

International Regulatory Update

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MiFID review: European Commission publishes legislative proposals

The European Commission has published its proposals, consisting of a directive and a regulation, to revise MiFID.

Amongst other things, the Commission's proposals introduce a new type of trading venue, the organised trading facility (OTF), into MiFID's regulatory framework. They also introduce new rules for algorithmic and high frequency trading activities, including the requirement for all algorithmic traders to become properly regulated, provide appropriate liquidity and rules to prevent them from moving in and out of markets. In addition, the proposals introduce a new trade transparency regime for non-equities markets (bonds, structured finance products and derivatives).

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In coordination with ESMA and under defined circumstances, supervisors will be able to ban specific products, services or practices in case of threats to investor protection, financial stability or the orderly functioning of markets. The proposals also envisage stronger supervision of commodity derivatives markets and introduce a position reporting obligation by category of trader. In addition, they empower financial regulators to monitor and intervene at any stage in trading activity in all commodity derivatives, including in the shape of position limits if there are concerns about disorderly markets.

The proposals also set new requirements for portfolio management, investment advice and the offer of 'complex' financial products such as structured products. Finally, rules on corporate governance and managers' responsibility are introduced for all investment firms.

[Proposed directive](#)
[Proposed regulation](#)

Market abuse review: European Commission publishes legislative proposals

The European Commission has published a proposal for a regulation on insider dealing and market manipulation, which updates the existing framework provided by the Market Abuse Directive.

Amongst other things, the Commission's proposal extends the scope of the existing framework to financial instruments only traded on multilateral trading facilities (MTFs), other organised trading facilities (OTFs) and over-the-counter so that trading on all platforms and of all financial instruments which can impact them will now be covered by market abuse legislation. It also clarifies which high frequency trading (HFT) strategies constitute prohibited market manipulation, such as submitting orders without an intention to trade but to disrupt a trading system ('quote stuffing').

In addition, the proposal extends the scope of the existing framework to market abuse occurring across both commodity and related derivative markets, and extends the current reporting of suspicious transactions to suspicious unexecuted orders and suspicious OTC transactions.

The proposal also requires Member States to provide for the protection of whistleblowers and sets common rules where incentives are offered for reporting information about market abuse and introduces a new offence of 'attempted market manipulation' to allow regulators to impose a sanction in cases where someone tries to manipulate the market but does not succeed in actually trading.

In addition, the Commission has published a proposal for a directive on criminal sanctions for market abuse which requires Member States to introduce criminal sanctions for the offences of insider dealing and market manipulation where these are committed intentionally. Member States will also be required to impose criminal sanctions for inciting, aiding and abetting market abuse, as well as for attempts to commit such offences.

[Proposed regulation](#)
[Proposed directive](#)

Short selling and CDS: European Parliament and Council reach agreement on proposed regulation

Representatives of the European Parliament, Council and Commission have reached agreement on the proposed regulation on short selling and certain aspects of credit default swaps (CDS). The regulation will contain a ban on uncovered sovereign CDS, i.e. buying CDS protection otherwise than for hedging purposes, but subject to a limited power for national regulators temporarily to suspend the ban when it interferes with sovereign debt markets. The Commission has indicated that the new rules on short selling of securities will require an investor either to have agreed to borrow the securities or to have arrangements with a third party confirming that the securities have been located and that the necessary measures have been taken for the investor to have a reasonable expectation that settlement can be effected when due. The proposed regulation also includes new rules on reporting of net short positions to regulators and to the market and new powers for ESMA to coordinate Member State actions.

The Parliament expects to have a plenary vote on the agreed text at the end of November 2011, which will also need to be endorsed by the Council before the new regulation comes into force.

[Press release](#)
[Statement by Commission Barnier](#)

IOSCO publishes recommendations on market integrity

IOSCO has published its [final report](#) on regulatory issues raised by the impact of technological changes on market integrity and efficiency. The report contains recommendations intended to promote market integrity and efficiency and to mitigate the potential risks posed to the financial system by the latest technological developments including high frequency and algorithmic trading.

