

International Regulatory Update

11 – 15 December 2017

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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

[Paul Landless](#) +65 6410 2235

[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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MiFID2: EU Commission adopts equivalence decisions on trading obligation for Australia, Hong Kong and United States

The EU Commission has adopted three Implementing Decisions on the equivalence of the legal and supervisory frameworks in [Australia](#), [Hong Kong](#) and the [United States of America](#) relating to the trading obligation under MiFID2.

The equivalence procedure for trading venues established in third countries set out in Article 25(4)(a) of MiFID2 aims to allow investment firms to undertake trades in shares that are subject to the trading obligation in the EU, on third-country trading venues recognised as equivalent. The trading obligation under Article 23(1) of MiFIR relates to dual-listed shares.

All three decisions entered into force on 15 December 2017.

MiFID2: Delegated Regulation on participation in matching arrangements published in Official Journal

Commission [Delegated Regulation \(EU\) 2017/2294](#) amending Delegated Regulation (EU) 2017/565 as regards the specification of the definition of systematic internalisers for the purposes of MiFID2 has been published in the Official Journal. In particular, the Delegated Regulation inserts a new Article 16a on participation in matching arrangements.

The Delegated Regulation entered into force on 14 December 2017 and will apply from 3 January 2018.

CRR: RTS for asset encumbrance disclosure published in Official Journal

Commission [Delegated Regulation \(EU\) 2017/2295](#) supplementing the Capital Requirements Regulation (CRR)

as regards regulatory technical standards for the disclosure of encumbered and unencumbered assets has been published in the Official Journal.

The Delegated Regulation will enter into force on 2 January 2018.

Brexit: EU27 adopt guidelines for second phase of negotiations

The European Council, meeting in EU27 format, has adopted [guidelines](#) for the second phase of the Brexit negotiations.

The Council welcomes the progress achieved during the first phase of negotiations and has decided that it is sufficient to move to the second phase related to transition and the framework for the future relationship. However, the guidelines emphasise that negotiations in the second phase can only progress as long as all commitments undertaken during the first phase are respected in full and translated faithfully into legal terms as quickly as possible.

As regards transition, the European Council notes the proposal put forward by the UK for a transition period of around two years, and agrees to negotiate a transition period during which the UK, as a third country, will no longer participate in or nominate or elect members of the EU institutions, nor participate in the decision-making of the EU bodies, offices and agencies, while all EU regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will apply to the UK, including the competence of the Court of Justice of the European Union. The European Council has called on the EU Commission to put forward appropriate recommendations to this effect, and on the EU Council to adopt additional negotiating directives on transitional arrangements in January 2018.

The guidelines also reconfirm the European Council's desire to establish a close partnership between the EU and the UK. The Council will continue to follow the negotiations closely and will adopt additional guidelines in March 2018, in particular as regards the framework for the future relationship. The Council has called on the UK to provide further clarity on its position on the framework for the future relationship.

ECB announces new collateral eligibility criteria for unsecured bank bonds

The European Central Bank (ECB) has [announced](#) changes to the eligibility criteria for using unsecured bank bonds (UBBs) as collateral for ECB refinancing operations.

Broadly, the new criteria remove the eligibility of newly issued UBBs that are subject to statutory, contractual or structural subordination, and UBBs issued by credit institutions, investment firms or their closely-linked entities established outside the EU.

UBBs that are currently eligible, but do not fulfil the new criteria, will remain eligible until 31 December 2018. UBBs that are eligible for the public sector purchase programme (PSPP) and government-guaranteed bank bonds (GGBBs) remain eligible as collateral until maturity provided they are not subject to subordination and are issued before 31 December 2018. No change is made to the eligibility of senior (preferred) unsecured bank bonds.

The new eligibility criteria are expected to come into effect with the entry into force of the upcoming regular update of the General Documentation in Q1 2018.

Prospectus Regulation: ESMA consults on RTS

The European Securities and Markets Authority (ESMA) has published a [consultation paper](#) on draft regulatory technical standards (RTS) under the new Prospectus Regulation. The RTS set out a number of requirements on the following topics:

- key financial information that should appear in the prospectus summary;
- data and machine readability of information to be sent to ESMA in order to provide free access to the public;
- advertisements for public offers or admissions to trading;
- instances which require the publication of a supplement to a prospectus; and
- publication of a prospectus.

