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INTERNATIONAL REGULATORY UPDATE 4 – 8 DECEMBER 2023

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- **Recent Clifford Chance briefing: Mandatory climate related financial disclosure. Follow this link to the briefings section.**

Banking Union: EU Council and Parliament reach agreement on 'daisy chain' amendments to BRRD and SRMR

The EU Council and Parliament have reached a provisional political agreement on the proposed directive on targeted amendments to the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism Regulation (SRMR) regarding daisy chains.

The amendments form part of the EU Commission's crisis management and deposit insurance (CMDI) legislative package. They concern certain aspects of the minimum requirement for own funds and eligible liabilities (MREL) that are intended to improve the resolution framework for EU banks. In particular, the proposal gives the resolution authorities the power of setting internal MREL on a consolidated basis subject to certain conditions, and introduces a specific MREL treatment for 'liquidation entities'.

The provisionally agreed text still needs to be formally approved by both the EU Parliament and the Council before it can be published in the Official Journal. The directive will enter into force 20 days following its publication in the Official Journal and will start applying six months later.

CRR3/CRD6: EU Council publishes final compromise texts

The EU Council has published the final compromise texts on the Capital Requirements Directive (CRD6) and the Capital Requirements Regulation (CRR3).

The texts follow the provisional political agreement reached by the Council with the EU Parliament in June 2023 and reflect the outcome of a technical review by the EU co-legislators in November 2023 as well as minor technical comments subsequently made by Member States' delegations to the Council.

EMIR 3.0: EU Council agrees position on proposals for EU clearing systems

The EU Council has agreed its negotiating position on the EU Commission's legislative proposals to mitigate risks in and improve the efficiency of EU clearing markets.

The Commission's proposals include a review of the European Market Infrastructure Regulation (EMIR 3.0) and a Directive on the treatment of concentration risk towards central counterparties (CCPs) and the counterparty risk on centrally cleared derivative transactions.

The EU Council and Parliament are now ready to begin trilogue negotiations on the proposals in order to agree the final texts.

ECON Committee adopts report on proposed regulation on ESG ratings

The EU Parliament's Committee on Economic and Monetary Affairs (ECON Committee) has adopted a report on the EU Commission's proposed regulation on the transparency and integrity of environmental, social, and governance ESG rating activities.

The proposal is intended to enable investors to make better informed decisions regarding sustainable investments and will require ESG rating

providers offering services to investors and companies in the EU to be authorised and supervised by the European Securities and Markets Authority (ESMA).

The regulation is intended to complement existing legislation such as the Sustainable Finance Disclosure Regulation (SFDR), the Taxonomy Regulation, the Corporate Sustainability Reporting Directive (CSRD) and the Green Bonds Regulation.

CRD4: EU Commission adopts RTS on supervisory outlier tests

The EU Commission has adopted a Delegated Regulation containing regulatory technical standards (RTS) under the Capital Requirements Directive (CRD4) which set out the supervisory shock scenarios, the common modelling and parametric assumptions and the definition of a large decline, to enable the performance of supervisory outlier tests of institutions' exposure to the interest rate risk arising from non-trading book activities and their impact on net interest income (NII) and economic value of equity (EVE).

The RTS state that, among other things:

- a constant balance sheet assumption over a one-year time horizon should be used for calculating the NII, and commercial margins and spread components should be included in the calculation; and
- for calculating the EVE, a run-off balance sheet assumption should be used where maturing positions are not replaced, and institutions should follow their internal management and measurement approach for interest rate risk in the non-trading book.

SFDR: ESAs publish final draft amending RTS

The European Supervisory Authorities (ESAs) have published their final report on draft amending RTS under SFDR Delegated Regulation (EU) 2022/1288. The ESAs have proposed adding new social indicators and streamlining the framework for the disclosure of principal adverse impacts of investment decisions on the environment and society. They have also suggested new product disclosures regarding 'greenhouse gas emissions reduction' targets. In addition, they have proposed further technical revisions to the SFDR Delegated Regulation, including:

- improvements to the disclosures on how sustainable investments 'do no significant harm' (DNSH) to the environment and society;
- simplification of the pre-contractual and periodic disclosure templates for financial products; and
- other technical adjustments concerning, among others, the treatment of derivatives, the calculation of sustainable investments, and provisions for financial products with underlying investment options.

ESAs launch second consultation on guidelines on information system for assessing fitness and propriety

The ESAs have published a joint consultation paper on guidelines on the system established by the ESAs for the exchange of information relevant to the assessment of the fitness and propriety of holders of qualifying holdings,

directors and key function holders of financial institutions, and financial market participants by competent authorities.

The consultation covers amendments extending the scope of the joint guidelines to legal persons, thus ensuring the complete coverage of data subjects. These guidelines aim to increase the efficiency of the information exchange between sectoral supervisors by harmonising practices and covering both natural and legal persons.

Comments are due by 15 January 2024.

MiCA: EBA consults on draft RTS on ART issuers' conflicts of interest policies and procedures

The European Banking Authority (EBA) has published for consultation draft RTS setting out the requirements for policies and procedures on conflicts of interest (CoIs) for issuers of asset-referenced tokens (ARTs) under the Markets in Cryptoassets Regulation (MiCA).

