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## **ECON Committee adopts position on proposed prudential rules for investment firms**

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has [adopted](#) its reports on the legislative proposals to amend the current EU prudential rules for investment firms. The proposals for a directive and a regulation would amend the existing prudential framework set out in the Capital Requirements Regulation (CRR) and Directive (CRD 4) and in MiFID2 and MiFIR.

Overall the Committee broadly supports the measures set out in the legislative proposals, but it has endorsed certain amendments, including:

- an extension to the period during which thresholds must be exceeded before moving to the higher, more burdensome category;
- an increase in the number of investments that should be subject to the lowest requirements
- tighter rules on equivalence;
- a requirement for firms to set up an EU subsidiary if they wish to provide typical bank like services;
- gender equality rules relating to remuneration and new disclosure requirements on investment policy.

The proposals will be considered in trilogue negotiations once the EU Council has reached political agreement on a negotiating stance.

## **MiFIR: ESMA agrees to EU Commission's proposed amendments to RTS 1**

The European Securities and Markets Authority (ESMA) has published an [opinion](#), accompanied by a [letter](#) to the EU Commission, on the Commission's revised proposal for amendments to Commission Delegated Regulation (EU) 2017/587 on regulatory technical standards under MiFIR (RTS 1).

RTS 1 sets out transparency requirements for equity instruments, including the quoting obligations for systematic internalisers (SIs). ESMA proposed to tie SI quotes to price levels that can be traded on trading venues for all equity and equity-like instruments and ESMA remains of the view that its proposal would better meet the legislative intent of the empowerment under Article 14(7) MiFIR. However, ESMA agrees with the Commission that any concerns about efficient valuation and price formation are more relevant for shares and depository receipts. As such, ESMA has agreed to the reformulation of Article 10 in RTS 1 and considers that the amendment will ensure the application of tick sizes to SI quotes in a timely fashion.

ESMA has also agreed to other technical amendments proposed by the Commission.

## **EMIR: ESMA publishes final report amending RTS on clearing obligation for intragroup transactions**

ESMA has published its [final report](#) on the clearing obligation under the European Market Infrastructure Regulation (EMIR) (No. 6).

Currently there are three Delegated Regulations on the clearing obligation, mandating a range of interest rate and credit derivative classes to be cleared. These regulations include a deferred date of application of the clearing obligation for intragroup transactions satisfying certain conditions and where one of the counterparties is a third country group entity in the absence of the relevant equivalence decision. To date there have not been any equivalence decisions with regard to the clearing obligation.

In July 2018 ESMA consulted on amending draft regulatory technical standards (RTS) to extend the date of deferral. The final report sets out the finalised version of the draft RTS amending the current Delegated Regulations on the clearing obligation with respect to the deferred date of application for certain intragroup transactions with a third country group entity, and feedback from the consultation.

ESMA has submitted the draft RTS to the Commission for endorsement.

## **ESMA renews product intervention measure on CfDs**

ESMA has [renewed](#) its product intervention decision under its MiFIR product intervention powers in relation to contracts for differences (CfDs).

Marketing, distribution or sale of CFDs to retail clients will continue to be restricted, including:

- leverage limits on the opening of a position by a retail client;
- a margin close out rule on a per account basis;
- negative balance protection on a per account basis;
- a restriction on the incentives offered to trade CFDs;
- a standardised risk warning, including the percentage of losses on a CFD provider's retail investor accounts; and
- a new reduced character risk warning.

The measure will apply for three months from 1 November 2018.

## **MMF Regulation: ESMA consults on stress testing rules**

ESMA has issued a [consultation](#) on draft guidelines for stress test scenarios under the Money Market Funds Regulation (MMF Regulation).

Under Article 28 of the MMF Regulation, ESMA must develop guidelines that establish common reference parameters of the stress test scenarios to be included in the stress tests managers of MMFs are required to conduct. The guidelines must be updated annually taking into account recent market developments. ESMA published its first set of guidelines in March 2018.

In this consultation, ESMA particularly seeks views on the methodology, risk factors, data and the calculation of the impact.

Comments to the consultation close 1 December 2018. The final guidelines will include the calibration of the stress test scenario for implementation.

## **Bank of Italy consults on amendments to prudential reporting requirements**

The Bank of Italy has launched a [public consultation](#) regarding a set of proposed amendments to the instructions applicable to prudential reporting obligations (Bank of Italy Circular no. 286/2013).

The amendments are principally intended to:

- extend to financial intermediaries (enrolled in the register provided for under Article 106 of Legislative Decree no. 385/1993) certain reporting requirements relating to exposure allocation by counterparties' residence; and
- align the reporting obligations relating to own funds to the recast Payment Services Directive 2015/2366/EU (PSD2).

The consultation will be open for 60 days.

