

# International Regulatory Update

## IN THIS WEEK'S NEWS

- ESMA updates Members' short selling measures
- HCMC to review short selling ban during September 2011
- FSMA publishes Q&As on modified short selling rules
- CONSOB extends deadline for restrictive measures on net short positions
- CNMV extends temporary preventive measure on net short positions
- AMF renews ban on taking net short positions and updates FAQs
- AIFMD: ESMA consults on future rules for alternative investment fund managers and treatment of third country entities
- IMF publishes working paper on taxation and regulation of banks
- IOSCO and CPSS consult on requirements for OTC derivatives data reporting and aggregation
- Wolfsberg Group publishes revised anti-corruption guidance
- Retail Distribution Review: FSA consults on proposed guidance
- Treasury Committee reports on future of cheques
- FINMA issues circular on credit rating agencies
- Federal Council proposes amendments to withholding tax on interest on bonds and CoCos
- Federal Council implements amendments to Banking Act to increase depositor protection
- MOFCOM consults on draft notice regarding direct investment of cross-border renminbi
- CSRC consults on trial measures for supervision and administration of refinancing business
- SFC consults on amendments to Takeovers Code
- MAS consults on proposed amendments to Notice 637 on risk based capital adequacy requirements for banks
- Upcoming Clifford Chance Event: Annual Global Funds Conference. [Follow this link to the events section.](#)
- Recent Clifford Chance briefings: Belgian short selling ban stretched far – too far? – by the FSMA; First High Court case in Japan – Arranger's liability in syndicated loan transactions; and more. [Follow this link to the briefings section.](#)

## SHORT SELLING UPDATE

### ESMA updates Members' short selling measures

ESMA has published an [updated table of measures](#) taken by its Members in relation to short selling in financial markets. The update includes short selling measures in Belgium, France, Greece, Italy, and Spain.

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

#### International Regulatory Group Contacts

[Chris Bates](#) +44 (0)20 7006 1041

[Nick O'Neill](#) +44 (0)20 7006 1139

[Marc Benzler](#) +49 69 7199 3304

[Thomas Pax](#) +1 202 912 5168

[Steven Gatti](#) +1 202 912 5095

[Martin Rogers](#) +852 2826 2437

[Mark Shipman](#) + 852 2826 8992

#### International Regulatory Update Editor

[Julia Milosh](#) +44 (0)20 7006 4171

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](http://www.cliffordchance.com)

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### **HCMC to review short selling ban during September 2011**

The Hellenic Capital Market Commission (HCMC) has [announced](#) its intention to reassess the prohibition of short selling of shares listed in the Athens Exchange before the end of September 2011 and in consultation with other European regulators, taking into account in particular the conditions prevailing in the Greek market as well as in the markets in general.

The HCMC has indicated that it will follow a similar approach as other European supervisors with respect to extending the duration of or lifting the short selling ban or to taking additional measures, to the extent that this is warranted by market conditions.

### **FSMA publishes Q&As on modified short selling rules**

The Financial Services and Markets Authority (FSMA) has published revised rules on the short selling ban, in the form of a website update of its [frequently asked questions](#). This update extends again the scope of the ban, which now prohibits generally any net short position, whether achieved through short sales properly speaking or through derivatives, index trades or otherwise.

### **CONSOB extends deadline for restrictive measures on net short positions**

The Commissione Nazionale per le Società e la Borsa (CONSOB) has [extended](#) the deadline of its resolution no. 17902, dated 12 August 2011, which prohibits the holding of net short positions, or the increase of existing net short positions, including intraday, in relation to the share capital of certain issuers operating in the financial markets, until 30 September 2011. CONSOB has also extended the deadline of its resolution no. 17862 issued on 10 July 2011, which contains rules on reporting net short position on shares to CONSOB, until 14 October 2011.

CONSOB intends to continue monitoring the markets and, if market conditions allow and in consultation with other European regulators, to assess whether the temporary ban can be lifted. CONSOB has indicated that this assessment will take place in the course of September 2011.

