

# International Regulatory Update

1 - 4 September 2015

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### MiFID 2: ESMA consults on draft ITS

The European Securities and Markets Authority (ESMA) [has launched a consultation](#) on three draft implementing technical standards (ITS) under MiFID 2.

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The draft ITS cover:

- suspension and removal of financial instruments from trading on a trading venue, relating to the timing and format of publications and communications;
- notification and provision of information for data reporting service providers (DRSPs), in particular applying for authorisation and notifications relating to membership of a DRSP's management body; and
- procedures for sending weekly aggregated position reports for commodity derivatives and emission allowances to ESMA at a specified time.

Comments on the consultation are due by 31 October 2015. ESMA intends to revise the draft ITS in light of input from stakeholders and send a final report to the EU Commission for endorsement by 3 January 2016.

#### **ECON Committee publishes draft report taking stock of EU financial services regulatory framework**

The EU Parliament Committee on Economic and Monetary Affairs (ECON) [has published a draft own initiative report](#) reviewing the effectiveness of the current EU financial services framework. The report argues that new Commission initiatives, such as the Capital Markets Union, will achieve better results when they are built on existing financial services regulation that works effectively and efficiently. It concludes that a thorough impact assessment of the framework is therefore necessary and that this should be repeated regularly.

The report is intended as a first step in reviewing current legislation, addressing shortcomings in law-making, and to voice concerns that the impact of individual legislative measures and their interactions has not yet been sufficiently analysed and the accumulated impact of the overall legislation has so far not been fully evaluated.

The report recommends improvements be made to coordination, timing and transparency in the law-making process, and highlights the importance and accountability of the European Supervisory Authorities (ESAs) and the Single Supervisory Mechanism (SSM) in this regard.

#### **Money market funds: IOSCO publishes final report on peer review**

The International Organisation of Securities Commissions (IOSCO) [has published its final report](#) on the peer review of regulation of money market funds (MMFs). The report sets out the findings of IOSCO's review of the progress of

adopting legislation, regulation and other policies in relation to MMFs in the following reform areas:

- scope of the regulatory reform;
- limitations to the types of assets of, and risks taken by, MMFs;
- valuation practices of MMFs;
- liquidity management for MMFs;
- MMFs that offer a stable net asset value (NAV);
- use of ratings by the MMF industry;
- disclosure to investors; and
- MMF practices in relation to repos.

The report found that the 31 participating jurisdictions had made progress in introducing implementation measures across the reform areas, although progress varied between jurisdictions.

The IOSCO Board accepted a recommendation to complete a further monitoring review beginning in 2016 to report progress made in MMF reforms since the review.

#### **IOSCO publishes peer review of incentive alignment recommendations for securitisation**

IOSCO [has published a report setting out results of a peer review](#) of the implementation of the incentive alignment recommendations for securitisation, which IOSCO published in 2012. The three incentive alignment recommendations call for national authorities to:

- evaluate incentives across the securitisation value chain, formulate and implement approaches to incentive alignment;
- set out the elements of the incentive alignment approach, including risk retention; and
- seek to minimise the potentially adverse effects to cross-border securitisation transactions resulting from differences in approaches to incentive alignment and risk retention.

The review of their implementation was conducted in response to a request from G20 Leaders in September 2013, although implementation of only the first two recommendations has been assessed. IOSCO viewed a review of its recommendation on cross-border securitisation to be premature at this stage.

Among other things, the peer review reports that:

- there has been significant but mixed progress in implementing the recommendations;

- of twenty-five surveyed jurisdictions, five respondents had completed implementation of both recommendations considered by the review, while eleven more were in the process of implementing the recommendations but had not fully adopted measures across the entire securitisation market;
- in six jurisdictions no draft adoption measures to implement the recommendations had been published; and

the EU and US have generally progressed further with implementation than many jurisdictions with smaller securitisation markets.

#### **CPMI and IOSCO consult on definitions of data elements for global OTC derivative reporting to trade repositories**

The Committee on Payments and Market Infrastructures (CPMI) and IOSCO [have jointly published a consultative report](#) on a first batch of key data elements for globally harmonising data on OTC derivatives transactions, other than the Unique Transaction Identifier (UTI) and the Unique Product Identifier (UPI). The report forms part of the CPMI-IOSCO Harmonisation Group's response to a mandate received from the Financial Stability Board (FSB) to develop global guidance to authorities on definitions of key data elements for reporting all OTC derivative contracts to trade repositories (TRs) as agreed by G20 Leaders in 2009.

