

International Regulatory Update

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FX swaps and forwards to be exempt from Dodd-Frank Act central clearing and exchange trading requirements

The US Treasury Department has published a [Notice of Proposed Determination](#) exempting FX swaps and forwards from the central clearing and exchange trading requirements imposed by the Dodd-Frank Act. Treasury has also published a [Fact Sheet](#) explaining the provisions of the Proposed Determination, which has been submitted for publication in the Federal Register.

Under the Proposed Determination, FX swaps and forwards would be excluded from the definition of a 'swap' under the Dodd-Frank Act, but would remain subject to the act's trade reporting requirements and business conduct standards. Additionally, the Dodd-Frank Act makes it illegal to use these instruments to evade other derivatives reforms. The terms 'foreign exchange swap' and 'foreign exchange forward' are narrowly defined under the Dodd-Frank Act, and the proposed determination does not extend to other FX derivatives, such as FX options, currency swaps, and non-deliverable forwards. These other FX derivatives will be subject to clearing and exchange requirements.

Comments on the Proposed Determination must be received by thirty days after its publication in the Federal Register, which is expected shortly.

Basel III: Guiding Opinion on implementation of new China banking industry supervision standard published

On 27 April 2011, the China Banking Regulatory Commission (CBRC) published a [Guiding Opinion](#) (Yin Jian Fa [2010] No. 44), which came into effect as of the same date, to promote the implementation of Basel III in China and to strengthen the regulation of China's banking industry.

Amongst other things, a unified standard will be set for all kinds of banking financial institutions and regulatory requirements will vary between systemically important banks (SIBs) and non-SIBs. These requirements will be implemented as of 1 January 2012. The determination of SIBs will be made based on factors including the size, relevance, complexity and substitutability of banking financial institutions and the regulator will set up the methodology and framework for the determination of SIBs. Meanwhile, stricter regulatory requirements will be imposed on SIBs, including the issuance of bonds for self-rescue, a higher liquidity ratio and a stricter restriction on the large risk exposure.

The regulatory requirements on the capital adequacy ratio (CAR) include the following: (i) core tier-one CAR, tier-one CAR and CAR must be no less than 5%, 6% and 8% respectively; (ii) the conservation buffer is set at 2.5% and counter-cyclical excess capital at 0-2.5%; and (iii) the supplementary capital for SIBs is temporarily fixed at 1%. After the new standard has been carried out, the CAR for SIBs and non-SIBs will be no less than 11.5% and 10.5% respectively under normal conditions. SIBs must meet the requirements by end-2013, and non-SIBs by end-2016.

A leverage ratio has been introduced which provides that tier-one capital must be at least 4% of the adjusted balance of on- and off-balance sheet assets. SIBs must meet the requirements by end-2013, and non-SIBs by end-2016. Regulatory and monitoring indicators such as the liquidity coverage ratio (LCR), net stable funding ratio (NSFR), liquidity ratio, deposit loan ratio and core debt dependency, liquidity gap ratio, concentration of the clients' deposits and concentration of inter-bank debts will be set up, and the LCR and NSFR must be at least 100%. Banking financial institutions must meet the LCR requirements by end-2013 and the NSFR requirements by end-2016.

Each banking financial institution must establish a comprehensive risk management framework and internal valuation procedures for the CAR by end-2016. Plans to implement the new regulatory standard must be formulated by all banking financial institutions and filed with the regulator by end-2011. The preparation and implementation of the new regulatory standard by commercial banks will fall under the routine supervision by the regulator from 2011.

[Q&A](#)

European contract law: Commission publishes expert group's feasibility study

An Expert Group, established by the European Commission, has issued a [feasibility study](#) on a future initiative on European contract law. The Commission had asked the Expert Group to conduct a feasibility study which would result in a text covering most aspects of a contractual relationship that would be of relevance for the contractual relationship in cross-border situations. The study focuses on a potential European contract law instrument applicable to business-to-consumer contracts and business-to-business contracts.

Feedback on the individual articles drafted by the expert group may be submitted until 1 July 2011. The Commission will take into account this input, as well as the results of a [consultation on a European contract law](#) concluded in January 2011, in the preparation of a political follow-up initiative. The Commission will then determine if, how and to what extent this feasibility study could serve as a starting point for the preparation of a political follow-up initiative on European contract law.

