EU Securities Financing Transactions Regulation - New rules on rights of reuse of collateral

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CLIFFORD
CHANCE

Contents

This document is not intended to be comprehensive or to provide legal advice. For more information contact one of the lawyers below.

Financial Stability Board Recommendations

Recommendation 7: Authorities should ensure that regulations governing re-hypothecation of client assets address the following principles:

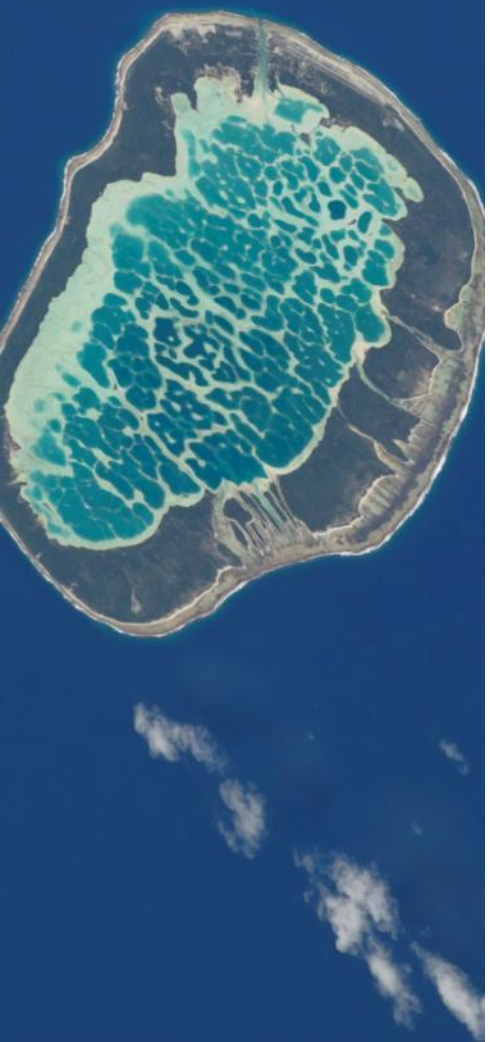
- financial intermediaries should provide sufficient disclosure to clients in relation to re-hypothecation of assets so that clients can understand their exposures in the event of a failure of the intermediary; …

Strengthening Oversight and Regulation of Shadow Banking - Policy Framework for Addressing Shadow Banking Risks in Securities Lending and Repos (August 2013)

Recital 17 EU Securities Financing Transactions Regulation

Reuse of collateral provides liquidity and enables counterparties to reduce funding costs. However, it tends to create complex collateral chains between traditional banking and shadow banking, posing financial stability risks. The lack of transparency on the extent to which financial instruments provided as collateral have been reused and the respective risks in the case of bankruptcy can undermine confidence in counterparties and magnify risks to financial stability.

Council paper confirming final political agreement with Parliament (26 June 2015)



Introduction

The new EU regulation on securities financing transactions (SFTR) also imposes new rules on rights of reuse of collateral

The European Parliament and the Council reached agreement on the text of the SFTR in June 2015 and it is expected that the SFTR will come into force in early 2016

The SFTR is part of the EU initiative on "shadow banking" and introduces new rules on:

- reporting of securities financing transactions (SFTs) to trade repositories
- disclosure by collective investment undertakings of their use of SFTs and total return swaps in their prospectuses and periodic reports

The SFTR also aims to implement recommendations of the Financial Stability Board (FSB) that financial intermediaries should provide clients with disclosure on the effects of re-hypothecation of client assets

The new EU rules will require all counterparties – not just financial intermediaries – to provide additional disclosures to the collateral provider if they receive financial instruments as collateral with a right of use or under title transfer arrangements

The SFTR also imposes new formalities with respect to financial collateral arrangements involving rights of use or title transfer as well as requirements with respect to securities accounts

These requirements will take effect six months after the SFTR comes into force, will have retroactive effect in relation to existing collateral arrangements and will apply extra-territorially to non-EU counterparties receiving collateral from persons in the EU

