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International Regulatory Update

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SHORT SELLING UPDATE

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- CONSOB extends restrictive measures on net short positions and reporting requirements and imposes ban on naked short selling
- ESCA releases draft regulations on short selling

AIFM Directive: ESMA publishes technical advice on implementing measures

ESMA has published its technical advice to the European Commission on possible implementing measures on the AIFM Directive.

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

In particular, the technical advice covers: (1) general provision for managers, authorisation and operating conditions; (2) governance of alternative investment funds' depositaries; (3) transparency requirements and leverage; and (4) third countries.

European Commission publishes work programme for 2012

The European Commission has published its work programme for 2012. Amongst other things, the work programme sets out the Commission's plans for the following proposals:

- a communication on shadow banking;
- an initiative on pre-contractual disclosures on complex investment products (PRIPs);
- an amendment to the UCITS Directive as regards rules on depositary functions, manager remuneration policy, and administrative sanctions (UCITS V);
- a possible framework for crisis management and resolution for financial institutions other than banks;
- a revision of the Insurance Mediation Directive (IMD);
- a Securities Law Directive;
- a legislative instrument on close-out netting;
- a review of the Third Anti Money Laundering Directive; and
- an amendment to the Financial Conglomerates Directive.

Annex

Credit rating agencies: European Commission publishes legislative proposals

The European Commission has published its legislative proposals for further amendments to the EU rules on credit rating agencies (CRAs), consisting of a proposed regulation amending Regulation 1060/2009 on CRAs and a proposed directive amending the UCITS Directive and the AIFM Directive in respect of the excessive reliance on credit ratings.

Amongst other things, the proposed changes to the UCITS Directive and the AIFMD introduce the principle that investment managers should not rely solely on external credit ratings and empower the Commission to further specify this principle in delegated acts.

CRAs and rated entities will be required to disclose more information underlying the ratings to professional investors.

A CRA should not issue ratings for a period of more than three years on an issuer that pays the agency for that rating, and ratings from two different CRAs would be required for structured finance instruments where such ratings are paid by the issuer.

CRAs will need to provide more information on the reasons behind sovereign ratings and to update the ratings every six months (rather than the current 12 months) in order to make sovereign ratings more transparent and reliable.

The proposals also introduce civil liability for CRAs which, intentionally or with gross negligence, infringe the regulation thereby causing damage to investors. Civil liability claims would be brought before national courts and the burden of proof would rest on the CRA.

BIS reports on macrofinancial implications of alternative configurations for access to central counterparties in OTC derivatives markets

The Bank for International Settlements' (BIS') Committee on the Global Financial System has published a report on the macro-financial implications of alternative configurations for access to central counterparties in OTC derivatives markets.

The report notes that various alternative access arrangements are under consideration for the central clearing of OTC derivatives trades, and that several jurisdictions are exploring the establishment of domestic central counterparties (CCPs) and the possible benefits of establishing links between them. According to the

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Committee, the conditions under which market participants obtain access to central clearing could have important implications for financial stability and efficiency.

Basel Committee updates interpretive issues regarding revisions to Basel II market risk framework

The Basel Committee on Banking Supervision has published an updated version of its document entitled 'Interpretive issues with respect to the revisions to the market risk framework', in which the Committee provides responses to interpretive issues regarding the revisions to the Basel II market risk framework and the guidelines for computing capital for incremental risk in the trading book.

BIS reports on global liquidity

The Bank for International Settlements' (BIS') Committee on the Global Financial System has published a report which analyses global liquidity from a financial stability perspective, using two concepts: (1) official liquidity, which is ultimately provided by central banks; and (2) private sector liquidity, which is created largely through the cross-border operations of banks and other financial institutions.

The report notes that private sector liquidity can give rise to international spillovers, as many financial institutions provide liquidity across borders. According to the report, this international component of liquidity can be a potential source of instability because of its own dynamics or because it amplifies domestic imbalances or cyclical movements.

The report argues that policy responses to global liquidity call for a consistent framework that considers all phases of global liquidity cycles, countering both surges and shortages, and that truly global liquidity shocks necessitate direct interventions in amounts large enough to break downward liquidity spirals. According to the report, only central banks have this ability.

