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conduct, risk management and accountability

- **MAS launches third consultation on proposed framework for variable capital companies**
- **Recent Clifford Chance briefings: EU Prospectus Regulation, Virtual Banking, and more. Follow this link to the briefings section**

Capital Markets Union: PEPP Regulation published in Official Journal

Regulation (EU) 2019/1238 on a pan-European Personal Pension Product (PEPP) has been published in the Official Journal following its adoption by the EU Parliament and Council.

PEPP is a voluntary personal pension scheme intended to complement existing public and occupational pension systems, as well as national private pension schemes, and forms part of the EU's Capital Markets Union package.

The regulation enters into force on 14 August 2019.

EU Commission publishes documents on strengthening the EU's AML/CFT framework

The EU Commission has published a package of documents intended to assist national competent authorities (NCAs) in addressing money laundering and terrorist financing (ML/TF) risks and to serve as a basis for future work on the EU's anti-money laundering and counter terrorist financing (AML/CFT) framework. The package includes four reports and one communication summarising the key findings of the reports.

The first report contains a supranational risk assessment of ML/TF risks across the internal market. Amongst other things, the assessment shows that most recommendations from the first risk assessment, carried out in 2017, have been implemented but that some vulnerabilities remain, including those caused by anonymous products, the identification of beneficial owners and new unregulated products such as cryptoassets.

The second report provides an analysis of ten recent ML cases in EU banks. The report notes that in a number of the cases, the banks did not effectively respect or did not comply at all with AML requirements, did not have sufficient internal mechanisms to prevent ML and did not align their AML/CTF policies when they had risky business models. The responding supervisory action taken by NCAs differed significantly in timeliness and effectiveness and there were major divergences in terms of prioritisation, resources and expertise. The report concludes that there are several outstanding structural issues in the implementation of EU AML/CFT rules.

The third report focuses on cooperation between Financial Intelligence Units (FIUs). It notes that the EU's FIU platform has improved cooperation but that there are remaining issues for some FIUs, including insufficient access to and sharing of information and inadequate IT resources. The limited scope of the FIU platform is also a hinderance as it cannot produce legally binding templates and standards.

The fourth report sets out a number of elements that should be considered before establishing an interconnected system of central bank account registries and data retrieval systems. It notes that legislative action, following consultation with Member States' governments, FIUs, law enforcement authorities and asset recovery offices, would be required to achieve such a system.

IFRS 9: EBA publishes roadmap on deliverables and launches benchmarking exercise

The European Banking Authority (EBA) has published an IFRS 9 roadmap providing an overview of planned monitoring activities on IFRS 9 implementation. The roadmap comes following preliminary observations on the first stages of implementation and clarifies the EBA's intention to continue to monitor and promote a consistent application of IFRS 9 and to work on the interaction with prudential requirements.

The roadmap is published alongside an IFRS 9 benchmarking exercise, which is aimed at analysing the different modelling practices followed by institutions and how IFRS 9 implementation affects the amount of expected credit losses in terms of own funds and regulatory ratios. The focus of the exercise is to assess whether the use of different modelling techniques and inputs can lead to significant inconsistencies in terms of the expected credit losses (ECL) calculation, the outcome of which directly affects the amount of own funds and regulatory ratios.

EBA publishes opinion on relevance of AML/CFT concerns to prudential objectives

The EBA has published an opinion highlighting the link between anti-money laundering and counter terrorist financing (AML/CFT) work and the prudential objectives of credit institutions. The opinion, which follows on from a request in the EU Council's AML Action Plan 2018, calls on prudential supervisors to work closely with AML/CFT supervisors and to factor AML/CFT issues into their prudential supervisory process. In particular, the EBA recommends that supervisors consider AML/CFT concerns:

- when considering whether to authorise an institution;
- when assessing proposed acquisitions of qualifying holdings;
- as part of ongoing supervision of institutions, such as in the assessment of their governance and risk management systems; and
- when taking corrective measures to address potential weaknesses from a prudential perspective.

The EBA also recommends that supervisors inform institutions that they will be taking AML/CFT considerations into account in their prudential supervision.

BCBS and IOSCO agree one year extension to final implementation of margin requirements

The Basel Committee for Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) have agreed to extend by one year the final implementation phase of the margin requirements for non-centrally cleared derivatives.

In the final phase of implementation, initial margin requirements are scheduled to apply to a large number of entities for the first time. In March 2019 the BCBS and IOSCO issued a joint statement noting that the framework does not specify documentation, custodial or operational requirements if a covered entity's bilateral initial margin amount does not exceed the framework's EUR 50 million initial margin threshold.

