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Securities Enforcement
Global Update
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Global Co-Chairs, Securities Enforcement Team

Bruce Bettigole
Partner (US)
T: +1 202 383 0165
brucebettigole@eversheds-sutherland.com

Greg Brandman
Partner (UK)
T: +44 20 7919 0757
gregorybrandman@eversheds-sutherland.com
United States

SEC Annual Report

The US Securities and Exchange Commission’s (SEC) Division of Enforcement released its annual report disclosing the results of its enforcement actions for the fiscal year 2018 as well as its initiatives going forward. The SEC indicated that the annual report reflects the implementation of its five core principles: (1) focus on Main Street investors, (2) focus on individual accountability, (3) keeping pace with technological change, (4) imposing remedies that most effectively further enforcement goals, and (5) constantly assessing the allocation of its resources. The SEC also focused on three new initiatives: focus on the Main Street investor through the creation of its Division of Retail Strategy Task Force, focus on policing cyber-related misconduct through the creation of its Cyber Unit, and the Share Class Selection Disclosure Initiative.

Although the SEC report cautions that it is difficult to measure the effectiveness of the enforcement program adequately through a review of the raw numbers, it nonetheless provided a large amount of quantitative data. First and most importantly, the SEC reported that the number of enforcement actions was up 9% for a total of 821. Of those 821 enforcement actions, approximately 85% fall into one of five categories: (1) securities offerings – 25%, (2) investment adviser issues – 22%, (3) issuer reporting/accounting and auditing – 16%, (4) broker-dealer misconduct – 13%, and (5) insider trading – 10%. The amount of penalties and disgorgement ordered by the SEC also went up 4% in FY2018. Specifically, the SEC ordered $1.4 billion in penalties and $2.5 billion in disgorgement for a total of $3.9 billion. Although this was an increase of 4% over the previous FY, it was down 6% over the 2015FY. An interesting point with regard to the penalties is that 77% of the total penalties and disgorgements were ordered from just 5% of the SEC’s largest cases. Finally, the SEC noted that because of the Kokesh v. SEC decision, the SEC would likely forgo approximately $900 million in disgorgement for matters that have already been filed.

Many of the cases the SEC cited as noteworthy were actions that related directly to one of its core principles or initiatives. For example, there were several cases involving Ponzi schemes that the SEC brought in order to protect Main Street investors. As for cyber-related misconduct, the SEC noted several actions involving initial coin offerings (ICOs) and other digital assets. With respect to issuer reporting, the SEC noted several actions involving CEOs who mislead investors with regard to the disclosure of certain information. Finally, the SEC noted various other matters including matters involving violations of the Foreign Corrupt Practices Act and even an action against the New York Stock Exchange and two affiliated exchanges for regulatory failures related to multiple episodes, including several disruptive market events.

Cryptocurrency and the Regulatory Environment

As investments in cryptocurrency become more popular, more entities are entering the marketplace, which is resulting in more attention from securities regulators. For much of 2017, the regulators issued guidance in the form of alerts and speeches warning firms about the potential regulatory issues related to the digital asset market. In 2018, the regulators began bringing enforcement actions. The SEC in a Statement on Digital Asset Securities Issuance and Trading indicated that its enforcement actions fell into three categories:
1. Initial offers and sales of digital asset securities – Most of these actions involve the question of whether digital assets are securities and, if so, whether the securities should have been registered prior to being offered.

2. Investment vehicles investing in digital asset securities and those who advise others about investing in these securities – These actions have centered on the questions of registration of both the Investment Company Act of 1940 and the Investment Advisers Act of 1940 (Advisers Act) as well as regulatory and fiduciary obligations under the Advisers Act.

3. Secondary market trading of digital asset securities – These actions have centered on whether certain activities in the digital asset market require registration as a national securities exchange or registration as a broker-dealer.

Both the SEC and the Financial Industry Regulatory Authority (FINRA) have indicated that the oversight of the digital asset market will be part of their 2019 exam priorities. The SEC stated that for firms actively engaged in the digital asset market, it will conduct examinations focused on, among other things, portfolio management of digital assets, trading, safety of client funds and assets, pricing of client portfolios, compliance and internal controls.

For its part, FINRA is encouraging firms to notify FINRA if they plan to engage in the digital asset market, even where a membership application is not required. FINRA said it will review firms’ activities through its membership and examination processes related to digital assets and assess firms’ compliance with applicable securities laws and regulations and related supervisory, compliance and operational controls to mitigate the risks associated with such activities.

Finally, US Commodity Futures Trading Commission (CFTC) Chairman Christopher Giancarlo indicated that he believes “the CFTC should establish a new office of data and analytics as a stand-alone department ready and capable of serving the needs of the Commission and the operating divisions” in order to “keep pace with digitization and execute [their] missions in the most effective and efficient ways possible.”

For more information, please see this Eversheds Sutherland (US) LLP Legal Alert.

Share Class Selection Disclosure Initiative Part II

A year ago, the SEC Division of Enforcement SEC announced the Share Class Selection Disclosure Initiative (Initiative). Its purpose was to encourage SEC registered investment advisers (RIAs) to self-report certain violations relating to their failure to disclose conflicts of interests associated with the receipt of 12b-1 fees for investing client funds in, or recommending that clients invest in, a share class paying 12b-1 fees when a lower cost share class was available.

Under the Initiative, the SEC’s Division of Enforcement would recommend favorable settlement terms with no civil penalty for any resulting enforcement action against an RIA that self-reported this share class violation and promptly returned money to harmed clients. To be eligible, an RIA was to self-report by June 12, 2018.

For those RIAs that did not self-report, Enforcement indicated it would recommend “violations and remedies beyond those described in the Initiative, including penalties” that could be “greater than those imposed in past cases involving similar disclosure failures.”

Beginning in December 2018, Enforcement sent request letters to firms that didn’t self-report, but perhaps should have. The request letters largely mirrored the 12b-1 disclosure issues set forth in the Initiative, but expanded the SEC’s initial review with regard to two key areas:

- First, the SEC has expanded the relevant time period, going back to 2013.
- Second, the SEC’s request covers not just 12b-1 fees, but also revenue sharing, including requesting the following:
  » All agreements concerning revenue sharing payments; and
  » Data regarding each mutual fund that made revenue sharing payments due to the share class in which the advisory client assets were held.

RIAs that did not self-report under the Initiative should consider conducting a self-assessment of this area and be prepared to address the following issues:

1. Why it did not self-report,
2. Why its conduct resulted in inadequate disclosure, and
3. Whether the RIA has engaged in any subsequent remedial efforts.

For more information on the current status of the Share Class Selection Disclosure Initiative, please see the following two Eversheds Sutherland (US) LLP Legal Alerts.

Earning Cooperation Credit

On November 29, 2018, the US Department of Justice (DOJ) modified prior guidance on individual liability for corporate misconduct by affording federal prosecutors discretion to focus on “individuals who play significant roles in setting a company on a course of criminal conduct.” This relaxes the standard for cooperation credit previously described in the September 9, 2015, memorandum titled “Individual Accountability for Corporate Wrongdoing” (commonly known as the “Yates Memorandum”).

