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Briefing note

International Regulatory Update

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- Recent Clifford Chance briefings: The SEPA Regulation – The Clock is Ticking; and more. Follow this link to the briefings section.

OTC derivatives and market infrastructures: ESMA publishes discussion paper on draft technical standards

ESMA has published a discussion paper setting out its preliminary views and seeking stakeholder input on the regulatory and implementing technical standards it is required to draft under the regulation on OTC derivatives and market infrastructures. The first section of the paper focuses on OTC derivatives and, in particular, the clearing obligation, risk mitigation techniques for contracts not cleared by a central counterparty (CCP), and exemptions to certain requirements. The second part focuses on CCP requirements, where a number of provisions need to be specified through technical standards. The third part deals with trade repositories and, in particular, the content and format of the information to be reported to trade repositories, the content of the application for registration to ESMA, and the information to be made available to the relevant authorities.

Comments are due by 19 March 2012. ESMA is also organising a public hearing on 6 March 2012 to provide an opportunity to interested stakeholders to discuss the paper. Following this preliminary consultation, ESMA will prepare draft technical standards to be included in a consultation paper which it expects to publish around summer 2012.

In addition, ESMA expects to publish in the coming weeks a joint discussion paper with EBA and EIOPA on regulatory technical standards they are required to jointly draft. This joint discussion paper will cover risk mitigation techniques for OTC derivatives that are not cleared by a CCP, notably on capital requirements and exchange of collateral to cover the exposures arising from those transactions and on operational processes for the exchange of collateral, minimum transfer amount and intra-group exemptions. The EBA is also expected to issue in the coming weeks a discussion paper on draft regulatory technical standards on capital requirements for CCPs.

CRD 4: EBA consults on draft implementing technical standard on reporting of large exposures

EBA has published a consultation paper (CP51) on a draft implementing technical standard on reporting of large exposures. CP51 relates to the European Commission's legislative proposals for CRD 4, which were published in July 2011 and which set out prudential requirements which are expected to be applicable as of 1 January 2013.

CP51 puts forward a draft standard on reporting of large exposures as requested by Article 383 of the proposed Capital Requirements Regulation and represents an addendum to the EBA's proposals on supervisory reporting requirements, which were published in December 2011. The draft standard is intended to implement uniform reporting requirements in order to ensure fair conditions of competition between comparable groups of credit institutions and investment firms. It covers both the information needed to check institutions' compliance with the large exposure regime as set out in Articles 376 – 392 of the proposed Capital Requirements Regulation, and the information on concentration risk which competent authorities need to analyse under Article 79 of the Capital Requirements Directive.

Comments are due by 26 March 2012. The EBA intends to finalise the draft standard and submit it to the Commission by 30 June 2012.

European Parliament study on venture capital in the European Union published

The European Parliament has published a study which provides an overview of the situation of the venture capital industry in the European Union, its perspectives for and barriers to further development. In addition, the study includes suggestions for policy initiatives that may help to diminish these barriers.

Amongst other things, the study suggests that: (1) public policy initiatives should target larger venture capital funds or funds of funds; (2) the European passport is an appropriate tool to reduce the complexity of cross-border venture capital fundraising; and (3) a pan-European fund structure should be a long-term goal.

ESMA Chair discusses proposed regulation on OTC derivatives and market infrastructures

ESMA Chair Steven Maijoor has given a speech on ESMA's work on the proposed regulation on OTC derivatives and market infrastructures. Amongst other things, in relation to FX derivatives, Mr. Maijoor argued that the real issue on FX derivatives is not the clearing obligation, but the bilateral collateralisation, and that the problem of international inconsistency and regulatory arbitrage is more serious on margins for contracts that are not centrally cleared than on the clearing obligation.

With respect to the regulation of central counterparties (CCPs), MR. Maijoor argued that, given the systemic role played by CCPs and the greater role they will play in view of the clearing obligation, the liquidity collected by CCPs mainly in the form of cash cannot be allowed to be put at risk, and called for strict rules on CCPs' investment policies.

