CLIFFORD
CHANCE

31 January - 4 February 2011

International Regulatory Update

IN THIS WEEK'S NEWS

- EU financial supervision: Parliament confirms selection of ESA chairmen
- Treasury Committee reports on financial regulation reforms
- ECON Committee approves report on financial transaction tax
- European Commission issues communication on commodity markets and raw materials
- UK financial supervision: Martin Wheatley appointed to head new CPMA
- FSA consults on product disclosure
- Tripartite Authorities set out financial sector exercising strategy
- Remuneration: Treasury Committee Chairman calls on FSA to provide more disclosure
- BaFin extends general decree as regards transparency requirements for short-selling positions until 25 March 2012
- AMF publishes study evaluating MiFID questionnaires in France
- New French reporting obligations for net short positions enter into force
- Dutch regulator to focus on directors' expertise
- CRD 3: Belgian regulator updates guidelines on own fund requirements
- CRD 2: Bank of Italy publishes new supervisory rules on securitisation transactions
- Swiss regulator consults on draft circular on capital buffer and capital planning
- Tokyo Stock Exchange consults on development of listing rules and frameworks for JDR-wrapped ETNs
- SEC proposes rules for security-based swap execution facilities
- US Financial Crisis Inquiry Commission reports on causes of financial crisis
- Recent Clifford Chance briefings: SEC finalizes rules on say-on-pay, say-when-on-pay and say-on-golden parachutes votes under Dodd-Frank; Netting in Russia – Light at the End of the Tunnel; and more. Follow this link to the briefings section.

If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

Chris Bates +44 (0)20 7006 1041

Nick O'Neill +44 (0)20 7006 1139

Marc Benzler +49 69 7199 3304

Thomas Pax +1 202 912 5168

Steven Gatti +1 202 912 5095

Martin Rogers +852 2826 2437

Mark Shipman + 852 2826 8992

International Regulatory Update Editor

Julia Milosh +44 (0)20 7006 4171

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street, London, E14 5JJ, UK
www.cliffordchance.com

EU financial supervision: Parliament confirms selection of ESA chairmen

The European Parliament has approved the proposed chairmen for the European Supervisory Authorities (ESAs), whose selection was announced on 13 January 2011. The confirmation follows an open hearing before the Parliament's ECON Committee on 1 February 2011. The ECON Committee had initially decided to withhold from making a recommendation on the nomination of the proposed chairmen, calling for more guarantees from the European Commission and Member States regarding the three candidates' strategies for ensuring genuine independence for the authorities from national supervisors, amongst other things.

EBA press release
ESMA press release
EIOPA press release
European Parliament press release

Treasury Committee reports on financial regulation reforms

The Treasury Committee has published its report on the government's plans to change the system of UK financial regulation. Under the government's proposals, the FSA will cease to exist in its current form, and will be replaced by two new bodies: (1) the Prudential Regulation Authority (PRA), a new subsidiary of the Bank of England focusing on regulation of banks, deposit-takers and insurers; and (2) the Consumer Protection and Markets Authority (CPMA), with a special focus on consumer protection and market conduct. A new Financial Policy Committee (FPC) will be set up in charge of macro-prudential regulation. The FPC will be a committee of the Bank of England Court of Directors.

The government has indicated that that it intends for the legislation to establish the new regulatory structure to be introduced in mid 2011 and to be completed by 2012.

Amongst other things, the Treasury Committee is concerned about the government's timetable for the reforms, and emphasises that the legislation should be subject to pre-legislative scrutiny, and that the timetable for the Bill should be generous enough to allow proper parliamentary consideration. The Treasury Committee also notes that the macro-prudential tools which the FPC is to use are as yet undefined and untested and may have unexpected consequences, and calls for the secondary legislation setting out these tools to be published as soon as possible so that Parliament can assess the nature of the powers to be devolved to the FPC.

Oral and written evidence
Additional written evidence

ECON Committee approves report on financial transaction tax

The European Parliament's ECON Committee has approved a non-legislative draft report from October 2010 on innovative financing at a global and European level, which argues that an EU financial transaction tax could help finance budgets, reduce public deficits and avoid speculation.

Amongst other things, the report proposes a financial transaction tax: (1) of between 0.01% and 0.05%, to limit the risk of transaction flows; (2) that aims to reduce speculation; (3) that has a broad base, including every type of transaction, in order to avoid flows towards less regulated parts of the financial sector; and (4) that has clearly defined exemptions and thresholds, taking into account the needs of the retail sector and small investors and individuals. The report suggests that a low-rate financial transaction tax could generate a revenue of nearly EUR 200 billion a year at an EU level and USD 650 billion at a global level.

The ECON Committee has noted that the European Commission supports further development of a financial transaction tax at a global level, but the report suggests starting implementation in Europe as a first step.

The European Parliament's plenary session is due to vote on the report in March 2011.

European Commission issues communication on commodity markets and raw materials

The European Commission has issued a Communication on commodity markets and raw materials, setting out proposals to improve the regulation, functioning and transparency of financial and commodity markets. The Communication also calls for the swift implementation of the Raw Materials Initiative, which the Commission adopted in 2008.