Amongst other things, the report recommends that regulators should seek to ensure that trading venues have in place suitable trading control mechanisms (such as trading halts, volatility interruptions, limit-up-limit-down controls, etc.) to deal with volatile market conditions. It also indicates that all order flow of trading participants, irrespective of whether they are direct venue members or otherwise, must be subject to appropriate controls, including automated pre-trade controls. The report adds that these controls should be subject to the regulatory requirements of a suitable market authority or authorities.

In addition, the report states that regulators should continue to assess the impact on market integrity and efficiency of technological developments and market structure changes, including algorithmic and high frequency trading, and that market authorities should monitor for novel forms or variations of market abuse that may arise as a result of technological developments and take action as necessary.

IOSCO intends to carry out further work to assess the challenges that technological changes pose for regulators in their market surveillance, and the impact of changes in market structure on market efficiency and integrity.

Basel III: Basel Committee reports implementation

The Basel Committee on Banking Supervision has published its first [progress report](#) on Basel III implementation. The report provides an overview of its members' progress in adopting Basel II, Basel 2.5 and Basel III, as of the end of September 2011. It focuses on the status of domestic rule-making processes to ensure that the Committee's capital standards are transformed into national law or regulation according to the internationally agreed timeframes.

The report is one element of the Committee's framework to monitor and review its members' implementation of the Basel regulatory capital framework, which was announced on 28 September 2011. A subsequent element of the Committee's framework will be to review the consistency of members' national rules or regulations with the international minimum standard to identify differences that could raise prudential or level playing field concerns. The framework will also review the measurement of risk-weighted assets in both the banking book and the trading book to ensure consistency in practice across banks and jurisdictions. The Committee has indicated that these reviews are likely commence by the beginning of 2012.

G20 endorse framework on systemically important financial institutions

A [Communiqué](#) from the G20 Finance Ministers and Central Bank Governors has been published following their meeting in Paris on 14 and 15 October 2011.

Amongst other things, the G20 endorsed a comprehensive framework to address risks associated with systemically important financial institutions, including strengthened supervision, key attributes of effective resolution regimes, a framework for cross-border cooperation and recovery and resolution planning, as well as additional loss absorbency requirements for those banks determined as global systemically important financial institutions.

The G20 also agreed on initial recommendations and a work plan to strengthen regulation and oversight of shadow banking, and reaffirmed their commitment to implementing agreed reforms on OTC derivatives, reducing overreliance on external credit ratings, and all Basel agreements on banking regulation within agreed timelines.

FSA issues finalised guidance on 'buy out' awards to new staff

The FSA has issued finalised [guidance](#) relating to situations where a firm is hiring a new staff member and is seeking to 'buy out' an existing award of deferred variable remuneration made by that individual's previous employer.

Although the FSA does not encourage the use of buy out awards, such awards may normally be made without contravening the Remuneration Code in situations where: (1) the firm has taken reasonable steps to ensure that the buy out is not more generous in amount or terms than the award from the previous employer – the guidance indicates that this includes taking reasonable steps to ensure that the award contains at least a similar proportion of non-cash instruments as the deferred award from the previous employer, as well as taking reasonable steps to obtain evidence of the existing award; and (2) the buy out is subject to appropriate performance adjustment

requirements – the guidance emphasises that allowing a buy out award to operate to remove performance adjustment requirements from an award would not be consistent with effective risk management.

HM Treasury launches review of its response to financial crisis

HM Treasury has [announced](#) that it is reviewing its response to the financial crisis. The review, which is being led by Sharon White, formerly a Director General at the Ministry of Justice and the Department for International Development, will examine: (1) the Treasury's capability on financial services ahead of the crisis; (2) the pace at which the Treasury built its capability when the crisis hit; and (3) whether the capability and senior management arrangements put in place to handle the crisis and the aftermath have been adequate.

The review follows recommendations from the Public Accounts Committee and the National Audit Office. The final report is due to be publicly presented to the Treasury's executive management board no later than Easter 2012.

