

International Regulatory Update

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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

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MiFID: ESMA consults on draft guidelines clarifying definition of derivatives

The European Securities and Markets Authority (ESMA) has published a [consultation paper](#) on future guidelines clarifying the definition of derivatives as financial instruments under the current Markets in Financial Instruments Directive (MiFID I). The adoption of the guidelines would aim to allow a common approach by national competent authorities in the implementation of the European Market Infrastructure Regulation (EMIR) from the date these guidelines start applying and until MiFID II and the relevant implementing regulation will start applying.

Comments are due by 5 January 2014.

EMIR: ESMA publishes RTS for clearing of interest rate swaps and consults on clearing obligation for foreign exchange non-deliverable forwards

ESMA has published [final draft regulatory technical standards](#) (RTS) for the central clearing of interest rate swaps (IRS) which it is required to develop under EMIR. The RTS define those types of IRS contracts which will have to be centrally cleared, the types of counterparties covered by the obligation and the dates by which central clearing of IRS will become mandatory for them.

The RTS define the following four IRS classes to be subject to central clearing:

- basis swaps denominated in EUR, GBP, JPY, USD;
- fixed-to-float swaps denominated in EUR, GBP, JPY, USD;
- forward rate agreements denominated in EUR, GBP, USD; and
- overnight index swaps denominated in EUR, GBP, USD.

The RTS have been submitted to the European Commission, which has up to three months to endorse them. Following the non-objection period of the European Parliament and Council, the RTS will enter into force 20 days after publication in the Official Journal.

ESMA has also published a [consultation paper](#) on draft RTS concerning the clearing of foreign-exchange non-deliverable forwards under EMIR. Comments are due by 6 November 2014.

Meanwhile, Steven Maijor, ESMA Chair, has [written](#) to Michel Barnier, European Commissioner for the Internal Market and Services, explaining that ESMA is postponing the submission of certain reports required under Article 85.3 of EMIR.

Article 85.3 required ESMA to submit, by 30 September 2014, reports on the:

- application of the clearing obligation;
- application of the identification procedure under Article 5(3);
- application of the segregation requirements laid down in Article 39;
- extension of the scope of interoperability arrangements under Title V to transactions in classes of financial instruments other than transferable securities and money-market instruments;
- access of central counterparties (CCPs) to trading venues, the effects on the competitiveness of certain practices, and on the impact on liquidity fragmentation;
- staffing and resources needs arising from the assumption of ESMA's powers and duties in accordance with EMIR; and
- impact of the application of additional requirements by Member States pursuant to Article 14(5).

ESMA is postponing the reports in order to ensure that they reflect the experience gained throughout the authorisation process of EU CCPs, once completed, and the finalisation of RTS on the clearing obligation. It plans to start the preparation of the report on the application of the identification procedures under Article 5(3) of EMIR (point (b) of Article 85.3) once the first RTS on the clearing obligation is adopted.

Transparency Directive: ESMA publishes draft RTS on notification of major shareholdings

ESMA has published its [draft RTS](#) under the revised Transparency Directive relating to the notification of major

shareholdings. The draft RTS is intended to support the objectives of the revised directive by seeking to facilitate the creation of a harmonised regime regarding the aggregation of holdings of shares and financial instruments, the calculation of notification thresholds and the exemptions from notification requirements.

The draft RTS on major shareholding notifications address the following issues:

- method of calculation of 5% threshold exemption regarding trading books and market makers;
- calculation method regarding a basket of shares or an index;
- methods for determining the 'delta' for calculating voting rights; and
- financial intermediaries' notification regime of financial instruments.

The final report also sets out the indicative list of financial instruments which are subject to the notification requirements laid down in the directive.

The report will be submitted to the EU Commission by 27 November 2014. The Commission has three months to decide whether to endorse the RTS.

CRR: ESMA consults on main indices and recognised exchanges

ESMA has published a [consultation paper](#) setting out its proposals relating to the definitions of 'main indices' and 'recognised exchanges' under the Capital Requirements Regulation (CRR). The definitions will be used in the specification of eligible collateral and will be an important element for the calculation of credit risk by the credit institutions and investment firms to which the CRR applies. The consultation sets out ESMA's rationale for the definitions and draft Implementing Technical Standards (ITS), which include a proposed list of main indices and recognised exchanges.