The new rules overlap with a number of existing and planned EU and national requirements with respect to collateral arrangements, including the proposals under MiFID2 regarding the use of title transfer collateral arrangements by non-retail clients

Article 15 SFTR

Reuse of financial instruments received under a collateral arrangement

1. **Any right of counterparties to reuse financial instruments received as collateral shall be subject to at least all the following conditions:**

(a) **the providing counterparty has been duly informed in writing by the receiving counterparty of the risks and consequences** that may be involved in:

(i) granting consent to a right of use of collateral provided under a security collateral arrangement in accordance with Article 5 of Directive 2002/47/EC; or

(ii) concluding a title transfer collateral arrangement.

In the circumstances laid down in this point, the providing counterparty shall at least be informed in writing of the risks and consequences that may arise in the event of the default of the receiving counterparty.

(b) **the providing counterparty has granted its prior express consent, as evidenced by the signature in writing or in a legally equivalent manner, of the providing counterparty to a security collateral arrangement**, the terms of which provide a right of use in accordance with Article 5 of Directive 2002/47/EC, **or has expressly agreed to provide collateral by way of a title transfer collateral arrangement**.

2. **Any exercise by counterparties of their right to reuse shall be subject to** at least all the following conditions:

(a) **reuse is undertaken in accordance with the terms specified in the collateral arrangement** referred to in point (b) of paragraph 1;

(b) **the financial instruments received under a collateral arrangement are transferred from the account of the providing counterparty**.

By way of derogation to point (b), where a counterparty to a collateral arrangement is established in a third country and the account of the counterparty providing the collateral is maintained in and subject to the law of a third country, the reuse shall be evidenced either by a transfer from the account of the providing counterparty or by other appropriate means.

3. This Article is without prejudice to stricter sectoral legislation, in particular to Directives 2014/65/EU [MiFID2] and 2009/65/EC [UCITS], and to national law aimed at ensuring a higher level of protection of providing counterparties.

4. **This Article shall not affect national law concerning the validity or effect of a transaction**.

Source: Council paper confirming final political agreement with Parliament (26 June 2015) – emphasis added

Article 28 SFTR

Entry into force and application

1. This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

2. This Regulation shall apply from the date of entry into force, with the exception of:

…

(c) Article 15 shall apply from [6 months after the date of entry into force].

(d) Article 15 shall apply to collateral arrangements existing at the [date of entry into force].

Recital 18 SFTR

Application of the reuse requirements should be deferred by 6 months in order to provide counterparties with sufficient time to adapt their outstanding collateral arrangements, including master agreements, and to ensure new collateral arrangements comply with this Regulation.

Timing

SFTR - next steps

Legal linguists' review and translation into official languages

European Parliament approval in plenary (set for 27 October 2015)

Endorsement by the Council

Signature on behalf of the European Parliament and Council

Publication in the Official Journal

SFTR is likely to be in force in early 2016

SFTR does not require the adoption of any regulatory technical standards or delegated or implementing acts with respect to Article 15

Implications for Article 15

The new requirements will have retroactive effect on existing collateral arrangements

Counterparties will need to remediate existing collateral arrangements and put in place processes for new collateral arrangements by mid-2016

Scope of Article 15 SFTR

Covered transactions

Article 15 is not limited to securities financing transactions – it covers all security financial collateral and title transfer collateral arrangements

It is wider than the Financial Collateral Directive (FCD) – it applies even if the arrangement does not secure "relevant financial obligations"

But it only applies to the reuse of financial instruments (not cash)

Covered counterparties

The obligations apply to a "counterparty" that receives collateral with a right of reuse, possibly including from an individual (Article 3(1)(7))

Counterparties are "undertakings" established in the EU or third countries - not only regulated firms (wider than FSB Recommendation 7)

The obligations do not apply to members of ESCB, EU public bodies charged with or intervening in the management of the public debt or BIS

