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Sustainable Finance: EU Commission consults on Taxonomy Regulation related disclosures by undertakings reporting non-financial information

The EU Commission has published an inception impact assessment on a proposed delegated act specifying a set of rules for undertakings under the Non-Financial Reporting Directive (NFRD) to include in their non-financial statements information on how and to what extent their operations are associated with economic activities that qualify as environmentally sustainable under the Taxonomy Regulation.

The Taxonomy Regulation already specifies two indicators in which non-financial undertakings under the NFRD are legally obliged to disclose the proportion of their:

- turnover derived from products or services associated with environmentally sustainable economic activities; and
- total investments (capital and operational expenditure) related to assets or processes associated with environmentally sustainable economic activities.

The impact assessment is intended to examine whether these indicators alongside the set of rules for undertakings under the NFRD need to be further developed.

Comments on the impact assessment are due by 8 September 2020. The EU Commission is expected to adopt the proposed delegated act by Q2 2021.

Benchmarks Regulation: EU Commission proposes amendments regarding third country foreign exchange benchmarks and designation of replacement benchmarks for benchmarks in cessation

The EU Commission has published a legislative proposal to amend the EU Benchmarks Regulation (BMR) as regards the designation of replacement benchmarks for benchmarks in cessation and the exemption of third country foreign exchange benchmarks.

This follows a review of the BMR by the EU Commission, including a consultation launched in October 2019 and an inception impact assessment published on 18 March 2020.

The EU Commission proposes amendments to the BMR that will empower it to designate a replacement benchmark that covers all references to a widely used reference rate that is phased out, such as LIBOR. The aim of this proposal is to help the winding down of tough legacy contracts and to avoid contractual conflicts, since the statutory replacement reference rate will be a matter of law.

Under the BMR, benchmarks administered in third countries can only be used in the EU following an equivalence, recognition or endorsement procedure. At the end of the BMR transitional period, the reference to foreign exchange spot rates in EU-traded currency forwards or swaps would no longer be allowed. The EU Commission proposes to modify the scope of the BMR to enable EU users to continue using third country currency benchmarks after the expiry of the transitional period at the end of 2021. This would allow EU companies to continue covering the risk of foreign currency fluctuations in their exporting and foreign investment activities.

BRRD: EBA consults on draft technical standards on MREL

The European Banking Authority (EBA) has published two consultation papers on draft technical standards under the Bank Recovery and Resolution Directive (BRRD).

The consultation papers set out:

- draft regulatory technical standards (RTS) on methods for resolution entities to avoid indirectly subscribed instruments hampering the smooth implementation of the resolution strategy (EBA/CP/2020/18); and
- draft implementing technical standards (ITS) specifying uniform reporting templates, instructions and methodology for the identification and transmission, by resolution authorities to the EBA, of information on minimum requirements for own funds and eligible liabilities (MREL) (EBA/CP/2020/17).

The draft RTS concern the internal MREL applicable to entities that are not themselves resolution entities in a resolution group and seek to ensure the

proper transfer of losses to the resolution entity and of capital from the resolution entity, and to avoid double-counting of internal MREL capacity. To that end, the draft RTS set out:

- a general deduction framework where the internal MREL-eligible instruments deduction at intermediate subsidiary level amounts to the full amount of the intermediate subsidiaries' holdings of internal MREL eligible instruments of the lower subsidiaries, with a 0% risk weight applied to those holdings; and
- a fall-back solution in cases where the deduction approach is impracticable that enables the resolution authority to apply MREL breach measures, including the removal of a substantive impediment to resolvability, if the entity fails to demonstrate that the issued instrument fulfils the internal MREL requirements.

The consultation on the draft RTS closes on 27 October 2020. A public hearing will take place via conference call on 29 September 2020 from 14:00 CET.

The consultation on the draft ITS closes on 24 October 2020.

Brexit: EBA publishes press release on firms' preparedness

The EBA has published a press release calling on financial institutions to finalise the full execution of their contingency plans in preparation for the end of the transition period on 31 December 2020.

Noting its opinion on preparations for the withdrawal of the UK from the EU published on 25 June 2018 and the EU Commission's readiness notice on banking and payment services published on 7 July 2020, the EBA highlights the following issues:

- finalisation of preparations and effective establishment in the EU by UK-based financial institutions as agreed with relevant competent authorities, in particular, ensuring that associated management capacity and technical risk management capabilities are effectively in place ahead of time;
- preparedness of UK-based payment and electronic money institutions, noting, among other things, that firms making late applications may not obtain authorisation in time, and that UK-based account information service provides (AISPs) and payment initiation service providers (PISPs) will no longer be entitled to access customers' payment accounts held at EU PSPs and their eIDAS certificates will be revoked; and
- all financial institutions affected by the UK's withdrawal, particularly those offering services to EU-based customers on a cross-border basis, to adequately inform their EU customers of relevant actions undertaken as part of contingency planning.

The press release also includes links to other previous EBA opinions and communications which remain valid in the light of the end of the transition period.