The Yates Memorandum required corporations to provide “all relevant facts about the individuals involved” in the misconduct, irrespective of position, status or seniority, to be “eligible for any cooperation credit.” This emphasis on individual misconduct created a tension for directors and officers deciding whether to self-report, because the policy did not offer leniency for the individuals’ misconduct. Now, the DOJ has revised the Justice Manual to only require disclosure of all relevant facts about “all individuals substantially involved in or responsible for the misconduct” (emphasis added).

On November 29, 2018, Deputy Attorney General Rod J. Rosenstein expounded on the revised requirements. Under the modified policy, Rosenstein said that pursuing individuals responsible for wrongdoing would be a top priority in every corporate investigation. He said the DOJ wants to focus on the individuals who play significant roles in setting a company on a course of criminal conduct to know who authorized the misconduct and what they knew about it. In that
regard, the DOJ is making clear that it does not want corporate investigations to be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted. Rosenstein said that corporations that want to cooperate in exchange for credit should have full and frank discussions with the prosecutors about how to gather the relevant facts.

For civil matters, Rosenstein said the “all or nothing” approach to cooperation introduced a few years ago was counterproductive. He said the staff needed flexibility to accept settlements that remedy the harm and deter future violations so that they can move on to other important cases. Like in criminal matters, Rosenstein said that if a corporation wants to earn maximum credit, it must identify every individual who was substantially involved in or responsible for the misconduct including members of senior management or the board of directors. He did say, however, that when a corporation honestly and meaningfully assists the government’s investigation, the staff can now give partial credit. He said that a binary choice – ‘full credit or no credit’ – usually results in delaying resolution of the matter while providing little or no benefit. Finally, Rosenstein said that staff attorneys are now permitted to consider an individual’s ability to pay in deciding whether to pursue a civil judgment.

There are still many other factors that are considered in determining whether the government will give cooperation credit. For civil actions, the DOJ Manual states that to be eligible for cooperation in a civil corporate case, “corporations should be measured by how much meaningful assistance it provides to the government. Meaningful assistance may include, for example, a corporation’s voluntary disclosure of misconduct, cooperation that allows the DOJ to identify a problem and secure a resolution without expending investigative resources that otherwise would be required, or assistance that enables the DOJ to pursue misconduct that otherwise would not be redressed.”

For more information, please see this Eversheds Sutherland (US) LLP Legal Alert.

UK Broker Charged in Global Securities Fraud

Scheme

Securities enforcement litigation continues to focus on microcap fraud. A Massachusetts federal grand jury has indicted Roger Knox, the head of a Swiss asset management firm, for orchestrating a global pump-and-dump scheme that yielded approximately $164 million over three years. Knox, a resident of the United Kingdom, was charged with one count of securities fraud and one count of conspiracy to commit securities fraud.

In June 2015, Knox allegedly began operating a fraudulent Swiss asset management firm known as Silverton and later renamed Wintercap. He facilitated pump-and-dump schemes by selling penny stocks for investors who secretly owned the stock through nominee shareholders. Simultaneously, the investors Knox was selling on behalf of orchestrated promotional campaigns to artificially inflate the price and trading volume of the stocks. Prosecutors say Knox funneled the proceeds from the sales of more than 100 stocks to co-conspirators in the United States and elsewhere “through a complex money transfer system that disguised the source and nature of the funds.” For his services, Knox charged a fee of approximately 6% of the proceeds.

The SEC has also filed a civil complaint against Knox. The SEC complaint names Michael T. Gastauer as a co-conspirator, alleging he aided and abetted Knox’s fraud by allowing Knox to disburse proceeds through bank accounts of US corporations that Gastauer established.

For further information, please contact:

Bruce Bettigole  
Partner  
T: +1 202 383 0165  
brucebettigole@eversheds-sutherland.com

Olga Greenberg  
Partner  
T: +1 404 853 8274  
olgagreenberg@eversheds-sutherland.com

Brian Rubin  
Partner  
T: +1 202 383 0124  
brianrubin@eversheds-sutherland.com
United Kingdom

FCA Market Watch: Issue 58

In December 2018, the Financial Conduct Authority (FCA) published Issue 58 of Market Watch, its newsletter on market conduct and transaction reporting issues. The FCA has reviewed the industry’s implementation of the Market Abuse Regulation (MAR) since 2016 and in this edition the FCA outlines its findings and clarifies a number of the issues arising. Points to note include:

- **Tailoring risk assessments:** The most effective compliance the FCA saw during its review was where participants could demonstrate that their risk assessments were calibrated to the markets and asset classes they operate in. The FCA encourages market participants to exercise their own judgement when assessing potentially manipulative behaviors taking into account the characteristics of the financial instruments and markets they are operating in. In this assessment, firms should ensure they have properly considered their regulatory obligation to counter the risk of financial crime.

- **Surveillance:** The FCA found that not all firms were carrying out adequate surveillance of orders and transactions. The FCA reminded market participants of their duty in executing or arranging transactions to maintain effective arrangements, systems and procedures that enable successful detection and reporting of all suspicious transactions and orders. The FCA emphasized that this is a multi-asset exercise. Although more than 70% of all Suspicious Transaction and Orders Reports (STORs) received by the FCA relate to insider dealing in equities, the FCA reiterated that firms that surveillance should occur across all relevant asset classes, including fixed incomes and commodities.

- **Market Soundings:** The FCA emphasized that MAR has formalized a regime for conducting market soundings, and that issuers reported that the new market sounding regime did not inhibit their ability to raise share capital in UK markets. The FCA praised a gatekeeper model of compliance, whereby front-office teams will decide whether or not to accept a wall-crossing and how this might operate in practice. The FCA emphasized that a declined wall-crossing could still convey inside information, if the information provided allowed for reasonably easy identification of the security in question.

- **Insider Lists:** The FCA reiterated that anyone with potential access to inside information, whether issuers or their advisers, individuals working for the buy-side or sell-side, is under an obligation to identify when they came into possession of inside information, and to control it. A firm’s insider list should include the details of all individuals who had access to that information, whether they are working for an issuer, or completing any other tasks which would enable access to such information. Sixty-three percent of firms from the FCA survey reportedly utilized permanent insider lists. The FCA noted that, when used appropriately, permanent lists may reduce the administrative burden. However, the FCA noted that it expected participants to “ensure that the number of employees captured on such lists is not disproportionately large and remains restricted to employees who have access at all times to all inside information.” Notably, the FCA emphasized that those who do not require permanent access to inside information should be recorded in deal-specific or event-based insider lists.
Manufactured Credit Events: The FCA reported that within the Credit Default Swap (CDS) market, there appeared to be a number of intentional or "manufactured" events, which could severely harm confidence and trust in the credit derivatives market. The FCA noted that the CDS market was global, and although the UK had not currently been affected, such behaviors could transfer easily.

FCA consultation on further changes to the SMCR

On January 23, 2019, the FCA opened a consultation setting out its proposals for further changes to the Senior Managers and Certification Regime (SM&CR). The FCA stated that these proposals "are intended to provide extra clarity in some areas and help firms adjust to the SM&CR" and respond to feedback received as a result of Discussion Paper 16/4.