- Commission can adopt delegated acts to cover e.g. non-EU central banks
- Counterparties receiving collateral from exempt entities must still comply with Article 15 (contrast Article 2(2) and 2(2a) SFTR)

Extra-territorial impact

Requirements apply where counterparty engaging in reuse of collateral is:

- Established in the EU (including where acting through non-EU branches); or
- Established in a third country and is receiving collateral:
  - through a branch in the EU; or
  - from an EU counterparty (or an EU branch of a third country entity)

SFTR Recitals

(17b) Although the scope of the rules concerning reuse is wider than the one of the Directive 2002/47/EC [FCD], this Regulation does not amend the scope of Directive 2002/47/EC but rather should be read in addition to Directive 2002/47/EC. …

(18a)In order to promote international consistency of terminology, this Regulation employs the term "reuse" due to the FSB Recommendations. This should however not lead to inconsistency within Union acquis, in particular it should be without prejudice to the use of the term "reuse" employed in Directives 2009/65/EC [UCITS] and 2011/61/EU [AIFMD].

Article 3(1) SFTR

(7) "reuse" means the use by a receiving counterparty, in its own name and on its own account or on the account of another counterparty, including any natural person, of financial instruments received under a collateral arrangement. Such use includes transfer of title or exercise of a right of use in accordance with Article 5 of Directive 2002/47/EC [FCD] but does not include the liquidation of the financial instrument in the event of default of the providing counterparty;

(7a) "title transfer collateral arrangement" means a title transfer financial collateral arrangement as defined in point (b) of Article 2(1) of Directive 2002/47/EC concluded between counterparties to secure any obligation.

(7b) "security collateral arrangement" means a security financial collateral arrangement as defined in point (c) of Article 2(1) of Directive 2002/47/EC concluded between counterparties to secure any obligation.

(9) "collateral arrangement" means title transfer collateral arrangement and security collateral arrangement.

(8) "financial instruments" means financial instruments as defined in point (15) of Article 4(1) of Directive 2014/65/EU10 [MiFID2];

Article 32(7) MiFID implementing directive

7. An investment firm, before entering into securities financing transactions in relation to financial instruments held by it on behalf of a retail client, or before otherwise using such financial instruments for its own account or the account of another client, shall in good time before the use of those instruments provide the retail client, in a durable medium, with clear, full and accurate information on the obligations and responsibilities of the investment firm with respect to the use of those financial instruments, including the terms for their restitution, and on the risks involved.

CASS 9.3.1R

(1) A firm must ensure that every prime brokerage agreement that includes its right to use safe custody assets for its own account includes a disclosure annex.

(2) A firm must ensure that the disclosure annex sets out a summary of the key provisions within the prime brokerage agreement permitting the use of safe custody assets, including:

(a) the contractual limit, if any, on the safe custody assets which a prime brokerage firm is permitted to use;

(b) all related contractual definitions upon which that limit is based;

(c) a list of numbered references to the provisions within that prime brokerage agreement which permit the firm to use the safe custody assets; and

(d) a statement of the key risks to that client's safe custody assets if they are used by the firm, including but not limited to the risks to the safe custody assets on the failure of the firm.

(3) A firm must ensure that it sends to the client in question an updated disclosure annex if the terms of the prime brokerage agreement are amended after completion of that agreement such that the original disclosure annex no longer accurately records the key provisions of the amended agreement.

Key obligations

Information obligation

Article 15 imposes a new requirement to inform the collateral provider of "the risks and consequences" of granting consent to a right of use or entering into a title transfer collateral arrangement

Compare Article 32(7) MiFID implementing directive (retail clients), CASS 9.3.1R (prime brokerage) and proposed standards under MiFID2 for title transfer collateral agreements with non-retail clients (see below)

- The SFTR obligations also apply to clients and counterparties receiving collateral from regulated firms
- Mutual disclosure may be required for two-way collateral agreements

Counterparties may choose to provide information by:

- specific disclosures in new master agreements/credit support documents or
- cross-agreement disclosure through one-way notices or terms of business (in particular when remediating for existing collateral arrangements)

