

International Regulatory Update

3 – 7 December 2012

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- CFTC's Division of Swap Dealer and Intermediary Oversight issues no-action letter regarding family offices
- Recent Clifford Chance briefings: Euro area member states take collective action to facilitate sovereign debt restructuring; and more. [Follow this link to the briefings section.](#)

Verena Ross discusses ESMA's role in markets reform

The Executive Director of ESMA, Verena Ross, has given a [speech](#) on ESMA's role in markets reform. Ms. Ross provided an overview of ESMA's recent work programme and its priorities for 2013.

Ms. Ross also discussed the implementation of the regulation on OTC derivatives and market infrastructures (EMIR) and ESMA's draft technical standards. The European Commission has until 27 December 2012 to decide whether to endorse the draft regulatory technical standards, which will then move to the European Parliament and Council for their endorsement. Depending on whether the standards have been amended by the Commission, this may take from one month to three. However, Ms. Ross emphasised that, with regard to the timing for implementation, certain provisions of the standards will not have a practical impact on market participants immediately. She indicated that, according to ESMA's projections, the first clearing obligation under EMIR should start to apply during the summer of 2014.

Ms. Ross also discussed ESMA's future work programme related to EMIR, in particular the preparation of additional standards relating to the provisions on extraterritoriality, and how to prevent regulatory arbitrage and the exchange of collateral for bilateral trades. With regard to the latter, she indicated that ESMA supports a two-way system in which the obligation to exchange collateral lies on both sides of the trade.

Ms. Ross then discussed ESMA's preparations for MiFID 2/MiFIR, as well as its work in the area of investment management. She indicated that ESMA's guidelines on ETFs and other UCITS issues are now close to finalisation, and that the full package of guidelines, incorporating the part on the treatment of repo and reverse repo transactions, will be formally issued before the end of 2012 and will apply two months from that date.

Finally, Ms. Ross discussed ESMA's work on the AIFM Directive, focusing on the following three workstreams:

- developing guidelines on sound remuneration policies – Ms. Ross indicated that ESMA is currently in the process of finalising its approach based on the feedback received to its June consultation paper and is planning to finalise the guidelines at the beginning of 2013;
- developing the regulatory technical standards on types of AIFM and clarifying key concepts – Ms. Ross indicated that ESMA will soon issue a follow-up consultation to its February discussion paper; and
- the framework of rules with respect to non-EU entities – Ms. Ross indicated that ESMA will continue to treat its work on negotiating MoUs on supervisory co-operation arrangements between the relevant EU and non-EU authorities as a high priority in the coming months, with a view to getting satisfactory MoUs in place by July 2013 and well in advance of that date wherever possible.

EU Council publishes final report on process towards deeper economic and monetary union; ECON Committee publishes reports on Commission proposals for single supervisory mechanism; EU Council Presidency publishes compromise texts

The EU Council has published its [final report](#) on the process towards a deeper economic and monetary union and suggests a timeframe and a stage-based approach.

In particular, stage 1 (end 2012-2013) would include:

- the establishment of a Single Supervisory Mechanism (SSM) for the banking sector and the entry into force of the Capital Requirements Regulation and Directive (CRR/CRD 4);
- agreement on the harmonisation of national resolution and deposit guarantee frameworks; and
- setting up an operational framework for direct bank recapitalisation through the European Stability Mechanism (ESM).

Stage 2 (2013-2014) would consist of two essential elements:

- the completion of an integrated financial framework through the setting up of a common resolution authority and a backstop to ensure that bank resolution decisions are taken swiftly and impartially; and
- setting up a mechanism for stronger coordination, convergence and enforcement of structural policies

based on arrangements of a contractual nature between Member States and EU institutions on the policies countries commit to undertake and on their implementation.

Finally, stage 3 (post 2014) would include establishing a limited fiscal capacity to improve the absorption of country-specific economic shocks, through an insurance system set up at the central level. The report adds that this stage could also build on an increasing degree of common decision-making on national budgets and an enhanced coordination of economic policies, in particular in the field of taxation and employment.

The report will be discussed by the European Council on 13 and 14 December 2012.

In addition, the European Parliament's ECON Committee has published its reports on the European Commission's proposal to set up a single supervisory mechanism for banks in the euro area, comprising a Council regulation conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions and a regulation of the EU Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing the European Banking Authority (EBA).

[ECON Report on regulation conferring tasks on the ECB](#)
[ECON Report on regulation amending regulation establishing the EBA](#)

Separately, the Cyprus EU Council Presidency has published its new compromise texts for the proposals for a regulation conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions and a regulation of the European Parliament and of the Council amending Regulation establishing the European Banking Authority (EBA).

