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fund managers and REIT managers under Securities and Futures Act

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Capital Markets Union: EU Commission publishes proposal to simplify settlement rules under CSDR

The EU Commission has published a proposal to amend the Central Securities Depositories Regulation (CSDR) to enhance the efficiency of the EU settlement's markets while safeguarding financial stability.

The proposal is intended to reduce compliance costs and regulatory burdens for central securities depositories (CSDs), facilitate their ability to offer a broader range of services cross-border and improve their cross-border supervision. The proposal involves:

- simplifying the passport regime for CSDs so that they can operate across the EU with one single licence by removing costly and duplicative procedures;
- requiring the establishment of colleges for certain CSDs to increase consistent and convergent supervision;
- adjusting the conditions under which CSDs can access banking services, enabling them to offer settlement services for a broader range of currencies and offering businesses the opportunity to obtain financing from a larger pool of investors, including cross-border;
- amending certain elements of the settlement discipline regime and changing the process under which mandatory buy-ins could become applicable and certain technical aspects of the settlement discipline regime to make it more effective and proportionate; and
- ensuring that supervisors have better information about the activities of third-country CSDs in the EU.

The proposal will now be submitted to the EU Parliament and the Council for their consideration and adoption.

Taxonomy Regulation: EU Commission adopts Complementary Climate Delegated Act on nuclear and gas activities

The EU Commission has adopted a Delegated Regulation amending the Taxonomy Climate Delegated Act ((EU) 2021/2139) as regards nuclear energy and natural gas economic activities and the Taxonomy Disclosures Delegated Act ((EU) 2021/2178) as regards specific public disclosures for those economic activities (the Taxonomy Complementary Climate Delegated Act).

Among other things, the Commission notes that the approach of the Complementary Climate Delegated Act is consistent with the approach of the Taxonomy Climate Delegated Act in reflecting the fact that all economic

sectors will need to adapt to the adverse impacts of climate change, and that the Taxonomy Regulation also covers economic activities that are clearly not climate neutral or renewable but that could, under strict conditions and for a limited time, enable the transition towards a sustainable energy sector.

The Delegated Regulation will now be scrutinised by the EU Council and Parliament.

CRR: EU Commission adopts RTS on measuring indirect exposures in derivatives contracts

The EU Commission has adopted regulatory technical standards (RTS) under the Capital Requirements Regulation (CRR) specifying the measurement methods for indirect exposures arising from derivative and credit derivative contracts for institutions to correctly identify and limit their large exposures.

The RTS specify how institutions should determine the indirect exposures to a client arising from derivatives listed in Annex II of the CRR and credit derivatives contracts where the contract was not directly entered into with a client but the underlying debt or equity instrument was issued by the client. For large exposures purposes, an institution shall calculate the exposures to a client or group of connected clients by adding the direct and indirect exposures in the trading book and in the non-trading book.

The RTS are intended to build upon the Basel large exposures (LEX) standards to promote consistency with market risk rules for the calculation of exposures from (credit) derivatives.

The RTS will enter into force on the twentieth day following their publication in the Official Journal.

Investment firms: EU Commission adopts RTS for public disclosure of investment policy

The EU Commission has adopted a Delegated Regulation setting out RTS for the public disclosure of investment policy by investment firms under the Investment Firms Regulation (IFR).

The RTS specify uniform formats and associated instructions for the disclosure of:

- information on the proportion of voting rights attached to shares held directly or indirectly by the investment firm;
- information on their voting behaviour;
- an explanation of votes and the ratio of proposals put forward and approved;
- information on the use of proxy advisor firms; and
- information on voting guidelines.

The disclosure requirement applies to investment firms other than small and non-interconnected investment firms, and the information is required to be published on an annual basis along with financial statements.

The Delegated Regulation will enter into force on the twentieth day following its publication in the Official Journal.

