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INTERNATIONAL REGULATORY UPDATE 29 MAY – 01 JUNE 2018

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EU Commission publishes legislative proposals on depositary safekeeping duties under AIFMD and UCITS Directive

The EU Commission has published two draft Delegated Regulations amending the current Delegated Regulations under the Alternative Investment Fund Managers Directive (AIFMD) and the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive, aiming to clarify rules relating to the safekeeping of client assets by depositaries.

In July 2017 the European Securities and Markets Authority (ESMA) issued an opinion on asset segregation, identifying issues where the understanding among stakeholders differs and invited the EU Commission to clarify certain obligations of depositaries in case they delegate safekeeping functions to third parties. ESMA proposed that the asset segregation requirement be better defined and complemented by additional safeguards, in particular the requirement to contractually ensure a sufficient flow of information between the depositary and the custodian. ESMA also suggested strengthening the requirement to maintain accurate record-keeping and reconciliation systems, including calibrating the frequency of reconciliations with respect to the frequency of trading activities relating to all the assets that might be kept in an omnibus account.

The legislative proposals aim to clarify that UCITS, alternative investment funds (AIFs) and other client assets can be comingled at the level of the first custodian under the condition that they are initially held by the same depositary or are initially held by the same custodian where the latter further delegates the custody of assets down the custody chain.

Feedback on the proposals is due by 26 June 2018.

CSDR: EU Commission adopts Delegated Regulation on settlement discipline

The EU Commission has adopted a Delegated Regulation supplementing the Central Securities Depositories Regulation (CSDR) with regard to regulatory technical standards (RTS) on settlement discipline.

The RTS cover measures for preventing settlement fails, through processes and functionalities including automated matching, partial settlement and a hold and release mechanism. The RTS also set out measures for monitoring and addressing settlement fails, in particular, the cash penalties mechanism and the buy-in process.

The Delegated Regulation will enter into force 24 months following the day of its publication in the Official Journal and will be directly applicable in all Member States.

Capital Markets Union: EU Commission adopts Delegated Regulation on regulatory capital requirements for STS securitisations held by insurance undertakings

The EU Commission has adopted a Delegated Regulation as regards the calculation of regulatory capital requirements for securitisations and simple, transparent and standardised (STS) securitisations held by insurance and reinsurance undertakings.

As part of its work on the Capital Markets Union (CMU) the Commission adopted a proposal for a regulation on STS Securitisation and a proposal for an amendment to the Capital Requirements Regulation (CRR). These Regulations entered into force on 17 January 2018 and will apply as from 1 January 2019.

A Delegated Act detailing implementing rules under the Solvency II Directive, including risk calibrations for the calculation of capital charged for specific asset categories, was adopted by the Commission in October 2014. The Delegated Act adopted by the Commission makes changes to the Solvency II Delegated Act to ensure alignment and consistency, including:

- aligning the definitions used in the Solvency II Delegated Act regarding securitisation with those in the STS Regulation; and
- repealing specific provisions in the Solvency II Delegated Act to avoid insurers being subject to different requirements under the STS Regulation and the Solvency II Delegated Act.

The Delegated Act will apply as of 1 January 2019 if the EU Council and the Parliament raise no objections.

CRD 5: EU Council Presidency publishes revised compromise text

The EU Council Presidency has published a revised version of the Presidency compromise text on the proposed Directive amending the Capital

Requirements Directive (CRD 4) as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (CRD 5).

The compromise text was previously published on 24 May 2018, when the Council reached political agreement on the package of proposals on risk reduction, but was subsequently amended by document 9056/18 COR 1.

EMIR: ECON Committee publishes report on CCP supervision proposal

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has published its 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.

EU Parliament adopts own-initiative resolution on sustainable finance

The EU Parliament has adopted an own-initiative resolution on sustainable finance.

