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EMIR: ESAs consult on amendments to RTS on clearing obligation and risk mitigation techniques for uncleared derivatives

The Joint Committee of the European Supervisory Authorities (ESAs), which comprise the European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) and European Securities and Markets Authority (ESMA), has published two consultation papers on amendments to regulatory technical standards (RTS) under the European Market Infrastructure Regulation (EMIR) on the clearing obligation and on risk mitigation techniques for OTC derivatives not cleared by a central counterparty (CCP).

The amendments are intended to provide a specific treatment for simple, transparent and standardised (STS) securitisations and ensure a level playing field with covered bonds.

The [draft RTS on the clearing obligation](#) clarify which arrangements under covered bonds or securitisations adequately mitigate counterparty risks and may benefit from an exemption from the clearing obligation.

The [draft RTS on risk mitigation techniques](#) extend the type of special treatment currently associated with covered bonds to STS securitisations.

Comments on both consultations are due by 15 June 2018.

MiFID2: ESMA updates double volume cap register

ESMA has published the April 2018 update of the [double volume cap \(DVC\) register](#) under MiFID2. The update includes DVC data and calculations for 1 April 2017 – 31 March 2018.

DVC limits the amount of dark trading allowed under the reference price waiver and negotiated transaction waiver. The April 2018 update sets out new breaches of 58 equities for the 8% cap, applicable to all trading venues, and 10 equities for the 4% cap, which applies to individual trading venues. Trading under the waivers for all new instruments in breach of the DVC thresholds should be suspended from 14 May 2018 to 14 November 2018.

The update has also revised data from past DVC calculations and, as such, suspensions of trading under the waivers for 12 instruments have been lifted.

ESMA launches authorisations information portal

ESMA has launched a [portal](#) on companies, which is intended to provide investors with information on whether a financial service provider is authorised in the EU.

The portal provides access to a register of:

- MiFID investment firms including systematic internalisers (SIs);
- MiFID trading venues;
- MiFID data reporting service providers;
- UCITS management companies; and
- AIFMD fund managers.

The portal is also intended to set out details of sanctions applied by competent authorities in Member States.

AMLD 4: EU Commission adopts RTS on criteria for appointment of central contact points for electronic money issuers and payment service providers

The EU Commission has adopted a [Delegated Regulation](#) setting out RTS on the criteria Member States should use for appointing a central contact point (CCP) for electronic money issuers and payment service providers headquartered in another Member State.

The RTS seek to create legal certainty and a consistent interpretation of the CCP provisions set out in the fourth Anti-money Laundering Directive (AMLD 4) across the EU.

The Delegated Regulation will enter into force on the twentieth day following its publication in the Official Journal.

Capital Markets Union: EU Parliament Legal Affairs Committee publishes draft report on assignment of claims proposal

The EU Parliament's Committee on Legal Affairs has published its [draft report](#) on the proposal for a regulation on the law applicable to the third-party effects of assignments of claims. The proposal is part of the Commission's Capital Markets Union (CMU) action plan.

The rapporteur broadly supports the measures in the proposals, but suggests changes relating to:

- the habitual residence of the assignor;
- the explicit exclusion of debtors and of insolvency proceedings; and
- the choice of law applicable to third party consequences of an assignment.

Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2018 laid before Parliament

The [draft Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) Order 2018](#) has been laid before Parliament.

The Order is intended to bring regulatory treatment of alternative finance investment bonds (AFIBs) under the Financial Services and Markets Act 2000 in line with the Finance Act 2018. The draft Order expands the definition of AFIBs to allow these to be admissible for trading on multilateral trading facilities (MTFs) and organised trading facilities (OTFs), to ensure equivalent regulatory treatment with conventional bonds.

The Order also includes a provision to amend the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177) in order that a person carrying on the regulated activity of administering a benchmark will be seen as carrying on the activity by way of business. The amendment is consequential on the coming into force of the EU Benchmarks Regulation (Regulation (EU) 2016/1011).

FCA confirms retirement of superseded guidance on inducements

The Financial Conduct Authority (FCA) has published a [policy statement \(PS18/10\)](#) on retiring two guidance documents that have been largely superseded by the implementation of MiFID2. The policy statement confirms that the following guidance documents have been retired:

- Retail Distribution Review: independent and restricted advice (FG 12/15); and
- Supervising retail investment advice: inducements and conflicts of interest (FG 14/1).

The policy statement summarises feedback received to the FCA's consultation and notes that firms should already be complying with the new rules for inducements and the description of advice services which came into effect on 3 January 2018.

FG 12/15 and FG 14/1 have been retired with immediate effect.

