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- **ASIC publishes regulatory guidance on breach reporting**
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- **Recent Clifford Chance briefings: Scottish independence, SEC finds eight firms for deficient cybersecurity practices, and more. Follow this link to the briefings section.**

EMIR: Delegated Regulation specifying conditions for FRANDT status published in Official Journal

Delegated Regulation (EU) 2021/1456 supplementing the European Market Infrastructure Regulation (EMIR) specifying the conditions under which commercial terms for clearing services for over-the-counter (OTC) derivatives are to be considered to be fair, reasonable, non-discriminatory and transparent (FRANDT) has been published in the Official Journal. Under EU rules, certain OTC interest rate derivative contracts must be cleared through central counterparties (CCPs); Regulation (EU) 2019/834 (EMIR REFIT) introduced an obligation on clearing service providers to provide those services under FRANDT commercial terms from 18 June 2021.

Delegated Regulation 2021/1456 entered into force on 9 September 2021 and applies from 9 March 2022.

EU Commission adopts RTS on impracticability of contractual recognition of bail-in

The EU Commission has adopted a Delegated Regulation setting out regulatory technical standards (RTS) on the impracticability of contractual recognition of write-down and conversion powers under the Bank Recovery and Resolution Directive (BRRD).

Dated 8 May 2021 and published 8 September 2021, the Delegated Regulation specifies:

- the conditions under which it would be legally or otherwise impracticable for an institution or entity to include, in the contractual provisions governing a relevant liability, the contractual term for the recognition of bail-in;
- the conditions for the resolution authority to require the inclusion of the contractual term; and
- the reasonable timeframe for the resolution authority to require the inclusion of the contractual term.

If neither the EU Council nor the EU Parliament object to the Delegated Regulation, it will enter into force 20 days after publication in the Official Journal.

PRIIPs Regulation: EU Commission adopts Delegated Regulation on presentation and contents of KIDs

The EU Commission has adopted a Delegated Regulation which amends the RTS set out in Delegated Regulation (EU) 2017/653 on the presentation and contents of the Packaged Retail and Insurance-based Investment Products (PRIIPs) key information document (KID). Under the PRIIPs Regulation, KIDs are provided to private investors when they purchase certain investment products, to ensure they have sufficient information to understand and compare products.

The new regulation introduces amendments to the:

- underpinning methodology and presentation of performance scenarios in KIDs;
- the presentation of costs and the methodology for the calculation of summary cost indicators;
- the presentation and content of information on past performance;
- the presentation of costs by PRIIPs offering a range of options for investment; and
- the alignment of the transitional arrangement for PRIIP manufacturers offering units of funds referred to in Article 32 of the PRIIPs Regulation as underlying investment options with the prolonged transitional arrangement set out in Article 32.

Basel III: EU prudential supervisors and central banks write to EU Commission calling for full, timely and consistent implementation of remaining reforms

The EU's national prudential supervisors and the European Banking Authority (EBA) and the European Central Bank (ECB) have written letters to the EU Commission on the implementation of the Basel III framework.

The bodies have reaffirmed the importance of full, timely and consistent implementation of the remaining Basel III reforms as agreed globally.

The prudential supervisors believe that diluting the framework would not be in the EU's best interests, and that the global financial crisis and the COVID-19 pandemic have demonstrated the interdependencies between economies globally and that it is more important than ever that the EU implements the minimum standards to ensure resilience.

The EBA and ECB have stressed that, while they supported delaying the implementation date in light of the pandemic, the reforms are critically important for addressing shortcomings in the existing framework, with any additional postponement in the EU being detrimental to the public interest. The letter also highlights that continued commitment to international financial standards and cooperation is essential to maintaining the credibility of EU banking regulation and confidence in EU banks.

Both letters particularly stress the need for implementation of the output floor to reduce variability in how banks risk-weight their assets. The EBA has emphasised that implementing the final Basel III reforms is likely to have only modest transitional costs which, it argues, will be greatly outweighed by long-run economic benefits.

IOSCO publishes AI/machine learning guidance for intermediaries and asset managers

The International Organization of Securities Commissions (IOSCO) has published a final report setting out guidance intended to help its members supervise the use of artificial intelligence (AI) and machine learning (ML) by market intermediaries and asset managers.