The Commission notes that the prices of commodity derivatives and underlying physical derivatives are interlinked, and highlights a number of ongoing initiatives to reform financial market regulation, which are intended to enhance the integrity, transparency and stability of commodity derivative markets, including: (1) the

proposed regulation on OTC derivatives; (2) the MiFID review; (3) the Market Abuse Directive review; (4) the initiative on packaged retail investment products; (5) the AIFM Directive; and (6) the creation of the European Securities and Markets Authority (ESMA).

The Commission also notes that further work is necessary to understand the interlink between physical and financial markets fully, and intends to continue working on this matter in the framework of the G20 debate.

Q&As

UK financial supervision: Martin Wheatley appointed to head new CPMA

The government has announced that Martin Wheatley will become chief executive of the Consumer Protection and Markets Authority (CPMA) once the new body is established at the end of 2012. Mr. Wheatley has also been appointed as a new managing director of the FSA's consumer and markets business unit from 1 September 2011. He will work with the current FSA executive team to prepare for the transition from the FSA to the new regulatory structure.

Mr. Wheatley joins the FSA after six years with the Securities and Futures Commission (SFC) in Hong Kong, where he is now Chief Executive Officer.

HM Treasury press release
FSA press release

FSA consults on product disclosure

The FSA has published a Consultation Paper (CP11/03) on product disclosure, which proposes changes to reflect the Retail Distribution Review (RDR) rules on adviser and consultancy charging, and to improve pension scheme disclosure. In particular, the FSA is proposing the following changes: (1) amending the key features illustrations (KFIs) that firms are required to give their clients; (2) enhanced disclosures in relation to personal pension schemes marketed as SIPPs; and (3) potentially replacing monetary projections by inflation-adjusted projections for personal and stakeholder pensions (both individual and group).

Comments are due by 3 May 2011. The FSA intends to publish a policy statement in the second half of 2011.

The FSA has indicated that any final rules will come into force as follows: (1) the rules to reflect the RDR adviser and consultancy charging requirements – 31 December 2012; and (2) the rules on pension scheme disclosures – 6 April 2012.

The FSA intends to consult on the move to inflation-adjusted projections in the second half of 2011.

Tripartite Authorities set out financial sector exercising strategy

The Tripartite Authorities – HM Treasury, the FSA, and the Bank of England – have published a paper setting out their strategy for future financial sector exercising. The paper also provides the authorities' feedback to the discussions with sector groups (including retail and investment banks, insurers, infrastructure providers and trade bodies) on the future of financial sector exercising, which followed the 2009 market-wide exercise.

Remuneration: Treasury Committee Chairman calls on FSA to provide more disclosure

The Chairman of the Treasury Committee, Andrew Tyrie, has written to Hector Sants, Chief Executive of the FSA, asking for the FSA to provide more disclosure on remuneration at the 'high-end' of the banking sector, in aggregate form. Mr. Tyrie notes that, while remuneration information on board members is available in the accounts of financial firms, information on the remuneration of other highly paid members of such firms is unavailable. He acknowledges that, without international agreement for disclosure of remuneration at the top level, banks are reluctant to release information which they consider may place individual firms at a competitive disadvantage, but argues that aggregation of the information should address these concerns.

BaFin extends general decree as regards transparency requirements for short-selling positions until 25 March 2012

The Federal Financial Services Supervisory Authority (BaFin) has extended its general decree on transparency requirements for net short-selling positions until 25 March 2012. Under the general decree, which was originally introduced on 4 March 2010, market participants must notify BaFin of net short-selling positions in specific financial stocks (identified by BaFIN) of a threshold of 0.2% or more and publish the same upon a threshold of 0.5% or more.

Notifications must be made by the holder of such positions by the end of the next trading day by fax, using a form available on BaFin's website. Publications will be made in anonymised form on BaFin's website.

FAQs

AMF publishes study evaluating MiFID questionnaires in France

The Financial Markets Authority (AMF) has published a study about the usefulness of MIFID 'Know Your Client' questionnaires answered by retail customers, which concludes that there is significant room for improving the questionnaires.

The study found that the questionnaires are generally badly perceived by customers, who regard them as too intrusive or as leaving too much room for interpretation. In particular, the study has identified the following weaknesses: (1) insufficient quantitative measurements; (2) a failure to take account of the excessive influence of the short-term outlook on customers' responses; (3) over reliance on customer self assessment; and (4) insufficient consideration of customers' personal characteristics.

The report also proposes solutions for improvement, including conducting a more systematic qualitative analysis of the financial situation of customers, taking into account customers' tolerance to losses.

Summary of the main results of the MiFID questionnaires

New French reporting obligations for net short positions enter into force

A new short-selling disclosure regime relating to the disclosure of net short positions has entered into force in France. As a result, the exceptional ban on short-selling of shares of financial sector firms imposed by the French Financial Markets Authority (AMF) on 19 September 2008 will no longer apply. The new short selling disclosure regime is set out in article 223-37 of the AMF General Regulation and its implementing instruction 2010-08 of 9 November 2010.