Under MiCA, ART issuers are required to implement and maintain effective policies and procedures to identify, prevent, manage and disclose CoIs. The draft RTS:

- require ART issuers to pay particular attention to CoIs that could arise in relation to the reserve of assets;
- set out specific requirements around documentation for personal transactions;
- state that the remuneration procedures, policies and arrangements of the issuer should not create CoIs;
- highlight the key role of issuers' management bodies, who are responsible for the creation and adoption of CoIs policies and procedures;
- require issuers' to have in place, and grant sufficient resources to, a person responsible for the management of CoIs; and
- specify the content of the disclosures which issuers must make available to the public on their websites in the relevant languages.

Comments on the draft RTS are due by 7 March 2024.

Basel Committee to consult on revisions to cryptoasset standards and interest rate risk and on measures to prevent window-dressing by banks.

The Basel Committee on Banking Supervision (BCBS) has published a summary of the meetings held on 5 and 7 December 2023, in which it discussed a range of policy and supervisory initiatives.

The Committee agreed to:

- consult on targeted revisions to the prudential standard for banks' exposures to cryptoassets, which was published in December 2022. The potential revisions would relate to the criteria for stablecoins to receive a preferential Group 1b regulatory treatment;
- continue monitoring the risks arising from banks providing cryptoasset custody services;

- consult on targeted adjustments to its standard on interest rate risk in the banking book to reflect interest rate movements since the standard was first published in April 2016;
- consult on potential policy options to reduce 'window-dressing' behaviour by banks, in which banks seek to temporarily reduce their perceived risk profile around the reference dates used for the identification of global systemically important banks (G-SIBs);
- consider, as part of its holistic approach to addressing climate-related financial risks, the development of potential risk management responses to the risks arising from the transition to a low carbon economy; and
- approve the assessment reports on the implementation of the net stable funding ratio and large exposures framework by Mexico and Switzerland, and to publish later in December its report on the implementation of the liquidity coverage ratio by Mexico.

IOSCO consults on voluntary carbon markets

The International Organization of Securities Commissions (IOSCO) has launched a public consultation outlining a set of good practices to promote the integrity and orderly functioning of the voluntary carbon markets (VCM). The proposed good practices build on the key considerations included in the discussion paper published in November 2022, the feedback received in response to that paper, as well as IOSCO members' knowledge and oversight of financial markets. The good practices draw on existing good practices and principles for well-functioning markets.

The consultation closes on 3 March 2024.

IOSCO publishes report on greenwashing supervisory practices

IOSCO has published a report on supervisory practices to address greenwashing. The report provides an overview of initiatives undertaken in various jurisdictions to address greenwashing, in line with IOSCO recommendations. The report presents the challenges hindering the implementation of these recommendations, including:

- data gaps;
- transparency, quality and reliability of ESG ratings;
- consistency in labelling and classification of sustainability-related products;
- evolving regulatory approaches; and
- capacity building needs.

The report notes that most jurisdictions have supervisory mechanisms in place to address greenwashing in the area of asset management. Educational and capacity building activities are also used as proactive tools to prevent greenwashing. The report further notes that while the ESG ratings and data products market remains largely unregulated, some jurisdictions are developing policy frameworks for ESG ratings and data products providers. It also refers to the cross-border nature of sustainability-related investments and emphasises that cross-border cooperation, including sharing experiences and knowledge, as well as exchanging relevant information and data, is necessary in ensuring market integrity and investor protection.

House of Commons Treasury Select Committee reports on Edinburgh Reforms

The House of Commons Treasury Select Committee has published a report on the impact of the Edinburgh Reforms, one year after they were proposed. The report highlights key conclusions and concerns, emphasising the need for a balanced approach that promotes economic growth while maintaining robust regulatory standards.

Amongst other things, the report:

- calls for the completion of all 31 strands of the Edinburgh Reforms;
- expresses doubts that the work completed as part of the reforms to date will have a substantial impact on the UK economy;
- states that many strands of the reforms are essentially preparatory work, and questions the categorisation of certain changes as significant reforms;
- urges the Treasury to prioritise reforms that will make the most difference to the UK's economic growth, and reforms that prevent harm to consumers and businesses;
- acknowledges that the process of moving onshored rules into the regulators' rule books will take many years, but calls on regulators and the Treasury to ensure that there is a sustained and focussed pace of change;
- agrees with the Treasury that the UK's regulators should consider economic growth when designing new regulations;
- highlights concerns about widening retail investment in Long-Term Asset Funds, citing their risks and the potential misuse of exemptions for high net-worth individuals;
- reaffirms the Committee's support for pension scheme consolidation;
- expresses scepticism about the competition impact of a government-approved monopoly for providing data to market participants through a consolidated tape;
- acknowledges the potential for improvements to the ring-fencing framework, but advises cautious consideration of removing the ring-fencing regime entirely in the long-term, emphasising the need for substantial evidence of the benefits of such a move; and
- supports the Government's efforts to correct problems with the Packaged Retail and Insurance-based Investment Products (PRIIPS) regime.

House of Commons Treasury Committee reports on introduction of retail CBDC

The House of Commons Treasury Committee has published a report setting out its recommendations to the UK Government on the introduction of a retail central bank digital currency (CBDC). The report is, in part, a response to the Bank of England (BoE) and HM Treasury (HMT) consultation on the potential future introduction of a 'digital pound'.

