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authorised institutions regarding investment and insurance products

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MAR: ITS on cooperation between authorities published in Official Journal

Commission Implementing Regulation (EU) 2020/1406 laying down implementing technical standards (ITS) with regard to procedures and forms for the exchange of information and cooperation between competent authorities, the European Securities and Markets Authority (ESMA), the EU Commission and other entities under the Market Abuse Regulation (MAR) has been published in the Official Journal.

The ITS lay down the procedures to be followed by ESMA and competent authorities for making, acknowledging, replying to and processing specific and unsolicited requests for cooperation or exchange of information, as well as the relevant forms to be used, which are set out in the annexes to the regulation.

The Regulation enters into force on 27 October 2020.

Coronavirus: EU Commission consults on proposals to prolong and adjust State aid Temporary Framework

The EU Commission has sent to Member States for consultation draft proposals to prolong and adjust the scope of the State aid Temporary Framework, which was adopted on 19 March 2020 to support the economy in the context of the coronavirus outbreak. Under the current terms, the Framework will expire on 31 December 2020, except for recapitalisation measures which may be granted until 30 June 2021. The Commission is proposing to:

- prolong all existing provisions until 30 June 2021;
- allow Member States to contribute to the fixed costs of companies that are not covered by their revenues; and
- adapt the conditions for recapitalisation measures to allow Member States to exit from the equity of enterprises of which they were an existing shareholder prior to the recapitalisation, through an independent valuation.

Member States now have the possibility to comment on the Commission's proposals.

Capital Markets Union: EU Parliament approves new crowdfunding framework

The EU Parliament has voted to adopt the EU Commission's legislative proposals for a regulation and directive to establish a framework aimed at improving the way crowdfunding platforms operate across the EU. The framework sets out common prudential, information and transparency requirements for European crowdfunding service providers (ECSPs), common authorisation and supervision rules for national competent authorities and empowers ESMA to facilitate coordination, mediate disputes and develop relevant technical standards. It covers crowdfunding campaigns of up to EUR 5 million (calculated over a period of twelve months), with larger operations being regulated by MiFID and the Prospectus Regulation.

Among other things, the new framework requires ECSPs to:

- gain authorisation from the NCA of the Member State in which they are established; and
- provide key investment information sheets to investors and to give clients clear information about the financial risks and charges they may incur.

The framework will enter into force one year after its publication in the Official Journal.

Coronavirus: ECON Committee publishes draft reports on proposals to adjust securitisation framework

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has published its draft reports on the EU Commission's legislative proposals for two regulations to adjust the securitisation framework in an effort to assist recovery from the coronavirus pandemic.

Firstly, the EU Commission has proposed a regulation to amend the Securitisation Regulation, which adapts the securitisation framework to cater for on-balance-sheet synthetic securitisation and the securitisation of non-performing exposures (NPEs). In summary, the rapporteur Paul Tang agrees with the intention of the Commission's proposals but argues that banks should not neglect the option of improving their capital position by raising new own capital. Suggested amendments to the proposals include:

- adjusting the definition of NPEs to require the maintenance of a pool containing more than 90% NPEs after the origination;
- establishing a notification process to competent authorities to oblige originators either to show the fulfilment of credit granting criteria or to demonstrate the impossibility of fulfilling these requirements;
- further reducing the complexity of STS synthetic products;
- requiring the European Systemic Risk Board to monitor macroprudential risks associated with synthetic securitisation; and
- calling on the Commission to consider how sustainable securitisation could be stimulated as part of the framework revision.

The EU Commission has also proposed a regulation to amend the Capital Requirements Regulation (CRR) in an effort to make recourse to the securitisation tool more economically viable. The rapporteur Othmar Karas

supports the proposal, particularly the more risk-sensitive prudential treatment for STS on-balance-sheet securitisations, but suggests the following:

- that the treatment of NPE securitisations be refined in line with the findings of the European Banking Authority Opinion 2019/13 and the European Central Bank Opinion 2020/22;
- that the Commission reviews the provisions to implement the final Basel standard on the treatment of NPE securitisations and puts forward a legislative proposal, if appropriate; and
- that the inconsistency between the CRR and the Basel III framework, with regards the eligibility of unfunded credit protection, is addressed.

