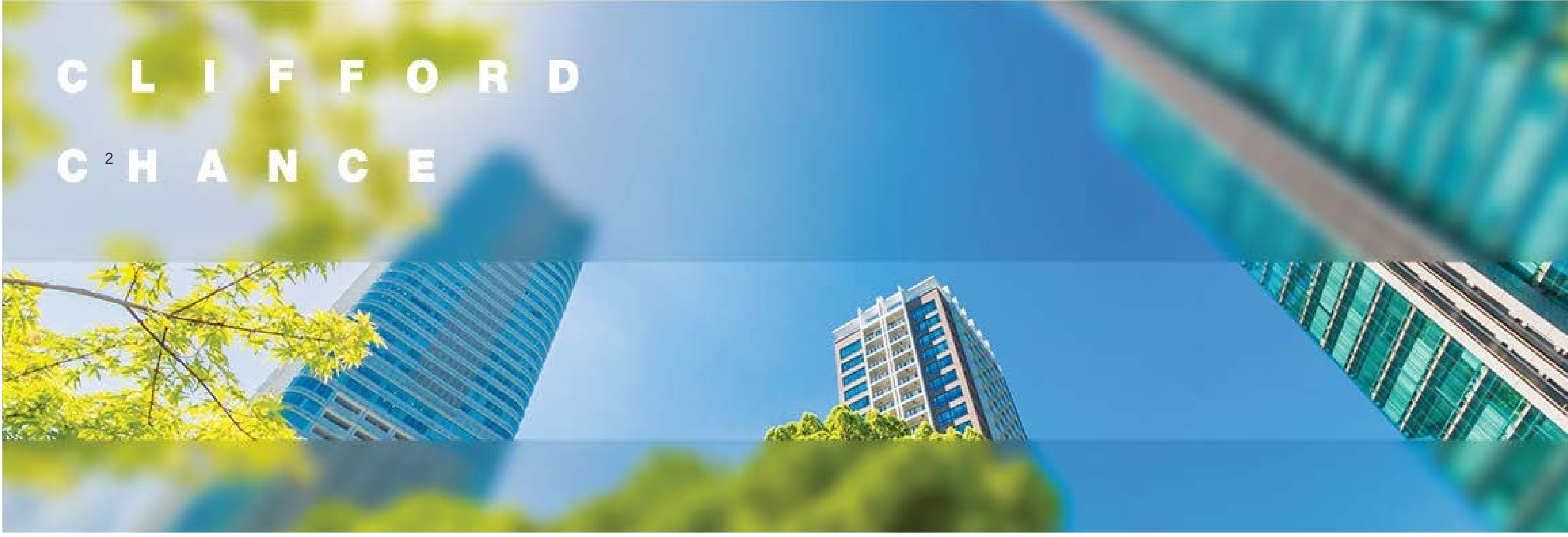


CLIFFORD CHANCE PRIVATE FUNDS UPDATE: JULY 2019

Welcome to the July 2019 edition of our private funds update. This briefing is intended to give you a short update on key legal, tax and regulatory developments relevant to private fund managers, drawing on expertise from across our Global Funds & Investment Management practice. If you would like to know more about a particular development, please get in touch with any of the contacts listed at the end of this update.

AIFMD REVIEW

As reported in our February 2019 briefing on this topic, the European Commission has published the report it had commissioned from KPMG into the operation of AIFMD, which is intended to 'provide and assess evidence' for the Commission's review. The report is available here.

The report does not necessarily reflect the views of the Commission or prejudge future policy decisions. Rather, the Commission has indicated that it will continue its work on the AIFMD review, focusing on the areas identified in the report, with the intention of issuing its own report to the EU Parliament and Council on the functioning of the AIFMD during 2020. Accordingly, the key value of the KPMG report is that it gives an early indication of the main topics likely to be covered by the Commission in next year's AIFMD review, such as:

- Third Country Access (Passporting/NPPRs)
- The Treatment of Sub-Threshold Managers
- Remuneration
- Asset Stripping

The Commission will focus on areas that require further analysis – such as leverage, reporting, where AIFMD rules overlap with other EU requirements or where member states have interpreted rules differently. So far, no details have been given as to the direction of future policy or the precise changes that might be made to the AIFMD. More information will be available next year when the Commission issues its reports to the Council and the Parliament. It may issue a public consultation paper in early 2020 and it is unlikely that we will see any legislative proposal any earlier than that date.

