

International Regulatory Update

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MiFID review: EU Council Presidency publishes compromise texts

The Cyprus EU Council Presidency has published new compromise texts for the proposals for a directive on markets in financial instruments repealing Directive 2004/39/EC (MiFID 2) and a regulation on markets in financial instruments and amending the regulation on OTC derivatives, central counterparties and trade repositories (MiFIR).

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[Proposed directive – Presidency compromise](#)
[Proposed regulation – Presidency compromise](#)

Short selling and CDS: European Commission implementing measures published in Official Journal; ESMA consults on market maker and primary dealer exemption

The following European Commission implementing measures in relation to the regulation on short selling and credit default swaps (CDS) have been published in the Official Journal:

- [Commission Delegated Regulation No 826/2012](#) of 29 June 2012 supplementing Regulation No 236/2012 with regard to regulatory technical standards on notification and disclosure requirements with regard to net short positions, the details of the information to be provided to ESMA in relation to net short positions and the method for calculating turnover to determine exempted shares; and
- [Commission Implementing Regulation No 827/2012](#) of 29 June 2012 laying down implementing technical standards with regard to the means for public disclosure of net position in shares, the format of the information to be provided to ESMA in relation to net short positions, the types of agreements, arrangements and measures to adequately ensure that shares or sovereign debt instruments are available for settlement and the dates and period for the determination of the principal venue for a share according to Regulation No 236/2012 on short selling and certain aspects of credit default swaps.

Both regulations entered into force on 19 September 2012 and will apply from 1 November 2012, except for certain specified Articles which will apply from the date of entry into force.

In addition, ESMA has published a [consultation paper](#) which contains draft guidelines on market making and the application of exemptions for market making activities and primary market operations under the regulation on short selling and certain aspects of credit default swaps (CDS).

Responses are due by 5 October 2012.

On 30 August 2012, ESMA alerted the market and securities markets regulators to the opening on 1 September of the notification period for the use of the exemption and indicated that the consultation paper should be used as the interim benchmark for the notification and application of the exemption.

MiFID: ESMA consults on remuneration guidelines for firms providing investment services

ESMA has published a [consultation paper](#) on proposed guidelines on remuneration policies and practices under existing MiFID legislation. The guidelines are intended to strengthen investor protection by seeking to improve the implementation of the MiFID rules on conflicts of interest, and thereby preventing mis-selling of products.

The proposed guidelines will apply to investment firms, credit institutions, fund management companies when providing investment services, and to competent authorities. Firms must ensure that they have appropriate remuneration policies and practices in place, bearing in mind the obligation on firms to act honestly, fairly and professionally in the best interests of their clients.

The guidelines focus on the remuneration of all staff involved in the provision of investment and/or ancillary services – in particular, staff who can have a material impact on the service provided, on the conduct of business risk profile, and who can influence corporate behaviour. This includes client-facing front-line staff, sales force staff, and/or other staff indirectly involved in the provision of investment services whose remuneration may create inappropriate incentives to act against the best interests of their clients.

Comments are due by 7 December 2012. ESMA expects to publish the final report and guidelines by the second quarter of 2013.

FOA publishes guidance for systems and controls in electronic trading environments

The Futures and Options Association (FOA) has published [guidance](#) to provide listed derivative market participants with industry standards that aim to mitigate risks in electronic trading environments. The guidance supports ESMA's '[Guidelines on systems and controls in an automated trading environment](#)', which came into force in May 2012.

The FOA has indicated that its guidance complements and builds on ESMA's guidelines, and is designed to assist clients, direct electronic access (DEA) providers, venues and service providers with a hands-on perspective on how to comply. The document will also help market participants understand the reasonable expectations of one another.

Basel III: Results of Basel Committee monitoring exercise published

The Basel Committee on Banking Supervision has published the [results](#) of its Basel III monitoring exercise as of 31 December 2011. While the Basel III framework sets out transitional arrangements to implement the new standards, the monitoring exercise results assume full implementation of the final Basel III package based on data as of 31 December 2011. They do not take account of the transitional arrangements such as the phase in of deductions. No assumptions were made about bank profitability or behavioural responses, such as changes in bank capital or balance sheet composition.

The study found that, based on data as of 31 December 2011 and applying the changes to the definition of capital and risk-weighted assets, the average common equity Tier 1 capital ratio (CET1) of Group 1 banks was 7.7%, as compared with the Basel III minimum requirement of 4.5%. In order for all Group 1 banks to reach the 4.5% minimum, an increase of EUR 11.9 billion CET1 would be required. The overall shortfall increases to EUR 374.1 billion to achieve a CET1 target level of 7.0% (including the capital conservation buffer). This amount includes the surcharge for global systemically important banks where applicable. Compared to the June 2011 exercise, the aggregate CET1 shortfall with respect to the 4.5% minimum for Group 1 banks has reduced by EUR 26.9 billion. At the CET1 target level of 7.0%, the aggregate CET1 shortfall for Group 1 banks has reduced by EUR 111.5 billion.