Proposals

Some areas of interest from the proposals are set out below:

- **Excluding the Legal Function from the Overall Responsibility Requirement:** The proposal clarifies the application of the SM&CR to the Legal Function and following the Discussion Paper DP16/4 – "Overall responsibility and the legal function," published in September 2016, the FCA proposes to exclude the Legal Function from the Overall Responsibility Requirement.

- **Including the Systems and Controls Function in the Certification Regime:** The FCA proposes to ensure that the Certification Regime applies to individuals performing roles that were Systems and Controls functions under the Approved Persons Regime, but which are no longer approved under the SM&CR.

- **Applying Senior Manager Conduct Rule 4 to Non-Approved Executive Directors at Limited Scope Firms:** The FCA proposes to apply Senior Manager Conduct Rule 4 (SC4), in COCON 2.2 of the FCA Handbook, to non-approved executive directors at Limited Scope firms to ensure that executive and non-executive directors at these firms are subject to equivalent requirements. The proposals will impact all firms that are currently and will be subject to the SM&CR (but note that some proposals apply specifically to certain types of firms). As a reminder, this includes banking firms, insurers and also solo-regulated firms from December 2019. Solo-regulated firms are further divided into Limited Scope Firms, Core Firms and Enhanced Firms, and each type of firm will be subject to slightly different SM&CR rules.

FCA speech on diversity and culture in the regulatory context

Christopher Woolard, Executive Director of Strategy and Competition at the FCA, gave a speech on diversity in financial services and the challenge to be met on December 19, 2018.

Mr. Woolard emphasized that the FCA was planning to explore the relationship between diversity and firm behavior including misconduct, to understand the connection between the two. He emphasized that:

- "In our judgement, the way a senior manager approaches issues around diversity may be relevant to our assessment of their competence and character."

- "The way firms handle non-financial misconduct, including allegations of sexual misconduct, is potentially relevant to our assessment of that firm, in the same way that their handling of insider dealing, market manipulation or any other misconduct is."

- "Non-financial misconduct is misconduct, plain and simple."

The FCA noted that in 2017, it received 20 reports of non-financial misconduct, and in 2018, it received 64 such reports. This indicates clearly that the FCA will continue to broaden its approach to assessing misconduct beyond purely financial misconduct in the future.

FCA Final Notice – Tesco Personal Finance plc

On October 1, 2018, the FCA issued Tesco Personal Finance plc a Final Notice for a breach of Principle 2 of the FCA’s Principles for Businesses, by failing to exercise due skill, care and diligence in protecting its personal current account holders against a cyber-attack in 2016. Tesco has been ordered to pay a fine of £16.4 million. The cyber-attack saw £2.26 million stolen from more than 9,000 customer accounts within 48 hours.

The FCA found that Tesco Bank breached Principle 2 because it failed to exercise due skill, care and diligence in relation to how the firm:

- Designed and distributed its debit card.
- Configured specific authentication and fraud detection rules.
- Failed to take appropriate action to prevent the foreseeable risk of fraud.
- Responded to the November 2016 cyber-attack with lack of sufficient rigor, skill and urgency.

Tesco obtained a significant reduction in penalty in recognition of the following:

1. A 30% discount at Stage One for agreeing to an early settlement.
2. Another 30% discount for a high level of cooperation with the FCA, as well as providing a well-organized redress scheme which fully compensated customers.
3. The FCA also acknowledged in its findings and penalty that Tesco prevented further significant unauthorized transactions, which helped to mitigate the damage.

FCA Decision Notice against Mohammed Ataur Rahman Prodhans

On December 4, 2018, the FCA published the Decision Notice issued to Mohammed Ataur Rahman Prodhans, former CEO of Sonali Bank (UK) Ltd., fining him £76,400.

The FCA considered that Mr. Prodhans breached Statement of Principle 6 by acting without due skill, care and diligence in managing the business of the firm for which he was responsible. It considered that he was also knowingly concerned in Sonali’s
breach of Principle 3 of the Principles for Businesses, by failing to maintain effective anti-money laundering (AML) systems. Mr. Prodhan was the Sonali senior manager with responsibility for establishing and maintaining effective AML systems.

In the FCA’s view, between June 2012 and March 2014, Mr. Prodhan failed to take reasonable steps to assess and mitigate the AML risks arising from a culture of non-compliance among Sonali’s staff. He failed to ensure that sufficient focus was given to AML systems and controls within Sonali. He also failed to ensure there was a clear allocation of responsibilities to oversee Sonali’s branches, and failed to appropriately oversee, manage and adequately resource Sonali’s money laundering reporting officer (MLRO) function.

The FCA took the view that, because of these failings, Sonali’s operational staff failed to appreciate the need to comply with AML requirements, and the MLRO function was ineffective in monitoring Sonali’s compliance. This led to systemic failings in Sonali’s AML systems throughout the business.

The FCA believes that a firm’s AML systems will not be effective unless senior managers understand the risks faced by the business they are responsible for, create a culture that supports effective regulation, and take responsibility for overseeing systems for which they are responsible.

Mr. Prodhan has referred the Decision Notice to the Tax and Chancery Chamber of the Upper Tribunal. The Tribunal will determine what, if any, is the appropriate action for the FCA to take, and will remit the matter back to the FCA with the directions it considers appropriate for giving effect to its determination. The proposed action outlined in the Decision Notice will have no effect pending the Tribunal’s determination.

FCA Final Notice against Paul Stephany

On February 4, 2019, the FCA published the Final Notice issued to Paul Stephany, a former fund manager at Newton Investment Management Limited. Mr. Stephany was fined more than £32,000 for breaches of Statements of Principles 2 and 3 of the FCA’s Statements of Principle and Code of Practice for Approved Persons (APER) in relation to an IPO and a placing.

The FCA found that on two separate occasions, Mr. Stephany submitted orders as part of a book build for shares that were to be quoted on public exchanges. Prior to the order books for the new shares closing, Mr. Stephany contacted other fund managers at competitor firms and attempted to influence them to cap their orders at the same price limit as his own orders.

The FCA found that Mr. Stephany risked undermining the integrity of the market and the book build by encouraging other fund managers participating in the book build to use their collective power to influence the price formation process. As a consequence, Mr. Stephany failed to observe proper standards of market conduct. He was also found to have acted without due skill, care and diligence by failing to give proper consideration to the risks of engaging in these communications. There was a risk of loss to the issuers and existing shareholders, if Mr. Stephany had successfully undermined the proper price formation process.

Mark Steward, Executive Director of Enforcement and Market oversight at the FCA, highlighted:

“This matter underscores the importance of fund managers taking care to avoid undermining the proper price formation process in both IPOs and placings. These markets play a vital role in helping companies raise capital in the UK’s financial markets and when they are put at risk the FCA will take action.”

The FCA is pursuing a related investigation under the Competition Act 1998, to which Mr. Stephany is not subject, but which represents the first investigation that the FCA has pursued using its concurrent competition powers. The FCA is expected to make further announcements regarding the outcome of its Competition Act investigation in due course.

