

# International Regulatory Update

2 - 6 February 2015

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- CFTC publishes White Paper on swaps trading rules
- Recent Clifford Chance Briefings: Banking Union; Negative LIBOR; and more. [Follow this link to the briefings section.](#)

#### **Market Abuse Regulation: ESMA publishes technical advice on possible delegated acts**

The European Securities and Markets Authority (ESMA) has published its [technical advice](#) to the EU Commission on possible delegated acts concerning the Market Abuse Regulation (Regulation (EU) No 596/2014 – MAR). The technical advice is intended to provide details for the implementation of the Regulation and sets out:

- market manipulation indicators, including examples of practice that may constitute market manipulation and proposals for additional indicators;
- recommendations to set the minimum thresholds relating to exemptions for disclosure of inside information for certain market participants in the emissions allowance market;
- suggestions relating to disclosure of inside information to regulators and determination of the appropriate regulator;
- clarifications on the enhanced disclosure of managers' transactions; and
- proposals for procedure and arrangements to ensure protections for whistleblowing.

ESMA will send the technical advice to the Commission to assist the Commission in drafting implementing technical standards (ITS).

#### **Rating agencies: ESMA consults on competition, choice and conflicts of interests in credit rating industry**

ESMA has launched a [call for evidence](#) as part of the development of technical advice for the EU Commission pursuant to Articles 39(4) and 39(5) of Regulation 1060/2009 on credit rating agencies (CRA Regulation) on the functioning of the credit rating agency industry and the evolution of the markets for structured finance instruments.

ESMA is asking for evidence about how the CRA Regulation is achieving the objectives of stimulating competition between credit rating agencies, improving the choice of credit rating agencies available and minimising conflicts of interests in the industry.

The deadline for comments is 31 March 2015.

#### **EMIR: ESMA publishes feedback statement on central clearing of non-deliverable forwards**

ESMA has published a [feedback statement](#) on its consultation on the clearing obligation for non-deliverable forwards (NDFs). Based on the feedback received, the statement confirms that:

- ESMA is not proposing a clearing obligation on the NDF classes at this stage;
- more time is needed to address appropriately the main concerns raised in the responses; and
- it is difficult to evaluate the amount of time needed to address those issues.

The decision is without prejudice to the possibility for ESMA to propose a clearing obligation on the NDF classes, by the submission of a final report to the EU Commission including draft regulatory technical standards (RTS), at a later point in time to take into account further market developments.

#### **EMIR: EU Commission recommends two-year exemption from central clearing requirements for pension funds' OTC derivative transactions**

The EU Commission has published a [report](#) that recommends granting pension funds a two-year exemption from central clearing requirements for their over-the-counter (OTC) derivative transactions. The report concludes that central counterparties (CCPs) need this time to find solutions for pension funds and it encourages CCPs to continue working on finding technical solutions. The objective is that pension scheme arrangements (PSAs) should use central clearing for their derivatives transactions, as is the case for other financial institutions.

Under current arrangements, PSAs (which encompass all categories of pension funds), would have to source cash for central clearing. Given that PSAs hold neither significant amounts of cash nor highly liquid assets, the report notes that imposing such a requirement on them would require very far-reaching and costly changes to their business model which could ultimately affect pensioners' income.

Current EU law provides for a temporary exemption from the clearing obligation for certain contracts, which is set to expire in August 2015. The report recommends extending it for another two years. This extension would take the form of a delegated act.

### Capital Markets Union: Commissioner Hill discusses intention of the project and early proposals

Jonathan Hill, the EU Commissioner responsible for Financial Stability, Financial Services and Capital Markets Union, has delivered a [speech](#) on Capital Markets Union (CMU) as an instrument of sustainable growth at the Finance Watch Conference. Commissioner Hill discussed measures being taken by the Commission focussed on threats to the financial system, in particular highlighting rules on bank structural reform, money market funds, benchmarks and an intention to bring forward proposals to deal with risks arising from entities other than banks when they need to be resolved. He also identified the lack of growth within the EU as the biggest current threat to stability and made the case for sustainable growth.