Retail Distribution Review: FSA consults on adviser charging and treatment of legacy assets

The FSA has published a consultation paper (CP11/26) on the distribution of retail investments. In particular, CP11/26 sets out the FSA's draft guidance on how 'legacy assets', i.e. retail investment products purchased by a retail client before the Retail Distribution Review (RDR) rules come into effect and which the client is still holding when the rules are in force, should be treated under the RDR adviser charging rules.

Comments are due by 16 January 2012.

HM Treasury issues statement on money laundering controls in overseas jurisdictions

HM Treasury has issued a statement containing its advice about risks posed by unsatisfactory money laundering controls in a number of overseas jurisdictions.

The Treasury's advice follows the Financial Action Task Force's (FATF's) October 2011 public statement which identified: (1) jurisdictions with ongoing and substantial money laundering and terrorist financing risks; and (2) jurisdictions which have strategic anti-money laundering and combating the financing of terrorism (AML/CFT) deficiencies for which they have developed an action plan with the FATF.

The Treasury draws the attention of UK financial institutions and other persons regulated for money-laundering purposes to the FATF statements in respect of each of those jurisdictions, and advises them to take the FATF's assessment into account in respect of their systems and controls to counter financial crime. In particular, the Treasury advises all UK businesses regulated under the Money Laundering Regulations 2007, whether financial institutions or other regulated persons, to treat transactions associated with Iran and the Democratic People's Republic of Korea as situations that by their nature can present a higher risk of money laundering or terrorist financing, and which therefore require increased scrutiny, enhanced due diligence, and ongoing monitoring, particularly in the case of correspondent relationships.

The Treasury's statement supercedes previous advice issued in connection with AML deficiencies, specifically its advice issued on 26 July 2011, with immediate effect.

HKMA enhances monitoring of banks engaged in Mainland businesses

The Financial Services and the Treasury Bureau (FSTB) has announced that the Hong Kong Monetary Authority (HKMA) has enhanced its monitoring of banks' engagement in Mainland China-related business. The monitoring is intended to assess whether there is any deterioration in banks' underwriting standards and their concentration risk. The FSTB notes that the HKMA has required banks to make regular submissions of more comprehensive

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and detailed information for risk analysis, and increased the number and frequency of its regular and thematic on-site examinations of banks. Banks have also been required to increase their regulatory reserve to build up a bigger cushion against possible deterioration in asset quality in the future.

APRA consults on implementation of Basel III liquidity reforms

The Australian Prudential Regulation Authority (APRA) has published a discussion paper and draft Prudential Standard APS 210 outlining its proposed implementation of the Basel III liquidity reforms in Australia.

APRA is proposing to apply the Basel III liquidity coverage ratio and net stable funding ratio to the larger authorised deposit-taking institutions (ADIs). However, it does not intend to apply these standards to ADIs that are subject to a simple quantitative metric, the minimum liquidity holdings regime. The enhanced qualitative requirements will apply to all ADIs in Australia.

APRA is proposing to follow the Basel Committee's timetable for the implementation of the new global liquidity standards. Accordingly, the liquidity coverage ratio requirement will become effective from 1 January 2015 and the net stable funding ratio requirement from 1 January 2018. APRA is also proposing that the qualitative requirements outlined in the package become effective when the revised APS 210 is implemented.

Comments are due by 17 February 2012. APRA intends to publish a final Prudential Standard APS 210 Liquidity in mid-2012 and to consult on the detailed reporting requirements associated with the Basel III liquidity reforms in early 2012.

Australian Council of Financial Regulators launches review of financial market infrastructure regulation

The Council of Financial Regulators has published a consultation paper on proposals to enhance the supervision of Australia's financial market infrastructure. The proposals include new powers to require certain systemically important market infrastructures to have key aspects of their operations located in Australia and overseen by 'fit and proper' persons, as well as increased power for regulators to intervene in the event of infrastructure experiencing substantial difficulties. The consultation paper proposes strengthening the regulators' powers to include the capacity to make direct interventions in the operations of financial market infrastructures, including through enhanced powers to issue directions and, in certain specific circumstances, to step in to take control of financial market infrastructures.

Comments are due by 2 December 2011.

ESCA releases draft regulations on market making, securities lending and liquidity provision

The UAE Securities and Commodities Authority (ESCA) has released draft regulations on market making, securities lending and liquidity provision.

Under the draft regulation on market making, companies which are authorised brokers in the UAE and companies which hold a commercial banking or investment banking license from the Central Bank of the UAE and who comply with certain other requirements will be eligible to apply for a market making license. A company which has obtained a market making license is also eligible to be appointed as a liquidity provider by an issuer whose shares are listed on a market in the UAE.

