

International Regulatory Update

27 April - 1 May 2015

IN THIS WEEK'S NEWS

- ECB and EU Commission report on financial integration
- Money Market Funds: EU Parliament approves text of proposed regulation
- Bank structural reform: ECB opinion on proposed Regulation published in Official Journal
- CRR: ECB decision on conditions for including interim or year-end profits in CET1 capital published in Official Journal
- EBA consults on minor revisions for identification of G-SIIs and special disclosure rules
- ESMA recognises third-country CCPs and updates EMIR Q&As
- Basel Committee reports on adoption of Basel regulatory framework
- Senior Supervisors Group issues report on algorithmic trading
- PRA publishes branch return rules for incoming and third country firms
- PRA launches third consultation on draft instruments for new Rulebook
- German Federal Parliament adopts law to protect retail investors
- SRM: German Federal Government proposes draft law on implementation
- Transparency Directive: German Federal Government proposes draft implementing law
- RQFII quota granted to Luxembourg
- Polish Ministry of Finance and Financial Supervision Authority propose amendments to Trading in Financial Instruments Act
- SFAMA amends guidelines on calculation and disclosure of the Total Expense Ratio and real estate funds
- MAS consults on amendments to Securities and Futures (Exemption from requirement to hold Capital Markets Services Licence) Regulations
- MAS issues revised notices on sale of and recommendations on investment products

Clifford Chance's International Regulatory Update is a weekly digest of significant regulatory developments, drawing on our daily content from our Alerter: Finance Industry service.

If you would like to continue to receive International Regulatory Update or would like to request a subscription for a colleague, please [click here](#).

To request a subscription to our Alerter: Finance Industry service, please email [Online Services](#).

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

- CFTC Chair discusses swap execution facilities at ISDA's 30th Annual General Meeting
- SEC proposes to regulate non-US persons that engage in security-based swap dealing activity in United States
- SEC publishes cybersecurity guidance
- Recent Clifford Chance briefings: Defences available to defeat insolvency challenges; Securitisation in Spain; and more. [Follow this link to the briefings section.](#)

ECB and EU Commission report on financial integration

The European Central Bank (ECB) and EU Commission have jointly launched their reports on financial integration in the EU in 2014/15.

[The ECB report](#), Financial Integration in Europe, sets out recent developments in integration across the euro area, measured in four key market sectors: money markets, euro area bond markets, euro area banking markets and equity markets. For the first time, the report includes a section on the Financial Integration Composite (FINTEC) measure, which consists of standard indicators of all four market segments and provides an overall view of financial integration.

Among other things, the ECB reports on developments relating to banking union and includes a special feature chapter on the banking union's role in enhancing financial integration. The chapter discusses the expected benefits of the banking union and further possible developments. The chapter also considers the Commission's capital markets union (CMU) project and its relationship to financial integration. Other special features in the report discuss bank funding conditions and the size, structure and contribution of the EU financial sector.

[The EU Commission report](#), the European Financial Stability and Integration Review (EFSIR), discusses the position of the EU economy as measured by relevant financial indicators and provides an overview of the structure of the financial sector in the EU, proposals for CMU and the financial sector's role in providing funds across the economy. Special feature chapters discuss:

- the role of private debt overhang in the EU;
- large financial risks facing households;
- competition and regulation in the financial system;
- cyber security risks to the financial sector; and

- the shape of credit information for small and medium-sized enterprises (SMEs) in the EU.

Money Market Funds: EU Parliament approves text of proposed regulation

The EU Parliament has [approved](#) the text of the proposed regulation on money market funds (MMFs) already adopted by the Economic and Monetary Affairs Committee (ECON).

The approved text will now be the basis for the Parliament's position for trilogue negotiations with the EU Council and the EU Commission.

Bank structural reform: ECB opinion on proposed Regulation published in Official Journal

The [opinion](#) of the ECB on the proposed EU Regulation on bank structural reform has been published in the Official Journal.

The ECB received requests for an opinion on the proposal from the EU Parliament and the EU Council in March 2014 and published its opinion in November 2014. The opinion states that the ECB broadly welcomes the proposal as a contribution towards ensuring a harmonised EU framework addressing concerns regarding banks that are 'too big to fail' and 'too interconnected to fail'.