## **Bank of Italy consults on amendments to supervisory provisions for financial intermediaries**

The Bank of Italy has launched a [public consultation](#) regarding a set of proposed amendments to Bank of Italy Circular no. 288/2015 in relation to large exposures.

The amendments are mainly intended to align the Bank of Italy's regulations relating to the prudential treatment of investment schemes as regards large exposures to the regulatory framework set out under Commission Delegated Regulation (EU) No 1187/2014, which sets out regulatory technical standards for determining the overall exposure to a client or a group of connected clients in respect of transactions with underlying assets.

The consultation will close on 23 November 2018.

## **Hong Kong Companies Registry issues guideline on anti-money laundering and counter-terrorist financing requirements for licensed money lenders**

The Hong Kong Companies Registry has issued a [guideline](#) on compliance with anti-money laundering and counter-terrorist financing (AML/CTF) requirements for licensed money lenders. The new guideline is intended to provide guidance to licensed money lenders on the implementation of effective measures to mitigate the risks of money laundering and terrorist financing.

The guideline provides general background on the subjects of money laundering and/or terrorist financing, as well as practical guidance to assist licensees and their senior management in devising and implementing policies, procedures and controls in relevant operational areas, taking into consideration their own circumstances by reference to the AML/CTF requirements under Schedule 2 to the Anti-Money Laundering and Counter-Terrorist Financing Ordinance.

## **FSA outlines strategic priorities for 2018-19**

The Financial Services Agency (FSA) of Japan has published a [summary document](#) outlining its strategic priorities for 2018-19. The summary points have been derived from the report entitled 'For Providing Better Financial Services in the Era of Transition Financial Services Policy: Assessments and

Strategic Priorities 2018', published by the FSA in program year 2018 (July 2018 to June 2019) for improving its 'Plan-Do-Check-Act' (PDCA) cycles.

The FSA report outlines an analysis of Japan's financial system and challenges identified during the program year 2017 (July 2017 to June 2018). Combining the earlier reports ('Strategic Directions and Priorities' and 'Progress and Assessment of the Strategic Directions and Priorities'), the report also indicates what goals the FSA aims to attain during the period from July 2018 to June 2019, and how these goals will be attained.

The key priorities for 2018-2019 include:

- responding to accelerating digitalisation;
- promoting long-term personal asset building;
- vitalising capital market and securing market integrity and transparency;
- securing effective financial intermediation and financial stability;
- enhancing trust from customers;
- contributing to global policy discussion and building global network; and
- reforming the FSA.

### **FSC proposes amendments to Regulation on Supervision of Electronic Financial Transactions**

The Korean Financial Services Commission (FSC) has [proposed amendments](#) to the Regulation on Supervision of Electronic Financial Transactions, as a follow-up to the measures announced on 16 July 2018 to promote the use of cloud services in the financial sector.

The proposed amendments are intended to expand the scope of data that may be managed in the cloud environment and to provide for standards for secure provision and use of cloud services. The key proposals include the following:

- financial institutions and other registered entities may make use of cloud services to manage or administer personal credit information and personally identifiable information; and
- financial institutions will be required to evaluate the soundness and security of cloud service providers pursuant to the standards set out in the Regulation on Supervision of Electronic Financial Transactions.

Comments on the proposed amendments are due by 30 October 2018.

### **FSC proposes amendments to Enforcement Decree of Act on Reporting and Use of Certain Financial Transaction Information**

The FSC has [proposed amendments](#) to the Enforcement Decree of the Act on Reporting and Use of Certain Financial Transaction Information.

The proposed amendments are intended to improve consistency with the international anti-money laundering (AML) standards issued by the Financial Action Task Force. The key proposals include the following:

- electronic financial services providers and private moneylenders that are registered pursuant to Article 3(2)5 of the Act on Registration of Credit

Business, etc. and Protection of Finance Users will be subjected to compliance with AML requirements;

- the Financial Supervisory Service will assume the examination authority over electronic financial services providers and private moneylenders; and
- the reporting threshold for currency transaction reports to the Korea Financial Intelligence Unit will be lowered to KRW 10 million from KRW 20 million.

Comments on the proposed amendments are due by 16 November 2018.

### **MAS publishes enforcement monograph**

The Monetary Authority of Singapore (MAS) published an [enforcement monograph](#) to provide greater clarity and transparency into how the MAS deters, detects, investigates and takes action against breaches of the rules and regulations it administers.