MiFID2: BaFin publishes guidance note on exemption for FX derivatives

The German Federal Financial Supervisory Authority (BaFin) has published a [guidance note](#) specifying the scope of Art. 10 of Delegated Regulation (EU) 2017/565 in relation to the characteristics of an FX derivatives contract in order not to qualify as financial instrument within the meaning of MiFID2.

Pursuant to Art. 10 of the Delegated Regulation, FX derivatives contracts used for the purpose of payment shall not qualify as financial instruments subject to further requirements. In particular, BaFin's guidance sets out that an FX derivatives contract must:

- not contain any cash-settlement; and
- be entered into in order to facilitate payment of identifiable goods, services or direct investments.

As the German version of Art. 10 of the Delegated Regulation (EU) 2017/565 does not contain the word 'identifiable', BaFin has clarified that, notwithstanding the German wording, the payment must be related to 'identifiable' goods, services or direct investments.

Amendments to Act on Payment Services published in Polish Journal of Laws

The Act amending the Act on Payment Services has been published in [the Polish Journal of Laws](#). The amendment is intended to regulate the problem of payment transactions affected by the use of an incorrect unique identifier and enable the recovery of the amounts under payment transactions where incorrect bank account numbers have been used.

The Act comes into force three months after publication.

SFC adopts enhanced IOSCO standard for cross-border enforcement cooperation

The Securities and Futures Commission (SFC) has [adopted](#) the Enhanced Multilateral Memorandum of Understanding Concerning Consultation and

Cooperation and the Exchange of Information (EMMoU) of the International Organization of Securities Commissions (IOSCO) for cross-border enforcement cooperation.

The EMMoU, approved by IOSCO in March 2017, is built upon the current Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information to which the SFC has been a signatory since March 2003. The EMMoU provides signatory IOSCO members with additional tools to combat financial misconduct.

Under the EMMoU's framework for mutual assistance and exchange of information, securities regulators can obtain and share audit working papers, telephone and internet records, compel attendance at interviews and provide guidance on freezing of assets.

HKMA announces details of Pilot Bond Grant Scheme

The Hong Kong Monetary Authority (HKMA) has published [details of the Pilot Bond Grant Scheme \(PBGS\)](#), announced in the 2018-19 Budget.

Among other things, the HKMA has announced the key eligibility criteria for the PBGS:

- eligible issuers must be first time issuers, which are issuers that have not issued bonds in Hong Kong in the five-year period between 10 May 2013 and 9 May 2018, both days inclusive;
- eligible issues must satisfy the following criteria:
 - being issued in Hong Kong;
 - having an issuance size of at least HKD 1.5 billion (or the equivalent in foreign currency);
 - being lodged with and cleared by the Central Moneymarkets Unit (CMU) operated by the HKMA in its entirety, or being listed on the Stock Exchange of Hong Kong Limited (SEHK); and
 - being, at issuance, issued in Hong Kong to: (i) ten or more persons; or (ii) less than ten persons none of whom is an associate of the issuer; and
- the grant amount for each bond issue is equivalent to half of the eligible issuance expenses, up to the following limits:
 - HKD 2.5 million where the bond, its issuer or its guarantor(s) possess a credit rating by a rating agency recognised by the HKMA; or
 - HKD 1.25 million where none of the bond, its issuer or its guarantor(s) possess a credit rating by a rating agency recognised by the HKMA.

Each issuer can apply for a grant for two bond issuances at most. The commencement date of the PBGS will be the date of the completion of legislative process for the 2018-19 Budget. The PBGS will be valid for a period of three years.

Alongside the announcement, the HKMA also set out progress on other bond market-related initiatives. The HKMA has indicated that it is working with the Government in implementing the enhancements to the qualifying debt instrument (QDI) scheme by amending the existing law. The effective date of the enhancements, which would expand the profit tax exemption coverage,

will be announced after the completion of legislative process. In relation to green finance, the HKMA has appointed an advisor to study relevant issues in respect of green finance in Hong Kong and the government green bond issue and will report the findings to the government.

HKEX concludes consultation on capital raisings by listed issuers

The Stock Exchange of Hong Kong Limited (SEHK), a wholly owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEX), has published the [conclusions of its consultation](#) on capital raisings by listed issuers and will implement the proposals with minor modifications in response to the comments received.

The [amendments to the Main Board listing rules](#) and [the GEM listing rules](#), effective from 3 July 2018, are intended to restrict abusive practices relating to capital raisings by listed issuers and protect the interests of minority shareholders.