OTC derivatives and market infrastructures: Hungarian EU Presidency publishes compromise proposal

The Hungarian EU Council Presidency has published a [compromise text](#) for the proposed regulation on OTC derivatives and market infrastructures.

European Payments Council consults on mobile contactless SEPA card payments interoperability implementation guidelines

The European Payments Council (EPC) has published its [Draft Mobile Contactless SEPA Card Payments Interoperability Implementation Guidelines](#) for consultation. These Guidelines are exclusive to mobile contactless payments using near field communications (NFC) technology.

The Guidelines detail the various service models and processes involved in the provisioning and the lifecycle management of a mobile contactless payment application residing in a mobile phone secure element (SE). They also outline the technical infrastructure as well as the essential security requirements for each component within this architecture. In addition, the Guidelines acknowledge the different aspects of processing a mobile contactless Single Euro Payments Area (SEPA) card payment such as transaction flows, cardholder verification methods and risk management. They also provide an overview of standards and specifications defined by other standard and industry bodies to offer an overview of how this converging landscape interlinks with different stakeholders and their associate rules and regulations.

The EPC has called on industry to provide feedback by 17 June 2011. The EPC expects to publish the final version of these guidelines in October 2011. The EPC is also developing implementation guidelines for mobile remote payments to be released at a later stage.

Corporate governance: FRC consults on boardroom diversity

The Financial Reporting Council (FRC) has launched a [consultation](#) on whether the UK Corporate Governance Code should be revised to require listed companies to publish their policy on gender diversity in the boardroom and report against it annually. This requirement was recommended in [Lord Davies' report](#), 'Women on Boards', which was published in February 2011.

The FRC is also seeking views on whether the Code should identify some of the key issues to be considered when boards carry out their regular effectiveness reviews, and on the timing of any changes that might be made to the Code as a result of the consultation.

The consultation closes on 29 July 2011. A decision on whether to amend the Code and, if so, the timetable for doing so, will be announced later in the year.

UK Government responds to Treasury Committee's report on proposals for financial regulatory reform

The House of Commons Treasury Committee has published the [Government's response](#) to the Committee's February 2011 report, [Financial Regulation: a preliminary consideration of the Government's proposals](#).

The paper sets out the Government's response and recommendations. With respect to its timetable for regulatory reforms, the Government noted that it believes its aim to implement the reform programme by the end of 2012 remains an appropriate and achievable target. The Government also confirmed its decision that reform of regulation of individual firms will be implemented through primary legislation amending the Financial Services and Markets Act 2000 (FSMA), rather than revisiting FSMA in its entirety. The Government aims to publish a 'consolidated' version of FSMA, incorporating the changes that would be made through the current Bill, to assist the scrutiny process.

The Government also discussed, amongst other things, the Bank of England's enhanced powers, the costs of regulation, international regulation, monitoring and management of risk, and the transparency and accountability of the new regulatory bodies.

FSA consults on proposed guidance on mortgage forbearance and impairment provisions

The FSA has published [proposed guidance](#) which sets out the FSA's findings during a prudential review of firms' mortgage forbearance and impairment provisions processes, and sets out actions the FSA wants firms to take. This review considers forbearance processes wherever they arise in the firm, whether in customer services, operations, debt management, credit risk or finance functions. It includes consideration of internal reporting of forbearance activities, impairments and provisions to management committees and boards, and external disclosures of credit risk exposure and impairment provisions.

The guidance provided in this document covers: (1) the provision of forbearance support for customers undergoing financial stress; (2) the recognition of impairment within the book through management committees and Board reporting; and (3) the disclosure of impairment and its recognition through loss provisions in external reporting.

Comments are due by 14 June 2011.

