

# International Regulatory Update

## IN THIS WEEK'S NEWS

- CNMV publishes further update to FAQs on short selling
- Financial transaction tax: France and Germany outline key principles
- Credit rating agencies: ESMA consults on draft regulatory technical standards
- OTC derivatives and market infrastructures: Polish EU Presidency publishes compromise proposal
- Securities Law Directive: Commission publishes extended summary of consultation responses
- FOA publishes study on impact of speculative trading in commodity markets
- BIS consults on narrative reporting and executive remuneration
- APRA consults on Basel III implementation
- Recent Clifford Chance briefings: Executive Remuneration – UK Government consults on enhanced disclosure and 'say on pay' proposals and more. [Follow this link to the briefings section.](#)

## SHORT SELLING UPDATE

### CNMV publishes further update to FAQs on short selling

The Comisión Nacional del Mercado de Valores (National Securities Market Commission) (CNMV) has published an updated set of [FAQs](#) in relation to its temporary measure on net short positions.

In particular, the CNMV has added FAQ number 10 on whether explicit approval from the CNMV is needed to make use of the market maker exemption.

## OTHER NEWS

### Financial transaction tax: France and Germany outline key principles

French Finance Minister François Baroin and his German counterpart Wolfgang Schäuble have sent a joint [letter](#) to the European Commission welcoming the announcement that a legislative proposal on the implementation of a financial transaction tax will be put forward in Autumn 2011.

Amongst other things, the letter argues that the tax base should be broad and cover all financial transactions related to financial instruments, such as equities, bonds, currency transactions and derivatives. It also indicates that the tax should be owed by the counterparties, and financial institutions (banks, stock exchanges, financial services providers etc.) should be responsible for the payment of the tax on behalf of the counterparties to the transactions.

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In addition, the letter encloses a paper outlining the design of a financial transaction tax, which covers transactions subject to the tax, territorial coverage of the tax, tax bases, tax rate, persons liable for the tax, collection, and taxable event.

### **Credit rating agencies: ESMA consults on draft regulatory technical standards**

ESMA has published for consultation its first set of [proposed regulatory technical standards](#) on credit rating agencies (CRAs), which detail the information that CRAs would have to disclose and the rules they would have to comply with in order to fulfil the requirements of the Credit Rating Agencies Regulation (1060/2009/EC).

The draft regulatory technical standards cover the following technical areas of conduct for CRAs: (1) the information to be provided by a CRA in its application for registration and certification, and for the assessment of the systemic importance to the financial stability or integrity of financial markets; (2) the presentation of the information, including structure, format, method and period of reporting that a CRA must disclose; (3) the assessment of compliance of CRAs with the requirements set out in Article 8(3) on the credit rating methodologies; and (4) the content and format of ratings data to be requested from CRAs as part of their periodic reporting for the purpose of the on-going supervision by ESMA.

Comments are due by 21 October 2011. ESMA intends to send the final draft standards to the European Commission by 2 January 2012.

### **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.

### **Securities Law Directive: Commission publishes extended summary of consultation responses**

The European Commission has published an [extended summary of the responses](#) to its November 2010 consultation paper on the Securities Law Directive. The consultation paper sought stakeholders' views on the harmonisation of the legal framework for securities holding and transactions, and contained a list of principles which the Commission wanted to submit to stakeholders for further evaluation before preparing a legislative proposal.

[Consultation page](#)

### **FOA publishes study on impact of speculative trading in commodity markets**

The Futures and Options Association (FOA) has published a [report](#), compiled by economic research group FTI Consulting, which reviews the evidence on speculation in commodity markets and investigates the underlying arguments for and against financial participation in commodity markets. FTI found little evidence to support the view that speculation is a direct or major cause of long-term pricing trends, but the report recommends that further work should be undertaken to fully understand the interaction between financial and commodity markets.