CROSS-BORDER DISTRIBUTION OF FUNDS

Legislative proposals to amend the UCITS and AIFM Directives were issued by the European Commission in May 2018 in response to concerns about regulatory and administrative barriers to the cross-border distribution of investment funds in Europe, which had been highlighted as part of the Commission's work on the Capital Markets Union.

The proposals aimed to align national marketing requirements and regulatory fees, as well as the process for verification of marketing material by national competent authorities. It also seeks to harmonise rules on what constitutes 'marketing' and 'pre-marketing' and sets out when managers may stop marketing a fund in a particular Member State.

Key changes

The key changes and implementation areas in the proposed Directive and Regulation are:

Key changes in the Directive	Key implementation areas
Pre-marketing of AIFs	Pre-marketing: reliance on reverse solicitation more difficult No longer sufficient for an EU AIFM to rely solely on the fact that an enquiry came from a potential investor. The AIFM will need to satisfy itself that (i) the enquiry was not the result of the investor having been sent information about the AIF prior to the AIF's establishment or its notification for marketing under Article 31 or Article 32 of the AIFMD; and (ii) the investor is not seeking to invest in an AIF which may not, itself, have been pre-marketed but which has "similar features" to the one on which the investor has been sent information
Provision of local facilities for AIFs and UCITS marketed to retail investors	Local facilities: increased costs associated with extending the requirement to provide facilities to certain AIFs
A process to de-notify marketing of an AIF or UCITS in a host member state	Discontinuing marketing: careful administration needed to avoid inadvertently breaching UCITS and AIFMD requirements
Alignment of certain notifications in respect of marketing an EU AIF or UCITS in a host member state	
Key changes in the Regulation	
Requirements in relation to marketing communications	Marketing communications: now more extensive as AIFMs marketing AIFs to professional investors need to ensure communications comply with the new requirements
Verification of marketing communications	
Central databases for the publication of: • national marketing requirements • fees and charges • a list of AIFs, UCITS and their managers	Central databases: note that the central database for the publication of AIFs and UCITS is restricted to AIFs managed by EU AIFMs - AIFs marketed in the EU by non-EU AIFMs under Article 42 of the AIFMD not included

Although the introduction of the 'pre-marketing' concept has been generally welcomed by EU AIFMs looking to test the waters in other EU member states, the legislation does not extend to non-EU AIFMs, and the benefits of other aspects of the new legislation, however well-intentioned, seem less clear.

For example, with respect to the de-notification process, although in the final text of the new rules the controversial requirement to make a blanket offer to repurchase all the AIF interests held by investors in the relevant member state has been watered down to exclude closed-ended funds, a restriction has been inserted preventing the AIFM, for 36 months from the date of de-notification, from engaging in pre-marketing the EU AIF(s) referred to in the notification, or AIFs with similar strategies, in the member state in which the de-notification takes place. It remains to be seen how many managers think the benefits of de-notification outweigh these conditions.

On the other hand, the requirement for ESMA to publish and maintain a central database containing information on each national regulator's marketing requirements, fees and charges, and a list of AIFs, UCITS and their managers has generally been recognised by the industry as a positive development.

Status and Timing

The Regulation and the Directive have now been published in the Official Journal. The Directive will enter into force on 1 August 2019, with a two-year implementation period (i.e., it will apply from 2 August 2021). The Regulation will apply from

1 August 2019, with the exception of Articles 4(1) to (5), Articles 5(1) and (2), Article 15 and Article 16, which contain most of the substantive provisions that will affect managers, which will also apply from 2 August 2021.

EU SUSTAINABLE FINANCE ACTION PLAN: CLARIFYING ASSET MANAGERS' DUTIES

Political agreement has now been reached on the text of draft legislation relating to Action Point 7 (clarifying institutional investors' and asset managers' duties) of the European Commission's Sustainable Finance Action Plan, which was adopted in March 2018 as part of the EU's efforts to connect finance with the specific needs of the European and global economy for the benefit of the planet and society. This draft legislation, known as the Disclosure Regulation, will clarify the disclosure obligations of asset managers in relation to sustainability considerations. In addition, on 30 April 2019, ESMA published its final report on the integration of sustainability risks and factors into the AIFMD, the UCITS Directive and MiFID II (the ESMA Report).

