

# International Regulatory Update

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## SHORT SELLING UPDATE

### AMF publishes further update to FAQs on short selling ban

The Autorité des marchés financiers/Financial Markets Authority (AMF) has published an updated set of frequently asked questions in relation to the ban on creating a 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.

In particular, the FAQs were revised for the purpose of providing for the conditions under which investors may, in the event of the rebalancing of an index, sell the securities concerned by such a rebalancing.

[FAQs \(English\)](#)  
[FAQs \(French\)](#)

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## OTHER NEWS

### Independent Commission on Banking publishes final report

The Independent Commission on Banking has published its [Final Report](#), which sets out the Commission's recommendations on reforms which are intended to improve stability and competition in UK banking.

The Commission's recommendations focus on: (1) financial stability; (2) structural reform (retail ring-fencing); (3) loss absorbency; (4) the economic impact of the Commission's financial stability recommendations and implementation issues; and (5) competition issues, the relationships between financial stability and competition, and steps to improve competition.

[Opening remarks by Sir John Vickers](#)  
[Statement by Chancellor](#)

### FSA consults on simplified advice

The FSA has issued a [consultation paper](#) to provide additional guidance on suitability, adviser charging and service disclosure. It also contains general guidance on professional standards, designing and delivering a simplified advice process, and choosing an appropriate product suite. The FSA has indicated that the aim of this guidance is to reduce any regulatory uncertainties that may be discouraging firms from offering simplified advice services in relation to retail investment products. It outlines how the regulatory regime applies to such processes, and the FSA's expectations of such services, focusing on the issues raised by the industry.

In particular, the consultation paper: (1) outlines the background to this document, including the FSA's regulatory approach; (2) covers certain aspects of the regulatory regime for advising on investments, and provides additional guidance on specific rules for simplified advice; and (3) summarises some of the high-level standards and guidance which firms should pay particular regard to when designing and delivering simplified advice, and considers what these standards mean for both the design of the advice process itself and for choosing or developing an appropriate product suite.

Responses are due by 15 November 2011.

### ESMA issues call for evidence on empty voting

ESMA has issued a [call for evidence](#) on empty voting, i.e. having voting rights attached to shares without corresponding economic exposure. Currently there are no specific rules relating to empty voting at the European level. However, in light of the fact that two Member States have taken or are planning to take steps to address empty voting, ESMA has decided to issue this call for evidence in order to collect information and evidence on the extent to which empty voting practices exist in practice and the effects of such practices.

In particular, ESMA's paper contains questions relating to: (1) ways of exercising empty voting; (2) consequences of empty voting; (3) internal policies relating to voting practices; and (4) need for regulatory action.

Comments are due by 25 November 2011. ESMA will use the responses received to assess whether there is need for further ESMA work with regard to empty voting.

### OTC derivatives and market infrastructures: Polish EU Presidency publishes compromise proposal

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

### IOSCO announces commodity derivatives markets supervisory principles

The Technical Committee of the International Organization of Securities Commissions (IOSCO) has published its report on '[Principles for the Regulation and Supervision of Commodity Derivatives Markets](#)'. The Report was prepared to address the G20's November 2010 request for further work on regulation and supervision of physical commodity derivatives markets.

IOSCO has explained that, in developing these Principles, the Task Force has added to the areas of guidance in the 1997 Tokyo Communiqué to take account of their experiences and to respond to contemporary trends in commodity derivatives markets. These trends include: (1) the scale, speed and cross-border nature of trading on markets; (2) novel forms of market abuse; (3) investors' focus on commodities as an asset class and the impact

of new investor classes and futures trading on physical commodity prices; (4) the rapidly evolving regulation of OTC derivatives markets; and (5) regulation of market participants.

The principles address the following areas: (1) design of physical commodity derivatives contracts; (2) surveillance of commodity derivatives markets; (3) disorderly markets; (4) enforcement and information sharing; and (5) enhancing price discovery and transparency.

### **ICMA reports on interplay between central bank and commercial bank money in securities settlement**

The International Capital Market Association's (ICMA's) European Repo Council (ERC) has published a report, ['The interconnectivity of central and commercial bank money in the clearing and settlement of the European repo market'](#). The report is intended to shed light on the workings of the payment infrastructure that underlies the settlement of transactions in securities in Europe, including repo transactions, and maps the different routes by which financial institutions exchange money and securities.

The report has been produced in the context of regulatory efforts to reduce systemic risk by better underpinning the smooth functioning of clearing and settlement in Europe. ICMA has noted that regulators have turned to the issue of whether specialised securities clearing and settlement entities, designated 'Financial Market Infrastructures' (FMIs) - Central Securities Depositories (CSDs), International Central Securities Depositories (ICSDs) and central counterparties (CCPs) - should make and receive payments in 'central' rather than 'commercial' bank money.

