

INTERNATIONAL REGULATORY UPDATE 5 – 9 SEPTEMBER 2022

- **Consumer Credit Directive 2: EU Parliament Internal Market and Consumer Protection Committee publishes report**
- **Investment firms: RTS on fixed overheads requirement published in OJ**
- **CPMI and IOSCO report on access to central clearing and portability**
- **Financial Services and Markets Bill: Call for evidence launched**
- **UK Government and regulators respond to Treasury Committee's future of financial services regulation report**
- **HM Treasury and BoE announce joint energy markets financing scheme**
- **PRA consults on approach to policy-making**
- **FCA publishes portfolio letter on supervisory expectations of benchmark administrators**
- **FCA publishes Dear CEO letter on trade repositories**
- **BaFin compliance instructions on private financial transactions conduct of its employees enter into force**
- **BaFin publishes Q&A on SFDR**
- **BaFin launches Fintech Innovation Hub**
- **Consob publishes amendments to Issuers' Regulation regarding cross-border distribution of funds**
- **WIBOR® transition: WIRD® index chosen as the alternative interest rate benchmark**
- **PRC futures and commodity exchanges announce futures and options products tradable by QFIs**
- **SFC publishes review of online brokerage, distribution and advisory services**
- **HKMA issues guidance on cloud computing**
- **MAS renews statement of commitment to FX Global Code**
- **Australian Government consults on taxation treatment of digital currency**
- **ASIC remakes sunset class order on financial requirements for retail over-the-counter derivative issuers**

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.

To request a subscription to our Alerter: Finance Industry service, please [subscribe to our Client Portal](#), where you can also request access to the Financial Markets Toolkit and subscribe to publications, insights and events.

If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

[Marc Benzler](#) +49 69 7199 3304
[Caroline Dawson](#) +44 207006 4355
[Steven Gatti](#) +1 202 912 5095
[Lena Ng](#) +65 6410 2215
[Gareth Old](#) +1 212 878 8539
[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

- **Recent Clifford Chance briefings: UK Financial Services and Markets Bill, FCA's Consumer Duty and more. [Follow this link to the briefings section.](#)**

Consumer Credit Directive 2: EU Parliament Internal Market and Consumer Protection Committee publishes report

The EU Parliament's Internal Market and Consumer Protection Committee (IMCO) has published its [report](#) on the proposed directive on consumer credits, repealing and replacing Directive 2008/48/EC (the Consumer Credit Directive).

The proposed directive is intended to protect consumers online from credit card debt, overdrafts and loans that are unsuitable for their financial situation.

This follows the Committee's adoption of the report in July 2022.

Investment firms: RTS on fixed overheads requirement published in OJ

[Delegated Regulation \(EU\) 2022/1455](#) setting out regulatory technical standards (RTS) specifying the methodology for calculating the fixed overheads requirement (FOR) for investment firms under the Investment Firms Regulation (IFR) has been published in the Official Journal.

In particular, the RTS specify:

- the elements to be deducted by investment firms from their total expenses used for the calculation of the FOR;
- additional deductions for commodity and emission allowance dealers; and
- the notion of material change.

Delegated Regulation (EU) 2022/1455 enters into force on 25 September 2022.

CPMI and IOSCO report on access to central clearing and portability

The Bank for International Settlements' (BIS) Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) have published a [report](#) on access and portability in client clearing.

The report aims to increase common understanding of new access models that enable clients to directly access central counterparty (CCP) services, and of effective porting, or transferring, practices for their positions.

The client clearing process facilitates access to CCPs, particularly for firms that are not direct participants in a CCP and must rely on intermediaries to indirectly clear their trades. Since some entities cannot, or choose not to, directly participate in a CCP, improving access to client clearing forms parts of the G20's objective to have all standardised over-the-counter (OTC) derivatives contracts cleared through CCPs.

The report considers the potential benefits and challenges, particularly around risk management, of the new access models developed by CCPs, taking into

account industry feedback. The CPMI and IOSCO have encouraged industry efforts to engage in further work to:

- enhance transparency and disclosure regarding direct and sponsored access model participation; and
- develop further effective practices to facilitate porting, thereby ensuring clients' continued access to clearing in the event of an intermediary default.

Financial Services and Markets Bill: Call for evidence launched

The UK House of Commons Public Bill Committee has launched a [call for written evidence](#) on the Financial Services and Markets (FSM) Bill.

The Bill is intended to implement the outcomes of the UK Government's future regulatory framework (FRF) review and to make other significant changes to the structure and content of UK financial services regulation.