The report includes individual tables specifying consistent definitions for each data element, comprising:

- a naming convention;
- standard;
- format;
- a list of allowable values; and
- cross-references for identifying interdependencies between data elements.

CPMI-IOSCO is consulting, in particular, on whether the data elements would consistently support meaningful global aggregation, capture different market practices, reflect current market practices and provide sufficient detail and specifications to form guidance.

Comments on the consultation are due by 9 October 2015. CPMI and IOSCO have highlighted that it is working in parallel on a second consultative report providing a second batch of data elements, which together with the elements in the first batch would form a final list of key data elements.

#### **ACMF implements streamlined review framework for ASEAN common prospectus**

The ASEAN Capital Markets Forum (ACMF) [has announced](#) that the Securities Commission Malaysia (SC), the Monetary Authority of Singapore, the Securities and Exchange Commission, Thailand and Singapore Exchange Securities Trading Limited (SGX) have established the Streamlined Review Framework for the ASEAN Common Prospectus, pursuant to a memorandum of understanding signed on 3 March 2015.

The establishment of the framework coincides with the 23rd ACMF meeting in Kuala Lumpur hosted by the SC, the current Chair of the ACMF. The ACMF was set up in 2004 to promote freer flow of capital and greater connectivity of ASEAN capital markets.

The framework, an initiative under the ACMF Implementation Plan endorsed by the ASEAN Finance Ministers, is intended to enhance ASEAN's attractiveness as a fund-raising centre. Under the framework, issuers planning to offer or list equity or plain debt securities can expect a shorter time-to-market and faster access to capital across signatory countries through a streamlined review process.

In conjunction with the implementation of the framework, a [handbook](#) has been issued which provides guidance on the various administrative and procedural matters, including the criteria for issuers to come under the framework, the application procedures, ongoing requirements and the review timeline.

#### **New FCA Handbook and PRA Rulebook websites launched**

The Financial Conduct Authority (FCA) [has launched a new online version of the FCA Handbook](#) and, separately, the Prudential Regulation Authority (PRA) has launched its [online version of the PRA Rulebook](#).

The FCA Handbook website is intended to include improved functionality to view rules at different points in time and a new favourites feature to enable registered users to build their own tailored Handbook.

The PRA Rulebook website is divided into three main sections and is intended to assist users from specific types of firms to view the rules applicable to them more easily. The sections are:

- banking and investment, which is subdivided to show rules for CRR and non-CRR firms;

- insurance, which is subdivided to show rules for Solvency II and non-Solvency II firms; and
- non-authorised persons.

Access to instruments and the 'what's new' feature, which shows recent amendments to both the FCA Handbook and PRA Rulebook, remain available through each of the new websites.

### FCA consults on implementation of UCITS V and ELTIF Regulation

The FCA has issued a consultation ([CP15/27](#)) on the implementation of the Undertakings for Collective Investment in Transferable Securities (UCITS V) Directive and the European Long-Term Investment Funds (ELTIF) Regulation. The FCA is required to transpose UCITS V by 18 March 2016 and is consulting on:

- the requirements applicable to management companies, including the remuneration principles and the transparency obligations towards investors; and
- changes to the regime for depositaries, including the eligibility criteria for firms acting as depositaries of UCITS and the capital requirements applicable to them.

The FCA proposes an 'intelligent copy-out' approach where, subject to certain exemptions, it would avoid imposing any new requirements on firms over and above what it believes is required by UCITS V. The FCA's main exemption is the prudential treatment of depositaries that are not national central banks or credit institutions.

The FCA is also consulting on changes to the FCA Handbook relating to the ELTIF Regulation, which becomes applicable on 9 December 2015. In the consultation, the FCA sets out changes to its current rules for depositaries wishing to act for an ELTIF and its proposed fees for authorisation and supervision.