The Disclosure Regulation will apply to, *inter alia*, AIFMs, UCITS management companies, and MiFID II investment firms. It sets out disclosures with respect to sustainability risks and factors that will need to be made on websites, in pre-contractual disclosures and, in some cases, in periodic reports. Certain required disclosures apply to all products while there are additional requirements for products that promote environmental or social characteristics, or which focus on sustainable investments. If the Disclosure Regulation is published in the EU Official Journal in Q3 2019 (expected timing for publication has not been confirmed) then many of the provisions could become applicable in Q4 2020 or Q1 2021.

The ESMA Report addresses organisational requirements, operating conditions (such as due diligence and conflicts of interest), risk management provisions and, in relation to MiFID II, product governance, and recommends potential amendments to the relevant legislation. ESMA has recommended a high level, principles-based approach to the integration of sustainability risks and factors and has made clear in the commentary in its report that the principle of proportionality should apply to the proposed amendments. ESMA will now work with the Commission to transform the advice in the ESMA Report into formal delegated acts.

Further information on the disclosure obligations of asset managers can be found in our client briefing: The EU's sustainable finance action plan: Clarifying Duties - What asset managers need to know.

IBOR TRANSITION

Across the financial markets, firms are preparing for the transition away from IBORs towards risk free rates (RFRs). Work has accelerated on the expectation that LIBOR will cease to exist – or change very substantially – soon after the end of 2021 when the FCA will no longer compel panel banks to make submissions. This will have implications for fund managers, particularly those with portfolios and investments (such as loans, bonds, securitisation interests and derivatives) that reference LIBOR or other IBORS or reference rates which may be replaced. Aside from investments that reference IBORs, there may also be implications for managers who have other contracts that refer to these rates, such as hedging instruments or investor default provisions in their funds' limited partnership agreements, for example.

The impact of the transition away from IBORS to RFRs, and how managers should implement this transition, are not entirely clear. This is for various reasons, such as: delays with identifying the RFRs (or rates based thereon), a lack of regulatory guidance on the transition, a lack of understanding as to how this transition affects fund managers, and diverging practices across the industry on how to implement the transition.

Practical issues for IBOR transition

- Continued development of replacement rates and fall-backs but timing remains challenging
- Tension between regulatory objectives and the scale/complexity of the issues
- Solutions to be informed by extensive due diligence exercises that institutions will need to undertake
- Legacy contracts remain challenging, even if consensus can be found
- Proliferation of affected rates and working groups creates real challenges in developing a coordinated approach
- Litigation and reputational risk need to be anticipated in order to mitigate effectively

Current status of reforms

Various currency and product-related Working Groups are working towards transition with the support of regulators. Risk free rates for the majority of currencies have been recommended – such as SONIA for sterling and SOFR for US dollars. However, these rates tend to be overnight rates which means that for some products, especially cash products, which are used to LIBOR (a term rate), the Working Groups are having to consider new interest rate conventions and market infrastructure to facilitate transition. A further complication for loans in particular is whether it is possible to construct a term rate from RFR based OIS or whether parties should consider using a backwards looking compounded rate.

What action should fund managers be taking?

In spite of the uncertainty, fund managers should be taking steps to deal with the transition, including collating an inventory of IBOR exposures, assessing the economic and operational impact of the transition to replacement rates, and engaging with both industry working groups and clients on transition issues (including items such as investor education and updates to fund disclosures). Credit sponsors, in particular, should assess the use of IBORs across their legacy debt investments, and the potential impact of the transition to RFRs on portfolio valuations.

Further information on how the transition is affecting different markets and what market participants should be doing to manage the transition can be found in the client briefings below.

Briefing: Rate Expectations: transitioning away from LIBOR – practical guidance for Corporate Treasurers

Briefing: LIBOR: cross-product review

Topic Guide: IBOR transition and new risk-free rates

The transition from EONIA to €STR- the story so far

EONIA is the current primary overnight reference rate for the Euro. It is based on overnight unsecured lending transactions in the interbank market in EU and EFTA countries.

Back in 2016, the European Money Markets Institute (EMMI), which is the administrator of EONIA, launched a review process seeking to enhance the methodology for the determination of EONIA to align it with the requirements of the EU Benchmarks Regulation. At the end of that process in February 2018, EMMI announced that, on the basis of the existing methodology for determining EONIA, the benchmark's continued compliance with the EU Benchmark Regulation could not be guaranteed. As a result of the scale of change that would be required to bring it into compliance, EMMI decided not to continue the review. In the meantime, the ECB announced that it would develop a new euro unsecured overnight interest rate based on data already available to the Euro-system and commenced a consultation process in respect of developing this rate. This process resulted in the development of €STR, which is a rate based on the wholesale euro unsecured overnight borrowing costs of euro area banks.

