

International Regulatory Update

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Shadow banking: European Commission issues consultation

The European Commission has published a [Green Paper](#) consultation on non-bank credit activity. The shadow banking activities discussed in the paper include securitisation, securities lending and repurchase transactions (repo). The Green Paper sets out how existing and proposed EU measures already address shadow

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banking activities and argues that, although these measures go some way towards addressing shadow banking entities and activities, there is still further progress to be made.

In coordination with the Financial Stability Board (FSB), the standard-setting bodies and the relevant EU supervisory and regulatory authorities, the Commission intends to examine existing measures and to propose an appropriate approach to ensure comprehensive supervision of the shadow banking system, coupled with an adequate regulatory framework.

In particular, the Commission is further investigating options and next steps in the following areas: (1) banking regulation; (2) asset management regulation; (3) securities lending and repurchase agreements; (4) securitisation; and (5) other shadow banking entities.

Comments are due by 1 June 2012.

[FAQs](#)

ESMA consults on proxy advisors

ESMA has published a [discussion paper](#) on the development of the proxy advisory industry in Europe. The discussion paper identifies a number of issues related to the proxy advisory market which may have an impact on the proper functioning of the voting process.

The range of policy options that ESMA will consider, and on which it seeks further input from market participants, consists of four areas: (1) no EU-level action at this stage; (2) encouraging Member States and/or industry to develop standards; (3) quasi-binding EU-level regulatory instruments; and (4) binding EU-level legislative instruments. ESMA will consider these options based on the feedback it receives from market participants to the consultation, and, if appropriate, will undertake further policy action, either directly or by providing an opinion to the European Commission.

Comments are due by 25 June 2012. ESMA expects to publish a feedback statement in Q4 of 2012, which will summarise the responses received and set out ESMA's view on whether there is a need for policy action in this area.

ESMA reports on supervision of credit rating agencies

ESMA has published a [report](#) on the supervision of credit rating agencies (CRAs) registered in the European Union. The report provides an overview of ESMA's supervisory activity and summarises the results of the first examinations

ESMA conducted in December 2011 of three groups of CRAs.

ESMA identified several shortcomings and areas for improvement that apply to a varying extent to all CRAs, relating to the following topics: (1) transparency of rating methodologies, disclosure and presentation of ratings; (2) adequacy of controls over IT systems; (3) recording of core internal processes and decisions; and (4) adequacy of resources devoted to internal control functions and analytical business lines.

OTC derivatives and market infrastructures: EU Council Presidency publishes final compromise text

The Danish EU Council Presidency has published the [final compromise text](#) for the proposed regulation on OTC derivatives and market infrastructures. The text reflects the provisional principle agreement reached with representatives of the European Parliament on 9 February 2012.

The Presidency has invited the Permanent Representatives Committee to approve the final compromise text, and to confirm that the Presidency can indicate to the Parliament that, should the Parliament's plenary session adopt the text at first reading, the Council would approve the Parliament's position and the regulation would be adopted in the wording which corresponds to the Parliament's position, subject, if necessary, to revision by the legal linguists of both institutions.

Bank accounts: European Commission issues consultation

The European Commission has issued a [consultation paper](#) to gather stakeholders' views on possible measures to be taken in relation to the transparency and comparability of bank account fees, bank account switching and access to a basic payment account.

The Commission notes that a number of initiatives have been taken at a national level in recent years to increase the transparency of fees linked to the operation of bank accounts, help consumers to switch smoothly between account providers and facilitate consumers' access to basic bank accounts. However, the Commission is concerned that these initiatives have followed different approaches and have had varying degrees of success, with the result that consumers in different countries enjoy different levels of protection. In addition, the Commission believes that the resulting patchwork of rules and codes of conduct renders cross-border mobility of market actors more difficult.

Comments are due by 12 June 2012.

IOSCO publishes updated systemic risk data requirements for hedge funds

IOSCO has published an [updated list](#) of categories of data for the global collection of hedge fund information, which it believes will assist in assessing possible systemic risks arising from the sector. The data categories were first published in February 2010, with the first IOSCO hedge fund survey in September 2011.

The Task Force on Unregulated Financial Entities has agreed to conduct a second hedge fund survey in September 2012, with responses expected by the end of the year. In support of this, the task force has reviewed the categories of data used for the first survey and amended the list of data it will collect for the second survey.

