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Briefing note

International Regulatory Update

10 – 14 December 2012

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- CFTC staff letter grants additional relief to securitization market
- Recent Clifford Chance briefings: Sovereign pari passu clauses – don't cry for Argentina – yet; FSB policy recommendations – November 2012 – a silhouette of the future of shadow banking; and more. Follow this link to the briefings section. Follow this link to the briefings section.

European Council sets out roadmap for completing Economic and Monetary Union

The European Council (Heads of State or Government) has published the conclusions from its meeting on 13 and 14 December 2012, at which it agreed on a roadmap for the completion of the Economic and Monetary Union.

The Council urged the European Parliament and EU Council to agree on the proposals for a Recovery and Resolution Directive and for a Deposit Guarantee Scheme Directive before June 2013, and called on the EU Council to reach agreement by the end of March 2013. The Council indicated that, once adopted, these Directives should be implemented by the Member States as a matter of priority.

In addition, the Council stated that an operational framework, including the definition of legacy assets, should be agreed as soon as possible in the first semester 2013, so that when an effective single supervisory mechanism is established, the European Stability Mechanism will, following a regular decision, have the possibility to recapitalise banks directly.

The Council noted that, in a context where bank supervision is effectively moved to a single supervisory mechanism, a single resolution mechanism will be required, with the necessary powers to ensure that any bank in participating Member States can be resolved with the appropriate tools. The Council indicated that the Commission will submit in the course of 2013 a proposal for a single resolution mechanism for Member States participating in the SSM, to be examined by the co-legislators as a matter of priority with the intention of adopting it during the current parliamentary cycle. The Council emphasised that this mechanism should safeguard financial stability and ensure an effective framework for resolving financial institutions while protecting taxpayers in the context of banking crises. It added that the single resolution mechanism should be based on contributions by the financial sector and include appropriate and effective backstop arrangements, which should be fiscally neutral over the medium term, by ensuring that public assistance is recouped by means of ex post levies on the financial industry.

Council Conclusions
Conclusions on completing EMU
Remarks by President Van Rompuy following the first session of the European Council
Remarks by President Van Rompuy following the concluding session of the European Council

Banking union: ECOFIN Council agrees position on bank supervision

The ECOFIN Council has set out its position with a view to negotiations with the European Parliament on two proposals aimed at establishing a single supervisory mechanism (SSM) for the oversight of credit institutions in the EU. Agreement in the Council will enable the EU Council Presidency to negotiate with the Parliament with the aim of adopting the legislation before the end of 2012, in line with the October European Council's conclusions.

The proposals comprise a regulation conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions and a regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing the European Banking Authority. Under the proposals, the ECB would have direct oversight of all eurozone banks, in cooperation with national supervisory authorities. Non-euro member states wishing to participate in the SSM would be able to enter into close cooperation arrangements.

The ECB would be responsible for detecting risks to banks' viability and requiring them to take the necessary actions. It would be competent for licensing and authorising credit institutions, assessing qualifying holdings, ensuring compliance with minimum capital requirements, ensuring the adequacy of internal capital, conducting supervision on a consolidated basis and supervisory tasks in relation to financial conglomerates. The ECB would also ensure compliance with provisions on leverage and liquidity, apply capital buffers and carry out, in coordination with resolution authorities, early intervention measures for breaches or potential breaches of regulatory capital requirements.

ECB oversight would be phased in over the course of 2013. It would initially cover only credit institutions that have received financial assistance, and would be extended by July 2013 to systemically important institutions and by 1 January 2014 to all credit institutions. The proposals also foresee changes to the EBA regulation, in particular as

regards voting modalities, which are intended to ensure that the countries participating in the SSM would not have an automatic veto in the EBA's board of supervisors.

Press release
Cyprus Presidency press release
President Barroso statement
Proposed regulation conferring tasks on the ECB – Presidency compromise
Proposed regulation amending regulation establishing the EBA – Presidency compromise

Cross-border insolvency: European Commission sets out proposals to modernise current rules

The European Commission has published a proposal for a regulation amending the EU Insolvency Regulation (EUIR). According to the Commission, the new rules are intended to shift focus away from liquidation and develop a new approach to helping businesses overcome financial difficulties while protecting creditors' right to get their money back.