For further information, please contact:

Greg Brandman  
Head of Financial Services Contentious Regulatory Investigations  
T: +44 20 7919 0757  
gregorybrandman@eversheds-sutherland.com

Claire Carroll  
Partner  
T: +44 20 7919 0724 (London)  
T: +44 191 241 6190 (Newcastle)  
clairecarroll@eversheds-sutherland.com

Jake McQuitty  
Partner  
T: +44 207 919 0600  
jakemcquitty@eversheds-sutherland.com
Hong Kong

SFC Enhances its Regulatory Framework to Manage Crypto-Asset Risks

The Securities and Futures Commission (SFC) of Hong Kong has published a number of changes to its regulatory framework with the aim of enhancing protection for investors participating in crypto-asset markets. These changes comprise new requirements for crypto-asset portfolio managers and fund distributors, together with a conceptual framework applicable to crypto-asset trading platform operators.

The SFC has been innovative in how it has sought to impose its control on the crypto-asset market. In particular, the SFC has used licensing conditions to enable it to move the regulatory needle in circumstances where changes to the Securities and Futures Ordinance (SFO), which would otherwise be required to properly regulate this market, are virtually impossible.

SFC Amends Anti-Money Laundering and Counter-Financing of Terrorism Guidelines

The SFC has revised its Guideline on Anti-Money Laundering and Counter-Terrorist Financing (AML/CFT Guideline), which took effect on November 1, 2018. The amendments are in line with the latest international standards and are aimed to make the AML/CFT Guideline more relevant in light of industry developments. Under the revised AML/CFT Guideline, the categories of politically exposed persons (PEPs) will be expanded to include international organization PEPs who are persons entrusted with a prominent function by an international organization. The enhanced scrutiny for foreign PEPs will be extended to domestic PEPs and international organization PEPs where their business relationships with a firm are assessed to be high risk.

Additionally, the changes allow firms the flexibility to adopt reasonable risk-based measures to verify customer identification information. To facilitate non-face-to-face customer onboarding, firms are allowed to take a mix of supplementary measures to guard against impersonation risk.

SFC and CSRC Hold High-Level Meeting on Enforcement Cooperation

The SFC and the China Securities Regulatory Commission (CSRC) held the seventh regular high-level meeting in Hong Kong to discuss a range of matters concerning cross-boundary enforcement cooperation. The two regulators conducted in-depth discussions on market surveillance workflows and procedures, updated each other on the progress of high-priority cases, and discussed important cross-boundary enforcement policies.

At the meeting, both sides also explored ways to further strengthen cross-boundary enforcement cooperation, including enhancing a coordinated investigation mechanism for emerging types of cross-boundary illegal activity; discussing a notification and evidence-sharing mechanism for cases involving dual listed companies in both markets; and organizing further joint training and case study workshops.
SFC Concludes Consultation on OTC Derivatives and Conduct Risk

The SFC released consultation conclusions on proposals to enhance the over-the-counter (OTC) derivatives regime and to address conduct risks posed by dealings with group affiliates and other connected persons.

Under the proposals to be implemented by the SFC, licensed corporations that are contracting parties to non-centrally cleared OTC derivative transactions or are licensed for Type 9 (asset management) regulated activity will be subject to risk mitigation requirements. Licensed corporations providing client clearing services for OTC derivative transactions will be subject to segregation, portability and disclosure requirements.

In addition, licensed corporations which have dealings with group affiliates and other connected persons will be subject to conduct requirements to ensure that risks are properly managed, they act in clients’ best interest and appropriate risk disclosure is provided.

SFC and FCA Sign MoU on United Kingdom-Hong Kong Mutual Recognition of Funds

The SFC and the Financial Conduct Authority (FCA) have entered into a Memorandum of Understanding (MoU) on Mutual Recognition of Funds, which will allow eligible Hong Kong public funds and United Kingdom retail funds to be distributed in each other’s market through a streamlined process.

The MoU also establishes a framework for exchange of information, regular dialog and regulatory cooperation in relation to the cross-border offering of eligible Hong Kong public funds and United Kingdom retail funds.

Further details of the mutual recognition of funds scheme are set out in the SFC circular and the FCA circular issued on October 8.

CSRC and SFC Sign MoU to Enhance Supervisory Cooperation and Exchange of Information with Cross-Boundary Regulated Entities

The CSRC and the SFC have entered into a Memorandum of Understanding (MoU) regarding the cooperation and exchange of information in connection with the supervision and oversight of regulated entities of the CSRC or the SFC that operate on a cross-boundary basis in Hong Kong and the Mainland (Cross-Boundary Regulated Entities).

The MoU facilitates the CSRC and the SFC to cooperate with each other in the interest of fulfilling their respective mandates, particularly in the areas of investor protection, promoting the integrity and financial prudence of the Cross-Boundary Regulated Entities, fostering fairness of markets, reducing systemic risk and maintaining financial stability.

SFC and CSSF sign MoU on Luxembourg-Hong Kong Mutual Recognition of Funds

The SFC and the Commission de Surveillance du Secteur Financier (CSSF) have entered into a Memorandum of Understanding (MoU) on Mutual Recognition of Funds (MRF), which will allow eligible Hong Kong public funds and Luxembourg UCITS funds to be distributed in each other’s market through a streamlined process.

The MoU also establishes a framework for exchange of information, regular dialog and regulatory cooperation in relation to the cross-border offering of eligible Hong Kong public funds and Luxembourg UCITS funds.

SFC Concludes Consultation on Amendments to the Code on Unit Trusts and Mutual Funds

The SFC released consultation conclusions on proposed amendments to the Code on Unit Trusts and Mutual Funds (UT Code).

The SFC will implement the proposals set out in the consultation paper with some modifications and clarifications. These include modifications to the calculation method for funds’ derivatives investments and clarification of the enhanced obligations of trustees and custodians.

Consequential amendments to the SFC Code on MPF Products (MPF Code), the Code on Pooled Retirement Funds (PRF Code) and the Code on Investment-Linked Assurance Schemes (ILAS Code) will also be implemented, with appropriate modifications.

Hong Kong Enforcement Highlights

SFC Reprimands and Fines SFM HK Management Limited $1.5 Million Over Naked Short Selling

In December, the SFC reprimanded and fined SFM HK Management Limited (SFM) $1.5 million for failures relating to the short selling of Great Wall Motor Company Limited shares in 2015 on behalf of a fund it managed.

The SFC considered that SFM not only failed to act with due skill, care and diligence in dealing in the bonus shares, but also failed to diligently supervise its staff members and implement adequate and effective systems and controls to ensure compliance with the short selling requirements.

SFC Reprimands and Fines FWD Life Insurance Company (Bermuda) Limited $2.4 Million for Regulatory Breaches

In January, the SFC reprimanded and fined FWD Life Insurance Company (Bermuda) Limited (FWD Life) $2.4 million for failures in complying with the key personnel requirements under the SFC Code on MPF Products (MPF Code) and the Fund Manager Code of Conduct.
The SFC found that FWD Life failed to ensure that there were at least two key personnel who met the minimum five-year investment experience requirement in managing retirement funds or public funds under the MPF Code at all times. The SFC also found that FWD Life failed to implement policies and procedures for the designation and monitoring of key personnel and to communicate to relevant staff members of their designations as key personnel. FWD Life’s failure in this respect contributed to the duration of its breach of the MPF Code.

