their experience in applying them; and
- the impact the AIFMD has had on the market.

Brexit: EU Commission publishes position paper on transitional arrangements

The EU Commission has published a position paper setting out a draft text of the transitional arrangements to be included in the Article 50 Withdrawal Agreement, following the UK's stated intention to remain in the Single Market and the Customs Union for a short time-limited period after its withdrawal from the EU on 30 March 2019. The draft text is intended to translate into legal terms the principles set out in the European Council guidelines of 29 April 2017 and 15 December 2017, as well as the negotiating directives adopted on 29 January 2018.

Amongst other things, the Commission has set out its position that:

- as the UK will remain part of the Single Market and the Customs Union until 31 December 2020, the UK will remain bound by EU law and the jurisdiction of the European Court of Justice;
- the EU acquis will continue to apply in full to and in the UK during this period;
- any changes made to the acquis during this time should automatically apply; and
- as the UK will be a third country as of 30 March 2019, it will no longer be represented in EU institutions, agencies, bodies and offices.

The draft text will now be discussed amongst the EU27 Member States, before being formally transmitted to the UK.

Brexit: EU Commission publishes notices to stakeholders in financial services

The EU Commission has published a series of notices addressed to stakeholders on the legal and practical implications of the UK's withdrawal from the EU with regard to financial services.

In particular, the papers cover the following topics:

- asset management;
- banking and payment services;
- credit rating agencies;
- insurance and reinsurance;
- markets in financial instruments; and
- post-trade financial service.

Each notice sets out a high level summary of the effect of the UK withdrawing from the EU without a transitional period, under which scenario all EU primary and secondary law would cease to apply to the UK from the withdrawal date.

In total, the Commission has so far published 35 papers on its Brexit Preparedness webpage, which also cover aspects of:

- company law;
- trade;
- intellectual property and data protection;

- food, agriculture and environmental issues;
- industrial products;
- justice;
- medicines; and
- transport.

Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018 published

The Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018 (SI 2018/135), which are intended to give effect to the EU Benchmarks Regulation, have been laid before Parliament.

In particular, the regulations provide that the Financial Conduct Authority (FCA) is designated as the competent authority for the purposes of the EU Benchmarks Regulation. This ensures that the FCA is responsible for regulating benchmarks and their administrators. The regulations further make provision for the FCA to exercise powers in respect of persons who are involved in the provision of a benchmark but are not benchmark administrators.

The regulations also amend the Financial Services and Markets Act 2000 to give effect to the EU Benchmarks Regulation. In addition, there are amendments to other secondary legislation.

The regulations come into force on 27 February 2018, except for:

- regulation 57 (amendments to the Consumer Credit (Disclosure of Information) Regulations 2010)(c), which comes into force on 1 July 2018; and
- regulations 37(c) and (d), 39, 43(b), 49(2)(c) and (d), 50 and 53 (miscellaneous amendments to the Financial Services and Markets Act 2000 and secondary legislation), which come into force on 1 May 2020.

AIFMD: Alternative Investment Fund Managers (Amendment) Regulations 2018 laid before Parliament

The Alternative Investment Fund Managers (Amendment) Regulations 2018 (SI 2018/134) have been laid before Parliament.

The regulations make changes to UK legislation to ensure alignment with the Regulation amending the European Venture Capital Funds (EuVECA) Regulation and the European Social Entrepreneurship Funds (EuSEF) Regulation.

The regulations will come into force on 2 April 2018, except for regulation 4, which amends the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 to update the definition of 'care home' in relation to Wales and will come into force on 1 March 2018.

BoE consults on new rule for CCPs relating to incident reporting

The Bank of England (BoE) has launched a consultation on a proposed new rule to formalise certain aspects of CCPs' incident reporting. There is currently a supervisory expectation that CCPs will promptly notify the BoE of

any operational incidents affecting the security of their information technology systems and will keep the BoE updated at regular intervals until the incident is resolved. In support of the Government's approach to implementing Directive (EU) 2016/1148 on security of network and information systems (the NIS Directive), the BoE is seeking to formalise this expectation, making it a requirement that CCPs notify the BoE of any incidents that have an actual adverse effect on the security of their information technology systems.

Comments are due by 3 April 2018. The proposed rule is expected to come into effect by 9 May 2018.

