

## Financial Regulatory Developments Focus

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**In this newsletter, we provide a snapshot of the principal European, US and global financial regulatory developments of interest to banks, investment firms, broker dealers, market infrastructures, asset managers and corporates.**

Our latest quarterly Governance & Securities Law Focus newsletter is available at:

[http://www.shearman.com/~media/Files/NewsInsights/Publications/2014/01/Governance\\_and\\_Securities\\_Q4\\_BulletinCMCGFIAECEBLT012414.pdf](http://www.shearman.com/~media/Files/NewsInsights/Publications/2014/01/Governance_and_Securities_Q4_BulletinCMCGFIAECEBLT012414.pdf)

### Derivatives

#### FSB Consults on Approaches to Aggregate OTC Derivatives Data

On 4 February 2014, the Financial Stability Board (“FSB”) published a consultation paper entitled, “Feasibility Study on Approaches to Aggregate OTC Derivatives Data.” The paper is part of a response to a request by the FSB for a feasibility study that sets out and analyses the various options for aggregating OTC derivatives data reported to trade repositories. As a result of the global derivatives reforms, derivatives trade data will be reported to trade repositories around the world. The FSB wants to ensure that the data reported to trade repositories can be effectively used by authorities, including to identify and mitigate systemic risk, through enabling the availability of the data in aggregated form. The study and consultation responses will assist the FSB in its decision, with the International Securities Organization Commission (“IOSCO”), as to whether a global aggregation mechanism is needed. The consultation paper sets out various models for such a mechanism. Responses to the consultation are due on 28 February 2014.

A copy of the FSB consultation paper is available at:

[http://www.financialstabilityboard.org/publications/r\\_140204.pdf](http://www.financialstabilityboard.org/publications/r_140204.pdf)

#### CFTC Announces Measures to Promote Trading on Swap Execution Facilities and Support an Orderly Transition to Mandatory Trading

On 10 February 2014, the Commodity Futures Trading Commission (“CFTC”) announced measures to promote trading on swap execution facilities (“SEFs”) and

support an orderly transition to mandatory trading of swaps, which begins for certain interest rate swaps on 15 February 2014.

In connection with the commencement of the trading mandate, the CFTC and the Division of Market Oversight (“DMO”), respectively, have taken the following measures:

1) In order to protect the identities of counterparties trading on SEFs and incentivize anonymous trading on regulated platforms, on 10 February 2014, the CFTC issued an interim final rule clarifying that consistent with the requirements of section 21(c)(6) of the Commodity Exchange Act, a party to an anonymous trade executed on a SEF or designated contract market (“DCM”) cannot access information in swap data repositories in order to obtain the identity of its counterparty.

The full text of the final rule is available at:

<http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister021014.pdf>

2) On 10 February 2014, DMO issued a no-action letter providing relief until 15 May 2014 from mandatory trading of certain swaps executed as part of a “package transaction.” Accordingly, DMO reminds SEFs that they may facilitate the trading of swaps subject to the trade mandate, if executed as part of such a “package transaction,” only if (i) the methods for executing such swaps comply with the trading protocols applicable to Required Transactions in § 37.9 of the Commission’s regulations or (ii) such SEFs have rules in effect that permit the trading of package transactions under the terms of the relief. DMO staff will hold a public meeting on February 12, 2014 to discuss potential challenges surrounding the execution of package transactions through SEFs or DCMs.

The full text of the no-action is available at:

<http://www.cftc.gov/ucm/groups/public/@newsroom/documents/letter/14-12.pdf>

3) DMO published guidance on 10 February 2014 clarifying that while Rule 37.202(b) requires that market participants trading on a SEF consent to its jurisdiction, it is a reasonable interpretation that such consent need not be obtained through an affirmative writing. DMO stated that at this time a SEF may comply with Rule 37.202(b) by providing in its rulebook that any person initiating or executing a transaction on or subject to the rules of the SEF directly or through an intermediary, and any person for whose benefit such a transaction has been initiated or executed, consents to the jurisdiction of the SEF.

