

## INTERNATIONAL REGULATORY UPDATE 3 - 7 AUGUST 2020

- EBA publishes final draft technical standards on disclosure and reporting on MREL and TLAC
- EBA consults on revised internal governance guidelines in response to CRD5 and IFD
- Basel Committee consults on principles for operational risk and resilience
- FCA consults on proposals to improve open-ended property fund structures
- CRD5: FCA consults on updating dual-regulated firms remuneration code
- German Bank Separation Act: BaFin publishes interpretative guidance
- Bank of Italy consults on proposed amendments to its regulation on collective asset management
- Insurance Distribution Directive: Consob publishes new regulatory provisions
- Shareholder Rights Directive 2: Legislative Decree no. 84 of July 2020 published
- Shareholder Rights Directive 2: Consob and Bank of Italy consult on identification of shareholders, transmission of information and facilitation of exercise of rights
- Luxembourg bill transposing CRD5 and BRRD2 published
- BRRD2: Spanish Government launches public hearing on transposition plan
- CRD5: Spanish Government launches public hearing on transposition plan
- China extends transitional period for Asset Management Guiding Opinions
- FSA creates new permit system so that foreign managers can temporarily operate their business in Japan as a BCP
- FSC announces launch of financial regulatory sandbox website and renewal of fintech information portal
- FSC announces plans to improve rules on retail structured products

*Clifford Chance's International Regulatory Update is a weekly digest of significant (non-Coronavirus-related) regulatory developments, drawing on our daily content from our Alerter: Finance Industry service.*

To request a subscription to our Alerter: Finance Industry service, please email [Online Services](#).

If you would like to know more about the subjects covered in this publication or our services, please contact:

### International Regulatory Group Contacts

[Marc Benzler](#) +49 69 7199 3304

[Caroline Dawson](#) +44 207006 4355

[Steven Gatti](#) +1 202 912 5095

[Owen Lysak](#) +44 207006 2904

[Lena Ng](#) +65 6410 2215

[Gareth Old](#) +1 212 878 8539

[Mark Shipman](#) + 852 2826 8992

[Donna Wacker](#) +852 2826 3478

### International Regulatory Update Editor

[Joachim Richter](#) +44 (0)20 7006 2503

To email one of the above, please use [firstname.lastname@cliffordchance.com](#)

Clifford Chance LLP,  
10 Upper Bank Street,  
London, E14 5JJ, UK  
[www.cliffordchance.com](http://www.cliffordchance.com)

- **Australian Government consults on reforms to foreign investment review framework**
- **Recent Clifford Chance briefings: The EU trade process explained; and more. Follow this link to the briefings section.**

## **EBA publishes final draft technical standards on disclosure and reporting on MREL and TLAC**

The European Banking Authority (EBA) has published its [final draft](#) implementing technical standards (ITS) on disclosure and reporting on the G-SII requirement for own funds and eligible liabilities (TLAC) and the minimum requirements for own funds and eligible liabilities (MREL). This is the first time that the EBA has developed disclosure and reporting requirements in this area, thus expanding the scope of the existing Pillar 3 and supervisory reporting frameworks in the EU.

The final draft ITS have been submitted to the EU Commission for adoption. The provisions on the disclosures on TLAC apply immediately after the adoption and entry into force of the ITS. The provisions on disclosures on MREL apply from 1 January 2024 at the earliest. The first reference date for reporting in accordance with the ITS is the 30 June 2021 (reporting framework 3.0) both for MREL and TLAC.

## **EBA consults on revised internal governance guidelines in response to CRD5 and IFD**

The EBA has launched a [public consultation](#) on proposed revisions to its guidelines on internal governance under Directive 2013/36/EU.

The draft changes are intended to address amendments introduced by the fifth Capital Requirements Directive (CRD5) and the Investment Firms Directive (IFD) in relation to credit institutions' sound and effective governance arrangements.

Comments are due by 31 October 2020.