The report follows a 2020 consultation on draft guidance and is intended to ensure that intermediaries and asset managers are equipped with the following attributes:

- appropriate governance, controls and oversight frameworks;

- staff with adequate knowledge, skills and experience;
- robust, consistent and clearly-defined development and testing processes; and
- appropriate transparency and disclosures to investors, regulators and other relevant stakeholders.

The report also includes annexes describing:

- how regulators are addressing the challenges created by AI and ML; and
- the guidance issued by supranational bodies in this area.

IOSCO publishes statement on credit sensitive rates

The Board of IOSCO has published a statement reiterating the importance of continued transition to robust alternative financial benchmarks to mitigate potential risks arising from the cessation of LIBOR, including USD LIBOR.

IOSCO highlights that alternative financial benchmarks will need to be compliant with the IOSCO Principles on Financial Benchmarks (IOSCO Principles). In light of some alternatives being suggested, notably credit sensitive rates, IOSCO calls for greater attention to Principles 6 and 7.

Regulators are concerned that some of LIBOR's shortcomings may be replicated through the use of credit sensitive rates that lack sufficient underlying transaction volumes. The disproportionality between the low/modest volume of transactions underlying credit sensitive rates and the increasingly higher volumes of activity in markets referencing them, raises concerns about market integrity, conduct risks and financial stability risks. The decline in the underlying activity of some of the credit sensitive rates during stress periods, such as the COVID-19 pandemic, raises additional regulatory concern.

IOSCO suggests that benchmark administrators of credit sensitive rates should consider how their benchmarks would continue to meet Principles 6 and 7 over time if use of that benchmark became widespread. Users of benchmarks should also consider the robustness and reliability of the benchmarks they choose and ensure that they have reliable fallback mechanisms that can be used, should their chosen benchmarks cease or become unrepresentative.

Additionally, IOSCO notes that widespread use of and transition to credit sensitive rates, instead of the US Alternative Reference Rates Committee's (ARRC's) preferred Secured Overnight Financing Rate (SOFR), may pose risks to financial stability.

IOSCO intends to monitor closely how the IOSCO badge is used in compliance assessments of the relevant credit sensitive rates.

Critical Benchmarks (References and Administrators' Liability) Bill receives first reading

The Critical Benchmarks (References and Administrators' Liability) Bill has received its first reading in the House of Lords.

The proposed Bill is intended to support the effective operation of the powers granted to the Financial Conduct Authority (FCA) under the Financial Services Act 2021 to oversee the wind-down of a critical benchmark. In particular, the Bill aims to provide legal certainty as to how contractual references to a critical benchmark should be treated where the FCA exercises powers under the UK

Benchmarks Regulation (BMR) to provide for the continuity of an unrepresentative critical benchmark.

The proposed Bill also grants an immunity to the administrator of a critical benchmark that is designated under Article 23A of the BMR, where the administrator acts in accordance with specific requirements imposed upon it by the FCA.

This follows a consultation launched by HM Treasury in February 2021.

The second reading of the Bill has not yet been scheduled.

Revised draft Markets in Financial Instruments, Benchmarks and Financial Promotions (Amendment) (EU Exit) Regulations 2021 laid for sifting

HM Treasury (HMT) has laid a revised version of the draft Markets in Financial Instruments, Benchmarks and Financial Promotions (Amendment) (EU Exit) Regulations 2021 for sifting.

Among other things, the draft statutory instrument (SI) is intended to address deficiencies in relation to the retained BMR and MiFIR as well as the Financial Promotions Order 2005, and seeks to:

- remove the non-discriminatory access regime for exchange-traded derivatives (ETDs);
- amend two Commission delegated regulations to ensure the efficacy of the regulatory framework for the transparency and comparability of low carbon benchmarks; and
- amend certain exemptions to the financial promotions restriction to ensure that the UK is also included in the definition of relevant markets.

The previous version of the draft SI published in July 2021 was withdrawn to correct typographical errors.

If made as drafted, the revised draft SI would come into force on 18 October 2021.

HMT consults on exclusion of short-term liabilities owed to investment firms from bail-in

HMT has launched a consultation on amending the definition of ‘investment firm’ in section 48D of the Banking Act 2009 to ensure that liabilities with an original maturity of less than seven days owed to PRA-designated and FCA-regulated investment firms with permission to underwrite or deal on own account are exempt from bail-in.