Execution obligation

Requires "prior express consent" of counterparty, "evidenced by signature or equivalent" to a security financial collateral agreement including rights of reuse

Requires "express agreement" of counterparty to provide collateral by way of title transfer

Compare Article 3 FCD: validity etc. "not dependent on a formal act" where "the financial collateral arrangement can be evidenced in writing or in a legally equivalent manner"

This should not require additional steps for counterparties using signed market standard securities financing/credit support documentation

Reuse conditions

Compliance with agreement

Reuse must be undertaken in accordance with the terms specified in the collateral arrangement

This should not require additional implementation steps by firms

Securities accounts

Reuse is also subject to condition that the "financial instruments received under a collateral arrangement are transferred from the account of the providing counterparty" except where:

- a counterparty to a collateral arrangement is established in a third country and
- the account of the counterparty providing the collateral is maintained in and subject to the law of a third country,

the reuse shall be evidenced either by a transfer from the account of the providing counterparty or by other appropriate means

Firms holding financial instruments in custody for clients which are reused under a collateral agreement should ensure that the reuse is reflected in the client's securities account

- Clients' accounts should distinguish between securities held in custody and those to which client has a contractual right of return of equivalent securities
- Compare Article 43(2)(b) MiFID implementing directive regarding the content of the annual financial statement sent to clients of investment firms and banks holding client financial instruments

Recital (17a) SFTR

In order to increase transparency of reuse, minimum information requirements should be imposed. Reuse should take place only with the express knowledge and consent of the providing counterparty. Therefore, the exercise of reuse should be reflected in its securities account of the providing counterparty, unless this account is governed by the law of a third country which might provide for other appropriate means to reflect the reuse.

Article 43 MiFID implementing directive

The statement of client assets ... shall include the following information:

(a) details of all the financial instruments or funds held by the investment firm for the client at the end of the period covered by the statement;

(b) the extent to which any client financial instruments or client funds have been the subject of securities financing transactions;

(c) the extent of any benefit that has accrued to the client by virtue of participation in any securities financing transactions, and the basis on which that benefit has accrued.

Recital 17b SFTR

The conditions subject to which counterparties have a right to reuse and to exercise that right should not diminish in any way the protection afforded to title transfer financial collateral arrangement under Directive 2002/47/EC [FCD]. Against this background, any breach of transparency requirements of reuse should not affect national law concerning the validity or effect of a transaction.

Article 15(4) SFTR

[Article 15] shall not affect national law concerning the validity or effect of a transaction.

Article 20(5) SFTR

A breach of the rules laid down by Article 4 [reporting to trade repositories] shall not affect the validity of the terms of a SFT or the possibility of the parties to enforce the terms of a SFT. A breach of the rules defined under Article 4 shall not give rise to compensation rights from a party to a SFT.

Penalties

Sanctions

Member states must give competent authorities the power to impose effective, proportionate and dissuasive administrative sanctions and other administrative measures for breach of Article 15, including:

- maximum administrative pecuniary sanctions of at least €15m or 10% of consolidated turnover (legal persons) or €5m (individuals)
- penalties and temporary bans for management and other individuals responsible for breach by a legal person
- Cease and desist orders, public censure, suspension or withdrawal of authorisation

Member states may provide for criminal sanctions instead of or additional to administrative sanctions

Member states must notify rules on sanctions to Commission and ESMA within 18 months of SFTR coming into force

Impact on validity and civil liability

Article 15(4) suggests that transactions that are otherwise valid under national law may not be affected by contraventions of Article 15 but:

- ECJ case law envisages the possibility of civil liability for breach of a directly applicable EU regulation (*Muñoz v Frumar*)
- Article 20(5) is explicit that contraventions of the reporting requirements under SFTR do not affect the validity of a transaction or give rise to civil liability

MiFID2 technical advice
Inappropriate use of TTCA for non-retail clients

Governance arrangements concerning the safeguarding of client assets

1. Investment firms shall appoint a single officer of sufficient skill and authority with specific responsibility for matters relating to the firm's compliance with its obligations regarding the safeguarding of client instruments and funds.

