CLIFFORD CHANCE

Briefing note

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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Securities financing transactions: ECON Committee votes on proposed regulation

The EU Parliament's Economic and Monetary Affairs (ECON) Committee has voted on the proposed regulation on securities financing transactions (SFTs).

The draft rules require that information on SFTs carried out by all counterparties (with some exceptions) is reported to trade repositories that centrally collect and maintain the transactions' records. The ECON Committee has added a provision that listed companies and banks, in addition to investment funds, would have to disclose their use of SFTs and reuse of collateral in their annual financial reports.

The Committee also extended the conditions that must be fulfilled when financial instruments received as collateral are being re-used. The providing party should be informed about risks and consequences involved in granting a right to use collateral and transferring a title to it in the event of the default of the receiving party.

The vote consolidates the ECON position on the proposal and the upcoming negotiations with the Council should start in April 2015.

CRR: Commission Delegated Regulation on calculation of fixed overheads published in Official Journal

Commission Delegated Regulation (EU) 2015/488, which establishes the methodology for calculating fixed overheads for firms under the Capital Requirements Regulation (CRR), has been published in the Official Journal. The Regulation amends Commission Delegated Regulation (EU) No 241/2014, which lays down regulatory technical standards (RTS) for own funds requirements based on fixed overheads in order that all RTS on own funds are included in one Regulation.

The Regulation will enter into force on 13 April 2015.

ECB publishes regulation on reporting of supervisory financial information

The European Central Bank (ECB) has published a regulation laying down the rules and procedures concerning reporting of supervisory financial information.

At present, supervisory financial reporting is only mandatory for institutions applying International Financial Reporting Standards (IFRS) at the consolidated level. The ECB regulation extends the regular reporting of supervisory financial information to the consolidated reports of banks under national accounting frameworks ('nGAAPs'), as well as to reports compiled on an individual basis. This extension covers all supervised entities subject to own funds requirements under the Capital Requirements Regulation (CRR).

The ECB regulation covers reporting requirements for supervised entities and sets out rules relating to the submission of information by the NCAs to the ECB.

The ECB regulation will enter into force on the day following that of its publication in the Official Journal.

ESMA publishes 2015 regulatory work programme

The European Securities and Markets Authority (ESMA) has published its 2015 regulatory work programme, which provides information on the planned technical standards, technical advice and guidelines and recommendations to be issued by ESMA in 2015.

MiFID 2: ESMA consults on complex debt instruments and structured deposits

ESMA has launched a consultation on draft guidelines on complex debt instruments and structured debt deposits.

Article 25(10) of MiFID 2 requires ESMA to develop guidelines for the assessment of:

- bonds, other forms of securitised debt and money market instruments incorporating a structure which makes it difficult for the client to understand the risk involved; and
- structured deposits incorporating a structure which makes it difficult for the client to understand the risk of return or the cost of exiting the product before term.

The consultation paper sets out draft guidelines on related issues that are important for the correct classification of debt instruments as either 'complex' or 'non-complex', specifically, the concept of embedded derivative for debt instruments.

ESMA expects to publish final guidelines in Q4 2015. Comments are due by 15 June 2015.

Credit rating agencies: ESMA publishes guidelines on periodic reporting

ESMA has published its final report on guidelines regarding the information that is periodically submitted to ESMA by credit ratings agencies (CRAs). In the final report, ESMA considers the responses received to the consultation paper during Q3 2014 and sets out the final guidelines.

Following the translation of the guidelines into the official languages of the EU, the final texts will be published on ESMA's website and become effective two months later.

Credit rating agencies: IOSCO issues final code of conduct fundamentals

The International Organization of Securities Commissions (IOSCO) has published its final report on Code of Conduct Fundamentals for Credit Rating Agencies, which includes significant revisions and updates to the current IOSCO Code of Conduct for Credit Rating Agencies.