EBA and ESMA consult on revised guidelines for assessing suitability of members of management body and key function holders

The EBA and the European Supervisory Market Authority (ESMA) have launched a public consultation on revised joint guidelines on the assessment of the suitability of members of the management body and key function holders. This review reflects the amendments introduced by the fifth Capital Requirements Directive (CRD5) and the Investment Firms Directive (IFD) in relation to the assessment of the suitability of members of the management body.

Comments are due by 31 October 2020.

MiFIR: ESMA updates third-country trading venues list

ESMA has updated the annex to its opinion on whether third-country trading venues are to be considered as a trading venue for the purposes of the Markets in Financial Instruments Regulation (MiFIR) post-trade transparency regime.

The annex to the opinion lists the venues with a positive or partially positive assessment and has been updated following requests from market participants to assess more venues. ESMA has also published additional guidance on the list providing:

- an overall description of the third-country trading venues' assessment;
- general guidance on updates to the list and the venue of execution in post-trade reports; and
- guidance related to specific fields.

SRB publishes guidance on operational continuity in resolution and FMI contingency plans

The Single Resolution Board (SRB) has published operational guidance on operational continuity in resolution (OCIR) and on financial market infrastructure (FMI) contingency plans.

The OCIR guidance provides further clarifications to banks on how to implement SRB expectations related to the following topics:

- service identification and mapping;
- assessment of operational continuity risk; and
- mitigating measures such as having adequately documented, resolution-resilient contracts, appropriate management information systems and governance arrangements.

Banks are expected to develop FMI contingency plans in line with recommendations published by the Financial Stability Board (FSB). The FMI contingency plans guidance provides details on a possible contingency plan outline and an indicative phase-in across FMI service providers.

The guidance follows the publication, following consultation, of the SRB Expectations for Banks document, which sets out the capabilities the SRB expects banks to demonstrate to show that they are resolvable including the dimensions of OCIR and access to FMIs.

FCA launches enhanced Financial Services Register

The Financial Conduct Authority (FCA) has launched an updated version of the Financial Services Register.

Changes include a simplified design and clearer language aimed at providing a better user experience, as well as:

- more information on the purpose of the register and how to use it;
- making important information, such as past actions, more prominent; and
- optimisation for some mobile devices.

The FCA intends to publish the directory of certified and assessed persons under the Senior Managers and Certification Regime (SM&CR) later this year.

FCA publishes Dear CEO letter on inappropriate use of title transfer collateral arrangements

The FCA has published a letter to brokers in wholesale financial markets on the inappropriate use of title transfer collateral arrangements (TTCAs) and regulatory permissions for financing transactions.

The letter notes that the FCA has recently identified examples of inappropriate use of TTCAs by firms, amounting to failures of compliance with the Client Assets Sourcebook (CASS) rules, such as:

- holding money or assets under a TTCA without meeting the requirement to consider client obligations;
- holding all of a client's money or assets under a TTCA in the absence of a present, future, actual, contingent or prospective obligation to the firm;
- holding an inappropriate amount of money or assets under a TTCA compared to that client's present, future, actual, contingent or prospective obligations; and
- moving an increased amount of collateral from a segregated (CASS) to a TTCA (non-CASS) environment without a corresponding documented consideration demonstrating a connection between the collateral taken and the relevant client obligation.

The FCA is especially concerned about cases where firms lacked arrangements promptly to return collateral to their clients, or to segregate it as required by CASS, including where firms did not have the relevant permission in relation to holding client money.

It has also seen examples of the same types of firms incorrectly classifying financial transactions as falling within the prudential matched principal exemption, thus holding lower financial resources than may be required and also acting outside the limitations of their regulatory permissions.

The FCA reminds firms with business models using TTCAs to hold collateral for leveraged client trading that it is their responsibility to ensure they have the correct regulatory permissions for the activities they undertake, including considering whether they can genuinely rely on the matched principal exemption for prudential categorisation purposes.

Firms are required to review the use of TTCAs and contact the FCA by 14 August 2020 confirming that they have all necessary permissions and are compliant with any requirements.

PSR launches engagement phase of future strategy and calls for input on innovation and future payment methods

The Payment Systems Regulator (PSR) has launched the engagement phase of its first long-term strategy for payments, which will set out areas of priority and objectives for the PSR's future work. In advance of a formal consultation, the PSR intends to seek views on the three key themes it will address in its strategy. It has published a set of questions and a series of related think pieces on the first of these three themes, innovation and future payment methods. In particular, the PSR is seeking comment on:

- how it can promote a choice of payment methods that suits the needs and preferences of people and businesses;
- whether it should intervene to ensure consumers can access their preferred payment method, with a particular focus on whether there is a need to maintain a cash system;
- its role in the future of payment systems in the UK;
- its role, and the role of regulators and the government, in the promotion of innovation, particularly as an alternative to existing payment methods;
- the definition of innovation and technological advancement;
- the lessons learnt from innovation in payment methods in other jurisdictions;
- whether the UK is ready to become a digital and/or card-only society; and
- the long-term impact of the COVID-19 lockdown on payment systems.