Alongside a sound and stable banking system, Commissioner Hill identified the long-term project of a Capital Markets Union (CMU) as a way to free up capital and support and strengthen stability. The Commissioner discussed what CMU is intended to be, in particular:

- the removal of barriers between investors' money and investment opportunities through a single market for capital, for example inward European investment from venture capital markets;
- giving smaller businesses a wider range of options for their financing, including listing on growth markets and attracting equity investment from outside their home state; and
- a mechanism for creating attractive alternatives for retail investors.

Financial stability and the single rulebook will be the basis of proposals to implement the CMU, which will be realised through addressing securities laws, investment restrictions, tax treatments and insolvency regimes.

The Commissioner also set out areas identified for early progress to help build sustainable growth:

- proposals to build a high-quality securitisation market, through transparent, simple and standardised instruments and measures to safeguard against emerging risks, such as proposals for the Securities Financing Transaction Regulation;
- a review of the Prospectus Directive so that firms, especially smaller ones, can more easily access markets and investors across borders while ensuring investors receive all the information necessary about a proposition;

- proposals to improve the availability of SME credit information to improve lending to SMEs;
- ensure legislation on European Long-Term Investment Funds (ELTIFs) is implemented quickly and encourage EU institutions to use ELTIFs to channel investment; and
- support the industry in developing a pan-European private placement regime.

The Commission will launch a green paper on CMU proposals within the next few weeks.

### CRR: ECB publishes decision on conditions for including interim or year-end profits in CET1 capital

The European Central Bank (ECB) has published a [decision](#) on the conditions under which credit institutions are permitted to include interim or year-end profits in Common Equity Tier 1 (CET1) capital under the Capital Requirements Regulation (CRR).

The ECB is the competent authority responsible for granting permission to credit institutions under its direct supervision to include interim or year-end profits in CET1 capital when certain conditions are met. The decision lays down the conditions under which the ECB has determined to grant permission to credit institutions. In cases where the conditions to apply the decision are not met, the ECB will individually assess requests for permission to include interim or year-end profits in CET1 capital.

### Basel Committee consults on guidance on accounting for expected credit losses

The Basel Committee on Banking Supervision (BCBS) has published a [consultation paper](#) on proposed guidance on accounting for expected credit losses. Comprising 11 fundamental principles, the guidance sets out supervisory expectations for banks relating to sound credit risk practices associated with implementing and applying an expected credit loss accounting framework. It also covers supervisory expectations of how an expected credit loss accounting framework should interact with a bank's overall credit risk practices and the regulatory framework.

Comments are due by 30 April 2015.

### Joint Forum consults on recommendations on credit risk management across sectors

The Joint Forum, comprising the BCBS, International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS), has published a [paper](#) on credit risk management across

the banking, insurance and securities sectors. The paper is intended to provide insight into the current supervisory framework around credit risk, the state of credit risk management at firms and implications for the supervisory and regulatory treatments of credit risk following the financial crisis of 2008. Publication of the report follows a survey of fifteen supervisors and 23 firms across Europe, North America and Asia in 2013 and updates the Joint Forum's 2006 review.

The consultative paper sets out emergent themes and recommendations for consideration by supervisors in relation to:

- use of internal-models for credit risk management and regulatory capital;
- risk management processes in response to the current low interest rate environment and firms' possible 'search for yield' through a variety of mechanisms;
- the growing need for high-quality liquid collateral to meet margin requirements for OTC derivatives sectors; and
- capturing central counterparty exposures in credit risk management.

Comments on the paper are due by 4 March 2015.

#### **House of Lords Committee reports on post-crisis EU financial regulatory framework**

The House of Lords European Union Committee has published a [report](#) on the post-crisis EU financial regulatory framework. The report concludes that, given the magnitude of the task that they faced in responding to a once-in-a-generation crisis, the EU institutions performed well.