The deadline for comments relating to the implementation of the UCITS V Directive is 9 November 2015, while comments on changes to the FCA Handbook relating to the ELTIF Regulation close on 5 October 2015. Comments relating to other changes to the Handbook being considered in the consultation close on 7 December 2015.

### FCA publishes Quarterly Consultation No.10

The FCA has published its quarterly consultation paper No. 10 ([CP15/28](#)), setting out proposed miscellaneous amendments to the Handbook. The consultation proposes, among other things, minor Handbook changes to complete

the implementation of the Mortgage Credit Directive (MCD), comments on which are due by 16 October 2015.

CP15/28 also proposes:

- an extension to the right to turn to the Financial Ombudsman Service and the application of COBS suitability rules in relation to investment advice on offshore life insurance bonds;
- updating FSA guidance on consumer redress schemes and incorporating the guidance into CONRED;
- updating SUP to improve data collection processes for firms and the FCA; and
- amendments to DISP to make rules relating to complaints more consistent and clear.

Comments on these sections are due by 5 November 2015.

Additionally, the FCA is consulting on changes to the Training and Competence (TC) sourcebook list of appropriate qualifications and technical changes to GEN in light of the PRA's ongoing deletion of its Handbook to ensure the continued effectiveness of the FCA Handbook; comments are due by 5 October 2015.

### HCMC extends temporary prohibition on short selling

The Hellenic Capital Market Commission (HCMC) [has announced](#) an extension to the temporary short selling restriction under Article 20 of the Short Selling Regulation (SSR) during the month of September. The restriction relates to the short selling of shares admitted to trading on the Athens Exchange (ATHEX) and the Multilateral Trading Facility (MTF) EN.A and applies to depository receipts and warrants representing those shares. An exemption will be in place for certain market making activities.

The HCMC announcement follows an opinion issued by the European Securities and Markets Authority (ESMA) on the prohibition, as required under Article 27 of the SSR. [ESMA's opinion](#) considers the adverse developments, the proportionality and duration of the measure and endorses HCMC's announcement due to continued threats to financial stability and investor protection. ESMA considers the measure to be a partial lifting of the previous ban on short positions, as it does not restrict the activities of the derivative markets. ESMA therefore views the measure to be proportionate to the threats facing the Greek market and its duration justified.

The temporary short selling restriction will apply until the end of 30 September 2015.

### **Bank of Italy publishes new regulation setting out reporting duties in case of offers in Italy of certain securities**

Further to the consultation launched in October 2013 on a draft regulation intended to implement Article 129 of Legislative Decree no. 385, dated 1 September 1993 (Italian Banking Act), the Bank of Italy [has published the final regulation](#) setting out reporting duties applicable to both Italian and non-Italian issuers in case of offers in Italy of the securities listed under paragraphs 1.2 and 2.2 of the regulation.

The regulation, which repeals Title IX, Chapter I of the Bank of Italy Circular no. 229/1999 (Supervisory Instructions for Banks), will come into force on 1 October 2016.

### **Polish Financial Supervision Authority consults on recommendation for security of internet payment transactions**

The Polish Financial Supervision Authority (PFSA) [has submitted for public consultation](#) a draft 'Recommendation for the security of internet payment transactions carried out by banks, domestic payment institutions, domestic e-money institutions and co-operative savings-and-loan banks'.

The purpose of the recommendation is to standardise the scope of minimum requirements for the security of internet payments connected with the provision of payment services. This set of PFSA expectations with respect to payment service providers within the scope of adequate and safe rules for offering solutions enabling internet payments, and relevant control mechanisms in this respect will implement European standards into the Polish regulatory system, in particular the Guidelines on the security of internet payments (EBA/GL/2014/12) issued by the European Banking Authority (EBA), which have replaced the earlier recommendations for the security of internet payments issued by the European Forum on the Security of Retail Payments (SecurePay).

The recommendation of the Polish Financial Supervision Authority will ultimately comprise:

- the rules and organisation of the management process and assessment of risk related to internet payments;
- special control and security measures within the scope of internet payments; and
- education and communication with customers making internet payments.

### **HKMA issues revised supervisory policy manual on risk management of e-banking**

The Hong Kong Monetary Authority (HKMA) [has issued a revised version](#) of the supervisory policy manual (SPM) on the risk management of electronic banking (e-banking). The revised module consolidates and updates all relevant guidance issued by the HKMA in the past in relation to e-banking services offered by authorised institutions.