The PSR intends to publish the questions on its second theme (competition) on the week of 14 September 2020 and on the third theme (the choice and availability of payment methods) on the week of 28 September 2020. Following this period of engagement, it expects to produce and consult upon a draft strategy at the end of 2020 or beginning of 2021.

HM Treasury consults on review of payments landscape

HM Treasury has launched a call for evidence as the first step in its review of the payments landscape in the UK, first announced in June 2019. The review is intended to ensure that UK payments systems are keeping pace with the rapid changes in the development and use of payments technology.

The call for evidence sets out the steps the Government has taken to achieve its aims for payments networks in the UK. These aims include ensuring that the UK payments industry:

- operates for the benefit of end users;
- promotes and develops new and existing payments networks;
- permits open access to participants and potential participants on reasonable commercial terms to facilitate competition; and
- is stable, reliable and efficient.

It then provides a high-level analysis of how well the present system is delivering against these aims and calls for views on this analysis, as well as on the opportunities, gaps and risks that need to be addressed in the future to place the UK payments industry at the forefront of payments innovation. In particular, HM Treasury is seeking views on the opportunities and risks posed

by the Faster Payments system, open banking, new payments services and chains, and innovation in cross-border payments.

Comments are due by 20 October 2020. Following the call for evidence, the government intends to publish a summary of responses and set out the next steps for the payments landscape review.

PRIIPs Regulation: HM Treasury issues policy statement on proposed approach to onshoring

HM Treasury has issued an update on its proposed approach to bringing forward amendments to the onshored Packaged Retail Investment and Insurance Products (PRIIPs) Regulation. The amendments enable the FCA to make supplementary provisions and amendments to the RTS with a view to avoiding consumer harm, addressing distortions of competition, and providing the appropriate certainty to industry.

Specifically, the Treasury intends to make the following changes to the onshored PRIIPs Regulation:

- an amendment enabling the FCA to clarify the scope of the PRIIPs Regulation through its rules;
- an amendment to replace 'performance scenario' with 'appropriate information on performance' in the PRIIPs Regulation; and
- an amendment enabling HM Treasury to further extend the exemption currently in place for Undertakings for the Collective Investment in Transferable Securities (UCITS) funds.

The Treasury plans to bring forward these amendments when parliamentary time allows and, in the longer term, intends to conduct a more wholesale review of the disclosure regime for UK retail investors. This review will explore, for example, how to harmonise the PRIIPs regime with requirements set out in MiFID2.

PRA consults on rule changes to implement CRD5

The Prudential Regulation Authority (PRA) has published a consultation paper (CP 12/20) which sets out proposed changes to its rules, supervisory statements (SSs) and statements of policy (SoPs) in order to implement elements of CRD5.

The consultation paper includes the PRA's proposals in relation to the following CRD5 topics:

- Pillar 2 requirements;
- remuneration policies;
- intermediate parent undertakings (IPUs);
- governance; and
- third-country branch reporting.

CRD5 must be transposed by 28 December 2020 and most of its requirements apply from 29 December 2020. The PRA proposes not to implement the requirements that do not need to be complied with until after the end of the EU exit transition period.

Comments are due by 30 September 2020.

PRA publishes policy statement on asset encumbrance

The PRA has published a policy statement (PS 18/20) setting out feedback and final policy following its consultation on its expectations of firms when managing the key prudential risks associated with asset encumbrance (CP 24/19).

In CP 24/19, the PRA proposed amending its supervisory statements, 'The PRA's approach to supervising liquidity and funding risks' (SS 24/15), 'Recovery planning' (SS 9/17) and 'Supervising building societies' treasury and lending activities' (SS 20/15) to clarify its expectation that firms demonstrate they have sufficiently considered the risks associated with asset encumbrance in the contexts of liquidity and funding, recovery planning and resolution. The PRA received two responses to the consultation, both of which supported the proposed amendments but asked for minor clarifications on the definition of 'market counterparties' and the expectations for building societies. The PRA has therefore made minor amendments to the final policy as set out in SS 24/15, SS 9/17 and SS 20/15 to address these points.

The policy came into effect on 27 July 2020.

Working Group on Sterling Risk-Free Rates publishes materials on LIBOR transition

The Working Group on Sterling Risk-Free Reference Rates (RFRWG) has published a suite of materials aimed at continuing the pace of Sterling LIBOR transition and helping firms implement transition plans.

Materials include:

- the RFRWG's latest priorities and roadmap for 2020-21;
- Q&As on the RFRWG's revised end-Q3 milestones for loan markets, including targeted information for transition across loan products; and
- the first in a series of educational videos and slides providing background on the key elements of LIBOR transition.