Comments are due 9 March 2018.

PSD2: EBA publishes final guidelines on security measures

The European Banking Authority (EBA) has published its [final guidelines](#) on security measures for operational and security risks of payment services under the revised Payment Services Directive (PSD2).

The guidelines, developed in cooperation with the ECB, set out the requirements for the risk management framework payment service providers (PSPs) must establish, implement and monitor to manage the operational and security risks relating to the payment services they provide. The guidelines cover, among other things:

- governance, in respect of the framework, risk management and control models and outsourcing;
- risk assessments of functions, processes and assets;
- preventative security measures, particularly those relating to the payment data of payment service users (PSUs);
- continuous monitoring and detection processes;
- business continuity planning and management;
- testing of security measures;
- situational awareness and continuous learning; and
- PSU relationship management.

The final guidelines include some amendments made following the EBA's consultation on the draft guidelines. These include clarifications of the scope of the guidelines, the meaning of proportionality and the certification process.

The guidelines apply from 13 January 2018.

PSD2: EBA publishes final draft RTS on central contact points

The EBA has published its [final draft RTS](#) on central contact points under PSD2.

The RTS apply where a host Member State makes use of the option under PSD2 to require payment institutions (Pis) and electronic money institutions (EMIs) providing cross-border payment services in its territory through agents to appoint a central contact point.

Aimed at facilitating supervision, the draft RTS set out:

- the criteria for determining when the appointment of a central contact point is appropriate, which relate to the number of agents operating, and the value and volume of transactions, in the host Member State; and,
- the functions of those contact points, which primarily relate to ensuring adequate communication and information reporting on compliance, and include the contact point possessing appropriate knowledge of the national law transposing PSD2 in the host Member State.

The draft RTS also clarify that Pis and EMIs who meet any of the criteria set out in the RTS should notify the host Member State's competent authority (CA), to enable the CA to exercise its supervisory responsibilities effectively.

Once endorsed by the EU Commission, the draft RTS will be scrutinised by the EU Parliament and Council, and then published in the Official Journal. They will enter into force on the twentieth day following publication.

PSD2: EBA publishes final draft technical standards on future EBA register

The EBA has published its [final draft RTS and implementing technical standards \(ITS\)](#) on the EBA electronic central register under PSD2.

The RTS specify the procedures competent authorities should follow when providing information to the EBA and those that apply to the EBA when processing and publishing that information.

The ITS specify the information that will be made available on the EBA register from a pre-defined list of institutions that is provided by the PSD2.

The aim of the EBA register is to provide transparency on the operation of payment and e-money institutions across the EU, enhance cooperation between competent authorities in the Member States and ensure a high level of consumer protection.

Central Banks and Supervisors Network for Greening the Financial System announced

Eight central banks and supervisors have issued a [joint statement](#) and [Q&As](#) on their commitment to establish a Central Banks and Supervisors Network for Greening the Financial System to help meet the goals of the Paris Agreement.

The Network, which will serve as a voluntary platform and forum for the exchange of experiences and best practices, is aimed at:

- developing environmental and climate risk management in the financial sector; and
- mobilising mainstream capital for green and low-carbon investments to support the transition toward a sustainable economy.

The founding members of the Network are the Banco de Mexico, the Bank of England, the Banque de France and Autorité de Contrôle Prudentiel et de Résolution (ACPR), De Nederlandsche Bank, the Deutsche Bundesbank, Finansinspektionen (the Swedish FSA), the Monetary Authority of Singapore (MAS) and the People's Bank of China, with membership expected to grow over time.

A work programme is currently being finalised. A stock-taking exercise will be conducted during 2018, a physical meeting is planned for early 2018, and a high-level conference on climate risk management and supervision organised by ACPR, Bank of England and De

Nederlandsche Bank will be held on 6 April 2018 in Amsterdam.

