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Investment firms: RTS on Pillar 2 add-ons under IFD published in OJ

[Commission Delegated Regulation \(EU\) 2023/1668](#) laying down regulatory technical standards (RTS) on Pillar 2 add-ons under the Investment Firms Directive ((EU) 2019/2034) (IFD) has been published in the Official Journal.

The RTS set out a number of indicative qualitative metrics to support competent authorities in the identification, assessment and quantification of material risks and elements of risks not covered or not sufficiently covered by own funds requirements set out in the Investment Firms Regulation (IFR). The proposed metrics seek to reflect the size, complexity of activities and business models of the various investment firms across the EU.

The Delegated Regulation enters into force on 20 September 2023.

FSB consults on effects of G20 financial regulatory reforms on securitisation

The Financial Stability Board (FSB) has [launched](#) a consultation on the effects of G20 financial regulatory reforms on the securitisation markets.

The FSB's evaluation exercise is intended to assess the extent to which the G20 reforms on securitisation implemented to date have achieved their financial stability objectives. The FSB also intends to examine the broader effects of the reforms on the functioning and structure of the securitisation markets and the implications for financing to the real economy.

The FSB is inviting feedback on:

- the extent to which securitisation reforms are achieving their intended objectives, especially the reduction of systemic and moral hazard risks;
- specific securitisation reforms (e.g. changes in bank prudential frameworks, risk retention requirements) which have had the greatest impact on originators, sponsors and investors; and
- the broader effects of these reforms on the functioning and structure of the securitisation markets as well as on financing to the real economy.

Comments are due by 22 September 2023.

The FSB intends to publish a note with its preliminary findings in early 2024, and its final evaluation report around mid-2024.

Explanatory Notes to FSMA 2023 published

The [Explanatory Notes](#) relating to the Financial Services and Markets Act 2023 (FSMA 2023), which received Royal Assent on 29 June 2023, have been published.

The Explanatory Notes set out an overview of FSMA 2023, policy background, legal background, territorial extent and application, commentary on individual provisions, and related documents.

FSMA 2023 implements the outcomes of the UK Government's future regulatory framework (FRF) review and makes other significant changes to the structure and content of UK financial services regulation.

The Explanatory Notes are intended to assist readers of and to help inform debate on FSMA 2023. They do not form part of the Act.

FCA publishes terms of reference for Wider Implications Framework

The Financial Conduct Authority (FCA) has published the [terms of reference](#) for the Wider Implications Framework, incorporating the statutory statement of policy for the cooperation duty under section 415C of the Financial Services and Markets Act 2000 (FSMA 200).

The Wider Implications Framework provides the principal means by which the FCA, the Financial Ombudsman Service (FOS) and the Financial Services Compensation Scheme (FSCS) comply with the duty to cooperate and consult in relation to the exercise of functions. Annex A to the terms of reference sets out the steps that each of these core members intend to take individually to comply with the cooperation duty.

The FCA has also published a [log of live wider implications issues](#) as at March 2023.

FCA publishes Quarterly Consultation No. 41

The FCA has published its latest [quarterly consultation paper](#) (CP23/18) on proposed amendments to the FCA Handbook.

The FCA proposes to make changes to:

- Insurance Conduct of Business sourcebook (ICOBS) 8 Annex 1, to simplify the employee reference number (ERN) matching requirements; and
- Supervision manual (SUP) 12.4.10AR, to clarify its interaction with Mortgage and Home Finance Firms, and Insurance Intermediaries (MIPRU) 3.2.

Comments are due by 9 October 2023.

FCA provides update on wholesale data market study.

The FCA has published a [report](#) containing updates on the progress of its wholesale data market study.

In the report, the FCA proposes not to refer any of the three markets covered by the market study (benchmarks, credit ratings data and market data vendor services) to the Competition and Markets Authority (CMA) at this stage, as it believes it is likely to be best placed to address any harm identified in these markets.

The report highlights emerging issues in these markets and commercial practices that could increase complexity and reduce transparency in pricing and contractual terms.

Comments on the update report are due by 29 September 2023. The FCA intends to publish its final report by 1 March 2024.

MiFIR: FCA issues updates on share and derivatives trading obligations

The FCA has issued updates in relation to the UK's [share trading obligation](#) (STO) and [derivatives trading obligation](#) (DTO) under UK MiFIR.