For further information, please contact:

John Siu
Partner
T: +852 9033 1561
johnsiu@eversheds-sutherland.com
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Singapore

Investigations into Noble Group
The Commercial Affairs Department of the Singapore Police Force (SPF), the Monetary Authority of Singapore (MAS) and the Accounting and Corporate Regulatory Authority (ACRA) are investigating a Singapore-listed commodities trader, Noble Group, for suspected false and misleading statements, as well as breaches of disclosure requirements under the Securities and Futures Act.

Noble Group’s market value of approximately $6 billion was almost wiped out after its accounting was questioned by Iceberg Research. In response, Noble had sold billions of dollars of assets, taken hefty write-downs and reduced its workforce. In spite of these actions, Noble Group continued to defend its accounts.

Noble Group had also attempted to restructure by transforming into an Asia-focused coal-trading business and listing the overhauled business, known as “New Noble.” However, the SPF, the MAS and the Singapore Exchange Regulation (SGX RegCo) had opposed the relisting after a careful review of the findings to-date, and stated the following in a joint statement:

MAS and SGX RegCo have concluded that there are significant uncertainties about the financial position of New Noble. It would be imprudent to allow the re-listing as investors will not be able to trade in New Noble’s shares on an informed basis. MAS and SGX RegCo will therefore not allow the re-listing of New Noble to proceed.

Investigations into Noble Group are ongoing.

Lifetime Prohibition Order
On December 19, 2018, MAS announced that it has increased the ban against one Tim Leissner to a lifetime prohibition order (PO), following Mr. Leissner’s admission to criminal charges brought against him by the US DOJ.

Previously, Mr. Leissner, a former Goldman Sachs banker, had issued in June 2015 an unauthorized letter to a financial institution based in Luxemburg, and had also made false statements on behalf of Goldman Sachs (Asia) LLC without the firm’s knowledge.

In December 2016, MAS had issued a 10-year PO against Mr. Leissner, which prohibited him from (i) performing any regulated activity under the Securities and Futures Act, and (ii) taking part, directly or indirectly, in the management of any capital market services firm in Singapore.

On November 1, 2018, the DOJ charged Mr. Leissner with conspiracy to (i) commit money laundering, and (ii) violate the US Foreign Corrupt Practices Act. Mr. Leissner pleaded guilty to these charges. He also admitted to participating in a conspiracy to (i) obtain and retain business from 1MDB for Goldman Sachs through the promise and payment of bribes and kickbacks to government officials in Abu Dhabi and Malaysia, and by embezzling funds from 1MDB for himself and others, and (ii) launder these bribes, kickbacks and funds through financial systems in the US and elsewhere.
The information revealed in the US criminal proceedings against Mr. Leissner were previously not available to the Singapore authorities, given that Mr. Leissner was not in Singapore and could not be compelled to return to Singapore to assist in the investigations. Accordingly, after considering Mr. Leissner’s admission and the criminal actions brought against him by the DOJ, MAS decided to extend the penalty against Mr. Leissner to a lifetime PO.

MAS also expanded the scope of the PO to prohibit Mr. Leissner from acting as a director of, or becoming a substantial shareholder, capital markets services licensee or exempt person under the Securities and Futures Act.

**MAS Issues Prohibition Orders for Fraudulent and Dishonest Conduct**

MAS recently issued a 12-year prohibition order against Lee Chang Yeh Bentley under the Securities and Futures Act (SFA) and the Financial Advisers Act (FAA). The primary aim of the prohibition order regime is to protect the financial industry, by preventing unsuitable persons from conducting regulated activities. The publication of prohibition orders also serves to ensure that a clear signal is sent to the rest of the industry that such misconduct will not be taken lightly.

Mr. Lee was a representative of CIMB Bank Berhad, Singapore, between September 2013 and July 2014. Prior to that, he had been employed by United Overseas Bank (UOB) from August 2005 to January 2010. While at UOB, Mr. Lee set up a company to invest in shares and foreign exchange on behalf of other investors, without holding a Capital Markets Services license, and later left UOB to manage his company full time. From May 2009 to January 2013, in the course of carrying out his fund management business, Mr. Lee misappropriated approximately $520,000 from the monies entrusted to him by clients whom he had served while with UOB. For committing criminal breach of trust in contravention of Section 409 of the Penal Code, as well as conducting regulated activities without a license in contravention of Section 82(1) of the SFA, Mr. Lee was sentenced by the State Courts in November 2017 to for years and nine months of imprisonment, and a fine of $50,000.

For further information, please contact:

**Andy Lem**  
Partner  
T: +65 6361 9853  
andylem@eversheds-sutherland.com
United Arab Emirates

ADGM Joins World Alliance of International Financial Centers as a Founding Member
The Abu Dhabi Global Market (ADGM) is one of the 11 founding members of this organization that has been established to facilitate cooperation, communication and innovation across the global financial market.

Initiatives that have been brought up by ADGM within the forum include a global regulatory regime and regulatory laboratory and the world’s first comprehensive crypto-asset regulatory framework.

Dubai Financial Services Authority (DFSA) Publishes Over-the-Counter Fixed Income Securities Market Report
The report mainly consists of a review of the Dubai International Financial Centre’s (DIFC) over-the-counter fixed income securities market structure and activity and reflects the ongoing efforts of the DIFC to ensure proper and effective regulation in this area.

ADGM and Industrial Development Bureau Sign MoU
On October 28, 2018, the ADGM and the Industrial Development Bureau of the Abu Dhabi Department of Economic Development signed a Memorandum of Understanding (MoU) for the advancement of the industrial sector in Abu Dhabi. The MoU reflects the shared goal of the parties in developing a platform to support strategic industrial projects and to enhance the exchange of information to help fulfill the respective regulatory mandates of both parties.

DIFC signs MoU with China Banking Association (CBA)
On November 4, 2018, an MoU was signed to facilitate communication between the two organizations and the building of a relationship that both will benefit from.

It was announced that DIFC and CBA will collaborate on best practices for delivering enhanced services to both their communities through the sharing of knowledge.

This MoU is yet another way in which Dubai maintains its position as a global financial hub, and allows Dubai to collaborate with China’s fintech industry.

ADGM Signs MoU with Central Bank of Bahrain
Signed on November 11, 2018, the MoU promotes cooperation between the United Arab Emirates and the Kingdom of Bahrain. The MoU has been put in place to facilitate innovation and the promotion of the growing fintech industry.

The Central Bank of Bahrain commented:
“This MoU represents the important role regulators play in creating an environment in which this sphere can progress.”
Securities and Commodities Authority (SCA), DFSA and the ADGM’s Financial Services Regulatory Authority (FSRA) Sign Agreement on Licensing and Promoting Investment Funds

On November 27, 2018, all three authorities signed the agreement, which facilitates the licensing of domestic funds for promotion across the UAE. The agreement also enhances the supervisory regime around investment funds and makes it easier for foreign entities to invest and move operations to the UAE.

