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International Regulatory Update

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G20: Sarkozy calls for financial transactions tax

French President Nicolas Sarkozy has given a speech launching France's presidency of the G20 and G8 and setting out its priorities for 2011.

Amongst other things, M. Sarkozy indicated that France is in favour of a tax on financial transactions, arguing that such a tax is morally justified in light of the recent financial crisis and that it would discourage speculation. He acknowledged that the financial transaction tax has many opponents, but vowed to convince them of its merits.

Priorities of the French Presidency

ESMA raises concerns about proposed US rules on registration of foreign swap data repositories and foreign boards of trade

ESMA has published letters to the SEC and the CFTC in which it raises a number of concerns in relation to the US regulators' proposed rulemakings on the registration of foreign swap data repositories and foreign boards of trade.

In particular, ESMA notes that the proposed rulemakings do not make any reference to equivalency of regulatory regimes or cooperation with the authorities of the country of establishment of foreign swap data repositories, and urges the two US regulators to consider a regime where foreign swap data repositories can register with the SEC/CFTC if the laws and regulations in a foreign jurisdiction are equivalent to the US ones and if a memorandum of understanding between the SEC/CFTC and the relevant foreign authorities has been signed.

Regarding the new rules on registration of foreign boards of trade, ESMA's letter suggests a similar approach as for swap data repositories, in order to avoid that a foreign board of trade that conducts cross-border activity is unnecessarily subject to multiple jurisdiction, on-site inspections and regulatory requirements.

SEC proposed rule (December 2010)
Letter to SEC
CFTC proposed rule (December 2010)
Letter to CFTC

Prospectus Directive: ESMA issues call for evidence on request for technical advice on possible delegated acts

ESMA has issued a call for evidence in relation to the European Commission's request for advice on possible delegated acts concerning the amended Prospectus Directive. The Commission has requested that ESMA provide its technical advice by 30 September 2011.

ESMA has invited all interested parties to submit views on aspects or areas it should consider in its advice by 25 February 2011. ESMA intends to publish a first consultation paper by July 2011.

Mandate

European Commission consults on interest rate restrictions study

The European Commission has launched a consultation to collect stakeholders' reactions to the findings of a study on interest rate restrictions in the EU, which were published in September 2010. The study explored the economic, financial, social and consumer protection implications of the imposition of interest rate restrictions.

OTC derivatives: Market participants commit to further improving infrastructure and reducing risk

International supervisory authorities and market participants met at the Federal Reserve Bank of New York to discuss ongoing efforts and future priorities for improving infrastructure and reducing risk in the OTC derivatives markets. Participants provided supervisors with updates on recent work and agreed to commit to further improvements in support of G20 objectives for reducing risks in global OTC derivatives markets. Participants agreed to communicate next steps and commitments in a collective letter to the OTC Derivatives Supervisors Group (ODSG) by 31 March 2011, in accordance with the recommendations of the Financial Stability Board's October 2010 report on implementing OTC derivatives market reforms.

Press release

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ISDA equity derivatives transparency studies published

ISDA has published two independent studies on transparency in the OTC equity derivatives market.

The Equities Transparency Study describes the structure, participants, products and existing forms of pre- and post-trade transparency for equity OTC derivatives. It notes that the link between listed stock and options exchanges and the OTC market currently provides significant pre-trade transparency and price discovery mechanisms. Overall, the study reports that the industry is evolving towards increased post-trade regulatory transparency via trade repositories, electronic reporting and centralised clearing.

The Equity Quantitative Study analyses differences in pricing amongst dealers and between dealers and end-users. Amongst other things, it indicates that, between dealers: (1) price to fair value discrepancies are found to be within one or two bid-offer spreads (95% confidence); and (2) transactions involving end-users are not further away from fair value than analogous dealer to dealer trades on average.

The studies conclude that the measures adopted by the industry for the past few years have enhanced transparency and will increase post-trade transparency for the regulators while maintaining the same flexibility and privacy that make OTC markets attractive to their participants. They further conclude that, due to the large variety of products, some of which are highly customised, standardisation and central clearing may not be suitable or feasible across all OTC equity derivatives.