The revisions to the Code are designed to:

- enhance provisions regarding protecting the integrity of the credit rating process, managing conflicts of interest, providing transparency, and safeguarding non-public information;
- strengthen the Code by adding measures regarding governance, training, and risk management; and improve the clarity of the Code by adding definitions of key terms and revising existing definitions, updating terminology, restructuring existing provisions to better group them thematically, and eliminating extraneous text.

MiFID 2: HM Treasury consults on transposition

HM Treasury has launched a consultation on the transposition of MiFID 2 into UK law. The consultation document sets out the government's intended approach and considers some of the issues that need to be addressed in transposition, including:

- third countries;
- data reporting services;
- position limits and reporting;
- unauthorised persons;
- structured deposits;
- the power to remove board members; and
- the operation of an organised trading facility.

MiFID 2 will be transposed primarily through the FSMA architecture in the same way MiFID was. This will involve a combination of secondary legislation and FCA rules. HM Treasury has published four draft statutory instruments alongside the consultation document. The FCA is expected to consult on the necessary changes to its rules and relevant handbooks towards the end of 2015 when there is greater certainty about the MiFID 2 and MiFIR implementing measures.

The government has also invited comments on proposed legislative amendments that will provide that certain binary options are regulated and supervised by the FCA, rather than the Gambling Commission.

Comments are due by 18 June 2015. MiFID 2 must be transposed into national law by 3 July 2016.

Financial Policy Committee reviews risks to financial stability

The Financial Policy Committee (FPC) has issued the statement from its meeting on 24 March 2015, at which it reviewed its assessment of risks to financial stability.

The Committee remains concerned that investment allocations and pricing of some securities may presume that asset sales can be performed in an environment of continuous market liquidity, although liquidity in some markets may have become more fragile.

The Committee has asked the Bank of England and Financial Conduct Authority (FCA) to work together to:

- encourage and contribute to international work to address data gaps and build a common understanding of vulnerabilities in capital market and asset management activities;
- deepen understanding of the channels through which UK financial stability could be affected by any market correction and reduction in market liquidity, including analysis of the reliance of UK corporate financing and economic activity on market-based sources of finance;
- gather information from asset managers in the United Kingdom about their strategies for managing the liquidity of their funds in normal and stressed scenarios; and
- assess how and why liquidity in relevant markets might have become more fragile.

The Committee has asked for a full report at its meeting in September 2015 and for an interim report in June.

FCA publishes 2015/16 business plan

The Financial Conduct Authority (FCA) has published its business plan for the financial year 2015/16. The

document incorporates the FCA's Risk Outlook, which sets out the top seven high-level risks facing the financial services sector and helps determine the priorities that the FCA will focus resources on.

Among the areas identified by the FCA for work in 2015/16 are a thematic review of conflicts of interest in relation to dark pools, the previously announced wholesale market study into competition in investment and corporate banking, a market study on asset management that will examine charges paid by investors and the reasons for those charges and working with firms to prepare for the implementation of MiFID 2 and the Market Abuse Regulation (MAR). The FCA will also carry out work in relation to:

- international benchmark reform;
- a review of the consumer credit sector;
- sales practices and provision of advice in relation to changes in the pensions sector; and
- competition in the mortgage market.

The FCA's concurrent competition powers with the Competition and Markets Authority (CMA) come into effect on 1 April 2015 enabling the regulator to enforce prohibitions on anti-competitive behaviour, carry out market studies and refer cases for market investigation to the CMA.

FCA consults on 2015/16 regulatory fees and levies

The FCA has published a consultation paper (CP15/14) setting out the proposed 2015/16 regulatory fees and levies for the FCA, the Financial Ombudsman Service (excluding case fees) and the Money Advice Service.

CP15/14 also sets out:

- proposals for consumer credit fees;
- pensions guidance levies and fees for the Payment Systems Regulator; and
- feedback to responses to the November 2014 consultation regulatory fees and levies: policy proposals for 2015/16 (CP14/26).