### **CNMV extends temporary preventive measure on net short positions**

The Comisión Nacional del Mercado de Valores (National Securities Market Commission, CNMV) has [extended](#) the temporary ban on entering into transactions which might constitute or increase a net short position on Spanish financial stocks. The ban, which was introduced on 11 August 2011, has been extended on the same terms until 30 September 2011, based on article 85.2 j of Law 24/1988, of 28 July, on Securities Markets (SMA).

The CNMV intends to continue monitoring the impact of the temporary measure and, in any event, before the end of September 2011 and in consultation with other European regulators, to assess the opportunity to lift the temporary ban. According to the CNMV, the aim is to lift the ban as soon as market conditions allow and, to the extent possible, in a coordinated way.

### **AMF renews ban on taking net short positions and updates FAQs**

The Autorité des marchés financiers/Financial Markets Authority (AMF) has [renewed](#) the ban on creating any net short position or increasing any existing net short position, including intraday, in the equity shares or securities giving access to the capital of certain credit institutions and insurance companies, as specified in a list published by the AMF. The ban, which was introduced on 11 August 2011, has been renewed until further notice and for a period that cannot go beyond 11 November 2011. The AMF intends to continue monitoring the markets and, before the end of September 2011 and in consultation with other European regulators, to assess the opportunity to lift the temporary ban. According to the AMF, the aim is to lift the ban as soon as market conditions allow and, to the extent possible, in a coordinated way.

The ban applies to any natural or legal person, French or foreign, regardless of whether trading takes place in France or in another country, or on a regulated market or not.

An exemption applies for financial intermediaries acting as market makers or liquidity providers when they are operating under a contract with the relevant market undertaking or with the issuer concerned, or when acting as counterparty for block trades in equities.

In addition, on 23 August, the AMF published an updated set of frequently asked questions in relation to the ban. In particular, the FAQs were updated for the purposes of: (1) adapting the methods for calculating a net short position by including convertible bonds therein; and (2) specifying the conditions for implementing the decision in

relation to investments in funds replicating the reverse return of an index whose basket includes one or more of the securities concerned (e.g., reverse ETF).

[FAQs \(French\)](#)  
[FAQs \(English\)](#)

### Other news

#### **AIFMD: ESMA consults on future rules for alternative investment fund managers and treatment of third country entities**

ESMA has published a [consultation paper](#) setting out its proposals for the detailed rules on supervision and third country entities underlying the AIFMD. The proposals published in ESMA's consultation paper cover three areas: (1) supervisory co-operation and exchange of information; (2) delegation of portfolio or risk management functions to third country entities; and (3) assessment of equivalence of third country depositary frameworks.

The consultation paper, which complements ESMA's [draft advice](#) published for consultation in July, has been prepared in response to the EU Commission's request for assistance from ESMA's predecessor, CESR, in December 2010.

Responses are due by 23 September in order to ensure ESMA can finalise its advice to the Commission, which is due by 16 November 2011.

#### **IMF publishes working paper on taxation and regulation of banks**

The IMF has published a [working paper](#) which considers the structure, appropriate rate, and revenue yield of corrective taxation of financial institutions addressed to two externalities: (1) those that arise when such institutions are simply allowed to collapse; and (2) those that arise when, to avoid the harm this would cause, their creditors are bailed out.

The paper also considers whether corrective taxation or a regulatory capital requirement is the better way to address these concerns. It suggests a potential role for taxing bank borrowing, perhaps as an adjunct to minimum capital requirements, at marginal rates that rise quite sharply at low capital ratios (but are likely lower when the government cannot commit to its bailout policy), reaching levels higher than those of the bank taxes so far adopted or proposed.

#### **IOSCO and CPSS consult on requirements for OTC derivatives data reporting and aggregation**

IOSCO and the Committee on Payment and Settlement Systems (CPSS) have published a [consultative report](#) on the OTC derivatives data that should be collected, stored and disseminated by trade repositories. The report addresses Recommendation 19 in the Financial Stability Board's October 2010 report on implementing OTC derivatives market reforms, which called on the CPSS and IOSCO to consult with the authorities and the OTC Derivatives Regulators Forum in developing minimum data reporting requirements and standardised formats, and the methodology and mechanism for data aggregation on a global basis. The proposed requirements and data formats set out in the consultative report apply to both market participants reporting to trade repositories and to trade repositories reporting to the public and to regulators.