Benchmarks Regulation: ECON Committee publishes draft report on proposed amendments

The ECON Committee has published its draft report on the EU Commission's proposed amendments to the Benchmarks Regulation regarding the exemption of certain third country foreign exchange benchmarks and the designation of replacement benchmarks for certain benchmarks in cessation.

The rapporteur broadly supports the Commission proposal, but argues that some changes could be made to the text regarding:

- waiving margin and collateral requirements in cases of mandatory replacement of a benchmark;
- updating the list of foreign exchange benchmarks; and
- limiting the intervention power of the EU Commission, including that any financial instruments, contracts or performance measurements which already contain fall back provisions should not fall within the scope of power given to the EU Commission to designate a replacement benchmark.

Benchmarks Regulation: EU Council adopts position on amendments addressing cessation of a critical benchmark

The EU Council has adopted its position on proposed amendments to the Benchmarks Regulation addressing the cessation of a critical benchmark. Currently the Benchmarks Regulation does not address the possibility of cessation of a critical benchmark.

In July 2020 the EU Commission proposed an amendment to the Benchmarks Regulation that would allow the Commission to designate a statutory replacement rate to replace all references to a benchmark whose cessation would result in significant disruption to the functioning of financial markets in the EU.

In its negotiating mandate, the Council:

- takes the view that the Commission's powers should apply to an expanded scope that includes financial contracts and instruments subject to the law of an EU Member State and certain third-country law contracts;
- provides for the possible statutory replacement of benchmarks that do have a fall-back provision for the cessation of a benchmark but where the

application of that clause would challenge financial stability and disrupt the market in a Member State; and

- takes the view that the current rules allowing EU supervised entities to make use of third-country benchmarks should be extended to continue to apply until the end of 2025 to allow for a smooth transition to a list of exempted benchmarks to be drawn up by the Commission.

On the basis of this negotiating mandate the Council Presidency will start negotiations with the EU Parliament once it has adopted its position.

Securitisation Regulation: ESMA publishes guidelines on portability of information between securitisation repositories and updates Q&A

ESMA has published a final report setting out guidelines on portability of information between securitisation repositories (SRs) under the Securitisation Regulation (EU) 2017/2402.

In particular, the guidelines provide clarification regarding:

- the transfer of securitisation information by an SR from which registration has been withdrawn to other SRs; and
- the content of the policies for the orderly transfer of data which an SR has to establish for the transfer of securitisation information to other SRs where requested by a reporting entity or where otherwise necessary.

The guidelines apply from 1 January 2021, except for the guidelines relating to Article 78(9)(c) of the European Market Infrastructure Regulation (EMIR), which apply from 18 June 2021.

In addition, ESMA has updated its questions and answers (Q&A) document on the Securitisation Regulation. The update provides new guidance on how to report certain underlying exposures which benefit from a COVID-19 related debt moratorium or payment holiday.

Money Market Funds: ESMA announces update of validations of instructions for reporting

ESMA has announced an update of the validations of the technical instructions for reporting under the Money Market Funds (MMF) Regulation.

Under Article 37 of the MMF Regulation, MMF managers must submit data to national competent authorities (NCAs), who then transmit the data to ESMA.

Following feedback after the publication of the validation rules, ESMA has added new warning type validations and clarified existing validation rules in order to fix inconsistencies and make the rules easier to understand. The deadline for reporting remains unchanged.

FSB and IMF publish G20 data gaps initiative 2020 progress report

The Financial Stability Board (FSB) and International Monetary Fund (IMF) have published the fifth progress report on the implementation of the second phase of the G20 data gaps initiative (DGI-2). The report will be submitted to the G20 finance ministers and Central Bank governors ahead of their meetings in Washington D.C. in mid-October 2020.