MiFID2: Financial Services and Markets Act 2000 (Markets in Financial Instruments) (No.2) Regulations 2017 laid before Parliament

The Financial Services and Markets Act 2000 (Markets in Financial Instruments) (No.2) Regulations 2017 ([SI 2017/1255](#)) have been laid before Parliament. The Regulations complete the UK implementation of MiFID2 and also correct two minor errors in the UK implementation of the Market Abuse Regulation (MAR).

MiFID2: FCA publishes Dear CEO letter on payment for order flow

The Financial Conduct Authority (FCA) has written a [Dear CEO letter](#) reiterating its view that the practice of brokers demanding payments from counterparties as a condition for conducting client business with them substantially undermines a broker's ability to act as a good agent.

The letter emphasises that firms that continue to charge payment for order flow (PFOF) will breach the new standards implemented in MiFID2, reminds firms that they must take action now to ensure compliance and warns against any attempted models that seek to avoid these rules.

FCA publishes approach documents on authorisation and competition

The FCA has published two documents, both open for consultation, as part of its series explaining its approach to regulation.

One document sets out the FCA's [approach to authorisation](#), and seek views from stakeholders on:

- threshold conditions;
- how the FCA supports firms to reach minimum standards; and
- whether the FCA has prioritised the right strategic goals.

The other document relates to the FCA's [approach to competition](#), and seeks views on whether its competition remit, powers and aims are clearly understood, and what tools could be used when designing remedies to address a lack of competition.

Comments on both documents are due by 12 March 2018.

Fintech: FCA publishes feedback statement on distributed ledger technology

The FCA has published feedback on its discussion paper (DP17/3) on distributed ledger technology (DLT).

The feedback statement ([FS17/4](#)) provides an overview on the feedback received in response to DP17/3; the aim of which was to consider the ways that DLT can impact on financial services and the regulatory implications.

The feedback suggested that the FCA's current rules are flexible enough to accommodate applications of various technologies, including the use of DLT by regulated firms. FS17/4 sets out the FCA's response to specific issues discussed by respondents, including:

- operational risk;
- digital currencies and initial coin offerings (ICOs);
- regulatory reporting;
- financial crime; and
- the General Data Protection Regulation (GDPR).

The FCA aims to maintain a proactive and supportive approach to technological innovation and to continue to monitor DLT-related market developments and keep their rules and guidance under review.

The FCA also intends to conduct a deeper examination of initial coin offerings (ICOs) to determine whether or not there is a need for further regulatory action.

FCA consults on transition to senior managers and certification regime

The FCA has launched three consultations on its proposals on how firms and individuals will move to the Senior Managers and Certification Regime (SM&CR).

The consultations include proposals covering:

- how the FCA will transition FSMA authorised firms and their senior staff to the SM&CR ([CP17/40](#));
- how the FCA will transition insurers and individuals to the SM&CR ([CP17/41](#)); and
- extending the 'Duty of Responsibility' to insurers and firms solely regulated by the FCA ([CP17/42](#)).

The FCA aims to finalise its approach in summer 2018. The date for the implementation of the new rules will be announced and set by HM Treasury in due course.

PRA publishes policy statement on Pillar 2A capital requirements and disclosures

The Prudential Regulation Authority (PRA) has published a policy statement ([PS30/17](#)) on Pillar 2A requirements and disclosure, which provides feedback on its consultation (CP12/17) and the final rules.

The policy statement relates to updating capital terminology, revises the Pillar 2A disclosure policy, and provides clarity on when and how individual Pillar 2A capital requirements may be set. The final rules are set out in an updated supervisory statement (SS31/15) and a Statement of Policy (SoP). Among other things, the rules introduce the term Total Capital Requirements (TCR).

The PRA's disclosure expectations will apply from 1 January 2018 and the PRA will apply Pillar 2A capital requirements to firms in line with their scheduled capital reviews. The PRA has set out that it expects firms to continue to follow current Internal Capital Guidance (ICG) until it is formally replaced by TCR following supervisory review.

PRA publishes policy statement on recovery planning

The PRA has published a policy statement ([PS29/17](#)) on recovery planning for groups containing a ring-fenced body (RFB) and the content of recovery plans. The policy statement is relevant to UK banks, building societies, PRA-designated investment firms and qualifying parent undertakings.