## **Basel Committee consults on principles for operational risk and resilience**

The Basel Committee on Banking Supervision has published for consultation proposed [principles](#) for operational resilience (POR) and proposed [amendments](#) to its existing principles for the sound management of operational risk (PSMOR). The new and revised principles are intended to complement existing guidance and practices and to ensure banks are able to absorb shocks from operational risks arising from, among other things, cyber incidents, technology failures and pandemics.

The draft POR contains principles for governance, operational risk management, business continuity planning and testing, the mapping of interconnections and interdependencies, third-party dependency management, incident management and resilient cyber security, and information and communication technologies (ICT).

The Basel Committee is proposing to amend its PSMOR to streamline the Committee's overall approach to improving banks' operational resilience, align the PSMOR with the recently finalised Basel III operational risk framework,

update guidance in the areas of change management and ICT, and improve the overall clarity of the principles.

Comments are due by 6 November 2020.

## **FCA consults on proposals to improve open-ended property fund structures**

The Financial Conduct Authority (FCA) has issued a [consultation paper](#) (CP20/15) setting out proposed rules requiring investors in open-ended property funds to give notice before their investment is redeemed.

The FCA authorises a number of UK daily dealing property funds, open-ended funds that offer investors the option to deposit and withdraw funds each working day. The terms for dealing in units of some property funds are not aligned with the time it takes to buy or sell the properties the funds invest in, creating a liquidity mismatch.

CP20/15 sets out the FCA's proposed approach to address this structural mismatch by requiring investors to give notice before their investment is redeemed. The FCA estimates that the introduction of notice periods could potentially deliver a material increase in returns to property fund investors, as fund managers could invest more assets in property and reduce cash balances held by managers to manage the risk of investors redeeming their investments at any time.

The proposed approach is only directly relevant to UK authorised property funds that are non-Undertakings for Collective Investment in Transferable Securities (non-UCITS) retail schemes (NURS), although other funds that invest in illiquid assets may face similar structural issues.

Comments to the consultation are due by 3 November 2020.

## **CRD5: FCA consults on updating dual-regulated firms remuneration code**

The FCA has published a [consultation paper](#) (CP20/14) setting out proposals to amend its 'Dual-regulated firms Remuneration Code' (SYSC 19D) and relevant non-Handbook guidance in order to reflect CRD5. The proposals are intended to ensure that the FCA's remuneration rules and guidance for dual-regulated firms remain largely consistent with the Prudential Regulation Authority's approach and that they will support the FCA's conduct-based objectives. The consultation paper also includes proposals intended to ensure that the amended remuneration requirements continue to work effectively at the end of the transition period following the UK's exit from the EU.

Comments are due by 30 September 2020.

## **German Bank Separation Act: BaFin publishes interpretative guidance**

The German Federal Financial Supervisory Authority (BaFin) has published an [updated version](#) of the interpretative guidance on Article 2 of the German Act on Ringfencing and Recovery and Resolution Planning for Credit Institutions and Financial Groups, which is also known as the Bank Separation Act. The updated version replaces the previous version of the interpretative guidance, which was published on 14 December 2016.

## **Bank of Italy consults on proposed amendments to its regulation on collective asset management**

The Bank of Italy has published a consultation document proposing a set of [amendments](#) to its Regulation of 19 January 2015 (as amended) on collective asset management.

Amongst other things, the proposed changes cover:

- modalities that managers shall follow to suspend, in exceptional market circumstances, investors' redemption rights; and
- a reorganisation of certain investment limits applicable to Italian closed-end AIFs.

The new regime will simplify the rules applicable to Italian closed-end AIFs in order to remove some potential obstacles to their use and strengthen their role as a financing channel for the real economy. These provisions will eliminate the obligation for Italian managers to invest in their AIFs amounts equal to at least 2% of the total initial net value of the relevant AIF and raise the concentration limit for investments in loans to the same counterparty applicable to Italian closed-end non-reserved AIFs (from 10 to 20% of net assets), while removing this limit for Italian closed-end reserved AIFs.