According to the report, the progress made to date by participating economies in providing accurate and timely data under the DGI-2 has proven its value during the COVID-19 pandemic. The bodies believe that policymakers have been able to gain better access to key information to monitor risks in the financial and non-financial sectors as well as to analyse interconnectedness and cross-border spill overs, although further improvement is needed.

The report highlights that:

- the COVID-19 pandemic posed significant challenges to the 2020 DGI work programme, which has been extended by six months to December 2021;
- implementation of DGI-2 has progressed despite COVID-19, with positive developments including enhancements in compilation processes, data sharing arrangements, production and dissemination of additional tables, as well as instrument and sector breakdowns;
- many participating economies support maintaining an organised international collaboration process to continue addressing data needs beyond 2021; and
- COVID-19 has increased policymakers' needs to obtain more granular, relevant, and reliable data and a possible new mandate could help address emerging policy questions.

FSB reports on use of regtech and suptech

The FSB has published a report on the use of supervisory (suptech) and regulatory (regtech) technology by its members and other regulated institutions. Key findings of the report include:

- the increase in availability and granularity of data and the emergence of new infrastructure such as cloud computing and application programming interfaces have opened up new opportunities for suptech and regtech;
- suptech and regtech tools could have important benefits for efficiency, effectiveness, financial stability and could help institutions manage the increased regulatory requirements in place since the 2008 financial crisis;
- suptech could improve oversight, surveillance and analytical capabilities, and generate real-time indicators of risk to support forward-looking, judgement-based supervision and policymaking;
- regtech could improve compliance outcomes, enhance risk management capabilities, and generate new insights into the business for improved decision-making;
- the majority of FSB members surveyed for the report had a suptech, innovation or data strategy in place, with the use of these strategies growing significantly since 2016;
- respondents were predominantly concerned by risks around resourcing, followed by cybersecurity, reputational risk and data quality issues; and
- respondents emphasised the importance of future data standards and effective governance frameworks for suptech and regtech.

The report also includes case studies from FSB members and other institutions, giving practical examples of their use of suptech and regtech tools.

FCA bans sale of crypto-derivates to retail customers

The Financial Conduct Authority (FCA) has banned the sale of derivatives and exchange traded notes (ETNs) that reference certain types of cryptoassets to retail consumers.

The FCA considers these products to be ill-suited for retail consumers due to the harm they pose, their inability to be reliably valued, and their potential to cause consumers to suffer harm from sudden and unexpected losses if they invest in these products, because of the:

- inherent nature of the underlying assets, which means they have no reliable basis for valuation;
- prevalence of market abuse and financial crime in the secondary market;
- extreme volatility in cryptoasset price movements;
- inadequate understanding of cryptoassets by retail consumers; and
- lack of legitimate investment need for retail consumers to invest in these products.

To address these harms, the FCA has made rules banning the sale, marketing and distribution to all retail consumers of any derivatives and ETNs that reference unregulated transferable cryptoassets by firms acting in, or from, the UK. The FCA estimates that retail consumers will save around GBP 53m from the ban on these products.

The ban will come into effect on 6 January 2021. UK consumers should continue to be alert for crypto-derivative investment scams. As the sale of derivatives and ETNs that reference certain types of cryptoassets to retail consumers is now banned, any firm offering these services to retail consumers is likely to be a scam.

PRA consults on measurement of risks not in value at risk and stressed value at risk

The Prudential Regulation Authority (PRA) is consulting on proposals to update its expectations regarding the measurement of risks not in value at risk (RNIV) and the meaning of 'period of significant financial stress relevant to the institution's portfolio' for stressed value at risk (sVaR) calculation (CP15/20). These proposals would amend Supervisory Statement (SS) 13/13 Market risk.

Comments to the consultation are due by 6 November 2020. The PRA expects that the draft changes to SS13/13 would take effect from the publication of the final policy.

Brexit: PRA and FCA publish Dear CEO letter on final preparations

The PRA and the FCA have published a Dear CEO letter on final preparations for the end of the transition period on 31 December 2020.