In its report, the Committee summarises its views on the need for a retail CBDC in the UK and on some of the specific issues it gives rise to. It also sets out the following recommendations:

- that the BoE and HMT further analyse the monetary policy impact of paying interest on the digital pound, and ensure that their current work on the design of the digital pound does not preclude the possibility of paying interest on it;
- that any primary legislation used to introduce the digital pound does not allow the Government or the BoE to use the data generated by it for any purposes beyond those already permitted for law enforcement;
- that the BoE reports on its expenditure on the digital pound initiative as a separate line item in its annual report and accounts from 2024 onwards; and
- that the Government and the BoE set out in detail, as soon as possible, the criteria they intend to use to inform their decision on whether or not to launch the digital pound.

The Government has two months in which to respond to the Committee's report.

Financial Services and Markets Act 2023 (Resolution of Central Counterparties: Partial Property Transfers and Safeguarding of Protected Arrangements) Regulations 2023 made

The Financial Services and Markets Act 2023 (Resolution of Central Counterparties: Partial Property Transfers and Safeguarding of Protected Arrangements) Regulations 2023 (SI 2023/1316) have been made and published, together with an explanatory memorandum.

SI 2023/1316 relates to the introduction of a new special resolution regime for CCPs in Schedule 11 of the Financial Services and Markets Act 2023 (FSMA 2023). It is intended to provide the necessary safeguards to ensure that certain types of contractual arrangements crucial to a CCP's operation are adequately protected when the BoE exercises its partial property transfer and write-down powers during a resolution. SI 2023/1316 replicates the following for the purposes of the new resolution regime:

- the Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014 (Si 2014/1828), by restricting the making of partial property transfer instruments under Schedule 11 and making provisions to protect certain interests where a partial property transfer has been made in respect of a CCP, including security interests, set-off arrangements and netting arrangements; and
- the Banking Act 2009 (Restriction of Special Bail-in Provision, etc) Order 2014 (SI 2014/3350) insofar as it applies to CCPs, by imposing restrictions on the making of write-down provision in instruments made under Schedule 11.

The Regulations also revoke the Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014 (SI 2014/1828) (2014 Order), which will continue to apply in limited circumstances to relevant instruments.

The Regulations will come into force on 31 December 2023.

Resolution of Central Counterparties (Modified Application of Corporate Law and Consequential Amendments) Regulations 2023 made

The Resolution of Central Counterparties (Modified Application of Corporate Law and Consequential Amendments) Regulations 2023 (SI 2023/1313) have been made and published, together with an explanatory memorandum.

SI 2023/1313 relates to the introduction of a new special resolution regime for CCPs in Schedule 11 of the FSMA 2023. It amends corporate law and makes consequential amendments to ensure that the CCP resolution regime functions as intended. Among other things, SI 2023/1313:

- applies certain provisions in the Companies Act 2006 with modifications to ensure parity with the bank resolution regime;
- amends the Finance Act 1986 to ensure that stamp duty is not payable for certain transfers;
- amends section 87(2) and section 166 of the Companies Act 1989 to allow information which is subject to disclosure restrictions to be disclosed for the purpose of civil proceedings relating to an assessment of compensation; and
- amends the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188) to enable the disclosure of confidential information by regulators in the course of discharging functions under the new regime.

The Regulations will come into force on 31 December 2023.

UK EMIR: The Central Counterparties (Equivalence) (United States of America) (Commodity Futures Trading Commission) Regulations 2023 made

The Central Counterparties (Equivalence) (United States of America) (Commodity Futures Trading Commission) Regulations 2023 (SI 2023/1323) have been made.

Under the Regulations, the legal and supervisory arrangements for certain CCPs authorised by the Commodity Futures Trading Commission (CFTC) are deemed to be equivalent to the UK's corresponding regime. The equivalence granted under the Regulations is a precondition for a CFTC-authorised CCP to be recognised by the (BoE, after which it will be able to provide clearing services to UK market participants.

The Regulations will come into force on 28 December 2023.

Draft Money Market Funds Regulations 2024 published

The Government has published a draft of the statutory instrument (SI) that will replace the existing Money Market Funds Regulation and establish a new framework for money market funds (MMFs) as part of HMT's Smarter Regulatory Framework initiative for financial services in the UK.

The decision to repeal and replace the MMF Regulation was announced at Mansion House in July. The draft SI, along with an explanatory policy note, outlines the Government's strategy for setting up a new legislative framework

for MMFs. In conjunction with the draft SI and policy note, the FCA is also launching a consultation on its draft rules for MMFs.

Technical comments on the draft SI are due by 24 January 2024.

Draft Financial Services and Markets Act 2000 (Ombudsman Scheme) (Fees) Regulations 2024 published

The Government has published an illustrative draft of a proposed SI that, if approved by Parliament, would allow the Financial Ombudsman Service (FOS) to charge case fees to claims management companies and other professional representatives who bring cases to the FOS on behalf of complainants.

The FOS is currently consulting on its approach to fee charging as part of its Plans and Budget for 2024-25. The draft SI is intended to support that consultation. The Government plans to finalise the draft regulations and introduce them in Parliament after the consultation period for the FOS Plans and Budget 2024-25 ends.

UK supervisory authorities consult on critical third parties

The BoE, Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) have published a consultation paper on proposed requirements and expectations for critical third parties (CTPs) (PRA CP26/23; FCA CP23/30).

The proposals, which build on a July 2022 discussion paper, are intended to manage the potential risks posed by a failure in, or disruption to, services provided by CTPs to firms and financial market infrastructure entities (FMIs) and cover, among other things:

- identifying potential CTPs and recommending them for designation by HMT;
- definitions of key terms;
- fundamental rules for CTPs;
- operational risk and resilience requirements;
- information-gathering and testing requirements;
- notification requirements; and
- record keeping.

