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International Regulatory Update

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IOSCO and CPSS consult on principles for financial market infrastructures

IOSCO and the Committee on Payment and Settlement Systems (CPSS) have published a consultative report setting out a new set of principles designed to apply to all systemically important payment systems, central securities depositories, securities settlement systems, central counterparties and trade repositories.

Once finalised, the new principles will replace the three existing sets of CPSS and CPSS-IOSCO standards: (1) the 'Core principles for

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systemically important payment systems' (2001); (2) the 'Recommendations for securities settlement systems' (2001); and (3) the 'Recommendations for central counterparties' (2004). The report also introduces a number of provisions on issues that are not addressed by the existing standards, including segregation and portability, tiered participation and general business risk.

Comments are due by 29 July 2011. IOSCO and the CPSS intend to publish a final report in early 2012.

Cover note

Short selling and CDS: Hungarian EU Presidency publishes compromise proposal, ECB issues opinion and ECON Committee and House of Lords set out positions

The European Central Bank has issued an opinion, dated 3 March 2011, on the European Commission's proposal for a regulation on short selling and certain aspects of credit default swaps (CDS), which was published in September 2010. Furthermore, on 4 March, the Hungarian EU Presidency published a revised compromise text for the proposed regulation.

In addition, the European Parliament's ECON Committee has voted on the proposal for a regulation. The Parliament has indicated that the position adopted by the Committee would, amongst other things: (1) prohibit anyone from being involved in CDS transactions if they do not already own sovereign debt linked to that CDS (i.e. naked CDS trading), or securities whose price depends heavily on the performance of the country, such as shares in a major company based there; (2) not entirely ban naked short selling, but require any naked short sale undertaken to be converted into a short sale by the end of the trading day; and (3) retain the Commission's 'locate and reserve rule', whereby a seller must not only identify from where it plans to borrow the shares in question, but must also have a guarantee that it will indeed be able to borrow them when the time comes.

The Parliament expects the regulation to be in force by 2012.

Finally, the House of Lords European Union Sub-Committee on Economic and Financial Affairs has published a letter to Mark Hoban MP, Financial Secretary to the Treasury, in response to the Commission's proposal for a regulation. The letter sets out the Committee's position in advance of the ECOFIN Council meeting on 15 March 2011.

Amongst other things, the Committee supports the view that restrictions on naked short selling and CDS on sovereign bonds should be removed from the Commission's proposals. It also does not support the introduction of an outright ban on naked CDS at this stage, because of concerns that such a ban might carry with it adverse and unintended consequences, including an increase in stock borrowing costs and a reduction in liquidity. However, the letter also notes that the CDS market is relatively young and little research has been done to assess its costs and benefits, and recommends that further analytical work on this issue be undertaken as soon as possible.

European Parliament adopts resolution on financial transaction tax

The European Parliament's plenary session has adopted a resolution on innovative financing at a global and European level. The resolution is based on a non-legislative report prepared by the Parliament's ECON Committee, which argued that an EU financial transaction tax could help finance budgets, reduce public deficits and avoid speculation.

Amongst other things, the resolution: (1) states that the EU should promote the introduction of a financial transactions tax (FTT) at a global level, failing which, the EU should implement an FTT at a European level as a first step; and (2) calls on the European Commission swiftly to produce a feasibility study and to come forward with concrete legislative proposals.

ECB publishes updated version of General Documentation

The European Central Bank (ECB) has published an updated consolidated version of 'The implementation of monetary policy in the euro area: General documentation on Eurosystem monetary policy instruments and procedures', which includes changes already decided and announced by the ECB's Governing Council on 9 October and 16 December 2010.

Amongst other things, the General Documentation covers: (1) eligible counterparties; (2) open market operations; (3) standing facilities; (4) procedures; (5) eligible assets; and (6) minimum reserves.

The new provisions apply as of 1 February 2011.

AIFM Directive: OJ publication delayed and Commission deadline for ESMA advice on implementing measures extended

The European Commission has sent a letter to ESMA in relation to the Commission's request for technical advice on the implementing measures on the AIFM Directive. In the letter, the Commission indicates that it has learned from the EU Council's and European Parliament's lawyer linguists that the AIFM Directive will most likely not enter into force before June 2011. As this is later than the Commission initially expected, and in view of the workload involved in preparing the technical advice, the Commission has decided to extend the deadline for the receipt of ESMA's advice by two months to 16 November 2011.