AMF and ACPR remind crypto-asset ATM operators in France of their obligations

The Autorité des marchés financiers (AMF) and the Autorité de contrôle prudentiel et de résolution (ACPR) have issued a statement indicating that service providers responsible for the operation of automatic telling machines (ATM) in France allowing for the purchase or sale of digital assets (such as Bitcoin) for legal tender are subject to a requirement to register with the AMF as digital assets service providers (PSAN), following assent (avis conforme) from the ACPR. This registration requirement, pursuant to Article L. 54-10-3 of the French Financial and Monetary Code, entails the obligation to set up appropriate governance, internal control, AML-CTF and freezing of assets schemes and procedures.

Service providers performing an activity which requires registration before the entry into force of the 'Pacte Law' shall be entitled to a period of twelve months as of publication of its implementing acts to register with the AMF. Service providers that had begun their activity before 24 May 2019 must therefore register with the AMF by 18 December 2020 at the latest. Other digital asset ATM operators that have not yet registered must cease all activity promptly.

Otherwise, they are liable to a two-year prison sentence and a fine of EUR 30,000.

Consob consults on proposed amendments to its Intermediaries Regulation

The Commissione Nazionale per le Società e la Borsa (Consob) has launched a consultation on proposed amendments to the Intermediaries Regulation regarding the knowledge and competence requirements for the staff of intermediaries. The main aim of the consultation is to transpose EU regulations by introducing new and supplemental provisions to the general principles established under MiFID2 and the European Securities and Markets Authority (ESMA) guidelines 2015/1886.

The consultation ends on 21 September 2020.

Consob publishes instructions to British investment firms providing investment services and activities in Italy

Following its warning notice no. 3 of 26 March 2020, Consob has published a set of instructions to British investment firms providing investment services and activities in Italy, reminding them that, at the end of the transition period (on 31 December 2020) provided for in the agreement defining the procedures for the withdrawal of the UK from the EU, British investment firms providing investment services and activities in Italy will be subject to the rules set out in Article 28 of the Consolidated Law on Finance (Legislative Decree no. 58/1998) and in Articles 25 - 31 of Consob Regulation no. 20307/2018.

Under these rules, third country firms (other than banks that intend to continue operating in Italy) should submit an application for authorisation to Consob, which shall ascertain the fulfilment of conditions for authorisation within 120 days, except in cases of suspension or interruption. As a consequence, Consob recommends that British investment firms wishing to continue operating in Italy submit the application for authorisation promptly, also taking into consideration that the duration of authorisation procedures can be subject to suspension and interruption.

Finally, British investment firms that intend to continue operating in Italy by transferring their activities to an EU investment firm are invited to complete such transfers by the end of the transition period and, where necessary, the procedures for passport notification into Italy. Conversely, UK investment firms that intend or are required to cease their operation by the end of the transition period shall terminate their relationships with clients in ways that ensure the full protection of their interests and in compliance with the notice deadlines for the contract termination.

Bank of Spain adopts EBA guidelines as its own

The Bank of Spain has adopted the following EBA guidelines as its own:

- Guidelines on reporting and disclosure of exposures subject to measures applied in response to the COVID-19 crisis (EBA/GL/2020/07);
- Guidelines on loan origination and monitoring (EBA/GL/2020/06); and
- Guidelines on the determination of the weighted average maturity (WAM) of the contractual payments due under the tranche in accordance with point (a) of Article 257(1) of Regulation (EU) No 575/2013 (EBA/GL/2020/04).

CNMV consults on draft technical guide on currency derivatives used as means of payment not qualifying as financial instruments

The Spanish Securities Market Commission (CNMV) has launched a public consultation regarding a draft technical guide in connection with the provisions of Article 10.1.b) of Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing MIFID2, which provides that currency-related derivative instruments that are means of payment and meet certain requirements are not considered to be financial instruments for the purposes of MiFID2. These financial instruments are not subject to MIFID2 and supervision by the CNMV, with the result that the transparency and customer protection rules of the banking regulations apply.

The purpose of the technical guide is to provide credit institutions and other institutions rendering investment services with a number of criteria in relation to the scope and the way in which compliance with the requirements determining that a currency derivative must be considered a means of payment and not a financial instrument shall be verified, in particular with the requirement that it is subscribed in order to enable the payment of identifiable goods, services or direct investments. For these purposes, institutions shall adopt the appropriate procedures, apply them effectively and record the verification actions carried out.

The draft guide will be subject to public consultation until 18 September 2020.

Order on regulation of revolving credits published

Order ETD/699/2020, of 24 July, on the regulation of revolving credits and amending Order ECO/697/2004, of 11 March, on the Risk Information Centre, Order EHA/1718/2010, of 11 June, on the regulation and control of advertising of banking services and products and Order EHA/2899/2011, of 28 October, on transparency and protection of customers of banking services, has been published. Revolving credits of indefinite term have certain characteristics that make them susceptible to differentiated regulatory consideration.