Benchmarks Regulation: FCA consults on DEPP and EG amendments

The FCA has launched a consultation (CP18/5) on proposed amendments to the Decision Procedure and Penalties manual (DEPP) and Enforcement Guide (EG) in light of changes introduced by the EU Benchmarks Regulation and the UK Benchmarks Regulations 2018.

The FCA is consulting on:

- a decision-making procedure for determining an application for authorisation and registration of an EU-based benchmark administrator;
- a decision-making procedure for determining an application for a recognition order or an endorsement order, or for withdrawing, suspending or varying such an order; and
- its general enforcement approach, the application of its penalty policy and decision-making procedure when exercising powers with respect to certain unauthorised persons, defined as miscellaneous BM persons.

Comments are due by 5 March 2018.

ACPR and AMF clarify their expectations regarding crowdfunding

Through their Joint Unit, the Autorité de Contrôle Prudentiel et de Résolution (ACPR) and the Autorité des Marchés Financiers (AMF) are seeking to enhance crowdfunders' protection. They have decided to publish a position on the procedure for default rates calculation, a recommendation on platforms run-off management and a position on the marketing of crowdfunding offers. These documents target several types of professionals, namely crowdlending intermediaries, crowdfunding investment advisors and investment services providers.

BaFin applies ESMA guidelines on management body of market operators and data reporting service providers

The German Federal Financial Supervisory Authority (BaFin) has announced that it intends to apply ESMA's guidelines on the management body of market operators and data reporting service providers.

The ESMA guidelines, based on Article 45(9) for market operators and Article 63(2) for data reporting services providers of MiFID2, clarify the requirements applicable to members of the management bodies of market operators or data reporting services providers.

BaFin consults on revised version of AnzV

As a follow-up to the European Central Bank's (ECB's) revised 'Fit and Proper Questionnaire' under the Single Supervisory Mechanism (SSM) Regulation, BaFin has published a consultation on proposed revisions to the corresponding notice forms under the Reports Ordinance (AnzV) for notices pursuant to section 24 of the German Banking Act (Kreditwesengesetz).

Comments on the draft AnzV may be submitted to BaFin until 7 March 2018.

Bank of Italy publishes regulation on temporary suspension of termination rights

The Bank of Italy's Resolution of 16 January 2018, laying down measures on the temporary suspension of termination rights of financial contracts governed by the law of a third country, has been published in the Italian Official Gazette (no. 25 of 31 January 2018).

With this resolution, the Bank of Italy, in its capacity as resolution authority, has implemented Article 68(8) of Legislative Decree no. 180/2015, as required by the Bank Recovery and Resolution Directive (BRRD).

The Decree came into force on 31 January 2018.

Consob regulation on 2018 supervisory fees published

The Commissione Nazionale per le Società e la Borsa's (Consob's) resolutions dated 20 December 2017 relating to the 2018 supervisory fees have been published in the Italian Official Gazette (no. 23 of 29 January 2018).

In particular, the resolutions are intended to:

- identify the recipients required to contribute for the year 2018 (Resolution no. 20232);
- establish the amount of fees due, pursuant to Article. 40 of Law no. 724/1994, for the year 2018 (Resolution no. 20233); and
- determine the procedures and terms regulating the payment of the above fees, pursuant to Article 40 of Law no. 724/1994, for the year 2018 (Resolution no. 20234).

Italian Treasury consults on draft regulation governing cryptocurrency providers

The Treasury Department of the Ministry of Economy and Finance has launched a consultation on the introduction of a regime governing cryptocurrency providers, pursuant to Article 17-bis(8)-ter of Legislative Decree no. 141 of 13 August 2010, as amended by Legislative Decree no. 90 of 25 May 2017 implementing the Fourth Anti-Money Laundering Directive (AMLD 4) in Italy. Amongst other things, the new regime will require these providers, in order to continue to provide services related to cryptocurrencies, to be registered in a special register held by the Organismo degli Agenti e dei Mediatori (OAM).

For the purposes of this legal framework, cryptocurrency providers are defined as any individual or legal person that provides, on a professional basis, services connected with the use, exchange, or keeping of cryptocurrencies and their conversion to or from legal currencies and cryptocurrency as a digital

value, not issued by a central bank or a public authority, not necessarily linked with a legal currency, used as a means of exchange for the purposes of purchasing goods or services, and transferable, recordable and negotiable electronically.