Under the draft regulation on securities lending, authorised brokers and market makers in the UAE will be eligible to apply for permission to undertake securities lending and borrowing activities. Institutional investors will be able to enter into securities lending and borrowing transactions in relation to securities listed on the Dubai Financial Market and the Abu Dhabi Securities Exchange with or through appropriately licensed brokers and market makers.

Under the draft regulation on liquidity provision, any market maker acting as a liquidity provider must enter into an agreement with the issuer setting out the terms under which it will provide liquidity services. The relevant market defines the necessary liquidity provision obligations for market makers. Liquidity providers will be subject to additional liquidity provision obligations set by the relevant issuer (subject to a limit on the maximum capital an issuer can allocate to liquidity provision).

These proposals have been introduced as part of a package of new regulations, which also cover short selling (see separate item in the short selling section).

Comments on the draft regulations are due by 30 November 2011.

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Clifford Chance launches Global M&A Toolkit

Clifford Chance has launched its Global M&A Toolkit, a new online service for M&A professionals and anyone involved in M&A transactions. The Global M&A Toolkit comprises a growing collection of web-based transaction tools and in-depth analysis of the most important market and regulatory developments in M&A regimes across the globe. It features special access to Clifford Chance's leading cross-border M&A databases, informative videos, guides, handbooks and publications covering the key issues in Global M&A.

RECENT CLIFFORD CHANCE BRIEFINGS

Contentious Commentary – a review for litigators

Contentious Commentary provides a summary of recent developments in litigation. Headlines in this edition include, amongst others: (1) market must be available at the time of breach; (2) losses arising from Lehman's collapse unforeseeable; (3) freezing injunction must exempt payments in ordinary course; (4) no undertaking in damages required from FSA; (5) UK opts out of EAPOs; and (6) FSA stopped from using privileged materials.

http://www.cliffordchance.com/publicationviews/publications/2011/11/contentious_commentary-november2011.html

The pledge in the Spanish Insolvency Law

This briefing considers the proposed changes to the Spanish law on pledges over future credit rights in terms of whether they are accorded the benefit of special privileges on insolvency. These changes are part of the Law on the Reform of the Insolvency Law 22/2003 of 9 July which was approved on 21 September 2011 and is to enter into force on 1 January 2012.

http://www.cliffordchance.com/publicationviews/publications/2011/11/pledge_of_or_overfuturecreditsandpledg.html

Polish Legislation Newsletter

The Polish Legislation Newsletter summarises selected recent changes to Polish law. The September to November 2011 edition contains information on, amongst other things: (1) an Act on Payment Services; (2) an Act amending the Act on the Protection of Employee Claims in the Event of Insolvency of the Employer and certain other Acts; (3) an Act amending the Banking Law and the Act on Consumer Credit; (4) an Act amending the Commercial Companies Code; and (5) an Act amending the Act on Real Estate Management and certain other Acts.

http://www.cliffordchance.com/publicationviews/publications/2011/11/polish_legislationnewsletteroctober-novembe.html

Japan – Parallel Imports: Which legal framework?

The main channel for importing certain goods, including high quality goods, in Japan is through retailers and other official intermediaries: products are imported by wholesalers, distributors or agents (often the manufacturer's local subsidiary). An alternative route is that of parallel imports, which involves the import and resale of non-counterfeit goods without the manufacturer's consent. These goods are commonly exchanged in the Japanese 'grey market' which thrives on price differentiation between countries. Parallel imports raise important questions, in particular, what defences are available to manufacturers and their authorised distributors?

http://www.cliffordchance.com/publicationviews/publications/2011/11/japan_-_parallelimportswhichlegalframework0.html

US Regulatory Update – SEC issues first annual whistleblower report

On 15 November 2011, the SEC Office of the Whistleblower issued the Annual Report on the Dodd-Frank Whistleblower Program for Fiscal Year 2011. The report provides important insights into the controversial whistleblower program. The SEC received 334 tips in the program's first 7 weeks. Those tips have been dispersed across a broad range of violations and have emanated from across the United States and the globe. In short, the bounties have attracted significant attention at the outset of the program.

