

International Regulatory Update

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Short selling and AIFM Directive: ESMA's Securities And Markets Stakeholder Group publishes advice

ESMA's Securities and Markets Stakeholder Group has published its advice on ESMA's February 2012 discussion paper on the key concepts of the AIFM Directive and types of AIFM. The Stakeholder Group's advice addresses the key elements of the AIF definition, proportionality, dual registration, and delegation.

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The Stakeholder Group has also published its advice on ESMA's draft technical advice on possible delegated acts concerning the regulation on short selling and certain aspects of credit default swaps (CDS). The Stakeholder Group's advice addresses the term 'third party' and the need for a separate legal entity, the interpretation of 'correlated' and 'highly correlated', a significant fall in value for shares or sovereign bonds, and price movements.

[Advice on key concepts of the AIFM Directive and types of AIFM](#)

[Advice on short selling and certain aspects of CDS](#)

CRD 4: EU Council publishes consolidated text of general approach

The EU Council has published the consolidated texts of its general approach to the proposed fourth package of amendments to the Capital Requirements Directive (CRD 4) that was agreed on 15 May 2012. The proposals comprise a directive governing access to deposit-taking activities and the prudential supervision of credit institutions and investment firms and a regulation on prudential requirements for credit institutions and investment firms.

The negotiations with the European Parliament will aim for adoption of the package at first reading, if possible by June 2012.

[Proposed directive – general approach](#)

[Proposed regulation – general approach](#)

Financial transaction tax: European Parliament sets out position

The European Parliament's plenary session has adopted its opinion on the European Commission's proposal for a directive on a common system of financial transaction tax (FTT) in the EU. The Parliament has outlined its position as follows:

- it considers the tax rates proposed by the Commission (0.1% for shares and bonds and 0.01% for derivatives) suitable and pension funds should be the only sector exempted from the tax;
- the adopted text includes an 'issuance principle', whereby financial institutions located outside the EU would also be obliged to pay the FTT if they traded securities originally issued within the EU;
- the 'residence principle' proposed by the Commission is also kept, which would mean that shares issued outside of the EU but subsequently traded by at least one institution established within the EU would be caught;
- the text links payment of the FTT to the acquisition of legal ownership rights, meaning that if the buyer of a security did not pay the FTT, he or she would not be legally certain of owning that security;
- if it is not possible to establish the tax throughout the EU at the outset, enhanced cooperation should be envisaged; and
- the opinion maintains the Commission's proposed timetable – a deadline of 31 December 2013 for Member States to adopt implementing laws and 31 December 2014 for entry into force of these laws.

[Adopted text](#)

[Press release](#)

Market abuse regulation: EU Council Presidency publishes compromise text

The Danish EU Council Presidency has published a new [compromise text](#) for the proposed regulation on insider dealing and market manipulation, which updates the existing framework provided by the Market Abuse Directive.

Credit rating agencies: IOSCO consults on internal controls and procedures

IOSCO has published a [consultation paper](#) which describes certain internal controls and procedures that credit rating agencies (CRAs) use to promote the integrity of the credit rating process and address conflicts of interest, with a view to promoting a better understanding of these practices.

IOSCO has invited the views of stakeholders and CRAs to assist it with further analysis of the internal controls and procedures used by CRAs. Responses are due by 9 July 2012.

Court of the Bank of England commissions reviews to learn lessons from financial crisis

The Court of the Bank of England has commissioned a set of three reviews into areas of the Bank's performance and current capabilities in order to learn lessons from the financial crisis and to ensure the Bank is best equipped to carry out its responsibilities in the future. The reviews will concentrate on areas where the Bank had sole responsibility.

In particular, the reviews will cover: (1) the provision of Emergency Liquidity Assistance in 2008/9; (2) the Bank's framework for providing liquidity to the banking system as a

whole; and (3) the Monetary Policy Committee's forecasting capability.