The BCBS and IOSCO have agreed to extend the final implementation of the margin requirements to 1 September 2021, at which point covered entities with an aggregate average notional amount (AANA) of non-centrally cleared derivatives greater than EUR 8 billion will be subject to the requirements. To facilitate the extension, the BCBS and IOSCO will introduce an additional implementation phase where covered entities with an AANA of non-centrally cleared derivatives greater than EUR 50 billion will be subject to the requirements.

The regulators have published a revised version of the margin requirements reflecting the extended timeline. The BCBS and IOSCO expect covered entities to act diligently to comply with the requirements by the revised timeline and strongly encourage market participants to make all relevant arrangements on a timely basis.

Green Finance: NGFS publishes technical supplement on macroeconomic and financial stability implications of climate change and announces new members

The Network for Greening the Financial System (NGFS), comprising 42 central banks and supervisors with the aim of meeting the goals of the Paris Agreement, has published a technical supplement to its first comprehensive 'call for action' report on climate-related financial risks.

The technical supplement is intended to provide an overview of existing approaches for quantitatively assessing climate-related financial risks.

In particular, the supplement aims to:

- set out physical and transition indicators to monitor key risks;
- identify key areas for further research including macroeconomic forecasting, financial stability assessments and scenario analysis; and

provide a menu of options for central banks and supervisors to assess key risks by setting out scenario-based stress testing to help size the economic costs from climate change.

Alongside the technical document, the NGFS has announced the addition of six new central banks and supervisors located in Abu Dhabi, Malta, Luxembourg, Dubai, Hong Kong and South Africa to its coalition.

Brexit: BoE and PRA publish consultation on temporary transitional power extension and other exit day amendments

The Bank of England (BoE) and Prudential Regulation Authority (PRA) have published a consultation (CP18/19) on changes following the extension of Article 50 to 31 October 2019.

The consultation, which is to be read in conjunction with the general approach consultation (CP25/18) and policy statement (PS5/19) on amendments to financial services legislation under the EU(W)A 2018, sets out:

- an update on the intended use of the temporary transitional power, including a proposed new fixed end date for directions to 31 December 2020 if exit day occurs on 31 October 2019; and
- proposals to fix deficiencies and make consequential changes to:
  - the PRA Rulebook and Binding Technical Standards (BTS); and
  - the BTS under the Central Securities Depositories Regulation (CSDR).

The consultation closes on 18 September 2019.

In addition, the Financial Conduct Authority (FCA) has announced that it intends to extend the proposed duration of the directions issued under the temporary transitional power to 31 December 2020. This is to reflect the extension of Article 50 and would provide for a transitional period of 14 months from exit day. The FCA has indicated that other than the additional time, its approach remains unchanged.

PRA consults on counterparty credit risk and treatment of model limitations

The PRA has launched a consultation on proposed changes to its supervisory statement, 'Counterparty credit risk' (SS 12/13), aimed at clarifying its expectations regarding the treatment of model limitations and assumptions for counterparty credit risk under the Capital Requirements Regulation (CRR).

Under the CRR, firms that use the internal model method (IMM) to calculate the exposure value for transaction are required to have a formal process in place to ensure senior management is aware of the limitations and assumptions of the IMM. The PRA's proposed amendments are intended to clarify its expectations with regards to this process and seek to address the variabilities it has identified in firms':

- tracking of limitations and assumptions;
- rigour in analysing the potential impact of the limitations and assumptions on the model outputs; and
- application of capital add-ons as mitigants to the limitations and assumptions.

Comments are due by 25 October 2019.

Brexit: SIs under the EU (Withdrawal) Act for 22 – 26 July 2019

HM Government published new draft statutory instruments (SIs) under the EU (Withdrawal) Act 2018 last week.

The draft Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) (No. 2) Regulations 2019 were laid before Parliament, amending the European Market Infrastructure Regulation (EU) No. 648/2012 (EMIR), as now amended by Regulation (EU) No. 2019/834 (REFIT), and the:

- Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018;
- Central Counterparties (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018;

- Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018;
- Over the Counter Derivatives; Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2019;
- Equivalence Determinations for Financial Services and Miscellaneous Provisions (Amendment etc.) (EU Exit) Regulations 2019;
- Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019;
- Securitisation (Amendment) (EU Exit) Regulations 2019;
- Public Record, Disclosure of Information and Co-operation (Financial Services) (Amendment) (EU Exit) Regulation 2019;
- International Accounting Standards and European Public Limited Liability Company (Amendment etc.) (EU Exit) Regulations 2019;
- Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019;
- Financial Services and Markets Act 2000 (Regulated Activities) Order 2001; and
- Financial Services and Markets Act 2000 (Qualifying EU Provisions) Order 2013.