Mr. Maijoor also discussed the proposed Markets in Financial Instruments Regulation (MiFIR) and Directive (MiFID 2), the rebuilding of the securitisation market, and credit rating agencies.

Collective investment schemes: IOSCO consults on revised valuation principles

IOSCO has published a consultation report on principles for the valuation of collective investment schemes (CIS). The report sets out principles that can be used to assess the quality of regulation and industry practices concerning the valuation of CIS in order to ensure that investors are treated fairly. It also clarifies a number of concepts put forward by IOSCO in its report on principles for the valuation of hedge fund portfolios, such as the entity responsible for establishing a policy governing valuation and the independence of the valuation duty.

Comments are due by 18 May 2012.

ISDA publishes paper on MiFIR/MiFID 2 and transparency for OTC derivatives

ISDA has published a paper which describes the nature of trading structure and liquidity formation in OTC derivatives markets and the implications for framing pre-trade transparency obligations under the proposed Markets in Financial Instruments Regulation (MiFIR) and Directive (MiFID 2).

Basel III: FSA consults on draft compliant administrative notices

The Japanese Financial Services Agency (FSA) has published draft administrative notices (kokuji) setting out capital requirements for financial institutions in Japan. The content of the draft administrative notices reflects the rules contained in Part 1, sections I and II of the Basel III rules text, 'A global regulatory framework for more resilient banks and banking systems'.

Comments are due by 7 March 2012. The new administrative notices will take effect on 31 March 2013, as announced in the progress report on Basel III implementation published on 18 October 2011.

Press release (Japanese)

MAS consults on regulatory review of derivatives market

The Monetary Authority of Singapore (MAS) has published two consultation papers on its proposed regulatory review of the OTC derivatives market in Singapore. The MAS is considering amendments to relevant parts of the SFA arising from the regulation of OTC derivatives, and proposes to make changes to align the treatment for OTC derivatives with that for securities and futures contracts where appropriate.

Separately, the MAS is working with the Singapore Foreign Exchange Market Committee (SFEMC) to encourage standardisation of OTC derivatives. The MAS is also engaging the industry to better understand the costs and benefits of introducing mandatory trading on exchanges or electronic platforms in Singapore's context and proposes to consult on this at a later date.

Comments are due by 26 March 2012.

Consultation paper on the proposed regulation of OTC derivatives
Consultation paper on the transfer of regulatory oversight of commodity derivatives from IE to MAS

Tri-Party Repo Infrastructure Reform Task Force publishes final report / NY Fed issues accompanying statement

The Tri-Party Repo Infrastructure Reform Task Force has published its final report, which describes the status of industry efforts to reform the tri-party repo market. The final report describes a desired 'target state' for tri-party repo that updates the recommendations made by the task force in its May 2010 report. The target state outlined in the report includes seven main elements that, collectively, are intended to ensure that the tri-party repo market can function effectively and efficiently with substantially reduced extensions of intraday credit by the clearing banks.

The FRBNY has issued a statement welcoming the report, but emphasising that the amount of intraday credit provided by clearing banks has not yet been meaningfully reduced, and that the systemic risk associated with the tri-party repo market remains unchanged. The statement also notes that a multi-year effort will be required to achieve all of the changes needed to realize the task force's vision for the entire tri-party repo market.

As a result, the FRBNY is making two changes in its approach to tri-party repo reform. First, it will intensify its direct oversight of the infrastructure changes that the

clearing banks and the Fixed Income Clearing Corporation (FICC) are undertaking in order to reduce market reliance on intraday credit. According to the FRBNY, the task force has not proved to be an effective mechanism for managing individual firms' implementation of process changes. Second, the FRBNY is escalating its efforts to explore additional policy options to address the remaining sources of instability identified in the FRBNY 's May 2010 White Paper. The FRBNY will pursue this work in parallel with the industry efforts to reduce reliance on intraday credit and will consult with other regulators and tri-party repo market participants as ideas are further developed. Ideas that have surfaced and could be considered include restrictions on the types of collateral that can be financed in tri-party repo and the development of an industry-financed facility to foster the orderly liquidation of collateral in the event of a dealer's default.

