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CSDR: RTS on penalty mechanism for settlement fails published in OJ

Commission Delegated Regulation (EU) 2023/1626 amending the regulatory technical standards (RTS) under the Central Securities Depositories Regulation (CSDR) as regards the penalty mechanism for settlement fails relating to cleared transactions submitted by central counterparties (CCPs) for settlement has been published in the Official Journal.

The amending RTS are intended to facilitate the calculation and distribution of cash penalties regarding settlement fails relating to cleared transactions, while reducing the risks and cost related to the process. The amendments include:

- removing the separate process established in Article 19 of the RTS on settlement discipline, putting CSDs in charge of the entire process of

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collection and distribution of penalties according to Articles 16, 17 and 18; and

- specifying that, in the event of imbalanced positions in respect of cleared transactions, CCPs may allocate the remaining penalties' amount, credit or debit to their clearing members and should establish relevant mechanism in their rules to that effect.

The Regulation will enter into force on 31 August and will apply from 2 September 2024.

CCP recovery and resolution: RTS published in Official Journal

Two Commission Delegated Regulations containing RTS under the Regulation on CCP recovery and resolution (CCPRRR) have been published in the Official Journal.

Commission Delegated Regulation (EU) 2023/1615 specifies the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds referred to in Article 63(1) to clients and indirect clients is required, and the conditions under which it is to be considered proportionate.

Commission Delegated Regulation (EU) 2023/1616 specifies:

- the circumstances in which a person is deemed to be independent from both the resolution authority and the CCP under valuation for the purposes of Article 25(1) of the CCPRRR;
- the methodology for assessing the value of the assets and liabilities of the CCP; and
- the separation of the valuations under Articles 24 and 61.

The Delegated Regulations will enter into force on 29 August 2023.

EBA publishes supervisory handbook on IRB approach and updates roadmap timeline

The European Banking Authority (EBA) has published a press release and final supervisory handbook relating to the internal ratings based (IRB) approach.

The EBA has updated its timeline for the final implementation of its IRB roadmap to limit compliance costs for institutions. It has taken the view that the implementation of certain IRB repair requirements may be postponed until the date of entry into force of the future Capital Requirements Regulation (CRR3). The updated timeline relates specifically to loss given default (LGD) and credit conversion factor (CCF) models that cover portfolios no longer eligible for the revised advanced internal ratings based (AIRB) approach in accordance with the Basel III framework.

The press release notes that postponing the implementation of the IRB roadmap provisions does not apply to any probability of default (PD) models, nor to those LGD or CCF models that have exposures that may remain under the AIRB approach in their scope of application.

The EBA has also published its final supervisory handbook for the validation of IRB ratings systems to clarify the role of the validation function as part of

corporate governance. The handbook sets out the best supervisory practices that national competent authorities (NCAs) are expected to give consideration to when performing their supervisory activities and developing their own expectations on the validation of IRB rating systems. It contains a general description of the requirements applicable to the validation function and details of the tasks to be performed, covering tasks related to the model performance assessment and tasks related to the modelling environment.

HM Treasury publishes response to consultation on payments regulation and systemic perimeter

HM Treasury (HMT) has published the Government's response to its July 2022 consultation on reforms to the Bank of England's (BoE's) and Payment Systems Regulator's (PSR's) respective regulatory frameworks over the payments sector.

The Government received 23 responses from a range of financial services actors operating within the sector, including payment services and e-money providers, payment system operators and trade and business associations.

In particular, the consultation response:

- summarises the feedback received to the call for evidence concerning the Government's proposals and outlines the Government's overall approach to enabling these reforms through primary legislation when future parliamentary time allows;
- provides updates in relation to the Government's commitment to enable rulemaking and direction-making powers for the Financial Conduct Authority (FCA) and PSR over their aspects of retained EU payments law, as part of the Government's approach towards enabling a Smarter Regulatory Framework for financial services; and
- provides an update on the remit of the Senior Managers & Certification Regime in relation to payments, noting the Government's ongoing wider review of the Regime.

FCA consults on securitisation rules

The FCA has launched a consultation (CP23/17) on its proposed rules for the UK securitisation markets.

Following the enactment of the Financial Services and Markets Act (FSMA) 2023 and the publication by HMT of a Securitisation Regulations 2023 policy note and near-final draft statutory instrument (SI), HMT plans for most firm-facing provisions of the UK Securitisation Regulation (UK SR) to be replaced with Prudential Regulation Authority (PRA) and FCA rules. The PRA launched a consultation (CP15/23) on its proposed rules on 27 July 2023. The PRA's proposals in CP15/23 and the FCA's proposals in CP23/17 are together intended to create a coherent framework for regulating securitisation in the UK.

CP23/17 sets out the FCA's proposed rules to replace the firm-facing provisions from the UK SR which are being transferred into the FCA Handbook and contains the proposed legal instrument and all related technical standards and their annexes.