BoE discussion paper on optimal bank capital published

The Bank of England has published a discussion paper on optimal bank capital, which reports estimates of the costs and benefits of banks having higher levels of loss-absorbing capital. The paper uses empirical evidence on UK banks to assess the costs, and reviews data from shocks to incomes from a wide range of countries over a long period to assess risks to banks and how equity funding or capital protects against those risks. It concludes that the amount of equity capital that is likely to be desirable for banks to hold is very much larger than banks have held in recent years and also higher than targets agreed under the Basel III framework.

Independent Commission on Banking publishes responses to issues paper

The Independent Commission on Banking has published the responses received to its September 2010 Issues Paper on structural and related non-structural reforms to the UK banking sector.

There was considerable interest among respondents, both positive and negative, in the question of splitting retail and investment banks, with those in favour of a split arguing that there should be separation of risk and reward for universal bank employees risking shareholder capital and that the implicit ‘too big to fail’ guarantee was market distorting, while those against a split highlighted the impact on businesses needing access to a range of complex financial products as well as more basic services, the cost of a split to the sector, and the impact on the UK’s competitiveness as a location for financial services.

Amongst other things, the Commission has also indicated that: (1) there was general support for the ‘living will’ process; (2) there was little support for the notion of narrow or limited purpose banks; (3) a majority of the responses on issues relating to bank capital, liquidity and loss absorbency in banks saw Basel III as insufficient; and (4) there was general acceptance in principle of the benefit of contingent capital including 'bail-in'.

The Commission will produce an interim report in April 2011, to be followed by a further round of consultation, ahead of the publication of its final recommendations to the government in September 2011.

Summary of responses (includes links to individual responses)

Sir John Vickers considers ring-fencing of retail banking

The Chairman of the Independent Commission on Banking, Sir John Vickers, has given a speech in which he discussed the Commission's ongoing work on how to regulate the capital and corporate structures of banks.

Sir John noted that one theme in the Commission's discussions so far has been that the failure of retail banking services – credit provision as well as payments system and deposit-taking services – would be especially damaging in terms of wider economic and social costs. According to Sir John, one response to this concern could be to ring-fence the retail banking activities of systemically-important institutions and require them to be capitalised on a stand-alone basis, or, alternatively, to require the ring-fenced retail banking activities to be relatively strongly capitalised, while adopting a lighter regulatory policy towards the other activities (if any) of banks, thereby focussing and limiting the need for heightened capital requirements on the key retail services.

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Sir John concluded his speech by indicating that the Commission's work in the coming months will focus on the following questions: (1) whether, and if so how, structural reform of systemically-important institutions might affect appropriate levels of loss-absorbing capacity; and (2) whether, and if so how, forms of structural separation might enhance the credibility and effectiveness of resolution schemes.

UK government announces package of measures to enhance consumer protection in mortgage market

The government has announced a package of measures intended to simplify the mortgage regulation landscape by making the FSA responsible for all residential mortgages. In particular, the measures: (1) transfer the regulation of new and existing second charge residential mortgages from the OFT to the FSA, to ensure consistent standards of consumer protection and simplify the regulatory environment for mortgage lenders and borrowers; (2) are intended to ensure consumer protections are maintained when a mortgage book is sold by a mortgage lender to an unregulated firm; and (3) extend the current regulation of the sale and rent back market to all providers, to ensure appropriate protection for consumers.

The government has indicated that statutory instruments will be published later in 2011. In advance of this, it expects the FSA to begin work immediately to implement these measures.

Link to impact assessments

FSA opens public debate on product intervention

The FSA has published a discussion paper (DP11/01) to open a public debate about how the FSA and, in the future, the proposed Consumer Protection and Markets Authority (CPMA), should pursue the objective of consumer protection and specifically the issue of product intervention.

The paper outlines how the FSA has begun to shift towards a more interventionist approach with tighter supervision of the governance of product development. It also sets out a range of future interventions that could be introduced in areas where the FSA considers the potential for customer harm to be greatest. These might include interventions such as banning products or prohibiting the sale of certain products to specific groups of customers.