ASIC consults on equity market structure issues

The Australian Securities and Investments Commission (ASIC) has published a second-phase [consultation paper \(CP 168\)](#) on equity market structure issues arising from recent and anticipated developments in Australia's financial markets.

In particular, CP 168 seeks views on proposed market integrity rules relating to: (1) automated trading including high frequency trading; (2) volatility controls for extreme price movements; (3) enhanced data for supervision; (4) the product scope of best execution; and (5) pre-trade transparency and price formation in the market.

Comments are due by 20 January 2012.

SFC issues conclusions and launches further consultation on short position reporting rules

The Securities and Futures Commission (SFC) has announced the conclusions of its May 2011 consultation exercise on the Securities and Futures (Short Position Reporting) Rules and has issued a further consultation in light of the feedback received. Noting the industry's concerns regarding the difficulty of reporting short positions on a gross basis, the SFC is proposing to revise the rules to require the reporting of net short positions.

The SFC has indicated that further guidance on reporting will be provided in due course. Subject to the legislative process, the SFC intends to implement the short position reporting requirement by the end of the first quarter of 2012.

Comments are due by 4 November 2011.

[Consultation conclusions and further consultation paper](#)

SFC and HKMA consult on proposed regulatory regime for OTC derivatives market

The Securities and Futures Commission (SFC) and the Hong Kong Monetary Authority (HKMA) have issued a [joint consultation paper](#) on a proposed regulatory regime for Hong Kong's OTC derivatives market.

The proposed regime will be set out in the Securities and Futures Ordinance (SFO), and will be jointly overseen and regulated by the HKMA and the SFC. OTC derivatives transactions will have to be reported to the trade repository, which is being set up by the HKMA;

In addition, standardised OTC derivatives transactions will have to be centrally cleared through a designated central counterparty (CCP). Initially, OTC derivatives transactions will not be required to be traded on an exchange or electronic trading platform. The consultation paper states that further study is needed to assess how best to implement such a requirement in Hong Kong.

OTC derivatives activities by authorised institutions (i.e. banks) are already subject to the HKMA's regulatory oversight in respect of capital, liquidity and other relevant requirements and the HKMA and SEC have indicated that this should remain so under the proposed regime. The HKMA and SEC have stated that, in order to bridge the regulatory gap that would otherwise exist, there is a need to require entities that are not authorised institutions and engage in OTC derivatives activities (other than as end users) to be licensed for a new Type 11 regulated activity under the SFO.

Large players who are not regulated by the HKMA or the SFC may be subject to certain obligations and requirements, such as producing information regarding their OTC derivatives activities, and reducing their OTC derivatives positions, if so requested by the SFC in extreme situations.

The SFC and the HKMA intend to implement the finalised regime by the end of 2012. Comments are due by 30 November 2011.

FRB approves final rule implementing Dodd-Frank resolution plan requirement

The Board of Governors of the Federal Reserve System (FRB) has approved a [final rule](#) to implement the resolution plan requirement in the Dodd-Frank Wall Street Reform and Consumer Protection Act. This is a joint rule by the FRB and the Federal Deposit Insurance Corporation (FDIC), which approved the rule on 13 September 2011. The rule requires bank holding companies with assets of USD 50 billion or more and nonbank financial firms designated by the Financial Stability Oversight Council for supervision by the FRB to annually submit resolution plans to the FRB and the FDIC.

SEC requests comment on proposed registration rules for securities-based swap dealers and major security-based swap participants

The SEC has, accordance with provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, voted to propose rules laying out the process by which security-based swap dealers and security-based swap participants must register with the SEC. The proposed rules would require security-based swap entities to register by electronically filing a new form, Form SBSE.

Amongst other things, proposed rule would require security-based swap entities to: (1) promptly update their forms if the forms become inaccurate; (2) have a knowledgeable senior officer provide a certification as to the firm's financial, operational and compliance capabilities to the SEC within a specified timeframe; and (3) obtain and retain certain information from each of its associated persons that are involved in effecting security-based swaps.