The Presidency has also published a general approach document setting out the key outstanding issues in the compromise text. Amongst other things, these relate to:

- changes to voting modalities in the EBA;
- the distribution of competences and tasks and powers between the ECB and the national competent authorities;
- the governance of the Supervisory Board; and
- phasing in, and entry into force, of the Single Supervisory Mechanism.

[Proposed regulation conferring tasks on the ECB – Presidency compromise](#)
[Proposed regulation amending regulation establishing the EBA – Presidency compromise](#)
[General approach document](#)

ESMA finalises guidelines on repo arrangements for UCITS funds

ESMA has published its [final guidelines](#) on repurchase and reverse repurchase agreements for UCITS funds. The guidelines state that UCITS should only enter into such agreements if they are able to recall at any time any assets or the full amount of cash.

The guidelines will now be translated into all EU languages and will be incorporated into ESMA's guidelines on ETFs and other UCITS issues, which were published in July 2012. The full set of guidelines will enter into force two months after the publication of the translations.

MiFID review: EU Council Presidency publishes compromise texts

The Cyprus EU Council Presidency has published new compromise texts for the proposals for a directive on markets in financial instruments repealing Directive 2004/39/EC (MiFID 2) and a regulation on markets in financial instruments and amending the regulation on OTC derivatives, central counterparties and trade repositories (MiFIR).

[Proposed directive – Presidency compromise](#)
[Proposed regulation – Presidency compromise](#)

Credit rating agencies: Provisional agreement between European Parliament and Council published

The EU Council Presidency has published the text of its provisional agreement with the European Parliament on the proposals for further amendments to the EU rules on credit rating agencies (CRAs), consisting of a proposed regulation amending Regulation 1060/2009 on CRAs and a proposed directive amending Directive 2009/65/EC on Undertakings for Collective Investment in Transferable Securities (UCITS IV) and the AIFM Directive in respect of the excessive reliance on credit ratings.

The agreement still needs to be formally approved by the Parliament's plenary session and by the Council. The Parliament is expected to vote on the agreement at its January 2013 plenary session.

[Proposed regulation – political agreement](#)

[Proposed directive – political agreement](#)

[Cover note](#)

EU and Swiss regulators to co-operate on cross-border supervision of alternative investment funds

ESMA has [announced](#) the approval of the co-operation arrangements between the Swiss Financial Market Supervisory Authority (FINMA) and the EU securities regulators for the supervision of alternative investment funds, including hedge funds, private equity and real estate funds. ESMA negotiated the agreement with FINMA on behalf of all 27 EU national competent authorities for securities markets regulation.

The co-operation arrangements include the exchange of information, cross-border on-site visits and mutual assistance in the enforcement of the respective supervisory laws. This co-operation will apply to Swiss alternative investment fund managers (AIFMs) that manage or market alternative investment funds (AIFs) in the EU and to EU AIFMs that manage or market AIFs in Switzerland. The agreement also covers co-operation in the cross-border supervision of depositaries and AIFMs' delegates. The agreement will take the form of a memorandum of understanding between the EU securities supervisors and FINMA.

Market abuse regulation: EU Council Presidency publishes compromise text

The EU Council Presidency has published a new [compromise text](#) for the proposed regulation on insider dealing and market manipulation, which updates the existing framework provided by the Market Abuse Directive.

[Cover note](#)

Shadow banking: IMF staff discussion paper published

The IMF has published a staff [discussion paper](#) on shadow banking which highlights the following priorities for a comprehensive policy response:

- dealing with regulatory arbitrage;
- addressing systemic risks in the shadow banking system, which includes developing a regulatory approach to dealer banks, money market funds, the tri-party repurchase market, and dealing with innovation and complexity;
- considering demand-side pressures, including the merits of accommodating a shortage of safe and liquid assets with publicly guaranteed short-term debt;

- better measuring and monitoring of the shadow banking system; and
- studying the shadow banking system's macroeconomic effects and implications for monetary policy.

The IMF has emphasised that the paper represents the views of its authors and does not necessarily represent IMF views or IMF policy.

International regulators issue statement on regulation of cross-border derivatives market

Leaders of authorities with responsibility for the regulation of the OTC derivatives markets in Australia, Brazil, the EU, Hong Kong, Japan, Ontario, Quebec, Singapore, Switzerland and the United States have issued a [statement](#) following their meeting on 28 November 2012 to discuss reform of the OTC derivatives market and potential conflicts, inconsistencies, and duplicative requirements within their respective contemplated rules.