Comments are due by 18 May 2015.

MiFID 2: FCA publishes discussion paper on developing its approach to transposition

The FCA has published a discussion paper (DP15/3) on developing its approach to the implementation of conduct of business rules and organisational requirements under MiFID 2. The discussion paper is intended to engage stakeholders with the policy choices the FCA will need to make and also highlight important changes for firms within the scope of MiFID 2. The discussion paper is primarily focussed on the implementation of rules under Articles 24 and 25 MiFID 2 for both retail and professional clients and also discusses certain changes to domestic rules to implement the new minimum regulatory framework for firms exempt from MiFID 2. The paper does not consider wholesale markets.

The paper discusses possible options and decisions for implementing rules on:

- insurance-based investment products and pensions;
- investor protection measures for structured deposits, in particular three possible options for incorporating rules into the Handbook;
- offering independent advice on shares, bonds, derivatives and structured deposits;
- remuneration rules for sales staff and advisers to non-MiFID firms;
- recording of telephone conversations and electronic communications;
- costs and charges disclosures;
- inducement rules for advisers, discretionary investment managers, and other firms; and
- complex products.

The paper seeks feedback on these issues and also seeks views on whether the FCA should ban discretionary investment management firms from accepting commissions and other benefits and proposed policy options for alternative domestic criteria for the categorisation of local authorities.

Comments on the discussion paper are due by 26 May 2015. The FCA has indicated that it expects to publish a consultation paper on domestic Handbook changes across both retail and wholesale markets towards the end of 2015 and will take comments on the discussion paper into account when launching the formal consultation. The consultation paper will be published following the finalisation of Level 2 implementing measures for MiFID 2 by the EU Commission and the FCA will confirm final rules by July 2016, which is the transposition deadline. The new rules will start to apply on 3 January 2017.

FCA issues feedback and policy statement on joint sponsor proposals

The Financial Conduct Authority has issued a policy statement (PS15/7) setting out feedback, final rules and a technical note in response to its consultation on joint sponsors (CP14/21).

The statement confirms that the FCA is:

- retaining the joint sponsor regime;
- making minor changes to Listing Rule (LR) 8 where they affect joint sponsors; and
- publishing the technical note that was included in CP14/21 subject to a minor change in response to feedback received.

The technical note and the changes to LR 8 will take effect from 1 April 2015.

Payment Systems Regulator sets out regulatory framework and work programme

The Payment Systems Regulator (PSR) has published a policy statement (PS 15/1) setting out its framework and regulatory approach to the payment services industry once it becomes fully operational on 1 April 2015.

The PSR's aims relate to improving the strategy setting process, improving the governance and control of payment systems and ensuring there are no unnecessary barriers to access to payment systems and the regulator intends to use its regulatory oversight to:

- develop competitive markets;
- base decisions on clear evidence and only regulate where required;
- take independent decisions for which it will be accountable to Parliament; and
- monitor its decisions to ensure they are effective and necessary.

The policy statement follows a consultation in November 2014 and highlights policy decisions taken on the basis of the outcome of the consultation, including:

- clarification on the PSR's regulatory tools, which have been published alongside the directions in an Annex to the policy statement;
- the establishment of a Payments Strategy Forum comprising industry and service-user stakeholders;
- issuing general directions to Interbank Operators (excluding Northern Ireland Cheque Clearing (NICC)) on representing service-users interests on their governing bodies, prohibiting directors from being simultaneously a director of a Central Infrastructure Provider and requesting that minutes and votes made by governing bodies are published;
- the termination of reserved matters between the Payments Council and Interbank Operators;
- a new Access Rule and Reporting Rule with respect to direct access; and
- issuing directions over primary Sponsor Banks to require them to publish certain information and an intention to develop a new Code of Conduct for Sponsor Banks.