In addition, the report concludes that: (1) speculation is not a major cause of market volatility, but can amplify underlying price movements; (2) the most critical reports accept that, at worst, speculation accounts for no more than 25% of commodity price movements in recent years, leading to the conclusion that 75% of such movements are accepted by all parties as being generated by fundamental supply and demand problems; (3) some reports cautioned that ill-informed regulatory action could increase market volatility, destabilise the price formation process and hamper the ability of physical producers and consumers to hedge risk, supporting the view that further work is required; and (4) all reports emphasise the benefits of increased price transparency.

### **BIS consults on narrative reporting and executive remuneration**

The Department for Business, Innovation and Skills (BIS) has published two papers setting out its proposals to improve the corporate governance framework in the UK.

The first [consultation paper on a new framework for narrative reporting](#) proposes to simplify the reporting requirements for companies in order to provide better information to investors on performance and pay. It sets out proposals to improve reporting on remuneration, including requiring companies to provide information on the link between the performance of companies and top executives' earnings. Amongst other things, this includes requiring disclosure where the remuneration committee has agreed to pay bonuses when performance targets have not been met. The consultation paper also sets out the government's plans to divide companies' narrative reports into a Strategic Report, aimed at shareholders, providing information on financial results, information on

the business model, strategy, risks, remuneration and key environmental and social issues, and an Annual Directors' Statement, published online, which will provide the detailed information that underpins the Strategic Report.

The second [consultation paper on executive remuneration](#) focuses on: (1) whether there is a case for a binding vote for shareholders on deciding pay; (2) diversifying the membership of remuneration committees to encourage greater challenge, such as having employee representation; (3) how to simplify and improve the structure of remuneration to incentivise and reward sustainable long-term performance; and (4) improved research and guidance on remuneration to help companies and shareholders make more informed decisions on pay.

Comments on both papers are due by 25 November 2011.

### **APRA consults on Basel III implementation**

The Australian Prudential Regulation Authority (APRA) has published a [discussion paper](#) outlining its proposed implementation of the Basel III capital reforms in Australia. In APRA's view, authorised deposit-taking institutions (ADIs) in Australia are well placed to meet the new minimum capital requirements under Basel III and APRA is therefore proposing to accelerate aspects of the Basel Committee's timetable.

Amongst other things, under APRA's proposals:

- ADIs will be required to meet the revised Basel III minimum capital ratios and regulatory adjustments in full from 1 January 2013;
- APRA will adopt the Basel III phase-out arrangements for capital instruments that no longer qualify as Additional Tier 1 capital or Tier 2 capital, and will require outstanding non-complying capital instruments to be phased out no later than their first available call date, where one exists;
- the capital conservation buffer will apply in full from 1 January 2016 – APRA is of the view that, with the transition allowance for capital instruments that no longer qualify as Tier 1 and Tier 2 capital, ADIs should be able to meet the combined Common Equity Tier 1 minimum requirement and the capital conservation buffer by that date;
- APRA will indicate in 2015 whether any countercyclical buffer will apply from 1 January 2016 and whether any phasing-in of that buffer is necessary; and
- APRA will introduce the leverage ratio on the Basel III timetable, which envisages this ratio migrating to a Pillar 1 requirement on 1 January 2018.

Comments are due by 2 December 2011. Following consideration of submissions received, APRA intends to issue draft prudential standards and reporting requirements for consultation in early 2012.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **Executive Remuneration – Government consults on enhanced disclosure and 'say on pay' proposals**

Regulation of executive remuneration has been in the sights of Vince Cable, the Secretary of State for Business for some time. The Department of Innovation Business and Skills (BIS) has now published two documents: a discussion paper relating to executive remuneration; and a consultation paper on the simplification of company reporting requirements, including information regarding performance and pay. This is a consultation exercise at this stage, but the proposals on 'say on pay' raise and the publication of remuneration data some interesting practical and legal issues, and will no doubt cause some controversy.

This briefing discusses the proposals.