The proposals also include preventing a CTP from unduly using its designation for marketing purposes, and the requirement for a non-UK CTP to nominate a legal person with authority to receive documents and notices from the regulators.

Comments are due by 15 March 2024.

HMT publishes feedback to call for proposals on measuring success of new regulator objectives under FSMA 2023

HMT has published its response to the feedback received to a call for proposals on how the success of certain objectives under FSMA 2023 should be measured.

FSMA 2023 introduced new secondary objectives for the FCA and the PRA, intended to help facilitate the international competitiveness of the UK economy and its growth in the medium to long term. In its call for proposals, published in May 2023, HMT sought views on what additional metrics the FCA and PRA should publish to track their progress on these objectives.

As a result of the responses received, the regulators intend to publish metrics on the following broad themes:

- operational efficiency and management information;
- international competitiveness;
- regulatory burden;
- policy and implementation; and
- digital and innovation.

The exact metrics under each theme will differ slightly between the FCA and the PRA due to the granularity of existing data, and the feasibility of additional data collection in each case. The regulators intend to publish the first set of metrics in the next editions of their regular quarterly reporting, by the first report on the new secondary growth and competitiveness objectives (due by Summer 2024) or, where appropriate, in their 2023/24 annual reports.

FCA and HMT publish discussion paper on financial advice

The FCA and HMT have published a discussion paper (DP23/5), seeking views on proposals intended to help more people access financial advice. The paper forms part of the wider Advice Guidance Boundary Review being conducted by the FCA and UK Government, which examines the regulatory boundary between financial advice and other forms of support.

It seeks stakeholder views on the following proposals:

- to provide further guidance (or simplify existing guidance) to clarify when firms can give consumers support without giving regulated financial advice in an effort to encourage firms to operate closer to the regulatory boundary;
- to introduce a new regulatory framework to allow firms to suggest products or courses of action to a consumer based on the target market the consumer has been identified as belonging to, rather than fully individualised advice; and
- to define a new form of simplified advice for consumers with less complex needs. This is intended to build on and adjust the proposals consulted upon in November 2022, which received limited support from respondents due to the perceived commercial barriers to implementing the proposed regime.

Comments are due by 28 February 2024.

FCA consults on access to cash

The FCA has published a consultation paper (CP23/29) on new rules to maintain access to cash.

Under the FCA's proposals, designated banks and building societies will need to assess gaps in access to cash. These assessments need to take into account local factors such as demographics and transport. Where firms identify gaps, they will need to act to address these needs.

Under the proposals, designated firms will be required to:

- undertake cash access assessments when changes are being made to cash access services to understand whether additional services are required to meet local gaps;
- respond to requests from local residents, community organisations and representatives to consider, assess and address gaps;
- deliver reasonable additional cash services to fill gaps in provision where assessments show that there is or will be a significant local gap; and
- ensure they do not close cash facilities, including bank branches, until any additional cash services identified are available.

The FCA notes that its new powers do not prevent bank branches from closing, but that the proposed rules aim to have an impact where branches are a key local source of cash. The FCA intends to ensure these rules work in harmony with its existing guidance on bank branch closures.

Comments are due by 8 February 2023. The FCA expects to finalise the rules by Q3 of 2024.

FCA consults on implementing overseas funds regime

The FCA has published a consultation paper (CP23/26) on implementing the Overseas Funds Regime (OFR).

The OFR sets out a process for non-UK domiciled funds to market to UK retail customers where the Government has found a jurisdiction equivalent.

The FCA is consulting on changes to its rules that will allow overseas schemes to be recognised under the OFR, should the Government make any determination on equivalence. The FCA has proposed the types of information that overseas schemes must provide for recognition under the OFR and has also suggested measures to ensure investors are informed of the protections they have.

Comments are due by 12 February 2024.

FCA consults on money market funds regime

The FCA has launched a consultation (CP23/28) on updating the regime for MMFs.

The FCA is proposing two principal changes to the regulation of MMFs, which are intended to reduce their vulnerability. The first proposal is to increase the minimum proportion of highly liquid assets that all MMFs must hold, in order to ensure that they can withstand large withdrawals during severe market stresses and reducing the 'first-mover advantage'. The second proposal is to remove a regulatory requirement for certain MMFs that links the levels of liquid assets with the need for the MMF manager to impose tools that could limit

investors' ability to quickly recover their money without unanticipated losses ('delinking'). These changes, along with further proposed enhancements, are intended to maintain the current MMF operating model while strengthening the regulatory regime, in an effort to improve the long-term competitiveness of the UK MMF sector and increase investor confidence in UK domiciled funds.

Comments are due by 8 March 2024.

Wholesale Markets Review: FCA consults on reforming commodity derivatives regulatory framework

The FCA has published a consultation paper (CP23/27) setting out its proposals to reform the commodity derivatives regulatory regime.

In particular, CP23/27 sets out proposals on:

- the setting of position limits by trading venues and the FCA's expectations as to the factors they should have regard to;
- applying position limits only to certain commodity derivatives contracts, based on a set of 'critical' contracts for which disorderly trading would have the greatest impact on commodity markets and their users;
- enhanced position management controls and reporting, and requiring trading venues to establish accountability thresholds and to have access to additional information, including information on positions held over-the-counter (OTC) by members and their clients;
- new exemptions from position limits for liquidity providers and for financial firms dealing with non-financial firms that are hedging risks arising from their commercial activities; and
- the ancillary activities test, including new guidance on what constitutes ancillary activity.