Alongside the policy statement, the PSR has also published its indicative work programme for 2015/16, divided between strategy setting projects, markets projects and pipeline projects and including two market reviews to be taken forward looking at:

- ownership and competitiveness of infrastructure provision, which will examine infrastructure related to clearing functions; and
- supply of indirect access to payment systems, in particular economic issues and whether current arrangements deliver a good outcome for service-users, which will cover interbank systems.

Terms of reference for both reviews have been published.

PRA publishes first set of rules for senior managers

The Prudential Regulation Authority (PRA) has published a policy statement (PS3/15) containing the first set of final rules to implement the Senior Managers Regime (SMR) for UK banks, building societies, credit unions and PRA-designated investment firms and Senior Insurance Managers Regime (SIMR) for Solvency II insurers, including prescribed responsibilities under both regimes, assessment of fitness and propriety for senior managers and, for the SMR, the scope of the PRA's Certification Regime for relevant authorised persons.

SIMR rules set out in Appendix two of the policy statement transpose or are closely related to the implementation of the Solvency II Directive in the UK and will come into force on 1 January 2016. These rules will be replaced by the rules set out in Appendix three from 7 March 2016, which are intended to align the SIMR and the SMR. Rules under the SMR are set out in Appendix one and will enter into force on 7 March 2016.

Further policy statements will be published later in 2015 setting out rules on outstanding aspects of the two regimes, including rules to be finalised in conjunction with the FCA.

AIFMD: Treasury publishes second-level regulation for implementation in Italy

The Treasury Department of the Ministry of Economy and Finance has published Ministerial Decree no. 30 of 5 March 2015 (the Regulation) intended to implement Article 39

(Structure of Italian collective investment schemes) of Legislative Decree no. 58/1998 (Italian Financial Act), as amended by Legislative Decree no. 44/2014, which implemented the Alternative Investment Fund Managers Directive (AIFMD) in Italy.

Article 39 instructs the Treasury Department, together with the Bank of Italy and CONSOB, to provide for a set of second-level provisions regarding, amongst other things, requirements to be complied with by Italian collective investment schemes, targeted investors, etc.

The Regulation, published in the Official Gazette (Gazzetta Ufficiale) on 19 March 2015, comes into force on 3 April 2015 and replaces Ministerial Decree no. 228 of 24 May 1999.

The Regulation provides for a temporary regime in respect of certain provisions.

CSSF issues circular modifying deadline for compliance with requirements concerning Luxembourg UCITS depositary function

The Luxembourg supervisory authority for the financial sector, the Commission de Surveillance du Secteur Financier (CSSF), has issued Circular 15/608, which modifies the deadline for compliance by depositaries of Luxembourg UCITS with the requirements laid down in Circular 14/587 of 11 July 2014.

Circular 14/587 clarifies the depositary regime of Luxembourg UCITS by defining new organisational arrangements which must be put into place at the level of the depositaries of UCITS established in Luxembourg as well as at the level of Luxembourg UCITS themselves in relation to the duties, obligations and rights concerning the UCITS depositary function. As far as is possible, these clarifications anticipate the standardisation of the depositary regimes of both Luxembourg UCITS and AIFs as regards their common elements, as they are due to emerge further to the forthcoming implementation of the UCITS V Directive into Luxembourg law.

In order to be consistent with the implementation deadline of the UCITS V Directive, Circular 15/608 provides that credit institutions established in Luxembourg and that are acting as depositary of Luxembourg UCITS as well as Luxembourg UCITS, where appropriate represented by their management company, must comply with the provisions of Circular 14/587 by 18 March 2016 (instead of 31 December 2015 as initially required).

In its Circular 15/608, the CSSF also reconfirms that the regime set out in Circular 14/587 will be amended in due time in order to be aligned with the full depositary requirements imposed by the UCITS V Directive and the delegated acts to be adopted later in 2015.