The proposed consequential amendment follows the UK Government’s April 2021 response to HMT’s consultation on the implementation of the Investment Firms Prudential Regime (IFPR) and the remaining Basel III standards in the UK, and its decision to remove FCA-regulated EUR 730,000 initial capital requirement (ICR) firms and additional firms brought into scope of the GBP 750,000 capital requirement from the scope of the UK resolution regime.

The consultation closes on 5 October 2021.

PRA consults on identification of material risk takers under remuneration regime

The Prudential Regulation Authority (PRA) has published a consultation paper (CP18/21), in which it sets out proposed changes to the requirements on the identification of material risk takers (MRTs) for the purposes of the PRA's remuneration regime.

The proposals:

- revoke the onshored Commission Delegated Regulation (EU) No. 604/2014 of 4 March 2014 with regard to PRA-regulated firms, which has now been replaced by the MRT Regulation (Commission Delegated Regulation (EU) 2021/923);
- amend the Remuneration Part of the PRA Rulebook to insert the provisions from the MRT Regulation on the relevant definitions and criteria for identifying MRTs; and
- update to supervisory statement (SS) 2/17 'Remuneration', to reflect the rule changes and the amended process for excluding an employee identified solely based on the quantitative criteria.

The amendments are intended to rationalise the MRT identification regime, remove duplications and consolidate all legislative requirements within the PRA Rulebook.

Comments are due by 8 November 2021. The PRA intends to implement the proposed changes from the first performance year after the publication of the final rules, which, pending the extent and nature of the feedback received, it expects to be in Q4 2021.

PRA publishes statement on remuneration benchmarking and high earners 2020 submissions

The PRA has published a statement providing an update on the submission by firms of remuneration benchmarking and high earners reports for 2020.

The statement notes that, in order to facilitate compliance, the PRA has made available reporting templates REP004 and REP005 on RegData, and, for third country branches that previously passported into the UK, the reporting schedules for REP004 and REP005 have been updated on RegData.

For firms that have not already done so, the PRA expects the reports to be submitted by 30 September 2021.

PRA publishes Dear CEO letter on regulatory reporting

The PRA has published a letter to CEOs setting out thematic findings on the reliability of regulatory reporting following skilled person reviews and the PRA's supervisory work.

The PRA broadly expresses disappointment at finding significant deficiencies in a number of firms' processes for delivering accurate and reliable regulatory returns, and sets out its most material findings covering:

- governance and ownership, including instances where responsibilities were dispersed and delegated too far down the organisation, and poor governance around key regulatory interpretations;
- controls, including deficiencies in the control environment around models and spreadsheets, and unsatisfactory reconciliation disciplines; and

- data and investment, including a lack of strategic investment in regulatory reporting.

The PRA expects all regulatory returns to be reliable and accurate, and for the regulatory reporting process to receive no less rigour than financial reporting.

All banks, designated investment firms and building societies are expected to consider the findings of the letter and any work required to remediate applicable issues.

The PRA intends to follow up with relevant firms on specific findings, and notes that, where individual firms fall short of its expectations, it will consider the full range of supervisory responses and enforcement powers at its disposal.

PRA and FCA issue Dear CEO letter on trade finance activity

The PRA and FCA have issued a Dear CEO letter highlighting their supervisory expectations of firms undertaking trade finance business.

The letter notes the incidence of several high-profile failures of commodity and trade finance firms over the past 18 months, and highlights the inherent risks in trade finance activity due to its global nature, complexity and the large volumes of trade flows. In recent assessments of trade finance firms, the regulators have identified several significant issues relating to credit risk analysis and financial crime controls. They have therefore written to firms to emphasise the following expectations:

- firms should undertake a holistic assessment of financial crime risks associated with trade finance. These assessments should take account of the issues raised in the letter, be clearly documented within the firm's wider financial crime risk assessment, and identify the types of customers or transactions which require enhanced due diligence;
- firms must conduct appropriate credit analysis of all trade finance counterparts prior to formal credit limits being put in place and set out clearly in their policies and procedures when it may be appropriate to conduct due diligence on other parties;
- firms should establish a structured process for assessing risks and red flags, and should consider carefully the need for further analysis before approving individual transactions; and
- firms should seek formal confirmation regarding payment mechanics, including acknowledgement from end-buyers, when they represent the primary source of repayment, that the amount due is payable to the financing firm and not the borrower, and confirmation that the firm is explicitly identified as a loss payee under credit insurance arrangements.