Comments are due by 16 February 2018.

CSRC announces opening of onshore iron ore futures market to foreign investors

The China Securities Regulatory Commission (CSRC) has announced that iron ore futures traded on the Dalian Commodity Exchange (DCE) have been designated as a futures product that is open to foreign investors. The announcement was made under the 'Interim Measures on Trading of Designated Domestic Futures Products by Foreign Traders and Brokerage Firms', which were issued by the CSRC on 26 June 2015 and have been effective as of 1 August 2015.

Under the Interim Measures, foreign traders and brokerage firms may participate in the PRC domestic futures market and trade specific types of futures products that are designated by the CSRC. Prior to the announcement, only crude oil futures had been designated under the Interim Measures by the CSRC on 26 June 2015. Crude oil futures will be traded on the Shanghai International Energy Exchange.

Detailed arrangements in respect of foreign participants' trading of iron ore futures will be issued by the relevant competent authorities (mainly DCE) but the specific timeline has not been announced yet.

HKMA issues circular on distribution of fixed income and structured products

The Hong Kong Monetary Authority (HKMA) has issued a circular to authorised institutions on the key observations and good practices in relation to the distribution of fixed income and structured products identified during the course of its supervision. In view of an increase in the sale of investment products and recent increased market volatility, the HKMA has reminded authorised institutions to comply with the expected standards governing the selling of investment products, especially complex and high-risk bonds and structured products.

The circular reminds authorised institutions to be vigilant in selling debt instruments that may be converted to common equity or written down on the occurrence of a trigger event, in particular loss-absorbing capacity (LAC) debt instruments that would absorb loss when the issuer is likely to reach or has reached the point of non-viability. Authorised institutions are advised to have an adequate understanding of the nature and risks of these products, assign an appropriate risk rating, identify a suitable target market, and provide adequate training to staff. The HKMA's January 2018 consultation on 'Rules on LAC requirements for authorised institutions' suggests that LAC debt instruments are not suitable for retail investors due to their complex nature and riskiness, and proposes that the distribution of LAC debt instruments and related products should be restricted to professional investors that are not retail banking customers. Subject to the outcome of the consultation, the HKMA will introduce appropriate selling restrictions and enhanced investor protections on the distribution of LAC debt instruments and related products.

In addition, the HKMA has drawn authorised institutions' attention to a circular issued by the Securities and Futures Commission (SFC) to licensed corporations on the compliance failures identified in the SFC's onsite inspections and investigations of licensed corporations' distribution of complex bonds and structured products.

HKMA consults on revised guideline for authorisation of virtual banks

The HKMA has launched a public consultation on a revised guideline for the authorisation of virtual banks. As part of the package of initiatives announced in September 2017 to bring Hong Kong into a new era of smart banking, the HKMA intends to facilitate the establishment of virtual banks in Hong Kong and carry out a review of the guideline on the authorisation of virtual banks first issued in 2000.

The guideline on the authorisation of virtual banks sets out the principles which the HKMA will take into account in deciding whether to authorise virtual banks to conduct banking business in Hong Kong. The HKMA considers that the basic principles contained in the guideline issued in 2000 remain applicable. These include those relating to the requirement on a virtual bank to present a concrete and credible business plan, the importance of properly managing the risks associated with virtual banking, the requirement to treat customers fairly, and the need to maintain adequate capital commensurate with the nature and scale of operation of the virtual bank.

Some updates or refinements have been deemed necessary, having regard to the present day circumstances. These include:

- banks, financial institutions and technology companies may apply to own and operate a virtual bank in Hong Kong;
- virtual banks should play an active role in promoting financial inclusion in delivering their banking services;
- since virtual banks will engage primarily in retail businesses, they should operate in the form of a locally-incorporated bank;
- virtual banks will be subject to the same set of supervisory principles and key requirements applicable to conventional banks, although some of the requirements will need to be appropriately adapted to suit the business models of virtual banks; and
- as virtual banking is a new business model in Hong Kong, virtual banks should provide an exit plan at the time of application, so that they can unwind their businesses in an orderly manner should it become necessary.

Comments on the consultation are due by 15 March 2018. The HKMA will take into account the comments received and issue a revised guideline in May 2018.