The report calls for balance in re-engineering the payment architecture and highlights the critical role of commercial bank money in making multi-currency, cross-border payments, cautioning that this role is becoming ever more important.

### **Kay review of UK Equity Markets and Long-Term Decision Making: call for evidence**

Professor John Kay has launched a [call for evidence](#) for his review of the UK equity markets and long-term decision making at an event held at the National Association of Pension Funds (NAPF). The focus of the review is to examine the mechanisms of corporate control and accountability provided by UK equity markets and their impact on the long term competitive performance of UK businesses, and to make recommendations.

Professor Kay has stressed that the subject of the review is corporate decision making and corporate performance, not corporate governance. The core questions that will be asked are how well equity markets perform in: (1) enabling publicly traded companies to make the right decisions in the development of sustainable, profitable businesses; and (2) enabling savers and those who act for them to make the right decisions to achieve their underlying investment goals.

Responses are due by 18 November 2011. The intention is to provide the Secretary of State with an interim report in February 2012, which will describe preliminary findings and possible recommendations. There will then be a further opportunity for comment before the final report is presented July 2012.

[Professor Kay's speech](#)

### **Money Laundering Guidance: JMLSG consults on proposed amendments**

The Joint Money Laundering Steering Group (JMLSG) has conducted a review of its Money Laundering Guidance, examining areas of omission, provisions that are difficult to implement or effect, and provisions that no longer reflect current practice. The Board has approved a number of amendments to the Guidance and the JMLSG has published the revised text for consultation.

The JMLSG has indicated that: (1) the amendments proposed to Part I are relatively minor; (2) for Part II, the guidance relating to Trade Finance (sector 15) has been updated, as well as incorporating the previous text on Proliferation financing from Part III; (3) the text on Electronic money (sector 3) is still being amended to reflect the implementation of the Electronic Money Regulations, and will be published for comment in due course; and (4) other changes to Part II, and the proposed amendments to Part III, are relatively minor matters of clarification.

Comments are due by 17 October 2011.

[Link to guidance](#)

### **FOS consults on publishing ombudsman decisions**

The Financial Ombudsman Service (FOS) has issued a [discussion paper](#) on the practical issues and next steps involved in publishing ombudsman decisions. The government has indicated its intention to require that the FOS publish the final decisions of its ombudsmen (subject to certain safeguards) by including a clause to that effect in the recently published draft Financial Services Bill. This discussion paper sets out the FOS's initial thoughts on how it might publish decisions in practice.

Comments are due by Friday 9 December 2011.

### **SGX consults on proposed enhancements to default management framework for derivative contracts**

The Singapore Exchange (SGX) has issued a [consultation paper](#) on amendments to the Singapore Exchange Derivatives Clearing Limited (SGX-DC) rules, in relation to the proposed enhancements to its default management framework for exchange-traded and over-the-counter (OTC) derivative contracts. The proposed enhancements are intended to safeguard the clearing system in events of multiple defaults occurring in quick succession.

The proposed enhancements include: (1) introducing a mechanism to limit the SGX clearing members' default management liabilities as well as changes to the manner in which the clearing fund will be used in default scenarios; and (2) refinements to the default management framework to strengthen SGX-DC's authority in the management of defaults and to provide greater clarity on procedures.

Comments are due by 3 October 2011.

### **FDIC approves Final Rule on resolution plans under Dodd-Frank**

The Board of Directors of the Federal Deposit Insurance Corporation (FDIC) has announced the approval of a Final Rule to be issued jointly by the FDIC and the Federal Reserve Board (FRB) to implement Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The final rule implements provisions of Dodd-Frank requiring bank holding companies with assets of USD 50 billion or more and companies designated as systemic by the Financial Stability Oversight Council to report periodically to the FDIC and the FRB the company's plan for its rapid and orderly resolution in the event of material financial distress or failure.

The Final rule, which is still to be considered by the FRB, requires companies to describe their plans for resolution under bankruptcy proceedings. The goal is to achieve a rapid and orderly resolution of organizations in such a way as not to cause a systemic risk to the financial system. The Final Rule also sets specific standards for the resolution plans, including requiring a strategic analysis of the plan's components, a description of the range of specific actions to be taken in the resolution, and analyses of the company's organization, material entities, interconnections and interdependencies, and management information systems among other elements.

Additionally, the FDIC has approved a complementary Interim Final Rule under the Federal Deposit Insurance Act which will require insured depository institutions with USD 50 billion or more in total assets to submit periodic contingency plans to the FDIC for resolution in the event of the depository institution failure.