Citing activity at both EU and international level, including the EU Commission's Action Plan on Sustainable Finance announced on 8 March 2018 and the Paris Agreement, the resolution sets out the EU Parliament's position on how sustainable finance may be achieved, such as by:

- increasing the price for greenhouse gas emissions and phasing out direct and indirect subsidies for fossil fuels;
- introducing 'carbon stress tests' as proposed by the European Systemic Risk Board (ESRB);
- considering the role of the European Supervisory Authorities (ESAs) in investigating and developing standards for assessing carbon and other environment related risks;
- making greater use of innovative financial tools integrating sustainability indicators, such as publicly issued green bonds;
- establishing a sustainability taxonomy and 'Green Finance Mark' by the end of 2019;
- including sustainable finance indicators, with harmonised definitions, in all new and revised legislation relating to the financial sector;
- adopting a regulatory strategy and roadmap aimed at measuring sustainability risks within the prudential framework of capital adequacy rules;
- revising disclosure and reporting frameworks, such as those set out in the Accounting Directive, the NFRD, the CRD and CRR, and extending Key Information Document (KID) disclosure under the PRIIPS Regulation to all retail financial products;
- the development of guidelines by the ESAs for model contracts incorporating economic, social and governance (ESG) risks and factors;

- the development of guidelines by the European Insurance and Occupational Pensions Authority (EIOPA) on best practice on engaging with beneficiaries and retail clients for occupational pension scheme and private pension product providers; and
- requiring credit-rating agencies operating in the EU to integrate ESG indicators and incorporate sustainability risks into their methodologies.

The resolution will be forwarded to the EU Council and EU Commission for consideration.

ESMA adopts product intervention measures for binary options and CfDs

ESMA has adopted product intervention decisions in relation to contracts for differences (CfDs) and binary options. The decisions, which have been published in the Official Journal, have been adopted under the MiFIR product intervention powers enabling ESMA to introduce temporary intervention measures for three months.

Marketing, distribution and sale of the products to retail investors will be prohibited from 2 July 2018 for binary options and 1 August 2018 for CfDs. The CfD intervention is intended to ensure that investors cannot lose more money than invested, restrict the use of leverage and incentives, and apply firm specific, standardised risk warnings.

The measures will apply for three months from the application dates. ESMA intends to review the measures and consider the need to extend them for a further three months before they expire.

MiFID2: ESMA publishes final guidelines on suitability requirements

ESMA has published its final report on guidelines on certain aspects of the MiFID2 suitability requirements. The report sets out feedback to the comments received to ESMA's consultation which closed in October 2017 alongside the final guidelines.

Overall, ESMA has sought to build on the text of its 2012 MiFID1 suitability guidelines, which have been confirmed but also expanded, including guidance that relates to:

- technological developments of the advisory market, including so-called robo-advice;
- national competent authorities' (NCAs') supervisory experience of the application of the 2012 guidelines; and
- the outcome of studies on behavioural finance.

The guidelines also include good practice for firms addressing the issue of sustainable finance, pending any changes to the legal framework following the EU Commission's action plan on sustainable finance.

The guidelines in Annex IV of the paper will be translated into the official languages of the EU and published on ESMA's website, after which date competent authorities will have two months to notify ESMA whether they comply or intend to comply with the guidelines.

EMIR: ESMA publishes guidelines on anti-procyclicality margin measures for CCPs

ESMA has published final guidelines on anti-procyclicality margin measures for CCPs under EMIR.

The guidelines seek to clarify the application of EMIR in the context of procyclicality of CCP margin with the aim of ensuring a common, uniform and consistent application of the relevant provisions of EMIR and the regulatory technical standards (RTS) on requirements for CCPs. 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.

BRRD: EBA and ESMA publish statement on retail clients holding debt financial instruments

The European Banking Authority (EBA) and ESMA have published a joint statement on the treatment of retail holdings of debt financial instruments in the context of the Bank Recovery and Resolution Directive (BRRD) and MiFID2. The statement warns that the distribution of debt financial instruments issued by institutions to retail clients, including the practice of 'self-placement', may raise significant consumer protection issues and affect the practical application of the resolution framework under the BRRD. On the basis of data analysis conducted for the purpose of preparing the statement, retail investors were found to hold an important part of EU debt securities issued by institutions, with high concentrations evident in some Member States.

In cases of bail-in, the BRRD does not provide for a different treatment of eligible liabilities based on the nature of the holder. On this basis, the statement sets out considerations that the EBA and ESMA view as appropriate for institutions and authorities. Among other things, the statement encourages resolution authorities to consider this issue when carrying out resolution planning and assessment of possible impediments to resolution, and for resolution and market authorities to share relevant information on this topic.