Companies intending to apply for a virtual banking licence may submit an application to the HKMA now. The HKMA has encouraged applicants to review the revised guideline and make preparations for submitting an application.

SFC warns of cryptocurrency risks

The SF) has issued a warning to alert investors to the potential risks of dealing with cryptocurrency exchanges and investing in initial coin offerings (ICOs).

Following a statement on ICOs released on 5 September 2017, the SFC has taken regulatory actions against a number of cryptocurrency exchanges and issuers of ICOs.

In particular, the SFC sent letters to seven cryptocurrency exchanges in Hong Kong or with connections to Hong Kong, warning them that they should not trade cryptocurrencies which are 'securities' as defined in the Securities and Futures Ordinance (SFO) without a licence. Most of the cryptocurrency exchanges either confirmed that they did not provide trading services for such cryptocurrencies or took immediate rectification measures, including removing relevant cryptocurrencies from their platforms. The SFC may take further action where appropriate, in particular against cryptocurrency exchanges which disregard the provisions of the SFO and those which are repeat offenders.

The SFC has also written to seven ICO issuers. Most of them confirmed compliance with the SFC's regulatory regime or immediately ceased to offer tokens to Hong Kong investors. The SFC has indicated that it will continue to monitor ICOs closely, and will not tolerate any violations of the securities laws of Hong Kong.

The SFC has urged investors to be wary of the increased risk of extreme price volatility, hacking and fraud when investing in cryptocurrencies and ICOs, and using services of cryptocurrency exchanges.

Financial Services Agency of Japan introduces new fair disclosure rules

The Financial Services Agency of Japan (JFSA) has announced (here and here) new rules under the Financial Instruments and Exchange Act of Japan in order to introduce Fair Disclosure Rules (FD Rules). The relevant new rules will become effective on 1 April 2018. According to the JFSA, the FD Rules reflect practices similar to those in Europe and the United States.

The FD Rules require a listed company to release undisclosed material information to the public when such information has been provided to analysts etc. in the company's investor relations activities, unless they are subject to any other confidentiality obligations. The place of disclosure includes the company's website, the EDINET and TDnet. The scope of material information is wider than that used in the context of insider trading regulations. Earnings guidance could be included. Companies may therefore need to re-consider their internal policies on the control of information in light of the scope of information caught by the FD Rules. Not only the issuers of shares, but also the issuers of debt securities, exchange-traded funds (ETFs) and real estate investment trusts (REITs) will be in scope if they are listed on a Japanese securities exchange.

Securities companies, investment banks, financial institutions, investment managers, credit rating agencies, etc. will also need to take measures to ensure their financial instruments business operating teams do not use undisclosed material information for their business when they receive such information when conducting non-financial instruments businesses.

Financial Services Agency of Japan introduces new AML and CTF guidelines

The JFSA has published new guidelines relating to Anti-Money Laundering (AML) and Counter-Terrorist Financing (CTF), together with the JFSA's answers to public comments. The new guidelines became effective on 6 February 2018.

The guidelines are the first ever cross-sectoral and comprehensive guidelines to set the standard for AML and CTF compliance for JFSA regulated entities which qualify as 'Specified Business Operators' (tokutei jigyousya) under the AML Act.

The guidelines follow a thoroughly 'risk based approach' and set out 'what is required' and 'what is expected' to be done by regulated entities with regard to AML/CTF compliance. The supervisory points covered by the guidelines address not only transaction screening and customer due diligence, but also the involvement of top management in building and maintaining the 'three lines of defence'.

MAS encourages financial institutions to use technology to on-board customers more efficiently

The Monetary Authority of Singapore (MAS) has issued new guidance to financial institutions (FIs) on the use of innovative technology solutions to facilitate safe, non-face-to-face (NFTF) customer on-boarding. This is intended to increase efficiency and improve the customer on-boarding experience, while safeguarding against money laundering and terrorism financing risks.

Currently, the MAS requires FIs operating in Singapore to implement controls to detect and deter money laundering or terrorism financing when on-boarding new customers (for example, when opening a bank account). In this connection, FIs are currently allowed to carry out NFTF verification of customer identity, provided that there are adequate measures to guard against impersonation. MAS has advised that:

- such measures can include biometric identification, real-time video conferencing, and secure digital signature using Public Key Infrastructure (PKI)-based credentials. The PKI-based credentials must be issued by accredited Certificate Authorities under the Electronic Transactions Act; and
- it will also allow the use of 'MyInfo', which is a digital service that enables individuals to authorise service providers to access their personal data previously submitted to and verified by the Singapore government, for NFTF customer identification and verification. MAS will not require FIs that have been given access to a customer's MyInfo data to obtain additional documents to verify the customer's identity or separately obtain a photograph of the customer.