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This briefing provides an overview of the report.

http://www.cliffordchance.com/publicationviews/publications/2011/11/clifford_chance_usregulatoryupdatesecissue.html

US covered bonds – Senate introduces legislation to encourage market development

On 9 November 2011, Senator Kay Hagan (D-NC) and Senator Bob Corker (R-TN) and co-sponsors Chuck Schumer (D-NY) and Mike Crapo (R-ID) introduced the 'United States Covered Bond Act' to the United States Senate. The bi-partisan Senate bill is intended to promote the development of a covered bond market in order to diversify the sources of financing available in the United States, thereby increasing both retail and commercial lending. This bill is the Senate's response to H.R. 940, which passed the Financial Services Committee of the House of Representatives in June 2011 and is currently pending before the House Ways and Means Committee.

This briefing discusses the Senate bill and compares it with H.R. 940.

http://www.cliffordchance.com/publicationviews/publications/2011/11/us_covered_bondssenateintroduceslegislatio.html

The IRS releases proposed regulations regarding taxation of investments by foreign governments

On 2 November 2011, the IRS released a set of proposed regulations under Section 892 of the Internal Revenue Code, which exempts certain investment income earned by foreign governments from US taxation. The regulations limit the extent to which entities controlled by foreign governments will be treated as engaged in 'commercial activity', a characterization which disqualifies such entities' entire income from exemption under Section 892. With the implementation and expansion of safe harbors for certain direct and indirect investment activities, the regulations create new opportunities for sovereign investors in funds and US real property.

This briefing provides an overview of the new regulations.

http://www.cliffordchance.com/publicationviews/publications/2011/11/the_irs_releasesproposedregulationsregardin.html

SHORT SELLING UPDATE

Short selling and CDS: European Parliament approves proposed regulation

The European Parliament's plenary session has formally approved the proposed regulation on short selling and certain aspects of credit default swaps (CDS). The regulation will contain a ban on uncovered sovereign CDS, but subject to a limited power for national regulators temporarily to suspend the ban when it interferes with sovereign debt markets. It also includes new rules on the reporting of net short positions to regulators and to the market and new powers for ESMA to coordinate Member State actions.

The regulation now needs to be formally approved by the Council and will enter into force in November 2012.

CONSOB extends restrictive measures on net short positions and reporting requirements and imposes ban on naked short selling

The Commissione Nazionale per le Società e la Borsa (CONSOB) has issued the following resolutions:

- resolution No. 17992, providing for an extension until 15 January 2012 of the restrictive measures on net short positions which were introduced on 12 August 2011 by means of resolution No. 17902; and
- resolution No. 17993, providing for an indefinite extension to the reporting obligations in relation to net short positions which were introduced on 10 July 2011 by means of resolution No. 17862.

Both the restrictive measures on net short positions and the reporting obligations were previously extended by resolutions No. 17911 and No. 17951.

In addition, resolution No. 17993 introduces a requirement for the sale of shares listed on Italian regulated markets to be covered by the availability of securities by the seller at the time of order. CONSOB has indicated that the availability requirement is met if the seller has: (1) borrowed the shares; (2) signed a loan agreement in relation to the shares; or (3) entered into an agreement with one or more third parties confirming the location of

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the shares and allowing the seller to have a reasonable expectation that the settlement can be made within the agreed timeframe.

The restriction will come into force at 00:00 on 1 December 2011 and will remain in force until a future change or revocation, which CONSOB may implement at any time, depending on market conditions and, to the extent possible, in agreement with the other European authorities which have adopted similar measures.

Resolution No. 17992 (Italian)
Resolution No. 17992 (English)
Resolution No. 17993 (Italian)
Resolution No. 17993 (English)

ESCA releases draft regulations on short selling

The UAE Securities and Commodities Authority (ESCA) has released draft regulations on short selling. The short selling regulations will permit short selling of securities listed on the Dubai Financial Market and the Abu Dhabi Securities Exchange. Under the regulations, investors will be permitted to conduct short selling on a covered basis only, and authorised brokers will be responsible for ensuring that investors are able to deliver securities at settlement. Market makers will be permitted to engage in naked short selling, but must make arrangements to cover the short position on the same trading day.

The ESCA will be able to temporarily or permanently prohibit shorting of certain or all categories of securities in exceptional market conditions and shorting of a security will not be permitted where the intra-day price of the security has decreased by 10% or more.

The proposals have been introduced as part of a package of new regulations that cover securities lending, market making and liquidity providers.

Comments are due by 30 November 2011.

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