In light of technological advancement and industry development, the HKMA also considers it appropriate to allow more flexibility for authorised institutions to offer e-banking services. This includes, among other things:

- the option for customers to effect small-value funds transfers to third-party payees through internet banking, without the need to use 2-factor authentication to re-authenticate the customer's identity; and
- the ability of customers to use mobile devices (such as smartphones or tablet computers) to conduct a wide range of transactions including funds transfers to unregistered third-party payees and the above mentioned small-value funds transfers.

The HKMA has indicated that, as in the case of other services, it is the primary responsibility of authorised institutions to ensure that the risks posed by e-banking are properly managed and to educate and protect their customers. To this end, authorised institutions are advised to complete by the end of 2015 an assessment to identify any material gaps in their existing risk management controls (including customer protection and education programme) against the revised module and any other relevant guidance. On the basis of the assessment, authorised institutions should establish action plans to implement appropriate measures promptly to strengthen their risk management controls whenever necessary. Authorised institutions should also ensure that the risk management controls of the new service or enhancement concerned are in line with the revised module and any other relevant guidance before its launch.

### **FSS announces plan to encourage fair practices in non face-to-face marketing of financial products**

The Financial Supervisory Service (FSS) [has introduced a detailed plan](#) to encourage fair practices with regard to the sale of financial products on the internet or through home shopping networks. With financial product sales using non face-to-face channels on the rise, the new plan seeks to promote fairness in relevant business practices with the aim

of improving consumer convenience and preventing damage caused by mis-selling.

Firstly, to promote the sale of financial products through non face-to-face channels, the use of electronic methods for the identification check of a consumer will be allowed. To ensure smooth implementation of this proposal, the FSS will join forces with the Financial Services Commission (FSC), and help the Korea Federation of Banks set up detailed guidelines for financial companies.

Secondly, to prevent damage caused by mis-selling, the FSS will make it mandatory that both financial companies and their sales agency carry out monitoring for any mis-selling within a given period from the sale of financial products using non face-to-face channels. In particular, insurers and card issuers will be urged to establish effective post-sales monitoring procedures.

The FSS will also strengthen the obligation of financial companies to check for mis-selling by telemarketing agencies to which they entrust non face-to-face sales, while calling for channel- and product-specific monitoring.

To help consumers obtain information on online financial products more easily, the FSS will enable comparison of all financial products sold offline and online on a single screen on its website and each of Korea's financial associations will be encouraged to add online products to the list of offline ones on their website for comparison purposes. The FSS will also conduct on-site monitoring for non face-to-face marketing practices with a focus on insurance products and ancillary services of credit card companies (e.g. revolving credit payment) that consumers have indicated are often mis-sold.

#### **MAS consults on proposed consequential amendments following removal of DBU-ACU divide**

Following its June 2015 announcement of the removal of the Domestic Banking Unit (DBU)-Asian Currency Unit (ACU) divide, the Monetary Authority of Singapore (MAS) [has launched a consultation](#) on proposed consequential amendments to regulatory requirements.

Currently, all banks in Singapore have to maintain two accounting units – DBU and ACU. Transactions in Singapore dollars can be booked only in the DBU, whereas transactions in foreign currencies are typically booked in the ACU. Removal of the DBU-ACU divide means that banks will no longer need to maintain two separate accounting units.

Amongst other things, the consultation proposes to:

- amend section 62(1) of the Banking Act to rank uninsured non-bank deposits in insolvency by the currency denomination of the deposits;
- amend MAS Notice 640 to apply the asset maintenance requirements by currency denomination;
- revise the anti-commingling limits applicable to banks – the revised methodology for computing limits is based on total assets instead of capital funds and the proposed revised limits are calibrated at lower absolute levels than the current limits;
- remove the general limits on equity investments and immovable property, under sections 31 and 33 of the Banking Act, for banks incorporated outside Singapore – the MAS will, however, retain the discretion to impose such limits for supervisory or prudential reasons;
- remove the large exposure limit, substantial exposures limit, and limits for investments in index or investment funds, under MAS Notice 639, for banks incorporated outside Singapore;
- remove the limits on unsecured credit facilities to director groups under MAS Notice 639 for all banks;
- amend MAS Notice 639A so banks will no longer need to prepare separate statements for DBU and ACU operations, and can submit a single statement; and
- amend other regulatory requirements that refer to the DBU-ACU divide.