2. In accordance with the MiFID proportionality principle, investment firms shall decide where it is appropriate for the officer appointed under (1) to be dedicated solely to this task, or to have additional responsibilities.

Inappropriate use of title transfer collateral arrangements (TTCAs) for non-retail clients

3. Article 16(10) of MiFID II prohibits firms from concluding TTCAs with retail clients for the purpose of securing or covering present or future, actual or contingent or prospective obligations. For non-retail clients, investment firms shall not conclude TTCAs without proper consideration.

4. TTCAs are not appropriate where:

i. there is only a very weak connection between the client's obligation to the firm and the use of TTCAs, including where the likelihood of a liability arising is low or negligible;

ii. the amount of client funds or financial instruments subject to TTCAs far exceeds the client's obligation, or is even unlimited if the client has any obligation at all to the firm; or

iii. firms insist that all clients' assets must be subject to TTCAs, without considering what obligation each client has to the firm.

5. Investment firms shall consider and be able to demonstrate that they have properly considered the use of TTCA in the context of the relationship between the client's obligation to the firm and the client assets subjected to TTCA by the firm.

6. Where using TTCAs, Investment firms shall highlight to clients the risks involved and the effect of any TTCA on the client's assets.

Securities financing transactions and TTCAs

7. While some transactions permitted under Article 19 of the MiFID Implementing Directive may require the transfer of title, it shall not be possible to make use of Article 19 to effect arrangements that are prohibited under Article 16(10) of MiFID II.

Securities financing transactions and collateralisation

8. Investment firms shall adopt specific arrangements for retail and non-retail clients to ensure that the borrower of client assets provides the appropriate collateral and that the firm monitors the continued appropriateness of such collateral and takes the necessary steps to maintain the balance with the value of client assets.

Source: ESMA Technical Advice (December 2014), p. 75

Glossary

AIFMD: the EU Alternative Investment Managers Directive

BIS: the Bank for International Settlements

Commission: the European Commission

Council: the Council of the EU

ECJ: the European Court of Justice

ESMA: the European Securities Markets Authority

EU: the European Union

FCD: the EU Financial Collateral Directive

FSB: the Financial Stability Board

MiFID: the EU Markets in Financial Instruments Directive

MiFID2/MiFIR: the new EU directive and regulation replacing MiFID

Parliament: the European Parliament

SFT: securities financing transaction (which, under SFTR, includes corresponding commodities transactions)

SFTR: the recently agreed EU regulation on securities financing transactions

TTCA: title transfer collateral arrangements

UCITS directive: the EU directive on undertakings for collective investment in securities

Clifford Chance contacts

Chris Bates
Partner, London
T: +44 20 7006 1041
E: chris.bates@cliffordchance.com

Marc Benzler
Partner, Frankfurt
T: +49 697199 3304
E: marc.benzler@cliffordchance.com

Anna Biala
Advocate, Warsaw
T: +48 22429 9692
E: anna.biala@cliffordchance.com

Lucio Bonavitacola
Partner, Milan
T: +39 028063 4238
E: lucio.bonavitacola@cliffordchance.com

José Manuel Cuenca
Partner, Madrid
T: +34 91590 7535
E: josemanuel.cuenca@cliffordchance.com

Lounia Czupper
Partner, Brussels
T: +32 2533 5987
E: lounia.czupper@cliffordchance.com

Caroline Dawson
Senior Associate, London
T: +44 20 7006 4355
E: caroline.dawson@cliffordchance.com

Simon Gleeson
Partner, London
T: +44 20 7006 4979
E: simon.gleeson@cliffordchance.com

Frank Graaf
Partner, Amsterdam
T: +31 20711 9150
E: frank.graaf@cliffordchance.com

Steve Jacoby
Partner, Luxembourg
T: +352 485050 219
E: steve.jacoby@cliffordchance.com