[Press release \(with attached Notice\)](#)

### **SEC consults on review of existing regulations**

The SEC has indicated that it plans to conduct retrospective reviews of existing regulations in accordance with Executive Order 13579 issued by President Obama on 11 July 2011. This order recommends that independent regulatory agencies consider how they might best analyze rules that may be outmoded, ineffective or excessively burdensome, and modify, streamline or repeal them. The order also recommends analysis of regulations that might need to be strengthened or modernized, which may entail new rulemaking.

The SEC is [requesting public comment](#) on the process it should use in conducting retrospective reviews, such as how often rules should be reviewed, the factors that should be considered, and ways to improve public participation in the rulemaking process. Comments are due by 6 October 2011.

## RECENT CLIFFORD CHANCE BRIEFINGS

### UK Independent Commission on Banking publishes final report

The Independent Commission on Banking (ICB) was appointed by the UK government last year. The ICB published its Final Report on Monday 12 September. The Final Report recommends that, by early 2019, UK retail banking activities should be ring-fenced into separate subsidiaries and that both ring-fenced banks and wider financial institution groups should be subject to capital requirements that are stricter than those required by Basel III standards. The broad content of the ICB's Final Report was foreshadowed by the ICB's Interim Report in April (see our briefing 'The UK Independent Commission on Banking's Interim Report', April 2011).

This briefing summarises the key proposals discusses the features of the ICB's reports that were not expressly anticipated by the Interim Report.

September 2011 Briefing On Final Report

[http://www.cliffordchance.com/publicationviews/publications/2011/09/uk\\_independent\\_commissiononbankingpublishe.html](http://www.cliffordchance.com/publicationviews/publications/2011/09/uk_independent_commissiononbankingpublishe.html)

April 2011 Briefing On Interim Report

[http://www.cliffordchance.com/publicationviews/publications/2011/04/the\\_uk\\_independentcommissiononbanking.html](http://www.cliffordchance.com/publicationviews/publications/2011/04/the_uk_independentcommissiononbanking.html)

### Banks in Hungary are threatened by fixed rate FX conversions

On 12 September, Hungarian Prime Minister Viktor Orbán announced that his government is supportive of the proposals put forward in the Hungarian Parliament by FIDESZ Party MPs which plan to oblige banks in Hungary to permit borrowers to repay their foreign exchange liabilities at a legislated conversion rate that has been announced as, variously, approximately 22% below the current rate for the Swiss franc and 11% for the euro. The impact of the proposed scheme on banks active in Hungary could be considerable.

Clifford Chance has prepared a briefing paper which discusses the government's proposal, the issues it raises and the reactions to it.

Please contact Barbara Kahn by email at [barbara.kahn@cliffordchance.com](mailto:barbara.kahn@cliffordchance.com) for a copy of this briefing.

### The Italian Council of State rules on local authorities' powers to annul derivative contracts

In a case concerning derivative transactions entered into between the Italian Province of Pisa and certain credit institutions, the Council of State (Italy's highest ranking court for administrative litigation - decision no. 05032/2011 filed on 7 September 2011) ruled that Italian administrative courts have jurisdiction over the legitimacy of the administrative annulment by a local authority of its own decision to enter into derivative contracts, and over the consequences of such annulment on the validity of the relevant contracts.

According to the Council of State, the jurisdiction of the Italian (administrative) courts must be upheld notwithstanding the jurisdiction clause in the ISDA Master Agreement governing the transactions and prior legal proceedings on the same transactions pending before the courts of the jurisdiction stipulated in the agreement.

The Council of State further ruled that a local authority may, subject to certain conditions, unilaterally revoke its decision to enter into a derivative transaction if any irregularities are found to have affected the administrative process resulting in the decision; where the decision to enter into a derivative transaction has been lawfully revoked, then the transaction must be deemed (retroactively) unenforceable.

This briefing outlines the new relevant provisions.

Please contact Barbara Kahn by email at [barbara.kahn@cliffordchance.com](mailto:barbara.kahn@cliffordchance.com) for a copy of this briefing.

### Germany's Federal Constitutional Court rejects challenges against aid measures for Greece and against the euro rescue package

In its judgment of 7 September 2011, Germany's Federal Constitutional Court rejected three complaints against German and European legal instruments and other measures in connection with the financial assistance to Greece and the euro rescue package. The Constitutional Court held that neither the Monetary Union Financial Stabilisation Act nor the Act Concerning the Assumption of Guarantees in the Framework of a European Stabilization Mechanism violate German constitutional law.

This briefing analyses the Constitutional Court's decision in greater detail and looking at further implications.

Please contact Barbara Kahn by email at [barbara.kahn@cliffordchance.com](mailto:barbara.kahn@cliffordchance.com) for a copy of this briefing.

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