CRD 4: EBA publishes final draft amending ITS on supervisory disclosure

The EBA has published a final report on amended implementing technical standards (ITS) on supervisory disclosure under Article 143 of CRD 4. The final draft ITS would amend the ITS under Article 143 of CRD 4 that were published in the Official Journal on 4 June 2014.

The amending ITS are intended to incorporate changes to the EU legal framework and the establishment of the Single Supervisory Mechanism (SSM), in particular:

- applying a consolidated approach in line with the existing reporting framework with the aim of avoiding additional burden and to enhance the comparability of the data;
- clarifying the responsibilities to disclose information between the European Central Bank (ECB) and national competent authorities (NCAS); and

- setting out the differences between permanent and transitional options and discretions (O&Ds), as well as greater clarity on whether the power to exercise O&Ds is held with competent authorities or Member States.

EPC publishes position on Brexit and UK PSPs

The European Payments Council (EPC) has published a position on Brexit and UK payment service providers' (PSPs') participation in the Single Euro Payments Area (SEPA) schemes. 82 UK PSPs participate in the SEPA schemes and the UK is part of the geographical scope of the SEPA schemes due to its EU membership.

The position sets out that in the case of a transition period, the UK would automatically remain within the geographical scope of SEPA. The position also sets out post-Brexit scenarios, relating to three possible UK-EU future relationships:

- the UK leaving the EU but remaining in the EEA;
- the UK leaving the EU and the EEA but putting in place a free trade agreement that results in 'functional equivalence' of the EU legal framework; and
- the UK leaving the EU and EEA but not agreeing on the alignment of its relevant legal framework with the EU.

FCA consults on high-cost credit and overdrafts

The Financial Conduct Authority (FCA) has launched two consultations on high-cost credit (CP18/12) and on overdrafts (CP18/13). The consultations form part of the FCA's wider review of the high-cost credit market and contain proposals intended to protect overdraft and high-cost credit users by reducing the cost of credit and giving them more control over their finances.

CP18/12 contains proposals aimed at reducing costs to consumers, ensuring repeat borrowing is consumer-led and encouraging market innovation to make alternatives more widely available. Amongst other things, the FCA is seeking feedback on proposals to:

- introduce a cap on rent-to-own prices and a ban on the sale of warranties at the point of sale;
- prevent home-collected credit firms from offering new loans or refinancing during home visits without the customer specifically requesting them; and
- requiring catalogue credit and store card firms to do more to help customers avoid persistent debt.

CP18/13 contains proposals aimed at increasing consumer awareness of how overdrafts work and how they are using theirs. These proposals include introducing mobile alerts warning of potential overdraft charges and online tools to make the cost of overdrafts clearer. The FCA is also seeking feedback on more interventionist measures, such as banning fixed fees, ending the distinctions around unarranged overdraft prices and requiring firms take active steps to address repeat overdraft use.

The proposals contained in these consultations form the first part of a series of reforms the FCA aims to introduce to protect consumers in the high-cost credit market. The FCA intends to gather additional evidence and carry out further analysis before coming to any formal decisions on other issues raised by the review.

Responses to the rent-to-own pricing discussion questions in CP18/12 are due by 13 July 2018, all other responses and comments are due by 31 August 2018.

FCA publishes Quarterly Consultation No.21

The FCA has published its quarterly consultation (CP18/14) on proposed miscellaneous amendments to the FCA Handbook.

In particular, the consultation sets out proposed amendments to:

- disapply some Handbook rules to authorised professional firms who carry out non-mainstream regulated activities;
- the appointed representatives appointment form;
- the Conduct of Business sourcebook (COBS) rules for insurance distribution;
- the Fees manual 4.2 (relating to the tariff data used to calculate fees for newly authorised firms) and 4.4, 4 Annex 1AR and 5.4 (relating to the tariff data used use to calculate insurers' periodic fees and levies from 2018/19);
- the Banking Conduct of Business sourcebook (BCOBS) 7 as a result of detailed technical discussions with firms preparing to implement the requirements, which have identified that certain rules do not achieve the outcome set out in PS17/26;
- the Decision Procedure and Penalties manual (DEPP) and the Enforcement Guide (EG) to reflect the transfer of the Northern Ireland mutual societies registration function to the FCA; and
- DEPP and EG following the implementation of the EU Money Market Funds (MMF), Social Entrepreneurship Funds (EuSEF) and Venture Capital Funds (EuVECA) Regulations.