All three bodies have agreed to establish common rules and to each set up a notification and registration facility, and foreign investors in the UAE will operate under a single license. This is a continuation of Dubai’s efforts to make investment easier and more secure for foreign entities and establish itself as a global financial hub.

DFSA Signs MoU with Bank Negara Malaysia

The signing of this MoU strengthens the relationship between Dubai and Malaysia, and is representative of the DFSA’s efforts to strengthen regulatory ties and continue international engagement. This MoU is expected to aid in maintaining and promoting the high quality and secure financial services available in both jurisdictions, and increasing the presence of Malaysian institutions in the DIFC.

DFSA Hosts Authorization Roundtable

Held on December 9, 2018, the DFSA issued several updates, including developments to the DFSA online forms, and updates on anti-money laundering and the Financial Action Task Force Mutual Evaluation. The event also included an opportunity for various financial firms and their representatives to raise concerns with the DFSA and to work towards making it easier and more secure for foreign financial firms to operate in Dubai.

ADGM and United Arab Emirates Ministry of Economy Sign MoU

Signed on December 24, 2018, this MoU is between the Registration Authority of the ADGM and the UAE Ministry of Economy. The MoU concerns the cooperation of the two bodies and aims to increase the oversight of the audit profession in the UAE. The MoU reflects the ongoing efforts of both bodies to ensure a high standard of financial audits in the UAE.

DIFC Signs MoU with Innovate Finance

The MoU, signed on January 6, 2018, strengthens relationships between Dubai and the UK’s fintech industries. Both organizations have agreed to share knowledge, host learning initiatives and to foster relationships between their regulatory and financial communities.

For further information, please contact:

Rebecca Copley
Partner
T: +97 14 38 97 044
rebeccacopley@eversheds-sutherland.com
France

The Launch of “SPOT” Investigations by the French Financial Market Authority and Publication of the First Results

In 2018, the French Financial Market Authority (AMF) has launched its strategy #Supervision2022 and the practice of conducting brief inspections called Supervision des Pratiques Opérationnelle et Thématique (SPOT) on any topic it might consider of interest.

The purpose of the SPOT investigations will be to analyze the practices of stakeholders in the field concerned, and to share lessons learned with the financial markets and all persons involved in each of these fields. The AMF will enhance the SPOT results with reminders, updates or clarification of applicable regulations, and practices implemented in other countries.

The AMF specifies that these controls are not repressive. However, a SPOT control can be transformed into a “classic” control, if necessary.

In 2019, the first results of a SPOT focusing on the valuation of unlisted holdings by private equity management companies have been published. The investigation, which lasted for three years and was completed in December 2017, concerned five asset management companies (AMCs).

In order to assess the good conduct of the valuation, the SPOT has assessed:

- The independence of the valuer: It was found that all five AMCs used the service of a valuer. Among them, four were perfectly independent;
- The valuation system and the procedures involved: It was found that four AMCs describe the valuation methods used but only two prioritize them and determine in which case each method is to be used;
- The valuation of holdings transferred between portfolios: It was found that all operations were done with respect to the interests of unit holders. However, they were not subject to prior documentation, creating possible conflicts of interest;
- The information addressed to the investors about the valuation of holdings: It was found that the information addressed to investors a posteriori was complete, but two AMCs gave insufficient information regarding the description of the valuation methods and the corresponding selection criteria;
- The justification of the valuation: It was found that the test identified the overly partial nature of the entire set of audit trails provided. More information is needed regarding the choice of valuation methods, and the nature of the valuer’s due diligence; and
- The control in place for the valuation of holdings: It was found that the second-level controls are set out in the compliance and internal control plan of all of the AMCs, but it is insufficiently documented for three of the AMCs.

Overall, the results are positive although it was found that efforts must be made on detailed and precise documentation and formalization.
The publication of this first investigation confirms that SPOT is a very useful tool for the AMF, exposing market operators to additional investigation proceedings but contributing to the safety of financial markets.

The Return of the Gold Market on the Paris Financial Market May Play a Central Role in Europe

In 2018, the Banque de France opened a bank account at JPMorgan Chase, an American bank operating on the gold market, in order to open its services to gold deposits, swaps, gold loans and leases to foreign central banks, services which so far were proposed in Europe by the London Bullion Market Association (s) only.

As a consequence, the central banks having gold deposits in France will not have to go through London anymore to carry out their transactions; this creates an interesting alternative in the context of the Brexit.

As for the Banque de France, this account at JPMorgan Chase will enable it to mobilize its stock of gold, estimated in September 2018 at 2,436 tons, and to deal indirectly with a broader range of actors such as refiners and mining companies. This opportunity will expand strategic gold transactions in France, and strengthen the Banque de France’s central role in the financial market.

Gold, which has a high market value and is easily convertible as currency, falls within the financial asset category. A question then arises about whether the gold market shall be supervised as any other financial asset, controlled by the French Prudential Supervision and Resolution Authority (ACPR). Also, it raises the question of whether the same standards of transparency, supervision and traceability should apply to gold transactions operated between central banks. As of today, these questions remain unanswered.

In any event, concerns have been expressed by French economists with regard to trading gold, considering that the yellow metal is a safe haven that should be ring-fenced since it provides security and guarantee in case of severe monetary crises and that some transactions, such as swap operations (exchanging gold against currency) might put the stability of public finance at risk.

A First Insight into the Market of Alternative Investment Funds Subject to Reporting in France

In January 2019, the French Financial Market Authority (AMF) provided its first insight into the market of Alternative Investments Funds (AIFs) subject to reporting in France.

As a reminder, the 2011/61/EU Directive on Alternative Investment Fund Managers was adopted in June 2011, creating new reporting obligations. The main objective was to harmoniously supervise all managers across the European Union, in order to increase their transparency, to secure the investments, and to supervise and limit systemic risks.

Pursuant to this Directive, managers must disclose detailed information to the national authorities on their investments and investors, particularly their principal exposures and their liquidity risk. They must also explain the liquidity management tools employed, and their level of leverage.

AMF’s insight, based on the date reported in application of this Directive, reveals that 5,168 AIFs are subject to reporting in France. Together, they represent €688 billion in net assets at the end of 2017, and €915 billion in exposure.

Also, some trends arose from those reporting:

- Most AIFs present similar characteristics with lower-risk, more traditional funds: 59% of total net assets are made up of equity, bond or diversified funds;
- Only 0.6% of total net assets are represented by hedge funds;
- It is possible for the AIFs to liquidate the majority of their assets within one day or less, because their portfolios are sufficiently liquid to handle the frequencies at which investors redeem;
- Generally speaking, leverage is in line with the investment strategies employed; and
- Exposures are consistent with the strategies of the AIFs.

This insight also underlines the limits of the reporting set out by the 2011/61/EU Directive:

- The funds cannot be classified properly because the principal strategies submitted by the reporting do not allow a majority of funds to recognize themselves among them; and
- The statistical analysis of the reported date is difficult because reporting is based on variables that are optional.

The AMF suggests that the reporting might be improved by including more risk indicators or supervision tools and better data coverage.

French Authorities Warn Against the Risk of Money Laundering and Fraud that Initial Coin Offerings Actually Create

At the end of 2018, the National Treatment of Information and Action against Illicit Financial Circuits Unit (TRACFIN) released its report “Pattern and analysis of the risks in 2017–2018.”