Federal agencies request comment on proposed amendments to swap margin rule

The Board of Governors of the Federal Reserve System (FRB), the Farm Credit Administration (FCA), the Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Agency (FHFA) and the Office of the Comptroller of the Currency (OCC) are requesting comments on proposed

amendments to the swap margin rule. The swap margin rule was issued by the same agencies in November 2015, and established minimum margin requirements for swaps and security-based swaps that are not cleared through a clearinghouse.

The agencies now propose to change swap margin requirements to conform to recent rule changes imposing new restrictions on certain qualified financial contracts (QFCs) of systemically important banking organizations. Under the proposed amendments, legacy swaps entered into before the applicable compliance date would not become subject to the margin requirements if they are amended solely to comply with the requirements of the QFC rules.

The proposed amendments would also harmonize the definition of 'eligible master netting agreement' in the swap margin rule with recent changes to the definition of 'qualifying master netting agreement' in the respective capital and liquidity regulations of the FRB, FDIC, and OCC by recognizing the restrictions that were adopted by these agencies with respect to the QFC rules.

Comments on the proposals will be accepted for 60 days following their publication in the Federal Register.

RECENT CLIFFORD CHANCE BRIEFINGS

New tax on securities accounts finally adopted by Belgian Federal Parliament

On 1 February 2018, the Belgian Federal Parliament approved a law introducing the tax on securities accounts. This tax will be applicable as of the day of the publication of the law in the Belgian State Gazette.

This briefing discusses the tax, securities covered and exemptions, and anti-abuse provisions.

https://www.cliffordchance.com/briefings/2018/02/new_tax_on_securitiesaccountsadoptedbybelgia.html

GDPR — how the new EU Data Protection Regulation impacts businesses in Asia Pacific

The General Data Protection Regulation (GDPR) is the biggest shift in data protection and privacy legislation in Europe for a generation, with extraterritorial effect, so an Asia Pacific-based company may have to comply even though it is not based in Europe.

Failure to comply exposes a company to unprecedented regulatory risk, and sizeable penalties for serious breaches – up to EUR 20 million or 4% of global turnover – whichever is higher. The GDPR becomes effective on 25 May 2018.

This briefing reviews key considerations for Asia Pacific businesses, including the GDPR's extraterritorial effect, regulation of data processors, increased cybersecurity regulatory risk and scrutiny, mandatory breach notification and other issues, such as IT systems capability and reputational impact.

https://www.cliffordchance.com/briefings/2018/02/the_gdpr_-_how_theneweudataprotectio.html

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First Certifications under NY DFS Cybersecurity Rules due 15 February 2018

On 15 February 2018, banks, insurance companies, and other financial services providers covered by the new Cybersecurity Rules issued last year by the New York Department of Financial Services (DFS) will be required to submit to the DFS a certification that they are in compliance with the regulation – or at least with those parts of the regulation that are in effect.

This briefing discusses the new Cybersecurity Rules, including key requirements that are now in effect and other significant requirements that go into effect in the next six months.

https://www.cliffordchance.com/briefings/2018/02/first_certificationsundernydfscybersecurit.html

FIRRMA — addressing the 'weaponization' of cross-border investment through CFIUS reform?

In response to increased foreign investment in potentially sensitive sectors such as artificial intelligence, robotics, autonomous vehicles and cyber, particularly from China, the US Congress is considering legislation to update the rules governing foreign investment in the United States. If enacted, the 'Foreign Investment Risk Review Modernization Act of 2017' (FIRRMA) could have broad implications for both overseas investors looking to participate in the US economy and US technology companies seeking access to opportunities outside the United States.

This briefing discusses the draft act, giving an overview of the Committee on Foreign Investment in the United States (CFIUS) process and the impetus to reform CFIUS through FIRRMA.

https://www.cliffordchance.com/briefings/2018/02/firrma_addressingtheweaponizationo.html