The methodology for the calculation of €STR was announced in June 2018 and in September 2018, the working group on euro risk-free rates recommended that €STR should be the new euro risk-free rate. Finally, in December 2018 the working group published a report on the transition from EONIA to €STR, setting out options in respect of how this transition could be managed. In March the ECB has announced that €STR will start to be published from 2 October 2019 and around the same time, the working group published its recommendations in respect of the transition path from EONIA to €STR.

The working group recommended that EMMI, as the administrator of EONIA, modify the current methodology of EONIA to become €STR plus a fixed spread for a limited period and to engage with the relevant authorities to ensure the compliance of this modified EONIA with the EU Benchmarks Regulation. The purpose of this artificial continuation of EONIA is to provide continuity in legacy transactions by keeping the EONIA rate available for a certain period and therefore minimise cliff edge effects relating to a more abrupt discontinuation. The spread would be based on a simple average with an observation period of 12 months combined with trimming mechanisms. The ECB confirmed that it would calculate and publish this spread and the spread was published by the ECB at the end of last month and was calculated at 8.5 basis points.

More recently, in May 2019, the working group published a further consultation paper of its legal action plan for the transition from EONIA to €STR. This is because, as part of its mandate, the working group was tasked with the development of a market adoption plan, including a legal action plan for legacy and new contracts referencing EONIA and addressing best practices for contract design to ensure a smooth transition from EONIA to €STR.

The EONIA legal action plan covers legacy and new contracts referencing EONIA in different asset classes, including derivatives. The recommendations in the consultation paper are not particularly surprising. Firstly, it recommends that market participants consider replacing EONIA with €STR as a reference rate for all products and contracts and that they make all operational adjustments necessary for using €STR as their standard benchmark as soon as possible once €STR starts being published on 2 October. It also recommends that new contracts referencing EONIA include robust fall-back provisions and an acknowledgement that references to EONIA will be understood to be references to EONIA as modified after the change to its methodology on 2 October. For legacy contracts referencing EONIA and maturing after December 2021, it recommends that market participants consider replacing EONIA as the primary rate as soon as possible or embedding robust fall-back clauses referencing the recommended fall-back rate for EONIA.

Lastly, in July 2019, the working group recommended €STR plus a fixed spread of 8.5 basis points as the EONIA fallback rate.

BREXIT UPDATE

At the time of writing, the two contenders in the Conservative Party leadership election are Boris Johnson and Jeremy Hunt. Boris Johnson has issued a "do or die" challenge to Jeremy Hunt regarding the withdrawal of the UK from the EU on 31 October 2019, come what may. Mr. Hunt's public position initially was that his preference would be to ask the EU for a further extension in the event that he cannot negotiate a better deal than is currently on the table by 31 October 2019. However, he has also recently said that he would decide whether there was a realistic chance of reaching a new Brexit deal with the EU by the end of September. These differing positions mirror the uncertainty that we have been facing since Article 50 was invoked by the UK government in March 2017, but particularly over the last 12 months. The key issue is that the UK has not yet ratified the withdrawal agreement that has been negotiated between the UK government and the EU, and without the withdrawal agreement being put in place, or another extension of the exit date, the UK could leave the EU on 31 October 2019 without a transition period.

Managers based in the UK who are or would like to be active in Europe, and *vice versa*, should continue to assess their contingency plans in the event of a "no-deal" scenario; the principal issues being the continuation of marketing rights, the ability to continue and/or delegate investment management activities outside of the UK/EU, and ensuring that managers (and indeed portfolio investments) are as well placed as possible to navigate what may be a more politically and economically unstable environment.

EXTENSION OF UK TEMPORARY PERMISSIONS REGIME

As detailed in our February 2019 briefing, the UK Government has legislated for a Temporary Permissions Regime (TPR) which will enable EEA managers who are currently marketing funds in the UK using a passport to continue marketing those funds for a limited period (expected to be a maximum of three years) in the event of a no-deal Brexit. The TPR was originally due to come into force on 29 March 2019 but, in light of the delay to the process of the UK's withdrawal from the EU, the notification window has been extended to the end of 30 October 2019. Notifications should be submitted via the FCA's Connect system. A guide to doing this is available from the FCA's website.