Comments on chapters 2, 4, 5 and 6 are due by 30 June 2018 and on chapter 3 by 31 July 2018.

Investment funds' liquidity risk management tools: AMF amends its General Regulation and updates its policy

The Autorité des Marchés Financiers (AMF) has amended its General Regulation and its policy to clarify the framework applicable to three liquidity risk management tools. The tools covered by these modifications are as follows:

- the establishment of subscription and/or redemption notice periods, which give fund managers more flexibility to execute orders on certain markets that might be less liquid (for example, the small-cap or high-yield bond markets) and therefore prevent portfolio distortion, in the interest of the fund's unit-holders or shareholders;
- redemptions in kind, i.e. directly in portfolio assets, when certain professional investors request them and certain conditions are met; and
- the full or partial closing of subscriptions ('soft' or 'hard' close), for example when a fund becomes too big for its reference market.

AMF details authorisation procedures and rules on preparation of KIIDs and prospectuses and periodic reporting for French and foreign UCITS marketed in France

The AMF has published Instruction DOC-2011-19, which details the rules that apply to French UCITS and foreign UCITS distributed in France regarding the approval procedure, the drafting of a key investor information document (KIID) and a prospectus, and periodic reporting.

Clarifications are provided regarding the creation of a French UCITS, changes during the life cycle of UCITS, and the requirements regarding reporting to investors and to the AMF. The document has not been updated in light of the laws and regulations that transpose MiFID2 and legally separate investment firms from asset management companies. That update will take place soon.

Italian Treasury publishes consultation outcomes on draft regulation governing cryptocurrencies providers

The Treasury Department of the Ministry of Economy and Finance has published the outcomes of a consultation process on the introduction of a regime governing cryptocurrencies 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 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 maintained by the Organismo degli Agenti e dei Mediatori (OAM).

For the purposes of this legal framework, cryptocurrencies 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 the 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 mean of exchange for the purposes of purchasing goods and services, and transferable, recordable and negotiable electronically'.

The consultation involved around 30 participants (including 2 supervisory bodies, 7 associations active in bitcoin technology, 3 entities from the banking sector and 18 privates).

AMLD 4: Consob consults on amendments to its second-level regulations

The Commissione Nazionale per le Società e la Borsa (CONSOB) has launched a consultation process on the introduction of a new regulation on, amongst other things, customer due diligence and record-retention by statutory auditors (revisori legali) and auditing firms (società di revisione) carrying out statutory audits on, amongst others, public interest entities.

The new regulation is intended to replace:

- Consob resolution no. 18802/2014 on customer due diligence; and
- the provisions on registration applicable to auditors included in the Bank of Italy

- Regulation on dated 3 April 2013.

The main changes include:

- new provisions on customer due diligence taking into account the new rules on anti-money-laundering transposing the Fourth Anti-Money Laundering Directive (AMLD 4); and
- new provisions on obligations to record data and information.

Comments are due by 28 June 2018.

Polish Financial Supervision Authority publishes standpoint on guarantee agreements concluded by investment fund managers with third parties for the benefit of participants of closed-end investment funds

The Polish Financial Supervision Authority (PFSA) has published its standpoint relating to agreements concluded by investment fund managers under which third parties undertake to pay the participants of closed-ended investment funds a sum that is the difference between the redemption price of certificates and the value of their issue price, often also increased by what is known as the guaranteed profit. The PFSA notes that it is necessary for fund managers to adopt a prudent approach to concluding such agreements because they result in investors bearing a significant risk and the obligation to accurately present information to the extent arising under the provisions of the Act on Investment Funds and Management of Alternative Investment Funds.

PRC government takes further steps to prevent risks associated with foreign debts and local government debts

The National Development and Reform Commission and the Ministry of Finance (MoF) have jointly issued the 'Circular on improving market constraint mechanisms and preventing foreign debt risks and local debt risks'. This follows the 'Circular on regulating the investment and financing by financial enterprises to local governments and state-owned enterprises' released by MoF on 28 March 2018.