The Commission has also published an accompanying Communication entitled 'A new European approach to business failure and insolvency', which highlights those areas where differences between domestic insolvency laws have the greatest potential to hamper the establishment of an efficient insolvency legal framework in the internal market, and seeks to identify the issues on which the new European approach to business failure and insolvency should focus so as to develop the rescue and recovery culture across the Member States.

Financial transactions tax: European Parliament gives 11 Member States green light for enhanced cooperation

The European Parliament has adopted a resolution approving the European Commission's proposal for an EU Council Decision authorising enhanced cooperation in the area of financial transaction tax (FTT). The text stresses that the ultimate goal should still be a worldwide FTT, and urges the EU to continue campaigning for it. The 11 participating countries are Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain.

Having obtained Parliament's consent, the Council now needs to achieve a qualified majority vote to allow the Commission to initiate enhanced cooperation.

European company law and corporate governance: Commission sets out action plan

The European Commission has adopted an action plan outlining future initiatives in the areas of company law and corporate governance. The action plan sets out a number of measures intended to increase the level of transparency between companies and their shareholders in order to improve corporate governance. It also sets out initiatives aimed at encouraging and facilitating long-term shareholder engagement. In addition, the action plan sets out initiatives in the field of company law to support European businesses and encourage their growth and competitiveness. Finally, it foresees merging all major company law directives into a single instrument.

The EU corporate governance rules apply in principle to all EU companies listed on a stock exchange. Since most banks are listed on a stock exchange they will also be covered by the actions announced in the action plan in the area of corporate governance. However, in view of the specific nature of the activities of financial institutions, the Commission already proposed a number of corporate governance measures in July 2011 as part of the revision of the Capital Requirements Directive (CRD 4). These will apply only to banks and will be complemented by the measures foreseen in the action plan.

FAQs

Short selling regulation: European Commission requests ESMA's technical advice on evaluation

The European Commission has sent a formal request for technical advice on the evaluation of the regulation on short selling and certain aspects of credit default swaps (CDS) to ESMA. The Commission has asked ESMA to consider the observable effects of the regulation, if any, in order to answer the following questions, taking into account both the provisions relating to short selling as well as those pertaining to CDS:

- whether and to what extent the beneficial effects of short selling for volatility and price formation during normal times have been affected by reporting and publication requirements or restrictions on uncovered short selling;
- to what extent any temporary restrictions imposed by competent authorities on short selling have had any positive effects in terms of reducing price falls, or any negative effects on volatility and price formation;
- to what extent the thresholds set for notification to competent authorities are appropriate for competent

authorities' supervisory purposes and the thresholds for public disclosure are appropriate for the market's needs;

- whether the thresholds set to identify a significant drop in the price of financial instruments are appropriate for all instruments, and whether (and if so how) thresholds should be set for significant price falls in UCITS and commodity derivatives; and
- whether and to what extent the ban on naked sovereign CDS has had any effects in terms of market prices and of volatility of sovereign debt markets or investment by affecting the scope for hedging.

The Commission is obliged to report to the European Parliament and the Council on the short selling regulation by 30 June 2013. The deadline set to ESMA to deliver its technical advice is 31 May 2013.

Market abuse: EU Council reaches agreement on Commission proposals on criminal sanctions

The EU Council has agreed a general approach on the European Commission's proposal for a directive on criminal sanctions for insider dealing and market manipulation. This general approach will constitute the basis for negotiations with the European Parliament in order to agree the final text of the directive.

EU Council approves regulation on jurisdiction and recognition and enforcement of judgments in civil and commercial matters

The EU Council has given its formal approval to the regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The regulation is a recasting of Regulation EC/44/2001 (Brussels I), which sets out the framework for civil judicial cooperation in the EU and entered into force in March 2002. The purpose of the recast is to make the circulation of judgments in civil and commercial matters easier and faster within the EU, in line with the principle of mutual recognition and the Stockholm Programme guidelines.

The regulation will enter into force 20 days after its publication in the Official Journal and will start applying two years after its entry into force.

HM Treasury announces review of special administration regime for investment banks

HM Treasury has announced the launch of an independent review of the Investment Bank Special Administration Regulations (SAR) 2011. Peter Bloxham has been appointed to lead the review, which will be conducted in two phases.

The first phase will address a number of core questions, including how far the regulations are achieving their objectives, and whether the regulations should continue to have effect. It will identify any perceived shortcomings of the SAR, including any failure to meet its objectives, and set out a work programme for the second phase that will consider what changes to law or practice, if any, would better deliver the objectives of the SAR. The second phase will deliver the work programme.