Comments are due by 23 September 2011. IOSCO and the CPSS intend to publish a final report by the end of 2011.

#### [Cover note](#)

#### **Wolfsberg Group publishes revised anti-corruption guidance**

The Wolfsberg Group has replaced its 2007 Wolfsberg Statement against Corruption with a revised, expanded and renamed version of the paper, the [Wolfsberg Anti-Corruption Guidance](#). The Wolfsberg Group has indicated that the impetus for this review includes the legal and regulatory developments and anti-bribery enforcement actions over recent years, particularly under the US Foreign Corrupt Practices Act. The Group has also noted that this, combined with increased regulatory scrutiny of financial institutions in the wake of the financial crisis, the increasing implementation across the world of the United Nations Convention Against Corruption, as well as new laws enacted to implement the OECD Convention Against Bribery in International Business Transactions and, finally, the coming into law of the UK Bribery Act, which introduces a wide reaching corporate offence of failing to prevent bribery as a result of not having implemented 'adequate procedures' to address bribery and corruption risks, has resulted in a revised paper.

The Wolfsberg Anti-Corruption Guidance includes a new Appendix which sets out the elements for an internal Anti-Corruption framework, suitable for an international financial institution. In addition, there are sections on roles and responsibilities, reporting, policies, and the programme framework. The programme framework includes risk assessments, due diligence in relation to third parties (including the use of intermediaries), political and charitable contributions, gifts and entertainment, whistle blowing, as well as controls (e.g. monitoring and surveillance) and communication, training and awareness.

### **Retail Distribution Review: FSA consults on proposed guidance**

The FSA has published [proposed guidance](#) setting out the answers to the most commonly asked questions at its recent Retail Distribution Review (RDR) roadshows. Comments are due by 22 September 2011.

### **Treasury Committee reports on future of cheques**

The Treasury Committee has published its [report](#) on the future of cheques, which welcomes the Payments Council's decision to retain cheques, but argues that the Council should no longer have the unfettered power to decide the future of cheques or other payment methods.

Amongst other things, the report recommends that the Treasury should make provision in the forthcoming Financial Services Bill to bring the Payments Council formally within the system of financial regulation. In addition, the report recommends that the Payments Council must obtain a commitment from banks to give the Council advance sight of any material related to the future availability of cheques that the banks send to their customers. The report also calls on the Payments Council to examine reintroducing the cheque guarantee card system that was withdrawn earlier in 2011.

#### [Written evidence](#)

### **FINMA issues circular on credit rating agencies**

The Financial Market Supervisory Authority (FINMA) has published a revised [circular](#) on credit rating agencies, following a consultation which ended in May 2011.

Amongst other things, the circular governs the recognition of institutions that can issue credit ratings for regulatory use and redefines FINMA's requirements on credit rating agencies for its various supervisory areas and standardises the conditions for recognition. In addition, the circular governs the regulatory use of ratings by banks and securities dealers as well as by insurance companies and by collective investment funds, and brings the relevant requirements in line with the current guidelines of international standards, taking into account the market environment in Switzerland.

The circular will enter into force on 1 January 2012.

#### [Press release](#)

### **Federal Council proposes amendments to withholding tax on interest on bonds and CoCos**

The Federal Council has [introduced](#) amendments to the withholding tax regime in relation to bonds, including contingent convertible bonds (CoCos) to be used for banks for regulatory capital purposes. In particular, the Federal Council is proposing that interest payments to natural persons domiciled in Switzerland will be subject to withholding tax for bonds issued in Switzerland as well as foreign bonds. Currently, bonds issued in Switzerland are subject to withholding tax on interest payments whereas bonds issued abroad are not. The Federal Council has indicated that the changes are intended to allow bonds, and in particular CoCos, to be issued in Switzerland on a more competitive basis and to improve legal certainty by using Swiss law as the applicable law.

The legislative amendments will come into force on 1 January 2013 at the earliest.

### **Federal Council implements amendments to Banking Act to increase depositor protection**

The Federal Council has [announced](#) that amendments to the Banking Act, which are intended to increase depositor protection, will become effective on 1 September 2011. The amendments, which were adopted by the Swiss Parliament in March 2011, put into law the measures which were introduced on a provisional basis in 2008.