However, the report adds that the sheer scale of the reforms, amounting to 41 legislative proposals in total, means that the reformed framework inevitably contains some weaknesses. In particular, the Committee found that the expected standards of consultation and impact assessments were not always maintained, and that not enough consideration was given to the overall effect on the financial sector of such a huge programme of reform.

The report also concludes that the three European Supervisory Authorities (ESAs) have been responsible for much good work, but that they are hampered by several fundamental weaknesses, including a lack of authority, independence, resources and influence over the legislative process.

According to the Committee, the most flawed of the legislative proposals were the result of political pressure to take action and/or to make the financial sector pay for the crisis. The report cites the Alternative Investment Fund Managers Directive (AIFMD), the bank remuneration provisions in the Capital Requirements Directive (CRD 4) and plans for a Financial Transaction Tax as examples of this. However, the Committee found that the bulk of the new regulatory framework was necessary and proportionate, and would have been implemented by the UK even if action had not been taken at the EU level.

Finally, the Committee believes that the UK Government must act urgently to increase the UK's influence over the future development of the financial sector regulatory framework. The report warns that, given the importance of the financial sector to the UK economy, the Government would be failing in its duty to protect the interests of the UK if it did not do everything possible to enhance its influence among the EU institutions.

#### **Financial Policy Committee to be granted powers of direction over LTV and DTI ratios for owner occupied mortgages**

HM Treasury has [announced](#) that the Financial Policy Committee (FPC) of the Bank of England (BoE) will be granted new powers of direction, if necessary to protect and enhance financial stability, over the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) to require regulated lenders to place limits on mortgage lending, both owner occupied and buy-to-let, by reference to ratios in respect of owner-occupied mortgages, in particular:

- loan-to-value (LTV) ratios; and
- debt-to income (DTI) ratios.

Statutory Instruments (SIs) to enact the powers have been laid before Parliament. HM Treasury has also published a report on the outcome of its consultation on the new powers in 2014.

HM Treasury intends to consult separately on recommendations by the FPC on powers of direction over buy-to-let mortgages early in the next Parliament as part of a review of the operation of the buy-to-let market and possible risks to financial stability.

The new powers will enter into force once the SIs have been approved by both Houses of Parliament.

The draft legislation also sets out the new powers of direction the FPC will be given over the new leverage ratio framework for Britain's banks.

### **Mortgage Credit Directive: FCA consults on implementation of framework for buy-to-let mortgages**

The Financial Conduct Authority (FCA) has launched a [consultation](#) on its proposals to implement the framework for the consumer buy-to-let mortgage market (CBTL) in response to the Mortgage Credit Directive (MCD). The Government has chosen to use an exemption in the MCD relating to buy-to-let mortgages, which is available to member states with an appropriate framework for this type of activity in place from 21 March 2016. As such, the Government published the Mortgage Credit Directive Order 2015 on 26 January 2015, which establishes a set of conduct standards based on MCD Articles to apply to a firm conducting broking or lending activity with a buy-to-let customer from 21 March 2016. The legislation will grant the FCA the power to register, supervise and take any necessary action against firms carrying out CBTL activities.

The FCA is consulting on changes to the Handbook and its proposed approach to implement the framework set out in the legislation, in particular:

- the registration process for CBTL firms to register with the FCA;
- aggregated data-reporting from CBTL lenders to the FCA; and
- complaints handling rules to support the inclusion of CBTL firms under the Financial Ombudsman Service's compulsory jurisdiction.

Comments on the consultation are due by 19 March 2015.

### **FCA publishes review of crowdfunding regime**

The FCA has published a [review](#) of the implementation of its rules for crowdfunding activity. The FCA has found that the crowdfunding market is continuing to grow rapidly but at present finds no need to change its regulatory approach. The market will continue to be monitored and the FCA will take action as appropriate where it feels there are risks to investors. It may also need to adapt the framework to incorporate changes made as a result of future EU work.