[http://www.cliffordchance.com/publicationviews/publications/2011/09/executive\\_remunerationgovernmentconsultso.html](http://www.cliffordchance.com/publicationviews/publications/2011/09/executive_remunerationgovernmentconsultso.html)

## **UK Employment Update**

The September 2011 edition of Employment News in Brief reports on a case that examines what can constitute a reasonable adjustment for the purposes of enabling a disabled employee to return to the workplace. The question of when it can be fair to dismiss an employee and then re-engage them on less favourable terms where agreement cannot be reached about proposed changes to the contract is the subject of a second decision. The final case reported in this edition looks at the effect of summarily dismissing an employee during their notice period.

This edition also reports on new guidance issued by ACAS on social networking sites and the Equalities Office 'Think, Act, Report' aimed at encouraging the voluntary reporting of gender pay gaps.

[http://www.cliffordchance.com/publicationviews/publications/2011/09/uk\\_employment\\_update-september2011.html](http://www.cliffordchance.com/publicationviews/publications/2011/09/uk_employment_update-september2011.html)

## **Important opportunities for the market of short-term bonds and securitisation notes in Italy**

New tax legislation should open up great opportunities for Italian issuers to tap into the short term capital markets by removing the withholding tax discrimination currently existing vis-à-vis long term bonds. One of the (possibly unintended) consequences of the new measures proposed by the Italian Government to reform the taxation of interest (and capital gains) on securities is a significant widening of the scope of the tax regime applicable under Legislative Decree 239 of 1 April 1996. The new measures are contained in a decree law currently before Parliament for conversion into law. Once the conversion is accomplished as expected (in the next few weeks), the new regime will apply as of 1 January 2012.

This briefing discusses the new regime.

[http://www.cliffordchance.com/publicationviews/publications/2011/09/important\\_opportunitiesforthemarketo.html](http://www.cliffordchance.com/publicationviews/publications/2011/09/important_opportunitiesforthemarketo.html)

## **New transparency regime for cash-settled derivatives**

For some years now, regulators in Italy and at the European level have focused on the need for greater transparency for holdings of cash-settled derivative instruments, mainly because these instruments may be used with an intent to elude the law. While debate continues in Brussels, CONSOB has taken action (following in the footsteps of the United Kingdom, France and, most recently, Germany) to impose a new transparency regime upon holdings of financial instruments which have as their underlying the shares of listed companies, and which provide for settlement in cash, by way of amendment of CONSOB Regulation 11971 of 14 May 1999.

This briefing discusses the new regime.

[http://www.cliffordchance.com/publicationviews/publications/2011/09/new\\_transparencyregimeforcash-settle.html](http://www.cliffordchance.com/publicationviews/publications/2011/09/new_transparencyregimeforcash-settle.html)

## **New Dutch tax legislation affects leveraged acquisitions**

The Dutch government recently issued the long expected tax proposals which will affect leveraged acquisitions in the Netherlands. The proposals are expected to enter into force per 1 January 2012.

This briefing provides a brief summary of the main amendments.

[http://www.cliffordchance.com/publicationviews/publications/2011/09/new\\_dutch\\_tax\\_legislationaffectsleverage.html](http://www.cliffordchance.com/publicationviews/publications/2011/09/new_dutch_tax_legislationaffectsleverage.html)

## **France – Recognition of trusts and parallel debt structures**

In a landmark decision dated 13 September 2011, the French Supreme Court recognises trusts and parallel debt structures in International Financings. In the famous Belvedere restructuring, the French Supreme Court has recognised trust and parallel debt structures governed by New York law in the context of filing of proof of claims within French safeguard proceedings.

This briefing discusses the decision and its impact on international finance.