For Group 2 banks, the average CET1 ratio stood at 8.8%. In order for all Group 2 banks in the sample to meet the new 4.5% CET1 ratio, the additional capital needed is estimated to be EUR 7.6 billion. They would have required an additional EUR 21.7 billion to reach a CET1 target 7.0%.

The Committee also assessed the estimated impact of the liquidity standards. Assuming banks were to make no changes to their liquidity risk profile or funding structure, as of December 2011, the weighted average Liquidity Coverage Ratio (LCR) for Group 1 banks would have been 91% (compared to 90% for 30 June 2011) while the weighted average LCR for Group 2 banks was 98%. The weighted average Net Stable Funding Ratio (NSFR) is 98% for Group 1 and 95% for Group 2 banks.

HM Treasury consults on macro-prudential tools for Financial Policy Committee

HM Treasury has published a [consultation paper](#) on what tools the new Financial Policy Committee (FPC) should have in order to help ensure future financial stability.

The consultation document seeks comments on the government's proposals to: (1) make the FPC responsible for setting the level of the UK's counter-cyclical capital buffer; (2) provide the FPC with a direction-making power to impose sectoral capital requirements; and (3) provide the FPC with a time-varying leverage ratio direction-making tool, but no earlier than 2018 and subject to a review in 2017 to assess progress on international standards.

The document contains draft secondary legislation that will provide the FPC with its directive tools, and an impact assessment that contains illustrative estimates of the net benefits of the FPC's macro-prudential tools.

Responses are due by 11 December 2012.

FATCA: UK and US sign agreement to improve tax compliance; HMRC consults on implementing agreement

The UK government has signed an [agreement](#) with the United States to improve international tax compliance and implement the Foreign Account Tax Compliance Act (FATCA). The UK-US agreement follows the joint statement made in July 2012 by the governments of France, Germany, Italy, Spain, the United Kingdom and the United States, announcing the publication of the 'Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA'.

The signing of the agreement follows the conclusion of negotiations on the UK-specific Annex II. This sets out UK institutions and products which are seen as presenting a low risk of being used to evade US tax and are therefore effectively exempt from FATCA requirements.

HM Treasury has indicated that the UK-US agreement is closely based on the model agreement, and: (1) addresses legal barriers to financial institutions complying with FATCA; (2) ensures that withholding tax will not be imposed on income received by UK financial institutions or on payments they make; (3) ensures that the burdens imposed on financial institutions are proportionate to the goal of combating tax evasion; and (4) establishes a reciprocal approach to FATCA implementation.

The agreement has been laid before the Houses of Parliament and will undergo a 21 sitting day scrutiny period as part of the ratification process. Financial institutions and other interested parties will now be consulted on the implementation of the agreement in the UK and draft legislation will be published later in 2012.

In addition, HM Revenue & Customs (HMRC) has published a [consultation paper](#) which sets out how the government intends to legislate to deliver the commitments made in the agreement and seeks views on the proposed approach. The consultation paper also requests information on the expected costs of complying with the agreement to inform the impact assessment.

HMRC has indicated that the proposals will be reviewed in light of the responses, and that draft legislation will be published by the end of 2012 with a view to introducing legislation in the Finance Bill 2013.

Comments are due by 23 November 2012.

AFM investigates provision of services to non-retail clients

The Netherlands Authority for the Financial Markets (AFM) has [launched an investigation](#) into the distribution of complex financial products to non-retail clients. The current legislation assumes that all non-retail clients are professional and have sufficient expertise to properly assess the risks of financial products. However, the AFM has identified significant differences in the level of 'professionalism' amongst non-retail clients.

The AFM has indicated that it will impose sanctions, if possible and necessary, if it finds violations of integrity and violations of the Dutch Financial Markets Supervision Act. The AFM has further indicated that it will take the results of the investigation into account when contributing to the discussions about the upcoming MiFID 2 Directive. The results may also lead to amendments of current legislation on the protection of the parties involved.

China's 12th Five-Year Plan for Development and Reform of Financial Industry published

The People's Bank of China, the China Banking Regulatory Commission (CBRC), the China Securities Regulatory Commission (CSRC), the China Insurance Regulatory Commission (CIRC) and the State Administration of Foreign Exchange (SAFE) have jointly issued the [12th Five-Year Plan](#) for the Development and Reform of the Financial Industry, which was recently approved by the State Council.

The plan is intended to set out the guiding principles, objectives and policies for the development and reform of the financial industry during the five-year period from 2011 to 2015. The plan consists of nine chapters and focuses on deepening financial reforms, further opening up the financial market, maintaining financial stability and improving financial infrastructure.