The updates, which relate to the removal of the STO and amendments to the DTO under the FSMA 2023, include:

- a direction revoking the 22 December 2020 transitional direction for the STO;
- a direction varying the 30 December 2020 transitional direction for the DTO to reflect that the scope of the DTO has been brought in line with the scope of the clearing obligation under UK EMIR; and
- updated statements on the STO and the use of the temporary transitional power (TTP) to modify the DTO, and updated statement of policy on the operation of the MiFID transparency regime.

JMLSG publishes new guidance on cryptoasset transfers

The Joint Money Laundering Steering Group (JMLSG) has published the [final revisions](#) to Sector 22 (Cryptoasset providers and custodian wallet providers) in Part II of its guidance. This includes a new Annex I to Sector 22 relating to cryptoasset transfers. The new guidance relates to the provisions of The Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs) that implement the Travel Rule for cryptoasset transfers in the UK. The new obligations per Regulations 64A-64H came into effect on 1 September 2023.

Decree amending definition of reception and transmission of orders published

A [Decree](#) amending the definition of the investment service of reception and transmission of orders (RTO) set out in Article D.321-1, 1 of the Monetary and Financial Code has been published and will enter into force on 1 September 2023.

The definition has been amended to adapt it to the entry into force of Regulation (EU) 2020/1503 on European crowdfunding service providers for business.

The definition of RTO has been broadened by removing the condition that the person receiving and transmitting an order must be an investment services provider or a third country entity having an equivalent status.

Ordinance adapting French law to provisions of CCP Recovery and Resolution Regulation published

An [ordinance](#) adapting French law to the provisions of the CCP Recovery and Resolution Regulation (CCPRRR) has been published in the Official Journal. The ordinance amends the Monetary and Financial Code to provide:

- that the ACPR is the resolution authority under the CCPRRR and the ACPR's powers in this context;
- the sanctions applicable for non-compliance with the CCPRRR;
- the cooperation framework applicable under the CCPRRR between the ACPR and EU and third countries; and
- derogation provisions (including to corporate law) applicable in the context of the resolution of a CCP, as those are provided in the CCPRRR.

The text entered into force on 1 September 2023.

CSSF publishes 2022 annual report

The Luxembourg financial sector supervisory commission, the Commission de surveillance du secteur financier (CSSF), has published its [annual report](#) for 2022.

The report provides an overview of the CSSF's organisation and priority action areas, including the CSSF's efforts to adapt to a complex, changing environment without compromising its core mission, consumer and investor protection and contribution to financial stability. In this context, the CSSF highlights that the training of its agents and the upgrading of its IT infrastructure are of key importance.

The report also provides an insight into the CSSF's work and activities in relation to the main legal and regulatory developments of 2022 and the CSSF's activities at national and international level, as well as an analysis of the evolution of the different sectors that are subject to its supervision.

The report highlights the main current challenges faced by supervised entities and the CSSF, including in the areas of:

- economy - the report notes that, in order to reduce inflation, the European Central Bank (ECB) has progressively raised interest rates, and after ten years of zero and negative rates, they moved into positive territory as of July 2022;
- Luxembourg financial system - the report notes that the Luxembourg financial system has remained resilient, and despite a higher cost of borrowing, non-performing loans remained at a low level until year end and into 2023. Both the CSSF and the Luxembourg Systemic Risk Committee of which it is a member have followed the impact of the energy crisis and rising interest rates on the banking and investment fund sectors, including residential real estate, corporates and household indebtedness. This enhanced monitoring will continue in 2023;
- climate change - the report stresses that sustainability must be a core value of the Luxembourg financial centre, and the CSSF intends to ensure that the entities under its supervision implement the EU regulatory framework in a timely way. The report further states that the CSSF considers the inclusion, in its risk-based approach supervision, of risks arising from sustainability considerations for the financial sector and is providing guidance on this topic. The implementation of EU rules and guidance by the CSSF in 2021-22 will be supplemented by supervisory action starting in 2023;
- digitalisation of finance - the CSSF intends actively to contribute to and support the European framework, including a proposed regulation on artificial intelligence (AI), the Data Act, the European Data Governance Act and the Digital Services Act package. Its Information Technology Supervisory Team and Innovation Hub are following and accompanying startups and supervised entities in the digital transition and issuing guidance. The CSSF also recognises the need to regulate the activity of crypto-exchanges in a comprehensive and global manner. It states that the principle of 'same services/activities, same risks, same rules and same supervision' should always be applied so as to safeguard market integrity and protect investors;

- financial education - the report highlights that the financial education of children and adults is needed more than ever, with regard to the necessary shift to green finance, as well as the dangers related to some crypto markets; and
- operational resilience - the CSSF is a permanent member of the European Supervisory Authorities' Sub-Committee on Digital Operational Resilience. It is also following the implementation of NIS2 and the eIDAS Regulation, and has started to oversee the first tests under the so-called TIBER framework.