EEA managers will need to submit their notifications with a full list of the funds that they wish to continue marketing in the UK after exit day. There is no fee for fund managers to notify the FCA of which of their passported funds they wish to continue to market in the UK temporarily and they should not wait for confirmation of whether there will be an implementation period before they submit their notification.

Fund managers that wish to update their notification before 30 October 2019 should email the FCA by the end of 16 October 2019 confirming this and including their FRN. The FCA has published a Policy Statement setting out the rules that managers within the TPR will need to comply with.

EEA managers that have not submitted a notification for a fund before the window closes will not be able to use the TPR for that fund and will not be able to continue marketing that fund in the UK in the same way as before exit day – such funds will need to be marketed via the National Private Placement Regime.

Further information on how funds will exit the TPR will be provided by the FCA in due course.

EMIR REFIT: WHAT DOES IT MEAN FOR FUND MANAGERS?

EMIR Refit, which came into force on 17 June 2019, makes targeted amendments to EMIR that aim to simplify and take a more proportionate approach to certain existing requirements, particularly for smaller firms. However, EMIR Refit amends the definition of 'financial counterparty' (FC) to capture AIFs established or managed in the EU, some of which were previously treated as non-financial counterparties (NFCs). As a result, fund managers may find themselves adversely impacted by the increased compliance burden resulting from the changes.

Key changes for fund managers

Entity scope – changes to the definition of 'financial counterparty'

EMIR Refit amended the definition of FC as it relates to AIFs and their managers, effective from 17 June 2019. Previously, all AIFs managed by authorised or registered EU AIFMs were FCs, whereas EU AIFs managed by non-EU AIFMs were NFCs. Under EMIR Refit, an AIF is now a FC either if it is managed by an AIFM authorised or registered under AIFMD or if it is established in the EU (subject to carve outs for AIFs that serve employee share purchase plans or that are securitisation special purpose entities). In particular, this impacts EU AIFs managed by non-EU AIFMs, which were previously NFCs but will now be FCs.

This has a knock-on effect on the requirements applicable to AIFs and their managers under EMIR, including:

- **Clearing**: AIFs will need to comply with the clearing obligation unless they are considered a 'small FC'. However, in order to benefit from the small FC regime, the AIF would need to make the relevant calculations to show that it falls below the clearing threshold (as discussed further below).
- **Margin**: ***all*** EU AIFs (and their EU AIFMs) will be FCs and will be required to post variation margin to their counterparties in respect of their OTC derivative transactions, regardless of the size of their open OTC derivatives positions. This includes AIFs that were previously classed as NFC-. This may trigger a documentation exercise as the AIF will need to have requisite documentation, such as credit support annexes, in place.
- **Other risk mitigation obligations**: AIFs will need to comply with the operational risk mitigation obligations applicable to transactions between FCs, including faster trade confirmation times and more frequent portfolio reconciliation timetables.

This change to the FC definition also affects the indirect impact of EMIR on non-EU funds managed by non-EU managers (see the box below).

Clearing obligation – exemption from the clearing mandate for small FCs

EMIR Refit introduced a new exemption from the clearing obligation for 'small FCs'. An FC will be a small FC only where its OTC derivatives trading activity falls below the clearing threshold in all classes of derivatives subject to the clearing obligation (and if it exceeds the threshold in one class it will be subject to the clearing obligation in all classes).

In order to benefit from the small FC regime, AIFs must carry out annual clearing threshold calculations based on their aggregate month-end positions in OTC derivatives for the previous 12 months. The calculation methodology differs from the NFC clearing threshold calculation. For example, there is no carve out for hedging transactions. If the AIF does not carry out this calculation or finds that it exceeds the threshold in any class of derivatives, it must immediately notify ESMA and its national competent authority and establish clearing arrangements within four months of this notification.

For Category 3 counterparties (including many AIFs), ESMA stated in a recent Q&A that this notification should be made on the date EMIR Refit entered into force, i.e. 17 June 2019. Category 3 AIFs would therefore need to start clearing OTC derivatives transactions from 18 October 2019 (and not on 21 June 2019, which was the clearing start date for Category 3 counterparties under the clearing obligation RTS). However, if the AIF can demonstrate that it falls below the clearing threshold during that four-month period, it will not be required to start clearing.