[Cost benefit analysis](#)

BaFin circular on requirements for recognition of core capital instruments according to KWG published

The Federal Financial Supervisory Authority (BaFin) has published [circular 5/2011 \(BA\)](#) regarding requirements for recognition of core capital instruments according to section 10 para 2a sentence 1 no. 1 to 6, 8 and 10 of the German Banking Act (KWG) and for their early redemption. In accordance with section 6 para 5 of the KWG, the circular implements the 'Implementation Guidelines for Hybrid Capital Instruments' and the 'Implementation Guidelines regarding Instruments referred to in Article 57 (a) of Directive 2006/48/EC recast' issued by CEBS as an interpretation of CRD II requirements.

The circular applies from 5 May 2011.

BaFin consults on draft regulation detailing compensation procedures according to InvG

The Federal Financial Supervisory Authority (BaFin) has issued a consultation on a [draft Regulation](#) detailing the compensation procedures according to section 28 para 3 of the German Investment Act (InvG). It includes a draft Regulation on errors in the valuation of units and breaches of investment limits which aims to detail the compensation procedures investment management companies have to establish in case of errors in the calculation of the value of fund units as well as breaches of investment limits.

Furthermore, the draft Regulation contains amendments to the Regulation on Investment Audit Reports as well as the Regulation on Investment Accounting and Valuation. These amendments became necessary because of the adoption of the German Act on the strengthening of investor protection and enhancing the functionality of the Capital Market and the German Act Implementing the UCITS IV Directive.

Comments are due by 24 May 2011.

[Reasoning/explanation \(DE\)](#)

Dutch Minister of Finance comments on AFM's wish to supervise development process of financial products

In a [letter](#) to the Dutch Lower House, the Dutch Minister of Finance has indicated that more supervision of new financial products developed by Dutch regulated financial institutions is needed. Such supervision would not address every new product being brought to the market; rather, it would look at the process by which these products are developed.

In autumn 2010, the Netherlands Authority for the Financial Markets (AFM) urged lawmakers to grant it additional powers to keep a closer watch on the development process of financial products. The Minister will await the outcome of a corporate governance evaluation of the Dutch financial sector currently being conducted before deciding on the introduction of supervision of the product development process. It remains unclear if and how this sort of supervision would affect foreign financial institutions providing financial services on a cross-border basis into the Netherlands.

Dutch Ministry of Finance consults on increase of PMP threshold to EUR 100,000 and extension of inducement rules to non-life insurances

The Ministry of Finance has published a [consultation document](#) on proposed changes to certain decrees implementing the Financial Supervision Act (FSA). One of the changes concerns an increase of the threshold amount for qualifying as a Professional Market Party (PMP) from EUR 50,000 to EUR 100,000. The PMP threshold is relevant to all Dutch corporate borrowers who, unless they issue retail debt instruments in compliance with the Prospectus Directive, are required to borrow from PMPs, and to Dutch finance companies, SPVs and investment vehicles that cannot benefit from certain statutory exemptions from the bank license requirement.

The proposed decree would also contain new rules on inducements. The current inducement rules, which are – apart from the inducement rules contained in the Dutch rules implementing MiFID – only applicable in relation to certain complex products (including mortgage credit), would be extended to non-life insurance and be amended to provide that commissions paid or borne by the client will not be allowed if such commissions are manifestly unreasonable given the nature and scope of the financial service. Brokerage fees (including one-off and on-going fees), will only be allowed if the intermediary or advisor discloses the key characteristics of the fees prior to entering into an agreement. The explanatory notes suggest that bonus or turnover-related fees will be prohibited once the new rules become effective.

Comments are due by 11 May 2011. The intended implementation date is 1 January 2012.

UCITS: Circulars outlining new notification procedures and requirements for management companies and self-managed SICAVs published

The Luxembourg financial supervisory authority (CSSF) has published [Circular 11/509](#), dated 15 April 2011, which contains new notification procedures to be observed by UCITS incorporated under Luxembourg law which intend to market their units/shares in another EU Member State and by UCITS from another EU Member State which intend to market their units/shares in Luxembourg.

CSSF also published [Circular 11/508](#) outlining the requirements that apply to UCITS IV Management Companies and UCITS IV Self-Managed SICAVs.