The full text of the CFTC guidance is available at:

<http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/dmostaffguidance021014.pdf>

4) DMO announced that it has published on the CFTC’s website a centralized list of swaps subject to the mandate. This dedicated webpage is intended to provide notice to market participants of the swaps subject to the mandate and includes specific terms defining each such swap.

A copy of the centralized list of swaps can be found at:

<http://www.cftc.gov/ucm/groups/public/@otherif/documents/ifdocs/swapsmadeavailablechart.pdf>

The full text of the CFTC press release is available at:

<http://www.cftc.gov/PressRoom/PressReleases/pr6853-14>

### **CFTC's Division of Swap Dealer and Intermediary Oversight Provides Additional Guidance to Futures Commission Merchants and Depositories Regarding Procedures for New Filing Requirements**

On 5 February 2014, the CFTC's Division of Swap Dealer and Intermediary Oversight ("DSIO") issued a notice to provide market participants with additional guidance regarding the procedures for submitting to the CFTC the notices and reports required under new and amended regulations the CFTC adopted on 1 November 2013. This notice also provides guidance to futures commission merchants ("FCMs") based upon inquiries received from market participants since the issuance of the final regulations, and further reminds FCMs of certain significant revisions to the reporting requirements to assist them with their compliance obligations.

The full text of the DSIO Notice to FCMs and Depositories can be found at:

<http://www.cftc.gov/PressRoom/PressReleases/pr6851-14>

## **Regulatory Capital**

### **ECB Publishes First SSM Quarterly Report**

On 4 February 2014, the European Central Bank ("ECB") published its first Single Supervisory Mechanism ("SSM") (Regulation 1024/2013) quarterly report. The report covers the ECB's work from June 2012 to February 2014.

The following milestones are noted in the report:

- the development of the supervisory model of the SSM as reflected in the draft SSM supervisory manual (which covers the tasks and supervisory processes of the SSM, including the relations between the ECB and national competent authorities ("NCAs"));
- the finalisation of the draft ECB SSM Framework Regulation, (which will be submitted for public consultation before adoption); and
- the initial mapping of the euro area banking system, including a catalogue of all supervised entities falling within the scope of the SSM.

The second quarterly report will be published in May 2014. 'Next steps and future challenges' are laid out in chapter 9 of the report.

The ECB's report is available at:

<http://www.ecb.europa.eu/pub/pdf/other/ssmqr20141en.pdf>

### ECB Report on draft SSM Framework

On 7 February 2014, the (“ECB”) published a consultation paper on a draft of the ECB SSM Framework Regulation and an accompanying Questions and Answers document.

The ECB will begin its role as supervisor of Euro area banks on 4 November 2014. The draft Framework Regulation outlines the rules and procedures governing the relationship between the ECB and national competent authorities (“NCAs”) to ensure the SSM functions effectively.

The ECB plans to hold a public hearing on the consultation paper (broadcast live on the internet and available via a webcast) on 19 February 2014. Comments can be made on the consultation paper until 7 March 2014.

The ECB’s consultation paper is available at:

<http://www.ecb.europa.eu/ssm/consultations/shared/pdf/framework/draft-ssm-framework-regulation201402.en.pdf>

The ECB’s Questions and Answers document is available at:

<http://www.ecb.europa.eu/ssm/consultations/shared/pdf/framework/ssm-consultation-qa.en.pdf>

### The ECB Publishes Decision Identifying the Credit Institutions Subject to Comprehensive Assessment

On 6 February 2014, the ECB published its decision on the credit institutions that will be subject to comprehensive assessment by the ECB (as set out in the Annex to the decision).

The ECB will carry out a comprehensive assessment of large banks before 3 November 2014 (before taking on the role as supervisor under SSM on 4 November 2014). In accordance with Article 33(4) of the Regulation establishing the SSM (Regulation 1024/2013), the decision provides that national competent authorities (“NCAs”) responsible for supervising the listed credit institutions must submit “all information of relevance to the comprehensive assessment that the ECB requests.”

The NCAs may use on-site inspections or involve third parties to verify the information requested by the ECB. The NCA responsible for supervision of subsidiaries in a group that is subject to consolidated supervision within the SSM will also be responsible for the verification for the subsidiaries authorised in its member state.