CFTC issues proposed rule to harmonize compliance obligations for registered investment companies required to register as commodity pool operators

The CFTC is proposing to amend the reporting requirements applicable to certain investment companies registered under the Investment Company Act of 1940, whose advisors would be required to register with the CFTC as commodity pool operators (CPOs) pursuant to changes adopted by the CFTC to section 4.5. The CFTC received a number of comments regarding the changes to section 4.5 suggesting that sponsors of investment companies registered with the SEC, which would also be required to register as CPOs under section 4.5, may be subject to duplicative, inconsistent, and possibly conflicting, disclosure and reporting requirements. The proposed rulemaking seeks to harmonize CFTC and SEC requirements to minimize the compliance burden on these registrants.

The proposal would amend section 4.12(c) such that the CPO of any pool whose units of participation will be offered and sold pursuant to an effective registration statement under the Securities Act of 1933 may claim the relief from: (1) the delivery and acknowledgement requirements under section 4.21; (2) certain periodic financial reporting obligations under section 4.22; and (3) the requirement that records be maintained at the CPO's main office under section 4.23 with respect to that pool.

Comments on the proposed rule should be submitted to the CFTC no later than 60 days after its publication in the Federal Register.

Proposed Rule
Fact Sheet
Q&A

CFTC issues final rule amending registration and compliance obligations for commodity pool operators and commodity trading advisors

The CFTC has issued a final rule regarding changes to Part 4 of its regulations involving registration and compliance obligations for commodity pool operators (CPOs) and commodity trading advisors (CTAs). The rule is intended to increase transparency to the CFTC of CPOs and CTAs acting in the futures and swaps markets and enhance protections for their customers.

In particular, the rule: (1) rescinds the exemption from registration provided in section 4.13(a)(4); (2) removes relief from the certification requirement for annual reports provided to operators of certain pools offered only to qualified eligible persons under section 4.7(b)(3); (3) modifies the criteria for claiming relief under section 4.5; (4) requires the annual filing of notices claiming exemptive relief under several sections of the CFTC's regulations; and (5) adopts amendments that include new risk disclosure requirements for CPOs and CTAs regarding swap transactions.

In addition, the rule will require CPOs and CTAs to file reports regarding their direction of commodity pool assets. Reports must include a description of certain information, such as the amount of assets under management, use of leverage, counterparty credit risk exposure, and trading and investment positions for each pool.

Final Rule
Fact Sheet
Q&A

SHORT SELLING UPDATE

Short selling and CDS: ESMA consults on draft technical advice and publishes responses to consultation on draft technical standards

ESMA has published a consultation paper on the technical advice that it proposes to give to the European Commission on a number of possible delegated acts concerning the regulation on short selling and certain aspects of credit default swaps (CDS). Comments are due by 9 March 2012 and ESMA expects to publish a final report and submit the

draft advice on delegated acts to the Commission by mid-April 2012.

ESMA has also published the responses it received to its consultation on draft technical standards on the regulation on short selling and certain aspects of credit default swaps (CDS). ESMA expects to publish a final report and submit the draft technical standards to the European Commission by 31 March 2012.

Consultation page – draft technical advice on delegated acts
Consultation page – draft technical standards (includes link to responses)

CNMV lifts preventive ban on establishing or increasing short positions on Spanish financial stocks

The Comisión Nacional del Mercado de Valores (National Securities Market Commission) (CNMV) has agreed to lift, with effect from 16 February 2012, the preventive ban on establishing or increasing short positions on Spanish financial stocks, agreed on 11 August 2011 and renewed on 25 August and 28 September.

According to the CNMV, the decision to lift the ban is for the most part due to the fact that over the last weeks the situation of volatility, ongoing instability and uncertainty in the European securities markets and, particularly, in the financial securities markets, which resulted in the adoption of the temporary restrictions on transactions that could constitute or increase net short positions on the Spanish financial sector, has subsided.