Comments are due by the end of September 2020.

## **Insurance Distribution Directive: Consob publishes new regulatory provisions**

The Commissione Nazionale per le Società e la Borsa (Consob) has adopted its [Resolution](#) no. 21466 of 29 July 2020 amending the Consob Intermediaries Regulation. The new text, which is intended to transpose the Insurance Distribution Directive (IDD), has been put in place in accordance with the new allocation of powers over entities supervised by Consob and the Italian Institute for the Supervision of Insurance (IVASS), as envisaged by the Italian lawmaker in the European Delegation Law 2016-2017 (Legge di delegazione europea). The new provisions are the result of an extensive discussion between the two authorities aimed at identifying, with reference to their supervised subjects, rules of conduct as uniform as possible in the distribution of insurance-based investment products (IBIPs), regardless of the distribution channel used. Specifically, the amendments concern Book IX of the Consob Intermediaries Regulation and rules of conduct and information obligations to be observed by the intermediaries supervised by Consob (including banks and investment firms) in the distribution of IBIPs.

The provision will enter into force on 31 March 2021.

## **Shareholder Rights Directive 2: Legislative Decree no. 84 of July 2020 published**

[Legislative Decree](#) no. 84 of 14 July 2020 has been published in the Italian Official Gazette (no. 190 of 30 July 2020). The Legislative Decree is intended to harmonise internal regulations with the Shareholder Rights Directive 2 (SHRD 2) encouraging (i) long-term shareholder commitment and (ii) the regulation of corporate governance systems in listed companies, through the implementation of Article 7 of Law no. 117 of 4 October 2019 (European Delegation Law 2018) (Legge di delegazione europea 2018).

Amongst other things, this piece of legislation includes changes to the regulation of the corporate governance systems of insurance companies on remuneration, together with amendments to both the requirements and eligibility criteria for corporate officers, persons performing key functions and capital participants.

Furthermore, the Italian lawmaker has extended the sanctions system for violations of national rules on long-term shareholder commitment to also combat violations of particular obligations by intermediaries. In addition, the maximum pecuniary sanction for specific cases has been increased from EUR 5 million to EUR 10 million.

The Decree will enter into force on 14 August 2020.

## **Shareholder Rights Directive 2: Consob and Bank of Italy consult on identification of shareholders, transmission of information and facilitation of exercise of rights**

Following the adoption of Legislative Decree 49/2019, which transposed SHRD 2 into Italian law, second level regulations to complete the national implementation process have been published for [consultation](#).

In particular, Consob, together with the Bank of Italy, was required to adopt a set of rules on, amongst other things, identification of shareholders, transmission of information and facilitation of the exercise of social rights by shareholders of companies listed on regulated markets.

To this end, Consob and Bank of Italy have launched a public consultation on a set of proposed amendments to the Consob/Bank of Italy post-trading regulation on identification of shareholders, transmission of information and facilitation of the exercise of rights.

The consultation will end on 25 September 2020.

## **Luxembourg bill transposing CRD5 and BRRD2 published**

A [bill of law](#) (No. 7638/00) transposing CRD5 and Directive (EU) 2019/879 (BRRD2) and implementing Regulation (EU) 2019/876 (CRR2) has been lodged with the Luxembourg Parliament.

The bill transposes CRD5 provisions which include, amongst others, new methods for assessing interest rate risks arising from non-trading book activities and new measures strengthening the supervisory framework for holding companies. The bill also introduces a new obligation for third-country banking groups to set up a single intermediate EU parent undertaking established in the EU. The bill further extends the application of the proportionality principle in banking regulation, particularly with regard to remuneration policies, while strengthening the obligations for cooperation and information exchange between prudential authorities and authorities in charge of combating money laundering and terrorist financing.