The consultation period ends on 21 April 2011.

FDF consults on abolition of control premium in takeover legislation

The State Secretariat for International Financial Matters (SIF) of the Federal Department of Finance (FDF) is consulting market participants on the proposed abolition of the control premium in the Stock Exchange Act.

Under the current Stock Exchange Act, if a shareholder acquires at least a third of the voting rights of a listed company, that shareholder must make a public offer to acquire all of the remaining shares. The offer price must be at least equal to the then current market price, but may be up to 25% lower than the price paid in the last 12 months by the acquiring shareholder for shares in the company. During the Federal Council's consultation on the revision of the Stock Exchange Act, the Takeover Board proposed the abolition of this 'control premium' on the basis that it is contrary to the principle of equality of treatment of shareholders and unusual in a European comparison.

Comments are requested by 24 February 2011.

Irish Finance Bill 2011 published

The Irish Department of Finance has published the Finance Bill 2011, which gives effect to the taxation measures announced in the December 2010 Budget.

Amongst other things, the Bill amends section 110 of the Taxes Consolidation Act 1997 which deals with the tax treatment of securitisation companies. In particular, the Bill: (1) extends the definition of qualifying asset in section 110 to include plant and machinery, commodities and certain carbon offsets; (2) amends section 110 to provide that an expense deduction for interest and other payments made to certain non-resident persons will be disallowed in the circumstances provided for in the legislation; and (3) provides that the new legislation takes effect from 21 January 2011 in relation to assets acquired, securities issued or swap agreements entered into after that date.

Explanatory memorandum

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HKMA issues circular on implementation of Basel III

The Hong Kong Monetary Authority (HKMA) has issued a circular on the implementation of Basel III in Hong Kong. The circular sets out the HKMA's initial thinking on the implementation of Basel III in order to provide authorised institutions with a backdrop against which to develop their own plans for bringing their organisations into compliance with the Basel III requirements. The HKMA currently intends to adhere to the Basel Committee's implementation timetable, including the transitional arrangements.

Implementation of Basel III in Hong Kong will entail the amendment of the Banking Ordinance, Banking (Capital) Rules and Banking (Disclosure) Rules. To meet the deadline for the introduction of the first phase of Basel III as of 1 January 2013 (i.e. the new minimum capital levels and the parallel run of the leverage ratio), the HKMA plans to introduce the necessary legislative amendments during the 2011-2012 legislative session to allow sufficient time for development of supervisory guidelines by the HKMA, and for the necessary operational changes and systems enhancements by authorised institutions. The HKMA intends to conduct the required statutory consultation on the draft amendments to the Banking Ordinance and Banking (Capital) Rules in the third or fourth quarter of 2011.

In addition, the HKMA is considering convening a joint HKMA-industry working group on liquidity to provide a forum for detailed discussion of the relevant implementation proposals and issues.

Companies Registry announces commencement of parts 2 and 5 of Companies (Amendment) Ordinance 2010

The Companies Registry has issued a circular announcing the commencement of Part 2 and Part 5 of the Companies (Amendment) Ordinance 2010, and the commencement of the Business Registration (Amendment) Ordinance 2010, with effect from 21 February 2011. The amendments are intended to facilitate electronic company incorporation and electronic filing of documents with the Companies Registry.

Amongst other things, the amendments relate to: (1) company formation and business registration under Part 2; and (2) electronic communications with the Registrar of Companies under Part 5.

CBRC revises interim measures on administration of derivatives transactions by banking financial institutions

The China Banking Regulatory Commission (CBRC) has published the revised 'Interim Measures on the Administration of Derivatives Transactions by Banking Financial Institutions'. A new tiered licensing regime, as well as a set of rules in respect of risk management, marketing and ongoing services have been integrated into the revised measures.

SEC and CFTC jointly propose private fund systemic risk reporting rules

The SEC has proposed a rule requiring registered investment advisers to report information for use by the Financial Stability Oversight Council (FSOC) in monitoring risk to the US financial system. The CFTC, working in collaboration with the SEC, has also issued a similar rule proposal.