BaFin issues two collective administrative acts on reporting obligations of pension funds

The German Federal Financial Supervisory Authority (BaFin) has issued two collective administrative acts (Sammelverfügung) on reporting obligations.

The 'Collective administrative act of 28 July 2021 relating to the reporting obligations of insurance undertakings on their capital investments' is addressed to pension schemes (Pensionskassen) and small insurance undertakings under BaFin's supervision and will replace the collective administrative act of 21 June 2011. Amongst other things, it contains instructions on the mandatory reports on the investments, book and time values and hidden reserves and burdens.

The 'Collective administrative act of 29 July 2021 relating to the reporting obligations of pension funds on their capital investments' is addressed to pension funds and, for the first time, creates an obligation to report on their investments and coverage of technical liabilities.

Addressees are required to comply with the new reporting obligations as of 31 December 2021.

SFC to introduce questionnaire on asset management activities regarding private funds and managed accounts

The Securities and Futures Commission (SFC) has issued a circular to announce that it will introduce a questionnaire for selected licensed corporations to gain a better insight into asset management activities relating to private funds (other than hedge funds) and managed accounts.

The questionnaire is intended to collect data and information about the business activities of non-hedge fund managers, the types of private funds and managed accounts they manage and their sizes, investments, types of investors, leverage and risk management. The information will help the SFC identify industry trends and risks in the private funds and managed accounts sector.

The questionnaire will cover the period from 1 October 2020 to 30 September 2021. The SFC intends to send the questionnaire and guidance notes to selected licensed corporations in late September 2021, for completion by 1 November 2021.

Australian Government consults on review of insolvent trading safe harbour

The Australian Government has launched a public consultation on the review of the insolvent trading safe harbour provisions which were established under the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017. Amongst other things, the amendments introduced a safe harbour for company directors from personal liability for insolvent trading if the company is undertaking a restructure.

In its 2021-22 Budget, the Government announced that it would commence an independent review into the insolvent trading safe harbour, to ensure that the safe harbour provisions remain fit for purpose and its benefits can extend to as many businesses as possible. To support this commitment, an independent panel has been appointed to undertake the review.

The review is intended to assess whether the safe harbour provisions are achieving their goals, including giving financially distressed but viable companies more 'breathing space' to restructure their affairs. In particular, it will examine and report on the impact of the availability of the safe harbour provisions on:

- the conduct of directors, including decisions to seek advice about the company's financial position or to undertake a corporate restructure or turnaround plan outside of a formal insolvency process;
- the conduct of directors of small and medium-sized enterprises and any particular issues experienced by these directors when engaging with financial distress;

- the interests of creditors and employees of those companies, including benefits gained under a successfully implemented restructure or turnaround plan or in formal insolvency processes;
- the effectiveness of the underlying prohibition on insolvent trading and associated penalties; and
- the role of advisers under these provisions.

The review panel will submit a written report to the Government detailing its findings within three months of the review being announced to be tabled in the Australian Parliament as required by section 588HA(4) of the Corporations Act 2001.

Comments on the consultation are due by 1 October 2021.

ASIC publishes results of survey regarding superannuation trustee preparedness for new internal dispute resolution obligations

The Australian Securities and Investments Commission (ASIC) has published the results of its voluntary survey (conducted between April and May 2021) of registrable superannuation entity licensees (trustees) on their preparedness for the new enforceable internal dispute resolution (IDR) requirements set out in Regulatory Guide 271: Internal dispute resolution (RG 271). RG 271 establishes new standards and requirements for how all financial firms, including trustees, will need to deal with consumer complaints from 5 October 2021 onwards.

ASIC found that many trustees in the survey are taking significant steps to uplift their handling of consumer complaints in the lead up to the new requirements. However, it has identified some important areas requiring additional effort:

- attention to governance arrangements regarding superannuation fund's IDR processes;
- application of the expanded definition of 'complaint' under the regulatory guide RG 271;
- implementation of the new maximum timeframes for IDR responses;
- identification, ownership and reporting of systemic issues; and
- data capture and integration.

ASIC encourages all trustees to assess their preparedness for the regulatory guide RG 271 in light of the survey findings. ASIC has indicated that, from 5 October 2021, key parts of the IDR requirements will be enforceable, and it will take a reasonable approach in the early stages provided trustees are using their best efforts to comply.