The first sitting of the Committee, which will scrutinise the Bill line by line, is expected to be on 20 September 2022 and the Committee is scheduled to report by 25 October 2022. The Committee therefore advises that submissions should be sent as soon as possible.

UK Government and regulators respond to Treasury Committee's future of financial services regulation report

The UK House of Commons Treasury Committee has published [responses](#) from the Government, Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) to recommendations set out in its future of financial services regulation inquiry report.

The report examined the Government's proposals relating to its FRF review, which are being implemented via the FSM Bill and concern broad issues affecting the financial services industry, including the replacement of retained EU legislation and the framework for regulation, such as the scope and mandate of the regulators.

The Government's response highlights, among other things, measures set out in the FSM Bill relating to regulator independence and accountability, and also notes:

- that it is working with regulators on potential prioritisation for the repeal of retained EU law and an intention to set out further information on the programme for rule transfer in due course;
- an intention to respond to proposed reforms to Solvency II in due course; and
- an intention to consult jointly with the Bank of England (BoE) on a potential UK central bank digital currency (CBDC) during 2022.

The PRA's response notes, among other things:

- the publication of its prudential and resolution policy index;
 - an intention to consult on phase 2 of its Solvency II review in the autumn; and
 - an intention to consult on its approach to policy-making.
- The FCA's response notes, among other things:

- upcoming reforms, including the new consumer duty and changes to the listing regime and MiFID framework; and
- an intention to publish a space on its website tracking its work relating to FRF.

The FSM Bill had its second reading in the House of Commons on 7 September 2022.

HM Treasury and BoE announce joint energy markets financing scheme

HM Treasury and the Bank of England (BoE) have [jointly announced](#) the Energy Markets Financing Scheme (EMFS) to address the extraordinary liquidity requirements faced by energy firms operating in UK wholesale gas and electricity markets.

As a result of high and volatile prices, firms require large amounts of collateral to enter into contracts used to effectively insure themselves from price fluctuations, otherwise firms must accept large credit exposures to their counterparties. The scheme aims to provide resilience to both energy and financial markets, and the economy, and reduce the eventual cost for businesses and consumers.

The EMFS intends to enable short term financial support to wholesale firms. According to the announcement, it will be designed to be used as a last resort and will be structured and priced accordingly. It will be open to firms that can prove that they are otherwise in sound financial health, have a UK presence, and play a significant role in UK electricity or gas markets.

Further details of the scheme will be announced in due course and the opening date will be published by the end of October.

PRA consults on approach to policy-making

The PRA has published a [discussion paper](#) on its proposed approach to policy (DP4/22) in light of the FRF being implemented through the FSM Bill.

DP4/22 outlines the PRA's initial views on its approach to expanded policy and rule-making responsibilities to enable, among other things, the replacement of regulatory requirements relating to EU-derived legislation and other regimes once the FSM Bill is passed, and covers:

- the proposed new secondary competitiveness and growth objective;
- international engagement and collaboration;
- accountability measures;
- responsiveness, including enhanced external engagement; and
- rulebook reform.

The PRA notes that DP4/22 has been developed on the basis of the FSM Bill as introduced in Parliament in July 2022 and does not therefore cover the 'call-in' power the Government intends to introduce during the Parliamentary process, under which HM Treasury will be able to direct a regulator to make, amend or revoke rules where there are matters of significant public interest.

Comments are due by 8 December 2022. Responses are intended to inform a future consultation on the PRA's approach to policy, which the PRA expects to publish after the FSM Bill receives Royal Assent.

FCA publishes portfolio letter on supervisory expectations of benchmark administrators

The FCA has published a [portfolio letter](#) setting out its supervision strategy for benchmark administrators.

The FCA supervises benchmark administrators according to the UK Benchmark Regulations and applicable FCA Principles and Rules, including the Senior Managers Regime and Conduct Rules.

The letter sets out the FCA's expectations relating to its supervisory priorities for benchmark administrators, including on:

- disclosure;
- quality of data and data controls;
- operational resilience;
- oversight and governance; and
- competition.

FCA publishes Dear CEO letter on trade repositories

The FCA has published a [Dear CEO letter](#) outlining its supervisory priorities relating to its trade repositories (TRs) and securitisation repositories (SRs) portfolios.

The letter identifies the key risks identified to repositories and sets out the FCA's expectations of firms to manage these risks, as well as the FCA's intended supervisory actions.