The letter sets out key areas where firms are required to ensure their preparedness and minimise any disruption to financial services, including:

- facilitating the continuity of wholesale banking business and contracts;
- ensuring compliance with EU data protection requirements, such as via the implementation of standard contractual clauses into UK-EEA contracts;

- in relation to trading venues, planning any changes that may be needed to current systems and processes in order to meet the share and / or derivatives trading obligation in both the EU and the UK under a range of scenarios, as well as the implications for clients;
- in relation to payments, taking all reasonable steps to avoid disruption, including ensuring that the required information is included on Single European Payment Area (SEPA) payments where necessary and customers are aware of the need to provide the information, and being ready to communicate promptly with impacted customers if payments are disrupted and offer an alternative payment method; and
- preparing to comply with national regimes in order to continue providing retail banking services to EU customers, and providing sufficient notice to customers who will be affected by a reduction or cessation in service provision.

It also notes that firms should continue to take steps to address risks specific to them, such as in relation to changes to reporting requirements, operational continuity of services, safeguarding of client money and custody assets, and communications to customers.

In relation to EEA passporting firms, the letter sets out a high level overview of the Temporary Permissions Regime (TPR) and links to relevant information and guidance.

Coronavirus: Bank of Spain announces temporary exclusion of certain exposures to central banks from total exposure measure

The Executive Committee of the Bank of Spain has declared that, in view of the COVID-19 pandemic, exceptional circumstances exist that justify the temporary exclusion of certain exposures to central banks from the measure of total exposure by less significant institutions (LSIs) in application of Article 500b of the CRR. These include:

- coins and banknotes constituting legal currency in the jurisdiction of the central bank; and
- assets representing claims to the central bank, including reserves held at the central bank, that have been identified as relevant for the purposes of monetary policy transmission by the ECB in its Decision (EU) 2020/1306 dated 16 September 2020.

Spanish LSIs may benefit from this measure from the report relating to the third quarter of 2020 until 27 June 2021.

Coronavirus: FINMA partially extends exemptions for onboarding new relationships

The Swiss Financial Market Supervisory Authority (FINMA) has issued new guidance (07/2020) which extends certain exemptions for opening new business relationships. Current developments permit a return to the previous opening procedure for new business relationships in accordance with the Anti-Money Laundering Act, and exemptions are no longer required for clients domiciled in Switzerland. For clients domiciled abroad the situation varies depending on the domicile or individual situation, so FINMA will continue to grant certain exemptions for new client relationships in particular cases.

ASX consults on proposed amendments to ASX clear (futures) operating rules and procedures

The Australian Securities Exchange (ASX) has launched a public consultation outlining proposed amendments to the ASX Clear (Futures) Operating Rules and Procedures (ASXCLF Operating Rules) in relation to the default management of exchange traded derivatives (ETDs).

ASX had undertaken a review of the current rule framework and operational requirements that facilitate default management processes, precisely the restoration of a matched book in a default event and the extension of default indemnities. Based on the review, ASX is now proposing a number of changes to the ASXCLF Operating Rules, which are intended to:

- introduce a clear and transparent framework for the auctioning of ETDs by ASX Clear (Futures) (ASXCLF) in the event that a futures clearing participant defaults; and
- ensure consistency of default management powers available to both ASX Clear and ASXCLF through the extension of the existing ASXCLF indemnity.

ASX has indicated that, subject to consultation feedback and regulatory clearance, its plans to implement the amendments to the ASXCLF Operating Rules in the second quarter of 2021.

Comments on the consultation are due by 13 November 2020.

ASIC and Reserve Bank of Australia set out expectations regarding clearing house electronic sub-register system replacement

The Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA) have outlined their expectations of the ASX with respect to the Clearing House Electronic Sub-register System (CHESS) replacement project.

The regulators expect ASX to replace CHESS as soon as this can be safely achieved, taking into account user feedback from its recent consultation on a revised implementation timeline. ASX is also expected to demonstrate the readiness of the replacement system, and provide supporting independent assurances to the regulators before migrating to the new system.

