

International Regulatory Update

IN THIS WEEK'S NEWS

- ESMA consults on considerations of materiality in financial reporting
- ECOFIN Council discusses financial transactions tax
- G20 Cannes Summit: Leaders endorse policy measures to address systemically important financial institutions
- Basel Committee publishes assessment methodology and additional loss absorbency requirement for global systemically important banks
- FSA consults on distribution of retail investments
- FSA issues finalised guidance on enhancing frameworks in standardised approach to operational risk
- FSA issues policy statement on product disclosure
- FSA issues policy statement on changes to Retail Mediation Activities Return and complaints data collection
- SFC consults on proposed amendments to Code of Conduct to facilitate Financial Dispute Resolution Centre
- APRA consults on covered bonds and securitisation
- Basel III: Reserve Bank of New Zealand consults on capital adequacy reforms
- CFTC publishes final rule on derivatives clearing organization general provisions and core principles
- Recent Clifford Chance briefings: The bank trilemma; and more. [Follow this link to the briefings section.](#)

SHORT SELLING UPDATE

- EU Council publishes text of proposed short selling regulation provisionally agreed with Parliament
- French ban on taking net short positions extended
- CSRC issues new measures and guidelines on administration and internal management of margin trading and short selling by securities companies
- Korean regulator lifts short selling ban on non-financial stocks and maintains ban on financial stocks

.....
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

.....

ESMA consults on considerations of materiality in financial reporting

ESMA has published a [consultation paper](#) on the considerations of materiality in financial reporting. The concept of materiality is used to describe information which is required by a financial reporting framework and which, if omitted or misstated, could influence the economic decision-making of a user. ESMA notes that there appear to be differing views regarding the practical application of the concept of materiality amongst preparers, auditors, possibly users of the financial reports and, in some instances, accounting enforcers. The purpose of the consultation paper is to seek comments from interested parties on their understanding of various aspects of materiality in order to contribute to a consistent application of the concept.

Comments are due by 29 February 2012.

ECOFIN Council discusses financial transactions tax

The ECOFIN Council has published a [press release](#) setting out the main results of its meeting on 8 November 2011. Amongst other things, the Council took note of a presentation by the European Commission on a proposal for a directive on a common system of financial transaction tax (FTT) and amending Directive 2008/7/EC, and asked the Council working groups to analyse the proposal.

[European Commission statement on FTT](#)

G20 Cannes Summit: Leaders endorse policy measures to address systemically important financial institutions

The G20 has published a [final declaration](#) setting out the outcomes of its Cannes Summit. Amongst other things, the G20 leaders endorsed the [Financial Stability Board's \(FSB's\) policy measures to address systemically important financial institutions](#), comprising a new international standard for resolution regimes, more intensive and effective supervision, and requirements for cross-border cooperation and recovery and resolution planning as well as, from 2016, additional loss absorbency for those banks determined to be global systemically important financial institutions.

The G20 leaders also called on the FSB, in consultation with the Basel Committee on Banking Supervision, to deliver a progress report by the April 2011 G20 Finance Ministers' meeting on the definition of the modalities to extend the framework for global systemically important financial institutions to domestic systemically important banks. In addition, the G20 leaders agreed to strengthen the regulation and oversight of the shadow banking system and endorsed the FSB's initial eleven recommendations with a work-plan to further develop them in the course of 2012.

The G20 leaders also committed to implementing IOSCO's initial recommendations on market integrity and efficiency, including measures to address potential risks associated with high frequency trading and dark liquidity, and called for further work by mid-2012. They further called on IOSCO to assess the functioning of credit default swap (CDS) markets and the role of those markets in price formation of underlying assets by the next G20 Summit.

Finally, the G20 leaders welcomed the [G20 study group report on commodities](#) and endorsed IOSCO's report and its common principles for the regulation and supervision of commodity derivatives markets. The leaders called on IOSCO to report on the implementation of its recommendations by the end of 2012.

[FSB key attributes of effective resolution regimes for financial institutions](#)

[FSB progress report on intensity and effectiveness of SIFI supervision](#)

[FSB progress report on implementation of G20 recommendations for strengthening financial stability](#)

[FSB status report on progress in implementing G20 recommendations on financial regulatory reform](#)

[FSB Chairman's letter to G20 leaders](#)

Basel Committee publishes assessment methodology and additional loss absorbency requirement for global systemically important banks

The Basel Committee on Banking Supervision has published its [final rules](#) for global systemically important banks. The rules set out the Committee's framework on the assessment methodology for global systemic importance, the magnitude of additional loss absorbency that global systemically important should have, and the arrangements by which the requirement will be phased in.