EU Commission adopts Delegated Regulation on PRIIPs KIDs amendments

The EU Commission has adopted a Delegated Regulation making legislative amendments concerning the use of key information documents (KIDs) under the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation.

Delegated Regulation (EU) 2021/2268 amended PRIIPs RTS set out in Delegated Regulation (EU) 2017/653 in relation to, among other things, the presentation and contents of KIDs, including methodologies for the calculation and presentation of risks, rewards and costs. It entered into force on 9 January 2022, with the new requirements set to apply from 1 July 2022.

The new Delegated Regulation extends the transitional arrangements under Regulation (EU) 2021/2268 that are consistent with the extended transitional arrangements in Article 32 of the PRIIPs Regulation to allow PRIIPs manufacturers that offer investment funds as the only underlying investment options, or alongside other investment options, to continue using, for the purposes of producing PRIIPs KIDs, key investor information documents produced in accordance with Articles 78 to 81 of the UCITS Directive until 31 December 2022. The Delegated Regulation also extends the application date of Delegated Regulation (EU) 2021/2268 from 1 July 2022 to 1 January 2023.

The Delegated Regulation will enter into force on the twentieth day following its publication in the Official Journal.

CRR: RTS on internal ratings based approach assessment methodologies published in Official Journal

Commission Delegated Regulation (EU) 2022/439 setting out RTS on the specification of the assessment methodology competent authorities are to follow when assessing the compliance of credit institutions and investment firms with the requirements of the Internal Ratings Based Approach under the CRR has been published in the Official Journal.

The Delegated Regulation will enter into force on 7 April 2022.

Digital finance: ECON Committee adopts position on proposed regulation on markets in cryptoassets

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has adopted its negotiating position on the proposed regulation on markets in cryptoassets (MiCA).

Key provisions of the position include:

- requiring the EU Commission to develop a legislative proposal to include any cryptoasset mining activities that contribute substantially to climate change under the EU taxonomy by 1 January 2025; and
- granting the European Securities and Markets Authority (ESMA) supervisory responsibility over the issuance of asset-referenced tokens and the European Banking Authority (EBA) responsibility over electronic money tokens.

The EU Council adopted its negotiating position on 24 November 2021. Once a provisional political agreement is found between their negotiators, both institutions will formally adopt the regulation.

ESAs issue warning to consumers on risk of cryptoassets

The Joint Committee of the European Supervisory Authorities (ESAs) has issued a warning to consumers on the risks posed by cryptoassets. The ESAs note that there is growing consumer activity and interest in cryptoassets, including virtual currencies, non-fungible tokens (NFTs), crypto-derivatives, and decentralised finance (DeFi) applications. The ESAs are concerned that an increasing number of consumers are buying these assets with the expectation that they will earn a good return without realising the risks involved.

In particular, they wish to warn consumers that:

- many cryptoassets are subject to sudden and extreme price movements;
- cryptoassets and related products may be aggressively marketed with unclear, incomplete or misleading information;
- the majority of cryptoassets and related services are unregulated in the EU, meaning that consumers do not benefit from the rights and protections associated with regulated financial services;
- some products providing exposure to cryptoassets are highly complex and will not be suitable for many consumers;
- there are numerous fake cryptoassets and scams which seek solely to take consumers' money;
- cryptoasset markets are subject to manipulation, high concentrations, low liquidity, and a lack of price transparency; and
- several cryptoasset issuers and service providers have been victims of hacks and other cyberattacks, as well as severe operational issues, resulting in their consumers losing cryptoassets or suffering disruption.

SRB publishes guidance on collateral in resolution

The Single Resolution Board (SRB) has published operational guidance on the identification and mobilisation of collateral in resolution.

The guidance complements the SRB's expectations for banks and sets out operational and legal requirements aimed at:

- ensuring that banks' collateral governance and management is able to support the resolution scheme and contribute to the financial continuity of the group;
- ensuring that banks have capacity to identify collateral, including its amount, location, governing law, currency and overall availability; and
- assessing banks' capacity to mobilise collateral, and in particular non-marketable assets and assets not eligible for ordinary central bank funding.