[http://www.cliffordchance.com/publicationviews/publications/2011/09/france\\_recognitionoftrustsandparalleldeb.html](http://www.cliffordchance.com/publicationviews/publications/2011/09/france_recognitionoftrustsandparalleldeb.html)

## **Separation of JBIC from JFC under new JBIC Law offers more effective support to Japanese corporations for overseas investment**

Japan Bank of International Cooperation (JBIC) was formally a government-affiliated bank incorporated and registered pursuant to the Japan Bank for International Cooperation Law. Beginning 1 October 2008, it is currently the international finance sector of Japan Finance Corporation (Nihon Seisaku Kin'yuu Kouko) (JFC) which was established by merging the National Life Finance Corporation, the Agriculture, Forestry and Fisheries Finance Corporation, the Japan Finance Corporation for Small and Medium Enterprise together with the International Finance Operations of the former JBIC. The 'Joint Stock Company Japan Bank for International Cooperation Law (the New JBIC Law)' was enacted on 28 April 2011 and came into effect on 2 May 2011. Based on the New JBIC Law, JBIC will be separated from JFC and will be established as an independent judicial person (hojin) on 1 April 2012. The new name for JBIC will be the Joint Stock Company Japan Bank for International Cooperation. The establishment of New JBIC Law with its functional enhancements will provide more effective support to private Japanese corporations for their overseas investments.

This briefing discusses the changes.

[http://www.cliffordchance.com/publicationviews/publications/2011/09/separation\\_of\\_jbicfromjfcundernewjbicla.html](http://www.cliffordchance.com/publicationviews/publications/2011/09/separation_of_jbicfromjfcundernewjbicla.html)

## **Libya – back in business?**

On Friday 16 September 2011 the United Nations Security Council adopted Resolution 2009 (2011) welcoming recent developments in Libya and announcing a number of measures intended to support peace-building and reconstruction efforts. The Resolution is of significance for businesses with operations or assets in Libya or wishing to invest in Libya as it significantly eases the economic sanctions imposed earlier this year.

This briefing highlights a number of issues which should be considered by businesses intending to resume or establish operations in Libya and before making new investments in the country.

[http://www.cliffordchance.com/publicationviews/publications/2011/09/libya\\_back\\_in\\_business.html](http://www.cliffordchance.com/publicationviews/publications/2011/09/libya_back_in_business.html)

## **SEC issues 3(c)(5)(C) concept release – Clifford Chance does not anticipate material changes to mortgage REIT exemptions**

On 31 August 2011, the US Securities and Exchange Commission issued a concept release seeking public comment regarding the status under the Investment Company Act of 1940 of companies engaged in the business of acquiring mortgages and mortgage-related instruments, such as real estate investment trusts (REITs), many of which rely on Section 3(c)(5)(C) for their exemption from registration under the 1940 Act. Section 3(c)(5)(C) excludes from the definition of investment company 'persons primarily engaged in ... purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.'

The concept release has generated some (but not universal) negative reaction due to the inclusion in the release of a handful of questions and commentary which can be read to suggest that the Commission is considering changes in the existing Section 3(c)(5)(C) guidance that could materially limit the manner in which mortgage REITs conduct their businesses.

This briefing sets out why we do not expect the Commission's review of the 3(c)(5)(C) exemption to result in this outcome.

[http://www.cliffordchance.com/publicationviews/publications/2011/09/sec\\_issues\\_3\\_c\\_5conceptreleaseclifford.html](http://www.cliffordchance.com/publicationviews/publications/2011/09/sec_issues_3_c_5conceptreleaseclifford.html)

## **CFTC proposes schedule for swap rules**

On 8 September 2011, the US Commodity Futures Trading Commission (CFTC) issued two proposed rules addressing the timetable for implementation of new regulatory requirements for swaps under the Dodd-Frank Wall Street Reform and Consumer Protection Act. One of these proposals relates to the implementation schedule for clearing and trade execution requirements; the other relates to the implementation schedule for documentation and margin requirements for uncleared swaps. On the same day, CFTC Chairman Gary Gensler also issued a tentative schedule for finalizing various other derivatives-related rules to be promulgated under Dodd-Frank.

This briefing discusses the proposals.

[http://www.cliffordchance.com/publicationviews/publications/2011/09/cftc\\_proposes\\_scheduleforswaprules.html](http://www.cliffordchance.com/publicationviews/publications/2011/09/cftc_proposes_scheduleforswaprules.html)

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