Suggested amendments to draft text of the proposed Regulation are set out in an annex to the opinion.

CRR: ECB decision on conditions for including interim or year-end profits in CET1 capital published in Official Journal

[Decision](#) (EU) 2015/656 of the ECB 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) has been published in the Official Journal.

The decision was first published by the ECB on 4 February 2015 and has applied since 6 February 2015. 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.

EBA consults on minor revisions for identification of G-SIIs and special disclosure rules

The European Banking Authority (EBA) has published a [consultation paper](#) on updates to its methodology for identifying global systemically important institutions (G-SIIs). The EBA's methodology closely follows the Basel Committee on Banking Supervision (BCBS) recommendations for identifying global systemically important banks (G-SIBs) but BCBS made minor revisions to its template for identifying G-SIBs in 2015 based on end-2014 business year data. As such, the EBA is consulting on updating its regulatory technical standards (RTS) for identifying G-SIIs, implementing technical standards (ITS) on special disclosure rules applicable to G-SIIs, and guidelines on special disclosure rules for large institutions in line with the BCBS amendments.

Comments on the consultation are due by 20 May 2015.

ESMA recognises third-country CCPs and updates EMIR Q&As

The European Securities and Markets Authority (ESMA) [has recognised](#) ten third-country central counterparties (CCPs) established in Australia, Hong Kong, Japan and Singapore. The recognition by ESMA allows third country CCPs to provide clearing services to clearing members or trading venues established in the EU. The CCPs recognised by ESMA are established in jurisdictions which have been assessed as equivalent by the EU Commission with regard to their legal and supervisory arrangements for CCPs.

ESMA has published a list of the recognised third-country CCPs as well as the classes of financial instruments covered by their recognition, which will be updated with each new decision on the further recognition of CCPs.

ESMA has also published [updated questions and answers](#) (Q&As) on the implementation of the European Market Infrastructure Regulation (EMIR). The update relates to the second level of EMIR validation specifications to be commonly applied by trade repositories (TRs) to ensure that they meet reporting requirements under the EMIR regime.

ESMA's Q&As are intended to promote common supervisory approaches and practices in the application of EMIR and is aimed at competent authorities. It is also intended to help investors and other market participants by clarifying requirements under EMIR.

Basel Committee reports on adoption of Basel regulatory framework

The Basel Committee on Banking Supervision (BCBS) has published an [updated progress report](#) on adoption of the Basel regulatory framework, which provides a high-level view of Basel Committee members' progress in adopting Basel II, Basel 2.5 and Basel III, as of end-March 2015. BCBS' monitoring reports have been published semi-annually since 2011 and focus on the status of domestic rule-making processes to ensure that the Committee's capital standards are implemented in jurisdictions according to internationally agreed timeframes.

The report is based on information provided by members as part of the Committee's Regulatory Consistency Programme (RCAP) and includes the status of standards for global and domestic systemically important banks (SIBs), risk-based capital standards, the Basel III leverage ratio (LR) and liquidity coverage ratio (LCR).

Senior Supervisors Group issues report on algorithmic trading

The Senior Supervisors Group (SSG), which comprises senior financial supervisors from ten countries and the European Union, has issued a [report](#) that assesses risks associated with algorithmic trading and identifies risk-based control principles and questions for supervisors and supervised firms to consider when assessing the current control environment.

The report highlights key supervisory concerns including whether risks associated with algorithmic trading activity have outpaced control improvements, and whether standard risk management tools are effective for ongoing monitoring. In addition to assessing the related risks, the report identifies key control principles and suggests questions that supervised firm can use to self-assess and supervisors might consider as they monitor and examine trading activity. The report concludes by stating that supervision needs to remain flexible and adaptable to address the growth and evolution of algorithmic trading.

PRA publishes branch return rules for incoming and third country firms

The Prudential Regulation Authority (PRA) has published a policy statement ([PS8/15](#)) containing final rules for a twice-yearly branch return to be completed by all non-UK headquartered PRA-supervised firms operating in the UK. The final rules follow publication of PS8/14 on the PRA's approach to supervising branches of international banks in September 2014, which indicated that the PRA would

publish details of the branch return for incoming firms and third country firms once a second voluntary pilot collection had been completed.