The FCA will publish a full post-implementation review of the rules in 2016.

### **BaFin proposes draft circular regarding minimum safety requirements for internet payments**

The German Federal Supervisory Authority (BaFin) has published a [draft circular](#) regarding minimum safety requirements for internet payments. The circular is relevant for client payments through online banking. The draft circular is based on the proposals of the European Forum on the Security of Retail Payments of 1 February 2013. Amongst other things, the proposal includes the following:

- the implementation of effective client authentication;
- the protection of sensitive payment data; and
- the improvement of client protection.

Comments on the draft circular are due by 19 March 2015.

### **German Federal Government proposes draft law on criminal liability for terrorist financing**

The German Federal Government has proposed a [draft law](#) on the extension of criminal liability for the preparation of a serious offence endangering the state, introducing a special provision for the criminal offence of terrorist financing based on a proposal from the Financial Action Task Force. The draft law provides for an extension of criminal liability and also a liability for smaller amounts for the collection, reception or provision of any asset which, to the knowledge of the offender, is used by the offender or someone else to finance a terrorist act. The relevant acts of terrorism are summarised in a list. In addition, the draft law criminalises the attempt to travel or the financing of travel to a terrorist camp.

### **Amendments to Code on Unit Trusts and Mutual Funds take effect**

The Securities and Futures Commission (SFC) has [announced](#) that amendments to the Code on Unit Trusts and Mutual Funds have been gazetted, thereby taking effect. The amendments are intended to implement proposals to give public funds greater flexibility in determining the means for making public their offer and redemption prices, net asset values and notices of dealing suspension.

The SFC has [updated its frequently asked questions \(FAQs\)](#) on the post authorisation compliance issues of SFC- authorised unit trusts and mutual funds (Question 3 has been updated and Question 3A has been added) and [revised the November 2001 circular](#) on notification requirements regarding suspension of dealings of authorised funds to provide further guidance to the industry on the implementation of the proposals.

### **RBI issues circular on foreign investment in India by foreign portfolio investors**

The Reserve Bank of India has issued a [circular](#) to all authorised persons on requirements regarding foreign investment in India by foreign portfolio investors (FPIs). The circular has been issued in response to an announcement made in the Sixth Bi-Monthly Monetary Policy Statement 2014-15, issued on 3 February 2015, under the terms of which all future investment by FPIs in the debt market in India will be required to be made with a minimum residual maturity of three years.

All future investments by an FPI within the limit for investment in corporate bonds are required to be made in corporate bonds with a minimum residual maturity of three years. Further, all future investments against the limits vacated when the current investment runs off either through sale or redemption, are required to be made in corporate bonds with a minimum residual maturity of three years. FPIs will not be allowed to make any further investment in liquid and money market mutual fund schemes.

However, there will be no lock-in period and FPIs are free to sell the securities (including those that are presently held with less than three years residual maturity) to domestic investors.

The directions came into force with immediate effect. Further operational guidelines, if any, will be issued by SEBI.

All other existing conditions for investment by FPIs in the debt market remain unchanged.

### **FSS reviews suitability of investment advice given by financial investment companies**

The Korean Financial Supervisory Service (FSS) has [published the findings](#) of its review of the suitability of investment advice given by 64 financial investment companies through surveys, interviews and simulated analysis. The Financial Investment Services and Capital Markets Act states that a financial company must assess the investment profile of an investor and recommend an investment suitable for that particular investor in light of the investment purpose, and the investor's financial situation and experience in investment.

The findings indicate that the suitability assessment process was generally satisfactory. However, the FSS found some weaknesses in the client risk profiling process. In particular, it found that the wording of questions in the questionnaires and weighting to answers was inappropriate

and that, in many cases, the suitability assessment only considered risk attitude. The client's investment objectives, knowledge, experience and financial capacity to withstand losses were thus neglected. Regarding this point, the FSS suggests that the financial company should take reasonable steps to ensure that the process for assessing the risk a customer is willing and able to take considers a customer's capacity for loss, appropriately interprets customer responses to questions and appropriately weights all the answers.