Comments are due by 16 February 2024.

FCA announces decision on publication of synthetic 3-month sterling LIBOR

The FCA has decided to compel ICE Benchmark Administration Limited (IBA) to continue publishing 3-month sterling LIBOR for the period 29 December 2023 to 28 March 2024.

The LIBOR panel banks ceased contributing data to help set 3-month sterling LIBOR after 31 December 2021. IBA had therefore previously notified the FCA that it intended to cease providing 3-month sterling LIBOR unless compelled to do so by the FCA. The FCA requested that the IBA continue to publish certain LIBOR settings, including 3-month sterling LIBOR, using a 'synthetic' methodology until 31 December 2022, and then again until 29 December 2023. It is now extending the deadline for the use of the synthetic methodology for another three months, requesting that IBA continue to publish 3-month sterling LIBOR until 28 March 2024.

The FCA has indicated that it does not intend to use its powers to compel IBA to continue to publish 3-month sterling LIBOR beyond 28 March 2024.

PRA and FCA publish policy statement on remuneration for small firms

The PRA and the FCA have published a joint policy statement (PS16/23) setting out their responses to feedback received to their respective consultation papers, 'Remuneration: Enhancing proportionality for small firms (CP5/23) and 'Remuneration: Enhancing proportionality for dual-regulated firms' (CP23/11).

In CP5/23, the PRA sought feedback on proposals to amend:

- PRA rules that define 'small CRR firms' and 'small third-country CRR firms' to align them with the proposed Small Domestic Deposit Takers (SDDT) regime, and for firms with over GBP 4 billion in total assets, with reference to selected other SDDT criteria under the Strong and Simple framework; and
- supervisory statement (SS) 2/17 to remove the application of the rules on malus, clawback, and buyouts to small firms, introduce an expectation that small firms report material changes in their remuneration structures to supervisors, and remove references to proportionality on remuneration disclosures as these are now set out in the Disclosure (CRR) Part of the PRA Rulebook.

In CP 23/11, the FCA proposed changes to its existing approach in SYSC 19D that were consistent with the changes proposed by the PRA.

While most respondents to the consultations welcomed the regulators' proposals, the PRA has amended its draft policy to better reflect its intention that all firms within the same group must be subject to the same remuneration rules. In particular, it has amended the conditions in the definitions of small CRR firm and small third-country CRR firm to align with the final rules setting out the SDDT criteria, and to clarify how the criteria in those definitions apply in the group context. The FCA has not made any changes to its policy position, but has made some minor changes for clarity.

The changes resulting from PS16/23 came into force on 8 December 2023.

PRA publishes policy statement on simplifications to prudential framework

The PRA has published a policy statement (PS15/23) setting out a summary of responses, as well as its final policy, following its consultation papers (CPs) on various aspects of the proposed strong and simple framework.

In CP5/22, the PRA proposed a set of criteria to define a type of UK bank or building society that could be subject to a simpler set of prudential rules. Following the responses to CP5/22, the PRA sought feedback on a revised set of criteria in CP16/22, which proposed to use the criteria for determining eligibility for the Transitional Capital Regime (TCR). In CP4/23, the PRA proposed a series of simplifications to liquidity and disclosure requirements for firms meeting the revised criteria. In CP14/23, the PRA proposed simplifications to remuneration disclosure requirements for SDDTs and small remuneration firms, using the criteria proposed in CP4/23 and CP5/23.

After considering the responses to these consultations, the PRA has made the following changes to the draft policy:

- Simpler-regime firms have been renamed SDDTs, Simpler-regime consolidation entities have been renamed SDDT consolidation entities, the Simpler regime has been renamed the SDDT regime, and the Simpler regime criteria have been renamed the SDDT criteria;
- the modification by consent process for consolidation groups has been changed so that the responsibility for certifying that the group meets (or ceases to meet) the SDDT criteria on a consolidated basis and that the other firms in the group meet (or cease to meet) the SDDT criteria sits with the group's CRR consolidation entity, rather than the solo entity;
- the implementation date has been set as 1 January 2024 for the rules relating to the definition of an SDDT, the ability for eligible firms and consolidation entities to become SDDTs and SDDT consolidation entities, the glossary changes, application rules, definitions, and disclosure rules, and as 1 July 2024 for the liquidity rules; and
- minor amendments have been made to correct errors and improve readability.

PS15/23 sets out the final policy in the form of amendments to the Liquidity, Reporting and Disclosure Parts of the PRA Rulebook, updates to the SS, 'The PRA's approach to supervising liquidity and funding risk' (SS24/15), and statements of policy (SoPs) 'Liquidity and funding permissions' and 'Pillar 2 liquidity', as well as a new SoP, 'Operating the SDDT regime'.

The PRA intends to consult on simplifications to Pillar 2 and buffer requirements for SDDTs and SDDT consolidation entities in Q2 2024.

CRR: PRA consults on step-in risk, shadow banking entities and groups of connected clients

The PRA has launched a consultation on its proposals regarding step-in risk, shadow banking entities and connected clients.

The consultation proposes rules which require CRR firms that are not SDDTs and CRR consolidation entities that are not SDDT consolidation entities to assess their step-in risk. The rules would require firms to develop their own policies and procedures for step-in risk, that is, the risk that a bank provides financial support to an unconsolidated entity that is facing stress in the absence of, or in excess of, any contractual obligations to provide such support. Firms would also be required to report their assessment to their supervisor on proposed assessment templates, contained in an appendix to the consultation.

