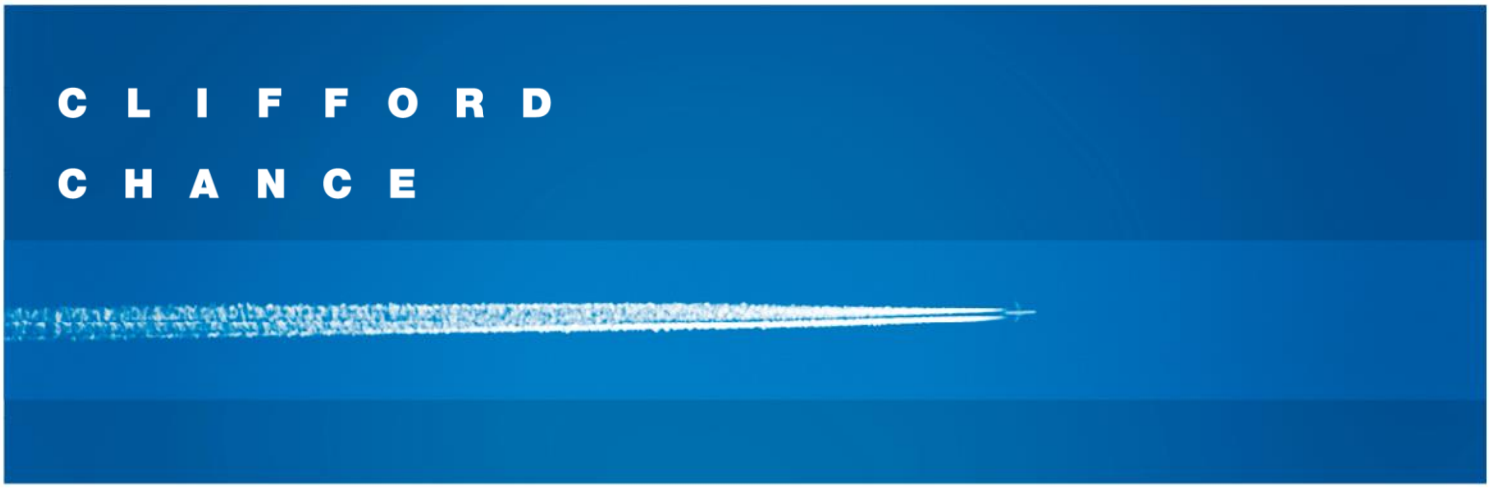

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Iran: Updated EU Blocking Regulation enters into force

The EU Blocking Regulation has been updated with effect from 7 August 2018. It follows the US decision on 8 May 2018 to withdraw from the Joint Comprehensive Plan of Action (JCPOA) and to reimpose certain sanctions with respect to Iran. Following an initial wind down period of 90 days, the US Iranian sanctions have been reinstated with effect from 7 August 2018.

The updated Blocking Regulation prohibits EU entities from complying (directly or indirectly) with any requirement or prohibition of the reinstated US Iranian sanctions. EU persons may find that they face competing compliance obligations and risks under the US Iranian sanctions laws and the updated Blocking Regulation.

The Commission has published a guidance note in respect of the updated Blocking Regulation, as well as additional questions and answers on the Commission website. The Commission has also published criteria in respect of the procedure under the Blocking Regulation for authorisation to comply with US Iranian sanctions laws.

Benchmarks Regulation: ITS on provision of information to ESMA and compliance statements published in Official Journal

Two Commission Implementing Regulations setting out implementing technical standards (ITS) under the Benchmarks Regulation have been published in the Official Journal.

The first (Commission Implementing Regulation 2018/1105) lays down ITS on forms and procedures competent authorities (CAs) should use when providing information to the European Securities and Markets Authority (ESMA) under the Benchmarks Regulation. The ITS cover, amongst other things, the process for CAs when:

- notifying ESMA of information required for the public Benchmarks Register;
- notifying ESMA of benchmarks by recognised administrators; and
- responding to requests for information from ESMA.