FINMA reports on effectiveness and efficiency in supervision

The Swiss Financial Market Supervisory Authority (FINMA) has published a [report](#) outlining the steps it has taken to increase the effectiveness and efficiency of supervision and the results it has achieved to date. The report explains how the lessons learnt from the financial crisis and the efforts undertaken to build an integrated financial market supervisory authority from the three predecessor organisations have shaped FINMA's supervisory operations.

FINMA is focusing on three aspects: (1) adopting a systematically risk-based supervisory approach for all areas of supervision; (2) further developing the supervisory instruments, including conducting more on-site reviews and carrying out rapid and comprehensive, cross-sector surveys or comparisons; and (3) optimising FINMA's organisation.

SFC consults on proposed amendments to list of exchanges under Securities and Futures (Financial Resources) Rules

The Securities and Futures Commission (SFC) has issued a [consultation paper](#) on its proposed amendments to the list of exchanges specified in the Securities and Futures (Financial Resources) Rules. The proposed amendments are intended to update the list of specified exchanges so as to facilitate market development and alleviate the compliance burden of licensed corporations. Under the proposal, four futures exchanges (including the newly-authorized Hong Kong Mercantile Exchange) will be added to the list and the names of some of the exchanges will be updated.

Comments are due by 3 June 2011.

RBI issues guidelines on information security, electronic banking, technology risk management and cyber frauds

The Reserve Bank of India (RBI) has issued a [circular](#) to all scheduled commercial banks (excluding regional rural banks) on final [guidelines](#) regarding information security, electronic banking, technology risk management and cyber frauds. According to the RBI, the guidelines are not 'one-size-fits-all' and the implementation of these

recommendations needs to be risk based and commensurate with the nature and scope of activities engaged by banks and the technology environment prevalent in the bank.

The RBI requires all banks to conduct a formal gap analysis between their current status and stipulations as laid out in the circular and put in place a time-bound action plan to address the gap and comply with the guidelines. Banks need to ensure implementation of a basic organisational framework and put in place policies and procedures by 31 October 2011. The rest of the guidelines need to be implemented within a period of one year unless a longer time-frame is indicated.

CBB consults on proposed minimum requirements on customer complaints procedures for banks

The Central Bank of Bahrain (CBB) has published a [consultation paper](#) on proposed minimum requirements on customer complaints procedures for banks. The Consultation proposes that all banks have an appropriate customer complaint handling policy, which is appropriately documented and made available to customers upon request.

At a minimum, banks must have procedures and policies in respect of: (1) receiving and acknowledging complaints; (2) investigating complaints; (3) responding to complaints in a timely manner (i.e., acknowledgement of a complaint within 5 working days with a view to responding to the complaint within 4 weeks); (4) recording information concerning complaints; and (5) identifying reoccurring system failure issues. Furthermore, it is proposed that all banks appoint a customer complaints officer, of suitable seniority, responsible for recording complaints and reporting complaints to the CBB on a quarterly basis.

Comments are due by 30 May 2011.

CBB consults on Volume 6 of Rulebook and proposed High-Level Controls (Corporate Governance) Module

The Central Bank of Bahrain (CBB) has published a [consultation paper](#) on Volume 6 of its Rulebook and a proposed High-Level Controls (Corporate Governance) Module (the 'HC Module') relating to corporate governance requirements applicable to capital markets service providers.

The HC Module will require capital markets service providers to have effective corporate governance policies and procedures in place and contain detailed requirements relating to: (1) the compulsory evaluation and training of the board, directors and senior officers; (2) Audit Committee and Financial Statements Certification; (3) remuneration of directors and officers; (4) management structure; (5) corporate communication; (6) corporate governance disclosure; and (7) specific corporate governance provisions relating to Islamic capital markets service providers.

All companies listed on the Bahrain Stock Exchange fall within the scope of the Corporate Governance Code of the Kingdom of Bahrain and will also be subject to the HC Module.

Comments are due by 1 June 2011.

FINRA announces approval of new rules governing member books and records

The US Financial Industry Regulatory Authority (FINRA) has issued [Regulatory Notice 11-19](#) announcing SEC approval of its proposed rules governing books and records for the consolidated FINRA rulebook. The new rules, which are modeled after NASD Rule 3110, NYSE Rule 440 and NYSE Rule Interpretations 410/01 and 410/02, require member firms to make and preserve certain books and records to show compliance with applicable securities laws, rules and regulations.