The review also found that the written confirmation that a customer is willing to take more risk than recommended or that the customer does not want to receive investment advice from a financial company was frequently used by some financial companies. The FSS is concerned that this may lead to regulatory avoidance because the suitability obligation and duty to provide product guidance applies only when a financial company makes an investment recommendation. Accordingly, the FSS will encourage financial companies to disadvantage employees who sell investment products with such a confirmation when determining performance pay.

### **Central Bank of Myanmar and Monetary Authority of Singapore to sign MoU to strengthen bilateral cooperation**

The Central Bank of Myanmar (CBM) and the Monetary Authority of Singapore (MAS) have [announced](#) that they will enter into a Memorandum of Understanding (MoU) to strengthen bilateral cooperation.

Under the proposed MoU, the MAS and CBM will cooperate on banking supervision and capacity building. The MoU reflects longstanding bilateral relations that have deepened in recent years.

This also follows the CBM embarking on a banking liberalisation programme in 2014, in which it awarded nine foreign bank licences to allow foreign banks to offer wholesale banking services to foreign corporates, and financial and technical support to Myanmar's domestic banks.

### **MAS responds to feedback on proposals to facilitate better understanding of prospectuses and consults on draft guidelines on good drafting practices**

The Monetary Authority of Singapore (MAS) has published its [responses](#) to the feedback it received during its October 2013 public consultation on proposals to improve the readability of prospectuses and help retail investors better

understand key information presented in prospectuses. The MAS will proceed with the following proposals:

- a product highlights sheet (PHS) is to be provided to investors in any offer of debt securities, hybrid instruments, and equity securities where the offer is required to be made in or accompanied by a prospectus or offer information statement (OIS);
- the PHS proposals will be introduced in the form of guidelines (The Guidelines on the Product Highlights Sheet for Offers of Debt Securities, Hybrid Instrument and Equity Securities dated 5 February 2015) first, to provide guidance to issuers and their professional advisers in preparing the PHS – these guidelines will apply to offers of debt securities, hybrid instruments and equity securities for which prospectuses or OIS are submitted or lodged with the MAS on or after 1 July 2015; and
- certain information contained in a separate document outside the prospectus will be allowed to be incorporated in the prospectus by reference to the separate document, subject to certain safeguards.

Together with the release of the response paper, the MAS has also released the draft [Guidelines on Good Drafting Practices for Prospectuses](#) for public consultation. The drafting guidelines are intended to highlight common drafting problems and encourage good drafting practices for prospectuses.

Comments on the drafting guidelines are due by 13 March 2015.

#### **CFTC publishes White Paper on swaps trading rules**

Commissioner J. Christopher Giancarlo of the Commodity Futures Trading Commission (CFTC) has published a [White Paper titled 'Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank'](#), which analyzes flaws in the CFTC's implementation of its swaps trading regulatory framework under Title VII of the Dodd-Frank Act and proposes alternatives. Commissioner Giancarlo asserts that the CFTC's swaps trading rules do not accord with Title VII of the Dodd-Frank Act. Giancarlo states that the CFTC's swaps trading rules add regulatory complexity without meaningful benefit, wasting taxpayer money at a time when the CFTC is seeking additional funding. He also calls for the implementation of standards of professional conduct for swaps market personnel.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **Banking Union and the role of the European Central Bank**

On 4 November 2014 the European Central Bank (ECB) assumed its role as a supra-national bank supervisor for banks established in the eurozone and other participating Member States. The ECB is given this role under the Single Supervisory Mechanism (SSM), which forms the first pillar of a 'Banking Union' for the eurozone. The second pillar is the Single Resolution Mechanism (SRM).

This briefing provides an overview of the various legislative components of the SSM and the SRM. It also explains the division of responsibilities between national supervisors and the ECB in relation to standard supervisory and resolution related tasks for EU banks.