Comments on the consultation are due by 1 November 2014 and responses will be considered by ESMA when preparing final draft ITS to submit to the EU Commission, which ESMA must do by 31 December 2014.

Bail-in: EBA consults on interrelationship between BRRD sequence of writedown and conversion and CRR/CRD 4

The European Banking Authority (EBA) has launched a [consultation](#) on draft guidelines on the rules that should be applied to the treatment of liabilities in bail-in, in particular

clarifying the interrelationship between the writedown sequence under the bail-in power contained in the Bank Recovery and Resolution Directive (BRRD) and the hierarchy of capital instruments set out in the CRR.

The draft guidelines set out two general guiding rules in relation to the sequence:

- when applying the bail-in tool or writing down or converting capital instruments at the point of non-viability (the PONV conversion power), resolution authorities should treat capital instruments equally when they rank equally in insolvency regardless of other qualities, unless there is an exclusion made under Article 38 of the BRRD; and
- resolution authorities should apply the same treatment to instruments that are partially included in the calculation of own funds as to instruments which are fully included.

The draft guidelines are intended to clarify potential ambiguity between the BRRD and CRD 4 about which category of the writedown sequence a particular instrument belongs to in order to ensure the effective absorption of losses by capital instruments. The guidelines set out the application of the rules in two particular cases relating to:

- grandfathered Tier 1 instruments; and
- Tier 2 instruments subject to the amortisation regime of the CRR and therefore only partially included in the calculation of own funds.

This consultation is the first of a number of consultations the EBA will run in relation to the bail-in power as part of its mandate to draft guidelines and technical standards under the BRRD. Comments on the consultation are due by 3 January 2015.

EBA consults on minimum list of qualitative and quantitative indicators to be used in recovery plans

The EBA has launched a [consultation](#) on draft guidelines specifying the minimum list of qualitative and quantitative indicators to be included in a recovery plan under the BRRD.

Recovery plan indicators should be established by each institution and agreed with competent authorities when the recovery plan is assessed and provision should be made to ensure that institutions regularly monitor the indicators chosen. The draft guidelines set out the requirements on institutions when developing the framework for their recovery plan indicators and specify the minimum list of

categories that should be included in a recovery plan relating to:

- capital;
- liquidity;
- profitability; and
- asset quality.

The guidelines additionally specify market-based indicators and macroeconomic indicators that should be included unless an institution justifies to the relevant competent authority why these are not relevant to its structure based on certain criteria. The EBA expects additional indicators beyond the minimum list to be used by institutions in their recovery plans and also includes in the draft guidelines an illustrative list of other possible indicators.

Comments on the proposals are due by 2 January 2015.

CRR: Implementing Regulation on uniform disclosure formats and date for identifying G-SIIs published in Official Journal

Commission [Implementing Regulation \(EU\) No. 1030/2014](#) specifying implementing technical standards with regard to uniform formats, date and location for the disclosure of values used to identify global systemically important institutions (G-SIIs) according to the CRR has been published in the Official Journal.

The Implementing Regulation will enter into force on 20 October 2014.

Rating agencies: EU Commission adopts Delegated Regulations on transparency requirements

The EU Commission has adopted three Delegated Regulations under the Credit Rating Agencies (CRA3) Regulation. The Delegated Regulations cover regulatory technical standards on:

- [disclosure requirements](#) for structured finance instruments;
- the [presentation of information](#) that rating agencies make available to ESMA for the purpose of publication of credit ratings on the European Rating Platform; and
- [periodic reporting on fees](#) charged by credit rating agencies for the purpose of on-going supervision by ESMA.

The EU Parliament and Council of Ministers have one month to exercise their right of objection, with the possibility – twice – to extend this period for another month at their initiative. Following the expiry of this objection period, the RTS will be published in the Official Journal and will enter

into force on the twentieth day following the date of their publication. Their provisions will be directly applicable (i.e. legally binding in all Member States without implementation into national law) from the following dates:

- reporting on fees charged by CRAs – date of entry into force;
- European Rating Platform – 21 June 2015;
- disclosure on structured finance instruments – 1 January 2017.

