

International Regulatory Update

15 – 19 September 2014

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If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

[Chris Bates](#) +44 (0)20 7006 1041

[Nick O'Neill](#) +1 212 878 3119

[Marc Benzler](#) +49 69 7199 3304

[Steven Gatti](#) +1 202 912 5095

[Mark Shipman](#) + 852 2826 8992

[Donna Wacker](#) +852 2826 3478

International Regulatory Update Editor

[Joachim Richter](#) +44 (0)20 7006 2503

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

- US Court upholds CFTC's policy statement on cross-border application of US swap regulations
- Recent Clifford chance Briefings: European Depositary Regimes – a comparison; Vietnam – new bankruptcy law; and more. [Follow this link to the briefings section.](#)

European Court of Auditors assesses EU banking supervision under the EBA

The European Court of Auditors (ECA) has published a special audit [report](#) on the establishment of the European Banking Authority (EBA) and the ongoing impact of its supervisory function. The audit's objectives were to assess:

- the extent to which the EU Commission and EBA satisfactorily carried out their responsibilities in setting up the new regulatory and supervisory framework for the EU banking sector; and
- how successfully the framework functions in respect of cross-border banking supervision, the resilience of EU banks and promotion of consumer protection in the EU's financial services market.

The report also considers lessons from the EBA's work since 2011 that may be of relevance for banking supervision under the Single Supervisory Mechanism (SSM).

The report is critical of aspects of the current regime, such as the ECB's limited powers in relation to enforcing decisions on supervisory convergence and resolving disputes between national supervisory authorities (NSAs) and limited legal powers in mediation. The report also makes proposals for further clarifying the roles and responsibilities of the EBA, European Central Bank (ECB) and NSAs, especially in light of the ECB's forthcoming new supervisory function under the SSM from autumn 2014.

Rating agencies: ESMA publishes updated technical advice on development of European creditworthiness assessment for sovereign debt

The European Securities and Markets Authority (ESMA) has reissued its [technical advice](#) on the development of a European creditworthiness assessment for sovereign debt. In its advice published in July 2014, ESMA provided information regarding the market for sovereign ratings and advised on criteria critical in the consideration of the development of a creditworthiness assessment.

The advice has been revised to reflect an amended figure in Table 1 (Outstanding sovereign ratings in the EU as of

2H2013) and two re-classifications of solicitation status in Table 2 (Solicitation status of EU sovereign ratings as of 2H2013).

EMIR: ESMA adds BME Clearing to list of registered CCPs

ESMA has added BME Clearing to its [list](#) of registered central counterparties (CCPs) under the European Market Infrastructure Regulation (EMIR). EMIR requires EU-based CCPs to be registered and non-EU CCPs to be recognised in the EU.

PSD 2: EU Council Presidency publishes compromise proposal

The EU Council Presidency has published a [compromise text](#) for the proposed second Payment Services Directive (PSD 2).

IOSCO consults on risk mitigation standards for non-centrally cleared OTC derivatives

The International Organization of Securities Commissions (IOSCO) has published a [consultation report](#) on risk mitigation standards for non-centrally cleared OTC derivatives.

The consultation proposes nine standards covering:

- trading relationship documentation;
- trade confirmation;
- valuation with counterparties;
- reconciliation;
- portfolio compression;
- dispute resolution;
- implementation; and
- cross-border transactions

The proposed risk mitigation standards would aim to:

- promote legal certainty and facilitate timely dispute resolution;
- facilitate the management of counterparty credit and other risks; and
- increase overall financial stability.

Comments on the proposals should be submitted on or before 17 October 2014.

FSB reports to G20 on jurisdictions' ability to defer to each other's OTC derivatives market regulatory regimes

The Financial Stability Board (FSB) has published a [report](#) to the G20 Finance Ministers and Central Bank Governors

on jurisdictions' ability to defer to each other's OTC derivatives market regulatory regimes.

The report sets out that:

- all but five jurisdictions report having some capability to defer to OTC derivatives requirements in another jurisdiction;
- there are some broad similarities in how jurisdictions approach the application of 'deference'; and
- there are still differences in the circumstances under which deference would be applied, and how it would be applied.