Frederic Lacroix
Partner, Paris
T: +33 14405 5241
E: frederick.lacroix@cliffordchance.com

Caroline Meinertz
Partner, London
T: +44 20 7006 4253
E: caroline.meinertz@cliffordchance.com

Habib Motani
Partner, London
T: +44 20 7006 1718
E: habib.motani@cliffordchance.com

Stephanie Peacock
Lawyer, London
T: +44 20 7006 4387
E: stephanie.peacock@cliffordchance.com

Jeremy Walter
Partner, London
T: +44 20 7006 8892
E: jeremy.walter@cliffordchance.com

Ute Brunner-Reumann
Counsel, Frankfurt:
T: +49 697199 3234
E: ute.reumann@cliffordchance.com

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Worldwide contact information

36* offices in 26 countries

Abu Dhabi
Clifford Chance
9th Floor, Al Sila Tower
Abu Dhabi Global Market Square
PO Box 26492
Abu Dhabi
United Arab Emirates
Tel +971 (0)2 613 2300
Fax +971 (0)2 613 2400

Amsterdam
Clifford Chance
Droogbak 1A
1013 GE Amsterdam
PO Box 251
1000 AG Amsterdam
The Netherlands
Tel +31 20 7119 000
Fax +31 20 7119 999

Bangkok
Clifford Chance
Sindhorn Building Tower 3
21st Floor
130-132 Wireless Road
Pathumwan
Bangkok 10330
Thailand
Tel +66 2 401 8800
Fax +66 2 401 8801

Barcelona
Clifford Chance
Av. Diagonal 682
08034 Barcelona
Spain
Tel +34 93 344 22 00
Fax +34 93 344 22 22

Beijing
Clifford Chance
33/F, China World Office 1
No. 1 Jianguomenwai Dajie
Chaoyang District
Beijing 100004
China
Tel +86 10 6535 2288
Fax +86 10 6505 9028

Brussels
Clifford Chance
Avenue Louise 65 Box 2
1050 Brussels
Belgium
Tel +32 2 533 5911
Fax +32 2 533 5959

Bucharest
Clifford Chance Badea
Excelsior Center
28-30 Academiei Street
12th Floor, Sector 1
Bucharest, 010016
Romania
Tel +40 21 66 66 100
Fax +40 21 66 66 111

Casablanca
Clifford Chance
169, boulevard Hassan 1er
Casablanca 20000
Morocco
Tel +212 520 132 080
Fax +212 520 132 079

Doha
Clifford Chance
QFC Branch
Suite B, 30th floor
Tornado Tower
Al Funduq Street
West Bay PO Box 32110
Doha
State of Qatar
Tel +974 4491 7040
Fax +974 4491 7050

Dubai
Clifford Chance
Level 15
Burj Daman
Dubai International Financial Centre
PO Box 9380
Dubai
United Arab Emirates
Tel +971 4 503 2600
Fax +971 4 503 2800

Düsseldorf
Clifford Chance
Königsallee 59
40215 Düsseldorf
Germany
Tel +49 211 43 55-0
Fax +49 211 43 55-5600

Frankfurt
Clifford Chance
Mainzer Landstraße 46
60325 Frankfurt am Main
Germany
Tel +49 69 71 99-01
Fax +49 69 71 99-4000

Hong Kong
Clifford Chance
27th Floor
Jardine House
One Connaught Place
Hong Kong
Tel +852 2825 8888
Fax +852 2825 8800

Istanbul
Clifford Chance
Kanyon Ofis Binasi Kat 10
Büyükdere Cad. No. 185
34394 Levent
Istanbul
Turkey
Tel +90 212 339 0001
Fax +90 212 339 0098

Jakarta**
LWP
DBS Bank Tower
Ciputra World One 28th Floor
Jl. Prof. Dr. Satrio Kav 3-5
Jakarta 12940
Indonesia
Tel +62 21 2988 8300
Fax +62 21 2988 8310