The bill also transposes BRRD2, which aims to improve the resolution of banks in crisis. To this end, it strengthens the rules on loss-absorption capacity, creating a framework for restructuring that should be less costly for the resolution fund, while extending the protections given to depositors and to other non-subordinated creditors of banks. The bill further proposes new

standards for determining additional own funds requirements that would be more specific to the risks inherent in each institution.

The bill also improves depositor protection by introducing an additional safety net for the Luxembourg deposit guarantee scheme (Fonds de garantie des dépôts Luxembourg).

Finally, the bill makes targeted amendments to other laws, including the Law of 23 December 1998 establishing a financial sector supervisory commission and the Law of 24 March 1989 on the Banque et Caisse d'Epargne de l'Etat, with a view to facilitating, where necessary, the implementation of the crisis management mechanisms provided for by EU directives.

The publication of the bill constitutes the start of the legislative procedure.

## **BRRD2: Spanish Government launches public hearing on transposition plan**

The Spanish Government has launched a public hearing on the transposition plan for BRRD2.

The transposition plan for BRRD2 consists of two regulatory provisions:

- a [preliminary draft law](#) amending Law 41/1999, of 12 November, on payment and securities settlement systems, Royal Decree-Law 16/2011, of 14 October, creating the Deposit Guarantee Fund, Law 11/2015, of 18 June, on the recovery and resolution of credit institutions and investment services companies and the revised text of the Securities Market Law approved by Royal Legislative Decree 4/2015, of 23 October; and
- a [draft Royal Decree](#) amending Royal Decree 2606/1996, of 20 December, on deposit guarantee funds for credit institutions and Royal Decree 1012/2015, of 6 November, implementing Law 11/2015, of 18 June, on the recovery and resolution of credit institutions and investment services companies and amending Royal Decree 2606/1996 of 20 December on deposit guarantee funds for credit institutions.

All entities are required to maintain a minimum of own funds and eligible liabilities capable of supporting losses in the event that the entity becomes nonviable and must be resolved.

The transposition plan also increases the protection of retail customers in the marketing of products susceptible to assuming losses in a resolution process and clarifies the bank resolution protocols to speed up the process.

Finally, changes are made to the bankruptcy procedure for credit institutions to bring it into line with the resolution procedure and to minimise the risk of litigation in the event of a financial institution's resolution.

The public hearing will be open until 21 September 2020.

## **CRD5: Spanish Government launches public hearing on transposition plan**

The Spanish Government has launched a public hearing on the transposition plan for CRD5. The transposition plan for CRD5 consists of three legislative acts:

- a [preliminary draft law](#) amending Royal Legislative Decree 1/2010, of 2 July, which approves the consolidated text of the Spanish Corporates Law,

Law 10/2014, of 26 June, on the regulation, supervision and solvency of credit institutions and Law 22/2015, of 20 July, on auditing;

- a [draft Royal Decree](#) amending Royal Decree 84/2015, of 13 February, implementing Law 10/2014, of 26 June, on the regulation, supervision and solvency of credit institutions; and
- a draft circular amending Circular 2/2016 of the Bank of Spain, of 2 February, to credit institutions on supervision and solvency, which completes the adaptation of Spanish law to Directive 2013/36/EU and Regulation (EU) 575/2013 (the text of the draft circular is not yet available).

CRD5 aims to ensure the solvency of financial institutions and to establish incentives for them not to take excessive risks. To this end, it clarifies the remuneration policy of groups of credit institutions to avoid the overlapping of sectoral regulations, while guaranteeing the solvency of the group and it introduces greater proportionality in the restrictions applicable to variable management remuneration. However, in both cases, the supervisor is empowered to maintain the restrictions on remuneration policy in certain circumstances. The obligation for entities to implement a gender-neutral remuneration policy is also introduced as a governance requirement.

The draft regulation introduces other prudential improvements, so that supervisors can improve the control of the activity of banking holding companies, groups and branches from third countries and the management of interest rate risk.