Submissions to this initial call for evidence are due by 10 January 2013. Mr. Bloxham will report to the Treasury before the end of January 2013 and the report will be laid before Parliament.

Terms of reference
Call for evidence

Kay Review of equity markets: House of Commons Business, Innovation and Skills Committee launches inquiry

The House of Commons Business, Innovation and Skills Committee has announced its intention to inquire into Professor John Kay's independent review of investment in UK equity markets and its impact on the long-term performance and governance of UK quoted companies and the government's response to the review.

The Committee has invited submissions of evidence on the recommendations set out in the Kay Review and the government's plans for the implementation of its recommendations.

Written submissions are due by 18 January 2013.

Kay report (July 2012)
Government response to Kay Review (November 2012)

Bank of England and FDIC issue joint paper on resolving globally active systemically important financial institutions

The US Federal Deposit Insurance Corporation (FDIC) and the Bank of England have published a joint paper outlining resolution strategies for resolving globally active systemically important financial institutions. The paper focuses on the application of 'top-down' resolution strategies that involve a single resolution authority applying its powers to the top of a financial group, that is, at the parent company level. It discusses how such a top-down

strategy could be implemented for a US or a UK financial group in a cross-border context.

In the US, the strategy has been developed in the context of the powers provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Such a strategy would apply a single receivership at the top-tier holding company, assign losses to shareholders and unsecured creditors of the holding company, and transfer sound operating subsidiaries to a new solvent entity or entities.

In the UK, the strategy has been developed on the basis of the powers provided by the Banking Act 2009 and in anticipation of the further powers that will be provided by the EU Recovery and Resolution Directive and the domestic reforms that implement the recommendations of the Independent Commission on Banking. Such a strategy would involve the bail-in (write-down or conversion) of creditors at the top of the group in order to restore the whole group to solvency.

The approaches outlined in the paper are designed to ensure that sound business, including operating companies (domestic and foreign) can be kept open and operating, limiting the effect on financial stability through contagion effects and cross-border complications. The FDIC and the Bank of England believe these approaches should help ensure continuity of business at the subsidiary level and, consequently, host stakeholders should have no incentive to ring-fence assets and commence separate territorial and entity-focused insolvency proceedings, which could be disruptive and destroy value.

Bank of England publishes Quarterly Bulletin article on Prudential Regulation Authority

The Bank of England has published a Quarterly Bulletin article on the Prudential Regulation Authority (PRA) by Andrew Bailey, Executive Director of the Bank of England and Managing Director of the Financial Services Authority's Prudential Business Unit, Sarah Breeden and Gregory Stevens of the Bank's PRA Transition Unit.

In April 2013, the PRA, as part of the Bank of England, will become the UK's prudential regulator for banks, building societies, credit unions, insurers and major investment firms. The article provides a summary of the PRA's objectives and its approach, setting out, at a high level, what the PRA will expect of firms in relation to these objectives and what the PRA will do in the course of supervision. It is intended to provide a clear indication of how the PRA will operate to firms, other interested parties, and the wider public. It summarises some of the key themes of the two more detailed documents about the PRA's intended approach that were published jointly by the Bank and the FSA in October 2012.

German Federal Parliament agrees on Act to implement EMIR

The German Federal Parliament has agreed on an Act to implement the EU regulation on OTC derivatives, central counterparties and trade repositories (EMIR). The Act contains rules on the administrative implementation of EMIR regarding notifications to and supervision by the Federal Financial Services Supervisory Authority (BaFin) and, in particular, licensing requirements for central counterparties (CCPs).

Under the Act, non-financial counterparties would be obliged to have their compliance with clearing and risk management obligations under EMIR verified and certified by appropriate auditors, if during a financial year they entered into more than 100 OTC derivatives, or concluded OTC derivatives the notional value of which exceeds EUR 100 million (as opposed to a threshold of EUR 10 million which had been proposed by the Federal Government in its draft Act).

The Act also proposes a change of German insolvency laws, by addressing the enforceability of measures taken under Art. 48 of EMIR including close-out netting, porting and the enforcement of collateral in case of an insolvency proceeding. The proposal further excludes such measures from insolvency clawback. The obligation of CCPs to make a compensation payment under certain circumstances which was included in the draft versions of the Act has been dropped and not become part of the Act as resolved by the Bundestag. The Act will now have to be signed into law by the Federal President and will enter into force upon publication in the Federal Gazette.