ICE Benchmark Administration launches ICE Term SOFR

ICE Benchmark Administration (IBA) has launched ICE Term SOFR Reference Rates (ICE Term SOFR) as a benchmark for use in financial instruments by licensees.

This follows the conclusion of a testing period during which IBA made available an indicative, Beta version of ICE Term SOFR Reference Rates.

ICE Term SOFR are designed to measure expected SOFR rates over one, three, six and 12-month tenor periods. The rates are based on a waterfall methodology, which uses eligible input data for specified SOFR-linked interest rate derivative products.

ICE Term SOFR settings are published daily at or around 11:15am Eastern Time on New York business days.

Ring-fencing and proprietary trading review report laid before Parliament

HM Treasury has laid the final report on ring-fencing and proprietary trading before Parliament, on behalf of the Ring-fencing and Proprietary Trading (RFPT) review panel.

HM Treasury appointed an independent panel to review the operation of the legislation related to ring-fencing and to review banks' proprietary trading activities following a statutory report from the Prudential Regulation Authority (PRA) published in September 2020.

In its final report, the RFPT review panel makes a number of recommendations, including:

- changing the scope of the ring-fencing regime to focus on large, complex banks;
- aligning the ring-fencing regime with the resolution regime;
- adjusting the restrictions on servicing relevant financial institutions (RFIs);
- improving the operation of the ring-fencing regime through technical amendments;
- removing the blanket geographical restrictions from legislation that prevent ring-fenced bodies (RFBs) from establishing operations or servicing customers outside of the EEA;
- reviewing the excluded activities under the ring-fencing regime;
- ensuring that sufficient plans are in place as part of the Bank of England's contingency planning to provide liquidity to non-ring-fenced bodies (NRFBs) in a stress scenario;
- monitoring risks from proprietary trading activities undertaken by banks in the UK; and
- monitoring and mitigating potential risks emanating from proprietary trading activities undertaken in the non-bank sector.

Regarding the panel's recommendation to introduce a new power for authorities to remove banks from the ring-fencing regime where they are judged as being resolvable, the panel considers it imperative that the practicalities of this power should be reviewed by HM Treasury as soon as practicable, to ensure risks to too-big-to-fail are addressed.

HM Treasury publishes money laundering notice on high risk third countries

HM Treasury has published an advisory notice regarding the risks posed by jurisdictions with unsatisfactory money laundering and terrorist financing controls.

The notice sets out which jurisdictions will be included in forthcoming amendment to Schedule 3ZA of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. The list replicates those countries identified as high risk or under increased monitoring by the Financial Action Task Force (FATF) in statements published on 4 March 2022.

PRA publishes occasional consultation paper on minor amendments to its rules and policies

The PRA has published an occasional consultation paper (CP3/22) setting out minor amendments to its Rulebook, technical standards (UKTS), supervisory statements (SS) and legacy SS, and a statement of policy (SoP). The proposed changes include:

- minor updates to the PRA's approach to publishing Solvency II technical information;
- minor amendments to SS 45/15 to address an inconsistency in relation to the leverage ratio framework;
- consequential amendments relating to CRR rules;
- deletion of non-relevant policy material from various SS, Legacy SS and a SoP;
- consequential amendments to the PRA Rulebook and UKTS arising from the introduction of the Investment Firms Prudential Regime (IFPR);
- amendments to clarify elements of the Pillar 3 Liquidity disclosure template and instructions; and
- the publications of a CRR Rule Administration Instrument.

Comments are due by 28 July 2022.

BaFin revokes general decree on capital requirements for interest rate risks in banking book

The German Federal Financial Supervisory Authority (BaFin) has issued a general decree (Allgemeinverfügung) revoking its 2016 general decree on capital requirements for interest rate risks in the banking book.