ESMA has indicated that firms subject to EMIR should obtain representations from their counterparties detailing their status and that in the absence of such a representation, the firm should assume the counterparty is above the relevant clearing threshold(s). Therefore, AIFs and their managers may receive requests from counterparties to provide these representations in light of the EMIR Refit changes to the FC definition and introduction of the small FC regime. Non-EU AIFs that are not directly subject to EMIR requirements may also need to calculate whether they would exceed the small FC clearing threshold in order to be able to give the necessary representations to EU counterparties.

Other amendments

- **AIFMs to report on behalf of AIFs**: EMIR Refit provides that, from 18 June 2020, AIFMs will be responsible and legally liable for reporting OTC derivative transactions on behalf of AIFs they manage, as well as for ensuring the correctness of the details reported. This should not, however, prevent AIFMs from entering into or maintaining contractual delegated reporting arrangements with counterparties.

- **Margin requirements:** EMIR Refit introduces a new mandate for the European Supervisory Authorities (ESAs) to draft technical standards setting out supervisory procedures to ensure initial and ongoing validation of firms' risk management procedures for the exchange of collateral under Article 11(3) EMIR. In practice, this may require firms to obtain prior approval for their initial margin models and implement ongoing governance processes in respect of those models.

This may be challenging particularly for AIFs that fall within scope of Phase 5 initial margin requirements. A number of industry associations have highlighted the potential practical challenges associated with these new requirements in a joint letter to the ESAs, requesting that pre-approval should not apply to existing models and that the new approval and ongoing governance requirements should be limited in scope such that they would not apply to AIFs (or other Phase 4 and 5 firms).

Implementation challenges

There are a number of practical challenges for funds that have to comply with the new requirements. Funds impacted by the change to the FC definition had very little time to adjust. The indirect impact on non-EU funds with non-EU managers has been raised with ESMA and national regulators in particular. Although no formal forbearance statement has been issued by either, it is understood that this is not an enforcement priority.

EMIR Refit: impact on non-EU AIFs

Non-EU funds managed by non-EU managers will continue to be 'third country entities' that are not directly subject to EMIR. However, they will be impacted by EMIR Refit to the extent they are dealing with EU counterparties who are subject to EMIR.

Counterparty classification: EU firms subject to EMIR will typically require non-EU counterparties (such as non-EU funds) to make representations as to what their EMIR counterparty classification would be if they were established in the EU. Non-EU funds are likely to receive requests for updated representations about their classification under EMIR Refit, which in turn may require these non-EU funds (or their managers) to carry out clearing threshold calculations.

Clearing and margining: The non-EU fund may have to comply with the clearing and margining requirements as a result of the change in its own categorisation and/or the categorisation of its EU counterparty. This may require it to put in place new documentation and make other practical arrangements to clear and margin trades.

Status and timing

EMIR Refit was published in the Official Journal on 28 May 2019 and came into force on 17 June 2019. The EMIR Refit amendments have staggered application dates, although the changes to the FC definition and introduction of the small FC regime applied immediately. For a summary of other EMIR Refit changes and their application dates, please see our recent briefing on EMIR Refit.

SOLVENCY II – AMENDMENTS TO CAPITAL CHARGES SIGNALS BOOST TO PE INVESTMENT

Amendments to the Solvency II regime which would reduce the regulatory capital charges for EU insurers investing in private equity funds are soon to come into force, aimed at encouraging insurers to invest in equity and private debt, particularly that of small and medium-sized enterprises (SMEs) and to provide long-term capital financing, developments that could significantly boost private equity and venture capital funding.

The impetus behind these amendments comes from the Commission's Capital Markets Union project. For years insurers have been saying that Solvency II rules were preventing them from investing more in equity and private debt because of the high capital charges imposed on these investments. The amendments are intended to make it easier and more attractive for insurers to invest in SMEs and to provide long-term funding by lowering the capital requirements for insurers' investments in equity and private debt.

Key points

- Reduced capital charges for long term equity investments: Insurance companies taking advantage of the new rules could reduce their capital requirements by c.50%: the Regulation will introduce a stress factor of 22% for long term investments, which could apply instead of either 39% or 49% that has applied so far to private funds.

