

INTERNATIONAL REGULATORY UPDATE 17 – 21 AUGUST 2020

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EBA publishes response to EU Commission AML/CTF action plan

The European Banking Authority (EBA) has published a [response](#) to the EU Commission's Action Plan for an EU-level policy on preventing money laundering and terrorism financing (ML/TF).

In its response, the EBA sets out considerations for policymakers when deciding on the scope and powers of an EU-level supervisor for anti-money laundering and combating the financing of terrorism (AML/CFT).

The EBA's recommendations include that the Commission take the following measures:

- harmonise the EU's legal framework in order to reduce the risk of gaps created by divergent approaches to incorporating EU AML/CFT law into national law;
- combine an ongoing role for national AML/CFT authorities with an EU-level AML/CFT supervisor in a hub-and-spoke approach. This would be intended to build on national AML/CFT authorities' expertise and resources; and
- complement this hub-and-spoke approach with EU-level oversight.

The EBA will provide additional technical input through its forthcoming response to the Commission's separate call for advice in which the EBA is asked to define the scope of application and the enacting terms of a regulation to be adopted in the field of preventing AML/CFT.

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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

AIFMD Review: ESMA publishes letter recommending priority topics

The European Securities and Markets Authority (ESMA) has published a [letter](#) to the EU Commission highlighting areas to be considered during the forthcoming review of the Alternative Investment Fund Managers Directive (AIFMD).

Annex 1 to the letter sets out ESMA's proposed changes to the AIFMD, including:

- greater harmonisation of the UCTIS and AIFMD frameworks, such as in relation to risk and liquidity management requirements and delegation, and aligning UCITS reporting with AIFMD reporting;
- clarifications on the scope of permissible business activities and on the application of rules when providing services, including greater regulatory consistency between AIFMD/UCTIS and MiFID;
- clarifications on the maximum extent of delegation and other forms of outsourcing to ensure adequate substance in the EU, particularly in light of the UK's withdrawal from the EU;
- making additional liquidity management tools available;
- amending the gross method calculation to ensure alignment with the IOSCO framework for assessing leverage in investment funds;
- harmonisation of supervision of cross-border entities, including in relation to cross-border activities and branches;
- clarification of the definition of professional and semi-professional investors;
- a specific framework for loan origination;
- allowing depositaries not to apply the delegation rules to central securities depositories (CSDs) in their capacity as issuer CSDs;
- clarifying that the proportionality principle applies to remuneration requirements;
- clarifying the discretion of Member States to introduce additional national requirements on sub-threshold AIFMs;
- limiting the definition of negligence in relation to external valuer liability to gross negligence;
- amending definitions to clarify the scope of the AIFMD;
- clarifying the notion of reverse solicitation;
- clarification of the rules prohibiting UCITS managers exercising significant influence over investee companies to allow for the possibility that the same managers may manage private equity or other funds;
- allowing increased use of digital communication; and
- reconsideration of the possibility of a depositary passport.

Primary Market Bulletin No. 30: FCA consults on new technical note on prospectus requirements for schemes of arrangement

The Financial Conduct Authority (FCA) has published the latest [edition](#) of its Primary Market Bulletin (PMB). The bulletin sets out recent news and changes to the Knowledge Base and includes:

- a reminder of the importance of the person discharging managerial responsibilities (PDMR) regime under MAR;
- updates on recent changes to the Prospectus Regulation;
- comments on the prospectus requirements for Global Depository Receipts;
- finalised technical notes the FCA consulted on in PMB 24;
- a consultation on a new technical note on prospectus requirements for schemes of arrangement; and
- further updates of the FCA's technical and procedural notes to reflect the EU Prospectus Regulation.

Belgium implements Fifth Anti-Money Laundering Directive

Belgium has transposed Directive (EU) 2018/843 (AMLD5) into its domestic law and the [amended Belgian law](#) came into effect on 15 August 2020. In particular, the implementing law will have the following consequences for the anti-money laundering regime that was previously in force:

- the notion of 'obliged entities' has been expanded to include, among others, (i) service providers providing custody services in relation to virtual currencies, (ii) service providers providing exchange services between virtual currencies and fiat currencies, (iii) fine art or antique furniture brokers and persons involved in 'warehousing' fine art or antique furniture, (iv) major football clubs and (v) sports agents;
- additional rules apply in relation to identification of customers and beneficial owners;
- the verification of the identities of customers and beneficial owners may be performed by electronic means;
- enhanced due diligence measures are more stringent in relation to transactions with high-risk countries;
- additional procedures in relation to reporting of suspicious transactions to the authorities will apply;
- additional penalties and fines for non-compliance have been enacted; and
- powers are given to the Belgian government to enact rules in relation to the new obliged entities which would subject them to a 'fit and proper' test and, in some cases, registration.