The second (Commission Implementing Regulation 2018/1106) lays down ITS on the compliance statement that benchmark administrators who chose not to comply with certain requirements of the Benchmarks Regulation must publish and maintain to demonstrate why it is not appropriate for them to comply with those requirements. The Regulation sets out template compliance statements

to be used by administrators of significant benchmarks (Annex I) and non-significant benchmarks (Annex II).

Both Regulations enter into force on 29 August 2018 and will apply from 29 October 2018.

MLD4: RTS on central contact points for PSPs and e-money issuers published in Official Journal

Commission Delegated Regulation (EU) 2018/1108 setting out regulatory technical standards (RTS) on central contact points for electronic money issuers and payment service providers (PSPs) under the Fourth Anti-Money Laundering Directive (2015/849 – MLD4) has been published in the Official Journal.

The RTS lay down criteria for determining the circumstances in which the appointment of a central contact point is appropriate under MLD4 and rules concerning the functions of central contact points.

Electronic money issuers and PSPs may appoint central contact points to ensure, on behalf of the appointing institutions, compliance with anti-money laundering and counter-terrorist financing (AML/CTF) rules. Appointment of central contact points may be justified where the size and scale of the activities carried out by the electronic money issuers and PSPs through establishments in forms other than a branch meets or exceeds certain thresholds to be set at a level that is proportionate to the aim of MLD4 in order to facilitate supervision by competent authorities of compliance with local AML/CTF obligations. In exceptional cases, where a Member State has reasonable grounds to believe that the money laundering or terrorist financing risk associated with a particular PSP or electronic money issuer that operates an establishment in their territory is high, they should be able to require the issuer to appoint a central contact point even if it does not meet the thresholds laid down in the RTS or does not meet the category of institutions required to appoint a central contact point.

The RTS will enter into force on 30 August 2018.

EMIR: ESMA publishes communication on clearing obligation for pension scheme arrangements

ESMA has published an updated statement on the clearing obligation and trading obligation for pension scheme arrangements (PSAs) under the European Market Infrastructure Regulation (EMIR). EMIR introduced a temporary exemption for PSAs from the clearing obligation to allow time for a suitable technical solution for the transfer of non-cash collateral as variation margins to be developed by central counterparties (CCPs), with two possible extensions. The second, and final, extension to the exemption from the clearing obligation expires on 17 August 2018.

ESMA's communication notes that the EU Commission's Refit proposal to amend EMIR includes a further extension of the temporary exemption for PSAs from the clearing obligation but acknowledges that the Refit negotiations have not been finalised. As such, ESMA highlights the timing gap during which PSAs would need to have clearing arrangements in place and start clearing their derivative contracts before they are once again no longer required to do so.

ESMA's statement is intended to clarify ESMA's expectation for competent authorities not to prioritise their supervisory actions towards entities that are expected to be exempted again in a relatively short period of time and generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in a proportionate manner.

AIFMD: ESMA publishes letter to EIOPA on leverage and AIF definition

ESMA has published a letter to the European Insurance and Occupational Pensions Authority (EIOPA) setting out its response to questions relating to the leverage calculation and AIF definition pursuant to the Alternative Investment Fund Managers Directive (AIFMD).

Noting that there is no formal legal definition of 'leveraged AIFs' or 'unleveraged AIFs', ESMA is of the view that:

- AIFs that use borrowing arrangements which are temporary in nature and fully covered by contractual capital commitments from investors in the AIF (article 6(4), Commission Delegated Regulation (EU) 231/2013) should be considered unleveraged; and
- the gross method for calculating overall exposure (article 7) does not exclude currency hedging, whereas the commitment method (article 8) does exclude financial derivative instruments used for currency hedging purposes provided they do not add any incremental exposure, leverage or other risks.

As to whether AIFs managed by registered or sub-threshold AIFMs are to be considered 'AIFs', ESMA is of the view that, notwithstanding national requirements, all collective investment undertakings managed by AIFMs that meet the definition (article 4(1)(a), AIFMD) should be considered as 'AIFs'.

The questions were raised by EIOPA in its second set of advice to the EU Commission on specific items in the Solvency II Delegated Regulation (EIOPA-BoS-18/075).