In this regard, Order ETD/699/2020 introduces the following changes:

- in order to reinforce the information available to credit entities and their procedures for analysing the solvency of potential borrowers, article 1 of Order ECO/697/2004, of 11 March, on the Risk Information Centre, is amended to separate the processing of the information that the Bank of Spain receives in the exercise of its supervisory and inspection functions and other functions legally attributed to it from the processing intended to provide information to the reporting entities for the exercise of their business. The rule also lowers the threshold for the data provided to reporting entities in the course of their business;
- Order EHA/1718/2010, of 11 June, on the regulation and control of advertising of banking services and products, is amended in order to establish the criteria to be used in the representative example referred to in Law 5/2019, of 15 March, when advertising a revolving credit;
- a provision is incorporated in Order EHA/2899/2011, of 28 October, on transparency and protection of customers of banking services, establishing guidelines to be followed by credit entities when assessing the solvency of the potential borrowers;

- a new chapter III.bis is inserted in title III in Order EHA/2899/2011, of 28 October, to strengthen the delivery of information to the borrower. These new provisions will apply to credits of indefinite term and of defined term that can be automatically extended, excluding those credits in which the holder pays the whole amount of the credit drawn down at the end of the agreed settlement period without interest, whether or not they are associated with payment instruments;
- new official interest rates are introduced in Order EHA/2899/2011, of 28 October, specifically the one-week, one-month, three-month and six-month Euribor rates, as well as the Euro short-term rate (€STR), and any other index expressly established for this purpose by resolution of the General Secretariat of the Treasury and International Finance (Secretaría General del Tesoro y Financiación Internacional). Additionally, reference to Mibor is removed from the list of official interest rates (without prejudice to its continued publication for application in loan contracts concluded prior to that date). Certain technical corrections are also included in Order EHA/2899/2011; and
- payment and electronic money institutions engaged in the activity of granting credit are considered reporting institutions to Bank of Spain's Risk Information Centre, including those operating on a cross-border basis.

The Order will enter into force on 2 January 2021, except for certain provisions whose entry into force depends, among other things, on the development of additional regulations.

BRSA announces new exemptions to TRY outflow restrictions

On 5 May 2020, the Banking Regulation and Supervision Agency of Turkey (BRSA) resolved that the size of Turkish banks' TRY denominated placement, deposit, repo and loan transactions to be entered into with offshore banks and financial institutions (including with offshore affiliates, branches and consolidated group entities of Turkish banks) was restricted so as not to exceed 0.5% of the relevant local bank's regulatory capital. On 20 May 2020, the BRSA granted an exemption from this TRY outflow restriction in respect of swap trades (both onshore and offshore) relating to TRY denominated securities to be entered into with Clearstream Banking, Euroclear Bank and any other foreign central securities depositories (FCSDs) to be approved by the BRSA.

Upon further assessment of the markets, the BRSA has now introduced new exemptions from the TRY outflow restriction through its board resolution dated 28 July 2020 and numbered 9109. In particular, the BRSA has announced that the following transactions entered into by FCSDs will not be subject to the TRY outflow restriction:

- transactions entered into with local banks operating in OTC markets as account managers;
- swap trades entered into in the BIST FX swap market where the local bank will receive Turkish Lira from a foreign counterparty at the maturity date (i.e. where a FCSD buys TRY in exchange for FX at the initial notional exchange date); and

- short term funding transactions relating to offshore TRY accounts in connection with swap trades relating to TRY denominated securities issued by Turkish or foreign issuers.

In addition, the BRSA has also granted a new conditional exemption from the TRY outflow restriction in favour of international development banks (IDBs) under the new resolution for the following types of transactions:

- FX swap transactions with Türkiye Kalkınma ve Yatırım Bankası A.Ş. (the Development and Investment Bank of Turkey) (TKYB) where an IDB buys TRY in exchange for FX at the initial notional exchange date;
- swap trades entered into in the BIST FX swap market where an IDB buys TRY in exchange for FX at the initial notional exchange date;
- repo and reverse repo transactions in the BIST Repo market; and
- TRY denominated deposit transactions with Turkish banks,

provided that, amongst other conditions, the relevant IDB obtains the BRSA's approval and uses any TRY proceeds to invest in Turkish money/capital markets or lend to Turkish companies.

Central Bank of Turkey amends Capital Movements Circular

The Central Bank of the Republic of Turkey (CBRT) has introduced an amendment to the Capital Movements Circular dated 2 May 2018. The Capital Movements Circular provides that foreign currency denominated (FX) funds made available to Turkish companies by banks and factoring companies by way of purchasing receivables (other than export or transit trade receivables), would be treated as an FX loan under the Capital Movements Circular. With the amendment, the CBRT has clarified that, in addition to export or transit trade receivables, the purchase of FX receivables arising from domestic trade on a non-recourse basis by banks or factoring companies will not be considered as an FX loan for the purposes of the Capital Movements Circular.

The amendment also clarifies that the transferee bank or factoring company must report any purchases that would qualify as an FX loan to the Risk Centre on behalf of the seller on the transfer date. In addition, the transferee bank or factoring company is also required to notify the Risk Centre on the maturity date of any such receivables for the purposes of deducting the relevant amount from the outstanding credit balance of the seller.