Amongst other things, the amendments provide that: (1) deposits per customer and bank are protected up to CHF 100,000; (2) banks must cover protected deposits with assets situated in Switzerland; (3) payments of protected deposits by failed banks will be facilitated; (4) the maximum coverage of the protection will be

increased to CHF 6 billion; and (5) the restructuring procedure of failed banks will be improved by a number of measures.

### **MOFCOM consults on draft notice regarding direct investment of cross-border renminbi**

The Ministry of Commerce (MOFCOM) has circulated for consultation a [draft notice](#) on relevant issues regarding direct investment of cross-border renminbi, which is intended to expand the scale of foreign direct investment denominated in renminbi (RMB).

Amongst other things, the draft notice indicates that: (1) foreign direct investment can be made by offshore RMB raised in a legitimate manner; (2) RMB is not permitted to be invested in securities and financial derivatives, or to be used to extend entrustment loans or to repay onshore/offshore loans; and (3) competent departments of commercial administration at all levels have the approval authority in accordance with currently applicable regulations governing the approval of foreign investment, while previously all foreign investments in RMB was subject to the approval of the MOFCOM on a case-by-case basis.

Comments are due by 31 August 2011

### **CSRC consults on trial measures for supervision and administration of refinancing business**

The China Securities Regulatory Commission (CSRC) has published a [consultation draft](#) on 'Trial Measures for the Supervision and Administration of Refinancing Business', which amends the current rule that securities companies can only use their proprietary funds and securities to engage in margin trading and securities lending. The consultation draft officially introduces a new type of financial institution, the securities finance company (SFC), which is intended to promote the margin trading and securities lending business.

Amongst other things, the CSRC has indicated that: (1) the establishment of SFCs is subject to review and approval by the CRSC according to the State Council's decision; (2) SFCs shall not be profit-oriented as their sole purpose is to develop the margin trading and securities lending business in China; and (3) SFCs will provide refinancing to the securities companies by extending loans of cash or eligible securities, either in the SFC's own account or acquired elsewhere.

Detailed provisions in relation to the business operation of SFCs, including deposit requirements, origin of funds and securities, risk control, internal compliance, etc, are also set out in the consultation draft.

### **SFC consults on amendments to Takeovers Code**

The Securities and Futures Commission (SFC) has issued a [consultation paper](#) on proposed amendments to the Codes on Takeovers and Mergers and Share Repurchases. The proposed amendments are intended to facilitate market operations and make the disclosure of information more focused and relevant. Amongst other things, the proposals aim to: (1) amend the property valuation requirement so that it will only be applicable to related-party transactions or offers which involve special deals that require shareholder approval; (2) clarify that it is the responsibility of financial advisers, placing agents and acquirers of the voting rights to confirm the independence of placees; and (3) change from 10 days to 7 business days the prescribed period for payment of acceptances to allow share registrars and receiving agents a more manageable timeframe to process payments without compromising the interests of accepting shareholders.

Comments are due by 26 September 2011.

### **MAS consults on proposed amendments to Notice 637 on risk based capital adequacy requirements for banks**

The Monetary Authority of Singapore (MAS) has issued a [consultation paper](#) on the proposed amendments to MAS Notice 637 on risk based capital adequacy requirements for banks in Singapore. The proposed amendments are intended to incorporate the Basel Committee on Banking Supervision's Pillar 3 disclosure requirements on remuneration, which were issued on 1 July 2011.

Amongst other things, the proposed amendments would require Singapore-incorporated banks to disclose qualitative and quantitative information about their remuneration practices and policies covering the following areas: (1) governance structures overseeing remuneration; (2) design or operation of remuneration structure and frequency of review; (3) independence of remuneration for staff in risk and compliance functions; (4) risk adjustment methodologies; (5) the link between remuneration and performance; (6) long-term performance measures (i.e. deferral, malus, clawback); and (7) types of remuneration (i.e. cash or equity; fixed or variable remuneration).

The proposed amendments are set out in Part XI of MAS Notice 637. Comments are due by 14 September 2011.