Financial Services (Banking Reform) Act 2013 (Commencement No. 6) Order 2014 published

The Financial Services (Banking Reform) Act 2013 (Commencement No. 6) Order 2014 ([SI 2014/2458](#)) has been published.

The Order brings into force remaining provisions of the Financial Services (Banking Reform) Act 2013 relating to competition functions conferred on the Payment Services Regulator (established under the Act) and the Financial Conduct Authority (FCA) concurrently with the Competition and Markets Authority. In particular the Order brings into force:

- provisions about giving guidance under the Competition Act 1998 that relates to the enforcement of competition law from 1 November 2014; and
- remaining uncommenced provisions in the Act relating to the conferral of competition functions on the Payment Services Regulator and the Financial Conduct Authority from 1 April 2015.

Central Securities Depositories Regulation: LSE publishes notice on Article 3

The London Stock Exchange (LSE) has published [market notice N08/14](#) on Article 3 of the Central Securities Depositories Regulation (CSDR).

CSDR Article 3(1) requires transferable securities which are admitted to trading or traded on trading venues to be represented in book-entry form as immobilisation or subsequent to a direct issuance in dematerialised form. There is an additional requirement under Article 3(2) that where transactions in transferable securities take place on a trading venue, the relevant securities should be recorded in book entry form in a Central Securities Depository (CSD) on or before the intended settlement date.

This requirement applies irrespective of whether the security is currently eligible for electronic settlement or not and applies to all transactions executed under the Rules of the London Stock Exchange irrespective of whether or not the securities are issued by an EU issuer. The Exchange intends to amend its rules with effect from 5 January 2015 so that on Exchange transactions are able to comply with the requirements of Article 3(2).

The notice sets out the impact of these requirements on issuers and securities admitted to trading on LSE and on the Rules of the LSE.

Decree implementing Ordinance on crowdfunding published

The [decree](#) implementing Ordinance no 2014-559 of 30 May 2014 on crowdfunding has been published in the Journal Officiel. The decree, dated 16 September 2014, sets maximum amounts applicable to loans (EUR 1000 by lender and by project for a maximum term of 7 years, EUR 4000 for an interest-free loan) and borrowings (EUR 1 million by project holder and by project) regarding crowdfunding through loans. It establishes requirements for access to the crowdfunding advisor or intermediary professions, rules of good conduct of these regulated professions and clauses which have to be inserted in standard contracts made available to lenders and borrowers. It sets out reduced obligations for crowdfunding intermediaries who issue calls for donations. The text also provides conditions for registration for equity investments advisors and crowdfunding intermediaries on the single register managed by the French register of insurance intermediaries (ORIAS). Finally, it sets out rules applicable to lightly-supervised payment institutions.

The decree is aimed at crowdfunding intermediaries, equity investment advisors, borrowers and lenders in the form of loans. It will enter into force on 1 October 2014.

FSTB and HKMA launch consultation on enhancements to deposit protection scheme

The Financial Services and the Treasury Bureau (FSTB) and the Hong Kong Monetary Authority (HKMA) have jointly issued a [consultation paper](#) on proposed enhancements to the deposit protection scheme (DPS). The DPS is a statutory scheme established to protect depositors and reduce the risks of bank runs during a banking crisis. It is operated by the Hong Kong Deposit Protection Board.

The consultation paper notes that, while the DPS has never been triggered since its establishment in 2006, its role in

contributing to depositor confidence and general banking stability has been affirmed. The FSTB and HKMA believe that it is important that enhancements to the DPS are implemented to provide a more reliable safeguard for depositors against any event of bank failures.

The FSTB and the HKMA note that a key focus of relevant reforms internationally in recent years has been to strengthen the capacity to make prompt payouts when a deposit protection scheme is triggered. In view of this and the recent assessment results of the International Monetary Fund (IMF), the government proposes introducing the following enhancement measures to the DPS to accelerate the process of making deposit compensation to depositors when a bank fails:

- adopting the 'gross payout' approach to determine DPS compensation, i.e. a depositor will be compensated an amount up to the DPS protection limit, currently HKD 500,000, without the need to set-off the depositor's liabilities against his/her protected deposits in the same bank at the time of determining and distributing the payouts;
- providing more certainty for determining the reference date used for calculating the deposit compensation amount to accelerate the calculation; and
- enabling the use of electronic communication channels by the Hong Kong Deposit Protection Board under certain circumstances, in addition to the conventional written communication, to notify depositors of the compensation arrangements and other details in case the DPS is triggered.