Once again this year, TRACFIN issued risk warnings and recommendations regarding initial coin offerings (ICOs). ICOs appear to create high identified risks of money laundering and fraud.

ICOs may present multiple advantages, and TRACFIN also pointed out the opportunities given by this digital currency.
However, the use of crypto assets guaranteeing anonymity and the lack of traceability facilitates money laundering, price manipulation, cyberattacks and trade of illicit products on the Dark Web.

Illicit funds can also be invested with tokens, which will be resold to several other investors. At the end of the process, these same illicit tokens are finally converted into legal currency.

In addition, money launderers might be able to justify their course of action by explaining that they funded a project and that they maximized the return on their investment.

To prevent these hazards, TRACFIN recommended implementing at both international/European and national levels regulations regarding crypto assets and ICOs. Such regulation should prevent mainly two risks: money laundering and terrorism financing.

In France, cooperation should be strengthened between TRACFIN and the French Financial Market Authority (AMF), mostly with regard to the means deployed for investigating financial markets.

The law on Business Growth and Transformation (PACTE), which is currently in the process of adoption, will regulate ICOs by authorizing the AMF to issue a visa to operators wishing to issue tokens into the French market, in order to guarantee the credibility of the operation.

For further information, please contact:

**Remi Kleiman**  
*Partner*  
T: +33 155 73 40 24  
remikleiman@eversheds-sutherland.com

**Sophie Scemla**  
*Partner*  
T: +33 155 73 40 31  
sophiescemla@eversheds-sutherland.com
Ireland

Corporate Governance Requirements for Investment Firms

The Central Bank of Ireland has published its Corporate Governance Requirements for Investment Firms and Market Operators 2018. The requirements will apply to all firms authorized by the Central Bank that are designated as High, Medium High or Medium Low Impact under the Central Bank’s Probability Risk Impact System. The requirements deal with board composition, the role of the Chairman, remuneration committees, audit committees and risk committees.

The requirements come following the identification of a number of deficiencies of corporate governance in investments firms, and it is hoped that they will provide clarity to the industry and promote high standards of corporate governance within firms.

Major Reforms to Combat Corporate Crime Recommended

On October 23, 2018, the Law Reform Commission published its report on “Regulatory Powers and Corporate Offences.” The report recommends an overhaul of the current regimes in place to tackle regulatory breaches and white collar crime. Since this is only a report, it is important to note that government support and legislative change will be required to bring any of the recommendations into effect.

Notable recommendations include:

- A properly resourced statutory Corporate Crime Agency be established;
- Economic regulators should be given authority to impose significant financial sanctions and to make regulatory enforcement agreements; and
- Fraud offenses should be reformed to address egregiously reckless risk-taking.

Central Bank of Ireland Sets Out Strategic Priorities for Next Three Years

The Central Bank of Ireland has set out its key priorities for the next three years in its Strategic Plan 2019-2021. The strategy sets out the following five strategic themes the Central Bank will focus on for the next three years: strengthening resilience; Brexit; strengthening consumer protection; engaging and influencing; and enhancing organization capability.

Launching the strategy, Governor Philip R. Lane, said “in common with the wider European system, the last decade saw the Central Bank initially immersed in crisis management, followed by the reconstruction of the regulatory system in recent years. It is now timely to enter a period of consolidation, in which the progress made in recent years is maintained, while the taking on of new challenges is accompanied by a focus on improving our efficiency and capability in delivering existing tasks.”
Navigating the issues
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New Requirements for Firms to Register with the Central Bank of Ireland

Effective on November 26, 2018, the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018 introduced a statutory requirement to register with the Central Bank of Ireland for anti-money laundering purposes. The obligation to register arises if a firm offers any of the services set out in Schedule 2 of the Act, and it is not otherwise authorized or licensed to carry on business by the Central Bank. However, the obligation to register does not occur if a firm is carrying out a Schedule 2 activity provided the firm falls into one of the exemptions set out under the Act.

Criminal Justice (Money Laundering and Terrorist Financing) Bill 2019

The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2019 received Cabinet approval on January 3, 2019. The Bill transposes and gives effect to the provisions of the Fifth EU Money Laundering Directive (5AMLD) and will enhance existing Irish anti-money laundering legislation.

Some notable provisions of the Bill include:

- Prevention of risks associated with virtual currencies and limiting the use of prepaid cards;
- Improving safeguards for financial transactions to and from high-risk third countries;
- Broadening the scope of designated bodies under existing legislation; and
- Enhancing existing customer due diligence requirements.

The approval of this Bill marks a further important step in anti-money laundering legislation in Ireland.

New Credit Servicing Regime Comes into Effect

On January 21, 2019, the Irish Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 came into effect. It amends the existing credit servicing regime by providing greater protection to Irish borrowers who acquire consumer loans. The new regime requires that previously unregulated entities that hold title to Irish loans or have material decision making powers in relation to credit, may now be subject to regulation and a requirement to apply to the Central Bank of Ireland for authorization to carry on the business of a credit servicing firm.

The act represents a major expansion in the scope of the previous regime and will have a significant effect on all existing and prospective owners of in-scope credit agreements.

The Companies (Corporate Enforcement Authority) Bill 2018

The General Scheme of the Companies (Corporate Enforcement Authority) Bill 2018 has been published. The primary purpose of the Bill is to establish the Office of the Director of Corporate Enforcement as an agency, rather than as an office within the Department of Business, Enterprise and Innovation. This is to provide greater autonomy to the agency in terms of staffing and resources so it is better equipped to investigate breaches of company law. Further recommendations set out under the Scheme include proposed amendments with respect to share and share capital requirements, corporate governance, restriction of directors and other various changes to company law.

The General Scheme will undergo pre-legislative scrutiny before being finalized as a Bill. The Bill will then pass through the various stages of Parliament before being enacted.

Companies (Amendment) Bill 2019

The Companies (Amendment) Bill 2019 has been published and proposes to amend the Companies Act 2014 with respect to the time periods allowed for filing a company’s annual return. Once enacted, a company shall have 56 days after the annual return date to deliver the annual return, or where the annual return is made up to an earlier date than the company’s annual return date, 56 days from that earlier date. Currently, the annual return and statutory financial statements must be filed within 28 days of the company’s annual return date. Where the annual return is filed electronically, the company has an extra 28 days to file its financial statements.

E-Services and Communications Credit Union Limited Fined €155,000

E-Services and Communications Credit Union Limited has been fined €155,000 by the Central Bank of Ireland for breaching its regulatory requirements under the Central Bank Reform Act 2010. The breaches included a failure to introduce adequate systems or controls to ensure full compliance with its Fitness and Probity obligations, a failure to take all reasonable steps to carry out adequate Fitness and Probity due diligence on individuals performing controlled functions, and a failure to ensure that certain employees and an outsourced internal audit service provider complied with the Fitness and Probity Standards.

The Central Bank's Director of Enforcement and Anti-Money Laundering, Seána Cunningham, said: "E-Services not only failed to meet its obligations under the fitness and probity regime but it represented to the Central Bank in response to a Risk Mitigation Programme that these obligations had been met, when it subsequently transpired that this was not the case."