Federal government draft (German)
Amendments by the Bundestag's financial committee (German)

AFM writes to banks and insurance companies regarding prohibition of inducements

The Netherlands Authority for the Financial Markets (AFM) has published a letter it sent to banks and insurance companies on 29 November 2012. The letter sets out certain aspects in relation to the prohibition of inducements (provisieverbod) that will apply in relation to various financial products upon amendment of the Financial

Markets Supervision Act and related lower rules as of 1 January 2013.

Amongst other things, the letter contains guidance on the following aspects:

- advice and distribution fees – these should be charged to the consumer directly;
- cost-price model – offerors will also need to have a proper cost-price model which needs to be verified by an external auditor;
- product costs – these must be separated from costs for advising and distribution so that consumers can compare the various products that are offered to them;
- information disclosure – disclosure must be performed in compliance with the new rules and in a standardised format as of July 2013, and in the interim period (January – July) offerors should provide more elaborate information than currently on their website, e.g. on the services provided and costs charged to be transparent; and
- product discounts – these will still be allowed provided this is not based on variable components such as a minimum volume of products purchased or quality of the (advisory) service provided.

Press release and link to AFM letter (Dutch)

Bank of Italy consults on supervisory reports and reports on regulatory capital and prudential ratios

The Bank of Italy (BOI) has launched a consultation on proposed amendments to Circular No. 154 dated 22 November 1991 on credit and financial institutions' supervisory reports and to Circular No. 155 dated 18 December 1991 on instructions for preparing reports on regulatory capital and prudential ratios. While Circular 154 provides instructions for producing and submitting the reports that supervised intermediaries are required to transmit to the BOI, Circular 155 contains the rules for preparing prudential reports on an individual and consolidated basis. The proposed amendments are intended to implement the amendments made last December 2011 to the BOI Circular No. 263 of 26 December 2007 concerning the prudential supervision of banks.

Comments need to be submitted to the BOI within 45 days of the 6 December 2012.

Consultation document (Italian)

Bank of Spain circular to credit institutions on core capital minimum requirements published

The Bank of Spain's Circular 7/2012 of 30 November to credit institutions on core capital minimum requirements has been published in the Official Journal. In particular, the circular:

- specifies the eligible instruments that will compose the concept of core capital, as well as the manner in which they should be calculated and the issuance requirements, in particular for mandatory convertible debt instruments;
- determines how risk-weighted exposure amounts may be adjusted so that the requirements of own resources of each risk exposure does not exceed the value of the exposure itself, and the consistency between the value of exposures and the core capital components is preserved; and
- establishes the frequency and manner in which the compliance of the core capital ratio should be declared.

The circular enters into force on 1 January 2013.

Circular 7/2012

HKMA issues letter in relation to reporting of OTC derivatives transactions to trade repository

The Hong Kong Monetary Authority (HKMA) has issued a letter to authorised institutions in relation to the reporting of OTC derivatives transactions to its trade repository. In December 2011, the HKMA issued an Administration and Interface Development Guide (AIDG) on the technical and logistical arrangements for reporting OTC derivatives transactions to the trade repository. Following the re-scheduling of the implementation of the regulations for mandating trade repository reporting, the launch of the trade repository has also been rescheduled. As the regulations are now targeted to take effect in the third quarter of 2013, the HKMA is preparing to launch the trade repository by 2013. The HKMA has published its revised AIDG containing the finalised technical and logistical arrangement, reference manual and the implementation schedule.

Subject to the finalised scope of regulations for mandating trade repository reporting, the HKMA anticipates that authorised institutions under its purview and licensed corporations under the Securities and Futures Commission (SFC)'s purview will be required to report their trades, initially interest rate swaps and non-deliverable foreign exchange forwards, to the trade repository. Other

institutions with an activity level exceeding a threshold may also be required to report.

The SFC has issued a circular advising licensed corporations with activities that will be subject to the mandatory reporting obligations to review the AIDG, reference manual and the implementation schedule.