Through the circulars, the PRC government has adopted the following measures to control and address its local debt problems:

- general requirement - financial enterprises may not directly or indirectly provide financing in any form to local governments or their departments other than buying local government bonds and may not extend new loans to local government financing vehicles (LGFV) in violation of the relevant rules;
- no guarantee from local governments - where a financial enterprise provides financing for the purpose of local construction or establishes investment funds with local governments, it may not ask for or accept any form of guarantee regarding its principal / interest from local governments;
- disclosure requirements - enterprises (including financial enterprises) issuing medium to long-term offshore bonds as well as the relevant service providers may not disclose, in the prospectus, offering circular or other documents, any information that indicates or implies the existence of credit support from the local government (such as fiscal or debt information of the

government) or make misleading suggestions that the bond is linked to the local government's credit. The relevant document shall make clear that the local government, as the issuer's shareholder, only bears limited liability and the debt shall be repaid by the issuer independently; and

- credit rating - rating agencies may not link the credit rating of a LGFV / state-owned enterprise to the rating of the local government.

HKMA issues circular on disclosure requirements applicable to non-SFO-regulated structured investment products under discretionary accounts

Following the publication of the consultation conclusions by the Securities and Futures Commission (SFC) on its proposed disclosure requirements applicable to discretionary accounts on 23 May 2018, the Hong Kong Monetary Authority (HKMA) has issued a circular to authorised institutions setting out its expectations regarding the disclosure requirements applicable to non-Securities and Futures Ordinance (SFO)-regulated structured investment products under discretionary accounts.

The SFC has introduced a new paragraph 7.2 in the Code of Conduct for Persons Licensed by or Registered with the SFC to stipulate the requirements for disclosure of benefits under discretionary accounts. The HKMA expects authorised institutions to disclose monetary and non-monetary benefits from effecting a transaction in a non-SFO-regulated structured investment product under discretionary accounts in accordance with the requirements in the new paragraph 7.2 of the Code of Conduct.

The HKMA has advised authorised institutions to implement the requirements set out in the circular by 25 November 2018, the date on which the new paragraph 7.2 of the Code of Conduct becomes effective.

HKMA publishes revised guideline on authorisation of virtual banks

The HKMA has published a revised guideline on the authorisation of virtual banks following the completion of its February 2018 public consultation on the guideline.

During the public consultation, the HKMA received submissions from 25 respondents and all supported the introduction of virtual banking in Hong Kong. Most of the respondents agreed that virtual banks should be subject to the same supervisory requirements applicable to conventional banks. No respondents raised objections to allowing both financial and non-financial firms to operate a virtual bank in Hong Kong, and there was broad support for virtual banks to operate in the form of a locally-incorporated entity with no physical branches.

The HKMA is of the view that virtual banks should not impose any minimum balance requirements or low-balance fees on customers.

With regard to the production of an exit plan, the HKMA considers it prudent to require virtual bank applicants to develop the plan given that virtual banking is a new business model in Hong Kong. The purpose of the exit plan is to ensure that, should it become necessary, a virtual bank can unwind its business operations in an orderly manner without causing disruption to customers and the financial system.

On the minimum paid-up capital requirement of HKD 300 million for virtual bank applicants, the HKMA has clarified that the requirement is stipulated in the Banking Ordinance and is applicable to all licensed banks, adding that it is inappropriate to lower the requirement for virtual bank licensees.

The HKMA has advised companies intending to apply for a virtual banking licence to submit a substantially complete application to it by 31 August 2018 or they are unlikely to be included in the first batch of virtual bank applications to be processed.

SFC and BaFin sign MOU on enhanced supervision of cross-border regulated entities

The SFC and the German Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) have signed a memorandum of understanding (MOU) providing for consultation, cooperation and exchange of information in connection with the supervision and oversight of cross-border regulated entities in Hong Kong and Germany.

The MOU, which covers financial market participants and other entities that are regulated by the SFC or the BaFin, enables the SFC and the BaFin to cooperate with each other in the interest of fulfilling their respective regulatory mandates.

ASIC provides disclosure relief during transition to AFCA

The Australian Securities and Investments Commission (ASIC) has announced that it will give financial firms, including superannuation trustees, transitional relief until 1 July 2019 to allow them time to update mandatory disclosure documents and periodic statements with the contact details of the Australian Financial Complaints Authority (AFCA). The AFCA is the new single external dispute resolution (EDR) scheme for consumer and small business complaints. It will replace the three existing schemes: the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT).