Additionally, the FCA is consulting on:

- clarifying what kind of information UK institutional investors require to fulfil their due diligence obligations;
- amending and clarifying risk retention provisions, with particular reference to changes to facilitate non-performing exposures securitisation;
- making a number of clarificatory changes to other areas of the regulation based on market feedback, such as the geographical scope of the UK SR and the criteria for homogeneity in STS securitisations; and
- the definitions of public and private securitisations.

The FCA plans to hold a second consultation on proposed changes to the reporting regime at a later stage.

Comments are due by 30 October 2023.

The proposed implementation date for the changes resulting from CP23/17 is Q2 2024, subject to the progress of the draft Securitisation Regulations 2023.

FCA requests data from banks on account closures

The FCA has published a letter and information request sent to banks and building societies for data relating to the closure of bank accounts.

The request, which is intended to assist the FCA in identifying the extent to which banks may be terminating accounts for unjustified reasons, seeks data covering the following areas:

- the number of personal and business accounts that firms hold and have opened;
- the number of accounts either denied, suspended or terminated;
- reasons for accounts being denied, suspended or terminated;
- breakdown of complaints;
- breakdown of customer groups; and
- policies and procedures.

Data is sought for the period starting 1 January 2022 to 30 June 2023.

Firms are required to provide the requested information by 25 August 2023, and the FCA intends to share its analysis with the Government.

On 20 July 2023, HMT published a press release announcing an intention to introduce new rules on the closure of bank accounts intended to balance freedom of expression with the right to manage commercial risk using powers under the FSMA 2023.

Asset managers: FCA publishes results of assessments of fund value review

The FCA has published the results of its most recent targeted multi-firm review of authorised fund managers' (AFMs) assessments of value (AoV).

The FCA broadly finds that, when compared with initial July 2021 findings, firms have a better understanding of the Collective Investment Schemes sourcebook (COLL) rules and have significantly improved their AoV arrangements. Other key findings include:

- examples of good practice when poor value was identified, such as moving investors to clean share classes with no trail commission or reductions in funds' fees;
- AFM Board or committees sometimes reaching conclusions that did not take into account improved management information; and
- AoV decision making and outcomes being influenced by tensions between fund profitability and its value for money for investors.

The FCA expects AFMs to consider the results and assess the quality of analysis, decision-making and governance in their AoV processes to ensure compliance with the relevant rules and the Consumer Duty, and to take appropriate action to address concerns. The FCA also recommends that firms consider whether annual AoV reports can be simplified.

BaFin issues general decree on investment firm remuneration notifications

The German Federal Financial Supervisory Authority (BaFin) has issued a general decree (Allgemeinverfügung) regarding remuneration notifications of investment firms for the reporting date 31 December 2022.

The EBA has revised its guidelines specifying the remuneration notification obligations of investment firms under the Investment Firm Directive (IFD), which were implemented in the German Investment Firm Act (WpIG). Since 31 December 2022, large and medium-sized investment firms and supervisory authorities must apply the following new EBA guidelines:

- large investment firms must apply the guidelines on the benchmarking exercises on remuneration practices, the gender pay gap and approved higher ratios under Directive 2013/36/EU (EBA/GL/2022/06), which replace EBA/GL/2014/08;
- medium-sized investment firms must apply the guidelines on the comparison of remuneration practices and the gender pay gap under Directive (EU) 2019/2034 (EBA/GL/2022/07); and
- large and medium-sized investment firms must apply the guidelines on the data collection exercises regarding high earners under Directive 2013/36/EU and under Directive (EU) 2019/2034 (EBA/GL/2022/08), which replace EBA/GL/2014/07.

These reporting obligations and the general decree do not apply to small investment firms.

As national supervisors are obliged to provide the EBA with the information required under the new guidelines by 31 October 2023, but the process of incorporating the new requirements into the WpIG and the future German Investment Firm Notification Ordinance (WpI–AnzV) will extend beyond that date, BaFin has issued the general decree.

Luxembourg bill implementing DORA published

A bill implementing the Digital Operational Resilience Act (DORA) has been lodged with the Luxembourg Parliament.

Bill No. 8291 is intended to implement DORA and transpose the DORA Amending Directive into Luxembourg law.

The objective of DORA and the DORA Amending Directive is to harmonise and strengthen information and communication technology (ICT) security requirements in order to achieve a high level of digital operational resilience for the entire financial sector. DORA consolidates the different rules dealing with ICT risk in the financial sector and brings them together in a single legislative act to fill gaps and inconsistencies. The consolidation and further harmonisation of key digital operational resilience requirements are part of the objective of fostering innovation and the adoption of new technologies in the financial sector, while ensuring financial stability and the protection of investors and consumers.

As the provisions of DORA are directly applicable in the European Union, the main purpose of the Bill is to provide the national competent authorities with the supervisory and investigative powers necessary for the performance of their duties, within the limits defined by DORA, and to lay down a system of penalties.

The DORA Amending Directive accompanies and complements DORA by providing for a series of targeted amendments to existing EU directives in the financial sector. Such amendments are deemed necessary to ensure sectoral consistency with DORA as regards the application of digital operational resilience requirements that are currently spread across the various existing sectoral laws.