SFC circular and link to HKMA letter
Link to revised Interface Development Guide & other related documents

FINRA issues guidance on suitability rule

FINRA has issued Regulatory Notice 12-55 to provide guidance on FINRA Rule 2111, which is commonly referred to as the 'suitability rule'. The suitability rule broadly requires FINRA member broker-dealers to have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for a customer. The Notice seeks to clarify the suitability rule's definition of 'investment strategy' and the term 'customer'.

The Notice indicates that the term 'investment strategy' applies, for example, to recommendations to invest in certain market sectors, as well as recommendations to use a bond ladder, day trading, 'liquefied home equity,' or margin strategy, irrespective of whether the recommendation mentions particular securities. It also captures an explicit recommendation to hold a security or securities or to continue to use an investment strategy involving a security or securities. A general recommendation to invest in equities or fixed income securities would not qualify as an investment strategy.

The Notice also discusses when a potential investor must be treated as a 'customer' in detail. Potential investors become customers of the broker-dealer if the broker recommends a trade to the potential investor and then: (1) executes a trade for the investor; (2) opens an account for the investor; or (3) directly or indirectly receives compensation as a result of the recommended transaction.

This definition is broad enough to capture any broker who receives compensation on a securities transaction even though the security is held at an issuer, the issuer's affiliate, or a custodial agent (e.g., a 'direct application' business).

CFTC staff letter grants additional relief to securitization market

The CFTC's Division of Swap Dealer and Intermediary Oversight has issued an interpretive letter incrementally expanding the types of securitization vehicles that are excluded from the definition of 'commodity pool' under Section 1a(10) of the US Commodity Exchange Act (CEA) and Rule 4.10(d) under the CEA. The interpretative letter excludes certain actively managed securitization vehicles from the definition of 'commodity pool' so long as:

- the use of swaps by the vehicle is no greater than that contemplated by Regulation AB under the US Securities Act of 1933, as amended, and Rule 3a-7 under the US Investment Company Act of 1940, as amended;
- such swaps are not used in any way to create an investment exposure; and
- the activities of the vehicle are limited to the holding of financial assets.

In addition, sponsors or managers of certain other 'legacy' securitization vehicles covered by the letter are exempted from the requirement to register as a commodity pool operator (CPO). Finally, operators of securitization vehicles not covered by this or previous CFTC relief are exempted from CPO registration until 31 March 2013.

RECENT CLIFFORD CHANCE BRIEFINGS

FSB policy recommendations – November 2012 – a silhouette of the future of shadow banking

The Financial Stability Board (FSB) published a suite of documents on 18 November 2012 relating to its ongoing consultation on shadow banking. The documents outline the current status of the consultation and, for the first time, set out clear policy recommendations in respect of the different workstreams that the FSB had identified. The emerging clarity around regulatory policy is welcomed, as is the recognition by the FSB that shadow banking provides a real benefit to the economy: the FSB recommendations specifically acknowledge that, under certain conditions, non-bank credit intermediation can increase the resilience of the financial system.

This briefing discusses the FSB's policy recommendations.

http://www.cliffordchance.com/publicationviews/publications/2012/12/fsb_policy_recommendationsnovember2012.html

Sovereign pari passu clauses – don't cry for Argentina – yet

Holdout creditors who refused to take part in Argentina's two debt restructurings have won a major victory in the New York courts by relying on a pari passu clause, overturning

the conventional wisdom as to the meaning of this clause. The courts decided that the clause meant that Argentina could not pay those creditors who participated in the restructurings without at the same time paying those who did not.

The decision has caused uproar in the sovereign debt restructuring arena, but whether the success means that the holdouts will recover anything depends upon the next phase of the litigation and, in particular, the remedies that the courts grant. Whether the judgment has wider implications on sovereigns' ability to restructure their debts also turns on the next stage of the litigation, but the severe aggravation that holdout creditors can cause will have focused sovereigns' attention on the benefits of collective action clauses with aggregation.

This briefing discusses the decision.

http://www.cliffordchance.com/publicationviews/publications/2012/12/sovereign_pari_passuclausesdontcryfo.html

Security trustees – the in-betweeners?

When looking at a distressed credit, determining creditor priority becomes key. The focus is not just on realising value, but on who has control of that realisation process. In a recent case (Saltri III Ltd v MD Mezzanine SA Sicar & Ors [2012] EWHC 3025) the High Court in London was asked to consider whether action taken by a group of Senior Lenders to enforce their rights under a typical intercreditor agreement with a sale to an SPV and a release of the underwater Mezzanine debt was valid. The challenges to the enforcement by the Mezzanine Lenders were levelled not at the Senior Lenders themselves, but at the Security Trustee. As matters transpired these challenges were unsuccessful.