In order to demonstrate its readiness to migrate to the new system, ASX will need to provide independent assurances, to the regulators, that are consistent with an enterprise risk management three-lines-of-defence model. At a minimum, the new clearing and settlement system must meet the availability, resilience, recoverability, performance and security requirements that CHESS meets currently. Moreover, ASX has announced non-functional business requirements for the replacement system that will exceed these minimum requirements. In this regard, ASX will be required to provide assurances to demonstrate that these non-functional requirements have been met. Further, ASX is expected to achieve a significant uplift in intraday trade processing capacity and end-of-day processing performance in the new system.

The regulators have indicated that, along with the broader Council of Financial Regulators (CFR) and the Australian Competition and Consumer Commission (ACCC), they are closely supervising ASX's conduct in the CHESS

replacement program of change in accordance with the CFR's regulatory expectations for conduct in operating cash equities clearing and settlement. Moreover, the regulators' supervision and engagement with ASX will be focused on ASX's governance of the change program, its engagement with stakeholders, the functional and technical aspects of the replacement system, and its management of the risks associated with the migration to the new system.

The regulators have also indicated that they will continue to closely supervise ASX's CHESS replacement program of change.

APRA begins roll-out of new Supervision Risk and Intensity Model

The Australian Prudential Regulation Authority (APRA) has announced that it is commencing the roll-out of a new model for assessing the risks faced by banks, insurers and superannuation licensees as part of a broader response to the changing and increasingly challenging operating environment. The new Supervision Risk and Intensity (SRI) Model will replace the Probability and Impact Rating System (PAIRS) and the Supervisory Oversight and Response System (SOARS) systems that APRA has used since 2002.

The SRI Model is intended to assess the systemic significance of APRA-regulated entities and the level of risk each entity faces, which will inform the nature and intensity of APRA's supervisory response. In particular, the design features of the new model ensure greater elevation of non-financial risks whilst preserving the importance of financial resilience. The new model also introduces recovery and resolution considerations, and factors in the impact of the external environment on an entity's risk profile in a more systemic manner.

To assist the industry in preparing for the transition, APRA has released an SRI Model Guide with more detail on its design characteristics. APRA has also published its revised supervision philosophy, which sets out the supervisory approach used by it in pursuing its mandate. Moreover, APRA has indicated that it plans to conduct a series of structured engagements on the new SRI Model to help industry understand how it works, and what impact it may have on the level and intensity of supervision the regulator applies.

APRA has suggested that it will begin the use of its SRI Model from October 2020, with the new system expected to be fully implemented by June 2021.

HKMA publishes report on findings of MSP on selling practices of authorised institutions regarding investment and insurance products

The Hong Kong Monetary Authority (HKMA) has issued a circular to all authorised institutions announcing the publication of a report which summarises the findings and good practices of the mystery shopping programme (MSP) on selling practices of authorised institutions in respect of investment and insurance products.

To complement its supervisory work in relation to the sale of investment and insurance products by authorised institutions, the HKMA engaged a service provider from the second half of 2018 to 2020 to undertake the MSP as an additional supervisory tool with a view to assessing authorised institutions' implementation of the applicable regulatory requirements. The MSP covered several areas, including know-your-customer (KYC) procedures, disclosure of

product features and risks, suitability assessment and implementation of additional safeguards for less sophisticated customers. The results of the MSP suggested that:

- in respect of the sale of investment products, authorised institutions were generally in compliance with the KYC procedures, suitability assessment and implementation of additional safeguards for less sophisticated customers (including pre-investment cooling-off period), save for some isolated samples; and
- as regards the sale of insurance products, while authorised institutions generally complied with the relevant requirements, there was room for improvement in a few areas such as KYC procedures, suitability assessment, and disclosure of product features and risks.

The HKMA has advised authorised institutions to give due regard to the findings, and review their policies and controls to promptly implement any appropriate measures to enhance the selling process, staff training, compliance monitoring and other relevant internal controls.

The HKMA has indicated that it has taken into account the findings of the MSP in formulating the supervisory plans. The individual authorised institutions concerned have been required to take appropriate follow-up actions. The HKMA has further indicated that it will continue to monitor the selling practices of authorised institutions in its on-going supervision.