The text of the new rules is attached to the Regulatory Notice. The rules will take effect on 5 December 2011.

SEC and CFTC announce rule proposal on product definitions for swaps

In accordance with the Dodd-Frank Act, the SEC, together with the CFTC, has issued a [press release and fact sheet](#) announcing [joint proposed rules](#) further defining the terms 'swap', 'security-based swap', and 'security-based swap agreement'. The SEC has also proposed rules regarding 'mixed swaps' and books and records for 'security-based swap agreements'.

The joint proposal would provide interpretive guidance regarding which products would not be considered a 'swap' or a 'security-based swap'. These generally include insurance, security forwards, and certain 'consumer and commercial transactions'.

The fact sheet states that the following transactions fall within the definition of swap or security-based swap: (1) foreign exchange forwards; (2) foreign exchange swaps; (3) foreign currency options (other than foreign currency options traded on a national securities exchange); (4) non-deliverable forward contracts involving foreign exchange; (5) currency and cross-currency swaps; (6) forward rate agreements; (7) contracts for differences; and (8) certain combinations and permutations of (or options on) swaps and security-based swaps.

Further, in its proposed interpretive guidance, the SEC would clarify whether particular agreements, contracts or transactions are swaps, security-based swaps, or mixed swaps.

Public comments on the rule proposal should be received within 60 days after it is published in the Federal Register, which is expected shortly.

RECENT CLIFFORD CHANCE BRIEFINGS

Legal aspect of bank bail-ins

The aim of the bail-in proposal is that governments should have an alternative option to taxpayer-funded rescues of systemic banks. It operates through a mechanism whereby an insufficiently solvent bank can be returned to balance sheet stability by writing down not only the claims of its subordinated creditors but also some of its senior creditors; converting their claims to equity. To be effective, the mechanism should be 'hybrid', in that the terms of the relevant instruments should provide for the bail-in to operate through private contract, but the power to trigger the bail-in and to determine the extent of write-down and the resulting compensation should be vested in the relevant public authority.

This briefing discusses the legal aspects of bail-ins.

http://www.cliffordchance.com/publicationviews/publications/2011/05/legal_aspects_ofbankbail-ins.html

International restructuring – have schemes of arrangement come of age?

With businesses operating in a global market and barriers to capital movement falling, restructuring has increasingly become a cross-border affair. Following the recent Perspectives seminar, journalist John Rolinson heard from Clifford Chance experts about the impact of English schemes of arrangement on international restructurings.

http://www.cliffordchance.com/publicationviews/publications/2011/05/international_restructuring_haveschemeso.html

Financial sanctions affecting Libya – further update

As detailed in our March 2011 briefing paper, since February, the United Nations, the United States and the European Union have all imposed sanctions on the Libyan government and select Libyan companies, which to date have reportedly resulted in the freezing of Libyan state assets estimated at USD 120 billion (please see the link to the related alert below).

This new briefing considers recent developments in relation to the sanctions affecting Libya, against a backdrop of ongoing military operations for which no immediate end is in sight.

May 2011 briefing

http://www.cliffordchance.com/publicationviews/publications/2011/05/financial_sanctionsaffectinglibyafurthe.html

March 2011 briefing

http://www.cliffordchance.com/publicationviews/publications/2011/03/financial_sanctionsaffectinglibya-update0.html

'Deficit for equity swap': Uniq uses a scheme of arrangement to shed its pension liabilities

In a significant transaction for the pensions' industry, the high court has recently blessed a deal that sees shareholders relinquishing 90% of their shares in exchange for wiping out the company's GBP 473m pension scheme liability. This is the first restructuring where a scheme of arrangement (one of the techniques contained within the Companies Act 2006) has been used to shed this kind of liability. The case may serve as a blueprint for other companies in need of restructuring and weighed down by the enormous liabilities that are derived from participating in defined benefit pension schemes.