Act amending certain other acts in connection with ensuring development of financial market and protection of investors published

The [Act](#) amending certain other acts aimed at ensuring the development of the financial market and protection of investors has been published in the Journal of Laws.

The Act introduces amendments to numerous acts of law concerning the financial market. These include amendments to the bank outsourcing regime, amendments to the rules on administrative sanctions, and to the regulations concerning investment funds, including with regard to the distribution of EU alternative investment funds (AIFs) to retail investors. There are also certain amendments in the national law in relation to the distributed ledger technology (DLT) pilot regime.

SFC and HKMA publish joint consultation conclusions on proposed amendments to OTC derivative clearing rules

The Securities and Futures Commission (SFC) and the Hong Kong Monetary Authority (HKMA) have published the [conclusions](#) to their March 2023 joint consultation on proposed changes to the types of transactions subject to clearing obligations under the Securities and Futures (OTC Derivative Transactions – Clearing and Record Keeping Obligations and Designation of Central Counterparties) Rules for over-the-counter (OTC) derivatives.

Under the proposal, certain interest rate swap transactions referencing alternative reference rates (ARRs) will be subject to the clearing obligation under specified conditions. At the same time, the regulators will repeal the current requirement to clear certain interest rate swap transactions referencing interbank offered rates (IBORs) which are or will no longer be published or considered representative. This is in line with global interest rate benchmark reforms, particularly the transition from the use of IBORs to ARR.

Having considered the responses, and balancing the need to align with international standards on IBOR reforms as soon as practicable as well as industry requests and a need for operational efficiency, the regulators have indicated that they are inclined to a) implement the changes at a later date, to allow the industry more time to get ready for the proposed clearing obligation changes; and b) align the implementation date with a prescribed day (i.e. seven months after the end of the corresponding calculation period) under the clearing rules to reduce undue operational complexity for any prescribed person that has become newly subject to the clearing obligation after the end of a calculation period.

The amendments are set to be submitted to the Legislative Council for negative vetting. Subject to the legislative process, the amended clearing rules are expected to come into effect no earlier than 1 July 2024.

SFC concludes consultation on risk management guidelines for futures dealing activities

The SFC has published the [conclusions](#) to its November 2022 consultation on proposed risk management guidelines for licensed futures brokers. The guidelines set out a comprehensive risk management framework for futures brokers which covers market risk management, commodity futures trading, client credit risk management, concessionary margining, and risk management over executing or clearing agents. The requirements for funding liquidity risk management, safeguarding client assets, trading in futures markets outside Hong Kong and stress testing are also included.

According to the SFC, the main comments from respondents were related to the practical implications of some prescriptive and quantitative requirements, such as restrictions on granting waivers of margin calls and forced liquidation after two margin call failures, the threshold for identifying client concentration in stress testing and the controls and thresholds for applying concessionary margining. The SFC has replaced some prescriptive rules and quantitative thresholds with more principles-based risk management guidance. The SFC has also sought to present the requirements more clearly in its final guidelines, in addressing comments which stemmed from a misunderstanding of some of the proposed requirements.

The SFC has indicated that futures brokers will have a transitional period of six months to comply with the guidelines, and an additional 12 months to implement system changes for compliance with requirements relating to the automation of client risk limit controls and stress testing.

The HKMA has issued a circular to clarify that the SFC guidelines do not directly apply to registered institutions (RIs). However, RIs which engage in Type 2 regulated activity are expected to refer to the relevant requirements in the guidelines in managing their risks associated with the activity.

The guidelines gazetted on 25 August 2023 will be effective from 25 February 2024.

MAS responds to consultation on enhancing pre- and post-transaction safeguards for retail clients

The Monetary Authority of Singapore (MAS) has published its [responses](#) to the feedback it received to its June 2021 public consultation on proposals to enhance pre- and post-transaction safeguards for retail clients.

The June 2021 consultation followed the MAS' review of the effectiveness of the Balanced Scorecard framework and findings from a mystery shopping exercise to assess the standards of financial advisory (FA) representatives' sales and advisory processes, which revealed weaknesses in the implementation of safeguards for Selected Clients (SCs).