The branch return has not materially changed since the PRA consulted on the proposal in February 2014. The instrument bringing into force branch return rules is included in the appendix to PS8/15 and will enter into force on 1 July 2015.

PRA launches third consultation on draft instruments for new Rulebook

The PRA has launched its third consultation ([CP17/15](#)) on the new PRA Rulebook, which is intended to amend and streamline the PRA Handbook and associated materials from the PRA's predecessor regulator the Financial Services Authority (FSA).

The consultation includes proposals for Rulebook sections on:

- passporting;
- regulatory reporting; and
- internal governance of third country branches.

A content mapping table is included, which maps modules in the current PRA Handbook to the new Rulebook or supervisory statement. Draft versions of the proposed Rulebook instruments and draft supervisory statements are included in the appendices to the consultation paper; each has also been published individually on the PRA website.

Comments on the consultation are due by 30 June 2015.

German Federal Parliament adopts law to protect retail investors

The German Federal Parliament [has adopted](#) the Retail Investor Protection Act (Kleinanlegerschutzgesetz), which is intended to improve the level of consumer protection and transparency requirements for investment products. Amongst other things, the Act specifies that:

- promotional material for investment products must contain sufficient warnings about potential losses;
- prospectuses need to contain higher information quality; and
- the Federal Financial Services Supervisory Authority (BaFin) is entitled to publish the names of firms that have been fined for violating investor protection laws on its website and may prohibit the distribution of certain investment products.

SRM: German Federal Government proposes draft law on implementation

The German Federal Government [has proposed](#) a draft law on the implementation of the Single Resolution Mechanism (SRM) and corresponding amendments to existing laws (following the first draft published in March 2015), including the German Recovery and Resolution Act (Sanierungs- und Abwicklungsgesetz), the German Restructuring Fund Law (Restrukturierungsfondsgesetz), the German Banking Act (Kreditwesengesetz), the German Law on Covered Bonds (Pfandbriefgesetz), and further changes.

The draft includes a proposal on the subordination of senior bank debt (section 46f of the draft German Banking Act). This concept has not changed in general compared to the first draft, but the new wording clarifies that money market instruments and deposits are not covered and that contractually subordinated debt will remain to be subordinated to the (originally) senior bank debt. In terms of the duty to include a clause on the recognition of suspension of termination rights (section 60a of the draft German Recovery and Resolution Act), changes as compared to the March 2015 draft include the applicability to all credit institutions and group members but only for contracts governed by the law of or entered into with a party in a third country (instead of all foreign countries), the applicability also for liabilities before 1 January 2016 if they are part of a netting agreement and the non-applicability for liabilities under master agreements with clearing houses or clearing system members.

Transparency Directive: German Federal Government proposes draft implementing law

The German Federal Government [has proposed](#) a draft law on the implementation of the amended Transparency Directive (Directive 2013/50/EU). Amongst other things, the draft law includes clarification on the relevant point in time for the duty to make voting rights notifications (and which still sets the entering of an agreement as decisive, not the delivery), respective exemptions (which have been subject to discussion since the first published draft), the abolishment of the duty to publish quarterly reports and, beyond the Transparency Directive, a new licence requirement for central securities depositaries under Regulation 909/2014/EU. The draft contains further provisions implementing the Transparency Directive and aligning German law with some aspects which had formerly not been implemented.

RQFII quota granted to Luxembourg

The People's Bank of China [has announced](#) that the Renminbi Qualified Foreign Institutional Investor (RQFII) scheme has been expanded to Luxembourg with an initial total investment quota of RMB 50 billion.

The RQFII scheme was launched in China on 16 December 2011. So far, it has been expanded to 12 countries/regions, including Hong Kong (270 billion RMB), the UK (80 billion RMB), Taiwan (100 billion RMB), Singapore (50 billion RMB), France (80 billion RMB), South Korea (80 billion RMB), Germany (80 billion RMB), Qatar (30 billion RMB), Canada (50 billion RMB), Australia (50 billion RMB), Switzerland (50 billion RMB and now Luxembourg (50 billion RMB).

The RQFII programme in Luxembourg offers another channel for foreign investors to enter China's capital markets and is a further step in the continued internationalisation of the RMB.