The SSM Regulation will give the ECB investigatory and enforcement powers, including powers to request all relevant information from credit institutions and persons involved in their activities (Article 10), powers to conduct all necessary investigations, including onsite inspections (Articles 11 and 12) and powers to impose pecuniary sanctions and periodic penalty payments (Article 18).

The ECB's decision is available at:

[http://www.ecb.europa.eu/pub/pdf/other/en\\_dec\\_2014\\_03\\_fen.pdf](http://www.ecb.europa.eu/pub/pdf/other/en_dec_2014_03_fen.pdf)

### **FCA Updates Website to Include New Forms for Investment Firms Subject to CRR**

On 5 February 2014, the FCA updated its webpage on guidelines for investment firms subject to the Capital Requirements Regulation (Regulation 575/2013) ("CRR") seeking to apply for specific CRR permissions.

The FCA's updated webpage is available at:

<http://www.fca.org.uk/firms/being-regulated/waiver/crr-permission-application-guidelines>

### **FCA Publishes Report on Thematic Review of Transition Management Services**

On 10 February 2014, the FCA published a report and related press release outlining the findings of its thematic review into transition management ("TM") services in the UK.

The report examines the scale of TM in the UK, the complexity of the TM process and transparency and accountability of TM service providers. Transition management ("TM") is provided by investment banks, custody banks, asset managers and specialist firms to help move investment portfolios between different managers or markets.

The FCA's report concluded that generally TM providers demonstrated the existence of appropriate controls and an understanding of the risks. However it concluded that the quality and effectiveness of the controls varied. The FCA stated that it will continue to monitor the conduct of TM providers where firms fall short of its requirements.

The FCA's report is available at:

<http://www.fca.org.uk/static/documents/thematic-reviews/tr14-01.pdf>

The FCA's press release is available at:

<http://www.fca.org.uk/news/transition-management-findings>

### **OCC Issues Notice of Proposed Rulemaking Proposing Heightened Standards for Large Banks**

On 5 February 2014, the Office of the Comptroller of the Currency ("OCC") issued a notice of proposed rulemaking that would establish minimum standards for the design and implementation of a risk governance framework ("Framework") for large insured national banks, insured federal savings associations, and insured federal branches of foreign banks with average total consolidated assets of \$50 billion or more. The proposal also would establish minimum standards for an institution's board of directors in overseeing the Framework's design and implementation. The comment period for the proposed rule ends March 28, 2014.

The full text of the notice of proposed rulemaking can be found at:

<http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-1a.pdf>

## Financial Services

### European Parliament Adopts Directive on Criminal Sanctions for Market Abuse

The European Parliament announced on 5 February 2014 that it had adopted, in its plenary session held on 4 February, the proposed Directive on criminal sanctions for insider dealing and market manipulation (“CSMAD”). The vote follows the political agreement reached in trilogue on 10 December 2013. The Council of the EU will now formally adopt the CSMAD proposal. It is anticipated that CSMAD will be published in the Official Journal of the European Union in June 2014. Member States have two years from the date of publication to implement CSMAD into national laws.

The CSMAD, together with the proposed Regulation on insider dealing and market manipulation (known as “MAR”), make up the legislative proposals that will replace the Market Abuse Directive (2003/6/EC) (known as “MAD”).

The European Parliament’s press release is available at:

[http://www.europarl.europa.eu/pdfs/news/expert/infopress/20140203IPR34503/20140203IPR34503\\_en.pdf](http://www.europarl.europa.eu/pdfs/news/expert/infopress/20140203IPR34503/20140203IPR34503_en.pdf)

### ICE Benchmark Administration LIBOR Code Added to FCA List of Confirmed Industry Guidance.

The FCA updated its confirmed industry guidance webpage on 5 February 2014, adding the LIBOR Code of Conduct published by the LIBOR Administrator, ICE Benchmark Administration (“IBA”).

IBA published the code, alongside a whistleblowing procedure document, on 3 February 2014.