The revoked general decree set out general requirements for institutions to hold own funds for interest rate risks in the banking book. That general decree is now no longer necessary, as BaFin has in the meantime determined an individual assessment and requirement to hold own funds for all institutions by way of its Supervisory Review and Evaluation Process.

BaFin updates FAQs on MiFID2 rules of conduct

BaFin has updated its FAQs on the MiFID2 rules of conduct set out in sections 63 *et seq*. of the German Securities Trading Act (Wertpapierhandelsgesetz) by adding an additional FAQ.

In the additional FAQ, BaFin sets out that (and to what extent) the ex-ante disclosure of information on costs and charges pursuant to section 63 para 7 WpHG in conjunction with Article 50 of Commission Delegated Regulation (EU) 2017/565 is subject to the recording obligation under section 83 para 1 WpHG.

Swiss Federal Council proposes new tool to strengthen financial sector stability

The Swiss Federal Council is planning to expand its toolkit to strengthen the stability of the financial sector. At its meeting on 11 March 2022, it defined key parameters for a proposed public liquidity backstop, which would allow the Confederation and the Swiss National Bank (SNB) to bolster the liquidity of a systemically important bank that is in the process of resolution.

The public liquidity backstop is designed to provide rapid and subsidiary liquidity to a systemically important bank domiciled in Switzerland in the event that this should be necessary for successful resolution. The public liquidity backstop is intended to ensure existing or new market participants' willingness to maintain or engage in business relations with the affected bank. Its existence therefore has a preventive effect, before liquidity assistance is even needed. The Federal Council has emphasised that the proposed tool should not be confused with a state bailout of a systemically important bank.

Liquidity assistance for a systemically important bank would be provided by the SNB in the form of a state-guaranteed loan. Moreover, the backstop should have privileged creditor status in bankruptcy, in order to avoid potential losses for the Confederation, and should be predicated on a loss-recovery and sanctioning mechanism.

The Federal Council has instructed the Federal Department of Finance to prepare a consultation draft by mid-2023.

AIFs: changes to conditions of participation in reserved AIFs published in Italian Official Gazette

The Decree of the Ministry of Economy and Finance No. 19, of 13 January 2022, has been published in the Official Gazette No. 62 of 15 March 2022. The Decree amends Decree No. 30 of 5 March 2015, implementing article 39 of Legislative Decree No. 58 of 24 February 1998 (TUF), as regards the determination of the general criteria with which Italian Undertakings for Collective Investment in Savings (OICR) must comply.

The amendments are aimed at modifying the entry thresholds for reserved Italian AIFs.

In particular, the category of 'semi-professional investors' – in addition to non-professional investors committing to invest at least EUR 500,000 in the AIF – shall now include:

- non-professional investors who subscribe for the AIF in the context of receiving investment advice, for a minimum of EUR 100,000, provided that, upon subscription, the total amount of reserved AIFs in the portfolio of the relevant investor does not exceed 10% of his / her overall financial portfolio. The firm providing advice shall be responsible, based on information provided by the relevant client, for satisfying itself that the above conditions are met; and
- firms providing portfolio management that subscribe for the AIF for the account of their non-professional investor clients, for a minimum of EUR 100,000 (for each client).

The measure comes into force on 30 March 2022.

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New bill on AML/CTF lodged with Luxembourg Parliament

A bill amending: (1) the Code of criminal procedure, (2) the amended law of 7 March 1980 on the organisation of the judiciary, (3) the amended law of 8 August 2000 on international judicial assistance in criminal matters, (4) the amended law of 12 November 2004 on the fight against money laundering and terrorist financing and (5) the amended law of 10 July 2020 on the central fiduciary register (Bill No. 7972) has been lodged with the Luxembourg Parliament.

The bill is intended to ensure consistency of the legal texts governing international mutual assistance in criminal matters and the fight against money laundering and the financing of terrorism (AML/CTF), as well as their compliance with AML/CTF international standards and proliferation of the Financial Action Task Force (FATF), and to rectify a material error in the law of 17 December 2021 transposing Directive (EU) 2018/1673, through targeted amendments of various legal provisions.