Comments on the consultation paper are due by 12 December 2014.

HKEx amends listing rules governing collective investment schemes

The Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEx), has published minor [rule amendments](#) to Chapter 20 of the Main Board listing rules governing collective investment schemes (CIS) that are authorised by the Securities and Futures Commission (SFC). The rule amendments:

- clarify the eligibility requirement of a listing agent who handles a listing application on behalf of a new CIS applicant;
- streamline the application procedures for a new CIS applicant; and

- clarify the procedures for the listing of additional interests in a close-ended CIS after listing.

The SEHK has indicated that the rule amendments will apply to listing applications submitted to it on or after 10 November 2014 to give sufficient time for issuers and market practitioners to familiarise themselves with the changes.

The SEHK has also published a [guidance letter](#) (HKEx-GL79-14) and a set of [revised checklists and forms](#) to provide guidance on documentary requirements and administrative matters in relation to the rule amendments.

HKMA releases new template for reporting leverage ratio under Basel III implementation

HKMA has issued a [circular](#) to authorised institutions regarding the submission of quarterly templates through an electronic transmission system (STET) for reporting of the leverage ratio under Basel III implementation.

In order to enable the HKMA to maintain a complete time series of data in relation to the leverage ratio, authorised institutions are requested to resubmit via STET the quarterly templates for positions as of end-December 2013, end-March 2014 and end-June 2014.

The submission of the new template will start from end-September 2014.

Hong Kong supports new global standard for automatic exchange of financial account information

The FSTB has [announced](#) that the Hong Kong government will support the new global standard for automatic exchange of financial account information to enhance tax transparency and combat cross-border tax evasion in order to maintain Hong Kong's international reputation and competitiveness as an international financial and business centre.

In particular, the government will go through the usual due process of engaging relevant stakeholders, addressing relevant policy and legal issues involved, and seeking the Legislative Council's approval of the legislation required to implement the new global standards.

The first automatic information exchanges are expected to start by the end of 2018.

ASIC and MAS sign world's first MOU on access to OTC derivatives trade repository data

The Australian Securities and Investments Commission (ASIC) and the Monetary Authority of Singapore (MAS)

have entered into a [memorandum of understanding](#) (MOU) to allow trade repositories licensed in one jurisdiction to provide relevant data to the authority in the other jurisdiction. Under the MOU, ASIC and MAS intend to cooperate with each other and fulfill their respective responsibilities and mandates by facilitating each other's access to relevant trade repository data, while ensuring the confidentiality of the information is appropriately protected. The MOU follows ASIC's licensing of DTCC Data Repository (Singapore) Pte Ltd, a trade repository established and licensed in Singapore.

A joint statement issued by ASIC and MAS highlighted that the agreement is a world first for this type of arrangement and that the MOU embodies the on-going close co-operation between the two authorities on financial market issues, including the implementation of the G20 over-the-counter (OTC) derivatives reforms.

SGX launches consultation on reinforcing its listings and enforcement framework

The Singapore Exchange (SGX) has launched a public [consultation](#) on the proposed establishment of independent listings advisory, disciplinary and appeals committees (listings committees). The consultation follows the Monetary Authority of Singapore's (MAS's) and SGX's joint consultation in February 2014 on a set of proposals to enhance Singapore's securities market.

The Listings Advisory Committee (LAC) is intended to enhance SGX's existing framework for managing actual or perceived self-regulatory organisation (SRO) conflict arising from the SGX's dual role as a commercial for-profit entity and a regulator of listed companies. The SGX will also benefit from the perspectives of market professionals and representatives of the investment community in making its listing decisions. The proposed Listings Disciplinary Committee (LDC) and Listings Appeals Committee (LApC) are intended to enhance transparency of the SGX's disciplinary process and ensure fair and independent administration of sanctions.