Comments on the SEC's proposal should be submitted within 60 days of its publication in the Federal Register, which is expected shortly.

[Press release](#)

RECENT CLIFFORD CHANCE BRIEFINGS

Market Abuse – European Commission proposes new EU regime

The European Commission has now published its formal legislative proposals for a new Market Abuse Regulation (MAR) and a new Market Abuse Directive (MAD2) to replace the 2003 Market Abuse Directive (MAD). The new Regulation seeks to create a single, directly applicable EU-wide rulebook for market abuse enforced by national administrative sanctions, while the new Directive would require all Member States to introduce criminal sanctions for intentional insider dealing and market manipulation. The new regime would also broaden the coverage of the EU rules in a number of ways, in particular for instruments traded on trading facilities other than regulated markets and for emissions allowances and commodities.

This briefing discusses the proposals.

http://www.cliffordchance.com/publicationviews/publications/2011/10/market_abuse_europeancommissionpropos esnewe.html

New EU market abuse, reporting and registration rules for wholesale energy markets

A new Regulation on Energy Market Integrity and Transparency (REMIT) will impose for the first time EU-wide rules on insider dealing and market manipulation for wholesale electricity and natural gas markets (including derivatives), based on the existing Market Abuse Directive (MAD). In addition, REMIT creates an EU-wide reporting and registration regime for persons dealing in wholesale energy products. The Regulation will come into force shortly, but transitional provisions delay the immediate impact of the reporting and registration regime.

This briefing discusses the new regime.

http://www.cliffordchance.com/publicationviews/publications/2011/10/new_eu_market_abusereportingandregistra tio.html

Financial Transaction Tax – Update

Recent press coverage has speculated that the European Commission's proposed financial transaction tax (FTT) could be introduced by majority vote, even if the UK and others are opposed.

This briefing discusses whether these reports have any legal basis. We also look at two key difficulties with the current proposal: the 'cascade' effect and the fact that, unlike UK and Irish stamp duty, the FTT incentivises banks and others to move their business out of the EU. Finally, we attempt to predict what the likely future of the tax will be.

http://www.cliffordchance.com/publicationviews/publications/2011/10/financial_transactiontaxupdate.html

Transaction Services Newsletter – October 2011

Transaction Services Newsletter is a bi-monthly publication designed for business and legal professionals working in cash management and securities services.

This edition focuses on the entry into force on 1 January 2012 of article 69 of the Payment Services Directive, which provides that a payer's payment service provider must ensure that a payment is credited to the payee's payment service provider's account by the end of the next business day after the point in time of receipt of the payment instruction.

http://www.cliffordchance.com/publicationviews/publications/2011/10/transaction_servicesnewsletter-october2011.html

UK REITs – the government confirms changes will be made

The UK government has given its initial response to the Budget REIT consultation. The main purpose of the REIT consultation was to identify changes to the rules that would encourage new investment in the real estate sector (particularly in residential property). The government identified various changes that it was willing to contemplate, whilst also making clear that certain changes were outside the scope of the consultation – in particular, changes to allow private REITs. Comment was then invited – and received in abundance it seems. HM Treasury note that 53 written responses were received, from a range of sources, and that about 20 meetings were held with stakeholders.

This briefing discusses the government's proposed changes following the consultation.

http://www.cliffordchance.com/publicationviews/publications/2011/10/uk_reits_-_the_governmentconfirmschangeswil.html

Moral dilemma in Court of Appeal Pension case

On 14 October, the Court of Appeal decided unanimously that pension liabilities arising post insolvency as a result of the Pensions Regulator's moral hazard powers were to maintain their super priority ahead of all creditors other than those with a fixed charge. Whilst the decision comes as no surprise, it is still of great concern to those involved in these cases and other insolvencies where there is a defined benefit pension scheme with a deficit. It will cause further delay to the ongoing administration proceedings for Lehman Brothers International (Europe) and the Nortel Networks Group, including any distributions to creditors. It was recognised by the Appeal judges that the decision may have a serious impact on the rescue culture itself.