Companies Registry issues circular to announce commencement of Limited Partnership Fund Ordinance

The Companies Registry has issued a circular to announce that the Limited Partnership Fund Ordinance will come into operation on 31 August 2020. The Ordinance, which was gazetted on 17 July 2020, establishes a new limited partnership fund (LPF) regime to enable private funds to be registered in the form of limited partnerships in Hong Kong. The new LPF regime is intended to attract private investment funds (including private equity and venture capital funds) to set up and register in Hong Kong to facilitate the channelling of capital into corporates, especially start-ups in the innovation and technology field in the Greater Bay Area.

The LPF regime will be an opt-in registration scheme administered by the Companies Registry.

HKEX consults on proposals to introduce paperless listing and subscription regime and online display of documents

The Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEX), has launched a public consultation on proposals to introduce a paperless listing and subscription regime, online display of documents and a reduction of the types of documents on display.

Currently, the Listing Rules require all issuers of equities, debt securities and collective investment schemes to issue listing documents in physical printed form, as well as placing various documents on display for physical inspection. The HKEX notes that the Listing Rules requirements for printed form physical listing documents and the physical display of documents are out-of-step with modern practices. To address this, the consultation is intended to:

- introduce a paperless listing and subscription regime requiring (i) all listing documents in a 'New Listing' to be published solely in an electronic format, and (ii) New Listing subscriptions, where applicable, to be made through online electronic channels only;
- replace the requirement for certain documents to be physically displayed with a requirement for those documents to be published online;
- reduce the types of documents that are mandatory for an issuer to display for notifiable and connected transactions; and
- provide details of the SEHK's other paperless initiatives.

Comments on the consultation are due by 24 September 2020.

In addition, as part of its wider responsibility to set environmental compliance standards for issuers, the HKEX has published an updated Guidance Letter for IPO applicants (HKEX-GL86-16) requiring additional corporate governance and environmental, social and governance disclosures in the prospectus from IPO applicants.

SFC updates guidance materials to reflect changes in Mainland China's qualified foreign investors rules

The Securities and Futures Commission (SFC) has updated the following checklist, confirmation, frequently asked questions (FAQs) and guide:

- FAQs on application procedures for authorisation of unit trusts and mutual funds under the revamped process;
- FAQs on post authorisation compliance issues of SFC-authorised unit trusts and mutual funds;
- FAQs on Mainland-Hong Kong mutual recognition of funds;
- guide on practices and procedures for application for authorisation of unit trusts and mutual funds;
- information checklist for application for authorisation of unit trusts and mutual funds under the revamped process; and
- confirmation of fulfilment of authorisation conditions.

The updates have been made to reflect the changes in the new rules on qualified foreign institutional investors (QI) issued by Mainland China in terms of removing the Qualified Foreign Institutional Investors (QFII)/RMB-qualified foreign institutions Investors (RQFII) quota and allowing multiple Mainland China's custodians for QI, and the changes to the relevant rules of the ChiNext market.

FSC issues administrative guidance on private equity funds

The Financial Services Commission (FSC) has issued administrative guidance to strengthen the supervisory role of private equity fund sellers and trustees regarding fund management companies, and provide specific guidelines to facilitate more systematic and effective self-inspection of private equity funds.

Under the guidance, fund sellers will be required to check details of investment information packages as well as fund management, and suspend sales when redemption delays occur. Trustees will also be required to check whether fund management companies are engaged in any unlawful or unfair sales practices. Further, cross trading of funds from the same entity and coercive sales practices will be prohibited.

Regarding self-inspection of private equity funds, the guidance lays out specific requirements for fund sellers, managers, trustees and administrators. Under the guidance, site-inspections will be carried out through consultation and cooperation between fund sellers, managers, trustees and administrators, and the method of inspection will be determined through a consultative body. All private equity funds in operation as of 31 May 2020 will be subject to self-inspection.

The administrative guidance is expected to come into effect on 12 August 2020. The FSC has indicated that it will work to improve the regulatory framework on private equity funds and make sure that inspections are carried out properly.

Korean Government approves revised rules to promote digital new deal initiative

The FSC has announced that the Korean Government has approved the revisions to the enforcement decree of the Credit Information Use and Protection Act.

The revisions are intended to foster new industries, improve access to financial services by introducing nonfinancial credit bureaus and credit bureaus for self-employed business owners, introduce more consumer-oriented financial services with the application of big data, and ensure higher accountability standards by carrying out regular inspection of data protection system. In particular, the key revisions to the Act include the following:

- ensuring safety in data convergence – data convergence will be carried out by designated institutions specifically tasked with data convergence. Moreover, data specialising institutions will provide pseudonymised and anonymised data to financial institutions, and will be required to maintain an appropriate level of human resources and set up a risk management system and internal control mechanisms;
- lowering entry barriers for new MyData and credit bureau businesses – more fintech firms will be given opportunities to start their own credit

bureau businesses as the revisions restrict the required number of data specialists to a maximum of ten professionals even for business entities wishing to apply for multiple credit bureau licenses. In addition, new guidelines will be established to prohibit unfair practices by credit bureaus, such as discriminatory or preferential credit rating;

- requiring MyData businesses to protect personal financial data and strengthening data privacy rights for consumers – new rules have been established to guarantee that MyData service providers are abiding by data privacy rights and data transfer rights of consumers; and
- improving data protection in financial sector – financial companies will be required to inspect and report to the financial authority at least once every year the results of inspections for internal data management and protection status. Moreover, individuals will be entitled to explanations and formal objections against automated personal credit assessment or personal credit 'profiling,' which is intended to improve transparency in financial transactions.