The relevant government authorities and financial regulators are required to carry out the plan by formulating and issuing implementing measures to achieve the stated goals.

Thai Ministerial Regulation prescribing rules and procedures for customer due diligence published

The Ministerial [Regulation](#) Prescribing Rules and Procedures for Customer Due Diligence B.E. 2555 (2012) has been published. With effect from 21 August 2012, commercial banks and qualifying entities including the Bank of Thailand, banks specifically established by law, finance companies and credit foncier companies, securities companies, the Small Industry Finance Corporation, life and non-life insurance companies, certain types of cooperatives, juristic persons carrying on business relating to finance as prescribed in the Ministerial Regulations, any business operator that is not a financial institution engaging in a business operation or consultancy or the provision of advisory services relating to the investment of or mobilisation of capital, and business operators dealing in the business of electronic payments under the law on controlling electronic payments, have to conduct customer due diligence and must have policies on accepting customers and management of the risk of being connected with the money laundering activities of a customer, and customer identification measures to prevent the use of information technology in the commission of offences related to money laundering.

Financial institutions must implement this rule in relation to new customers from 21 August 2012. Within two years from 21 August 2012, financial institutions need to apply this rule to all existing customers. If it is not possible to apply the rules within this timeframe, the relevant financial institution must make a request for an extension from the Secretary-General, but in any case it shall not exceed three years from the date the Ministerial Regulation comes into force.

ASIC releases guidance on hedge fund disclosure

The Australian Securities and Investments Commission (ASIC) has issued ['Regulatory Guide 240 Hedge funds'](#):

Improving disclosure' (RG 240), which sets out new disclosure benchmarks and principles for hedge funds to improve investor awareness of the risks associated with these products. Those benchmarks and disclosure principles set out the specific features and risks associated with hedge funds that ASIC considers ought to be addressed in any Product Disclosure Statement (PDS) for these products dated on or after 22 June 2013. The disclosure model in RG 240 consists of a combination of disclosure principles and 'if not, why not' benchmarks.

ASIC considers that a failure to disclose against the benchmarks and apply the disclosure principles will result in an increased risk of a PDS not making the disclosure required under Australian law.

UPCOMING CLIFFORD CHANCE EVENTS

Perspectives Legal Development Series Autumn 2012

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

- The twilight zone for uncleared OTC derivatives;
- The Eurozone crisis and financial transactions;
- FATCA – how these new US tax rules now work, and the practical impact on European financial institutions and transactions;
- OTC derivatives reforms – developments in the EU and US;
- Demystifying renminbi internationalisation; and
- The EU recovery and resolution directive.

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 the following day.

Please direct registration queries to Beverly Otoki at +44 (0)20 8237 4092 or registration@cliffordchance.com.

RECENT CLIFFORD CHANCE BRIEFINGS

Impact of UK Takeover Code Reform – One Year On

Significant changes to the UK Takeover Code were introduced by the Panel on 19 September 2011 in an effort to address the perceived tactical imbalance which had arisen between prospective bidders and targets.

This briefing explores the impact of these changes one year on and considers whether the landscape of UK public M&A deals has altered.

http://www.cliffordchance.com/publicationviews/publications/2012/09/impact_of_uk_takeovercodereformoneyearon.html

Italy joins the Club – First scheme of arrangement for an Italian business

The UK continues to remain at the forefront of providing tried and tested legal processes to ensure that English and foreign companies alike can restructure their balance sheets without jeopardising the stability of their business and their ability to remain competitive in the global market. On 16 August 2012, the English Court sanctioned the very first scheme of arrangement of an Italian company, Seat Pagine Gialle S.p.A. This landmark decision should assist other Italian businesses achieve successful financial restructurings with greater ease than in the past.

This briefing discusses the decision.

http://www.cliffordchance.com/publicationviews/publications/2012/09/italy_joins_the_clubfirstschemeofarrangemen.html

India opens door for multi-brand retail trade

On 14 September 2012, the government of India amended its foreign investment policy permitting foreign direct investment in multi-brand retail trading up to 51%. The government of India had initially approved the proposal in November 2011, but put it on hold for developing broader consensus on the subject.

This briefing discusses the new policy.

http://www.cliffordchance.com/publicationviews/publications/2012/09/india_opens_doorformulti-brandretailtrade.html

The Impact of CPO Rule Changes

In December changes to the rules of the US Commodity Futures Trading Commission relating to funds and other collective investment vehicles will require many investment managers, banks and other financial institutions to register for the first time as commodity pool operators if they operate such funds, or as commodity trading advisers if they advise funds with respect to regulated commodity investments and are not the relevant fund's CPO.

This briefing discusses the rule changes.

http://www.cliffordchance.com/publicationviews/publications/2012/09/the_impact_of_cporulechanges.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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