Kyiv
Clifford Chance
75 Zhylyanska Street
01032 Kyiv
Ukraine
Tel +380 44 390 5885
Fax +380 44 390 5886

London
Clifford Chance
10 Upper Bank Street
London, E14 5JJ
United Kingdom
Tel +44 20 7006 1000
Fax +44 20 7006 5555

Luxembourg
Clifford Chance
10 boulevard G.D. Charlotte
B.P. 1147
L-1011 Luxembourg
Grand-Duché de Luxembourg
Tel +352 48 50 50 1
Fax +352 48 13 85

Madrid
Clifford Chance
Paseo de la Castellana 110
28046 Madrid
Spain
Tel +34 91 590 75 00
Fax +34 91 590 75 75

Milan
Clifford Chance
Piazzetta M.Bossi, 3
20121 Milan
Italy
Tel +39 02 806 341
Fax +39 02 806 34200

Moscow
Clifford Chance
Ul. Gasheka 6
125047 Moscow
Russian Federation
Tel +7 495 258 5050
Fax +7 495 258 5051

New York
Clifford Chance
31 West 52nd Street
New York, NY 10019-6131
USA
Tel +1 212 878 8000
Fax +1 212 878 8375

Paris
Clifford Chance
1 rue d'Astorg
CS 60058
75377 Paris Cedex 08
France
Tel +33 1 44 05 52 52
Fax +33 1 44 05 52 00

Perth
Clifford Chance
Level 7, 190 St Georges Terrace
Perth, WA 6000
Australia
Tel +618 9262 5555
Fax +618 9262 5522

Prague
Clifford Chance
Jungmannova Plaza
Jungmannova 24
110 00 Prague 1
Czech Republic
Tel +420 222 555 222
Fax +420 222 555 000

Riyadh
Clifford Chance
Building 15, The Business Gate
King Khaled International Airport Road
Cordoba District, Riyadh
P.O. Box: 90239, Riyadh 11613,
Kingdom of Saudi Arabia
Tel +966 11 481 9700
Fax +966 11 481 9701

Rome
Clifford Chance
Via Di Villa Sacchetti, 11
00197 Rome
Italy
Tel +39 06 422 911
Fax +39 06 422 91200

São Paulo
Clifford Chance
Rua Funchal 418 15th Floor
04551-060 São Paulo SP
Brazil
Tel +55 11 3019 6000
Fax +55 11 3019 6001

Seoul
Clifford Chance
21st Floor, Ferrum Tower
19, Eulji-ro 5-gil
Jung-gu, Seoul 100-210
Korea
Tel +82 2 6353 8100
Fax +82 2 6353 8101

Shanghai
Clifford Chance
40th Floor
Bund Centre
222 Yan An East Road
Shanghai 200002
China
Tel +86 21 2320 7288
Fax +86 21 2320 7256

Singapore
Clifford Chance
12 Marina Boulevard
25th Floor Tower 3
Marina Bay Financial Centre
Singapore 018982
Tel +65 6410 2200
Fax +65 6410 2288

Sydney
Clifford Chance
Level 16
No. 1 O'Connell Street
Sydney NSW 2000
Australia
Tel +612 8922 8000
Fax +612 8922 8088

Tokyo
Clifford Chance
Akasaka Tameike Tower, 7th Floor
17-7 Akasaka 2-Chome
Minato-ku, Tokyo 107-0052
Japan
Tel +81 3 5561 6600
Fax +81 3 5561 6699

Warsaw
Clifford Chance
Norway House
ul. Lwowska 19
00-660 Warszawa
Poland
Tel +48 22 627 11 77
Fax +48 22 627 14 66

Washington, D.C.
Clifford Chance
2001 K Street NW
Washington, DC 20006 - 1001
USA
Tel +1 202 912 5000
Fax +1 202 912 6000

* Clifford Chance's offices include a second office in London at 4 Coleman Street, London EC2R 5JJ.
** Linda Widyati & Partners in association with Clifford Chance.