The public hearing will be open until 21 September.

## **China extends transitional period for Asset Management Guiding Opinions**

Upon approval by the State Council, the People's Bank of China (PBoC), together with other regulatory authorities, has [decided](#) to extend the transitional period of the 'Guiding Opinions on Regulating the Asset Management Business of Financial Institutions' by one year to the end of 2021.

## **FSA creates new permit system so that foreign managers can temporarily operate their business in Japan as a BCP**

The Japanese Financial Services Agency (FSA) has announced a [new permit system](#) for foreign asset managers to temporarily operate their business in Japan as a BCP. The draft of the relevant amendment to the Cabinet Office Ordinance on Definitions under Article 2 of the Financial Instruments and Exchange Act was published in January 2020. Under the new permission system, a foreign investment manager and security broker or investment bank who has difficulty in continuing its business in the foreign country can continue the business temporarily in Japan based on a permission from the FSA. Difficulty may include pandemic, disaster and political unrest. Applications for permission can be made in English. Permission is expected to be granted promptly, within three business days. The temporary operation period is limited to up to three months. If the applicant has a licence to conduct trading business in its jurisdiction, it can apply for this permission for both trading and investment management businesses. PE issues must be resolved separately.

In conjunction with this amendment, the FSA has [clarified](#) the conditions to be categorised as an independent agent regarding foreign asset managers.

Under this clarification, when a foreign general partner or foreign investment manager of an offshore fund enters into a discretionary investment agreement with a domestic investment manager (DIM) licensed in Japan, and the DIM conducts certain investment activities (i.e. portfolio investment), the DIM could be treated as an independent agent of the partners of the offshore fund if it passes all of the following tests:

- detailed instruction test;
- shared officers test;
- remuneration test; and
- diversification capacity test.

### **FSC announces launch of financial regulatory sandbox website and renewal of fintech information portal**

The Financial Services Commission (FSC) has [announced](#) the launch of a financial regulatory sandbox website and the renewal of the fintech information portal.

The newly launched financial regulatory sandbox website is intended to integrate diverse information dispersed across different institutions to provide a one-stop support service for innovative firms. On the website, fintech businesses and financial companies can access information regarding the sandbox program, application process, consulting and financing support, B2B cooperation opportunities and past success stories.

The reorganised fintech information portal has been arranged mainly into the following service topics:

- investment platform which provides fintechs with a venture capital matching service;
- overseas expansion platform that supports fintechs to enter overseas markets with relevant information and consulting;
- financial innovation platform for improving efficiency and convenience in providing support to fintechs through offering a one-stop application system for all support programs;
- education platform to foster more experts in fintechs through up-to-date educational and training programs; and
- expo platform to support continuous operation of the Korea's annual fintech expo.

### **FSC announces plans to improve rules on retail structured products**

The FSC has [announced](#) its plans to improve the rules on retail structured products by strengthening securities firms' preparedness for market volatility, encouraging a reduction in the size of issuances and diversified investment for hedge assets, and bolstering investor protection measures.

In particular, the key measures under the plan are intended to:

- improve soundness and liquidity rules for securities firms by bolstering internal risk management and strengthening regulations on currency liquidity ratio for all securities firms issuing structured products;



- prevent the spread of systemic risks by strengthening leverage ratio rules, as well as introducing rules on diversifying hedge assets to help resolve the problem of currency mismatch between underlying assets and hedging assets and that of concentration toward debt issued by credit finance businesses; and
- strengthen investor protection by setting up an integrated information platform to provide relevant information on structured products, establish an exchange-based platform through which investors are able to sell structured products prior to their maturity, as well as improving objectivity in providing pre-subscription information to create a more balanced way of providing information about the yield and loss conditions.

The FSC has indicated that it will promptly carry out revisions to the regulations as there are possibilities of increasing volatility in financial markets. Moreover, the revisions requiring no changes in regulations will be implemented immediately through administrative guidance in August 2020. The FSC has also indicated that it will work to complete regulatory revisions within 2020, although the actual application of certain revisions may be postponed considering their expected effects on market conditions.