QUICK Corp. to publish daily prototype rates of Tokyo term risk free rate

The QUICK Corp., a financial market information vendor which was selected by the Cross-Industry Committee on Japanese Yen Interest Rate Benchmarks as a calculating and publishing entity of prototype rates in February 2020, has announced its plans to calculate and publish daily prototype rates of the Tokyo Term Risk Free Rate (TORF), which is one of the alternative benchmarks replacing LIBOR, starting from 9 October 2020.

The QUICK Corp. intends to help implement a smooth transition from LIBOR by aligning the publication of prototype rates with the definite rates which are scheduled to be published from the second quarter of 2021. The prototype rates can be accessed, as in the case of conventional publications, from the QUICK's Corp. information terminals.

The QUICK Corp. has emphasised that the prototype rates are only reference rates designed for preparation of administrative frameworks etc. and not intended for use in referencing for financial contracts. It has also stated that the calculation and publication of rates is subject to delays or suspensions and the published data might be retroactively corrected without prior notice.

Korean Government revises rules to facilitate accounting and audit reforms

The Financial Services Commission (FSC) has announced that the Korean Government has approved the revisions to the Enforcement Decree of the Act on External Audit of Stock Companies. The revised rules are intended to help begin accounting and audit reforms by relieving some of the regulatory burdens for stock companies and enabling more balanced discussions between relevant stakeholders.

In particular, key details of the amendments made to the Enforcement Decree include:

- removing regulatory redundancies to help relieve burdens for companies;
- establishing a two-thirds quorum rule for decision making by the standard audit hours deliberative committee to help reflect more balanced opinions from both the company and the auditor; and
- rephrasing the provision which specifies the standards of companies that are subject to external audit to help companies better understand those standards.

The revised rules will become effective on the day of their promulgation.

MAS publishes compliance toolkits for real estate investment trust managers and fund managers

The Monetary Authority of Singapore (MAS) has published compliance toolkits for licensed fund management companies (LFMCs), registered fund management companies (RFMCs), venture capital fund managers (VCFMs) and real estate investment trust (REIT) managers relating to various MAS approval and reporting requirements and timelines. In particular, the compliance toolkits serve to provide guidance on:

- applications for approvals from the MAS;
- notifications to be submitted to the MAS; and
- regulatory submissions to the MAS, which are applicable to LFMCs, RFMCs, VCFMs and REIT managers respectively.

The MAS has clarified that the guidance set out in the compliance toolkits is not exhaustive, and fund managers as well as REIT managers are expected to familiarise themselves with all the respective applicable legislation and requirements accordingly.

MAS revises notice on requirements for remuneration framework for representatives and supervisors and independent sales audit unit

MAS has revised its existing notice on requirements for the remuneration framework for representatives and supervisors (Balanced Scorecard Framework) and independent sales audit unit (Notice FAA-N20). Amongst other things, the amendments made to Notice FAA-N20 are intended to:

- revise the type of reports to be submitted by a financial adviser to the MAS and their respective formats as set out in annex 2 to the Notice;
- introduce a new Paragraph 11.2 for the purpose of specifying deadline dates for financial advisers in respect of the submission of reports set out in Paragraph 11.1 of the Notice for each measurement quarter; and
- introduce a new Paragraph 12 to provide transitional arrangements for the implementation of new reporting formats in relation to the reports mentioned under paragraph 11.1 of the Notice.

The revised Notice FAA-N20 has been effective since 5 October 2020.

RECENT CLIFFORD CHANCE BRIEFINGS

Security token offerings – a European perspective

Security token offerings, the issuance of digital tokens using blockchain or distributed ledger technology, are increasingly being seen as an alternative to mainstream debt and equity fundraisings. An evolution of the (supposedly) unregulated initial coin offerings or ICOs, security token offerings or STOs are typically structured to sit within securities law frameworks. This means much greater certainty for both fundraisers and investors, resulting in enhanced liquidity.