This briefing discusses the Court of Appeal's decision.

http://www.cliffordchance.com/publicationviews/publications/2011/10/moral_dilemma_incourtofappealpensioncase.html

UK Employment Update

The October 2011 edition of Employment News in Brief reports on more developments in the push to achieve greater gender diversity in the boardroom. It also looks at a case that confirms that directors can be personally liable for compensation awarded for acts that amount to religious discrimination against an employee and a case that highlights that changes may be made to terms and conditions after a TUPE transfer if motivated by the desire to conform to market practice. Finally, this edition outlines the government's proposals to increase the qualifying period for unfair dismissal rights and to introduce fees to pursue Employment Tribunal claims.

http://www.cliffordchance.com/publicationviews/publications/2011/10/uk_employment_update-october2011.html

HKMA and SFC begin joint consultation process relating to reporting, clearing and trading of OTC derivatives in Hong Kong

The Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission (SFC) have on 17 October 2011 issued a joint consultation paper relating to the reporting, clearing and trading of OTC derivatives in Hong Kong. The consultation paper also outlines the regulators' current thinking in respect of regulating the OTC derivatives market through amendments to the Securities and Futures Ordinance (SFO) and the introduction of a new regulated activity.

This briefing summarises the important proposals set out in the consultation paper.

<http://inform.cliffordchance.com/ve/3161tK91RL60HR5/VT=1/stype=dload/OID=311101912538427>

Remittance of RMB funds raised offshore – an update on regulatory developments

Both the Ministry of Commerce (MOFCOM) and the People's Bank of China (PBOC) have issued important circulars to clarify the regulatory framework for RMB foreign direct investment. This updated version of the July 2011 briefing paper entitled 'Cross-border RMB financing: how are funds raised offshore remitted into China' explains the source of RMB which qualifies for RMB foreign direct investment, the simplified approval procedures and the permissible scope of investment using such funds under the new MOFCOM circular. It further discusses the new PBOC circular which prescribes an account opening system for RMB foreign direct investment, and the implications of both circulars on RMB cross-border loans.

English version

http://www.cliffordchance.com/publicationviews/publications/2011/10/remittance_of_rmbfundsraisedoffshorea.html

Chinese version

http://www.cliffordchance.com/publicationviews/publications/2011/10/remittance_of_rmbfundsraisedoffshorea0.html

US OTC derivatives reforms – Impact on UK and other non-US asset managers

In the past year, the CFTC, the SEC and prudential regulators in the United States have produced drafts of many of the detailed rules to implement the swap market reforms contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act. Most of the principal changes they embody are expected to come into effect during 2012, and market practitioners need to understand the scope of the work ahead of them.

Prepared with the Investment Management Association, this briefing summarises the key provisions of the draft rules as they apply to investment managers and their clients. Many of the provisions described in the summary apply equally to other market participants.

http://www.cliffordchance.com/publicationviews/publications/2011/10/us_otc_derivativesreformsimpactonukan.html

Cross-Border Litigation Series – United States Businesses Have Powerful New Weapon to Combat the Overseas Theft of Trade Secrets

In a split ruling this week, the United States Federal Circuit Court of Appeals handed United States-based businesses a powerful weapon to combat the overseas theft of their trade secrets. The Court held that any product manufactured overseas with the assistance of purloined trade secrets belonging to a United States-based business can be refused entry into the United States, even if the theft of the secret occurred entirely on foreign soil. The decision significantly reverses what has been a clear multi-year trend in the United States Courts to limit judicial recourse and remedies to wrongdoing that occurs in the United States, while simultaneously asserting that United States law is a force to be reckoned with in defining the limits of acceptable business conduct around the world.

This briefing discusses the ruling.

http://www.cliffordchance.com/publicationviews/publications/2011/10/cross-border_litigationseries-unitedstate.html

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