### **Australian Government consults on reforms to foreign investment review framework**

The Australian Government has launched a [public consultation](#) on the exposure draft of the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, proposing to amend the Foreign Acquisitions and Takeovers Act 1975 (FATA) to give effect to its June 2020 reforms to Australia's existing foreign investment framework, including measures to address national security risks, strengthen compliance and enforcement powers, and streamline investment in non-sensitive businesses.

The exposure draft Bill includes provisions for the new national security powers – including the call in and the national security last resort power – integrity and technical amendments, and provisions to improve compliance and enforcement.

The Australian Treasury has indicated that the consequential draft amendments to the Foreign Acquisitions and Takeovers Regulation 2015 will be released in two parts – the first, released on 31 July 2020, includes the definition of national security business. The second will include the remainder of the regulatory changes, including the time limit for the call in power, streamlining measures (including investor exemption certificates) and other technical amendments, which will be released separately in September 2020 for consultation.

The Australian Treasury has also indicated that, following the public submission process, it will continue to engage with stakeholders on the implementation of the reforms, including the development of additional guidance. This timeline will allow for the subsequent finalisation and introduction of the exposure draft Bill into the Australian Parliament in the Spring sitting.

Comments on the exposure draft Bill and the definition of national security business are due by 31 August 2020.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **The EU trade process explained**

The EU is the world's largest trading bloc, and its second largest economy (after the USA). By acting as one in the international trade arena, EU Member States hold an enormous voice in this part of the world stage. For businesses seeking to understand or influence international trade law and policy, an understanding of the EU trade policy process is critical.

This briefing discusses the European Union's role in trade policy on behalf of its Member States, the process by which it undertakes different aspects of that policy, and the roles of the various EU institutions.

<https://www.cliffordchance.com/briefings/2020/08/the-eu-trade-process-explained.html>

### **The first amendment to the Japan-ASEAN EPA and why it matters**

On 15 June 2020, Japan notified the member states of the Association of South East Asian Nations (ASEAN) of its formal legal adoption of the First Protocol to amend the Japan-ASEAN Economic Partnership Agreement (JAEPA). Amongst other things, the First Protocol introduces an Investment Chapter into JAEPA, as Article 51 of Chapter 7. The JAEPA Investment Chapter is intended to promote and protect investments between investors from Japan and the ASEAN Member States (Brunei, Cambodia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam). It contains wide-ranging investment protections for investors from these jurisdictions and includes an investor-State dispute settlement (ISDS) mechanism. But the ISDS provisions have a twist – there are various novel features and innovations that show State practice in the area of ISDS is continuing to evolve and that Asian nations, increasingly experienced with ISDS, are at the forefront of these developments.

This briefing discusses the JAEPA Investment Chapter.

<https://www.cliffordchance.com/briefings/2020/08/the-first-amendment-to-the-japan-asean-epa-and-why-it-matters.html>

### **NYDFS announces first enforcement action under Cybersecurity Regulation**

On 22 July, the New York Department of Financial Services charged First American Title Insurance Company with multiple violations of NYDFS's Cybersecurity Regulation, 23 NYCRR 500. This is the Department's first enforcement action since the Regulation took effect on 1 March 2017, signalling that the Regulation definitely has teeth and carries the prospect of severe penalties for those who have not yet taken it seriously. The action thus provides important guidance to NYDFS-supervised entities, particularly given the heightened risk of cybersecurity incidents during the COVID-19 pandemic.

This briefing discusses the action.

<https://www.cliffordchance.com/briefings/2020/07/nydfs-announces-first-enforcement-action-under-cybersecurity-reg.html>

# CLIFFORD CHANCE

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

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 10 Upper Bank Street,  
London, E14 5JJ

© Clifford Chance 2020

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,  
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.