The LIBOR Code of Conduct is available at:

[https://www.theice.com/publicdocs/IBA\\_Code\\_of\\_Conduct.pdf](https://www.theice.com/publicdocs/IBA_Code_of_Conduct.pdf)

### UK Government Responds to ECJ Decision on Article 28 of the Short Selling Regulation

On 4 February 2014, the written answer of the Government regarding the ECJ judgment in *United Kingdom v European Parliament and Council of the EU*, (*Judgment of the Court*) [2014] EUECJ C-270/12 (22 January 2014) was published in Hansard.

- the report states that the Government is disappointed that the ECJ has not upheld the UK’s challenge to annul Article 28 of the Short Selling Regulation;
- the Government has consistently said it wants tough financial regulation that works, but powers conferred on EU agencies must be consistent with the EU treaties, and ensure legal certainty; and

- the ruling bears no impact on the day-to-day application of the Short Selling Regulation (Regulation 236/2012) and has no implications for other legal challenges made by the UK relating to financial services regulation.

The written answer is available at:

<http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140203w0001.htm>

### **ESMA Publishes an Opinion on Mifid Practices for Firms Selling Complex Products**

On 7 February 2014, the European Securities and Markets Authority (“ESMA”) published an opinion on MiFID practices for firms selling complex products (ESMA/2014/146).

The opinion is intended to remind national supervisors and investment firms of the minimum standards applicable when complex products (which according to ESMA include most types of structured product) are marketed to retail investors.

ESMA is concerned that compliance with MiFID selling practices may have fallen short of expected standards and that complex investment products previously only available to professional clients are in some cases being provided to retail investors who may not fully understand the products.

ESMA has also issued an EU-wide investor warning to raise awareness about the risks of investing in complex products.

ESMA’s Opinion is available at:

[http://www.esma.europa.eu/system/files/ipisc\\_complex\\_products\\_-\\_opinion\\_20140105.pdf](http://www.esma.europa.eu/system/files/ipisc_complex_products_-_opinion_20140105.pdf)

ESMA’s investor warning is available at:

[http://www.esma.europa.eu/system/files/investor\\_warning\\_-\\_complex\\_products\\_20140207\\_-\\_en\\_0.pdf](http://www.esma.europa.eu/system/files/investor_warning_-_complex_products_20140207_-_en_0.pdf)

### **ESAs’ Final Report on Mechanistic References to Credit Ratings in the ESAs’ Guidelines and Recommendations**

On 6 February 2014, the European Supervisory Authorities (“ESAs”) published a joint final report on mechanistic references to credit ratings in the ESAs’ guidelines and recommendations.

The ESAs are made up of the European Banking Authority (“EBA”), the European Securities and Markets Authority (“ESMA”) and the European Insurance and Occupational Pensions Authority (“EIOPA”).

The three ESAs were required by the CRA Regulation (Regulation 1060/2009) to review, and where appropriate to remove references to credit ratings that could trigger sole or mechanistic reliance on such ratings in existing guidelines and recommendations.

The joint final report includes the following:

- a feedback statement to the ESAs joint consultation paper (Section II);

- a definition for “sole or mechanistic reliance” (Section III);
- general examples of rating references to illustrate the concept of sole or mechanistic reliance (Section IV);
- a list of provisions from the EBA, EIOPA and ESMA guidelines and recommendations containing rating references that should not be viewed as sole or mechanistic (Section V); and
- a set of provisions that do require revision according to the ESAs, which includes ESMA’s guidelines on money market funds (“MMFs”) (Section VI).

The EBA, EIOPA and ESMA final report is available at:

[https://eiopa.europa.eu/fileadmin/tx\\_dam/files/consultations/consultationpapers/JC-CP-2013-02/JC\\_2014\\_004\\_Final\\_Report\\_Mechanistic\\_References\\_to\\_Credit\\_Ratings\\_.pdf](https://eiopa.europa.eu/fileadmin/tx_dam/files/consultations/consultationpapers/JC-CP-2013-02/JC_2014_004_Final_Report_Mechanistic_References_to_Credit_Ratings_.pdf)

## Hearings

13 February: The Semiannual Monetary Policy Report to the Congress (Senate Committee on Banking, Housing, and Urban Affairs)

11 February: Monetary Policy and the State of the Economy (House Committee on Financial Services)



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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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