In particular, the Committee has indicated that the assessment methodology for global systemically important banks is based on an indicator-based approach and comprises five broad categories: (1) size; (2) interconnectedness; (3) lack of readily available substitutes or financial institution infrastructure; (4) global (cross-jurisdictional) activity; and (5) complexity.

The Committee has also noted that the additional loss absorbency requirements will range from 1% to 2.5% Common Equity Tier 1 depending on a bank's systemic importance with an empty bucket of 3.5% Common Equity Tier 1 as a means to discourage banks from becoming even more systemically important. The higher loss absorbency requirements will be introduced in parallel with the Basel III capital conservation and countercyclical buffers, i.e. between 1 January 2016 and year end 2018 becoming fully effective on 1 January 2019.

In addition, the Committee has published a [cover note](#) to the rules text setting out a summary and evaluation of the public comments received on its July 2011 consultative document.

FSA consults on distribution of retail investments

The FSA has published a [consultation paper \(CP11/25\)](#) on the distribution of retail investments.

In particular, CP11/25 covers: (1) issues relating to facilitation of payment of adviser charges under the Retail Distribution Review (RDR) rules; (2) whether product providers should, when reporting data under the FSA's data requirements such as Product Sales Data, report investment amounts on a basis that is net or gross of any adviser charges being facilitated; and (3) minor changes to the disclosure requirements in chapters 13 to 16 of the Conduct of Business sourcebook (COBS) to implement Solvency II requirements.

Comments are due by 10 January 2012.

FSA issues finalised guidance on enhancing frameworks in standardised approach to operational risk

The FSA has published [finalised guidance](#) on enhancing frameworks in the standardised approach to operational risk, focusing on the importance of appropriate operational risk policies and documentation and their management as part of TSA frameworks. Amongst other things, the paper recommends that operational risk functions in firms not only manage documentation they are directly responsible for, but also promote good documentation practices in other functions and business units.

FSA issues policy statement on product disclosure

The FSA has published a [policy statement \(PS11/14\)](#) reporting on the main issues arising from its February 2011 [consultation paper \(CP11/03\)](#) on product disclosure, which proposed changes to reflect the Retail Distribution Review (RDR) rules on adviser and consultancy charging, and to improve pension scheme disclosure.

PS11/14 addresses: (1) changes to the key features illustrations (KFIs) that firms are required to give their clients; and (2) the potential replacement of monetary projections by inflation-adjusted projections for personal and stakeholder pensions (both individual and group).

The responses to the FSA's proposals in relation to the disclosure requirements applying to personal pension schemes (including SIPPs) showed a wide divergence of views and raised further issues and concerns. As a result, the FSA has decided to re-consult on revised disclosure requirements.

The rules will come into effect on 31 December 2012. However, a transitional rule allows firms to take advantage, from 1 October 2012, of a rule for generic key features illustrations for groups or sub-groups of employees in a group personal pension scheme.

FSA issues policy statement on changes to Retail Mediation Activities Return and complaints data collection

The FSA has published a [policy statement \(PS11/13\)](#) reporting on the main issues arising from its May 2011 [consultation paper \(CP11/08\)](#) on data collection issues arising from the Retail Distribution Review (RDR) rules on adviser charging and professionalism.

PS11/13 also sets out the FSA's final rules in this area, covering, in particular: (1) new requirements under the Retail Mediation Activities Return (RMAR), to allow the FSA to collect data on adviser charging revenue, payment and client numbers, and charging structure, from all firms that provide advice on retail investment products; and (2) new complaints data at individual adviser level, which the FSA intends to use in combination with other risk indicators as an indicator of behaviour that could imply potential consumer detriment.

The rules will come into effect on 31 December 2012.

SFC consults on proposed amendments to Code of Conduct to facilitate Financial Dispute Resolution Centre

The Securities and Futures Commission (SFC) has issued a [consultation paper](#) on its proposed amendments to the Code of Conduct for Persons Licensed by or Registered with the SFC, which are intended to facilitate the establishment of the Financial Dispute Resolution Centre Ltd (FDRC).

Amongst other things, the proposals include: (1) requiring licensed or registered persons regulated by the SFC or the Hong Kong Monetary Authority (HKMA) to comply with the FDRC Scheme and be bound by its process; (2) obliging licensed or registered persons to enhance the complaint handling procedures and act in good faith under the FDRC; and (3) strengthening enforcement against market misconduct and improving supervisory oversight of financial markets by upgrading current requirements relating to the recording of client orders, reporting of suspicious activities and provision of expert evidence.

Comments are due by 9 January 2012. The FDRC is expected to come into operation by mid-2012.