IOSCO consults on suspension of CIS redemptions

IOSCO has published a consultation report which analyses how different jurisdictions' regulatory regimes address the suspension of redemptions by open-ended collective investment schemes (CIS) and proposes principles which provide general standards for how regulatory regimes should approach and oversee suspension of redemptions.

The principles generally cover all types of open-ended CIS which offer a continuous redemption right, and apply irrespective of whether they are offered to institutional or retail investors. They are addressed to those entities responsible for the overall operation of the CIS and, in particular, its compliance with the legal/regulatory framework in the respective jurisdiction. IOSCO has emphasised that the delegation of activities may not be used to circumvent the principles, and that there should be compliance with the principles whether activities are performed directly or through a third party.

Comments are due by 30 May 2011.

IOSCO reports on implementation of securitisation recommendations

IOSCO has published the results of a survey on the implementation of its September 2009 recommendations with respect to securitisation and credit default swap markets. The report indicates that all jurisdictions surveyed by IOSCO's Task Force on Unregulated Financial Markets and Products had at least one, if not multiple, initiatives in progress to implement the recommendations on: (1) disclosure; (2) the retention of economic interest (skin in the game); (3) investor suitability; and (4) international coordination and regulatory cooperation. Most measures are expected to be implemented in 2010 and 2011.

Based on the survey responses and subsequent discussions, IOSCO has recommended that regulators encourage improvements in disclosure standards for private or wholesale offerings of securitised products, and that regulators engage in international cooperation toward convergence of national regulations, where desirable, and review progress regularly.

Bank of England reports on payment systems oversight

The Bank of England has published its Payment Systems Oversight Report 2010, which sets out how the Bank has implemented the statutory regime for oversight under Part 5 of the Banking Act 2009, and how it carries out its oversight of the recognised UK payment systems. The report highlights changes in the key UK payment systems and explains the focus of the Bank's work in this field.

The report also outlines the areas where further measures to reduce potential systemic risks should be undertaken.

Treasury Committee launches inquiry into Bank of England's accountability

Following the publication of its report on 3 February 2011 on the government's plans to change the system of UK financial regulation, the Treasury Committee has launched an inquiry into the Bank of England.

The inquiry will consider: (1) what kind of decisions should made by each body within the Bank, and whether, apart from the Monetary Policy Committee (MPC) and the Financial Policy Committee (FPC), there are other policy functions within the Bank's remit which deserve attention; (2) to whom the Bank should be accountable, and whether there are different accountability mechanisms needed for different functions; (3) whether the responsibilities of the Court of the Bank of England are clear and appropriate; (4) whether the members of the Court of the Bank and the arrangements for its members' appointment and dismissal are appropriate; and (5) what resources the Bank of England needs to carry out its functions.

The deadline for submissions is 31 March 2011.

CBFA becomes FSMA

A royal decree, dated 3 March 2011, which implements the changeover of Belgium's financial supervisory regime to a 'twin peaks' model, with the National Bank of Belgium (NBB) in charge of prudential supervision and the former regulator, the Banking, Finance and Insurance Commission (CBFA), left in charge of the rules of conduct and investor protection, has been published. The CBFA is also being renamed the 'Financial Services and Markets Authority' (FSMA). The changes take effect on 1 April 2011.

Resolution regimes: First draft Dutch Intervention Act published

The Dutch Ministry of Finance has published a consultation paper containing a first draft for a Dutch Act on special measures regarding financial institutions. Following the UK Banking Act 2009 and the German Restrukturierungsgesetz, this draft Intervention Act provides the authority for the Dutch Central Bank to prepare a transfer plan, which could, following court approval, result in the transfer of shares in or assets of financial institutions. The draft Intervention Act also provides for the use of a bridge bank and amendments to be made to the Dutch deposit guarantee scheme, allowing such a scheme to be used in order to finance the transfer of deposits. Amongst other things, it is proposed that the imposition of insolvency measures deactivates any events of default, early termination events, notification triggers or similar events.

The draft Intervention Act also provides for a set of immediate emergency arrangements to be taken when the stability of the financial system is endangered. The draft Intervention Act does not specify the exact scope of these powers and only states that all immediate measures necessary can be taken. In addition, the draft Intervention Act provides the possibility for the Minister of Finance to expropriate shares or assets of a financial institution if the stability of the financial system is endangered.