ASIC publishes regulatory guidance on breach reporting

ASIC has published regulatory guidance to help credit and Australian Financial Services (AFS) licensees to meet new breach reporting obligations. The new breach reporting obligations implement Recommendations 1.6, 2.8, 2.9 and 7.2 of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, and are set out in Schedule 11 of the Financial Sector Reform (Hayne Royal Commission Response) Act 2020.

Set to commence on 1 October 2021, the new reporting obligations are intended to address long-standing concerns about breach reporting by making the reporting consistent, clearer and timely across the industry. The new obligations are also intended to allow ASIC to better identify and swiftly address systemic problems, with greater transparency for consumers and firms with the publication of breach reporting data by ASIC from late 2022.

Under the new reporting obligations, AFS licensees will be required to report breaches that they discover after 1 October 2021, even if the breach occurred before that date. However, credit licensees will not be required to report breaches that occurred before 1 October even when identified after 1 October 2021.

ASIC has also published an information sheet 'INFO 259: Complying with the notify, investigate and remediate obligations' which sets out actions that must be taken by licensees to notify affected customers of a breach of the law, investigate the breach and remediate impacted customers. The information sheet implements a new obligation that applies to licensees of financial advisers and mortgage brokers in certain situations. These obligations will also be applicable from 1 October 2021.

ASIC has indicated that it will take a reasonable approach in the initial stages of these new obligations provided industry participants are using their best efforts to comply.

The guidance on breach reporting and the information sheet follow the responses to the feedback ASIC received on its April 2021 consultation on breach reporting and related obligations.

ASIC provides update on enforcement work

ASIC has published a report to provide an update on its enforcement work during the six-month period from 1 January to 30 June 2021.

Between January and June 2021, ASIC recorded the following enforcement outcomes:

- AUD 29.6 million in civil penalties imposed by the courts;
- 133 people or companies prosecuted for strict liability offences;
- 70 people or entities removed or restricted from providing financial services or credit;
- 19 people disqualified or removed as directors of companies;
- three infringement notices issued; and
- one court enforceable undertaking accepted by ASIC to ensure remediation of affected consumers.

The report also shows that ASIC commenced 12 civil penalty proceedings during the period and started court action targeting misconduct in insurance, superannuation, markets, auditing and credit.

RECENT CLIFFORD CHANCE BRIEFINGS

Scotland the brave? An overview of the impact of Scottish independence on business

Over the summer, we published a series of briefings looking at Scottish independence and the legal issues for business that might follow a second referendum. We have also published an overview examining how Scotland might achieve independence; the effect of independence on Scotland's international status, laws, people and companies; what currency Scotland might use; the implications for tax, pensions and financial services; and the consequences if Scotland were to join the EU.

https://www.cliffordchance.com/briefings/2021/07/scotland-the-brave--an-overview-of-the-impact-of-scottish-indepe.html

New CNMV criteria on the provision of investment services in Spain by third-country firms without the establishment of a branch

This briefing summarises the latest communication from the Comisión Nacional del Mercado de Valores (CNMV) on the legal regime applicable to third-country firms that wish to provide investment services in Spain without establishing a branch on Spanish territory.

https://www.cliffordchance.com/briefings/2021/09/-new-cnmv-criteria-on-the-provision-of-investment-services-in-sp.html

SEC fines eight firms for deficient cybersecurity practices, issues warning about importance of robust policies and procedures and accurate disclosures

In a strong statement about the importance of cybersecurity controls, on 31 August 2021, the Securities and Exchange Commission announced fines against eight registered investment advisers and broker-dealers for deficient cybersecurity practices that led to breaches of personal information of thousands of clients and customers. The charges come just days after the agency announced a USD 1 million fine against a London-based publisher for improper disclosures relating to a 2018 cybersecurity breach, a clear indication that the Commission will continue its focus on ensuring registered entities have adequate measures in place to protect the personal data of their clients and customers. Emphasizing that the Commission expects more than just policies that appear appropriate on paper, Cyber Unit Chief Kristina Littman warned that it was 'not enough to write a policy' if those policies aren't fully implemented. Notably, each charge highlighted the failure to require multi-factor authentication for email accounts of independent contractors with access to client and customer data – a strong signal to the industry to implement these security measures.

This briefing discusses the fines.

https://www.cliffordchance.com/briefings/2021/09/sec-fines-eight-firms-for-deficient-cybersecurity-practices--iss.html

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