The authorities reached understandings on clearing determinations, the sharing of information and supervisory and enforcement cooperation, and timing. They also discussed different possible approaches to regulating persons, transactions and infrastructures with respect to cross-border activity when more than one set of rules applies.

The authorities agreed to hold their next meeting in Brussels in early 2013.

FSA consults on changes to regulation and supervision of benchmarks

The FSA has published a [consultation paper \(CP12/36\)](#) setting out proposed new rules and regulations for financial benchmarks. This follows the recommendations of the Wheatley Review of the London Interbank Offered Rate (LIBOR). Although LIBOR initially will be the only regulated benchmark in the UK, the FSA notes that the new regime provides a framework for regulation that can be extended to cover additional benchmarks in the future, were the government to consider it appropriate to do so.

The FSA is also seeking comments on ensuring the continuity of LIBOR and broadening participation in the rate. Chapter 4 of CP12/36 takes the form of a discussion paper inviting feedback on how best to broaden the participation in LIBOR panels, including the use of the Financial Conduct Authority's (FCA's) powers to require firms to contribute to the rate on a permanent basis which the government is proposing to grant.

Comments are due by 16 January 2013. The FSA will accept responses for the part of the document that takes the form of a discussion paper until 13 February 2013.

Banking union: House of Lords EU Committee warns that proposals risk marginalising UK and fragmenting single market

The House of Lords European Union Sub-Committee on Economic and Financial Affairs has written a [letter](#) to HM Treasury setting out its emerging views on European banking union. The Committee warns that banking union risks UK marginalisation and fragmentation of the single market.

In particular, the Committee argues that:

- as banking union participants move toward common positions on issues relating to the EU financial sector, the UK risks being marginalised – the Committee urges the government to ensure that the status of the UK's financial services industry will not be diminished as a result;
- the levels of financial integration proposed for Eurozone countries could threaten the integrity of the single market with significant implications for countries such as the UK who remain outside the banking union; and
- stronger safeguards are needed to prevent a conflict of interest between the European Central Bank's supervisory and monetary policy roles – the Committee emphasises that the ECB must be held accountable for its supervisory role both to the EU Parliament and national parliaments.

The Committee also expresses its regret that the proposals for a single supervisory mechanism will not be complemented by a common deposit insurance scheme and a common resolution scheme because of German pressure, and argues that a viable banking union cannot be achieved without them.

The Committee's final report on banking union is expected to be published ahead of the European Summit on 13 December 2012.

FSA consults on plans for temporary product intervention rules

The FSA has published a [consultation paper \(CP12/35\)](#) on when and how the Financial Conduct Authority (FCA) may make temporary product intervention rules. The Financial Services Bill includes this power as part of the FCA's toolkit. The FSA is consulting on its successor body's behalf so

that the FCA's approach is clear and understood by April 2013 when the new regulator comes into being.

Rules made before consultation would last for no longer than twelve months and could not be renewed. During this time, the FCA will either consult on a permanent remedy or aim to resolve the problem another way. The consultation outlines some instances which may trigger temporary rules being made, including: (1) where a product is in serious danger of being sold to the wrong customers, for instance where complex or niche products are sold to the mass market; (2) where a non-essential feature of a product seems to be causing serious problems for consumers; and (3) where a product is inherently flawed.

The FSA has indicated that product intervention rules (temporary or not) may address a wide range of product-related issues, for instance by restricting the marketing of a product to only certain types of customer or by requiring a product feature to be removed or changed in some way. Where there is high risk to consumers, the FCA might make a rule change to ban a product but it would only do so in very serious circumstances. Other possible interventions, which would not necessarily require changes to rules, would include issuing warnings, or using supervisory powers to require firms to amend promotional materials.

The consultation closes on 4 February 2013.

Bank of England working paper on high-frequency trading behaviour and its impact on market quality published

The Bank of England has published a [working paper](#) which analyses the intraday behaviour of high-frequency traders (HFTs) and its impact on aspects of market quality such as liquidity, price discovery and excess volatility. The authors note that HFTs differ significantly from each other in terms of liquidity provision and that, while some HFTs mostly consume liquidity (i.e. trade more 'aggressively') by primarily executing trades via market orders, others mostly supply liquidity (i.e. trade more 'passively') by primarily executing trades via limit orders. To examine how trading behaviour is related to these patterns of liquidity provision, they split the HFTs in two groups, according to their trade aggressiveness, and examine the behaviour and impact of each group separately. The authors conclude that the 'passive' HFTs follow a trading strategy consistent with market making and as such their trades have alternating signs and are independent of recent (ten-second) price changes, whereas 'aggressive' HFTs exhibit persistence in

the direction of their trades and trade in line with the recent (ten-second) price trend.