The FSPO Publishes 228 Legally Binding Decisions for the First Time

The Financial Services and Pensions Ombudsman (FSPO) has published 228 legally binding decisions in complaints against financial services providers and pension providers reached throughout 2018. The power to publish decisions was granted to the FSPO under section 62(2) of the Financial Services and Pensions Ombudsman Act 2017. This is the first time the power has been exercised.
Leadership, Accountability and Culture in Financial Services

Speaking at the Eversheds Sutherland Conference on Leadership, Accountability and Culture in Financial Services, Director General, Financial Conduct, Derville Rowland, discussed the Central Bank of Ireland’s proposals to enhance accountability in the financial services sector. In her speech, she highlighted the importance of delivering a more effective consumer-focused culture at regulated financial institutions, and the role of leaders in bringing about the required changes.

She explained that the responsibilities placed on financial services providers are very onerous given the damage that financial institutions can do to their customers, shareholders and the wider economy. She stressed that “the time is now for the board and senior leadership teams at our financial institutions to ensure that the culture of the firms that they lead is one that demonstrates competency, honesty and reliability – the key components of trustworthiness.”

For further information, please contact:

**Norman Fitzgerald**
Partner and Head of Dispute Resolution and Litigation
T: +35 31 66 44 239
normanfitzgerald@eversheds-sutherland.ie

**Pamela O’Neill**
Partner
T: +35 31 66 44 241
pamelaoneill@eversheds-sutherland.ie
Milan prosecutors launch investigation against Saipem

Milan Public Prosecutors commenced criminal investigations against Saipem – an Italian company controlled by oil major Eni and Italian state lender CDP – its chief executive officer, and two of its managers for false accounting, market manipulation and providing false information in a cash call prospectus, which allegedly occurred between 2015 and 2017.

The investigation against the company was triggered in March 2018 by allegations brought by Consob, the Italian Authority in charge of supervision of the stock market.

Following the news of the investigation and the search, Saipem stated in a press release that it is ready to collaborate, and that it is confident that the investigations will prove the correctness of its work.

Italian case law on cryptocurrencies

Italian courts recently issued two judgments – delivered by the Court of Brescia (see Decree No. 7556, issued on July 18, 2018) and by the Court of Appeal of Brescia (see Decree No. 207, issued on October 24, 2018) – concerning the qualification of cryptocurrencies as an asset that may be validly awarded to a limited liability company’s capital.

Both decisions, despite being based on different rationales, deny this possibility, postponing a more specific interpretation once the legal framework for cryptocurrencies is defined in more detail.

The dispute started when a public notary refused to register with the Italian Companies Register a corporate capital increase which the shareholders realized with a contribution in kind, consisting of a cryptocurrency.

Legal action was brought by the company against the notary’s refusal, requesting the Court of Brescia to force the registration of the corporate capital increase with the Companies Register.

The court of first instance held that the economic value of cryptocurrencies is impossible to assess in a certain and sure way and, therefore, cryptocurrencies are not capable of being injected into the corporate capital of a company as a contribution in kind, because they do not meet the basic requirements of any good suitable for conferment, namely:

- The suitability to be the subject of a certain economic evaluation;
- The existence of an exchange market for the asset in question;
- The suitability of the asset to be targeted by social creditors, i.e., the suitability to be subject to forced execution.

The company opposed the court ruling, but the court of appeal upheld the first instance decision, laying down the principle that cryptocurrencies may not be contributed in kind, because they are equivalent to currencies – but currencies with an exchange rate system that is not “as stable and as easily determined as in the case of currencies with legal tender status in other countries (dollars, yen, pounds etc.).”
Cryptocurrencies and their use by shareholders will be spread only if and when the courts will provide consistent opinions on the matter, clarifying whether they shall be considered as goods/services or money with clear and undisputable value.

The Joint Section of the Italian Supreme Court on the possibility for municipalities to enter

With Decision no. 493, issued on January 10, 2019, the Italian Supreme Court referred to the Joint Sections (the highest Italian judicial institution), the following questions:

- Whether an interest rate swap providing for an upfront shall be treated (or not) by the municipality as an operation that generates a debt to finance functioning costs (different from mere investment costs, which is prohibited); and
- Whether the signing of such contract falls within the competence reserved to the municipal council, involving a spending resolution that imposes the budgets for the following financial years.

If the Joint Sections rule for to nullify interest rate swap agreements entered into by municipalities (by maintaining that they should be considered as an unlawful form of financial indebtedness), the possible impact of this decision on Italian litigation between financial intermediaries and municipalities could be potentially disruptive.

For further information, please contact:

Mariafrancesca De Leo
Partner
T: +44 20 7919 0855
mariafrancescadeleo@eversheds-sutherland.com
Netherlands

AFM Fines Both Company and Director and Major Shareholder
The Netherlands Authority for Financial Markets (Autoriteit Financiële Markten (AFM)) fined a company EUR 10,000 for offering investment services without a license. In addition, its director and major shareholder was fined EUR 200,000 for actual being in charge of the misconduct.

The Trade and Industry Appeals Tribunal concluded that it is possible for a regulator to fine a natural person who is in control of an act of misconduct even in the event that such person is both the director and (majority) shareholder of the financial institution. However, it is important that the regulator verifies whether it is proportionate that the two fines are imposed against one and the same person.

AFM Fines Audit Firm in Connection with a Violation of Independence Rules
On October 8, 2018, the AFM imposed an administrative fine of EUR 165,000 on an audit firm. The audit firm performed statutory audits for clients in 2015 and 2016, while other services were performed within the network for several of these clients at the same time. Such a concurrence of audit and advisory services is not allowed and may prevent the audit firm from rendering an independent audit opinion. Issuing an independent opinion is the core task of the auditor.

The audit firm has improved its internal procedures by including these incidents in its internal training program and by adjusting its IT systems. The fact that the audit firm refunded a significant part of its earnings from the non-audit services to the clients involved was also taken into consideration.

AFM Imposes Fine for Offering Payday Loans Without License
On October 18, 2018, the AFM imposed an administrative fine of EUR 1.75 million on a bank for offering payday loans (flitskredieten) to Dutch consumers without a required license. A payday loan is a loan with a short duration and a relatively low loan amount.

The bank had a banking license in Malta and mainly offered the payday loans from a branch office in the Netherlands. This would have been permissible if the branch had notified the Maltese regulator, the Malta Financial Services Authority, which in turn should have notified the Dutch regulator. The bank, however, had failed to do so and had thereby withdrawn from the supervision of the AFM.

Further Review of Compliance with Combating Money Laundering and the Financing of Terrorism in 2019
In 2018, the AFM started reviewing compliance with the Money Laundering and Terrorist Financing (Prevention) (BES Islands) Act (Wet ter voorkoming van witwassen en financieren van terrorisme, or (Wwft BES) by financial services providers involved in the brokerage of life insurance. The AFM will continue to devote attention to this review in 2019.

Dealing with money laundering is very important for the effective fight against all forms of serious criminality. The reviews and completion of individual cases from the reviews are still ongoing.