The consultation also seeks views on the PRA's proposals to transfer the EBA's guidelines on limits on exposures to shadow banking entities and on connected clients to PRA rules and SSs. The PRA believes that this would streamline the relevant policy documents and improve the currently fragmented policy landscape, therefore improving the accessibility and clarity of its policies.

Comments are due by 5 March 2024.

PRA consults on approach to policymaking under FSMA 2023

The PRA has published a consultation paper (CP27/23) on its proposed approach to policymaking under the regulatory framework as amended by FSMA 2023.

FSMA 2023 grants the PRA wider rule-making responsibilities and enhanced accountability requirements following the UK's exit from the EU. As a result, certain regulatory requirements which previously existed in statute will be replaced in the PRA Rulebook, and will be assessed, amended or added to by the PRA.

CP27/23 seeks stakeholder feedback on a draft Approach to Policy document. The document builds on the approach set out in a PRA discussion paper (DP4/22), which was published as Parliament was considering the bill that would become FSMA 2023. It covers, among other things, proposals to:

- 'cluster' regulatory principles which are similar to each other to allow the PRA to be more efficient and agile as a policymaker;
- take a proactive approach to fulfilling the PRA's secondary competitiveness and growth objective;
- aim to be 'largely compliant' with international standards;
- introduce enhanced transparency and independent scrutiny of the PRA's Cost Benefit Analysis (CBA);
- review rules as and when retained EU law is repealed and replaced in PRA rules;
- gather further data from firms in relation to policy development in order to meet the new accountability requirements under FSMA 2023 (although the PRA notes that work is currently being done to streamline this process and reduce the data burden on firms);
- adopt a flexible approach to stakeholder engagement and to engage a broader range of stakeholders; and
- reform the Rulebook to improve its accessibility, efficiency and clarity.

Comments are due by 8 April 2024.

FOS consults on 2024/25 plans and budget

The FOS has published a consultation paper on its 2024/25 plans and budget.

The consultation paper sets out the improvements that FOS has made to its services, including reducing the average time it takes to resolve a case. It also seeks feedback on the following proposals:

- to reduce costs to the industry in the form of its fees and levies, through the use of surplus reserves and improvements in its service; and
- to exercise new powers granted to it under FSMA 2023 to charge claims management companies and other relevant professional representatives for bringing cases to FOS on behalf of consumers.

Comments are due by 30 January 2024.

BaFin consults on ordinance regarding payment accounts comparison website

The German Federal Financial Supervisory Authority (BaFin) has launched a consultation on a draft Comparison Website Reporting Ordinance (Vergleichswebsitemeldeverordnung - VglWebMV).

The VglWebMV supplements and specifies the pending changes to sections 16 *et seqq.* of the Payment Accounts Act (Zahlungskontengesetz - ZKG) that are to be introduced by way of the Financing for the Future Act (Zukunftsfinanzierungsgesetz) in implementation of guidelines of the Payment Accounts Directive (Directive 2014/92/EU). Pursuant to these new provisions, BaFin will operate a comparison website for payment accounts offered to consumers in Germany and payment service providers will be obliged to report data on specific comparison criteria to BaFin.

The VglWebMV specifies the comparison criteria and the data to be reported to BaFin. Reporting is to be done via BaFin's existing MVP portal.

The purpose of BaFin's future comparison website is to create more transparency for consumers in Germany and thus contribute to collective consumer protection.

Comments are due by 15 December 2023.

CSSF-CODERES publishes circular on application of EBA guidelines on resolvability, transferability and resolvability testing

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has, in its capacity as Luxembourg resolution authority, issued circular letter CODERES 23/18 on the application of the following three EBA guidelines:

- EBA/GL/2022/01 on improving resolvability for institutions and resolution authorities under Articles 15 and 16 of the BRRD (the Resolvability Guidelines);
- EBA/GL/2022/11 on transferability to complement the resolvability assessment for transfer strategies (the Transferability Guidelines); and
- EBA/GL/2023/05 amending the Resolvability Guidelines to introduce a new section on resolvability testing (the Resolvability Testing Guidelines).

The CSSF has indicated that these guidelines are being implemented in a single circular as they should be read as a whole.

The circular is addressed to all Luxembourg institutions whose resolution plan established by the CSSF provides for the use of one or more resolution tools and who are not subject to simplified obligations for resolution planning in accordance with Article 5 of the Luxembourg law of 18 December 2015 on the failure of credit institutions and certain investment firms, as amended.

The purpose of the circular is to inform these addressees that the CSSF, in its capacity as resolution authority, applies the guidelines and has integrated them into its administrative practice and regulatory approach with a view to promoting supervisory convergence in this field at EU level.

The circular requires the addressees to take resolution tool-specific actions in order to improve their resolvability in the context of the resolvability

assessment performed by the CSSF according to Articles 26, 27 and 28 of the resolution law.

The CSSF has reminded the addressees that the resolvability assessment process is a key element of resolution planning in that it ensures that the resolution strategy can be effectively implemented.

Annex 4 to the circular contains a self-assessment report standard format to be used in line with point 129 of the Resolvability Testing Guidelines.

The circular also contains specifications on its scope of application in groups subject to consolidation supervision in Luxembourg according to Article 49 and 50-1 of the Luxembourg law of 5 April 1993 on the financial sector, as amended.