Comments on the consultation paper are due by 30 September 2015.

#### **MAS issues notice on financial market infrastructure standards**

The MAS [has issued a notice](#) on financial market infrastructure standards. The notice is issued pursuant to sections 46ZK and 81R of the Securities and Futures Act (SFA), and applies to licensed trade repositories, and approved clearing houses – each a financial market infrastructure (FMI).

The MAS administers the SFA in respect of the supervision and oversight of trade repositories and clearing houses in accordance with the CPMI-IOSCO Principles for Financial Market Infrastructures (PFMI), as set out under the Monograph on Supervision of Financial Market Infrastructures. Some of the principles in the PFMI are set out in the SFA and subsidiary legislation issued under the

SFA. The notice sets out the remaining principles in the PFMI that an FMI has to comply with.

The notice is effective from 31 August 2015.

## RECENT CLIFFORD CHANCE BRIEFINGS

### Near final – The Insurance Distribution Directive

On 22 July 2015, the European Council published a press release confirming its approval through its Permanent Representatives Committee of the final compromise text for the revision of the existing Insurance Mediation Directive (IMD), now renamed the 'Insurance Distribution Directive' (IDD).

The IDD has now been submitted to the European Parliament for a vote at first reading, before final consideration and adoption by the European Council. Member States will then have two years to transpose the IDD into national laws and regulations, with IDD related amendments to the FCA Handbook and PRA Rulebook expected in late 2017.

This briefing paper discusses the background on the IDD and outlines the main changes for UK insurance distributors – insurance intermediaries, ancillary insurance intermediaries and insurance undertakings – and for reinsurance distributors – all new defined terms under the IDD.

[http://www.cliffordchance.com/briefings/2015/09/near\\_final\\_the\\_insuredistributiondirective.html](http://www.cliffordchance.com/briefings/2015/09/near_final_the_insuredistributiondirective.html)

### Iran Sanctions Deal – Managing Your Risks While Preparing for the New Landscape

The Joint Comprehensive Plan of Action (JCPOA) on Iran's nuclear program presents companies and individuals with a potentially historic opportunity to consider new business opportunities with Iranian counterparties. It also presents unique compliance challenges, including under US

economic sanctions, which companies need to take into consideration prior to any prospective business planning.

This briefing paper discusses the Iran sanctions deal and how to manage your risks while preparing for the new landscape.

[http://www.cliffordchance.com/briefings/2015/08/iran\\_sanctions\\_dealmanagingyourriskswhil.html](http://www.cliffordchance.com/briefings/2015/08/iran_sanctions_dealmanagingyourriskswhil.html)

### Impact of amendments to the Bankruptcy Law on automatic early termination and insolvency events of default

The new restructuring law of 15 May 2015 will enter into force on 1 January 2016. The restructuring law introduces new restructuring procedures, allowing the restructuring of a debtor's business and avoiding its liquidation. It also introduces major amendments to the Bankruptcy and Recovery Proceedings Law of 28 February 2003.

This briefing paper discusses the impact of these amendments on automatic early termination and insolvency events of default.

[http://www.cliffordchance.com/briefings/2015/09/impact\\_of\\_amendmentstothebankruptcylawo.html](http://www.cliffordchance.com/briefings/2015/09/impact_of_amendmentstothebankruptcylawo.html)

### More Guidance from Delaware on Controlling Shareholder Take-Private Transactions

The Delaware Chancery Court has found two individuals jointly and severally liable for more than USD 148 million in damages for fiduciary breaches committed in connection with a controlling shareholder take-private transaction.

This briefing paper discusses the Delaware Chancery Court decision.

[http://www.cliffordchance.com/briefings/2015/09/more\\_guidance\\_fromdelawareoncontrollin.html](http://www.cliffordchance.com/briefings/2015/09/more_guidance_fromdelawareoncontrollin.html)

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