Press release

International standard-setting bodies jointly publish consultative report on incentives to centrally clear OTC derivatives

The Financial Stability Board (FSB) has published a consultative document jointly with the International Organization of Securities Commissions (IOSCO), the Basel Committee on Banking Supervision (BCBS) and the Committee on Payments and Market Infrastructures (CPMI) on incentives to centrally clear OTC derivatives. The report is a post-implementation evaluation of the effects of the G20 financial regulatory reforms and considers how the reforms interact and how they could affect incentives.

Overall, the report identifies that the reforms are achieving their goals of promoting central clearing, especially for the most systemic market participants. However, beyond the systemic core of the derivatives network, the incentives are less strong. As such, the report sets out potential areas of reform. The report is intended to inform relevant standard setting bodies and, if warranted, provide a basis for fine-tuning the post-crisis reforms, in line with

the objective to reduce complexity and improve transparency and standardisation in the OTC derivatives markets.

Comments on the report are due by 7 September 2018.

International standard-setting bodies jointly report on interdependencies between CCPs

IOSCO, the BCBS, the CPMI and the FSB have jointly published a second report mapping interdependencies between CCPs and their clearing members and other financial services providers. The report follows a first report published in July 2017.

In 2016 the international standard-setting bodies collected data from 26 CCPs across 15 jurisdictions to further understand and quantify the interconnections between CCPs and the rest of the financial system. After reviewing the findings, the standard-setting bodies agreed to conduct another, more streamlined data collection in 2017 with the same group of 26 CCPs. Overall the results of the second exercise are broadly consistent with the first, and among other things:

- prefunded financial resources are concentrated at a small number of CCPs;
- exposures to CCPs are concentrated among a small number of entities;
- the relationships mapped are characterised, to varying degrees, by a core of highly connected CCPs and entities and a periphery of less highly connected CCPs and entities, although less highly connected CCPs are often linked to at least one highly connected entity;
- a small number of entities tend to dominate the provision of each of the critical services required by CCPs; and
- clearing members and clearing member affiliates are also important providers of other critical services required by CCPs and can maintain several types of relationships with multiple CCPs simultaneously.

The report is intended to inform the ongoing policy work on CCP resilience, recovery planning and resolution. It may also provide inputs for designing a supervisory stress testing framework.

FCA and other financial regulators consult on Global Financial Innovation Network

The UK's Financial Conduct Authority (FCA), along with eleven other financial regulators and related organisations, has announced the creation of the Global Financial Innovation Network (GFIN), which is the result of the FCA's earlier consultation on a proposed 'global sandbox'. The GFIN is intended to provide a more efficient way for innovative firms to interact with regulators across the world and for regulators to co-operate with one another on innovation related topics.

As part of the announcement the group is launching a consultation on the role and priorities of the GFIN. The consultation sets out the proposed main functions of the GFIN, namely to:

- act as a network of regulators to collaborate and share experience of innovation in respective markets;

- provide a forum for joint policy work and discussions; and
- provide firms with an environment in which to trial cross-border solutions.

The group is seeking stakeholder feedback on these proposed functions, as well as how the network will work in practice and which activities it should prioritise.

Comments are due by 14 October 2018.

Brexit: FCA publishes Dear CEO letter on booking models

The FCA has published a Dear CEO letter on cross-border booking arrangements in the context of firms putting in place contingency plans due to Brexit. The letter sets out the FCA's expectation that firms must put in place structures that enable the FCA to supervise the conduct of their UK business effectively and ensure that they meet threshold conditions, and that proposed changes are in the best interests of clients.

The letter sets out that the FCA is open to a broad range of legal entity structures or booking models, including back-to-back and remote booking, provided that associated conduct risks are effectively controlled and managed. The letter specifies a set of principles that booking models should comply with.

Royal decree approving new FSMA regulations on prevention of money laundering and terrorist financing published

A royal decree of 30 July 2018 approving and giving effect to new regulations issued by the Financial Services and Markets Authority (FSMA) with respect to the prevention of money laundering and terrorist financing has been published in the Moniteur Belge. The FSMA regulations have been updated to reflect the provisions of the law of 18 September 2017, which adopted a risk-based approach to combating money laundering.