APRA consults on covered bonds and securitisation

The Australian Prudential Regulation Authority (APRA) has published for consultation a [discussion paper](#) outlining its proposals to introduce a new prudential standard for authorised deposit-taking institutions (ADIs) that issue covered bonds. The discussion paper is accompanied by a [draft of Prudential Standard APS 121](#) Covered bonds (APS 121).

The discussion paper and draft prudential standard are intended to ensure that ADIs adopt prudent practices when issuing covered bonds and managing risks associated with exposure to a covered bond special purpose vehicle. Following consideration of submissions received, APRA will finalise APS 121 and related amendments to other prudential standards with a view to implementation in early 2012.

The discussion paper also sets out proposed changes to Prudential Standard APS 120 Securitisation (APS 120) to clarify the prudential treatment of holdings of subordinate tranches of securitisations held by an ADI other than the originator of the loans. Subject to feedback on this proposal, APRA envisages that the proposed changes would be incorporated into APS 120 and take effect from 1 January 2012.

Comments are due by 9 December 2011.

Basel III: Reserve Bank of New Zealand consults on capital adequacy reforms

The Reserve Bank of New Zealand has published a [consultation paper](#) on the implementation of Basel III capital adequacy requirements in New Zealand. The consultation paper sets out the Reserve Bank's proposals for implementing core Basel III capital measures relating to capital ratios, the definition of capital and the leverage ratio.

The Reserve Bank intends to consult on other elements of Basel III capital in 2012. This will include a policy on restrictions that apply to banks operating within the Basel III conservation buffer, the countercyclical buffer, and counterparty credit risk requirements. The Reserve Bank has indicated that it has yet to reach a position on Basel III minimum requirements to ensure that all classes of capital instruments fully absorb losses at the point of non-viability, before taxpayers are exposed to loss. It expects to form a decision in early 2012. The Reserve Bank will also consult on any Basel III related changes to its disclosure requirements in 2012.

Comments are due by 27 January 2012.

CFTC publishes final rule on derivatives clearing organization general provisions and core principles

The Commodity Futures Trading Commission (CFTC) has published [final regulations](#) which implement certain provisions of Title VII and Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act governing derivatives clearing organization (DCO) activities. Section 725(c) of the Dodd-Frank Act amended Section 5b(c)(2) of the Commodity Exchange Act, which sets out core principles with which a DCO must comply in order to be registered and to maintain its registration as a DCO.

The CFTC's regulations establish the regulatory standards for compliance with DCO core principles A (Compliance), B (Financial Resources), C (Participant and Product Eligibility), D (Risk Management), E (Settlement Procedures), F (Treatment of Funds), G (Default Rules and Procedures), H (Rule Enforcement), I (System Safeguards), J (Reporting), K (Recordkeeping), L (Public Information), M (Information Sharing), N (Antitrust Considerations), and R (Legal Risk) set out in section 5b of the Commodity Exchange Act.

In addition, the CFTC is: (1) updating and adding related definitions; (2) adopting implementing rules for DCO chief compliance officers; (3) revising procedures for DCO applications, including the required use of a new Form DCO; (4) adopting procedural rules applicable to the transfer of a DCO registration; and (5) adding requirements for approval of DCO rules establishing a portfolio margining program for customer accounts carried by a futures commission merchant that is also registered as a securities broker-dealer.

The CFTC is also adopting certain technical amendments to parts 21 (Special Calls) and 39 (Derivatives Clearing Organizations), and is adopting certain delegation provisions under part 140 (Organization, Functions, and Procedures of the Commission).

The rules will become effective on 9 January 2012. DCOs must comply with sections 39.11, 39.12, 39.13 (except for 39.13(g)(8)(i)), and 39.14 by 7 May 2012. They must comply with sections 39.10(c), 39.13(g)(8)(i), 39.18, 39.19, and 39.20 by 8 November 2012, and all other provisions of the rules by 9 January 2012.

RECENT CLIFFORD CHANCE BRIEFINGS

The bank trilemma

From Basel III to the Independent Commission on Banking (ICB) and the Financial Transaction Tax (FTT), proposed new regulations will have a far-reaching impact on the way banks do business. Journalist Brian Thompson heard Clifford Chance partners discuss how banks face a trilemma as their capital requirements, asset book composition and funding sources are affected by regulatory pressures.

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

Key issues in microfinance legislation and regulation

The regulation of microfinance is becoming increasingly topical and significant to microfinance institutions (MFIs). Regulators around the world seem to be increasingly aware of the necessity of implementing legislative and regulatory frameworks allowing the microfinance industry enough flexibility to innovate and grow, whilst maintaining rules and restrictions to protect low income and often vulnerable microfinance clients. Ghana offers an example, where in July 2011 the regulator issued new legislation that covers the entire microfinance sector, including semi-formal and informal institutions which were previously unregulated.