The key changes to the listing rules include the following:

- highly dilutive capital raisings:
 - disallowing rights issues, open offers and specific mandate placings, individually or when aggregated within a rolling 12-month period, that would result in a cumulative material value dilution (25% or more), unless there are exceptional circumstances, e.g. the issuer is in financial difficulties;
- rights issues and open offers:
 - requiring minority shareholders' approval for all open offers, unless the new shares are to be issued under the authority of an existing general mandate;
 - removing the underwriting requirements for all rights issues and open offers;
 - removing the connected transaction exemption currently available to connected persons acting as underwriters of rights issues or open offers;
 - requiring issuers to adopt either excess application arrangements or compensatory arrangements for the disposal of unsubscribed shares in rights issues or open offers (currently, these arrangements are optional);
 - requiring issuers to disregard any excess applications made by the controlling shareholders and their associates in excess of the offer size minus their pro-rata entitlements; and
- placing of warrants or convertible securities under general mandate:
 - disallowing the use of general mandate for placing of warrants; and
 - restricting the use of general mandate for the placing of convertible securities with an initial conversion price that is not less than the market price of the shares at the time of placing.

There are also other listing rule amendments to enhance disclosure of the use of proceeds from equity fundraisings, and to impose an additional requirement for subdivisions and bonus issues of shares to ensure an orderly market.

HKMA issues guidelines on banks' credit risk management for personal lending business

The HKMA has issued [guidelines](#) to banks on credit risk management for personal lending business. The guidelines allow banks to adopt innovative technologies to manage credit risks related to personal lending business, in order to improve customer experience in the digital environment.

Under the guidelines, banks may carve out a portion of their personal lending portfolio as 'New Personal-Lending Portfolio' (NPP), in respect of which adherence to conventional lending practices will not be required. Instead of collecting borrowers' income proof to assess their repayment ability, banks may adopt new credit risk management techniques and practices enabled by innovative technology, such as big data and consumer behavioural analytics, to approve and manage the related credit risks.

To ensure proper management of the associated risks, the HKMA has advised banks to set a limit for the NPP, which should not exceed 10% of their capital base. At the initial stage, the amount of credit extended to individual borrowers should generally be smaller than that of conventional credit products. In applying new credit risk management techniques and practices, banks are advised to conduct the lending business in a responsible manner and provide customers with adequate information, including key product features and their repayment obligations under the loan product, to enable them to make informed borrowing decisions and avoid over-indebtedness.

The HKMA has indicated that it will review the effectiveness of the new risk management practices at a suitable juncture, and consider the future scope of application of the new arrangements.

HKMA issues circular on strengthening AML/CFT information and intelligence sharing

The HKMA has issued a [circular to authorised institutions](#) on strengthening public-private information and intelligence sharing on anti-money laundering and combating the financing of terrorism (AML/CTF). The circular is intended to provide an update on the latest developments and elaborate the HKMA's expectations.

The circular sets out details of a revised Annex (Quality and Consistency in Suspicious Transaction Reports) to the HKMA Guidance Paper on Transaction Screening, Transaction Monitoring and Suspicious Transaction Reporting, which was published in 2013, in order to further strengthen the contribution of authorised institutions to law enforcement efforts and intelligence capability. The revisions take into account recent experience and, in particular, analysis and comments from the Joint Financial Intelligence Unit (JFIU). Among other things, authorised institutions are advised to:

- review the policy and operational and technical changes to align practices for suspicious transaction reporting with those set out in the guidance paper, and implement such changes as soon as practicable;
- adopt a consistent approach to suspicious transaction reporting and ensure that suspicious transaction reports (STRs) are structured

systematically in accordance with the guidance and expectations of the JFIU; and

- keep abreast of comments and feedback provided by the JFIU from time to time as an additional resource, and take prompt steps to enhance suspicious transaction reporting where appropriate.

The circular sets out that all authorised institutions are expected to support the Fraud and Money Laundering Intelligence Taskforce (FMLIT) by making necessary resources and expertise available. The FMLIT is a public-private partnership for sharing information on cases and typologies which will assist law enforcement agencies, the HKMA and authorised institutions in the detection, prevention and disruption of crime in a more targeted way, thereby enhancing the integrity of the financial system by developing a greater collective understanding of risks.

The HKMA has also issued a [circular to stored value facility \(SVF\) licensees](#) encouraging them to review the revised Annex and take the practices recommended into account, as applicable, to help strengthen their ability to meet STR reporting obligations, and further contribute to law enforcement efforts and intelligence capability in Hong Kong.

SFC provides guidance to intermediaries on use of instant messaging

The SFC has issued a [circular](#) to intermediaries to provide guidance on the statutory and regulatory requirements for the use of instant messaging applications to receive orders from clients.

The SFC encourages firms to take adequate measures to ensure compliance with the requirements, which include keeping proper records of messages relating to client orders and ensuring they are accessible for monitoring and audit purposes, as well as validating client identities and maintaining adequate safeguards to prevent unauthorised account access and cybersecurity attacks.

The SFC advises intermediaries that clients should be made aware of the security risks of using instant messaging applications and be informed about the intermediaries' contingency plans to cope with disruptions affecting instant messaging services.