The reviews will be led by Ian Plenderleith, Bill Winters and David Stockton respectively. They will begin immediately, and their conclusions will be presented to the Court in October 2012.

[Press release](#)

Dutch Parliament adopts Bill on Special Resolution Measures for Financial Institutions

The [Bill on Special Resolution Measures for Financial Institutions](#) has been adopted by the Upper House of the Dutch Parliament. The enacted Bill will likely enter into force one day after its publication in the State Gazette, which is expected within the coming days or weeks and by 1 July 2012 at the latest. The Bill is intended to increase the powers of the Dutch Central Bank and the Ministry of Finance to intervene in unstable financial institutions and amends the Dutch Financial Supervision Act and the Dutch Bankruptcy Act.

The Bill contains two categories of measures. The first category focuses on the timely and orderly settlement of unstable financial institutions. Measures include the sale of business and the sale of assets. The second category aims to ensure the stability of the financial system as a whole, including internal intervention and expropriation. In order to make effective intervention possible, the proposal limits the rights of counterparties of an unstable financial institution to exercise certain contractual rights after a supervisory measure has been issued by one of the regulatory authorities.

[Overview of discussions on the Bill in Parliament](#)

Swiss Federal Council adopts report on FINMA supervisory instruments

The Federal Council has adopted a report on the development of supervisory instruments and the organisation of the Swiss Financial Market Supervisory Authority (FINMA). The Federal Council analyses the measures taken by FINMA in relation to bank supervision, including the concentration of bank supervision in one department, added on-site inspections and analytical research to support the supervisory function, and cooperation with the Swiss National Bank (SNB) and foreign supervisory authorities. The Federal Council also approves of FINMA's measures to strengthen the role of bank auditors. However, the report warns that FINMA will need to establish proper coordination between its own

supervisory activities and the role of the auditors, in order to ensure a clear separation of tasks.

[Report \(in German\) and expert advice](#)

SFC publishes draft guidance note on short position reporting

The Securities and Futures Commission (SFC) has published a [draft guidance note](#) in relation to short position reporting. The guidance note explains the SFC's policy intention with regard to certain aspects of the Securities and Futures (Short Position Reporting) Rules and informs market participants how the rules are intended to operate in practice so that they can structure their compliance process accordingly.

The SFC has indicated that the guidance note has not yet been published in the Gazette pursuant to section 399 of the Securities and Futures Ordinance and may be subject to change.

MAS responds to feedback on proposed regulation of derivatives market and consults on proposed amendments to Securities and Futures Act

The Monetary Authority of Singapore (MAS) has published the first phase of its [response](#) to feedback received on the proposed regulation of OTC derivatives market in Singapore. In view of the broad ranging proposals raised in the consultation, the MAS intends to release its response to the feedback received in phases. The first phase addresses feedback received on the proposals to: (1) extend the current regulatory regime for clearing facilities to OTC derivatives; and (2) introduce a new regulatory regime for trade repositories.

The MAS's response sets out its views on feedback received relating to: (1) the definition of 'clearing facility'; (2) the recognition of overseas clearing facilities; (3) the segregation and portability of customers' money and assets; (4) the imposition of 'living will' policies and procedures for clearing facilities; (5) the regulation of overseas trade repositories; and (6) the confidentiality of reported information.

At the same time, the MAS has published [Consultation Paper I on Proposed Amendments to the Securities and Futures Act on Regulation of OTC Derivatives](#).

MAS consults on proposed amendments to Securities and Futures Act and Financial Advisers Act

The Monetary Authority of Singapore (MAS) has issued a [consultation paper](#) on proposed amendments to the

Securities and Futures Act (SFA) and the Financial Advisers Act (FAA).

On 12 March 2009, the MAS issued a policy consultation paper seeking comments on the review of the regulatory regime governing the sale and marketing of unlisted investment products. On 28 January 2010, a further consultation paper was published to extend the scope of the review to both unlisted and listed investment products sold to retail investors. The MAS is now consulting on the draft legislation to amend the SFA and FAA to effect the policy positions set out in the previous two consultation papers and the MAS' response to feedback from the industry. The draft legislation also incorporates proposed amendments to enhance and refine the MAS' supervisory framework.