Targeted amendments are therefore being made to a series of Luxembourg laws relating to the financial sector, such as the law of 5 April 1993 on the financial sector (as amended), the law of 10 November 2009 on payment services (as amended), the law of 17 December 2010 on undertakings for collective investment (as amended), the law of 12 July 2013 on alternative investment fund managers (as amended) and the law of 7 December 2015 on the insurance sector (as amended).

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

SFC concludes consultation on enforcement-related amendments to Securities and Futures Ordinance

The SFC has published the conclusions to its June 2022 consultation on proposed amendments to the enforcement-related provisions of the Securities and Futures Ordinance (SFO). The proposals are intended to enable the SFC to better protect the interests of the investing public and uphold the reputation of Hong Kong's financial markets. Amongst other things, the consultation conclusions indicate that:

- the proposed amendments to section 213 of the SFO to expand the basis on which the SFC may apply for remedial and other orders against a regulated person will be put on hold – the SFC notes that many respondents raised legal and implementation concerns related to these proposals and that their comments can be subdivided into five major themes: legal and jurisprudence concerns when a breach of non-statutory SFC codes or guidelines may give rise to legal remedies; implementation issues arising out of the perceived conflation of the disciplinary regime and section 213; fairness and proportionality concerns; the impact of the amendments on the competitiveness and status of Hong Kong as an international financial centre; and the need for a broader and more holistic view of compensation orders as a remedy. The SFC acknowledges the

complexities raised by respondents and that they warrant further consideration;

- the proposed amendments to exemptions in section 103 will not proceed in their current form and will be put on hold – the SFC notes that many respondents expressed concerns about the proposal to amend the professional investor exemption in section 103(3)(k) of the SFO. The comments can be categorised into two broad concerns: the necessity of the amendments; and operational difficulties and the impact on business development and marketing; and
- the proposed insider dealing provisions amendment will proceed – the scope of the insider dealing provisions of the SFO will be broadened to cover: insider dealing perpetrated in Hong Kong with respect to securities listed on overseas stock markets or their derivatives; and insider dealing perpetrated outside of Hong Kong, if it involves any securities listed on a recognised stock market, i.e. a stock market operated by The Stock Exchange of Hong Kong Limited, or their derivatives. The industry will have the opportunity to review the draft amendments during the legislative process.

SFC warns virtual asset trading platforms about engaging in improper practices

The Securities and Futures Commission (SFC) has issued a statement to warn virtual asset trading platforms (VATPs) of the potential legal and regulatory consequences of engaging in improper practices. Amongst other things, the SFC warns VATPs of the following:

- it is an offence for any person to make a fraudulent or reckless misrepresentation for the purpose of inducing another person to trade in virtual assets. The SFC will take into account any misrepresentation made by an unlicensed VATP in considering its fitness and properness to be licensed when it eventually submits a licence application with the SFC;
- when assessing the licence applications of VATPs, the SFC will take into consideration any past non-compliant activities of VATPs and also consider whether the VATPs can demonstrate a genuine intention to rectify non-compliant activities, including gradually unwinding impermissible transactions in an orderly manner; and
- established entities of unlicensed VATPs which are operating a business in Hong Kong of providing virtual asset services will be subject to the new virtual asset service provider regime. Such established entities will also need to apply for SFC licences or they should proceed to close their business in Hong Kong. Conducting unlicensed activities in Hong Kong is a criminal offence.

Separately, the SFC has warned investors to be wary of the risks of trading virtual assets on an unregulated VATP, stressing that investors may potentially risk losing their entire investment held on the VATP if it ceases operation, collapses, is hacked or otherwise suffers from any misappropriation of assets.

RECENT CLIFFORD CHANCE BRIEFINGS

UK FCA publishes securitisation consultation

On 7 August 2023, the FCA published its consultation on new securitisation rules. The FCA's consultation needs to be read together with the equivalent PRA consultation and the UK Government's near-final SI and policy note. When finalised, these will together replace the UK Securitisation Regulation, which is currently retained EU law.

This briefing paper discusses the main elements of the consultation and next steps in the UK Government's 'Smarter Regulatory Framework' project as it applies to securitisation.

https://www.cliffordchance.com/briefings/2023/08/uk-fca-publishes-securitisation-consultation.html

'Reverse CFIUS' at (Almost) Long Last – Biden Administration issues highly anticipated Executive Order on outbound US investment

On 9 August 2023, President Biden issued the highly anticipated Executive Order (EO) addressing outbound US investments aimed at the development of critical technologies in 'countries of concern' for military, intelligence, surveillance, or cyber-enabled capabilities. The EO heralds the first official step in the long-awaited 'reverse CFIUS' process, which would constitute the reverse of the inbound foreign transaction reviews conducted by the Committee on Foreign Investment in the United States (CFIUS). While an important development, the measures called for under the EO still require the adoption of implementing regulations by the Department of the Treasury. The EO is effective immediately, but the supporting regulations may not be issued for months.

This briefing paper discusses the EO.

https://www.cliffordchance.com/briefings/2023/08/-reverse-cfius--at--almost--long-last--biden-administration-issu.html

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