The paper goes on to explore the relationship between HFT activity and market quality, concluding that both higher price volatility and lower spreads cause HFT activity to increase. Finally, the authors use a tick time specification to examine the impact of HFT activity on price discovery (i.e. information-based volatility) and noise (i.e. excess volatility). They conclude that while HFTs have a higher information-to-noise contribution ratio than non-HFTs, there are instances where this is accompanied by a large absolute noise contribution.

The Bank has emphasised that the views expressed in the paper are not necessarily those of the Bank of England.

German act on reinforcement of financial supervision published in Federal Gazette

The [‘Act on the Reinforcement of German Financial Supervision’](#) has been published in the German Federal Gazette. The Act covers the supervision of financial stability in Germany and the cooperation of public institutions in this context. The Act also changes the legal framework of the German Federal Financial Supervisory Authority’s (BaFin’s) financing through the institutions it supervises.

Amongst other things, the Act provides for:

- the establishment of a Committee for Financial Stability within the German Finance Ministry;
- close cooperation of the Committee for Financial Stability with the European Systemic Risk Board;
- the establishment of an advisory council on consumer matters within the BaFin;
- rights of individuals to lodge complaints with the BaFin in respect of institutions which are subject to the supervision of the BaFin; and
- the obligations of the Deutsche Bundesbank, the German central bank, to monitor financial stability in Germany, to report annually on financial stability and to cooperate with the Committee for Financial Stability and the BaFin.

The main parts of the Act will enter into force on 1 January 2013.

MAS consults on draft regulations pursuant to Securities and Futures Act and Financial Advisers Act

The Monetary Authority of Singapore (MAS) has published a [consultation paper](#) on draft regulations pursuant to the

Securities and Futures Act and the Financial Advisers Act as part of its efforts to enhance and refine its regulatory framework. Amongst other things, the consultation paper proposes amendments to:

- the Securities and Futures (Licensing and Conduct of Business) Regulations;
- the Securities and Futures (Offers of Investments)(Shares and Debentures) Regulations;
- the Securities and Futures (Composition of Offences) Regulations;
- the Securities and Futures (Markets) Regulations; and
- the Financial Advisers Regulations.

Comments are due by 4 January 2013.

[Annex 1 – Draft Securities and Futures \(Licensing and Conduct of Business\) \(Amendment\) Regulations 2013](#)

[Annex 2 – Draft Securities and Futures \(Offers of Investments\) \(Shares and Debentures\) \(Amendment\) Regulations 2013](#)

[Annex 3 – Draft Securities and Futures \(Composition of Offences\) \(Amendment\) Regulations 2013](#)

[Annex 4 – Draft Securities and Futures \(Markets\) \(Amendment\) Regulations 2013](#)

[Annex 5 – Draft Financial Advisers \(Amendment\) Regulations 2013](#)

Singapore’s new regime for OTC derivatives likely to take effect in third quarter of 2013

Lee Chuan Teck, Assistant Managing Director of the Monetary Authority of Singapore (MAS), has delivered a [speech](#) at the 8th Annual FIA Asia Derivatives Conference in Singapore. Mr. Teck noted that the Singapore Parliament recently passed amendments to the Securities and Futures Act to introduce a new licensing regime for trade repositories and amend the licensing regime for central counterparties, and to allow the MAS to mandate the reporting and clearing of derivative transactions. He indicated that the MAS will be providing details on entities and transactions that will be exempted from this new regime in the coming months.

Mr. Teck also stated that the MAS is likely to broaden the definition of hedging from the one used in the consultation, agree not to require back-loading, and exempt FX forwards and swaps. The MAS is still considering other areas.

Finally, Mr. Teck indicated that the MAS will commence this new regime in the third quarter of 2013, likely starting with the implementation of the reporting mandate first.

Federal Reserve Board Governor Tarullo discusses industry structure and systematic risk regulation

Federal Reserve Board (FRB) Governor Daniel K. Tarullo has given a [speech](#) at the Brookings Institution's forum on promoting economic health in the financial industry, in which he stressed that more research on the industrial organization of the financial industry is needed to formulate effective regulatory policy.

Governor Tarullo argued that the scarcity of research into the too-big-to-fail problem in financial markets means that regulators can only hypothesize how best to limit the scale and scope of financial firms, and suggested that an industrial organization research agenda would help shape regulatory policy by revealing patterns of interaction within the industry and predicting market behavior in the event of financial stress. He discussed three policy proposals aimed at addressing the too-big-to-fail problem:

- breaking up large firms by reinstating Glass-Steagall restrictions;
- capping the nondeposit liabilities of firms; and
- requiring large firms to hold minimum amounts of convertible debt.