FSB encourages further work to enhance financial institutions' risk disclosure practices

The Financial Stability Board (FSB) has agreed to take steps to encourage improved risk disclosures by financial institutions. In particular, the FSB has indicated that it will: (1) facilitate the formation of a joint private sector task force to develop principles for improved disclosures based on current market conditions and risks, including ways to enhance the comparability of disclosures; (2) encourage the task force to engage in a dialogue with standard-setting bodies; (3) ask the task force to identify leading practice risk disclosures presented in annual reports for end-year 2011; and (4) consider holding another international roundtable in late 2012 to facilitate further discussion by the private sector, regulators and supervisors to encourage further progress.

The decision follows the FSB's December 2011 roundtable and the recommendations set out in its March 2011 report on risk disclosures.

[Press release](#)

IMF publishes working paper on technical issues regarding CDS spreads in European periphery

The IMF has published a [working paper](#) which looks at a number of technical issues when using credit default swap (CDS) data. The paper endorses the use of stochastic recovery in CDS models when estimating probability of default and suggests that stochastic recovery may be a better harbinger of distress signals than fixed recovery. Similarly, the paper notes that probabilities of default derived from CDS data are risk-neutral and may need to be

adjusted when extrapolating to real world balance sheet and empirical data (e.g. estimating banks losses, etc).

Another technical issue discussed in the paper pertains to regressions trying to explain CDS spreads of sovereigns in peripheral Europe – the authors argue that the model specification should be cognisant of the under-collateralisation aspects in the overall OTC derivatives market. According to the authors, one of the biggest drivers of CDS spreads in the region has been the CVA teams of large banks that hedge their exposure stemming from derivative receivables due to non-posting of collateral by many sovereigns (and related entities).

The IMF has emphasised that the views expressed in this working paper are those of the authors and do not necessarily represent those of the IMF or IMF policy.

FSA publishes 2012/13 business plan

The FSA has published its [business plan for 2012/13](#). The plan sets out the FSA's work programme for the year ahead, focusing on the following areas: (1) delivering the regulatory reform programme; (2) continuing to influence the international and European policy agenda; (3) delivering financial stability by maintaining ongoing supervision of firms in a period of continued fragility in markets including business model analysis, capital/liquidity assessments, recovery and resolution planning and the significant influence function regime; (4) delivering market confidence and credible deterrence; and (5) delivering on the principal FSA initiatives to improve consumer protection – early product intervention, the Retail Distribution Review (RDR) and Mortgage Market Review (MMR).

This is likely to be the FSA's final business plan before it splits into the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) in 2013. Ahead of the split to the PRA and FCA, the plan also focuses on the move to a twin peaks model internally that will begin to reflect the shape of the new authorities.

Retail Distribution Review: FSA issues policy statement on adviser charging and Solvency II disclosures

The FSA has published a [policy statement \(PS12/05\)](#) discussing the responses to its November 2011 [consultation paper \(CP11/25\)](#) on the distribution of retail investments and setting out final adviser charging rules.

In particular, PS12/05 covers: (1) the facilitation of payment of adviser and consultancy charges under the Retail Distribution Review (RDR) adviser charging rules;

(2) whether, once the RDR rules are in force, product providers should report investment amounts net or gross of adviser or consultancy charges being facilitated; and (3) the implementation of certain disclosure requirements of Solvency II.

The FSA has indicated that the new rules will come into effect as follows: (1) rules on the facilitation of payment of adviser and consultancy charges – on 31 December 2012, at the same time as the main RDR adviser charging rules; and (2) the rule on reporting investment amounts where payment of adviser charges or consultancy charges is being facilitated – this will apply to firms' first full reporting period after 31 December 2012.

The Solvency II disclosure rules are 'near final', as they include new Glossary definitions to be made with the main Solvency II rules. They will be made at the same time as the main Solvency II rules, which the FSA expects to be at the end of 2012. The FSA expects them to come into effect on 1 January 2014.

UK 2012 Budget announced

Chancellor of the Exchequer George Osborne has presented the Budget to the House of Commons. Amongst other things, the measures announced in the Budget include:

- reducing the main rate of corporation tax by an additional 1% from April 2012 – the rate will therefore fall by 2% from 26% to 24% in April 2012, to 23% in April 2013 and to 22% in April 2014;
- increasing the rate of the bank levy to 0.105% from 1 January 2013; and
- introducing new controlled foreign company (CFC) rules, including a finance company partial exemption that will broadly result in an effective UK tax rate of one quarter of the main rate on profits derived from overseas group financing arrangements – the new rules will be effective for CFCs with accounting periods beginning on or after 1 January 2013.