- Long-term equity investments/fund structures: the 22% stress factor can be applied to a portfolio of equity investments subject to meeting certain criteria. This was a welcome outcome, as earlier drafts of the proposed amendments received much criticism, as they effectively excluded investments made through venture capital and private equity funds.
- In order to take advantage of the 22% stress factor, a number of requirements must be satisfied, including:
  - the equity investments in the portfolio and their holding period must be clearly identified;
  - the portfolio must be ring-fenced, separately managed, assigned to the obligations arising from a subset of the insurance company's activities and remain assigned for the life of those obligations;
  - the insurance company's solvency and liquidity position and asset-liability management must ensure that there will be no forced sales of the portfolio's equity investments for at least 10 years;
  - the equity investments are listed in the EEA or unlisted equities of companies that have their head offices in the EEA; and
  - the average holding period of the equity investments must exceed five years.
- Importantly, the new rules provide that the assessment of whether the conditions have been met may be made at the level of a fund and not the underlying investments.

Implications of Brexit

The requirements for the equity investments to be listed in the EEA or be unlisted equities of companies that have their head offices in the EEA is significant in the context of Brexit, as in a hard Brexit scenario UK companies or structures would not meet the requirements and this could be a disincentive for insurers from the EEA.

Similarly, under proposed Brexit legislation a UK insurer will not be able to take advantage of more beneficial capital requirements in respect of private equity investments held by a fund based outside the UK. In respect of long-term equity investments, it is not yet clear what the position will be, but it seems possible that UK (re)insurance companies may only be able to benefit from the 22% capital charge if their investment is in a fund established in the UK.

Status and timing

The Regulation entered into force on 8 July 2019.

NON-RESIDENT CAPITAL GAINS TAX ON UK REAL ESTATE

With effect from April 2019, the UK has introduced capital gains tax on disposals of UK real estate and UK rich real estate holding entities (75% or more by value from UK real estate). Although certain classes of investor are exempt from the tax - e.g. sovereign investors - since few double tax treaties provide protection against taxation in respect of profits from real estate, in the majority of cases the introduction of this tax represents a major change to the landscape for UK real estate and infrastructure investment.

While the introduction of non-resident capital gains tax brings the UK into line with the majority of other jurisdictions, one aspect of the new rules is worthy of particular note for funds. Given that the tax applies to disposals of both real estate and real estate rich holding entities, it is possible for multiple tax charges to arise in respect of the same underlying gain where assets are held through multi-tiered structures. The way the rules seek to mitigate these multiple charges is to allow for the making of one or other of two voluntary elections. The way the elections work is fundamentally different, but they effectively remove the tax charge from the entity that would otherwise be liable for it, in return for the tax being payable by the owners of the entity. Subject to some relatively complicated restrictions around which entities can make these elections, in principle they allow funds to pass all of the tax liabilities up to their ultimate investors. Although exposing investors to direct tax payment and/or filing obligations is generally considered unacceptable, given that certain classes of investor are not subject to the tax at all, the question of whether or not to make an election may be less straightforward than it may first seem.

UPDATE TO EU LIST OF NON-COOPERATIVE JURISDICTIONS

In March 2019 the EU Council adopted a revised EU list of non-cooperative jurisdictions for tax purposes. The list includes non-EU countries or territories that have failed to make sufficient commitments in response to EU concerns. This was the first comprehensive revision of the list since it was initially published in December 2017. Ten countries were added to the original list, including Aruba, Barbados and Bermuda.

However, in June 2019 the EU Council announced that those three jurisdictions would be removed from the list following high level political commitments by the jurisdictions to abide by the EU standards by the end of 2019. Aruba has been removed from the list entirely, whilst Bermuda and Barbados have been transferred to the Annex, which means that they will continue to be closely monitored by the EU's Code of Conduct Group.

As of 21 June 2019, the date of its publication in the Official Journal, the EU list is comprised of: American Samoa, Belize, Fiji, Guam, Marshall Islands, Oman, Samoa, Trinidad and Tobago, United Arab Emirates, US Virgin Islands, and Vanuatu.

OUR RESOURCES FOR PRIVATE FUND MANAGERS

Clifford Chance provides regular legal updates and access to legal insights calls and toolkits on a wide range of hot topics in the financial and corporate markets globally.

Insights for Asset Managers

"Insights" is a series of calls offering a practical overview of the issues faced by the asset management and funds sector in today's international legal, regulatory and commercial environment. Each call lasts for around 30 minutes and focuses on a specific topic, with participants able to submit questions via Webex during the call. To receive invitations to future calls in the Insights for Asset Managers and Funds series, please contact **Janice Alleway.**

Financial Markets Toolkit

Our **Financial Markets Toolkit** and associated App contains our growing collection of publications, guides, videos and transaction tools from across our global network. The resources are available for you on demand, whenever you need them.