This briefing paper considers how STOs are structured and some of the benefits and challenges, and exploring the regulatory landscape for STOs across Europe.

https://www.cliffordchance.com/briefings/2020/10/security-token-offerings---a-european-perspective-on-regulation.html

Fundamental Companies House reforms in the pipeline

Reforms to Companies House are in the pipeline, which will fundamentally change the role of Companies House, some of its processes and systems and the way individuals and companies interact with it. The most significant proposals are: (i) compulsory identity verification for all directors, persons with significant control (PSCs) and those filing information on behalf of a company, for example, company secretaries; (ii) the requirement for identity verification before a person can be legally appointed as a director; and (iii) Companies House having greater power to query information before it is placed on the public register.

Many of the reforms will require legislation to implement, however, the Government intends to publish a comprehensive set of proposals that will set out in detail how it thinks these reforms should be implemented. Subject to the views received, it will then proceed to legislate where necessary when Parliamentary time allows. Accordingly, some of the detail for the more complex proposals is yet to be seen.

This briefing paper discusses the reforms to Companies House.

https://www.cliffordchance.com/briefings/2020/10/fundamental-companies-house-reforms-in-the-pipeline.html

China combines QFII and RQFII regimes and expands investment scope

Following the landmark removal of the investment quota for both QFII and RQFII regimes in May 2020, PRC regulators have released official regulations to combine the two current parallel regimes of QFII and RQFII with a unified set of rules applicable to all QFIIs and RQFIIs (collectively 'QFIs'). This represents China's latest step to open up key areas of the onshore financial markets to international investors.

This briefing paper discusses the new eligibility requirements, expanded investment scope and enhanced compliance obligations of QFIs.

https://www.cliffordchance.com/briefings/2020/10/china-combines-qfii-and-rqfii-regimes-and-expands-investment-sco.html

Congress reauthorizes ACPERA, restoring reduced civil liability for companies receiving criminal leniency for US antitrust violations

On 23 June we reported that Congress had not reauthorized the Antitrust Criminal Penalty Enhancement & Reform Act, which offered the prospect of reduced civil liability for companies that successfully sought and received leniency from criminal prosecution from the Department of Justice's Antitrust Division. In our 23 June publication, we also identified the risks that companies face without ACPERA's benefits, analyzed the main criticisms concerning ACPERA's effectiveness, and gave our view that preserving ACPERA in its current form would be superior to letting it expire. On October 1, ACPERA was extended permanently in its original form, applying retroactively to any markers or agreements entered into in the brief period when ACPERA was expired.

This briefing paper discusses ACPERA's permanent extension.

https://www.cliffordchance.com/briefings/2020/10/congress-reauthorizes-acpera--restoring-reduced-civil-liability-.html

Treasury ransomware advisories warn companies to consider collateral legal risks in payments

On 1 October 2020, the US Department of Treasury issued a pair of advisories aimed at financial institutions and other corporates who may find themselves in the unfortunate position of being extorted to make payments to bad actors, or to process such payments, in connection with ransomware attacks. Both advisories remind companies in their crisis management considerations to consider the related money-laundering and sanctions risks. Companies should include these considerations in their ransomware playbook.

This briefing paper discusses the advisories.

https://www.cliffordchance.com/briefings/2020/10/Treasury-Ransomware-Advisories-Warn-Companies-to-Consider-Collateral-Legal-Risks-in-Payments.html

OFAC sends message regarding post acquisition compliance integration and risk management

On 24 September 2020, OFAC announced a settlement with California-based Keysight Technologies Inc. with respect to apparent violations of the Iranian Transactions and Sanctions Regulations committed by its then Finland-based subsidiary, Anite Finland OY, shortly after Anite had been acquired by Keysight. The case carries the lesson that acquiring companies in the face of known OFAC risk in their targets, should take affirmative steps post-acquisition to ensure and to verify that those risks are properly managed. OFAC determined that Keysight voluntarily disclosed the apparent violations, that they were egregious, and assessed a base penalty of USD 1,051,460. OFAC then reduced the final penalty to USD 473,157 based on a number of mitigating factors including Keysight's cooperation with OFAC, remedial measures and compliance enhancements.