The government has also accepted the recommendation of the Aaronson Report that a general anti-abuse rule (GAAR) targeted at artificial and abusive tax avoidance schemes would improve the UK's ability to tackle tax avoidance, and it intends to consult with a view to bringing forward legislation in the Finance Bill 2013.

[March 2012 Budget documents](#)

[March 2012 Budget statement](#)

[March 2012 Budget press notices](#)

Financial Transaction Tax: AFM argues that EU financial transaction tax is undesirable, Cabinet endorses view

The Netherlands Authority for the Financial Markets (AFM) has published a [letter](#) it has sent to the Dutch Ministry of Finance, in which it argues that the introduction of a European financial transaction tax (FTT) is undesirable. According to the AFM, the FTT will have adverse effects on the transparent and efficient functioning of financial markets, financial stability and, ultimately, on the real economy and the certainty of pensions for Dutch civilians.

The AFM also states that the FTT is not an appropriate instrument to realise the European Commission's objectives of providing for a contribution by the financial sector to the costs caused by the financial crisis, the harmonisation of current national regulations and strengthening of the internal market, and discouraging undesirable market behaviour which should result in more financial stability. The AFM believes that the intended behavioural effects can be achieved with less effort by directed incentives contained in specific regulations.

In addition, the Dutch Cabinet has submitted to Parliament its [response](#) to the evaluation conducted by the Centraal Plan Bureau (CPB), the government body for economic planning, on an FTT in the EU. The Dutch Cabinet has indicated that, although it endorses the objectives of the FTT, it wanted to conduct a thorough assessment of the consequences of an FTT for the Dutch financial sector and, in particular, for the pension sector.

Based on the CPB's analysis, and upon consultation with the AFM and the Dutch Central Bank (DCB), the government believes that the introduction of an FTT would not, or not in an efficient way, contribute to the Commission's objectives. The government notes that a number of measures are currently being prepared which would contribute to financial stability, such as the MiFID review and the proposed regulation on OTC derivatives and market infrastructures. As to the contribution to the general means, the CPB noted that there are alternatives to the FTT that would have a less distortive effect on the market. In this respect the Dutch Cabinet intends to invite the Commission to conduct further research on alternatives, such as the introduction of a financial activity tax, a (European-wide) banking tax or a stamp duty. Finally, the Cabinet's letter indicates that is not a proponent of the Commission's proposal to use a part of the FTT proceeds for the general means of the European Union.

FSTB consults on draft legislation on trust law reform

The Hong Kong Financial Services and the Treasury Bureau (FSTB) has published a [consultation paper](#) setting out draft legislation on trust law reform. Amongst other things, the consultation paper sets out draft provisions to amend the Trustee Ordinance and the Perpetuities and Accumulations Ordinance. The draft provisions are intended to: (1) clarify trustees' duties and powers to provide clearer guidelines on the role of trustees; (2) introduce statutory provisions to enhance the protection of beneficiaries' interests; and (3) modernise trust law by introducing a provision to clarify that a trust will not be invalidated only by reason of a settlor reserving to himself some limited power.

Comments are due by 21 May 2012. The FSTB intends to introduce the amendment bill into the Legislative Council in the legislative year 2012-13.

CFTC adopts final rules on customer clearing documentation, timing of acceptance for clearing, and clearing member risk management

The CFTC has adopted final regulations regarding the documentation between a customer and a futures commission merchant (FCM) that clears on behalf of the customer, the timing of acceptance or rejection of trades for clearing by derivatives clearing organizations (DCOs) and clearing members, and clearing member risk management for swap dealers (SDs), major swap participants (MSPs), and FCMs that are clearing members.