The proposed rule would implement Sections 404 and 406 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The proposal creates a new reporting form (Form PF) to be filed periodically by SEC or CFTC-registered investment advisers who manage one or more private funds. The rules request different categories of information from private fund advisers based on the types of funds they manage, including information about their use of leverage and collateral practices, counterparty disclosures, market positions, transaction financing, liquidity risk profile, and turnover. Information reported on Form PF would remain confidential.

The public comment period on the proposed reporting requirements will last 60 days.

SEC press release
CFTC statement

SEC consults on proposed net worth standard for accredited investors

The SEC has voted to propose amendments to its rules in order to conform the definition of 'accredited investor' to the requirements of Section 413(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

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The proposed amendments would exclude the value of an individual's primary residence in calculating net worth when determining accredited investor status. The amendments would also clarify that 'the value of the primary residence' – which must be excluded from the individual net worth calculation – is determined by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property. As a result, under the proposed rule, an investor's net worth would be reduced by the amount of 'value' that the primary residence would have contributed to net worth if the residence were not required to be excluded. The new net worth standard must remain in effect until 21 July 2014, four years after the enactment of the Dodd-Frank Act. Beginning in 2014, the SEC is required to review the definition of the term 'accredited investor' in its entirety every four years and engage in further rulemaking to the extent it deems appropriate.

Comments are due by 11 March 2011.

Press release

SEC adopts rules for say-on-pay and golden parachute compensation

The SEC has announced that, in accordance with the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, it has voted to adopt rules concerning shareholder approval of executive compensation and 'golden parachute' compensation arrangements.

The new rules mandate that say-on-pay votes required under the Dodd-Frank Act must occur at least once every three years beginning with the first annual shareholders' meeting taking place on or after 21 January 2011. In addition, companies are required to hold a 'frequency' vote at least once every six years in order to allow shareholders to decide how often they would like to be presented with the say-on-pay vote. Following the frequency vote, a company must disclose on an SEC Form 8-K how often it will hold the say-on-pay vote.

The new rules also require companies to provide additional disclosure regarding 'golden parachute' compensation arrangements with certain executive officers in connection with merger transactions. The SEC has also adopted a temporary exemption for smaller reporting companies (i.e., companies with public float of less than USD 75 million). These smaller companies are not required to conduct say-on-pay and frequency votes until annual meetings occurring on or after 21 January 2013.

SEC staff study recommends uniform fiduciary standard of conduct for broker-dealers and investment advisers

The SEC has submitted a staff study recommending a uniform fiduciary standard of conduct for broker-dealers and investment advisers who provide personalized investment advice about securities to retail investors to Congress. Currently, broker-dealers must deal fairly with customers but are not subject to a fiduciary standard of conduct. The proposed standard would require broker-dealers to act in the best interest of retail customers without regard to the broker-dealer's financial or other interest when providing personalized investment advice. The study was required by section 913 of the Dodd-Frank Wall Street Reform and Customer Protection Act of 2010.

Two SEC Commissioners, Kathleen L. Casey and Troy A. Paredes, have issued a joint statement opposing the study. They argue that the report does not justify its recommendation that the SEC begin working to change the regulatory regime for broker-dealers and investment advisers providing personalized investment advice to retail investors. In addition, they assert that the study inadequately addresses the risk that its recommendations may negatively impact investors.

Congress commissioned the SEC to produce the study as a prelude to determining whether it would authorize the SEC to implement a uniform fiduciary standard.

SEC proposes rule for timely acknowledgment and verification of security-based swap transactions

The SEC has proposed a rule governing the way in which security-based swap transactions are acknowledged and verified. Amongst other things, Rule 15Fi-1 proposes that security-based swap dealers and major security-based swap participants (collectively, SBS entities): (1) provide a trade acknowledgment detailing information specific to the transaction to its counterparty in a security-based swap transaction within 15 minutes, 30 minutes or 24 hours of execution, depending on whether the transaction is executed or processed electronically; (2) electronically process security-based swap transactions if the SBS entity has the ability to do so; and (3) have written policies and procedures in place designed to obtain verification of the terms outlined in the trade acknowledgment.