This briefing paper discusses the settlement decision.

https://www.cliffordchance.com/briefings/2020/10/OFAC-Sends-Message-Regarding-Post-Acquisition-Compliance-Integration-and-Risk-Management.html

US antitrust agencies propose significant changes to the HSR Act's rules for investment entities and master limited partnerships

On 21 September 2020, the Federal Trade Commission and the Antitrust Division of the Department of Justice published proposed amendments to the rules implementing the Hart-Scott Rodino Antitrust Improvements Act of 1976, as amended, which governs pre-merger antitrust notification filing requirements. There are two main proposed changes, the first of which could have a significant impact on financial investors, such as private equity firms, and other investors that often rely on master limited partnerships. The other proposed change, while appearing to alleviate certain filings by creating a ten percent exemption, leaves important issues unanswered. First, the proposed amendments expand the definition of 'person' under the HSR rules to now include certain related 'associates.' The change will result in acquisitions becoming reportable that currently do not meet the HSR Act's filing thresholds and increase the scope of information required in the HSR filing. Second, the proposed amendments create a new de minimis exemption for certain acquisitions that would result in the acquiring person holding less than 10-percent of an issuer.

This briefing paper discusses each proposed amendment, beginning with a discussion of the US Antitrust Agencies' objectives and then evaluating the practical impact for firms impacted by the proposed changes.

https://www.cliffordchance.com/briefings/2020/10/US-Antitrust-Agencies-Propose-Significant-Changes-to-the-HSR-Acts-Rules-for-Investment-Entities-and-Master-Limited-Partnerships.html

Carried interest proposed regulations offer long-term capital gain planning opportunities for private equity and real estate fund sponsors and managers

Recently enacted Section 1061 of the US Internal Revenue Code generally requires that capital assets be held for more than three years (rather than the normal one-year holding period requirement) in order for individuals, trusts or estates who are associated with sponsors and managers of investment partnerships, and are entitled to receive allocations of gain from those partnerships, to benefit from the reduced rate of US federal income tax that is imposed on long-term capital gains. The Department of Treasury recently released proposed regulations that modify and clarify the scope and operation of Section 1061 in many important respects.

This briefing paper discusses the proposed regulations.

https://www.cliffordchance.com/briefings/2020/09/carried-interest-proposed-regulations-offer-long-term-capital-ga.html

Six new critical technologies for CFIUS – commerce department implements multilateral controls on emerging technologies

On 5 October 2020, the Commerce Department's Bureau of Industry and Security issued a Final Rule implementing multilateral controls on emerging technologies. The United States and other participating states agreed to implement these controls at the December 2019 Plenary meeting of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies to improve regional and international security and stability. Effective immediately, the Final Rule revises the Commerce Control List to add six emerging technologies that are deemed essential to US national security, while making other corrections and revisions. Moreover, non-US investments in companies that produce, design, test, manufacture, fabricate, or develop these technologies (identified by their Export Control Classification Numbers) now may be subject to mandatory filings under the United States' foreign direct investment regime: the Committee on Foreign Investment in the United States (CFIUS).

This briefing paper discusses the Final Rule.

https://www.cliffordchance.com/briefings/2020/10/Six-New-Critical-Technologies-for-CFIUS-Commerce-Department-Implements-Multilateral-Controls-on-Emerging-Technologies.html

US House report on competition in digital markets focuses on big tech dominance and need for antitrust reform

On 6 October 2020, the US House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law issued a 449-page report on competition in digital markets, with a clear focus on the dominance of the 'GAFA'—Google, Apple, Facebook and Amazon. The report is the culmination of a sixteen-month investigation launched in June 2019 into the state of online competition. Although the investigation was bipartisan, the House majority released its own report. The Subcommittee requested detailed information from the tech giants, as well as other market participants and digital competition experts, and held several public hearings with testimony from GAFA executives and other participants in the digital marketplace.

This briefing paper discusses the results of the investigation and the report.

https://www.cliffordchance.com/briefings/2020/10/US-House-Report-on-Competition-in-Digital-Markets-Focuses.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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