Securities and Futures and Companies Legislation (Uncertificated Securities Market Amendment) Ordinance 2015 gazetted

The Financial Services and the Treasury Bureau (FSTB) has published in the Gazette the Securities and Futures and Companies Legislation (Uncertificated Securities Market Amendment) Ordinance 2015 (Amendment Ordinance), which provides for a legal framework to enable the introduction of an uncertificated (i.e. paperless) securities market regime.

The Amendment Ordinance mainly amends the Securities and Futures Ordinance (SFO) and the Companies Ordinance to stipulate the broad framework for the regulation of the uncertificated securities market. Its main provisions will commence operation on a date to be appointed by the Secretary for Financial Services and the Treasury in a Gazette Notice. The details relating to the operation and regulation of the uncertificated securities market regime will be set out in new subsidiary legislation to be made by the Securities and Futures Commission (SFC) under the SFO.

The SFC will oversee the regulatory and operational matters of the new uncertificated securities market environment. It will continue to work out the operational details of the uncertificated securities market with relevant stakeholders, and make the subsidiary legislation after public consultation.

Currently, the law requires the issue of paper certificates and the use of paper instruments of transfer for certain securities. Under the new uncertificated securities market regime, investors will be able to choose to hold and transfer securities without paper documents and register the securities in their own names, thus enjoying the full benefits of legal ownership.

The initial stage of the uncertificated securities market regime will cover shares of Hong Kong companies that are listed or to be listed on the Stock Exchange of Hong Kong. The government and the SFC are initiating discussion on this with the relevant jurisdictions and studying their laws, so that companies from more jurisdictions may be covered by the uncertificated securities market regime.

CFTC announces exemption for Hong Kong brokers to deal directly with US customers

The Securities and Futures Commission (SFC) has welcomed an order issued by the United States Commodity Futures Trading Commission (CFTC) permitting SFC-licensed corporations to deal directly with US customers in relation to trading of futures or options products on exchanges under the SFC's oversight without having to register as futures brokers in the US.

The exchanges covered by the order include Hong Kong Futures Exchange Limited and non-US exchanges authorised by the SFC under the Securities and Futures Ordinance (SFO).

Licensed corporations interested in the exemption under the order, which permits them to solicit and accept orders and funds directly from US customers, are required to submit applications with the US National Futures Association via the SFC. Details of the application procedures will be announced in due course.

SEC publishes proposed amendments to rule concerning exemptions for certain exchange members

The US Securities and Exchange Commission (SEC) has requested comments on a proposed rule amending Rule 15b-9 under the US Securities Exchange Act of 1934. The proposed rule would require certain broker-dealers trading in off-exchange venues to register with a self-regulatory organization or SRO. SROs are entities in the United States that help regulate the conduct and business activities of SEC-registered broker-dealers. Most SEC-registered broker-dealers are required to join SROs as a condition precedent of registration with the SEC. The largest SRO is the US Financial Industry Regulatory Authority (FINRA).

A number of SEC-registered broker-dealers engaged in proprietary high-frequency and algorithmic trading have avoided SRO membership and regulation by claiming an exemption under SEC Rule 15b-9. This exemption currently applies where the broker-dealer is a member of a national securities exchange, carries no customer accounts, and derives annual gross income of no more than USD 1,000 from non-proprietary securities transactions effected otherwise than on a national securities exchange of which they are a member. The proposed rule would significantly narrow this exemption and subject certain broker-dealers to an SRO's regulatory scrutiny for the first time.

Comments will be taken for 60 days following publication of the proposed rule amendments in the Federal Register.

RECENT CLIFFORD CHANCE BRIEFINGS

The Rising Powers – What role does law have to play in the economic development of the BRIC countries?

Clifford Chance is supporting a research project which examines the role of law and legal institutions in economic development in Brazil, Russia, India and China. The project is being led by the Centre for Business Research at Cambridge University, which brings together economists, lawyers and other social scientists to study the role of legal institutions in economic growth, development and innovation.