According to the letter, the key risks of harm to TRs include:

- a concentrated market in a relatively small number of providers, which has the potential to exacerbate operational resilience risk leading to an inability to access data, the loss or compromise of data, or potential disruption around reporting obligations;
- the concentrated market may also limit the ability of market participants to switch provider and lead to lower incentives for TRs to provide high quality services and compete on prices offered to clients; and
- inadequate systems and controls to ensure that TRs do not introduce errors into data after market participants have submitted it to them, which could significantly impact the quality of the data made available to authorities and their ability to use that data for monitoring and supervisory work.

The key risks of harm to SRs include:

- the new SR regime while the wider UK securitisation market and associated macro-economic conditions around SRs are still developing;
- inadequate systems and controls to ensure that SRs do not introduce errors into the data that they make available to regulatory authorities, investors, and potential investors; and
- situations where an SR arranges for a third party, which is not registered with the FCA, to perform activities on its behalf where the third party fails to perform those activities reliably and professionally, which could adversely

affect the service the SR provides and compromise its ability to comply with relevant legislative and regulatory requirements.

The letter also identifies the proposed changes to reporting requirements, procedures for data quality and registration of TRs under UK EMIR, the FSM Bill 2022 and the war in Ukraine as additional factors impacting the repositories portfolio.

BaFin compliance instructions on private financial transactions conduct of its employees enter into force

The German Federal Financial Supervisory Authority (BaFin)'s official [compliance instructions](#) to its employees on private financial transactions conduct have entered into force. The official compliance instructions replace the transitional provisions released by BaFin on 16 October 2020.

The transitional provisions of 16 October 2020 provided for a set of financial transaction prohibitions and restrictions (in conjunction with Section 11a of the Act Establishing the Federal Financial Supervisory Authority (FinDAG) which are integrated into the official compliance instructions and relate to:

- all BaFin employees being prohibited from trading in financial instruments issued by supervised entities;
- BaFin employees in all supervision related units (90 percent of employees) being prohibited from trading in financial instruments relating to all credit institutions, insurance undertakings and other financial institutions domiciled in the EU;
- all BaFin employees being prohibited from trading in financial instruments traded on a domestic organised market;
- all BaFin employees being prohibited from engaging in speculative financial transactions, i.e. short-term trading in derivatives or shares; and
- all BaFin employees having to report any financial transaction activity irrespective of the invested monetary amount.

Making use of its power under section 11a (2) FinDAG to issue further prohibitions, BaFin has added further trading prohibitions where certain employees, mainly working in the market supervision unit, are prohibited from trading in financial instruments traded on the domestic open market.

BaFin publishes Q&A on SFDR

BaFin has published a [document](#) in which it answers various questions regarding Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (SFDR).

BaFin notes that the SFDR contains undefined legal terms that financial market participants and financial advisors find difficult to interpret in practice and that the Q&A published by the EU Commission in July 2021 and May 2022 also raise application questions. In its report of 29 June 2022, BaFin therefore announced that it would analyse the remaining issues and examine its own scope for action in this area. With the new Q&A, BaFin is publishing the first results and also plans continuously to expand the list.

For the time being, BaFin will base its administrative practice on the legal interpretations set out in the answers. However, there may be changes if the EU Commission or the Joint Committee of the European Supervisory Authorities publish different assessments.

BaFin launches Fintech Innovation Hub

BaFin has launched its [Fintech Innovation Hub](#), a new website created by BaFin to provide companies working with new technologies in the financial market with more up-to-date and market-oriented information and dialogue opportunities. The new website can be accessed at www.bafin.de/fintech and replaces BaFin's previous information page for company founders and fintechs.

The Fintech Innovation Hub offers compact information on various financial technology innovations and the resulting business models. The aim is to create a contact point for initial orientation and to link together a large amount of specialist information that BaFin already offers. The Hub also has an FAQ section for most innovations and business models.

The Hub's current focus areas include services based on distributed ledger technology (DLT)/blockchain, the use of artificial intelligence and machine learning in the financial sector and various forms of digital banking and payment transactions.

A revised contact form is integrated into the Innovation Hub website and offers users the opportunity to quickly enter into a structured dialogue with the responsible offices at BaFin.

Consob publishes amendments to Issuers' Regulation regarding cross-border distribution of funds

The Commissione Nazionale per le Società e la Borsa (Consob) has published a [set of amendments](#) to its Issuers' Regulation intended to implement the EU package on the cross-border distribution of funds (in accordance with Directive (EU) 2019/1160 and Regulation (EU) 2019/1156). The amendments also implement the new pre-contractual disclosure requirements set out in the SFDR and the Taxonomy Regulation.

WIBOR[®] transition: WIRD[®] index chosen as the alternative interest rate benchmark

The Steering Committee of the National Working Group, established in connection with the planned benchmark reform, has [decided](#) to choose the WIRD[®] index as the alternative interest rate benchmark. The input data for the WIRD[®] index is information representing ON (overnight) transactions.