Governor Tarullo suggested that the Federal Reserve is unlikely to support breaking up large firms by reinstating Glass-Steagall restrictions. He indicated that the other two proposals could be viable policy options to mitigate systematic risk in the financial industry, and encouraged the use of a combined industrial organization-finance perspective and research in the policymaking process.

CFTC's Division of Swap Dealer and Intermediary Oversight issues no-action letter regarding family offices

The CFTC's Division of Swap Dealer and Intermediate Oversight has issued a [no-action letter](#) regarding family offices. The letter states that Division of Swap Dealer and Intermediate Oversight will not recommend that the CFTC take enforcement action against the operators of family offices for failure to register as commodity pool operators under the Commodity Exchange Act and the CFTC's regulations, subject to certain conditions described in the letter including a notification to the CFTC which must be filed before 31 December 2012.

RECENT CLIFFORD CHANCE BRIEFINGS

Euro area member states take collective action to facilitate sovereign debt restructuring

A new agreed form of model collective action clause (CAC) for euro area member states to adopt in respect of their sovereign debt was published by the EFC Sub-Committee on EU Sovereign Debt Markets in March 2012. Following the publication, Germany is the first country to have passed legislation to implement a form of model collective action clause into national law. From 1 January 2013, all euro area sovereigns will be required to include the model CAC in both international and domestic government securities. With the January 2013 deadline looming and some sovereigns already starting to adopt the new model CAC, other countries are anticipated to follow suit in the near future.

This briefing describes the background to the new model CAC and answers some Q&A. It also includes a table comparing the new model CAC provisions with the International Capital Market Association collective action clauses published in 2004.

http://www.cliffordchance.com/publicationviews/publications/2012/12/euro_area_memberstatecollectiveaction.html

Schemes of Arrangement go Global

The sanction of an English law scheme of arrangement for a Kuwaiti investment company, Global Investment House KSC, represents another first for English schemes. It sets a precedent for debt restructuring in the Gulf region and treats Islamic and conventional debt as a single class.

Nicholas Frome, partner in Clifford Chance's restructuring and insolvency group in London, who acted for Global, comments: 'Schemes are now very much part of the restructuring scene. Before Global's scheme, however, nearly all overseas company examples related to European restructurings. The court's approval of an application by a Kuwaiti company represents another helpful example of the English court's willingness to assist overseas companies. It also provides further confirmation of the practical usefulness and flexibility of schemes as a delivery mechanism for cross border restructurings.'

This briefing discusses the court's decision.

http://www.cliffordchance.com/publicationviews/publications/2012/12/schemes_of_arrangementglobal.html

RQFLP – An extension of Shanghai’s pilot programme for private equity funds and fund managers

Recently, the Shanghai authorities have opened up the Qualified Foreign Limited Partners programme by allowing overseas RMB holders to make direct onshore investments using their RMB funds. This new avenue, also referred to as the RMB Qualified Foreign Limited Partners (RQFLP) scheme, is hoped to absorb the large amount of RMB funds resulting from the rapid development of RMB internationalization.

This briefing explains the background to the extension under the RQFLP scheme, introduces the new opportunities available and discusses the challenges ahead.

[http://www.cliffordchance.com/publicationviews/publications/2012/12/rqflp - an_extensionofshanghaispilo.html](http://www.cliffordchance.com/publicationviews/publications/2012/12/rqflp_-_an_extensionofshanghaispilo.html)

ASIC makes key announcements on market structure, dark pools and high frequency trading

On 20 November 2012 the Australian Securities and Investments Commission (ASIC) announced a package of regulatory reforms targeted at the growth in high frequency trading, the use of dark pools and the use of automated order processing systems in Australia’s financial markets.

This briefing discusses the proposals.

To view a copy of the briefing, please contact Mhairi Appleton at mhairi.appleton@cliffordchance.com.

Federal Reserve Board Governor Describes Significant Changes to be Proposed for the US Operations of Non-US Banks

On 28 November 2012, Federal Reserve Board Governor Daniel Tarullo provided a preliminary glimpse at new requirements to be imposed on non-US banks that have US banking operations. A proposed rule to be published by the Federal Reserve within weeks will include the most significant changes in over a decade to the way that the Federal Reserve regulates the operations of non-US banks.

This briefing discusses Governor Tarullo’s speech and the ‘new approach’ to the regulation of non-US banks that the Federal Reserve intends to take.

http://www.cliffordchance.com/publicationviews/publications/2012/11/federal_reserve_boardgovernordescribe.html

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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