The policy statement sets out feedback on the PRA's consultation (CP9/17) and the appendixes set out the final supervisory statements (SS8/13 and updated SS8/16).

Ministerial order completing implementation of MIFID2 and CRD 4 published

A [ministerial order dated 4 December 2017](#), which is intended to determine the rules relating to the approval and initial capital of investment firms, has been published in the Official Journal. The order completes the implementation of MIFID2 and the Capital Requirements Directive (CRD 4) in France.

Ordinance on use of blockchain for transfer of financial securities published

[Ordinance no. 2017-1674](#), dated 8 December 2017, on the use of a shared electronic recording device for the representation and transmission of financial securities has been published in the Official Journal of 9 December 2017.

The ordinance is intended to define a suitable legal regime for the transfer of ownership of financial securities through a shared electronic registration device, also known as blockchain. The ordinance will apply to, amongst others, fund units, marketable debt securities and unlisted financial securities.

FINMA revises circular on liquidity risks for banks

The Swiss Financial Market Supervisory Authority (FINMA) has published a [revised Circular 2015/2](#) 'Liquidity risks – banks'. The revisions reflect amendments made to the Liquidity Ordinance by the Federal Council.

In particular, the revised circular simplifies the application of the rule on liquidity coverage ratio for small banks, and includes clarifications set out in FINMA's frequently asked questions and recommendations from the Basel Committee on Banking Supervision in connection with its review of Swiss liquidity regulations (Regulatory Consistency Assessment Programme).

The new requirements on the net stable funding ratio (NSFR) which were included in the consultation draft circular have been removed, as the Federal Council decided to delay the introduction of the NSFR rules until the end of 2018.

The revised circular will enter into force on 1 January 2018.

FINMA revises circular on public deposits with non-banks

FINMA has published a [revised Circular 2008/03](#) 'Public deposits with non-banks'. The revisions reflect the new regulations on sandboxes and the extended timeframe for settlement accounts, which were introduced by the Federal Council in August 2017.

Currently, non-banks are permitted to accept public deposits up to an aggregate threshold up to CHF 1 million under certain conditions. The revised circular includes details on the exemption for settlement accounts, disclosures via websites, and the question of whether deposits exceeding CHF 1 million need to be returned during the notification and authorization process by such non-banks.

The revised circular will enter into force on 1 January 2018.

SFC issues reminder on cryptocurrency-related products and derivatives

The Securities and Futures Commission (SFC) has issued a [circular](#) to caution investors of the risks associated with

Bitcoin futures contracts and other cryptocurrency-related investment products and remind financial service providers of the legal and regulatory requirements when they target customers in Hong Kong.

The circular notes that the futures and commodities exchanges in the United States have launched or will soon launch Bitcoin futures contracts which Hong Kong investors may be able to trade through an intermediary. However, it adds that dealing in these contracts for investors in Hong Kong and related services, including relaying or routing orders, constitute regulated activities and require a licence from the SFC regardless of whether the business is located in Hong Kong.

The SFC has indicated that parties routing orders from investors in Hong Kong to trade Bitcoin futures contracts without a relevant licence from the SFC may be committing a criminal offence. The circular warns investors that the risks of high price volatility and illiquidity may be magnified in trading cryptocurrency futures contracts and other related investment products by the speculative nature of the underlying assets, that is, the cryptocurrencies, and the leverage embedded in these products.

Investors are further reminded that client assets have been stolen or misappropriated from cryptocurrency exchanges, some of which have collapsed. Other risks of trading cryptocurrency-related products highlighted in the circular include insufficient liquidity, high price volatility and potential market manipulation. The SFC has advised investors to carefully weigh the factors against their own risk appetite.

HKMA issues revised supervisory policy manual on competence and ethical behaviour

The Hong Kong Monetary Authority (HKMA) has issued a [revised module of the supervisory policy manual \(SPM\)](#) on competence and ethical behaviour as a guidance note. The SPM module has been revised mainly to reflect the latest developments in enhancing training programmes for banking practitioners in Hong Kong.

The SPM reiterates the importance of the competence and ethical behaviour of staff at all levels within an authorised institutions' organisational structure and provides guidance on measures that authorised institutions are expected to adopt in monitoring and maintaining the competence levels and ethical behaviour of their staff.