Statement

Short selling ban regarding French financial sector securities ends

The Autorité des marchés financiers/Financial Markets Authority (AMF) has confirmed that the provisions prohibiting the creation of any net short position, or the increase of any existing net short position, 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 the AMF, came to an end on 11 February 2012. Consequently, the prohibition of short sales regarding equity securities and securities giving access to the share capital of the relevant credit institutions and insurance companies has been lifted.

The AMF has highlighted that, with regard to equity securities, a net short position disclosure regime has been implemented since 1 February 2011, and that pursuant to French regulation, any investor must be in a position to deliver the securities he has sold within 3 trading days (T+3).

Press release

Short selling ban regarding Belgian financial sector securities ends

The Financial Services and Markets Authority (FSMA) has confirmed that the ban on taking or increasing net short positions in the equity shares (or securities giving access to the capital) of certain Belgian financial institutions has been lifted as of 13 February 2012. However, the FSMA has stressed that significant net short positions in Belgian financials are subject to a reporting obligation. Furthermore, the FSMA has introduced the 'locate rule', in line with the expected EU regulation on short selling. Pursuant to this rule, persons who sell shares without possessing or having borrowed them must make certain arrangements with third parties to ensure that they have a reasonable expectation that such shares can be delivered in a timely manner.

New FAQ about short selling rules

UPCOMING CLIFFORD CHANCE EVENTS

Perspectives Legal Development Series Spring 2012

Clifford Chance will be holding its next series of 'Perspectives' seminars in London from March to June 2012, covering a number of developments of relevance to finance and capital markets professionals. Amongst other topics, the series includes talks entitled:

- FATCA – the new US tax regime and its impact on European financial institutions and transactions;
- Can new forms of finance provide support for the real economy?;
- Accessing and managing liquidity – techniques available in unpredictable global leveraged markets;
- The Eurozone crisis and the markets;
- Prudential matters – assessing the real impact of Basel III and CRD IV; and
- The EU Prospectus Directive and structured products in Europe.

Each seminar will be held at Clifford Chance's Upper Bank Street offices on Tuesday evenings and will be repeated in the City at Saddlers' Hall on Wednesday mornings.

To register, please contact Beverly Otoki on +44 (0)20 8834 1087 or registration@cliffordchance.com.

RECENT CLIFFORD CHANCE BRIEFINGS

The SEPA Regulation – The Clock is Ticking

This briefing discussion the SEPA Regulation, which will be the fourth major regulatory intervention within a decade designed to achieve a harmonised euro payments market. It will apply to most credit transfer and direct debit transactions denominated in euros within the EU, setting 1 February 2014 as the migration deadline for credit transfers and for most direct debits.

The SEPA Regulation will standardise technical requirements (including message format and data) and empower payers with new rights to instruct their payment service providers to impose restrictions on direct debits. It will tackle multilateral interchange fees in relation to euro direct debits, phasing most of them out by 1 November 2012, and make payment schemes interoperable and payee accounts reachable via an EU-wide credit transfer and/or direct debit scheme. In order to ensure that the technical requirements contained in the SEPA Regulation are in sync with market and technological developments, the Commission will be given powers to amend such requirements through 'delegated acts'.

http://www.cliffordchance.com/publicationviews/publications/2012/02/the_sepa_regulationtheclockisticking.html

Corporate Liability in Europe

This European survey of corporate criminal liability answers, on a jurisdiction-by-jurisdiction basis, some common questions on a subject which features regularly in boardroom agendas. The survey looks at whether there is a concept of corporate criminal liability in several European jurisdictions and considers the underlying principles of such liability and the relationship with individual officers' liability. It also looks at whether there are any specific defences, or mitigating factors, and at the type and level of penalties.

http://www.cliffordchance.com/publicationviews/publications/2012/02/_corporate_liabilityineuropetechnicalbrochure.html

The new investment intermediary and investment product law – February 2012

The Bill to amend the investment intermediary and investment product law adopted by the Federal Parliament on 27 October 2011 was published in the Federal Law Gazette on 12 December 2011. The Bill will subject further products from the area of the grey capital market to state regulation, in particular through the introduction of additional bases for liability as well as authorisation requirements and a code of conduct for providers and intermediaries of certain products.