SEC proposes new rules on disclosure of incentive-based compensation arrangements

The SEC has proposed a rule to require certain financial institutions to disclose the structure of their incentive-based compensation practices, and prohibit such institutions from maintaining compensation arrangements that encourage inappropriate risks. The proposed rule is based on section 956 of the Dodd-Frank Act, which requires the SEC and several other agencies to jointly write rules and guidelines in this area. SEC-regulated financial institutions affected by the rulemaking include broker-dealers and investment advisers with USD 1 billion or more in assets.

Amongst other things, the proposed rules for such financial institutions would: (1) require that annual reports related to incentive-based compensation be filed with the SEC; (2) prohibit incentive-based compensation arrangements that encourage inappropriate risk-taking; (3) provide additional requirements for financial institutions with USD 50 billion or more in assets; and (4) require institutions to develop policies and procedures that ensure and monitor compliance with requirements related to incentive-based compensation.

Comments will be accepted for 45 days following publication in the Federal Register, which is expected shortly.

SEC consults on removing credit rating references from Investment Company Act rules and forms

The SEC has announced proposed rule amendments to remove the references to credit ratings in certain rules and forms under the Investment Company Act of 1940, including rule 2a-7 governing the operations of money market funds. The amendments have been proposed in accordance with the Dodd-Frank Act, which requires federal agencies to review rules that use credit ratings as an assessment of creditworthiness, and replace those credit rating references with other appropriate standards.

Under the proposed rules, a rating would no longer be a required element in determining which securities are permissible investments for a money market fund. In addition, the proposed rule amendments would remove references to credit ratings in rules governing the following three other areas: (1) repurchase agreements; (2) certain business and industrial development company investments; and (3) shareholder reports.

Public comments on the proposed rule will be accepted until 25 April 2011.

JFTC consults on amendments to implementing regulation and guidelines on merger filings

The Japan Fair Trade Commission (JFTC) has announced its plans to amend its implementing regulation and guidelines on merger filings and has invited public comments on these amendments. In particular, the amendments cover procedure and standards.

With regard to procedure, the JFTC has indicated that, as a consequence of the amendments: (1) the prior consultation procedure would be abolished (companies would still be able to ask questions about how to fill in the notification form); (2) communication between the JFTC and reporting companies would be enhanced; (3) the JFTC would notify reporting companies of the results of its review; (4) the JFTC would disclose transactions when the case goes to phase 2 (or when the case is considered to be useful to other companies); and (5) the scope of the cases for which the waiting period may be shortened would be expanded.

With regard to standards, the amendments include a non-exhaustive example in which the whole world may be the relevant market and clarify that the JFTC may take import pressure (i.e. potential new entrants) into account even if products are not being effectively imported in the relevant market.

Comments are due by 4 April 2011.

BSP amends regulations regarding securities custodianship operations

The Bangko Sentral ng Pilipinas (BSP) has issued a circular to amend the regulations regarding securities custodianship operations. Amongst other things, the amendments relate to: (1) pre-qualification requirements for a securities custodian or registry; (2) the distinction between a custodian and a registry; (3) functions and responsibilities of a securities custodian; (4) protection of securities of the customer; and (5) the basic security deposit.

The circular is effective 15 calendar days following its publication either in the official gazette or in a newspaper of general circulation.

APRA clarifies implementation of global liquidity standards in Australia

The Australian Prudential Regulation Authority (APRA) has clarified the treatment of high-quality liquid assets it will apply when implementing the new global liquidity standard (the Liquidity Coverage Ratio (LCR) requirement) announced by the Basel Committee on Banking Supervision in December 2010. The new standard aims to ensure that banking institutions hold a stock of high-quality liquid assets sufficient to survive an acute stress scenario lasting for one month.

APRA has been reviewing a range of marketable instruments denominated in Australian dollars against the Basel Committee's criteria for high-quality liquid assets. Based on this review, APRA has determined that, at this point of time: (1) the only assets that qualify as Level 1 assets are cash, balances held with the Reserve Bank of Australia, and Commonwealth government and semi-government securities; and (2) there are no assets that qualify as Level 2 assets.

The LCR requirement comes into effect on 1 January 2015. APRA has emphasised that the treatment of Level 1 and Level 2 assets for the purposes of the LCR requirement does not affect the set of instruments that the Reserve Bank of Australia will accept as qualifying collateral for its committed secured liquidity facility. Accordingly, APRA does not anticipate that its treatment of Level 1 and Level 2 assets will have a material impact on the status of marketable instruments in the Australian capital market.