The revisions to the Act are effective from 5 August 2020. The guidelines for personal data protection and for the use of pseudonymised and anonymised data processing will also be made available in August 2020 to facilitate clear understanding of safe data processing protocols.

The FSC plans to promptly implement other measures to promote the data economy by designating data specialising institutions and licensing MyData businesses and new credit bureaus. Moreover, the FSC has indicated that it will continue to maintain close communication with market experts on data-related issues.

KRX seeks to protect investors more effectively through strengthened management of preferred stocks

The Korea Exchange (KRX) has announced that it will improve its market operational regulations and tighten market monitoring activities to minimise the stock price fluctuations of preferred stocks resulting from the lack of free floating shares and the act of encouraging some price hikes. The initiatives to be taken by the KRX in this regard include the following:

- tightening criteria for listing and de-listing - when preferred stocks are to be listed or de-listed, the required number of preferred stocks will be revised to prevent price fluctuations from small transactions. In this regard, the KRX will encourage listed companies to increase free float of preferred stocks, so the prices of these stocks are not affected significantly by small transactions;
- application of single price auction on a yearly basis - the single price auction will be applied, on a yearly basis, to preferred stocks of which the number of listed shares is less than 500,000 in order to prevent rapid price fluctuations;
- improvement of the short-term overheated issue designation - a new requirement regarding the disparity ratio of preferred stocks to common stocks will be introduced as a criterion for the designation of the short-term overheated issue to apply the single price auction for three trading days;
- notice of preventative information on investment - when an investor makes an order to buy a high-risk stock, a prior guidance on the stock will be provided; and

- strengthened market surveillance - to check whether any unfair transaction is involved, the KRX will conduct a planned monitoring on preferred stocks whose prices surge, and enhance its market surveillance activities including rejections of orders from unsound trading accounts and intensive monitoring of cyber information.

The KRX has indicated that it plans to implement the new system within 2020.

MAS consults on new omnibus Act for financial sector

The Monetary Authority of Singapore (MAS) has launched a public consultation proposing enhanced powers to deal with financial sector-wide risks more effectively.

Currently, the powers of the MAS to regulate the financial sector by entity and activity are set out in various Acts administered by it. Recognising the increasing need for a financial sector-wide regulatory approach to complement its entity and activity based regulation in addressing the emerging risks and challenges that impact the financial sector, the MAS proposes to introduce a new omnibus Act for the financial sector. With the introduction of the new Act, the existing provisions in the MAS Act that relate to the MAS' regulatory oversight of different classes of financial institutions (FIs) in the areas of anti-money laundering and countering the financing of terrorism (AML/CFT), control and resolution of FIs, and oversight of financial sector dispute resolution schemes will be moved to the new Act.

In addition, the MAS intends to introduce the following key proposals into the new Act:

- the MAS proposes to harmonise and expand its power to issue prohibition orders (POs) by broadening the categories of persons who may be subject to POs, rationalising the grounds for issuing POs (from a list of specific criteria into a single fit and proper test), and widening the scope of prohibition (to include handling of funds and risk management);
- the MAS proposes to license and regulate, for AML/CFT purposes, any person in Singapore who carries on a business of providing virtual asset activities outside of Singapore;
- the MAS proposes to harmonise and expand its existing powers to impose requirements pertaining to the management of technology risk, including cyber security risks and data protection, on all regulated FIs. It also proposes to increase the maximum penalty to SGD 1 million for any contravention of these requirements; and
- the MAS proposes to provide statutory protection from liability to persons performing the duties of an approved dispute resolution scheme operator for acts or omissions done with reasonable care and in good faith.

Comments on the consultation are due by 20 August 2020.

MAS issues circular on good disclosure practices for actively managed funds

The MAS has issued a circular highlighting the findings from a thematic review it carried out on equity funds with active management mandates offered by 19 fund management companies (FMCs) to retail investors, and setting out recommended practices for FMCs to enhance such disclosures. While the review focused primarily on funds offered to retail investors, the MAS has

instructed FMCs to apply these practices to funds offered to other investor classes where appropriate.