The circular will apply as of 1 January 2024.

CSSF issues circular on ESMA guidelines on reporting under EMIR

The CSSF has issued circular 23/846 on the adoption of the revised ESMA guidelines (ESMA74-362-2281) on reporting under the European Market Infrastructure Regulation (EMIR) into its administrative practice and regulatory approach.

The circular is addressed to financial and non-financial counterparties to derivatives as defined in Articles 2(8) and 2(9) of EMIR for which the CSSF is the competent authority in accordance with Article 1(2) of the Luxembourg law of 15 March 2016 on OTC derivatives, CCPs and trade repositories, as amended (EMIR Law).

The guidelines were issued by ESMA on its own initiative and are related to the application of EMIR reporting obligations in accordance with Article 9 of EMIR and the trade repositories (TRs)' obligations under Articles 78 and 81 of EMIR.

The guidelines fulfil several purposes with regard to the harmonisation and standardisation of reporting under EMIR in order to ensure the high quality of data necessary for the effective monitoring of systemic risk. Increased harmonisation and standardisation of reporting is also intended to facilitate the containment of costs along the complete reporting chain – the counterparties that report the data, the TRs which put in place the procedures to verify the completeness and correctness of data, and the authorities under Article 81(3) of EMIR which use data for supervisory and regulatory purposes.

The guidelines provide clarifications on the following aspects:

- transition to reporting under the new rules;
- the number of reportable derivatives;
- exemption from intragroup derivatives reporting;
- delegation of reporting and allocation of responsibility for reporting;
- reporting logic and the population of reporting fields;
- reporting of different types of derivatives;
- ensuring data quality by the counterparties and the TRs;

- construction of the trade state report and reconciliation of derivatives by the TRs; and
- data access.

The circular states that the guidelines will apply as of 29 April 2024 in the context of the entry into force of the EMIR refit reporting technical standards. All addressees of the circular should comply with the guidelines as of this date.

FINMA implements NGFS recommendations on sustainable finance

The Swiss Financial Market Supervisory Authority (FINMA) has announced a series of measures implementing the non-binding recommendations of the Network for Greening the Financial System (NGFS), as well as the requirements and guidelines of international standard-setting bodies such as the BCBS and the International Association of Insurance Supervisors (IAIS).

These measures include:

- a new circular on nature-related financial risks, which will apply to banks and insurance companies. FINMA is seeking to specify risk management requirements for institutions with regard to climate and other nature-related financial risks. It intends to consult on the circular in the first quarter of 2024;
- a review of whether the current FINMA disclosure requirements need revision to reflect the many developments in climate and sustainability reporting. From 2024, numerous banks and insurance companies in Switzerland will be required to implement the new ordinance on climate reporting, which is based on the Swiss Code of Obligations and is, in some cases, more extensive than the existing FINMA requirements. FINMA notes that, while it is not directly responsible for monitoring supervised entities' compliance with civil law obligations, their compliance falls under the supervisory requirement of proper business conduct;
- the development of its data collecting capabilities with respect to climate risks; and
- an increasing integration of a comprehensive view of nature-related risks (i.e. the close link between climate change and biodiversity loss) into its practice where appropriate.

MAS publishes code of conduct for providers of ESG rating and data products

The Monetary Authority of Singapore (MAS) has published its finalised code of conduct (CoC) for ESG rating and data product providers and an accompanying checklist for providers to self-attest their compliance with the CoC. The MAS has also published its response to feedback received on the proposed CoC for ESG providers.

The CoC is intended to establish baseline industry standards for transparency in methodologies and data sources, governance, and management of CoIs that may compromise the reliability and independence of products. It builds on the IOSCO's recommendations for good practices for providers.

Amongst other things, the MAS' response sets out the following:

- the definitions of 'ESG Rating' and 'ESG Data Product' have been refined. For instance, proprietary ESG data products produced for use/consumption within the provider's own corporate group of affiliated companies and are not offered to third parties are carved out from the definition of 'ESG Rating';
- the MAS has clarified that the current definitions of 'ESG data product' and 'ESG data product provider' are sufficiently broad for second party opinions (SPOs) to be included, and the MAS will not specifically carve out SPOs. As the adoption of the CoC is on a voluntary basis, SPO providers can opt-in if users of their products prefer that their providers adopt the CoC;
- regarding the disclosures of forward-looking elements in ESG rating and data products, the MAS will maintain the current drafting in Best Practice 4e under Principle 4 of the CoC to align with a principle-based approach for the CoC;
- regarding the feedback on Principle 1 of the CoC on issuance of high quality ESG rating and data products the MAS will refine Best Practice 1d to require disclosures on changes to the methodologies and potential impact of such changes, where the changes are material and/or impact the final rating, and Best Practice 1i will be refined to cite the verification of data sources as an example of quality assurance;
- the MAS will proceed with a 'comply or explain' approach for providers to adopt the CoC, as well as the checklist to guide them in attesting their adoption of the CoC. Providers are encouraged to provide relevant links or attachments to support their completed checklist when publishing on their websites where feasible;
- the MAS will leave the decision to providers as to whether they wish to conduct third party assurances of their attestations on a voluntary basis;
- the MAS encourages providers to disclose their adoption of the CoC and publish their completed checklist within 12 months from publication of the CoC. To enable users to easily identify providers which have publicly adopted the CoC, the MAS has worked with the International Capital Market Association (ICMA) to host a list of such providers on ICMA's website; and
- regarding the phased approach towards regulating ESG rating providers as capital markets services (CMS) licensees under the Securities and Futures Act 2001, the MAS notes the feedback received and intends to take it into consideration when developing a regulatory regime for ESG rating providers. The MAS has also indicated that further public consultation on licensing and regulatory requirements will be conducted when it takes formal steps towards the regulatory regime.