Within our Financial Markets toolkit, we have Topic Guides that bring together our expertise and information on specific topics. They provide access to a summary of the latest developments as well as other resources such as Clifford Chance materials and contacts, legislation and official publications.

You can request full access by sending an email to **FMToolkit@cliffordchance.com**

SMCR Manager

The SMCR Manager is an interactive digital tool to assist clients with the implementation of the Senior Managers and Certification Regime.

The FCA Senior Managers and Certification Regime (SMCR) was first rolled out to banks in 2017. It will be extended to the rest of the UK financial services sector from 9 December 2019. Clifford Chance has leveraged the insights gained through advising banks on their SMCR implementation to develop the SMCR Manager, a compliance workflow product that will guide users through the application of SMCR and provide ongoing support for compliance following implementation.

For further information please visit www.cliffordchance.com/smcr or **smcr@cliffordchance.com.**

M&A market practice survey

Clifford Chance is involved in an unrivalled volume of M&A transactions which means that we are uniquely placed to share our insights on current trends, focusing on what is "on" or "off" market. Our annual market practice survey analyses Private Equity, M&A and management equity terms seen in a sample of over 50 transactions led out of London during 2018, in addition to highlighting the key themes seen in the debt markets in 2018.

Please contact **Tamsin Collins** if you would like further information.

Global M&A Toolkit

Our **Global M&A Toolkit** and associated App comprises a growing collection of web-based transaction tools and in-depth analysis of the most important market and regulatory developments in M&A regimes across the globe. It aims to bring clarity to the increasingly complex world of cross-border M&A and features special access to our leading cross-border M&A databases, informative videos, and access to a library of specialist publications covering the key issues in global M&A.

You can request full access by sending an email to **globalmandatoolkit@CliffordChance.com**

CONTACTS

Nigel Hatfield
Partner, Private Funds

T +44 20 7006 1834
E nigel.hatfield@cliffordchance.com

Gerard Saviola
Partner, Private Funds

T +44 20 7006 4958
E gerard.saviola@cliffordchance.com

Alexandra Davidson
Partner, Private Funds

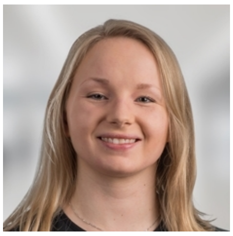
T +44 20 7006 2581
E alexandra.davidson@cliffordchance.com

Alexander Chester
Partner

T +44 207006 8365
E alexander.chester@cliffordchance.com

Lily Marcel
Senior Associate

T +44 207006 4158
E lily.marcel@cliffordchance.com

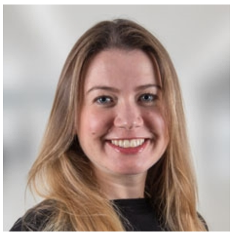


Morgan Pretswell
Senior Associate

T +44 207006 3982
E morgan.pretswell@cliffordchance.com

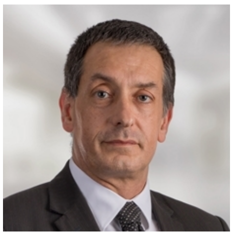
Fionnuala Oomen
Head of Strategy and Delivery, Funds

T +44 20 7006 8392
E fionnuala.oomen@cliffordchance.com



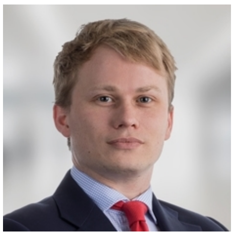
Amy Watt
Senior Associate Knowledge Lawyer

T +44 207006 1987
E amy.watt@cliffordchance.com



Anthony Stewart
Partner, Tax

T +44 20 7006 8183
E anthony.stewart@cliffordchance.com



Owen Lysak
Partner, Regulatory

T +44 20 7006 2904
E owen.lysak
@cliffordchance.com

Jacqueline Jones
Knowledge Director

T +44 207006 2457
E jacqueline.jones
@cliffordchance.com

Laura Douglas
Senior Associate
Knowledge Lawyer

T +44 207006 1113
E Laura.Douglas
@cliffordchance.com

Katharine Peacock
Knowledge Lawyer

T +44 207006 3605
E katharine.peacock
@cliffordchance.com