Based on the feedback received, the MAS' key responses are as follows:

- the MAS will proceed with the proposed requirements for FA representatives to check and document whether a client is an SC, and

conduct pre-transaction checks through documentary review and client call-backs. Digital advisers will be exempt from these requirements;

- the MAS will proceed with the proposed requirements for a trusted individual (TI) of at least 21 years of age and who meets other criteria to be present for the entire sales and advisory process, unless the SC does not identify a TI, or is unwilling to be accompanied by a TI. Certain digital advisers that operate will be exempt from these requirements;
- the MAS will proceed with the proposed requirement on the type of information to be covered during the pre-transaction client call-backs performed by FA firms within the specified areas under paragraph 5.4 of the consultation paper, and will also include an additional question for cases where a sale was made to an SC without a TI;
- on the proposal to require FA firms to audio record call-backs to SCs and clients of Selected Representatives (SRs), the MAS will provide further guidance to clarify that call-backs can be done by audio or video format, and that face-to-face meetings are permitted as an alternative to call-backs. Where recording is not possible, there should be certain controls in place to ensure that the interests of clients are safeguarded;
- the MAS will not proceed with the proposal to require call-backs and audio-recording of call-backs, or to provide a recap of the sales and advisory process, for retail clients (beyond SCs and clients of SRs). However, it expects FA firms to have policies and procedures in place to identify higher risk clients and representatives (beyond those required by the MAS) and encourages them to conduct audio-recorded call-backs on such transactions;
- on the proposal to require FA firms to provide a copy of the audio recording to clients, the MAS has clarified that they will not be required to do so on a proactive basis, except on clients' request. This requirement applies as long as a recording is available, regardless of the client's status as an SC or client of an SR;
- on the proposal to set up an independent panel to review all product recommendations made to SCs, the MAS has clarified that instead of a separate independent panel, it will require the Independent Sales Audit (ISA) unit to review product recommendations made to SCs on a post-transaction basis, and will consult on the proposed sampling requirements for SC transactions in a separate consultation paper; and
- the MAS will not proceed with the proposal to require the ISA unit to perform additional sampling and review for transactions involving higher risk clients but will continue to monitor and review the need to do so.

In light of the feedback received, the MAS will extend the transitional period from 6 months, as initially proposed, to a period of 9 months. However, the MAS has encouraged FA firms to consider early implementation of the proposed requirements where possible.

Australian Government consults on expanding consumer data right rules to non-bank lending sector

The Australian Government has [released](#) exposure draft amendments to the Competition and Consumer (Consumer Data Right) Rules 2020 (CDR Rules)

to expand the CDR to the non-bank lending sector, explanatory materials and a draft privacy impact assessment for public consultation.

The exposure draft amendments follow the Australian Treasury's December 2022 public consultation on rolling out the CDR to the non-bank lenders sector, after the sector was designated as subject to the CDR in November 2022. Amongst other things, extending the CDR to this sector is expected to facilitate more informed consumer engagement with both banks and non-bank lenders, leading to improved financial outcomes for individuals and businesses, in addition to an increased availability of data, innovation in financial technology and assistance to consumers to better understand and manage their finances.

The exposure draft amendments also include a new obligation for energy retailers to facilitate access to required product data held by the Australian Energy Regulator in accordance with the data standards.

Responses to the exposure draft are due by 6 October 2023.

RECENT CLIFFORD CHANCE BRIEFINGS

SEC Private Fund Adviser Rules

On 23 August 2023, the US Securities Exchange Commission adopted new rules and amendments under the Investment Advisers Act of 1940, as amended, which impose significant new restrictions and requirements on investment advisers to private funds. The Final PFA Rules represent the most comprehensive set of reforms affecting the private fund industry since the Dodd-Frank Act, and will have meaningful consequences for advisers, their private fund clients and fund investors.

This briefing paper discusses the new rules.

<https://www.cliffordchance.com/briefings/2023/08/sec-private-fund-adviser-rules.html>

Digital Personal Data Protection Act – India's new data protection framework.

The Indian Parliament recently passed the long-awaited Digital Personal Data Protection Act 2023 (the DPDPA) into law. As India's first comprehensive data protection law, the DPDPA will overhaul the existing patchwork of rules on personal data privacy.

The DPDPA applies across sectors to processing of digital personal data within India and has extraterritorial reach in certain circumstances. The DPDPA's provisions are expected to become effective in a phased manner.

Clifford Chance and J. Sagar Associates (JSA) have collaborated to co-author a briefing overviewing the key requirements, restrictions and rights to be aware of in DPDPA and the next steps for in-scope businesses.

<https://www.cliffordchance.com/briefings/2023/08/the-digital-personal-data-protection-act--india-s-new-data-prote.html>

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.

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