GPW Benchmark S.A. will act as the WIRD[®] benchmark administrator within the meaning of the Benchmark Regulation.

The Steering Committee's next step will be the adoption of a roadmap setting out a timeline for actions to replace the WIBOR[®] with WIRD[®].

PRC futures and commodity exchanges announce futures and options products tradable by QFIs

The Shanghai Futures Exchange (SHFE), Shanghai International Energy Exchange (INE), Zhengzhou Commodity Exchange (ZCE), Dalian Commodity Exchange (DCE), and China Financial Futures Exchange (CFFEX) have [announced](#) the respective lists of futures and options products listed on these exchanges that have been tradable by Qualified Foreign Investors (QFIs) starting from 2 September 2022.

SFC publishes review of online brokerage, distribution and advisory services

The Securities and Futures Commission (SFC) has issued a [circular](#) on its review of the business models of licensed corporations (LCs) which provided online brokerage, distribution and advisory services.

The SFC observed that out of the 50 LCs surveyed by the SFC on their ways of client onboarding, types of products, services and functionalities offered to clients through online platforms, and the extent of use of social media platforms for marketing and communication purposes, 96% of new accounts opened by LCs within a 12-month period were through non-face-to-face (Non-FTF) client onboarding approaches. The SFC also noted an increasing number of LCs distributing investment products to clients or executing client orders through online platforms, some of which were embedded with special functionalities for better customer experience. Examples of deficiencies identified by the SFC include the following:

- failure of LCs to conduct proper client identity verification procedures when onboarding clients online;
- inclusion of clauses and statements in client agreements and risk disclosure by LCs which might have restricted client's rights, excluded LCs' obligations, or misdescribed LCs' services;
- failure of LCs to conduct sufficient product due diligence and to observe selling restrictions applicable to specific products;
- failure to put in place adequate measures to identify and assess inconsistent client information or to detect abnormal frequent updates of client's risk profile questionnaire during the know-your-client process;
- lack of proper monitoring mechanisms in reviewing information and commentaries posted by the LC or its affiliates on the online platform to ensure that they are accurate and not misleading; and
- failure to implement adequate mechanisms to mitigate cybersecurity risks.

The SFC has reminded LCs to review their systems, controls and procedures, having regard to the expected standards set out in the circular and ensure that their online platforms are properly designed and operate in compliance with all applicable rules and regulations.

The Hong Kong Monetary Authority has also issued a [circular](#) recommending that registered institutions which provide online brokerage, distribution and advisory services make reference to the regulatory concerns and the expected regulatory standards set out in the SFC circular.

HKMA issues guidance on cloud computing

The HKMA has issued a [circular](#) to provide guidance to authorised institutions on its supervisory expectations with respect to the adoption of cloud computing.

The HKMA notes that cloud computing, if managed properly, provides a range of benefits, including cost efficiency, operational resilience, and business scalability. The HKMA's supervisory policy permits authorised institutions to utilise the technology as long as the associated risks are effectively managed, in compliance with the existing supervisory requirements, including those related to technology risk management and outsourcing. The HKMA's

supervisory expectations on cloud computing are developed with reference to the results of the HKMA's thematic examinations undertaken between 2021 and 2022. In particular, authorised institutions are expected to pay attention to the following key principles before adopting cloud computing:

- governance framework;
- on-going risk management and controls;
- protection of access and other legal rights; and
- risk management capabilities.

The HKMA notes that the above principles serve to complement, and should be read in conjunction with, relevant existing HKMA guidance, including its supervisory policy manual modules on outsourcing, operational resilience and general principles for technology risk management.

MAS renews statement of commitment to FX Global Code

The Monetary Authority of Singapore (MAS) has [renewed its statement of commitment](#) to the updated Foreign Exchange (FX) Global Code, reaffirming its adherence to the principles of the code as a market participant and the alignment of its internal practices and processes with these principles.

First published in May 2017 and updated in July 2021, the code sets out principles that promote a robust, fair, liquid, open, and appropriately transparent FX market, underpinned by high ethical standards. The code is promoted, maintained, and updated on a regular basis by the Global Foreign Exchange Committee.

The MAS has encouraged all wholesale FX market participants in Singapore as well as all its counterparties to adhere to the latest version of the code, in order to promote the integrity and effective functioning of the global FX market.

Australian Government consults on taxation treatment of digital currency

The Australian Government has released for [public consultation](#) the exposure draft legislation 'Treasury Laws Amendment (Measures for Consultation) Bill 2022: Taxation treatment of digital currency'.