Polish Ministry of Finance and Financial Supervision Authority propose amendments to Trading in Financial Instruments Act

The Ministry of Finance and the Polish Financial Supervision Authority have jointly [prepared a draft](#) amendment to the Act on Trading in Financial Instruments. The purpose of the proposals is to end the division between the stock exchange market and OTC market and replace these markets with one concept of a regulated market. Moreover, the proposals include introducing a new institution of derivatives account to the legal system and propose to give the Polish Financial Supervision Authority the sole authority to issue permits to operate a regulated market.

The draft bill has been delivered for review by the Standing Committee of the Council of Ministers.

SFAMA amends guidelines on calculation and disclosure of the Total Expense Ratio and real estate funds

The Swiss Funds and Asset Management Association (SFAMA) has announced amendments to its [guidelines](#) on the calculation and disclosure of the Total Expense Ratio (TER) of collective investment schemes (CIS) and [guidelines for real estate funds](#).

Changes to the guidelines on the calculation and disclosure of the TER of CIS include:

- removal of the Portfolio Turnover Ratio in line with the changes to the Collective Investment Schemes Ordinance (CISO);
- alterations to terminology in line with the revised CISO; and
- greater flexibility in relation to the existing exemption regarding fund of funds in compliance with Federal Occupational Pensions Regulatory Commission requirements on CIS transparency.

Amendments to the guidelines on real estate funds have been made in response to the partial revision of the Collective Investment Schemes Act and CISO, as well as the SFAMA Transparency Guidelines and Code of Conduct. Changes include deleting margins 44 to 51 regarding transactions with related persons and amending the wording of margin 58 on the maintenance of fund assets.

The revised guidelines will enter into force on 1 June 2015 and will serve as the minimum standard recognised by the Swiss Financial Market Supervisory Authority (FINMA) in accordance with FINMA Circular 2008/10 of 20 November 2008.

MAS consults on amendments to Securities and Futures (Exemption from requirement to hold Capital Markets Services Licence) Regulations

The Monetary Authority of Singapore (MAS) has issued a [consultation paper](#) on proposed amendments to the Securities and Futures (Exemption from requirement to hold Capital Markets Services Licence) Regulations.

MAS proposes to exempt remote clearing members, which clear futures contracts on Singapore-based central clearing counterparties (CCPs), from the requirement to hold a capital markets services (CMS) licence in respect of trading in futures contracts under the Securities and Futures Act. MAS proposes to exempt remote clearing members that meet certain criteria, in particular:

- incorporated outside Singapore;
- serves no customer resident in Singapore nor carries on business in providing financial services in Singapore;
- carries on business in a jurisdiction where the relevant regulator has an arrangement with MAS for information exchange and cooperation in respect of futures supervision; and

- is registered, licensed, approved or otherwise regulated in respect of trading in futures contracts by the relevant regulator in its home jurisdiction.

The MAS seeks views on the proposals, including whether the conditions of exemption adequately address the business conduct concerns arising from the participation of remote clearing members in Singapore's clearing system.

Comments on the consultation paper are due by 15 May 2015.

MAS issues revised notices on sale of and recommendations on investment products

The MAS has issued the following amended MAS Notices:

- Notice on the sale of investment products ([SFA 04-N12](#)); and
- Notice on recommendations on investment products ([FAA-N16](#)).

The MAS has taken into account industry feedback that funds which make limited use of derivatives are relatively less complex and should be made more accessible to retail investors. These are funds which invest only in simple products such as shares or gold, but may use derivatives for efficient portfolio management including the hedging of risks.

Under the amended MAS Notices, fund managers will be able to reclassify investment funds which make limited use of derivatives as Excluded Investment Products (EIPs). Retail investors can then access these investment funds which have been reclassified as EIPs more easily as they will no longer need to be assessed on their investment knowledge or experience. Details of when investment funds are considered to make limited use of derivatives can be found in Annex 1 of the respective MAS Notices.