SSM: ECB sets out new supervisory functions

The European Central Bank (ECB) has published an [opinion piece](#) by Danièle Nouy, Chair of the Supervisory Board of the Single Supervisory Mechanism (SSM), which was published in various European newspapers on 30 September 2014. The article provides an overview of some of the central elements of the SSM framework, which were set out in detail in the ECB's [guide to banking supervision](#), also published on 30 September 2014. The overview discusses:

- the functions of the Joint Supervisory Teams (JSTs), which will be responsible for supervising banks on a day-to-day basis – these will be led by a coordinator from the ECB and bring together staff from NCAs and the ECB;
- the role of on-site inspection teams, which will be groups of independent auditors supporting the work of JSTs by gathering in-depth information directly from the offices or branches of a bank;
- the composition of the Supervisory Board, which will include all NCAs from participating Member States with an equal weight to each vote; and
- the ECB's role in analysing developments and surfacing trends in the European financial system, which will be shared with NCAs.

The ECB will take on its direct supervisory function of the 120 biggest banking groups in the euro area on 4 November 2014. It will also indirectly supervise 3400 smaller institutions, which will be directly supervised by NCAs.

FSB consults on proposals to enhance legal certainty in cross-border resolution

The Financial Stability Board (FSB) has launched a [consultation](#) on measures to achieve cross-border recognition of resolution actions. The proposals follow the FSB's commitment at the 2013 G20 Summit to develop

guidance for enhanced cross-border resolution in time for the G20's 2014 Brisbane Summit. The proposals include:

- policy measures that should be considered for inclusion in the frameworks of individual jurisdictions for effective cross-border resolution as set out in the FSB's 'Key Attributes of Effective Resolution Regimes for financial institutions' document; and
- contractual approaches to cross-border recognition, in particular:
 - temporary restrictions or stays on early termination rights in financial contracts, including the development of proposals by the International Swaps and Derivatives Association (ISDA) in association with regulators and the FSB for a protocol relating to derivatives contracts governed by the ISDA Master Agreement; and
 - contractual recognition of bail-in, through the write-down, cancellation or conversion of debt instruments where the instruments are governed by laws of a jurisdiction other than that of the issuing entity.

Comments on the consultation are due by 1 December 2014.

FSB reports on foreign exchange benchmarks

The FSB has published the final version of its [report](#) on foreign exchange (FX) rate benchmarks. The report has been prepared in light of discussions with a range of FX market participants across the globe, along with submissions received in response to an interim report published in July 2014 for wider public consultation.

The report sets out a number of recommendations for reform in the FX markets and in the benchmark rates that have been identified as pre-eminent by market participants – in particular, the WM/Reuters (WMR) 4pm London fix produced by the WM Company. These recommendations fall into the following broad categories:

- the calculation methodology of the WMR benchmark rates;
- [recommendations](#) from a review by the International Organization of Securities Commissions (IOSCO) of the WM fixes;
- the publication of reference rates by central banks;
- market infrastructure in relation to the execution of fix trades; and

- the behaviour of market participants around the time of the major FX benchmarks (primarily the WMR 4pm London fix).

IOSCO released its principles for financial benchmarks in July 2013, and benchmark administrators were asked to publically disclose the extent of their compliance with them within twelve months. WM were found to have implemented some principles, but at twelve months on from the launch of the principles, still needed to implement many of them.

IOSCO's review team has identified recommended actions that WM could take to improve its implementation of the principles. It notes that many of the recommended actions are already covered by reforms that WM is in the process of implementing to improve its current policies and practices. IOSCO has recommended a subsequent review in mid-2015 to consider the implementation of the principles.

Financial Policy Committee publishes statement on proposed housing market powers of direction

The Financial Policy Committee (FPC) of the Bank of England (BoE) has published a [statement](#) on the proposed housing market powers of direction it will be granted following an announcement by the Chancellor of the Exchequer in the annual Mansion House speech on 12 June 2014. The statement follows discussion at the FPC policy meeting on 26 September 2014, a record of which will be published on 10 October 2014.