A range of measures has been put in place to ensure that consumers are kept informed of how and where to pursue a complaint during the transition to AFCA, which will start dealing with complaints about all financial firms from 1 November 2018. The measures include that:

- AFCA has a new website and new contact details:
  - prior to AFCA's commencement the final response letters that financial firms send to complainants who have been through internal dispute resolution will include AFCA's details;
  - arrangements are being made to effectively re-direct consumers from the predecessor dispute resolution schemes to AFCA from 1 November 2018; and
  - ASIC will require financial firms' broader consumer communications about how to complain (e.g. including on websites) to also be updated with AFCA's details by 1 November 2018;
- under the disclosure relief provided by ASIC:
  - financial firms will have until 1 July 2019 to update EDR details to refer to AFCA in mandatory disclosure documents, periodic statements and exit statements; and

- financial firms will not have to issue significant event notifications under section 1017B of the Corporations Act associated with the transition to AFCA.

The regulatory guide 165 licensing: internal and external dispute resolution (RG 165) has also been amended to require information about predecessor schemes and AFCA to be provided to complainants from 21 September 2018.

ASIC has indicated that it will continue to work with all EDR scheme stakeholders to ensure that the transition to AFCA is as smooth as possible for both financial firms and consumers.

ASIC consults on foreign financial services providers relief proposals

ASIC has launched a public consultation proposing a modified licensing regime for foreign financial service providers carrying on a financial services business in Australia with wholesale clients. The proposed approach is intended to provide ASIC with a broader range of tools to regulate the activities of foreign providers in Australia.

The consultation paper sets out ASIC's proposal to enable foreign providers to apply for a modified form of Australian financial services (AFS) licence (foreign AFS licence). Currently foreign providers of services to wholesale clients are not required to hold an AFS licence in some circumstances under ASIC relief.

Providers holding a foreign AFS licence will be exempt from certain licensee provisions under the Corporations Act. This is on the basis that there are similar regulatory outcomes achieved through the regime applying to the foreign provider in its home jurisdiction.

The consultation follows ASIC's review of the regulatory settings behind its foreign providers relief. The review identified some supervisory and regulatory concerns about the operation of the relief. ASIC considers that it is important for foreign providers to adhere to fundamental conduct obligations in its AFS licensing regime that govern how financial services are provided to Australian wholesale clients and promote market integrity.

The current foreign provider licensing relief is due to sunset on 27 September 2018. ASIC will extend the current relief for twelve months until 30 September 2019 while it consults with stakeholders. The consultation paper proposes a further transition period of twelve months to 30 September 2020 if ASIC proceeds with foreign AFS licensing.

Comments on the consultation paper are due by 31 July 2018.

US bank regulatory reform legislation includes provisions to facilitate capital formation for companies that are not banks

President Trump has signed into law the Economic Growth, Regulatory Relief and Consumer Protection Act. While this act primarily provides relief for smaller financial institutions with respect to regulations adopted under the Dodd-Frank Act, it includes several securities law provisions meant to facilitate capital formation for a variety of companies, including those that are not banks or bank holding companies.

In particular, this reform legislation directs the US Securities and Exchange Commission (SEC) to amend Rule 701's additional disclosure threshold from

USD 5,000,000 to USD 10,000,000 and to adjust this threshold for inflation every five years. Rule 701 provides a commonly-used exemption for securities issued to employees under compensatory benefit plans by companies that do not publicly report under the Securities Exchange Act of 1934, as amended (the Exchange Act). When a company exceeds this threshold, it must provide additional specified disclosures to relevant US employees.

Further, this reform legislation amends Section 18 of the Securities Act of 1933, as amended, to broaden the types of US exchanges for which listed securities would qualify as 'covered securities' entitled to federal preemption from state securities laws. It also amends Section 3(c)(1) of the Investment Company Act of 1940, as amended (the Investment Company Act), to increase the limitation on the number of persons allowed to invest in a qualifying venture capital fund without registration as an 'investment company' from 100 to 250 persons.

This reform legislation also directs the SEC to amend specified rules to facilitate capital formation, which would:

- expand Regulation A+ rules (which have provided an exemption from registration to certain smaller companies) to no longer exclude companies that are public reporting companies under the Exchange Act; and
- allow qualifying closed-end funds that are registered under the Investment Company Act to comply with the same securities offering and proxy rules that apply to public reporting companies under the Exchange Act.