This briefing provides an overview of the Rising Powers project.

http://www.cliffordchance.com/briefings/2015/03/the_rising_powerswhatroledoeslawhavet.html

Withholding Tax Exemption – Private Placements

Further to the Government's announcement in the 2014 Autumn Statement that it intended to introduce a new withholding tax exemption for privately placed debt, legislation has been included in this year's Finance Bill.

This briefing discusses how the legislation has developed since the draft published in December 2014 and the potential impact of the new exemption.

http://www.cliffordchance.com/briefings/2015/03/withholding_tax_exemptionprivateplacements.html

The UK diverted profits tax – final legislation published

The Finance Bill to enact the 'Google Tax' has been published. Properly known as the diverted profits tax (DPT), once enacted, for the first time companies outside the UK could be subject to UK tax merely for doing business with the UK. The Government says the tax is aimed only at artificial and contrived arrangements – we think it is much wider.

This briefing discusses the impact of the UK diverted profits tax legislation.

http://www.cliffordchance.com/briefings/2015/03/the_uk_diverted_profitstaxfinallegislatio.html

Implementation of the AIFMD in Spain

On 13 November 2014 the Official State Gazette published Spanish Law 22/2014, of 12 November, governing private equity entities, other closed-ended collective investment

undertakings and the management companies of closed-ended collective investment undertakings, amending Law 35/2003, of 4 November, on Spanish Collective Investment Undertakings. Law 22/2014 transposes the Alternative Investment Fund Managers Directive (AIFMD) into Spanish law.

This briefing discusses the impact of the implementation of the AIFMD in Spain.

http://www.cliffordchance.com/briefings/2015/03/implementation_oftheaifmdirectiveinspain.html

What is the future of market abuse prosecution in France after the outcome of the 'EADS case'?

On 18 March 2015, the French Constitutional Council delivered a landmark decision in the 'EADS case', declaring contrary to the constitution several provisions of the French Financial Monetary Code enabling successive prosecution of market abuse by the AMF and the Criminal Courts.

Through this decision, the Constitutional Council has imposed a radical change in the approach to market abuse enforcement in France.

This briefing discusses the concequences of this decision on market abuse enforcement.

http://www.cliffordchance.com/briefings/2015/03/what_is_the_futureofmarketabuseprosecutioni.html

Germany plans to subordinate senior unsecured bonds in bank insolvency

The draft law includes a proposal to subordinate senior debt instruments in the insolvency of German banks. The subordination is designed to enable the bail-in of senior debt instruments before other unsecured claims and to help German banks meet the loss absorbency requirements of new European bank resolution frameworks.

This briefing discusses the German draft law implementing the Single Resolution Mechanism.

http://www.cliffordchance.com/briefings/2015/03/germany_plans_tosubordinateseniorunsecure.html

US Supreme Court clarifies when opinions can be actionable under Federal Securities Laws

In a highly anticipated decision, the Supreme Court addressed when, and under what circumstances, opinions of issuers may be actionable under federal securities laws. The Supreme Court found that the Securities Act of 1933 is not 'an invitation to Monday morning quarterback an issuer's opinions' but left open the possibility of liability for opinions.

In a case captioned Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, the Supreme Court reviewed a Sixth Circuit decision involving claims brought under Section 11 of the Securities Act of 1933. The case challenges two opinions Omnicare included in a registration statement: 'We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws,' and 'We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements[.]' Plaintiffs argued that these legal compliance opinions were actionable because the federal government later pressed lawsuits against Omnicare based on allegations of kickbacks from drug manufacturers. The district court dismissed Plaintiffs' Section 11 claims, and the Sixth Circuit reversed, rejecting the Second Circuit's requirement in Fait v. Regions Financial Corp., 655 F.3d 105 (2d Cir. 2011) that an opinion can only be actionable under Section 11 if 'the statement was both objectively false and disbelieved by the defendant at the time it was expressed.'

This briefing discusses the case.

http://www.cliffordchance.com/briefings/2015/03/u_s_supreme_courtclarifieswhenopinionscanb.html

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

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