The statement sets out the FPC's assessment on the form of instruments it may require to manage risks to financial stability, including from the build-up of unsustainable levels of leverage, debt or credit growth in the housing market. The FPC's recommendation to HM Treasury is to enable the FPC to direct the PRA and FCA to require regulated lenders to place limits on residential mortgage lending, both owner occupied and buy-to-let, by reference to loan-to-value (LTV) ratios and debt to income (DTI) ratios, as required to protect and enhance financial stability. The proposed instruments would complement the FPC's existing powers and the Committee has judged them sufficient to protect against risks to financial stability emerging from the housing market in the future. The FPC intends to publish a draft policy statement on the recommendations to help facilitate parliamentary debate concerning the proposed new powers.

Alongside its statement, the FPC has also published a [letter](#) to the Chancellor providing its first annual assessment of the impacts of the Government's 'Help to Buy: Mortgage

Guarantee' scheme on financial stability and whether the house price cap and commercial fee charged to lenders remain appropriate. The letter considers these against current market conditions and assesses that the scheme does not pose material risks to financial stability.

FCA and PRA publish final rules on loan to income ratio limits in mortgage lending

The Financial Conduct Authority (FCA) has published its [final guidance](#) (FG14/8) on the implementation of the FPC's recommendations in relation to loan to income (LTI) ratios in mortgage lending. The FPC recommended that the PRA and FCA take steps to ensure mortgage lenders' new lending is constrained at LTI ratios at or above 4.5 to no more than 15% of the total number of new mortgage loans. The recommendation applies to all lenders which extend residential mortgage lending in excess of GBP 100 million per year. The FCA's guidance includes feedback received from a consultation which closed on 7 September 2014, the final rules and the FCA's expectations of firms when applying the LTI limit.

The Prudential Regulation Authority (PRA) has also published a [policy statement](#) (PS9/14) on the implementation of the FPC's recommendations. The policy statement includes feedback received from the PRA's consultation, which closed on 31 August 2014, and the final rules. The rules came into force on 1 October 2014.

FCA publishes policy statement on changes to adviser charging and product sales data reporting

The FCA has published a [policy statement](#) (PS14/13) clarifying changes to regulatory reporting in relation to the Retail Mediation Activities Return (RMAR), the annual questionnaire for authorised professional firms (APFs) and product sales data (PSD). The policy statement follows the FCA's consultation on these changes (CP14/5) and provides feedback on responses.

The changes are intended to support the FCA's Data Strategy published in September 2013, which sets out the FCA's aim that all data it collects should be actionable, integrated and fully accessible across the FCA.

The policy statement sets out changes in relation to:

- adviser charging reporting with changes to Section K of the RMAR designed to provide greater clarity around what firms should report, confirm some technical guidance on how to report and the removal in certain circumstances of the requirement for firms to separately report whether adviser charges were

facilitated by a product provider or platform service provider;

- product sales data with the introduction of a nil returns submission when no relevant sales have been made in a reporting period; and
- consultancy charging reporting through Section L of RMAR and modifications to the content of the annual questionnaire for APFs.

Changes to PSD will take place in two stages with policy changes reflecting pre-Mortgage Market Review (MMR) implementation taking effect from 1 October 2014 and those changes post-MMR implementation taking effect from 1 January 2015. Changes to Section K of RMAR will take effect from 31 December 2014.

BRRD: German Federal Government publishes statement

The German Federal Government (Bundesregierung) has published a [statement](#) on the intended implementation of the Bank Recovery and Resolution Directive (BRRD) in Germany in response to [comments](#) by the German Federal Council (Bundesrat). Amongst other things, the statement addresses:

- the Federal Government's commitment to work towards reduced contributions to the resolution fund for smaller banks at EU level;
- the application of reduced requirements in respect of recovery planning for small and medium banks;
- the application of certain requirements to institutions established under public law; and
- exempting resolution agencies.

Ministry of Finance consults on rules implementing new bankers' oath

The Ministry of Finance has launched a [consultation](#) on a regulation which would further implement the extended scope of the bankers' oath. The extended scope of the oath follows from a pending Dutch legislative proposal which introduces:

- the extension of the bankers' oath to all bank employees; and
- the requirement for employees of various financial institutions to take the oath if they influence the risk profile of the institution or are directly involved in the provision of financial services.

The new proposal supplements the existing requirement for policy makers of Dutch financial institutions to swear the oath.