The monograph outlines how the MAS' dedicated Enforcement Department (established in August 2016) works together with the other financial sector oversight functions in the MAS. The monograph supersedes the Capital Markets Enforcement monograph (published in January 2016) which covered enforcement within the capital markets sector. It extends the coverage to include the MAS' enforcement functions in the banking and insurance sectors as well. Amongst other things, the monograph sets out:

- the role of enforcement within the MAS' oversight of the financial industry;
- the role of other government agencies and organisations including the Commercial Affairs Department, the Attorney-General's Chambers and self-regulatory organisations, in the enforcement of laws and regulations under the MAS' purview;
- how the MAS proactively identifies breaches of laws and regulations;
- the MAS' investigative approach; and
- the range of enforcement actions available to the MAS as well as the underlying principles which guide the MAS' use of enforcement actions.

The monograph confirms the MAS' commitment to taking strong regulatory action against financial institutions and individuals who have breached laws and regulations and to publishing enforcement actions taken, if warranted.

### **MAS publishes guidance paper on effective anti-money laundering transaction monitoring controls**

The MAS has published a [guidance paper](#) setting out its key recommendations for financial institutions (FIs) in relation to the effective conduct of anti-money laundering and countering the financing of terrorism (AML/CFT) transaction monitoring (TM) controls. The guidance paper follows a series of AML/CFT inspections conducted by the MAS between Q4 2016 and Q2 2018 to examine the effectiveness of FIs' TM frameworks and processes.

FIs are advised to incorporate the learning points from the guidance paper in a risk-based and proportionate manner, giving proper regard to the profile of their business activities and customers.

Using case studies and examples of best practices implemented by some of the inspected FIs, the guidance paper sets out the MAS' supervisory expectations and recommended practices which FIs should use to strengthen and refine their AML/CFT TM controls. It states that an effective TM system comprises the following elements:

- a well-calibrated framework - the risks FIs face are dynamic and the transactions they carry out are varied and voluminous. FIs should therefore regularly review and enhance TM frameworks, and also do so when trigger events occur;
- robust risk awareness - to ensure the proper functioning and effectiveness of their TM systems, FIs should ensure that these are executed by competent and well-trained staff who exercise sound judgment in targeting unusual transactions, activities and behaviours;
- meaningful integration - FIs should ensure that their TM systems and frameworks reinforce, and are reinforced by, the broader AML/CFT controls that they employ. FIs should designate clear responsibilities for the effective conduct of TM across their three lines of defence, i.e. frontline staff, compliance and support functions and independent audit functions; and
- active oversight - FIs' board and senior management must take an active role in overseeing the satisfactory performance of TM. FIs' board and senior management should drive the continual enhancement of their TM systems with a view to ensuring that their key risks are appropriately mitigated.

FIs are further encouraged to consider the use of new technology and data analytics to improve their TM outcomes. To facilitate this development, a data analytics workgroup formed under the AML/CFT Industry Partnership (ACIP) is producing a report to share industry experiences of the use cases, key challenges and potential solutions to the adoption of such tools. This report is targeted for release in Q4 2018.

## **Federal Reserve and other US regulators amend swap margin requirements**

The Board of Governors of the Federal Reserve System (Federal Reserve), the Farm Credit Administration, the Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Agency and the Office of the Comptroller of the Currency (OCC) have approved [final amendments](#) to their jointly adopted swap margin requirements to conform with recent rule changes applicable to certain qualified financial contracts of systemically important banking organizations (QFC Rules).

As a result of this rule change, legacy swaps entered into before the applicable compliance date will not become subject to margin requirements administered by these regulators if they are amended solely to comply with the QFC Rules.

These amendments harmonize the definition of 'Eligible Master Netting Agreement' in the swap margin rule with recent changes to the definition of 'Qualifying Master Netting Agreement' in capital and liquidity regulations of the Federal Reserve, the FDIC and the OCC by recognizing the restrictions that were adopted by these agencies with respect to the QFC Rules.

These amendments will be effective 30 days after publication in the Federal Register.

### **Australian government consults on draft legislation to strengthen penalties for corporate and financial sector misconduct**

The Australian government has launched a [public consultation](#) on draft legislation – the [Treasury Laws Amendment \(ASIC Enforcement\) Bill 2018](#) – to strengthen penalties for corporate and financial sector misconduct.

The draft legislation is intended to amend the Corporations Act, Australian Securities and Investments Commission (ASIC) Act, Credit Act and the Insurance Contracts Act to introduce a stronger penalty framework in response to a number of recommendations from the ASIC Enforcement Review Taskforce report. In particular, the draft legislation:

- updates the penalties for certain criminal offences in the ASIC-administered legislation, including:
  - increasing the maximum imprisonment penalties for certain criminal offences;
  - introducing a formula to calculate financial penalties for criminal offences; and
  - removing imprisonment as a penalty and increasing the financial penalties for all strict and absolute liability offences;
- introduces ordinary criminal offences that sit alongside strict and absolute liability offences;
- significantly increases the financial penalties for civil contraventions and give courts discretion to strip contraveners of their ill-gotten gains in civil penalty proceedings;
- modernises and expands the civil penalty regime by making a wider range of offences subject to civil penalties;
- harmonises and expands the infringement notice regime;
- introduces a new test that applies to all dishonesty offences under the Corporations Act 2001; and
- ensures the courts prioritise compensating victims over ordering the payment of financial penalties.