Comments are due by 22 June 2012.

[Annex 1: Draft Securities and Futures \(Amendment\) Bill 2012](#)

[Annex 2: Draft Financial Advisers \(Amendment\) Bill 2012](#)

CFTC Chairman comments on cross-border application of Dodd-Frank Act

CFTC Chairman Gary Gensler has given a [speech](#) during which he discussed details of the cross-border application of the Dodd-Frank swaps market reforms. Chairman Gensler noted that there is still work to be done on the CFTC cross-border release, before setting out what the main points of the staff recommendations are likely to include:

- when a foreign entity transacts in more than a de minimis level of US facing swap dealing activity, the entity would register under the CFTC's recently completed swap dealer registration rules;
- the release will address what it means to be a US facing transaction – Chairman Gensler argued that this must include transactions not only with persons or entities operating in the United States, but also with their overseas branches on the grounds that, in the midst of a default or a crisis, there is no satisfactory way to separate the risk of a bank and its branches, and he also stated his belief that this must include transactions with overseas affiliates that are guaranteed by a US entity, as well as the overseas affiliates operating as conduits for a US entity's swap activity;
- a tiered approach for requirements for overseas swap dealers – Chairman Gensler indicated that some

requirements would be considered entity-level, such as for capital, risk management and recordkeeping, while some requirements would be considered transaction-level, such as clearing, margin, real-time public reporting, trade execution and sales practices;

- such entity-level requirements would apply to all registered swap dealers, but in certain circumstances, overseas swap dealers could comply with these requirements through substituted compliance; and
- such transaction-level requirements would apply to all US facing transactions, but for certain transactions between an overseas swap dealer (including a foreign swap dealer that is an affiliate of a US person) and counterparties not guaranteed by or operating as conduits for US entities, Dodd-Frank may not apply – for example, this would be the case for a transaction between a foreign swap dealer and a foreign insurance company not guaranteed by a US person.

RECENT CLIFFORD CHANCE BRIEFINGS

European Insolvency Procedures 2012 Edition

Clifford Chance is delighted to announce that the 2012 edition of its brochure 'European Insolvency Procedures' is now available.

The 2012 edition provides an updated guide to the legislative developments in the key European jurisdictions, including how the different corporate insolvency regimes operate in each of those jurisdictions. The brochure aims to assist clients assess credit risks and anticipate the potential impact of formal insolvency procedures on enforcing and realising security across Europe and contains a useful comparative table on issues such as the automatic stay, the ability to cram down creditors, and potential lender liability. This new edition also includes coverage of the new developments in Spain and Germany.

http://www.cliffordchance.com/publicationviews/publications/2012/05/european_insolvencyprocedures2012edition.html

Eurozone – developments in loan documentation

As Eurozone concerns continue so does the market's focus on the role that loan documentation has to play in addressing potential redenomination risk.

This briefing provides an update to our earlier briefing 'The Eurozone Crisis and Loan Agreements' and highlights the documentary developments arising since that earlier briefing.

http://www.cliffordchance.com/publicationviews/publications/2012/05/eurozone_developmentsinloandocumentation.htm
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Renminbi Internationalisation – Market and regulatory developments over the past three years

In light of a promising prospect for continuous economic development, China has taken a serious effort to internationalise its currency, the Renminbi (RMB). A look at the steps undertaken for RMB internationalisation thus far is key to gaining a better understanding of the market and the law, as well as predicting future developments.