This briefing discusses the restructuring.

http://www.cliffordchance.com/publicationviews/publications/2011/04/deficit_for_equityswapuniquesesaschemeo.html

Schemes of arrangement in the reform of Spain's Insolvency Law? (English)

The text of the Draft Bill for the Reform of the Spanish Insolvency Law has recently been published and is currently pending approval before Parliament. One of the main changes is that the Draft Bill introduces a Fourth Additional Provision in relation to refinancing agreements, the contents of which draws its inspiration from other European systems, mainly from the UK model for Schemes of Arrangement. However, the regulation contained in the Draft Bill still has a long way to go before it mirrors the UK model, as there are significant factors which will determine whether or not it applies; and in any event, it is still limited in scope. Therefore, it is necessary to explain what this mechanism, which is intended to be incorporated into Spain's insolvency system, includes and what it does not.

This briefing discusses the new Fourth Additional Provision.

English version

http://www.cliffordchance.com/publicationviews/publications/2011/04/schemes_of_arrangementinthereformofspain.html

Spanish version

http://www.cliffordchance.com/publicationviews/publications/2011/04/schemes_of_arrangementenlaleyconcurso.html

Shenanigans in Shangri-La? Hong Kong courts refuse to enforce mainland China arbitral award

In a recent decision, the Hong Kong Court of First Instance refused to enforce a mainland arbitral award on public policy grounds. The case highlights the perils of Arbitration-Mediation – common in mainland China – which involves arbitrators acting as mediators before deciding the merits of a case. The new Hong Kong Arbitration Ordinance, which enters into force later this year, also permits the practice subject to safeguards.

This briefing discusses the judgment.

http://www.cliffordchance.com/publicationviews/publications/2011/04/shenanigans_in_shangri-lahongkongcourt.html

Supreme Court hears oral arguments in Erica P. John Fund v. Halliburton

On 25 April 2011, the US Supreme Court heard oral arguments in Erica P. John Fund v. Halliburton, a private securities fraud case that may have lasting impact on class action lawsuits in the United States. One of the key questions in the case is whether plaintiffs in a securities fraud class action can obtain class certification without showing that the defendant's alleged fraud actually impacted the price of the relevant security. This is an important question in securities class actions. More broadly, this question raises the issue of when the underlying merits of a claim may be considered at the class certification stage – an issue that applies in all class actions.

Halliburton is one of four class action cases before the Supreme Court this term, and one of two related to class certification (the other is Wal-Mart v. Dukes). These cases promise to provide substantial guidance regarding the application of the rules for class certification.

This briefing discusses Erica P. John Fund v. Halliburton.

http://www.cliffordchance.com/publicationviews/publications/2011/05/supreme_court_hearsoralargumentsinericap0.html

Dodd-Frank proposed rules on swaps

Following the enactment of the Dodd-Frank Act, the regulators have proposed multiple regulations governing swaps. The proposal stage for the regulations is now largely complete.

This chart describes all of the regulations that have been proposed.

http://www.cliffordchance.com/publicationviews/publications/2011/05/dodd-frank_proposedrulesonswaps.html

Swaps trading prohibitions and sales compliance and Dodd-Frank

Following the enactment of the Dodd-Frank Act, the regulators have proposed multiple regulations governing swaps. The proposal stage for the regulations is now largely complete.

This briefing describes the swap trading restrictions and sales compliance requirements.

http://www.cliffordchance.com/publicationviews/publications/2011/05/swaps_trading_prohibitionsandsalescompliance.html

CISADA update – proposed reporting requirements

On 2 May 2011, the US Treasury Department published a proposal for implementing the US correspondent account provision of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA). The proposal would substantially increase US Treasury's extraterritorial ability to access and respond to information regarding the Iran related activity of non-US banks that maintain US correspondent accounts.

This briefing discusses the proposal.

http://www.cliffordchance.com/publicationviews/publications/2011/05/cisada_update_proposedreportingrequirements.html

CFTC's proposal to repeal or restrict exemptions from Commodity Pool Operator and Commodity Trading Advisor Regulation

The CFTC has proposed rules that would remove the exemptions that many US fund managers and non US fund managers of US funds currently rely on to avoid the need to register as commodity pool operators (CPOs) and commodity trading advisors (CTAs) in the United States.

This briefing discusses the proposed rules.

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

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