The FSMA has also published a new circular (FSMA_2018_12) on the prevention of money laundering and terrorist financing, setting out its expectations regarding the implementation of the risk-based approach by the relevant entities and certain supervisory actions that the FSMA intends to take to ensure compliance with the regulatory framework.

Belgium amends law requiring banks and various other regulated entities to report client information to National Bank of Belgium

In 2011, Belgium adopted a law requiring credit institutions and other regulated entities to communicate client account information, and the details of various types of contracts entered into by their clients, to the National Bank of Belgium (NBB) on an annual basis. Belgium has now adopted a new law which expands the type of information which regulated entities must provide to the NBB and the frequency on which such information must be provided. The law also expands the categories of institutions that will need to report client information to the NBB. Among others, payment institutions, electronic money institutions and certain insurance undertakings will also need to report client information to the NBB.

The new law will enter into force in August 2019 (or on such other date, which is either six months earlier or six months later, determined by royal decree). The law provides that the relevant entities required to report information to the NBB must notify their clients of the amended reporting obligation at the latest seven months after the entry into force of the law.

PSD2: Belgian law implementing consumer protection aspects enters into force

Belgium has implemented the revised Payment Services Directive (PSD2) by way of two separate laws – the law of 11 March 2018 implementing the licensing and supervision aspects of PSD2 and the law of 19 July 2018 on the consumer protection aspects of PSD2.

The provisions of the law of 19 July 2018 entered into force on 9 August. The law provides that the relevant regulated entities must amend their general terms and conditions in order to bring them in line with the provisions of the law of 19 July 2018, within a period of four months following the publication of the law in the Moniteur Belge.

Prospectus Regulation: AMF amends its General Regulation and publishes instruction

The Autorité des Marchés Financiers (AMF) has amended its General Regulation and published an instruction following the entry into force of the new Prospectus Regulation.

The provisions of the Prospectus Regulation relating to the national threshold above which a securities offering requires a public offering prospectus entered into force on 21 July 2018. Book II of the AMF General Regulation on issuers and financial disclosure was amended as of that date. A new instruction, no. 2018-07, will also be published. They establish:

- a new threshold, raised to EUR 8 million, above which a prospectus subject to prior review by the AMF must be published before a public offering of financial securities;
- below this threshold of EUR 8 million, a national ad hoc information regime, without prior review by the AMF, for offerings related to unlisted financial securities not presented on a crowdfunding website; and
- for initial public offerings on an organised multilateral trading facility (in the case in point Euronext Growth) open to the general public and for an amount of less than EUR 8 million, the requirement for an information document specified by the market rules and reviewed by the market operator's staff.

BaFin issues warning against online trading platforms operated by unlicensed providers

The German Federal Financial Supervisory Authority (BaFin) has issued a warning against entering into transactions, particularly involving contracts for difference (CFDs), binary options and so-called forex-trading, via online trading platforms operated by unlicensed providers.

The warning states that even if external circumstances, such as the use of German language or telephone numbers, indicate that a company is domiciled in Germany, this cannot safely be concluded. Company headquarters often change frequently, and operators of online trading platforms usually do not

hold any authorisation to target the German market or to conduct business in Germany. As a result, BaFin warns that there is a high risk that it will not be possible to enforce the repayment of funds paid into these online accounts or the payment of any profit generated.

Luxembourg law implementing European Account Preservation Order Regulation published

A new law of 18 July 2018 implementing Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters has been published in the Luxembourg official journal (Mémorial A).

The European Account Preservation Order procedure focuses on the preservation of the debtor's assets, but does not govern the execution phase, i.e. the recovery of the claim against the debtor, which remains to be governed by national law. The Luxembourg law account preservation order procedure equivalent to the European procedure is the saisie-arrêt, which does not clearly distinguish the preservation and the execution phase, but links the asset freezing directly to the recovery of the claim. Thus, an amendment was necessary in order to avoid any incoherence and legal uncertainty.

Accordingly, the law of 18 July 2018 inserts a new article 718-1 into the New Code of Civil Procedure, introducing a specific procedure for the execution phase, which is separate from the national saisie-arrêt procedure, and which applies when a European Account Preservation Order within the meaning of the Regulation is issued.