FINRA proposes changes to process for expungement of customer dispute information

The US Financial Industry Regulatory Authority (FINRA) has [proposed changes](#) to the expungement process relating to customer dispute information. Through the expungement process, associated persons may seek to remove allegations made by customers from the central licensing and registration system for the US securities industry.

FINRA's proposal includes the establishment of a roster of qualified arbitrators available to serve on special panels to decide requests for expungement of customer dispute information. These arbitrators would decide expungement requests where the underlying customer-initiated arbitration is not resolved on the merits or an associated person files a separate claim requesting expungement of customer dispute information.

In addition, FINRA is proposing a number of other changes to the expungement process, including the following:

- to grant expungement, a three-person panel of arbitrators must unanimously agree that expungement is appropriate under the relevant standard and find that the customer dispute information has no investor protection or regulatory value; and
- when a customer complaint does not result in an arbitration claim, expungement may only be requested by an associated person within one year of the initial report of the customer complaint.

FINRA is seeking public comments on this proposal. The comment period will end on 5 February 2018.

CFTC staff issues interpretative guidance regarding commodity trading advisor registration requirements

The Commodity Futures Trading Commission's (CFTC's) Division of Swap Dealer and Intermediary Oversight has issued [interpretative guidance](#) providing that receipt of separate compensation for commodity trading advice would not require futures commission merchants, swap dealers or introducing brokers (or any associated persons or other employees) to register as commodity trading advisors, as long as:

- in the case of a futures commission merchant or a swap dealer, the advice is solely incidental to its business; or
- in the case of an introducing broker, the advice is solely in connection with the operation of its business.

Whether commodity trading advice is 'solely incidental' or 'solely in connection with' will need to be analyzed based on the particular facts and circumstances of the relationship between the relevant parties.

The CFTC staff interpretation responds to concerns about the cross-border impact of the EU Markets in Financial Instruments Directive (MiFID2). Historically, EU investment managers were not prohibited from paying for commodity trading advice as part of a bundled payment or commission fee. From 3 January 2018, MiFID2 will require EU-regulated investment managers to pay separately for investment research services and execution services.

ASIC's regulatory sandbox proposal to remain unchanged

The Australian Securities and Investments Commission (ASIC) has released a [review](#) of its regulatory sandbox, which was introduced in December 2016.

ASIC has proposed in its review to retain the fintech licensing exemption, which allows eligible financial technology (fintech) businesses to test certain specified services without holding an Australian financial services or credit licence. ASIC had committed to reviewing its fintech licensing exemption after 12-18 months of operation.

To date, four fintech businesses have used the fintech licensing exemption. Relying on the exemption, one business tested its financial services (providing advice and dealing in listed Australian securities); two businesses are currently testing advisory and dealing services in deposit products; and one business is testing acting as an intermediary and providing credit assistance.

In addition, over a dozen fintech businesses have also contacted ASIC about using the fintech licensing exemption.

The consultation period for the review closes on 27 February 2018 and runs in conjunction with a consultation by Treasury on the Government's enhanced sandbox proposal.

RECENT CLIFFORD CHANCE BRIEFINGS

Brexit — sufficient progress, but to where?

This briefing paper discusses the UK-EU announcement on 8 December that 'sufficient progress' had been made to move on to the second phase of negotiations, providing analysis of key issues (including those the announcement failed to address) and likely next steps.

https://www.cliffordchance.com/briefings/2017/12/brexit_sufficientprogressbutwhere.html

Your 2018 AGM Update and beyond

This annual AGM update examines the developments and changes affecting this season's AGMs and annual reports, and looks ahead to other changes on the horizon.

https://www.cliffordchance.com/briefings/2017/12/your_2018_agm_updateandbeyond.html

Entry into force of the law of 2013 on security over moveable assets

This briefing paper examines the practical consequences for lenders and borrowers of Belgium's modernised framework for taking security over moveable assets, which is expected to enter into force on 1 January 2018.

https://www.cliffordchance.com/briefings/2017/12/entry_into_forceofthelawof2013onsecurit.html

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

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