The SFC notes that it may take regulatory action against firms which receive orders through instant messaging applications without taking sufficient measures to ensure compliance with the regulatory requirements.

FSC outlines plan for regulatory reform on entry barriers to financial services industry

The Financial Services Commission (FSC) has outlined its [plan on regulatory reform on entry barriers to financial services business](#) to promote competition and innovation in the financial sector.

The plan includes the following changes:

- expanding participation of private-sector experts - the FSC will expand participation of private-sector experts in the decision-making process related to approval for new entrants;
- lowering regulatory barriers to entry - the FSC will lower regulatory barriers to entry and reform entry-related regulations for banking, insurance and

financial investment industries to allow 'innovative challengers' to enter the market;

- for the banking industry, the FSC will consider allowing additional 'internet-only' banks, based on reviews and evaluations of competitive conditions in the banking sector. Two internet-only banks are already in operation in Korea;
- for the insurance industry, the FSC intends to facilitate market entry for smaller and specialised insurers by easing minimum capital requirements for business approval, amending relevant regulations to encourage the entrance of 'online-only' insurers, and encouraging the creation of specialised insurers in the areas of reinsurance and pension insurance; and
- for the financial investment industry, the FSC will ease entry requirements to facilitate the entrance of specialised players in financial investment business by switching from the current requirement of license to 'registration-only' system for brokerage firms specialised in venture capital investment, easing capital requirements for one-person advisory firms, and permitting the market entry of real estate trust business; and
- enhancing transparency in business approval procedure - the FSC will provide detailed standards and make them public when reviewing and making decisions for applications of new entrants. Further, a fast track will also be introduced to shorten the approval procedure for those who apply for formal approval within a certain period of time after preliminary approval.

The FSC intends to propose amendments to the relevant regulations for the banking, insurance and financial investment sectors by the third quarter of 2018. The committee for the evaluation of competitive conditions in the financial sector is expected to be created by the second quarter of 2018.

MAS publishes regulations for mandatory clearing of derivatives contracts

The Monetary Authority of Singapore (MAS) has published the [Securities and Futures \(Clearing of Derivatives Contracts\) Regulations 2018](#) and published its [responses](#) to the feedback it received on its July 2015 public consultation on the draft regulations for mandatory clearing of derivatives contracts. The regulations will come into operation on 1 October 2018.

Amongst other things, the MAS has confirmed in the regulations and its responses to the public consultation that:

- Singapore dollar (SGD) and United States dollar (USD) fixed-to-floating interest rate swap contracts (IRS) with tenors between 28 days and 10 years (inclusive) are prescribed to be specified derivatives contracts subject to the clearing obligations. The MAS will re-assess whether other types of derivatives contracts, such as Euro and Pound Sterling IRS, should be subject to the clearing obligation at a later stage;
- a derivatives contract will not be subject to the clearing obligations if (a) it is entered into or amended (i) as a result of a multilateral portfolio compression cycle, and (ii) with a participant in the multilateral portfolio compression cycle that was a party to one or more of the compressed

derivatives contracts under the cycle, and (b) none of the compressed derivatives contracts under the multilateral portfolio compression cycle met all of the criteria under (a);

- the timeframe for clearing specified derivatives contracts will be one business day after the day on which the specified derivatives contract is entered into (i.e., T+1);
- the following specified persons will be exempted from the clearing obligations: (a) a licensed bank whose aggregate outstanding notional amounts of derivative contracts booked in Singapore does not exceed SGD 20 billion, (b) a licensed bank that has been carrying on business for less than a year, (c) an approved merchant bank, (d) a licensed finance company, (e) a licensed insurer, and (f) a capital markets services licensee. As such, the clearing obligations apply only to licensed banks that do not fall within (a) or (b);
- intra-group transactions and public bodies will be exempted from the clearing obligations;
- in respect of packaged transactions, if the individual transaction in the package is a product subject to mandatory clearing, it will be subject to the clearing obligations. A single complex transaction, whose economic components include a SGD or USD IRS, will not be subject to clearing obligations;
- if a bank does not intend to clear a mandated product, that bank should provide confirmation to its counterparty that it is not subject to the MAS' clearing obligations; and
- backloading requirements will not be imposed for the clearing obligations.

RECENT CLIFFORD CHANCE BRIEFINGS

EU financial services horizon scanner, May 2018

Clifford Chance has prepared a financial services horizon scanner, providing a high level overview of ongoing and expected EU legislative initiatives that are likely to impact firms providing financial services in the EU.

The horizon scanner has been prepared as of May 2018 and sets out projected timelines for the finalisation and implementation of relevant requirements, covering approximately the next 18 months to two years.

https://www.cliffordchance.com/briefings/2018/05/eu_financial_services_horizon_scanner.html

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