The Law entered into force on 4 August 2018.

Polish Financial Supervision Authority publishes bulletin on Money Market Funds Regulation

The Polish Financial Supervision Authority (PFSA) has published a bulletin setting out the impact of Regulation (EU) 2017/1131 of 14 June 2017 on money market funds on the regulatory conditions for Polish investment funds. In this respect, the PFSA also analysed key EU regulations that will determine how collective investment institutions operating on the money market carry out their activity.

Polish Financial Supervision Authority reviews adequacy of buffer index of other institutions of systemic importance

On the basis of the provisions of the Act on Macroprudential Supervision of the Financial System and Crisis Management in the Financial System of 5 August 2015, and having taken the opinion of the Financial Stability Committee into account, the PFSA has confirmed the identification of 10 banks as other institutions of systemic importance and additionally identified one bank as an other institution of systemic importance. On that basis, the PFSA has also decided to impose or uphold appropriate capital buffers.

Among the other institutions of systemic importance, the PFSA has identified:

- Powszechna Kasa Oszczędności Bank Polski S.A.
- Bank Polska Kasa Opieki S.A.
- Bank Zachodni WBK S.A.

- ING Bank Śląski S.A.
- mBank S.A.
- Bank BGŻ BNP Paribas S.A.
- Bank Handlowy w Warszawie S.A.
- Deutsche Bank Polska S.A.
- Alior Bank S.A.
- Bank Polskiej Spółdzielczości S.A.
- SGB-Bank S.A

Bank Millennium S.A. and Getin Noble S.A. were not on the PFSA's list this time.

SFC publishes updated disciplinary fining guidelines

The Securities and Futures Commission (SFC) has gazetted its updated disciplinary fining guidelines. The guidelines, originally issued in February 2003, set out considerations relevant to the SFC's determination of whether to impose a fine and the amount of the fine on 'regulated persons' under sections 194 and 196 of the Securities and Futures Ordinance (SFO).

The guidelines have been updated to codify the Securities and Futures Appeals Tribunal's (SFAT's) principles with regard to the imposition of fines on regulated persons and clarify that:

- multiple culpable acts or omissions constituting misconduct may attract multiple penalties even if they are of the same generic nature;
- the SFC may use the number of persons affected by the misconduct as the multiplier in assessing the appropriate level of pecuniary penalty;
- using the number of affected persons as the multiplier may not be appropriate in every case. The appropriate approach in each case will depend on its own facts; and
- in cases where the misconduct attracts multiple penalties, the SFC will look at the totality of the penalties to ensure it is not disproportionate to the gravity of the conduct in question.

The updated guidelines will come into effect on 13 August 2018.

SFC issues circular to licensed corporations on disguised margin financing

The SFC has issued a circular to licensed corporations warning them that their involvement in disguised margin financing activities will have serious implications for their fitness and properness to remain licensed by the SFC.

In the course of its ongoing supervision of licensed corporations, the SFC has observed that some licensed corporations carrying on asset management activities may have aided and abetted unlicensed affiliates or third parties to provide securities margin financing in the guise of investments. The SFC warns that the provision of margin financing in the guise of investments under such an arrangement is illegal. The SFC notes that parties involved in the illicit activities may have avoided certain capital, conduct or disclosure requirements aimed at protecting investors and market integrity.

The SFC has advised licensed corporations not to facilitate the setting up or the operation of de facto margin financing arrangements to circumvent the Securities and Futures (Financial Resources) Rules and the risk management requirements. The fitness and properness of licensed corporations may be called into question when they aid and abet the conduct of illegal activities. Anyone involved in these arrangements may be liable to prosecution and should cease such arrangements immediately.

In addition, the SFC has reminded licensed corporations and their senior management to heed the circulars issued by the SFC on 31 July 2017 and 15 September 2017, which highlighted the irregularities, deficiencies and common instances of non-compliance in managing funds and discretionary accounts. The SFC reiterates that licensed corporations and their senior management are responsible for maintaining appropriate standards of conduct and robust policies and procedures to ensure fair treatment of their clients and compliance with regulatory requirements.