The SGX has indicated that the LAC will consider listing policy issues and initial public offer (IPO) and reverse takeover (RTO) applications which meet certain criteria. The LDC will hear charges brought by the SGX against parties for breaches of listing rules and can impose regulatory sanctions if the charges are found to be made out. The LApC will hear appeals from parties who are subject to sanctions by the LDC, and from issuers which are subject to certain SGX regulatory decisions.

In addition, the SGX proposes to widen its enforcement powers against breaches of the listing rules to increase their deterrence value against offenders; and set up a Compliance Fund which will comprise contributions from listing revenue currently paid by issuers to the SGX and fines collected by the LDC, LApC and the existing disciplinary and appeals committees.

Comments are due by 16 October 2014.

SGX launches consultation on introduction of minimum trading price and codification of regulatory tools

Following the positive response to the February 2014 joint [consultation](#) by MAS and the SGX on proposals to enhance the Singapore securities market, the SGX has launched a public consultation on details of the minimum trading price requirement and proposed changes to the existing watch-list. The consultation paper also proposes to retain and codify the notification process and privy list requirements for specific transactions into its listing rules.

The MAS and SGX have decided to introduce a minimum trading price for Mainboard-listed stocks as a continuing listing requirement to address risks associated with low-priced securities and to improve overall market quality. Given the strong public support for the requirement, the SGX intends to set a minimum trading price of SGD 0.20 for Mainboard stocks. With the introduction of the minimum trading price requirement and its designation as one of the criteria for entry into the watch-list, the SGX also proposes adjustments to the existing watch-list framework to better rationalise the existing watch-list criteria with the minimum trading price entry and exit criteria. The SGX targets to introduce the minimum trading price requirement and adjustments to the existing watch-list requirements by March 2015, and for them to take effect from March 2016.

In February 2014, the SGX announced a series of enhancements to its regulatory tools, one of which requires issuers and/or controlling shareholders to notify the SGX if they are aware of or involved in discussions that are likely to result in a takeover, reverse takeover or a very substantial acquisition by the issuer. Issuers and/or controlling shareholders are to concurrently commence the maintenance of a list of persons privy to such potential transactions. Since its introduction on 3 March 2014, the SGX has received more than 40 notifications. The SGX proposes to retain the current notification and privy list requirements and to codify them into the listing rules. The SGX is also seeking feedback on the types of transactions

requiring such notifications and concurrent maintenance of privy list, the circumstances under which the notification requirement is triggered, the sufficiency of guidance and illustrations provided and the proposed format for the notifications.

Comments are due by 16 October 2014.

ASIC grants first derivative trade repository licence

ASIC has [granted](#) the first Australian derivative trade repository (ADTR) licence to DTCC Data Repository (Singapore) Pte Ltd (DDRS).

The licensing of DDRS means that the start dates of trade reporting for so-called 'Phase 3 reporting entities' under the ASIC reporting framework have now been finalised. Phase 3 reporting entities are all authorised deposit-taking institutions and Australian financial services licensees, as well as some overseas firms, that are not already reporting OTC trades to ASIC. The trade reporting obligation will commence for large Phase 3 reporting entities (Phase 3A) from 13 April 2015, and for the remaining Phase 3 reporting entities (Phase 3B) from 12 October 2015.

DFSA publishes proposed changes to client classification regime

The Dubai Financial Services Authority (DFSA) has [proposed](#) substantial changes to the current client classification provisions in chapter 2 of the Conduct of Business (COB) module of its Rulebook to bring the regime in line with present developments and practices in the financial services industry. Some authorised firms had expressed concerns with the current client classification regime not catering to the wide ranging business structures and arrangements under which firms and their clients operate, as well as practical difficulties in complying with the regime.

The proposals include:

- expanding the categories of persons who can be classified as professional clients, without the firm undertaking a detailed assessment of the assets or expertise of such persons, based upon proxies such as the institutional or wholesale nature of the client ('deemed' professional clients) or the nature of the particular financial services involved ('service-based' professional clients);
- expanding the instances in which the professional status of one person can be attributed to another person based on either the strength of an

ownership-based or family relationship-based nexus between the two persons;

- providing flexibility for firms to rely on a client classification made by its head office or a group member, if risks associated with such reliance are effectively addressed; and
- providing greater scope for a firm, which is a member of a group, to operate under an arrangement where a bundle of financial services is provided to one client by the firm in conjunction with other members of its group.