MAS consults on proposed amendments to capital framework for approved exchanges and approved clearing houses

The MAS has launched a public consultation on proposed amendments to the current capital framework for approved exchanges (AEs) and approved clearing houses (ACHs), as part of a review to update the capital framework and align with international practices.

Amongst other things, the MAS is seeking feedback on the following proposals:

- the introduction of a separate liquidity requirement, to require AEs and ACHs to hold cash or near cash assets sufficient to cover at least six months of their operating expenses, or an amount as assessed by the AE and ACH that is needed to achieve recovery or an orderly wind-down, whichever is higher;
- in respect of the solvency requirement, to streamline the capital components and the deducted balance sheet components to strengthen the quality and availability of capital that contributes towards the eligible capital of an AE or ACH; and
- in respect of the total risk requirement, to introduce changes to the operational risk component, investment risk component, and general counterparty risk component. In particular, the MAS is proposing to include depreciation and amortisation charges in operating expenses when determining the operational risk component, cover all capital investments in subsidiaries and associated corporations, including the deductions from financial resources, under the investment risk component, and amend the calculation of the general counterparty risk component to 8% of the value of all credit-weighted exposures to all counterparties.

The MAS intends to impose the proposed capital framework via a new Notice issued under the Securities and Futures Act 2001. The MAS also intends to set out reporting requirements related to the framework for AEs and ACHs in the Securities and Futures (Organised Markets) Regulations 2018 and Securities and Futures (Clearing Facilities) Regulations 2013 (Regulations) respectively.

Views are also sought on the draft Notice and amendment Regulations.

Comments are due by 15 January 2024.

MAS revises guidelines on licensing, registration and conduct of business for fund management companies

The MAS has revised its guidelines on licensing, registration and conduct of business for fund management companies (FMCs).

Amongst other things, the MAS has enhanced the criteria for licensing of managers and announced that a person would not qualify for a fund management licence or registration, if the person:

- sets up fund structures that merely serve as a conduit for the offer of funds managed by other fund managers; and
- ultimately invests in assets that are not capital markets products.

In particular, an FMC is expected to conduct substantive fund management activity for all its segregated mandates and funds and demonstrate that it is conducting substantive fund management activity by retaining appropriate documentation. The MAS has also emphasised that applicants for licensing must provide credible plans to manage third party moneys as part of their application, and that the regulated status of FMCs will lapse if they do not commence fund management within six months of being issued a licence. Similarly, the MAS has emphasised that it does not regard managing one's own or one's family's moneys as relevant experience in the context of an FMC

that is seeking to be regulated to manage monies for third parties. Where an individual's past experience in investment management was gained at unregulated entities, the FMC must be prepared to substantiate the individual's experience.

The MAS has also refined its expectations in relation to the representatives of FMCs, and clarified the types of roles representatives may play, i.e., investment decision making, deal sourcing/origination and trade execution, in addition to roles which were previously already included in the guidelines. The MAS has stated that as a matter of good internal control and for proper segregation of duties, individuals who are responsible for, or involved in control functions, or middle or back-office functions (such as risk management, compliance, operations and finance) should not be appointed representatives of the FMC. In addition, the MAS has clarified its expectations for at least two full-time representatives residing in Singapore, and emphasised that FMCs should carry out substantive fund management activity in Singapore and have their representatives based in Singapore. Should there be exceptional reasons for an FMC to base a representative overseas, the FMC must have adequate compliance oversight over the overseas representative.

The MAS has included a new expectation in the guidelines that requires FMCs to minimise the shareholding held by passive shareholders (whether direct, intermediate or ultimate) who are not involved in the management of the FMC's business, and/or do not have relevant experience in fund management. In a similar vein, a new paragraph 3.9 has been added to the guidelines, which provides that CEOs and executive directors are expected to focus on the management of the FMC's business and may be required to divest outside business interests, if they are unable to adequately mitigate the CoIs (whether actual or perceived), or reputational risks posed to the FMC.

Paragraph 4.1.4 of the guidelines has been amended to state that where FMCs invest in digital assets, they should disclose at a minimum the following:

- the heightened price, liquidity and volatility risks associated with digital assets;
- the risks associated with the use of intermediaries such as trading platforms and custodians; and
- any other regulatory and legal risks that are associated with investments in digital assets.

RECENT CLIFFORD CHANCE BRIEFINGS

Mandatory climate related financial disclosure

The Australian Accounting Standards Board (AASB) has invited feedback on three exposure drafts of climate-related reporting standards by 1 March 2024 ahead of mandatory reporting proposed to commence from 1 July 2024 for large companies. This follows earlier consultation between Treasury and stakeholders on mandatory reporting and legislation amending the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) to introduce mandatory climate-related reporting requirements (see our briefing 'Mandatory Climate Related Financial Disclosure is Coming for Australia').

The legislation amending the ASIC Act was assented to on 27 November 2023.

This briefing paper considers the exposure drafts.

https://www.cliffordchance.com/briefings/2023/11/mandatory-climate-related-financial-disclosure.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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