The draft Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019 were also laid. The SI amends the Insolvency (Amendment) (EU Exit) Regulations 2019 and revokes Article 25 of the EU Insolvency Regulation (EUIR). It is intended to remove an obligation to integrate UK insolvency registers with the EU and to address the introduction of new Scottish Insolvency Rules.

For information on all draft SIs under the EU (Withdrawal) Act, visit www.gov.uk and www.legislation.gov.uk.

HMT launches Financial Services Future Regulatory Framework review

HM Treasury (HMT) has launched the Financial Services Future Regulatory Framework review and published a call for evidence on regulatory coordination.

First announced in the Chancellor's spring statement, the review aims to take stock of the overall approach to financial regulation and to determine the long-term effectiveness of the UK's regulatory regime.

The review is being conducted via a phased approach. The first phase is the call for evidence, which introduces the review, sets out an overview of the financial services regulatory landscape and seeks views on:

- how HMT and UK regulators work together to coordinate regulatory interventions for firms; and
- how regulators and firms can work together to make authorisation, supervision and enforcement more efficient.

The call for evidence closes on 18 October 2019.

Once arrangements for the UK's withdrawal from the EU become clear, HMT intends to set out further detail on the subsequent phases, which are expected to cover issues such as:

- operating outside the EU;
- new trading relationships, as well as how to facilitate cooperation on international standards and supervision;
- technological change; and
- wider global challenges, such as ageing population and carbon emissions.

AMF sets out functioning and mandate of its new Climate and Sustainable Finance Committee

On 2 July 2019, in a joint release issued by the French Ministry of Economy and Finance, the French supervisory authorities and the French financial community, the Autorité des Marchés Financiers (AMF) announced the creation of a Climate and Sustainable Finance Committee, which will contribute to the new mechanism for monitoring and evaluating the climate-related commitments of financial institutions.

The AMF has now published a press release and clarified the mandate and functioning of this committee, which will contribute to the work carried out in conjunction with the Autorité de Contrôle Prudentiel (ACPR) to monitor and evaluate the commitments taken by financial institutions in climate matters. In addition to contributing to the monitoring and evaluation of commitments, the committee will also be responsible for providing technical expertise and a forum for dialogue and work to promote the development of sustainable finance. It will be made up of members selected for their expertise in climate risk and sustainable finance, representing various market sectors as well as civil society. The composition of the committee will be announced in September, when it will begin its work.

BaFin to increase threshold for directors' dealings to EUR 20,000

The German Federal Financial Supervisory Authority (BaFin) has announced that it plans to increase the threshold for managers' transactions conducted on their own account (directors' dealings) by way of a general administrative act (Allgemeinverfügung), which it will consult on until 31 August 2019.

Managers will thereafter have to report such transactions only once a total amount of EUR 20,000 has been reached within a calendar year. The threshold is currently set at EUR 5,000 pursuant to Article 19 paragraph 8 of the Market Abuse Regulation (MAR).

Pursuant to Article 19 paragraph 9 of MAR national competent authorities may however decide to increase this threshold to EUR 20,000 under certain conditions, and BaFin now intends to make use of this possibility by issuing a general administrative act.

BaFin maintains restrictions on retail trading with financial contracts for difference

BaFin has issued a general administrative act (Allgemeinverfügung) regarding restrictions on the marketing, distribution and sale of financial contracts for difference (CFDs) to retail clients in Germany. Under the administrative act, contracts providing for an obligation on the client to make additional payments will remain prohibited. BaFin has also specified maximum permissible leverage, negative balance protection, a restriction on the incentives offered to trade CFDs and a requirement for risk warnings.

Following the initial prohibition of CFDs with additional payment obligations, which was imposed in May 2017, BaFin is again addressing the investor protection concerns raised at the time. CFD trading has been restricted for retail investors in Germany since May 2017 and in the EU as a whole since August 2018 on the basis of a temporary product intervention measure adopted by the European Securities and Markets Authority (ESMA). Upon expiry of this measure, the level of protection in Germany will be aligned with the European standard by means of BaFin's general administrative act.

The general administrative act will take effect on 1 August 2019. The full text has been published on BaFin's homepage.