This briefing provides an overview of the main amendments and our assessment of the key legal issues.

http://www.cliffordchance.com/publicationviews/publications/2012/02/the_new_investmentintermediaryandinvestmen.html

Class Action Reform

A class action is a form of legal action devised to protect the 'homogeneous' individual rights of consumers and users, which was introduced (after several unsuccessful attempts) on 1 January 2010 with the entry into force of section 140-bis of the Italian Consumer Code. In the two years since this law entered into force, there has been a relatively low rate of use of class actions. This is mostly a result of the rigid wording of the law and the 'filter' which an action is subjected to before being admitted as a class action.

This briefing outlines the more relevant provisions.

http://www.cliffordchance.com/publicationviews/publications/2012/02/class_action_reform.html

UCITS notifications in the Netherlands

The UCITS IV Directive was implemented in the Netherlands in July 2011.

This briefing reviews the practical consequences of the Directive for the registration and maintenance of all incoming UCITS in the Netherlands. The briefing relates to incoming UCITS only and is based on information which Clifford Chance received from the Dutch Authority for the Financial Markets (AFM).

http://www.cliffordchance.com/publicationviews/publications/2012/02/ucits_notificationsinthenetherlands.html

Retail distribution review in the Netherlands – a gradual introduction of a ban on third party inducement fees

Financial services providers operating in the Netherlands including, but not limited to, investment firms licensed in accordance with MiFID, should take note of recent developments concerning the regulation of inducements, i.e. fees, commissions or promotional gifts. The inducement rules are intended to prevent inducements being paid or provided to financial advisors and intermediaries at the detriment of the interest of the client. A distinction can be made between inducement rules applicable to: (1) banks and investment firms which are subject to the MiFID; and (2) non-MiFID financial services providers.

This briefing discusses the current rules and the proposed rules for both MiFID firms and financial services providers.

http://www.cliffordchance.com/publicationviews/publications/2012/02/retail_distributionreviewinthenetherlands.html

First comments on a thorough reform of Spanish employment legislation

On 12 February 2012, Royal Decree-Law 3/2012 of 10 February was passed, which contains urgent measures to reform the employment market. This new rule has made very significant changes in Spanish employment legislation, on issues such as employment contracts, modification of working conditions, collective negotiations or contractual termination. Notwithstanding its immediate applicability, the Royal Decree-Law will be processed in Parliament as a Draft Bill, and so its current wording is likely to change, to include technical improvements deemed necessary further to its implementation.

This briefing discusses the main changes.

http://www.cliffordchance.com/publicationviews/publications/2012/02/comentarios_de_urgenciasobreunaprofund.html

Arbitrability of Corporate Disputes in Russia

Recently, two Russian court decisions were published which are important for the purpose of determining from the standpoint of Russian law whether so-called 'corporate disputes' can be resolved by arbitral tribunals, including in the framework of international commercial arbitration.

This briefing discusses the two decisions.

http://www.cliffordchance.com/publicationviews/publications/2012/02/arbitrability_ofcorporatedisputesinrussi.html

English language disclosure for foreign issuers in Japan

Recent legislative amendments in Japan have expanded the scope of permissibility of English language disclosure and made it more 'issuer friendly'.

This briefing looks at the additional options the expansion offers to non-Japanese issuers entering the Japanese capital markets, as well as the flexibility it offers to non-Japanese issuers which already have continuous disclosure obligations in Japan.

http://www.cliffordchance.com/publicationviews/publications/2012/02/english_languagedisclosureforforeignissuer.html

MAS Consultation on OTC Derivatives Reform

The Monetary Authority of Singapore (MAS) has issued two consultation papers in respect of the OTC derivatives market in Singapore:

- a consultation paper on the proposed regulation of OTC derivatives including, amongst other things, the introduction of mandatory clearing and reporting of OTC derivatives trades and the implementation of a regulatory regime for market operators, clearing facilities, trade repositories and market intermediaries for OTC derivatives trades; and
- a consultation paper on the proposed transfer of regulatory oversight of commodities derivatives from International Enterprise Singapore Board to MAS.

This briefing discusses the proposals.