The main changes proposed by the bill are the following:

- abolishing the possibility of refusing a request for mutual assistance which relates exclusively to tax, customs or exchange offences under Luxembourg law;
- allowing the Financial Intelligence Unit to receive alerts from the associative sector and providing persons who carry out paid or voluntary activities in non-profit organisations with an additional communication channel to fulfil the obligation to inform the judicial or administrative authorities of certain crimes of which they become aware;
- clarifying that the obligation to identify the client and the ultimate beneficial owner is applicable regardless of the professionals' risk assessment, which excludes any risk-based discretion for professionals not to identify the client or the ultimate beneficial owner;
- clarifying that professionals are not obliged to duplicate copies of documents, information and data that are necessary to comply with customer due diligence obligations when they enter into or maintain several business relations, or carry out several occasional transactions, involving the same natural person or legal entity, of which a copy of the necessary documents, information and data has already been collected and kept, provided that the professionals are able to make the documents, data and information in question rapidly available to the authorities;
- allowing supervisory authorities to request their foreign counterpart authorities to carry out an investigation or inspection in the territory of that counterpart authority; and
- clarification of the deadline for trustees and fiduciaries to update the information on beneficial owners that they obtain and maintain, which is set at one month.

The lodging of the bill with the Luxembourg Parliament constitutes the start of the legislative procedure.

MAS revises compliance toolkit for financial institutions other than fund managers and REIT managers under Securities and Futures Act

The Monetary Authority of Singapore (MAS) has published a revised version of the compliance toolkit to guide capital market services (CMS) licensees (other than fund managers and Real Estate Investment Trust (REIT) managers), exempt financial institutions and other exempt entities on the various approval and reporting requirements and timelines under the Securities and Futures Act (SFA) and its subsidiary instruments.

Amongst other things, the compliance toolkit has been revised to provide for new requirements to notify the MAS on:

- a change of name or a change of principal place of business; and
- cross-border arrangements with foreign related corporations or foreign offices, change in particulars to/cessation of cross-border arrangements, and certification by an independent assurance function and information on cross-border arrangements under the Securities and Futures (Exemption for Cross-Border Arrangements) (Foreign Related Corporations) Regulations 2021, and the Securities and Futures (Exemption for Cross-Border Arrangements) (Foreign Offices) Regulations 2021.

US Congress passes legislation to facilitate LIBOR transition for legacy contracts

The US Congress has passed the Consolidated Appropriations Act, 2022, which includes the 'Adjustable Interest Rate (LIBOR) Act.' This federal legislation is intended to address legal uncertainty for outstanding loans, securities, derivatives and other contracts that reference specified tenors of USD LIBOR but do not include appropriate contractual fallback language to replace USD LIBOR when it ceases to be published in June 2023. This legislation is expected to be signed into law by President Biden in the next week.

Once signed by the President, this legislation will provide, by operation of law, a replacement benchmark based on SOFR to be selected by the Board of Governors of the US Federal Reserve System. In addition, this legislation includes an amendment to the US Trust Indenture Act to provide an exception to the requirement for unanimous bondholder approval that would otherwise apply to the amendment of interest rate provisions of certain legacy bonds that reference USD LIBOR.

This federal legislation, once enacted, will supersede the New York LIBOR transition legislation except with respect to legacy contracts that reference 1-week and 2-month USD LIBOR (which are not addressed by the federal legislation).

RECENT CLIFFORD CHANCE BRIEFINGS

Structured debt in a new world

Much has changed since we published Testing the New Foundations back in 2019. Back then, we were mainly focussed on the (then new) EU Securitisation Regulation and how it would form a new foundation for

securitisation markets in Europe. It feels now like we occupy a very different space – albeit a growing and vibrant one – whose worth is recognised increasingly as being an important and positive part of the global financial architecture.