The MAS has outlined its observations that prospectus and factsheet disclosures for actively managed funds could be enhanced in the following respects to enable investors to assess whether the management fees charged are justified:

- investment style – it is a good practice to clearly state that a fund is to be actively managed. This includes describing how the FMC intends to carry out active management to derive alpha;
- reference benchmark and its purpose – the relevant reference benchmark for the fund (if any) should be mentioned in the investment objective section. The purpose of the benchmark (i.e. either as a constraint for portfolio construction or as a target to beat) should also be clearly stated; and
- investment constraints and degrees of active management – FMCs should disclose: (i) how a fund's investment limits and constraints can affect risks and expected returns; (ii) the degree of freedom FMCs have relative to the benchmark; and (iii) active share and tracking error on a regular basis.

The MAS expects the board of directors and senior management to exercise effective oversight of the FMCs' operations, including the provision of clear, fair, balanced, and non-misleading promotional materials. It also expects FMCs to implement the sound disclosure practices in the circular over time, and improve their communication on how they seek to deliver value through active portfolio management.

ASX consults on proposed enhancements to existing BBSW waterfall calculation methodology

The Australian Securities Exchange (ASX) has launched a public consultation on proposed enhancements to the existing Bank Bill Swap Rate (BBSW) waterfall calculation methodology. The proposed enhancements relate solely to the transaction layer of the BBSW calculation waterfall, and are intended to increase the frequency with which BBSW rates are calculated using transaction data, while also ensuring that a high quality rate is produced.

The proposed enhancements to the existing transaction layer of the BBSW calculation methodology include the following:

- widening the maturity pool of eligible transactions for 2 to 6-month tenors and introducing a wider, asymmetric maturity pool for the 1-month tenor;
- lowering the volume threshold for the 1, 3 and 6-month tenors from AUD 200 million to AUD 100 million;
- introducing a weighted least squares regression (LSR) model to complement the existing Volume Weighted Average Price (VWAP) methodology; and
- progressing to the national best bid and best offer (NBBO) layer of the waterfall under specific circumstances.

ASX has indicated that it will publish a market notice to advise market participants and BBSW subscribers of the outcome of the consultation in September 2020, and proposes to implement the methodology changes in

November 2020, subject to the feedback received from this consultation paper.

Comments on the consultation are due by 27 August 2020.

CFTC amends cross-border swaps rule

The Commodities Futures Trading Commission (CFTC) has approved a rule that addresses the cross-border application of the registration thresholds and certain requirements for swap dealers and major swap participants. In addition, it provides a formal process for requesting comparability determinations for such requirements from the CFTC. The CFTC has also amended certain definitions, including its definition of 'US person' to harmonize it with the US person definition adopted by the Securities and Exchange Commission in the context of securities-based swaps. In addition, the CFTC has narrowed the scope of its interpretation of 'guarantee' to exclude similar arrangements (such as, among others, keepwells, liquidity puts, certain types of indemnity agreements and liability or loss transfer or sharing agreements).

In conjunction with the approval of this cross-border rule, the Divisions of Swap Dealer and Intermediary Oversight (DSIO), Clearing and Risk (DCR), and Market Oversight (DMO) withdrew a staff advisory and no-action relief relating to swaps between a non-US swap dealer and counterparties that are not US persons where the non-US swap dealer uses personnel or agents located in the US to 'arrange, negotiate, or execute' the swaps (ANE Transactions) and provided new no-action relief. Specifically, CFTC Staff Letter 20-21 provides relief to non-US swap dealers from transaction-level CFTC regulatory requirements for ANE Transactions to the extent such transaction level requirements are not addressed in the new cross-border rule. This no-action relief will apply only until the CFTC addresses whether a particular unaddressed transaction level requirement is or is not applicable to such ANE Transactions.

These amendments will be effective 60 days after publication in the Federal Register.

CFTC amends exemptive order for certain EU trading facilities

The CFTC has approved an amended order that provides exemptive relief from the requirement to register with the CFTC as swap execution facilities to certain multilateral trading facilities (MTFs) and organized trading facilities (OTFs) that are authorized within the European Union. This amendment confirms that MTFs and OTFs that are authorized within the UK and listed in Appendix A to the exemptive order during the UK's Brexit transition period will continue to be exempt from the requirement to register with the CFTC as a swap execution facility. In addition, the amended order granted exemptions to sixteen additional MTFs and OTFs authorized within the European Union.

This amended exemptive order became effective on 23 July 2020.

RECENT CLIFFORD CHANCE BRIEFING

Luxembourg bill of law proposes recognition of DLT for the issuance of dematerialised securities

The Luxembourg Government has submitted a bill to the Luxembourg Parliament with the aim of modernising the existing legal framework for

dematerialised securities. The bill forms part of the continued modernisation of Luxembourg's legal framework for finance transactions and is a continuation of the law of 1 March 2019, which expressly recognised the possibility of holding and registering book-entry securities in securities accounts by way of distributed ledger technology (DLT). The bill recognises the possibility of using secure electronic recording systems (including DLT) for dematerialised securities (whether at issuance or upon conversion from another form of security). The publication of the bill constitutes the start of the legislative procedure.

This briefing summarises the key aspects of the proposed framework.

https://www.cliffordchance.com/briefings/2020/07/luxembourg-bill-of-law-proposes-recognition-of-dlt-for-the-issua.html

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