[Fact sheet](#)
[Q&A](#)

RECENT CLIFFORD CHANCE BRIEFINGS

Transaction Services Newsletter – March 2012

Transaction Services Newsletter is a bi-monthly publication designed for business and legal professionals working in cash management and securities services. Amongst other things, this edition discusses the draft Regulation on Central Securities Depositories (CSDs), which has been published by the European Commission at last.

http://www.cliffordchance.com/publicationviews/publications/2012/03/transaction_servicesnewslettermarch2012.html

Antitrust Review for January – February 2012

The January – February 2012 issue of Antitrust Review contains commentary on the main developments in national and international antitrust law and policy.

http://www.cliffordchance.com/publicationviews/publications/2012/03/antitrust_reviewjanuary-february2012.html

Budget 2012

The UK Budget delivered on 21 March 2012 focused on headline tax rates. The corporation tax rate will be reduced from 26% to 24% in April 2012 and the 50% income tax rate will be reduced to 45% with effect from 6 April 2013. The majority of income tax payers will benefit from an increase in the personal allowance of over GBP 1,000 to GBP 9,205 from April 2013. These measures are to be paid for in part by a clampdown on tax avoidance with the government announcing that it will introduce a general anti-abuse rule (GAAR), and also by an increase in the bank levy rates. Purchasers of expensive residential property were the big losers as the rate of stamp duty land tax has been increased to 7% on such purchases. The penal rate of 15% where such a property is sold into a corporate envelope combined with the threat of an annual charge and possible retrospective legislation is likely to make SDLT mitigation for such properties far more challenging in the future.

This briefing discusses the announcements made in Budget 2012.

http://www.cliffordchance.com/publicationviews/publications/2012/03/budget_2012.html

VAT Cost Sharing Exemption

It has been confirmed that only technical changes will be made to the draft provisions to be included in the Finance Act 2012 to implement the VAT cost sharing exemption in the UK.

This briefing discusses the exemption.

http://www.cliffordchance.com/publicationviews/publications/2012/03/vat_cost_sharingexemption.html

Commissioner's appeal in a source of profits case dismissed by the Court of Appeal

Li & Fung (Trading) Limited (LFT) was in dispute with the Inland Revenue on its offshore claim. Both the Board of Review and the Court of First Instance held that the commission income earned by LFT was offshore source and not chargeable to Hong Kong profits tax. The Inland

Revenue was dissatisfied with the rulings, and appealed to the Court of Appeal on the question of the source of the commission income by way of case stated. The Court of Appeal dismissed the Inland Revenue's appeal.

This briefing discusses the Court of Appeal's decision.

http://www.cliffordchance.com/publicationviews/publications/2012/03/commissioner_s_appealinasourceofprofitscas.html

Record-breaking compensation and disqualification orders made against listed company directors in Hong Kong

A landmark ruling delivered by Hong Kong's Court of First Instance on 7 March 2012 in Securities & Futures Commission (SFC) v Cheung, Yeung, Li, Chan and Styland Holdings, following a petition hearing in January 2011, has, once again, demonstrated the tough action being taken by the SFC against company executive directors who are found to have breached their fiduciary duties owed to shareholders. This case was also the first time a compensation order has been made directly in proceedings brought by the SFC under section 214 of the Securities and Futures Ordinance against a company director for misconduct. The CFI granted record-breaking HKD 85 million compensation orders against two directors and lengthy disqualification orders against all four errant company directors.

This briefing discusses the CFI's ruling in the Styland case.

http://www.cliffordchance.com/publicationviews/publications/2012/03/record-breaking_compensationanddisqualificatio.html

Samurai Bonds

Non-Japanese issuers entering the Japanese debt capital markets have a variety of funding options, one of which is

issuing Japanese Yen denominated 'Samurai Bonds'. Appetite for Samurai Bonds remains strong and the public Japanese Yen market continues to provide a sound funding alternative.

This briefing provides a general overview of a Samurai Bonds transaction. Features of Samurai Bonds as well as issues to be considered are discussed.

http://www.cliffordchance.com/publicationviews/publications/2012/03/samurai_bonds.html

More Flexible Approach Announced for Non-US Issuers Seeking to Rely on the Section 3(c)(7) Exception Under the 1940 Act

New commentary recognises more flexibility on the procedures that non-US issuers of equity securities should implement when seeking to rely on the Section 3(c)(7) exception under the 1940 Act. The authors of benchmark procedures related to an exemption under Section 3(c)(7) for offerings of equity or hybrid securities, frequently referred to as the 2008 Procedures, have published a new commentary to these procedures. The new commentary affirms the current market practice of selectively implementing elements of the 2008 Procedures for offerings by non-US issuers depending on the particular facts of the issuer and the offering.

This briefing discusses the new approach.

http://www.cliffordchance.com/publicationviews/publications/2012/03/more_flexible_approachannouncedfornon-us.html

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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