CFTC staff grants no-action relief to certain non-US counterparties to swaps with specified development banks and similar institutions

The Commodity Futures Trading Commission's (CFTC's) Division of Swap Dealer and Intermediary Oversight has issued a no-action position providing relief to certain non-US persons with respect to their swaps with specified development banks and similar institutions. Specifically, no-action relief is granted to any non-US counterparty that is neither a guaranteed affiliate nor conduit affiliate of a US person, if it does not include one or more swaps entered into with any 'International Financial Institution' in determining whether it exceeds the thresholds that would require it to register with the CFTC as a swap dealer or major swap participant.

For purposes of this no-action relief, the following have been designated as 'International Financial Institutions': North American Development Bank, International Monetary Fund, International Bank for Reconstruction and Development, European Bank for Reconstruction and Development, International Development Association, International Finance Corporation, Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, Inter-American Development Bank, Bank for Economic Cooperation and Development in the Middle East and North Africa, Inter-American Investment Corporation, Council of Europe Development Bank, Nordic Investment Bank, Caribbean Development Bank, European Investment Bank and European Investment Fund.

This list of institutions is the same as those referenced in the CFTC's 2013 cross-border guidance, with the addition of the North American Development Bank.

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SEC requests comment on proposed safe harbor for investment company research reports and related rules

The US Securities and Exchange Commission (SEC) has proposed rules and amendments intended to promote research reports covering mutual funds, exchange traded funds, registered closed-end funds, business development companies, and similar covered investment funds.

The proposal would, among other things, establish a safe harbor for broker-dealers to publish or distribute research reports on investment funds without the report constituting an offer for sale or offer to sell a security that is the subject of an offering of the covered investment fund, even if the broker-dealer is participating or may participate in a registered offering of the covered investment fund's securities. A similar regulatory safe harbor currently exists for research reports about other public entities.

The SEC has also proposed new Rule 24b-4 under the Investment Company Act of 1940. Proposed Rule 24b-4 would exclude certain investment fund research reports from the SEC filing requirements in Section 24(b) of the Investment Company Act of 1940. That said, research reports that are not subject to the content standards and restrictions of a self-regulatory organization will not be excluded from Rule 24b-4.

Public comments will be accepted for 30 days following publication of the proposals in the Federal Register.

RECENT CLIFFORD CHANCE BRIEFINGS

Mark Zuckerberg speaking before the European Parliament about user privacy

The meeting between Mark Zuckerberg, Facebook's CEO, and the MEPs (Members of the European Parliament) took place on 22 May 2018 in Brussels. The intention of the MEPs was to get further information on how the social network plans to protect its users.

The meeting in the European capital between Mr Zuckerberg and the leaders of the political groups of the European Parliament was demanded by the EU following the Cambridge Analytica scandal.

This briefing discusses the meeting.

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

No Oral Modification Clauses Upheld

The Supreme Court has decided that the commercial desirability of no oral variation (or modification) clauses in contracts overrides any conceptual difficulty in their application. If parties include such a clause in their contract, then the contract can only be varied in writing – though the Court left open the possibility that if the parties act on an oral variation, they might be estopped from later denying the variation's validity.

This briefing discusses the judgment.

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

The European Union (Withdrawal) Bill in the House of Lords

The House of Lords' amendments to the European Union (Withdrawal) Bill can be categorised into five types: political; Parliamentary control over the Brexit process; Parliamentary control over the initial amendments to retained EU law needed to correct deficiencies; Parliamentary control over subsequent amendment to that law; and devolution. Many of the amendments are laudable in their aims, but it is important not to lose sight of the practical necessity of ensuring that UK law works effectively on Brexit and can then be kept up to date.

This briefing discusses the amendments.

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

US Congress passes Dodd-Frank reform legislation with a 'clarification' (and little else) for foreign banks

On 24 May 2018, the Economic Growth, Regulatory Relief, and Consumer Protection Act was signed into law, following a 258-159 vote in the US House of Representatives, which adopted without any changes the version of the legislation passed by the Senate earlier this year.

This briefing discusses the legislation.

https://www.cliffordchance.com/briefings/2018/05/u_s_congress_passesdodd-frankrefor.html

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