This briefing discusses the decision.

http://www.cliffordchance.com/publicationviews/publications/2012/12/security_trusteesthein-betweeners.html

Contentious Commentary – a review for litigators

Produced by lawyers in the litigation and dispute resolution practice at Clifford Chance Clifford Chance, this newsletter that provides a summary of recent developments in litigation. Headlines in this edition include:

- Security trustees must beware of conflicts of interest;
- Administration not analogous to liquidation for GMRA;
- Dispossession required for Financial Collateral Regs;
- Bringing a derivative claim against a limited partner; and
- Property means the same throughout the legal system.

http://www.cliffordchance.com/publicationviews/publications/2012/12/contentious_commentary-december2012.html

Netting in Russia – reporting of OTC transactions documented under a Master Agreement

At the beginning of 2011, amendments were made to the Russian insolvency and securities market legislation introducing the long-awaited rules for the recognition of close-out netting arrangements in cases of insolvency of a Russian counterparty to OTC derivative and repo transactions, as well as other types of transactions with securities or foreign currency documented under a master agreement. Under the amendments, reporting of the master agreement and of the individual transactions executed on its basis to a trade repository is one of the prerequisites for recognition of close-out netting. We note, however, that the reporting requirement is more general for it requires the parties to a master agreement to report OTC transactions executed on its basis irrespective of whether they intend to take advantage of close-out netting arrangements or not.

This briefing discusses the trade reporting regulation approved by Order of the Federal Service for Financial Markets (FSFM) No. 11-68/pz-n dated 28 December 2011 and points out some of the issues parties may face in complying with the reporting obligations.

http://www.cliffordchance.com/publicationviews/publications/2012/12/netting_in_russiareportingofotctransaction.html

Tiger Asia admits insider trading in US criminal and civil proceedings

Tiger Asia Management LLC, the international hedge fund which specialises in Asian-traded equities, has, through its founder and manager, S.K. 'Bill' Hwang, admitted to illegally using inside information to trade on Chinese bank stocks and has agreed to settle separate civil proceedings filed by the US SEC on 13 December 2012 in a federal court in New Jersey, USA. The alleged insider trading took place in Hong Kong. Disgorgement and pre-judgment interest penalties of more than USD 60 million were agreed to be paid to US federal authorities to settle the charges, comprising USD 44 million to be paid by Tiger Asia, Hwang, Tiger Asia Partners LLC and Raymond Y.H. Park, former head trader of Tiger Asia Fund and the Tiger Overseas Fund, as well as forfeiture of USD 16 million by Tiger Asia. Tiger Asia was also placed on probation for a year.

This briefing discusses the latest developments.

To view a copy of the guide, please contact Mhairi Appleton at mhairi.appleton@cliffordchance.com.

CFTC staff letter grants additional relief to the securitization market

On 7 December 2012, the Division of Swap Dealer and Intermediary Oversight of the CFTC issued a letter incrementally expanding the types of securitization vehicles that are excluded from the definition of 'commodity pool' under Section 1a(10) of the Commodity Exchange Act (CEA) and Rule 4.10(d) under the CEA. In addition, sponsors or managers of certain other 'legacy' securitization vehicles covered by this letter will be exempt from the requirement to register with the CFTC as a commodity pool operator. Finally, the registration deadline for operators of securitization vehicles not covered by this or previous CFTC relief has been delayed to 31 March 2013.

This briefing discusses the letter.

http://www.cliffordchance.com/publicationviews/publications/2012/12/cftc_staff_lettergrantsadditionalrelieftoth.html

Operators of Mortgage REITs Exempted from Requirements for Commodity Pool Operators

The CFTC's Division of Swap Dealer and Intermediary Oversight has issued a no-action letter that exempts an operator of a mortgage REIT (mREIT) that satisfies certain specified criteria from the requirements applicable to 'commodity pool operators'. As a result, the operators of qualifying mREITs will not need to register as 'commodity pool operators'. However, this exemption is not self-executing and the mREIT must file a claim for relief.

This briefing discusses the exemption.

http://www.cliffordchance.com/publicationviews/publications/2012/12/operators_of_mortgagereitsexemptedfro.html