CFTC Chair discusses swap execution facilities at ISDA's 30th Annual General Meeting

The Chairman of the U.S. Commodity Futures Trading Commission (CFTC), Timothy Massad, [has delivered a speech](#) before the ISDA 30th Annual General Meeting. Mr. Massad's speech focused on the importance the CFTC places on domestic and cross-border regulatory harmonization and discussed global derivatives regulation. Mr. Massad discussed developments related to swaps trading through swap execution facilities (SEFs) and outlined some of the actions CFTC has taken and work currently underway to improve the operational aspects of SEF trading. The CFTC is taking several operational steps

to ensure the trading framework is more effective and efficient, including:

- the recently issued no-action relief on error trades, intended to streamline the process for correcting erroneous trades;
- CFTC plans to initiate a rulemaking to clarify reporting of cleared swaps, as well as the role played by clearing houses in this workflow, and will propose to eliminate the requirement to report confirmation data for intended to be cleared swaps that are accepted for clearing and thereby terminated; and
- extending previous no-action relief permitting the SEF legal confirmation to incorporate the ISDA Master Agreement by reference. This letter also relieves the SEF from the requirement to maintain copies of the actual agreements. In addition, CFTC clarified the SEF reporting responsibility regarding uncleared swaps, under which SEFs need only report 'Primary Economic Terms', as well as any confirmation data they do in fact have.

SEC proposes to regulate non-US persons that engage in security-based swap dealing activity in United States

The Securities and Exchange Commission (SEC) is [seeking public comment](#) on a re-proposed rulemaking that would clarify the application of US regulations to crossborder security-based swaps (SBS) transactions. As now proposed, a non-US company that uses US personnel to arrange, negotiate or execute an SBS transaction would be required to include that transaction in determining whether it must register in the US as an SBS dealer. These rules would also specify which transactions of a US-registered SBS dealer are subject to US external business conduct standards. The rules would also address when and by whom specified transactions must be reported to a registered SBS data repository and publicly disseminated under Regulation SBSR.

The re-proposal focuses on where activities are carried out by a non-US person or its agent. A non-US dealer would need to look to where its own personnel or its agent's personnel engage in certain market-facing activity with respect to a particular SBS transaction. If those personnel are located in a US branch or office, relevant US regulation would apply to the transaction.

SEC publishes cybersecurity guidance

The SEC's Investment Management Division has issued [guidance](#) urging firms to improve their cybersecurity measures. The guidance highlights measures that funds

and advisors may wish to consider when addressing cybersecurity risks, including but not limited to the following:

- conducting periodic assessments of the information the firm collects and the technology systems in use, as well as identifying potential cybersecurity threats and vulnerabilities so as to prioritize and mitigate risk;
- creating a strategy designed to prevent, detect, and respond to cybersecurity threats; and
- implementing this strategy through written policies and procedures and training that provide guidance to officers and employees concerning applicable threats and measures to prevent, detect and respond to such threats and that monitor compliance with cybersecurity policies and procedures.

RECENT CLIFFORD CHANCE BRIEFINGS

European Court provides insights into defences available to defeat insolvency challenges

In the recent case of Lutz [2015] EU ECJ C-577/13, the European Court of Justice (ECJ) provided useful guidance on when a creditor or third party's legitimate expectations in respect of commercial transactions are protected, in the event such transactions are later challenged by an insolvency officeholder. In particular, the case considered the extent to which such parties can rely on the defence that the 'detrimental' transaction could not be unwound by the law governing that transaction.

This briefing paper discusses the European Court of Justice's decision.

http://www.cliffordchance.com/briefings/2015/04/european-court_providesinsightsintodefence.html

Germany – upfront fees in syndicated lending in light of recent Federal Court of Justice judgements

For German law consumer credits work fees can only be charged upfront if the consumer has been given a real choice between paying an upfront work fee or a higher interest rate over the lifetime. Equally, a bank cannot validly through its general business terms require a consumer to reimburse the bank for third party expenses it incurs when performing its contractual or statutory obligations or any other task that it performs predominantly in its own interest.

This briefing paper discusses the view that case law does not restrict typical upfront fees and expense provisions in syndicated loans to corporate borrowers.

http://www.cliffordchance.com/briefings/2015/04/germany-upfront_feesinsyndicatedlendingi.html

New developments on securitisation in Spain

The recently approved Business Finance Promotion Act reforms, among other things, the legal regime governing securitisation in Spain with a view to increasing the transparency, quality and simplicity of securitisation and bringing the Spanish legal system closer to that of its European neighbours.

This briefing paper discusses the Act.

http://www.cliffordchance.com/briefings/2015/04/new_developmentsonsecuritisationinspain.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.

www.cliffordchance.com

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

© Clifford Chance 2015

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.