RECENT CLIFFORD CHANCE BRIEFINGS

Transaction Services Newsletter – March 2011

Transaction Services Newsletter is a bi-monthly publication designed for business and legal professionals working in cash management and securities services. This issue examines recent regulatory developments which affect the viability of omnibus accounts, starting with the FSA's new Client Assets Rules which took effect on 1 March 2011 (with some transitional relief until October).

http://www.cliffordchance.com/publicationviews/publications/2011/03/transaction_servicesnewsletter-march2011.html

Global trends in regulatory enforcement

Clifford Chance has prepared an article informed by a series of workshops held in London, Frankfurt, Paris and Hong Kong in late 2010, on global trends in regulatory enforcement.

The key strands to the discussions are the hardening stance and current enforcement priorities of regulators; the dual-prong of domestic and regional anti-corruption agencies sinking their teeth into domiciles' international

operations at the same time as co-operating with one another more effectively across borders; and, partly as a consequence of these trends, the growing ubiquity of the US-styled internal investigation.

Reading between the lines, and gauging the responses of those who took part in the workshops, what's required today is the ability not only to recognise these trends and drill down into them – but to join them up by looking ahead to how they will play out in the future, while exercising caution in anticipating their implications for your business, locally and globally.

Please contact Barbara Kahn by email at barbara.kahn@cliffordchance.com for a copy of this briefing.

Eurosail Appeal – navigating troubled financial waters

The Court of Appeal has reinterpreted the test for balance sheet insolvency under section 123(2) of the Insolvency Act 1986 and has made it a more complex and subjective process but this should help in preserving asset-backed structures.

The judgment in the Eurosail appeal decided that the courts will not determine balance sheet insolvency by solely making technical calculations off the balance sheet, but will ask if the 'shutters are coming down' on a company. The court must determine whether a company was insolvent having a 'firm eye both on commercial reality and on commercial fairness'.

This briefing discusses the judgment.

http://www.cliffordchance.com/publicationviews/publications/2011/03/eurosail_appeal_navigatingtroubledfinancia.html

French thin-capitalisation rules

Article 113 of the French Finance Act for 2006 (law n° 2005-1719 dated 30 December 2005) has introduced French thin-capitalisation rules, codified under Article 212 of the French Tax Code. These rules have given rise to comprehensive comments by the French tax authorities in a circular referenced 4 H-8-07 published in the Official Tax Bulletin n° 133 dated 31 December 2007.

Article 12 of the Finance Act for 2011 (law n° 2010-1657 dated 29 December 2010) introduced new provisions extending the scope of the French thin-capitalisation rules to certain loans granted by third-party lenders and guaranteed by a related undertaking.

This briefing highlights the key points about the French thin-capitalisation rules.

Please contact Barbara Kahn by email at barbara.kahn@cliffordchance.com for a copy of this briefing.

Romania Employment Legal Update

The Romanian government has assumed responsibility on a draft law amending the Labour Code in the Romanian Parliament. In addition, the opposition parties have filed a motion of censure against the Romanian government, which will be submitted to a debate and vote on 16 March 2011. Should the motion of censure be rejected, the New Labour Code will be deemed as approved by the Parliament and enter into force 30 days after publication in the Official Gazette.

This briefing sets out some of the most important provisions of the New Labour Code.

Please contact Barbara Kahn by email at barbara.kahn@cliffordchance.com for a copy of this briefing.

Proposal by the Hong Kong government to establish a new Financial Dispute Resolution Centre

The Secretary for Financial Services and the Treasury recently published the results of its consultation process on the establishment of a new Financial Dispute Resolution Centre (FDRC), confirming its intention to have the FDRC up and running by mid-2012. The FDRC is considered by the government to be a key development in promoting greater accountability and transparency for the consumer in the financial sector, forming a central pillar in the ongoing reform process in the aftermath of the Hong Kong Securities & Futures Commission (SFC) and Hong Kong Monetary Authority's (HKMA) investigation into the selling of the Lehman mini-bonds.

This briefing discusses the key features of the government's FDRC proposal.

http://www.cliffordchance.com/publicationviews/publications/2011/03/proposal_by_the_hongkonggovernmenttoestablis.html

Interim provisions released for China's new national security review for foreign M&A

China's Ministry of Commerce has released further details of the application and review procedures for the country's new national security review system for foreign M&A involving Chinese enterprises.

This briefing summarises the interim provisions and the clarification that they provide. It also reminds foreign investors of the impact of the system and the steps they should take before embarking on M&A in China in order to comply.

http://www.cliffordchance.com/publicationviews/publications/2011/03/interim_provisionsreleasedforchinasne.html