[http://www.cliffordchance.com/briefings/2015/01/banking\\_union\\_andtheroleoftheuropea.html](http://www.cliffordchance.com/briefings/2015/01/banking_union_andtheroleoftheuropea.html)

### **Negative LIBOR – implications under syndicated lending documentation**

Negative interest rate benchmarks are not unknown. The loan market first grappled with the issue in 2011 when Swiss Franc LIBOR was reported as negative in some circumstances. However, recent activity by central banks has resulted in a preponderance of negative LIBORs for Swiss Francs and negative LIBORs and EURIBORs for Euro, sparking fresh concern about the potential effect on lending arrangements.

This briefing considers some of the key questions arising for lenders and borrowers in the syndicated loan market.

[http://www.cliffordchance.com/briefings/2015/02/negative\\_libor\\_implicationsundersyndicate.html](http://www.cliffordchance.com/briefings/2015/02/negative_libor_implicationsundersyndicate.html)

### **China proposes new Foreign Investment Law**

A major change in the regulation of foreign investment in China is underway. On 19 January 2015, the Ministry of Commerce (MOFCOM) of the People's Republic of China issued a draft Foreign Investment Law for public consultation. The content of the draft marks a significant move of MOFCOM to relax its regulation on foreign investment and streamline the current fragmented regulatory framework. At the same time, MOFCOM is tightening its scrutiny on foreign investments in 'restricted' sectors. If the draft is passed, it will replace the existing set of laws and regulations that govern the formation and operation of foreign-invested enterprises (which includes foreign-invested equity and cooperative joint ventures as

well as wholly foreign-owned enterprises) in China (FIE Laws), some of which have been in place for almost 30 years.

This briefing looks at the background of the draft and discusses the groundbreaking changes that it introduces to the regulatory framework on foreign investment.

[http://www.cliffordchance.com/briefings/2015/02/china\\_proposes\\_newforeigninvestmentlaw.html](http://www.cliffordchance.com/briefings/2015/02/china_proposes_newforeigninvestmentlaw.html)

#### **OTC derivatives – reporting exemption for certain foreign entities in Australia**

The latest class exemption published by the Australian Securities and Investment Commission (ASIC) may exempt certain foreign entities from reporting trades entered into in Australia but not booked to the profit or loss account of a branch in Australia.

This briefing discusses the new class exemption.

[http://www.cliffordchance.com/briefings/2015/02/otc\\_derivatives\\_reportingexemptionforcertain.html](http://www.cliffordchance.com/briefings/2015/02/otc_derivatives_reportingexemptionforcertain.html)

#### **Partnerships and Companies – new rules on registration of capital**

The Central Partnership and Company Registration Office has revised its rules for partnerships and companies when registering either their initial capital or an increase in their registered capital of over Baht 5 million.

This briefing discusses the new rules on registration of capital.

[http://www.cliffordchance.com/briefings/2015/02/thailand\\_partnershipsandcompaniesnewrule.html](http://www.cliffordchance.com/briefings/2015/02/thailand_partnershipsandcompaniesnewrule.html)

#### **Abu Dhabi Global Market – draft regulations and accompanying consultation papers**

The Abu Dhabi Global Market has been established to provide a broad-based financial services hub for local, regional and international institutions. The Global Market has now published a first draft of its core legal and regulatory framework – a major milestone in its development as a new financial free zone in the UAE.

The new draft regulations cover the application of English law as well as a companies law framework, insolvency, employment, real property and operating regulations. They position the Global Market as a business and investor friendly jurisdiction for the conduct of financial services business in the UAE and the broader region.

This briefing highlights some of the key features and proposals set out in the draft regulations.

[http://www.cliffordchance.com/briefings/2015/02/abu\\_dhabi\\_globalmarketdraftregulationsan.html](http://www.cliffordchance.com/briefings/2015/02/abu_dhabi_globalmarketdraftregulationsan.html)

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