## UPCOMING CLIFFORD CHANCE EVENT

### Annual Global Funds Conference

You are cordially invited to attend Clifford Chance's Annual Global Funds conference, which will take place at Clifford Chance's offices in 31 West 52 Street New York, NY 10019, 4th Floor Conference Centre from 8:30 am on 20 September 2011.

Regulatory and compliance issues remain firmly at the top of the priority list for fund managers across the globe, with a whole host of proposed reforms in the pipeline which look set to alter the global investment funds landscape significantly. From the Dodd-Frank Act to the AIFM Directive, the Advisors Act to the UK Bribery Act, changes to legislation on both sides of the Atlantic will have a profound effect on the way in which the funds industry is regulated in the future. In light of the extra territorial nature of much of the new regulation, we will bring together experts from Europe, the US and Asia who will consider these issues comparatively, looking at the challenges fund industry participants face in developing approaches and policies to achieve global compliance.

To register yourself and any interested colleagues for this seminar please RSVP to NY Seminars at [seminars.nyc@cliffordchance.com](mailto:seminars.nyc@cliffordchance.com) providing the name, job title, company and email address of all attendees.

If you have any questions, please do not hesitate to contact Fiona Grafton at [fiona.grafton@cliffordchance.com](mailto:fiona.grafton@cliffordchance.com).

[Invitation](#)

## RECENT CLIFFORD CHANCE BRIEFINGS

### Belgian short selling ban stretched far – too far? – by the FSMA

The FSMA has again extended the scope of its prohibition of shorting Belgian financial stocks. The prohibition now catches all types of trades, including derivatives, that result in a net short position. The legality of the revised rules is debatable and the FSMA, in its desire to avoid market disorder, may actually have been too ambitious and may have overstepped its powers.

This briefing provides further details in this respect and on the scope of the revised rules.

Please contact Barbara Kahn by email at [barbara.kahn@cliffordchance.com](mailto:barbara.kahn@cliffordchance.com) for a copy of this briefing.

### Recent PRC legal developments relevant to the aviation sector – IDERA and others

This briefing highlights recent regulatory changes in China that have an important impact on the aviation sector. These include: the Chinese aviation authority's revised procedures for IDERA; the continuation of the grandfathering of tax-free treatment for cross-border leases; the Chinese government's policy support for the Tianjin free trade zone; and the requirement for a guarantee to be made to the Customs office for exemption of import tax on imported aircraft as loan collateral.

English version

[http://www.cliffordchance.com/publicationviews/publications/2011/08/recent\\_prc\\_legaldevelopmentsrelevanttoth.html](http://www.cliffordchance.com/publicationviews/publications/2011/08/recent_prc_legaldevelopmentsrelevanttoth.html)

Chinese version

[http://www.cliffordchance.com/publicationviews/publications/2011/08/recent\\_prc\\_legaldevelopmentsrelevanttoth.html](http://www.cliffordchance.com/publicationviews/publications/2011/08/recent_prc_legaldevelopmentsrelevanttoth.html)

### First High Court case in Japan – Arranger's liability in syndicated loan transactions

On 14 April 2011, the Nagoya High Court issued a judgment ordering the arranger in a syndicated loan transaction to pay to the participating financial institutions a total of approximately JPY300 million in damages resulting from a breach of its obligation to provide information. The judgment came as the first High Court judgment in Japan to rule on the arranger's breach of this obligation. It has been attracting much attention and has been the centre of much discussion in the market. One of the reasons is that the Nagoya High Court overturned and affirmed the arranger's liability after such liability was previously denied by the Nagoya District Court in the first instance.



This briefing briefly explains the judgment and discusses future actions to be taken in light of the judgment.

English version

[http://www.cliffordchance.com/publicationviews/publications/2011/08/first\\_high\\_courtcaseinjapan-arranger0.html](http://www.cliffordchance.com/publicationviews/publications/2011/08/first_high_courtcaseinjapan-arranger0.html)

Japanese version

[http://www.cliffordchance.com/publicationviews/publications/2011/08/first\\_high\\_courtcaseinjapan-arranger.html](http://www.cliffordchance.com/publicationviews/publications/2011/08/first_high_courtcaseinjapan-arranger.html)

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