The regulation describes the manner in which the oath should be taken by the employees in question. The oath should be taken within three months of the relevant employee's commencement of work, and the wording of the oath and of which elements it should consist is prescribed by means of a form. The oath is taken by reading the text of the form before a person in a higher professional position and in the presence of another person representing the financial institution in question. Subsequently, the employee that has taken the oath and the person before whom the oath was taken should sign the form in each other's presence. This signed form containing the oath should be stored in an accessible manner.

The regulation will replace the current ministerial regulation which relates to the current scope of the oath.

Comments are invited by 11 November 2014.

SSE finalises rules for Shanghai-Hong Kong Stock Connect

The Shanghai Stock Exchange (SSE) has published the [final rules](#) for the Shanghai-Hong Kong Stock Connect Pilot Scheme. The final rules improve the operational arrangements in the earlier consultation draft with a view to facilitating a feasible, controllable and expandable channel for mutual market access. Compared to the consultation draft, the following changes relating to northbound trades have been made:

- HK investors can enter into margin financing and stock lending/covered short selling of permitted SSE shares in the HK market, subject to certain restrictions on price, balance control related to the securities lending and margin trading on the SSE of certain SSE shares;
- the permissible scope of non-trade transfers is extended to cover transfers in the context of certain short-term stock lending, trade error handling, allocation from a fund manager's master account to separate fund accounts;
- allotment of SSE shares is available via northbound trades upon approval by the competent PRC regulators; and
- requirements regarding the quota control, order routing and other operational aspects related to northbound trades are further clarified.

The rules also enhance the monitoring regime and operational arrangements for southbound trades.

The rules took effect on 26 September 2014.

FSC announces plan to improve prudential regulations for asset management industry

The Financial Services Commission (FSC) has [announced](#) its plan to improve prudential regulations for the asset management industry. The plan includes:

- replacing the net capital ratio (NCR) with a 'minimum capital requirement' – asset management companies will be required to hold equity capital that exceeds the minimum capital requirement;
- abolishing the management evaluation system – instead, operational risk evaluation will be introduced to evaluate asset management companies' internal control and risk management; and
- revising the prompt corrective action scheme – as revising the related legislation will take time, conditions for issuing prompt corrective action will be simplified first and will eventually be abolished.

The FSC has indicated that public hearing session will be held in October 2014 to discuss the details of the plan and a preliminary announcement on the revision to the related acts will be made in November 2014. The FSC intends to put the plan into effect in April 2015.

Korean government submits 2014-2018 public institution financial management plan to National Assembly

The Ministry of Strategy and Finance (MOSF) has [announced](#) that the government submitted the 2014-2018 public institution financial management plan to the National Assembly on 22 September 2014. In particular, the plan focuses on:

- improving financial soundness by properly implementing the 2013-2017 public institution debt reduction plans for each institution;
- utilising some of the funds becoming available in public institutions due to a strong won or other changes in external conditions in order to stimulate the economy and support small and medium enterprises (SMEs) and working classes; and
- introducing a total bond issuance limit for public corporations, and requiring them to include their bond issuance plans in their mid- to long-term financial management plans in order to prevent them from issuing too much debt.

Regarding the government's future plans, the MOSF has indicated that public institutions will be required to continue to carry out their individual debt reduction plans by selling

assets, scaling down projects and improving management efficiency. Debt reduction performance will be evaluated, and the head of an institution that receives a poor evaluation will have to take responsibility. The next evaluation is due in 2015. Further, the government will require more public institutions to adopt a project-based accounting system that is designed to efficiently manage debt by type.

The limit on total bond issuance will be introduced in 2014, and will be fully implemented beginning in 2015. Public institutions are required to take into account their bond issuance limits when planning their 2015 budgets, and the government will continue to monitor public institutions' bonds repayable every quarter to include the outcomes in the management performance evaluation. Public institutions whose bonds repayable exceed the limit will have to reduce bond issuance in 2015 to maintain bonds repayable below the limit.

Qatar Financial Centre Regulatory Authority consults on proposed rule changes

The Qatar Financial Centre (QFC) Regulatory Authority has released a number of consultation papers for public comment on proposed rule changes.

The [Consultation on the Approved Individuals Regime](#) includes proposals to update the Individuals Rules (INDI) by:

- introducing a new approval process;
- removing the customer-facing function (CFF) from the list of controlled functions; and
- enhancing particular knowledge competency requirements.