CFTC approves proposals to amend margin requirements for swap dealers and major swap participants

The Commodity Futures Trading Commission (CFTC) has [approved](#) two proposals amending certain margin requirements for swap dealers (SDs) and major swap participants (MSPs).

The first proposal would more closely align the CFTC's uncleared swap margin requirements (CFTC Margin Rule) with the Basel Committee on Banking Supervision and the International Organization of Securities Commissions' margin requirements for non-cleared derivatives (BCBS/IOSCO Framework). The proposal would modify the method for determining whether an entity falls within the scope of the initial margin requirements under the CFTC Margin Rule beginning in the last phase of the phased compliance schedule, which is scheduled to begin on 1 September 2021, and the timing for compliance with the initial margin requirements after the end of the phased compliance schedule.

The proposal would also allow SDs and MSPs that are subject to the CFTC Margin Rule (covered swap entities) to use the risk-based model calculation of initial margin of a counterparty that is a CFTC-registered SD or MSP. In such circumstances, the covered swap entity would be able to rely on the calculation of its counterparty to determine the amount of initial margin to be collected from such counterparty and to determine whether the initial margin threshold amount has been exceeded such that documentation concerning the collection, posting, and custody of initial margin would be required.

The second proposal would primarily codify the CFTC Margin Rule to permit the application of separate minimum transfer amounts for initial and variation margin, and the application of a minimum transfer amount of up to USD 50,000 for separately managed accounts.

Both proposed rules have a 30-day comment period following publication in the Federal Register.

RECENT CLIFFORD CHANCE BRIEFINGS

Germany aims to introduce concept of a digital bond

On 11 August 2020 the German Federal Ministry of Finance and the Federal Ministry of Justice and Consumer Protection published a draft law which aims to digitalise corporate financing in the capital markets by introducing the concept of a digital bond which no longer requires the embodiment of the respective claim in a physical certificate. The draft law is not confined to technical innovation but applies existing German property law requirements to a digital value by defining digital bonds as goods under the German Civil Code. Rather than implementing a new regulatory regime for digital bonds, the draft law also confirms that digital bonds qualify as securities and generally fall within the scope of existing regulation.

This briefing summarises the key measures imposed by the draft law.

<https://www.cliffordchance.com/briefings/2020/08/germany-aims-to-introduce-concept-of-a-digital-bond.html>

Privilege in antitrust investigations in Japan – new rules on treatment of attorney-client confidential communications

Attorney-client communications have not historically been privileged under Japanese antitrust law. However, under the new rules and guidelines published by the Japan Fair Trade Commission ('JFTC'), companies may request that the JFTC does not share with their investigation team certain confidential communications between a company and its lawyers in relation to alleged cartel activities. The scope of confidential communication and the procedure are different from those of privilege in the US, UK and EU. Companies should treat confidential communications in the manner required under the new rules, which differ from other jurisdictions.

This briefing discusses the new Japanese rules.

<https://www.cliffordchance.com/briefings/2020/08/privilege-in-antitrust-investigations-in-japan--new-rules-on-tre0.html>

Insider-trading risks for swaps, FX, interest rates, cryptocurrencies traders underscored by recent CFTC settlement

A recent CFTC settlement order underscores the risks posed by commodities insider-trading prosecutions, even where the defendant may have reasonable arguments against a finding of guilt. Indeed, defendants' decision to settle this matter rather than litigate may have reflected their determination that the cost of trial and the risk of an adverse jury verdict were unjustifiably high. Businesses worldwide that trade commodities (which are broadly defined to include swaps, FX, interest rates, cryptocurrencies, energy and more traditional commodities in US derivatives and physical markets) should take note of this result, especially as CFTC now has the authority to prosecute insider trading by virtually all participants in US commodities markets. Given the very high costs associated with even a successful defence of an insider-trading prosecution, businesses should take steps to assess and mitigate any insider trading risks related to their operations to ensure, to the greatest extent possible, that their practices do not come close to the line dividing permissible and insider trading.

This briefing discusses the settlement.

<https://www.cliffordchance.com/briefings/2020/08/Insider-Trading-Risk-for-Swaps-FX-Interest-Rates-Cryptocurrencies-Traders-Underscored-by-Recent-CFTC-Settlement.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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London, E14 5JJ

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