Polish Financial Supervision Authority publishes standpoint on notification requirements under Article 19 of MAR by persons holding managerial positions and persons close to them

The Polish Financial Supervision Authority has published a standpoint stating that in its opinion the establishment of an ordinary pledge, a registered pledge, or a financial pledge is the pledge transaction mentioned in Article 19 paragraph 7 a) of the Market Abuse Regulation (MAR). Consequently, the PFSA takes the view that the notification requirement under Article 19 paragraph 1 in conjunction with Article 19 paragraph 7 a) of MAR should apply to all types of pledges.

Polish Council of Ministers adopts amendment to Act on Public Offerings and Conditions of Introducing Financial Instruments to an Organised Trading System and on Public Companies

The Council of Ministers has adopted the draft Act Amending the Act on Public Offerings and the Conditions of Introducing Financial Instruments to an Organised Trading System and on Public Companies and Certain Other Acts.

The amendment is aimed at making necessary changes to Polish law in light of the entry into force of EU legislation on the rules of publishing prospectuses related to issues of securities and encouraging the long-term engagement of shareholders of public companies, i.e.:

- ensuring the application of Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71; and
- implementing Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

Polish Financial Supervision Authority issues bulletin on obligations of depositaries of investment funds

The Polish Financial Supervision Authority (PFSA) has issued a bulletin setting out its expectations with regard to certain standards of depositaries' actions.

The standpoint of the PFSA concerns the following aspects of the performance of obligations by depositaries of investment funds:

- independence and acting in the interests of the participants of the investment fund;
- safe-keeping of the investment fund's assets and maintenance of a register of all of an investment fund's assets;
- disposal and buying back of participation units and issuing, delivering and redeeming investment certificates in accordance with provisions of law and the statutes of the investment fund;
- ensuring that settlement of agreements related to an investment fund's assets takes place without unreasonable delay, and monitoring the timeliness of settlement of agreements with the fund's participants;
- ensuring that an investment fund's net asset value and the net asset value per participation unit or investment certificate are calculated in accordance with provisions of law and the statutes of the investment fund; and
- the depositary's monitoring and supervisory powers.

APRA proposes stronger requirements on remuneration to enhance conduct, risk management and accountability

The Australian Prudential Regulation Authority (APRA) has released for consultation a discussion paper on the creation of a new draft prudential standard entitled 'CPS 511: Remuneration' to clarify and strengthen remuneration requirements for all APRA-regulated entities.

The draft prudential standard introduces heightened requirements on entities' remuneration and accountability arrangements in response to evidence that existing arrangements have been a factor driving poor consumer outcomes. The proposed reforms are intended to address recommendations from the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

Amongst other things, APRA is proposing the following:

- to elevate the importance of managing non-financial risks, financial performance measures must not comprise more than 50% of performance criteria for variable remuneration outcomes;
- minimum deferral periods for variable remuneration of up to seven years will be introduced for senior executives in larger, more complex entities. Boards will also have scope to recover remuneration for up to four years after it has vested; and
- boards must approve and actively oversee remuneration policies for all employees, and regularly confirm they are being applied in practice to ensure individual and collective accountability.

APRA has indicated that it intends to release the final prudential standard before the end of 2019, with a view to it taking effect in 2021 following appropriate transitional arrangements.

Comments on the consultation are due by 23 October 2019.

MAS launches third consultation on proposed framework for variable capital companies

The Monetary Authority of Singapore (MAS) has launched a public consultation on the proposed subsidiary legislation relating to the insolvency and winding up of a variable capital company (VCC) and its sub-funds. The proposed subsidiary legislation has been adapted from the existing subsidiary legislation for the insolvency and winding up of a company under the Companies Act (CA), with modifications for a VCC and its sub-funds.

Amongst other things, the MAS is seeking comments on the following:

- the draft VCC (Application of Bankruptcy Act Provisions) Regulations 2019;
- the draft VCC (Filing of Documents) Regulations 2019;
- the draft VCC (Maximum Amount Payable in Priority in Winding Up) Order 2019;
- the draft VCC Regulations 2019; and
- the draft VCC (Winding Up) Rules.

The MAS has indicated that, once the VCC Act 2018 is in force, the insolvency and winding up provisions in the VCC Act and the proposed subsidiary legislation that is being consulted on in this consultation paper (proposed subsidiary legislation) will apply to the insolvency and winding up of a VCC and its sub-funds. The insolvency and winding up regime for a VCC and its sub-funds will also be aligned with that of the insolvency and winding up regime for other corporate structures in Singapore under the Insolvency, Restructuring and Dissolution Act 2018 (IRDA). In view of this, the VCC Act will be amended to adapt the relevant provisions under the IRDA that relate to the insolvency and winding up of a company under the CA, with modifications for a VCC and its sub-funds. The IRDA subsidiary legislation for companies under the CA will also be adapted for a VCC and its sub-funds (adapted IRDA subsidiary legislation), which will then replace the proposed subsidiary legislation.