This briefing studies the structure and operation of the markets in China and Hong Kong, which may provide insights for other developing offshore RMB centres, such as London.

http://www.cliffordchance.com/publicationviews/publications/2012/05/renminbi_internationalisation-marketan.html

Renminbi Internationalisation – The London Perspective

With Renminbi (RMB) internationalisation well underway and RMB full convertibility becoming an increasingly foreseeable event, London aspires to establish itself as an offshore centre for RMB business and recently saw the issue of the first retail RMB-denominated bond targeted at the European market. However, despite the positive recent steps, some uncertainties remain.

This briefing examines the challenges and opportunities for London in pursuing its aspiration and provides a glimpse into the future landscape of the offshore RMB market.

http://www.cliffordchance.com/publicationviews/publications/2012/05/renminbi_internationalisationthelondo.html

A mixed report for money laundering officers

Last week saw mixed fortunes for the individuals within financial institutions who act as Money Laundering Reporting Officers (MLROs) and who oversee anti-money laundering (AML) controls. The High Court has rejected a long running challenge by former customers to a bank's decisions to make Suspicious Activity Reports (SARs), in a decision that recognises the delicate balance that MLROs are required to strike between their own and their institutions' competing legal and commercial obligations. On the other hand, the significant personal responsibilities of such officers has been highlighted by the first fine imposed on an individual to arise from the Financial

Services Authority's thematic review into authorised firms' compliance with their AML obligations.

This briefing discusses these developments.

http://www.cliffordchance.com/publicationviews/publications/2012/05/a_mixed_report_formoneylaunderingofficers.html

Clifford Chance Russia Update: Legal and market developments in Russia – Spring 2012

Clifford Chance has prepared the inaugural issue of Russia Update: Legal and market developments in Russia. Russia Update is being launched as a tool to provide clients with a single 'one-stop shop' guide to major legal and market developments in Russia. In this new quarterly publication, we will alert you to key legal changes as well as news highlights from the business sectors which are of particular importance to the Russian economy. In the 'Russian Law Focus' section of each issue, we will provide some practical insights on core Russian law topics.

Amongst other things, the main topics covered in the Spring 2012 issue include the following: (1) changes to the enforcement regime for Russian security; (2) an introduction to the Insider Trading Law and supporting regulations; (3) deposits of up to 100% of shares into depositary receipt facilities; (4) new law on Central Depository; and (5) amendments to the Strategic Investments Law seek to exempt 'real' Russian deals.

http://www.cliffordchance.com/publicationviews/publications/2012/05/russia_update_legalandmarketdevelopmentsi.htm
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China's QFII Regime – A Complete Review of the Regulatory Scheme and Compliance Risks

Since its inception in late 2002 and UBS AG being granted the first Qualified Foreign Institutional Investor (QFII) licence in mid-2003, China's QFII regime has evolved rapidly attracting a wide range of international institutions from sizeable securities houses and banks to fund managers, insurance companies, sovereign wealth funds, central banks, pension plans and universities. As of April 2012, China's securities regulator, the China Securities Regulatory Commission (CSRC), had approved 158 QFIIs from 23 countries of which 129 QFIIs had been granted investment quotas by the State Administration of Foreign Exchange (SAFE, China's foreign exchange regulator) in the amount of USD 24.55 billion. As of 23 March 2012, the total market value of securities investments of all QFIIs had reached around RMB 265.6 billion (USD 42.2 billion), representing approximately 1.09% of the total market value

of tradable A shares. CSRC statistics show that the top five QFII origin countries/regions are the United States, United Kingdom, Japan, Korea and Hong Kong.

http://www.cliffordchance.com/publicationviews/publications/2012/05/china_s_qfii_regimeacompleteireviewofth.html

Basel III 'Lite' – DFSA Consultation Paper No. 83

On 3 May 2012 the Dubai Financial Services Authority (DFSA) released its Consultation Paper No. 83 regarding the proposed changes to the PIB Module of the Rulebook

to bring the PIB Module in closer alignment with the Basel III framework.

This briefing discusses the consultation.

http://www.cliffordchance.com/publicationviews/publications/2012/05/basel_iii_lite_ -dfsaconsultationpaperno83.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.

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