On 22 June 2022, the Government announced that it would introduce legislation to exclude cryptoassets such as Bitcoin from being treated as a foreign currency for Australian income tax purposes. The proposed legislation maintains the current tax treatment of cryptoassets and is intended to remove uncertainty following the decision of the Government of El Salvador to adopt Bitcoin as a legal tender.

In particular, the exposure draft legislation proposes to amend:

- the definition of foreign currency in the Income Tax Assessment Act (ITAA) 1997 to exclude digital currencies;
- the Goods and Services Tax (GST) Act 1999 definition of digital currency to ensure it excludes government-issued digital currencies and includes digital currencies that are not government-issued but have been adopted as a legal tender; and
- the ITAA 1997 to include a power to make regulations to provide for further exclusions from the definition of foreign currency in the ITAA 1997.

The proposed amendments commence on the first 1 January, 1 April, 1 July, or 1 October to occur after the date the bill receives Royal Assent. In addition, the amendments to the definition of foreign currency in the ITAA 1997 apply in relation to income years that include 1 July 2021 and to subsequent income years. Accordingly, the amendments have retrospective application.

Comments on the consultation are due by 30 September 2022.

ASIC remakes sunset class order on financial requirements for retail over-the-counter derivative issuers

Following a public consultation through Consultation Paper 363 titled 'Remaking ASIC class order on financial requirements for retail OTC derivative issuers', the Australian Securities and Investments Commission (ASIC) has [remade](#) the Class Order [CO 12/752] titled 'Financial requirements for retail OTC derivative issuers', which was due to sunset on 1 October 2022.

The new instrument commenced on 7 September 2022 and sets out the financial requirements for issuers of over-the-counter (OTC) derivatives to retail clients. These financial requirements are intended to ensure that Australian financial services licensees have adequate financial resources to operate their business in compliance with the Corporations Act 2001, and to manage the operational risks inherent in the OTC derivatives market. The new instrument will be effective for five years.

Under the instrument, ASIC specifically mandates retail OTCs to:

- meet a net tangible asset (NTA) requirement where the licensee must hold the greater of AUD 1 million or 10% of average revenue;
- prepare, each quarter, projections of cash flows over a 12-month period based on their reasonable estimate of revenues and expenses over that term;
- meet an NTA liquidity requirement where the licensee must hold 50% of the required NTA in cash or cash equivalents and 50% in liquid assets; and
- comply with financial trigger point reporting obligations if licensees fail to hold the required NTA.

RECENT CLIFFORD CHANCE BRIEFINGS

UK Financial Services and Markets Bill — new rules for 'critical third parties'

The UK FSM Bill includes proposals to regulate cloud service providers and other designated 'critical third parties' supplying services to UK regulated firms and financial market infrastructures. HM Treasury would have powers to designate service suppliers as 'critical' and the UK regulators would have new powers directly to oversee designated suppliers, which would be subject to new minimum resilience standards.

This briefing paper discusses the proposed new rules.

<https://www.cliffordchance.com/briefings/2022/09/uk-financial-services-and-markets-bill--new-rules-for-critical-third-parties.html>

Consumer Duty — FCA issues final rules and guidance

On 27 July 2022, the UK's FCA published its policy statement and final rules and guidance setting out how it intends to implement its new Consumer Duty in Policy Statement 22/9 and Final Guidance 22/5. The Duty is described as the 'cornerstone' in the FCA's strategy of setting higher standards of consumer protection in retail financial markets. The Duty marks a return to a more outcome-focused approach by the regulator and will place the onus on firms to proactively assess and evidence the extent to which and how they deliver good consumer outcomes.

This briefing paper discusses the Duty.

<https://www.cliffordchance.com/briefings/2022/09/consumer-duty--fca-issues-final-rules-and-guidance.html>

One 'fine' day? Insights from the first fine issued by the California Attorney General under the CCPA

On 24 August 2022, the California Attorney General (CAG) announced a USD 1.2 million settlement with Sephora to resolve allegations that the consumer goods retailer violated the California Consumer Privacy Act (CCPA) by failing to disclose to consumers that it was selling their personal information. The settlement is notable not only because it is the first civil penalty issued under the statute, but also because it confirms a broad interpretation of what constitutes a 'sale' of personal information under the law and the requirement for websites to respond to global privacy controls. The action also gives insight into the state's focus with regards to enforcement of the CCPA as the state prepares for changes to come in 2023.

This briefing paper discusses the settlement.

<https://www.cliffordchance.com/briefings/2022/09/one--fine--day--insights-from-the-first-fine-issued-by-the-calif.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 2022

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 • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.