Under the [Consultation on Banking Business Prudential Rules 2014 and Consultation on Investment Management and Advisory Rules 2014](#), it is proposed that the current Investment and Banking Business Rules 2005 will be repealed and replaced by the draft Banking Business Prudential Rules 2014 and Investment Management and Advisory Rules 2014. The proposed Banking Business Prudential Rules 2014 update and expand the prudential framework for banking business firms and are designed to align with the principles established by the 2012 revised Basel Core Principles for effective Banking Supervision and Basel Accord (I, II, 2.5 and III) frameworks. The proposed Investment Management and Advisory Rules 2014 are designed to simplify and tailor the rules that apply to firms undertaking investment management and advisory business.

FRB begins quantitative impact study on potential effects of revised regulatory capital framework on insurance holding companies

The Federal Reserve Board (FRB) has [announced](#) that it will begin a quantitative impact study (QIS) to evaluate the potential effects of its revised regulatory capital framework on savings and loan holding companies and nonbank financial companies that are substantially engaged in insurance underwriting activity (insurance holding companies). The QIS is being conducted to allow the FRB to better understand how to design a capital framework for insurance holding companies it supervises that is compliant with section 171 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly known as the Collins Amendment.

The FRB has contacted the insurance holding companies it supervises to request their participation in the QIS. Information submissions are due by 31 December 2014. The FRB has indicated that information collected through the QIS will allow for further exploration of areas of concern raised by commenters during the proposal stage of the revised regulatory capital framework rulemaking.

RECENT CLIFFORD CHANCE BRIEFINGS

Court jurisdiction under the Brussels I Regulation (recast) – good in parts

The Brussels I Regulation (recast) will introduce significant improvements in the jurisdictional regime within the EU. In particular, it gives priority to a court nominated in an exclusive jurisdiction clause, allowing that court to continue with its proceedings even if another court in the EU was seised of the claim first. But the recast Regulation also contains ambiguities and unsatisfactory elements, including regarding the ability of EU courts to give effect to jurisdiction agreements in favour of non-EU courts. Overall, the recast Regulation is to be welcomed, but its application will not always be plain sailing.

This briefing discusses the Regulation.

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

CRA3 – Commission Adopts Detailed Disclosure Rules for Structured Finance Instruments

On 30 September 2014, the EU Commission adopted a set of regulatory technical standards (RTS) setting out how market participants will need to comply with Article 8b of the

EU's Credit Rating Agencies Regulation. The version adopted by the Commission is broadly in line with expectations and similar to the final draft of the RTS adopted by the European Securities and Markets Authority (ESMA) on 24 June 2014.

This briefing explains some of the outstanding issues and the most important differences between ESMA's final draft RTS and the version adopted by the Commission.

http://www.cliffordchance.com/briefings/2014/10/cra3_com_mission_adoptsdetaileddisclosurerule.html

Moving towards greater transparency in the disclosure of non-financial information

European accounting legislation has been amended to require certain large companies to report on social, environmental and diversity matters. This is the latest development in a series of steps taken by European legislators to move towards greater transparency in company reporting. European companies need to get ready – more onerous reporting is on the way.

This briefing discusses these developments.

http://www.cliffordchance.com/briefings/2014/10/moving_towards_greatertransparencyinth.html

A practical guide to the Senior Managers and Certification Regimes

At 395 pages, the joint consultation paper on individual accountability in the banking sector, published by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), is weightier than the average guide to the galaxy.

Although some elements of the proposals may yet change in the light of responses to the consultation exercise, and as the regulators continue to refine their policy positions, the paper gives the clearest indications yet of the FCA's and PRA's (sometimes divergent) interpretations of how the new regimes set out in the Financial Services (Banking Reform) Act 2013 should work in practice, and to which firms and individuals it is proposed they will apply.

This briefing unpacks the main implications of the proposed new regimes and looking at the steps banks, building societies, credit unions and PRA regulated investment firms can take at this stage to map out their response to the proposals and begin to adjust their governance arrangements.

http://www.cliffordchance.com/briefings/2014/10/a_practical_guide_to_the_senior_managers_and_certification_regimes.html

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