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The rule also proposes to: (1) specify which SBS entity is responsible for providing the trade acknowledgment; (2) process the transaction through the facilities of a registered clearing agency in order to permit an SBS entity to satisfy the requirements of the proposed rule; (3) identify the transaction details that must be included in the trade acknowledgement; and (4) provide a limited exemption from the requirements of Rule 10b-10 under the Exchange Act for SBS entities that are also brokers.

Comments are due within 30 days of publication in the Federal Register.

RECENT CLIFFORD CHANCE BRIEFINGS

News for non-EU Issuers – another decision on equivalence

The eagle-eyed will have noticed that the transitional relief granted to auditors of non-EU issuers from the registration requirements of the Statutory Audit Directive ended on 1 July 2010. However, by a decision of 19 January 2011 the European Commission has determined that certain non-EU countries have equivalent auditors' oversight systems and therefore may be exempted from the auditor registration obligations of the Directive. The Commission has also extended the period of transitional relief for certain other non-EU countries until 31 July 2012.

This briefing discusses the Commission's decision.

http://www.cliffordchance.com/publicationviews/publications/2011/01/news_for_non-eu_issuers-anotherdecisiono.html

Corporate Update January 2011

The January 2011 edition of our bi-annual Corporate Update covering key company law topics contains the following: (1) Company Law Update; (2) Corporate Governance Update; (3) Regulatory Update; (4) Takeovers Update; and (5) Antitrust Update.

http://www.cliffordchance.com/publicationviews/publications/2011/01/corporate_update.html

Employee Benefits & Executive Compensation Newsletter – Winter 2011 edition

The winter 2011 edition of our Employee Benefits & Executive Compensation Newsletter covers the following: (1) Department of Labor fee disclosure regulations; (2) SEC proposes rules for institutional investment manager reporting of proxy votes on executive compensation; (3) non-discrimination rules for medical plans; and (4) Department of Labor proposes expanded ERISA 'fiduciary' definition.

http://www.cliffordchance.com/publicationviews/publications/2011/01/employee_benefitsexecutivecompensatio.html

SEC open meeting on private fund systemic risk reporting

On 25 January 2011, the SEC held an open meeting in which it proposed rules under the Investment Advisers Act of 1940 that would establish new reporting obligations for registered advisers to private funds. The proposed rules would implement Sections 404 and 406 of the Dodd- Frank Wall Street Reform and Consumer Protection Act. The SEC is proposing these rules jointly with the Commodity Futures Trading Commission, who also considered issuing these rules for comment at an open meeting on 26 January.

This briefing provides a summary of the 25 January discussion of the rule proposal.

Please contact Barbara Kahn by email at barbara.kahn@cliffordchance.com for a copy of this briefing.

Volcker Rule study recommends implementation of a comprehensive proprietary trading compliance framework

On 18 January 2011, the Financial Stability Oversight Council published a Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds. The Study was conducted pursuant to the requirements of Section 619 (commonly referred to as the 'Volcker Rule') of the Dodd-Frank Wall Street Reform and Consumer Protection Act and its principal purpose was to provide implementation recommendations to the regulatory agencies responsible for implementing the provisions of the Volcker Rule.

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This briefing outlines the principal aspects of the Council's recommendations on implementing the Volcker Rule's proprietary trading ban.

http://www.cliffordchance.com/publicationviews/publications/2011/01/volcker_rule_studyrecommendsimplementationof0.html

FCPA initiates sweep of firms doing business with sovereign wealth funds

The SEC has issued information requests to at least ten banks and private equity firms to examine whether their dealings with sovereign wealth funds (SWFs) implicate the US Foreign Corrupt Practices Act (FCPA). This development has broad implications for: (1) firms in which SWFs have invested capital; (2) firms that conduct other business with or provide services to SWFs; and (3) SWFs themselves. The requests also signal the US Government's intent to scrutinize an entire new area under the FCPA.

This briefing discusses the SEC's investigation and sets out a number of recommendations for firms on how to respond if the SEC issues additional information requests.

http://www.cliffordchance.com/publicationviews/publications/2011/01/fcpa_initiates_sweepoffirmsdoingbusinesswit.html

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