CFTC proposes framework for exempting non-US clearing organizations from registration as a derivatives clearing organization

The Commodity Futures Trading Commission (CFTC) has proposed amendments to its regulations to establish a framework for exempting a clearing organization organized outside of the United States from registration with the CFTC as a derivatives clearing organization in connection with that organization's clearing of swaps.

Under the proposal, for central counterparties in non-US jurisdictions, a framework that conforms to the Committee on Payments and Market Infrastructures and the IOSCO Principles for Financial Market Infrastructures would be deemed comparable to the CFTC's requirements for US domestic central counterparties.

In connection with the publication of this proposal for comment, CFTC Chairman Christopher Giancarlo noted that the proposal is part of the Commission's continued efforts to foster cross-border cooperation and show deference to home country regulation that is deemed comparable to the Commission's regulations.

Comments on the proposed rule will be accepted for 60 days following its publication in the Federal Register, which is expected shortly.

ASIC publishes enforcement report for first half of 2018

The Australian Securities and Investments Commission (ASIC) has published its report outlining the enforcement outcomes it achieved during the period from 1 January 2018 to 30 June 2018. The report provides a high-level overview of some of ASIC's enforcement priorities and highlights some important cases and decisions during the relevant period.

The report also outlines the priority areas that ASIC will have a particular focus on over the next six months. These include, but are not limited to:

- poor financial reporting by listed companies and other public interest entities;
- the quality of audits of listed companies and other public interest entities;

- responsible lending practices requiring credit licensees to make reasonable inquiries about a customer's financial situation;
- the responsibility of Australian financial services (AFS) licensees to monitor and supervise the advice of their financial advice representatives; and
- financial benchmark integrity – to ensure the adequacy and robustness of the systems and controls in bank bill trading and foreign exchange businesses.

RECENT CLIFFORD CHANCE BRIEFINGS

ISDA Credit Support Annex – High Court confirms no obligation to account for 'negative interest'

The English High Court has ruled on whether the standard form ISDA 1995 Credit Support Annex (CSA) contains an obligation to pay negative interest. The Court's judgment confirms that, where parties have not otherwise agreed how to address negative interest rates, there is no obligation in the CSA on a party transferring eligible collateral in the form of cash to pay or otherwise account for negative interest on that cash.

This briefing discusses the judgment.

https://www.cliffordchance.com/briefings/2018/08/isda-credit-support-annex.html

Treasury Issues Report Regarding Nonbank Financials, Fintech, and Innovation – Marketplace Lending Summary

The US Department of the Treasury has released a fourth report in its series on the core principles for regulating the US financial system. This report, entitled 'A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation', analyses and provides recommendations for the regulation of nonbank financial companies, the fintech sector and other forms of financial market innovation through the lens of the core principles. Thematically, the report primarily addresses the following two core principles:

- making regulation efficient, effective, and appropriately tailored; and
- enabling American companies to be competitive with foreign firms in domestic and foreign markets.

This briefing discusses the Treasury's recommendations regarding online lending. Our fintech team will distribute a series of briefings over the next two weeks providing summaries and analysis of further topics within the report. We will also distribute a separate summary of the proposed OCC Fintech Charter.

https://www.cliffordchance.com/briefings/2018/08/treasury_issues_reportregardingnonban.html

SEC Amends Rule 701 to Ease Disclosure Burdens for Certain Share Offerings to US Employees

The SEC has issued a final rule release to amend Rule 701 under the Securities Act of 1933, as amended – an exemption commonly relied on by companies not listed in the United States to offer shares to their US

employees. Specifically, the SEC has increased a threshold amount that triggers additional disclosure obligations pursuant to Rule 701 pursuant to a mandate contained in the recently enacted Economic Growth, Regulatory Relief, and Consumer Protection Act.

At the time the SEC adopted this rule change, it also issued a concept release to solicit comments on possible ways to modernize rules related to compensatory arrangements in light of the significant evolution in both the types of compensatory offerings and the composition of the workforce.

This briefing discusses both the rule change and concept release.

https://www.cliffordchance.com/briefings/2018/08/sec_amends_rule_701toeasedisclosureburden.html

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