This briefing provides an overview of the key factors to consider when assessing legislative and regulatory frameworks for microfinance. These issues are relevant to all actors operating or considering to operate in microfinance, from MFIs to governments, non-governmental organisations (NGOs) and commercial banks.

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

Suspicious minds – Court of Appeal rules on disclosure in challenges by customers to SARs

The Court of Appeal has ruled on the types of information which banks are required to disclose to customers about their money laundering reporting processes where customers bring civil claims for damages arising from suspicious activity reports (SARs) that are made.

This briefing discusses the Court of Appeal's ruling in *Shah v HSBC Private Bank (UK) Limited*.

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

DOL finalizes regulations on investment advice exemption for retirement

The US Department of Labor (DOL) has recently issued final regulations regarding acceptable arrangements for the provision of investment advice to participants in self-directed individual account plans, such as 401(k) plans. The regulations will provide a welcome change under the US Employee Retirement Income Security Act of 1974, as amended, where generally a party providing individualized advice for a fee can be viewed as a fiduciary.

This briefing provides an overview of the DOL's final regulations.

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

India tightens norms for pharma M&A

On 8 November 2011, the Indian government amended its foreign investment rules imposing a requirement to seek its approval for foreign direct investment (FDI) in existing Indian pharmaceutical companies. FDI in greenfield pharmaceutical ventures can be made without the requirement of any such approval.

This briefing discusses the new regime.

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

SHORT SELLING UPDATE

EU Council publishes text of proposed short selling regulation provisionally agreed with Parliament

The EU Council has published the [text](#) of the proposed regulation on short selling and certain aspects of credit default swaps (CDS), as provisionally agreed in the negotiations with the European Parliament on 18 October 2011.

The Parliament expects to have a plenary vote on the agreed text at the end of November 2011.

Ban on taking net short positions extended

The Minister for the Economy, Finance and Industry has [announced](#) the extension of 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 l'Autorité des marchés financiers/the Financial Markets Authority (AMF). The Minister's decision follows the AMF's assessment that market conditions were not satisfactory to lift the ban.

CSRC issues new measures and guidelines on administration and internal management of margin trading and short selling by securities companies

The China Securities Regulatory Commission (CSRC) has issued the '[Measures for the Administration of Margin Trading and Short Selling by Securities Companies](#)' and the '[Guidelines on the Internal Management of Margin Trading and Short Selling by Securities Companies](#)', which are intended to develop margin trading and securities lending from a trial program to a routine business in the capital market.

Amongst other things, the new measures and guidelines introduce the following amendments:

- the threshold to enter into the business has been lowered – the eligibility criteria for securities companies under the trial measures such as a net capital of no less than RMB 1.2 billion have been removed;
- differentiated registered capital requirements – to apply for participation in margin trading and securities lending, securities companies that are qualified for underwriting, proprietary trading or asset management business shall have a registered capital of no less than RMB 500 million, while other securities companies shall have a registered capital of no less than RMB 100 million;
- a requirement of passing the evaluation and system test – securities companies shall pass the evaluation of the China Securities Association and the relevant test by stock exchanges and the depository and clearing company to participate in margin trading and securities lending; and
- the business proposals and internal management systems of the applicant securities companies are subject to professional appraisal by the Securities Association of China.

Korean regulator lifts short selling ban on non-financial stocks and maintains ban on financial stocks

The Financial Services Commission (FSC) has issued a [notice](#) on its latest decision on the temporary short selling ban which was effective from 10 August 2011 to 9 November 2011. The FSC has indicated that the temporary short selling ban on non-financial stocks will be lifted from 10 November 2011, while the short selling ban on financial stocks (equity shares) listed on the Korea Exchange (KRX) will be maintained.

In this regard, the KRX has issued a notice stating that it will maintain certain exceptions to allow bona-fide short selling in the following cases: (1) where the registered liquidity provider of equity shares, exchange-traded funds (ETFs), or exchange-linked warrants (ELWs) is short selling to provide its obligatory quotations; (2) where the registered ELW liquidity provider is short selling to hedge its liquidity provider positions; (3) where the registered ETF liquidity provider is short selling to hedge its liquidity provider positions; and (4) where the registered market maker of the KRX derivatives market is short selling to hedge its market making positions.

Clifford Chance's International Regulatory Update is a weekly digest of significant regulatory developments, drawing on our daily content from our Alerter: Finance Industry service. If you would like to continue to receive International Regulatory Update or would like to request a subscription for a colleague, please [click here](#). To request a subscription to our Alerter: Finance Industry service, please email [Online Services](#).

This Client briefing 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.

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.

www.cliffordchance.com

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

* Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.