A wide range of factors have contributed to the different world we now inhabit. The COVID-19 pandemic and responses to it, both temporary (like debt moratoria) and permanent (like the Capital Markets Recovery Package in the EU); Brexit finally becoming a reality years after the 2016 vote that approved it, with the multiplicity of consequences that continue to flow from that; the plethora of legislative measures to deal with non-performing loans; the rapidly increasing focus on ESG concerns taking both industry initiative and legislative form. All these have contributed to the feeling of operating within a new world being formed from the remnants of the old. We should also not overlook the impact of smaller, incremental changes. An ESMA Q&A here and a new RTS there, over time, can have a similar effect to a significant regulatory initiative even if it has less dramatic immediate effects.

Indeed, frequent change seems to be one of a very few constants in the world of securitisation. In the UK there is the Future Regulatory Framework exercise that is re-examining the entire system of financial regulation post-Brexit, including the securitisation regulatory framework. In the EU, there have been rumblings of change to the Securitisation Regulation for a little while now, and the Commission's plans in this regard are due to be published in its Securitisation Regulation review report imminently.

This publication discusses the main regulatory and market trends, the forces for change affecting our world, and distils the key lessons needed to help you and your business to navigate the constantly shifting landscape we all find ourselves in.

https://www.cliffordchance.com/briefings/2022/03/structured-debt-in-a-new-world.html

New disclosure rules for foreign owners of UK land

The UK has adopted new rules that will require overseas entities acquiring UK land to disclose their beneficial owners. The new rules will also require the disclosure of beneficial owners by overseas entities that own land in England or Wales that was acquired in the last 20 years. The Economic Crime (Transparency and Enforcement) Act 2022 received Royal Assent on 15 March 2022 after being fast-tracked through the legislative process in response to the situation in Ukraine. Investors in and lenders to UK real estate will quickly need to consider how to comply with the new rules and to address the impact on transactions.

This briefing paper discusses the new rules.

https://www.cliffordchance.com/briefings/2022/03/new-disclosure-rules-for-foreign-owners-of-uk-land.html

SEC proposes expansive new cybersecurity disclosure regulations for public companies

On 9 March 2022, the US Securities and Exchange Commission (SEC) proposed rules that would require public companies to report material cybersecurity incidents within four business days and make periodic disclosures regarding their cybersecurity risk management, strategy, and

governance. If enacted in their current form, these rules would impose substantial new disclosure requirements on many issuers.

This briefing paper discusses the proposed rules.

https://www.cliffordchance.com/briefings/2022/03/sec-proposes-expansive-new-cybersecurity-disclosure-regulations-.html

Looming resurgence of FinCEN's Section 311 authority

On 13 January 2021, the Acting Director of the Financial Crimes Enforcement Network (FinCEN), a bureau within the US Department of the Treasury responsible for developing anti-money laundering requirements for financial institutions, addressed the annual Financial Crimes Enforcement Conference hosted by the American Bankers Association and American Bar association. During his speech, the Acting Director provided a detailed update on current FinCEN initiatives and priorities, including a 'renewed focus' on using FinCEN's special authorities under Section 311 of Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 to protect national security. Roughly three weeks later, the US Congress renewed consideration of expanding FinCEN's authority under Section 311 to facilitate its use generally and to strengthen FinCEN's ability to use it in connection with money laundering threats associated with the use of the digital currencies. Almost two months later, on 9 March 2022, President Biden signed an Executive Order pertaining to digital assets that highlighted the dangers posed by illicit actors able to operate in jurisdictions that had not implemented sufficient AML and terrorist finance controls for virtual currencies, noting that the US Government should use a range of authorities to mitigate against such threats. All of these actions indicate the potential for a broader use of Section 311 authority under the Biden Administration.

This briefing paper discusses FinCEN's renewed focus on using Section 311.

https://www.cliffordchance.com/briefings/2022/03/looming-resurgence-of-fincen-s-section-311-authority.html

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