The MAS has further indicated that it does not intend to undertake a public consultation for the adapted IRDA subsidiary legislation and it will take into account any feedback received during this public consultation to the extent that such feedback is applicable to the adapted IRDA subsidiary legislation.

Comments on the consultation are due by 24 August 2019.

RECENT CLIFFORD CHANCE BRIEFINGS

Risk factors in Securitisation Prospectuses under the EU Prospectus Regulation (PD3)

On 21 July 2019, the EU Prospectus Regulation (Regulation (EU) 2017/1129, commonly known as PD3) began to apply in full, replacing the previous regime under the EU Prospectus Directive (Directive 2003/71/EC, known in its most recent version as PD2). As a result, prospectuses approved from that date will be required to comply with PD3. The main area of focus in the structured debt markets has been around PD3's new, much more prescriptive, rules relating to risk factors.

This briefing paper examines those new rules and discusses the practical effect they are likely to have on structured debt prospectuses.

https://www.cliffordchance.com/briefings/2019/07/risk_factors_in_securitisationprospectusesunde.html

The Capital Markets Union – should the EU shut out the City of London?

The EU's Capital Markets Union is intended to make its economy more resilient. That goal will be easier to achieve if the EU remains open to City of London markets argue Clifford Chance Partner Simon Gleeson and Sir Jonathan Faull, Chair of European Public Affairs at the Brunswick Group, in a paper first published by think tank The Centre for European Reform.

https://www.cliffordchance.com/microsites/brexit-hub/thought-leadership/the-capital-markets-union.html

Virtual Banking – Singapore proposes new digital bank framework

The MAS announced on 28 June 2019 that it will issue up to five new digital bank licences. This will allow non-bank players to enter the Singapore digital banking market. MAS expects to invite applications for these licences in August 2019 and will provide more details on the eligibility and admission criteria at that time.

This briefing paper provides an overview of the proposed regulatory framework for digital banks in Singapore.

https://www.cliffordchance.com/briefings/2019/07/virtual_banking_singaporeproposesnewdigita.html

US court ruling against Chinese banks in sanctions case reaffirms government subpoena authority to require non-US banks to produce documents and information held overseas

A recent US court ruling reinforces the well understood rule that non-US banks with branches or correspondent accounts in the US must comply with US government subpoenas regardless of their own country's laws. Under the US PATRIOT Act, non-compliance risks access to the US financial system.

This briefing paper discusses the ruling.

https://www.cliffordchance.com/briefings/2019/07/us_court_ruling_againstchinesebanksi.html

FinCEN and the federal banking agencies reinforce emphasis on AML compliance and an informed risk management approach to BSA/AML supervision

On 22 July 2019, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union

Administration, the Office of the Comptroller of the Currency and the US Department of the Treasury's Financial Crimes Enforcement Network published a Joint Statement on Risk-Focused Bank Secrecy Act/Anti-Money Laundering Supervision. The statement does not create new requirements or supervisory expectations. It is significant, however, that FinCEN and the Federal Banking Agencies considered it important to reemphasize their risk-focused approach to BSA/AML supervision and noted that the statement is part of a broader effort to reinforce and enhance the effectiveness and efficiency of the BSA/AML regime. The issuance of the statement is yet another demonstration of the focus of the US authorities on ensuring and enforcing BSA/AML compliance.

This briefing paper discusses this statement.

https://www.cliffordchance.com/briefings/2019/07/fincen_and_the_federalbankingagenciesreinforc.html

Time to Get Your House in Order – US DOJ Antitrust Division Announces Credit for Strong Compliance Programs

On 11 July 2019, the US Department of Justice's Antitrust Division unveiled its new policy requiring prosecutors to credit qualifying corporate compliance programs at the charging and sentencing stages of a criminal antitrust investigation, even if the compliance program was in place at the time of an alleged antitrust violation and did not prevent the conduct at issue. The Division also issued detailed guidance on what elements it will consider when evaluating whether a compliance program will qualify for credit. Due to the extraterritorial reach of the US antitrust laws, this policy shift has important implications for all companies whose business has an effect on US commerce and underscores the importance of developing and maintaining a robust corporate compliance program. Companies should carefully scrutinize their existing antitrust compliance programs to ensure that they would be considered 'effective' pursuant to the Division's newly-issued guidance.

This briefing paper discusses the new policy.

https://www.cliffordchance.com/briefings/2019/07/time_to_get_yourhouseinorderusdo.html

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