Comments on the consultation are due by 23 October 2018.

### **Australian government launches second stage consultation on Treasury Laws Amendment (Consumer Data Right) Bill 2018**

The Australian government has launched a [public consultation](#) on the second stage of exposure draft legislation and explanatory material giving effect to proposed measures relating to the Consumer Data Right (CDR). The CDR is intended to provide individuals and businesses with a right efficiently and conveniently to access specified data that relates to them held by businesses, and to authorise secure access to this data by accredited third parties.



The definitions and privacy safeguards sections of the exposure draft legislation have been revised to reflect feedback from the first stage consultation, which was released on 15 August 2018. The revised sections include the following measures:

- limiting the scope of the Treasury Laws Amendment (Consumer Data Right) Bill 2018 with regard to rule-making powers requiring access to derived data. Rules can now only require data holders to allow customers access to derived data where the derived data is specifically included in a designation instrument;
- clarifying the interaction of the privacy safeguards with the Privacy Act, and narrowing their application to data holders so that they only apply in respect of the disclosure of data; and
- clarifying the operation of reciprocity.

Additionally, the second stage consultation seeks views on the following proposals:

- introduction of further legislative consultation requirements for sectoral designation and rule-making; and
- introduction of limitations on the rule-making power in regard to charges for licenses to access and use data.

The government intends to apply the CDR framework firstly to the banking sector. In view of this, the second stage consultation also seeks views on the designation instrument for the banking sector (open banking). The designation instrument sets out the classes of information that are subject to the CDR and the persons that hold this information, authorised deposit-taking institutions.

Comments on the consultation are due by 12 October 2018.

## **ASIC issues guidance on code of ethics compliance schemes for financial advisers**

The Australian Securities and Investments Commission (ASIC) has issued a [guidance note](#) on its proposed approach to approving and overseeing compliance schemes for financial advisers.

The financial advice professional standards reforms include obligations for financial advisers to comply, from 1 January 2020, with a code of ethics and be covered by an ASIC-approved compliance scheme under which their compliance with the code of ethics will be monitored and enforced.

The guidance note explains ASIC's process and criteria for determining whether to grant approval to a compliance scheme. It also sets out:

- ASIC's expectations for the governance and administration, monitoring and enforcement processes, and ongoing operation of compliance schemes;
- how ASIC will exercise its powers to revoke the approval of a compliance scheme and to impose or vary conditions on the approval; and
- the notifications that monitoring bodies must make to ASIC.

The code of ethics is being developed by the Financial Adviser Standards and Ethics Authority (FASEA) and the code has not been finalised yet. If there are

significant changes from the draft code, ASIC may need to revise its guidance when the final code is released.

### **ASIC reviews selected financial services groups' compliance with breach reporting obligation**

ASIC has published a [report](#) setting out the findings from its review of Australian financial services (AFS) licensees' compliance with their breach reporting obligation under the Corporations Act 2001. The review identifies delays by financial institutions in reporting, addressing and remediating significant breaches of law.

The purpose of the review was to consider selected financial services groups, covering all their AFS licensees. Depending on the groups' diversity, these licensees provided services such as banking, superannuation, investment management, insurance, and financial advice. The review also examined whether:

- their breach reporting is adequate and effective;
- they comply with the breach reporting obligation; and
- they demonstrate elements of a sound breach-reporting culture.

Based on the findings, the report also sets out 'what good looks like' to help AFS licensees improve their compliance measures and ensure they comply with the breach reporting obligation.

ASIC has indicated that it will ensure there is a strong focus on compliance with breach reporting requirements in its new close and continuous monitoring approach to supervising major institutions. ASIC is also actively considering enforcement action for failures to report breaches on time.

### **RECENT CLIFFORD CHANCE BRIEFINGS**

#### **UK Government announces insolvency and corporate governance reforms**

On 26 August 2018, the Department for Business, Energy & Industrial Strategy (BEIS) published a response to its March 2018 consultation on insolvency and corporate governance. BEIS launched that consultation, following a number of high profile company failures, to seek views on proposals to reduce the risk of major company failures occurring through poor governance or stewardship, and to strengthen the responsibilities of directors of companies which are in, or approaching, insolvency.

This briefing discusses the proposals.

[https://www.cliffordchance.com/briefings/2018/09/uk\\_government\\_announces\\_insolvencyandcorporat.html](https://www.cliffordchance.com/briefings/2018/09/uk_government_announces_insolvencyandcorporat.html)

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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