DFSA publishes proposed Code of Market Conduct

The DFSA has proposed to issue information in the form of [guidance](#) on the market abuse regime in the Markets Law 2012. The proposed guidance would be included in a new standalone document titled the Code of Market Conduct.

The proposed guidance is intended to provide further information and clarity to market participants about the market abuse regime and to assist them to:

- determine whether or not conduct may constitute market abuse under the Markets Law;
- avoid engaging in market abuse; and
- clarify that certain legitimate market practices will not ordinarily amount to market abuse.

CFTC approves final and proposed swaps rules

The Commodity Futures Trading Commission (CFTC) has approved a [Final Rule](#) on Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities. The rule was issued in response to the concerns of natural gas and electricity utilities that the number of counterparties willing to enter into swaps with them has been reduced because some of these counterparties do not want to exceed the CFTC's de minimis threshold for swaps with municipal utilities, which would require them to register as swap dealers. That threshold is currently set at USD 25 million. The final rule permits a firm to exclude trades with 'utility special entities' in calculating whether its trading exceeds the USD 25 million special entity de minimis threshold.

In addition, the CFTC has approved a Proposed Rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants. The proposed rule generally implements the standards recommended in September 2013 by international regulators through IOSCO and the Basel Committee. The rule will apply to swap dealers and major swap participants that are not subject to

the oversight of other regulators such as the Federal Reserve. Under the proposed timetable for implementation, initial margin requirements would be phased in beginning 1 December 2015 for the largest market participants and ending 1 December 2019 for the smallest.

US Court upholds CFTC's policy statement on cross-border application of US swap regulations

A US federal judge has dismissed significant portions of a lawsuit filed in December 2013 by three industry associations against the CFTC seeking to overturn its guidance related to the application of Title VII in the Dodd-Frank Act to cross-border transactions. The court upheld the CFTC's July 2013 [policy statement](#) on the cross-border application of Title VII swaps provisions. In addition, challenges to the CFTC's large trader reporting, straight-through processing and clearing determinations did not succeed.

The court ordered the CFTC to conduct cost-benefit analyses in connection with the extraterritorial application of many of the rules addressed in the CFTC's cross-border guidance, including reporting and record-keeping rules, swap dealer registration requirements, the swap dealer definition and swap execution facility regulations. While the CFTC's cost-benefit analysis is pending, the court has permitted the CFTC to continue to apply these rules extraterritorially.

RECENT CLIFFORD CHANCE BRIEFINGS

European Depositary Regimes – A comparison of UCITS IV, UCITS V and AIFMD

Another key piece of European asset management regulation will soon be in place as UCITS V entered into force on 17 September 2014.

UCITS V will amend the current UCITS regime to address perceived discrepancies across the European Union on the

duties and liability of depositaries, remuneration policy and sanctions.

This briefing focuses on some of the key issues arising from the new depositary regime, comparing it to the current regime under UCITS IV and to the recently introduced depositary regime for alternative investment funds under the AIFMD.

http://www.cliffordchance.com/briefings/2014/09/european_depositaryregimes-acomparisano.html

BEPS – practical impact of the hybrid and tax treaties proposals on funds, corporate groups, financial institutions and SPVs

On 16 September the OECD published the first set of seven recommendations under the Base Erosion and Profit Shifting (BEPS) project. Two will have particularly wide implications: hybrids (Action 2) and tax treaty abuse (Action 6). These proposals are not yet law, but some version of them is likely to be implemented fairly soon by many countries.

This briefing discusses what the practical impact will be and what steps should be taken now to anticipate and mitigate the impact.

http://www.cliffordchance.com/briefings/2014/09/beps_practical_impactofthehybridandta.html

Vietnam – New bankruptcy law 2014

A new bankruptcy law was recently adopted by the National Assembly of Vietnam which will replace the bankruptcy law introduced in 2004.

This briefing outlines some of the significant changes that the new law introduces in Vietnam.

http://www.cliffordchance.com/briefings/2014/09/vietnam_new_bankruptcylaw2014.html

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Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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