All natural and legal persons (except for liquidity providers duly approved by the AMF) must disclose to the AMF their net short positions held on shares traded on Euronext Paris or Alternext as soon as such net short-positions exceed certain pre-determined thresholds. However, the new short selling disclosure regime excludes from its scope shares whose driving trading platform is outside France. A list of such excluded shares was published on the AMF's website on 27 January 2011.

The new short selling disclosure regime is influenced to a large extent by the draft EU regulation on short selling which is currently being discussed for a planned entry into force in July 2012.

Dutch regulator to focus on directors' expertise

The Netherlands Authority for the Financial Markets (AFM) has announced that it will keep a closer watch on the expertise and reliability of the managing directors of Dutch financial institutions. The current list of the AFM's priorities for 2011 indicates that the functioning of the board and the quality of its members will be under the AFM's particular scrutiny. The AFM's focus on expertise follows the entry into force on 1 January 2011 of a new policy rule on expertise. The policy rule contains several criteria a prospective board member will have to meet, including being knowledgeable and able to make sound judgments. The past performance of a board member will also be examined.

Recently, the AFM sent a letter to the Dutch Ministry of Social Affairs and Employment emphasising that a higher standard of expertise should also apply to directors of pension funds and investment managers acting on their behalf. Earlier, several enquiries into the causes of the financial crisis resulted in the recommendation of improving the quality of managers of financial institutions.

Another priority for 2011 will be the functioning of the board of a financial institution in general.

CRD 3: Belgian regulator updates guidelines on own fund requirements

The Banking, Finance and Insurance Commission (CBFA) has published updated guidelines on the own fund requirements applicable to financial institutions. The update implements various CEBS guidelines released in 2009 and 2010.

In particular, the update provides that capital will be disallowed from the own fund calculations to the extent that the shareholder is funded by loans granted by the institution – a transition period of several years applies to situations in existence on 31 December 2010. The update also amends the eligibility criteria applicable to hybrid tier 1 instruments, and incorporates a number of Basel III features, such as the requirement that the instrument

must be written off or converted into ordinary shares prior to a public sector injection of capital without which the institution would have become non-viable.

Guidelines (French)
Guidelines (Dutch)

CRD 2: Bank of Italy publishes new supervisory rules on securitisation transactions

Following a consultation launched in October 2010, the Bank of Italy has published new supervisory rules on securitisation transactions. The new supervisory rules were introduced with the 7th update dated 28 January 2011 to Resolution N. 263 dated 27 December 2006, and implement certain provisions of the revised Capital Requirements Directive (CRD 2) in Italy, taking into account the relevant CEBS guidelines.

The new supervisory rules apply with effect from 1 January 2011. The provisions regarding retention, due diligence and disclosure requirements apply to securitisations completed on or after 1 January 2011. In addition, these provisions apply to existing securitisations with effect from 31 December 2014, to the extent new underlying exposures are added or substituted after that date. Furthermore, the criteria concerning significant credit risk transfer apply to securitisations already in existence on 1 January 2011.

Supervisory Bulletin No. 1 January 2011 (Italian)

Swiss regulator consults on draft circular on capital buffer and capital planning

The Swiss Financial Market Supervisory Authority (FINMA) has launched a consultation on a draft circular on capital buffer and capital planning, which redefines the capital adequacy requirements for banks under Pillar 2 of the Basel Capital Accord to bring transparency and objectivity to existing FINMA supervisory practice.

The main aim of the circular is to make the capital buffer, which is required by FINMA in excess of the minimum legal requirement, subject to objective criteria, taking into account, amongst other things, the following: (1) a risk-based approach; (2) the size and complexity of the institution; and (3) the institution's business activities.

The capital buffers are required to be anti-cyclical, i.e. institutions must comply with the capital buffer target and build up the required capital, which can then be temporarily drawn on within prescribed limits if a crisis arises due to an economic downturn or problems specific to such institutions. Institutions are subsequently required to implement measures enabling them to meet the target again.

The consultation period ends on 14 March 2011.

Tokyo Stock Exchange consults on development of listing rules and frameworks for JDR-wrapped ETNs

The Tokyo Stock Exchange (TSE) has published a consultation paper on the development of listing rules and frameworks for Japanese depositary receipt (JDR)-wrapped exchange traded notes (ETN). The TSE intends to develop listing rules and frameworks for ETNs with the aim of creating an environment in Japan which provides investors with convenient means to invest in a variety of asset classes and, at the same time, maintaining as well as improving the global competitiveness of the Japanese financial and capital markets. Only JDRs backed by ETNs issued by foreign entities will constitute eligible securities.

The TSE plans to implement the amendment to the listing rules in April 2011. Comments are due by 27 February 2011.

SEC proposes rules for security-based swap execution facilities

The SEC has voted to propose rules defining security-based swap execution facilities (SEFs) and establishing their registration requirements, as well as their duties and core principles.

According to the SEC, the proposed rules would: (1) interpret the definition of 'security-based SEFs' as set forth in the Dodd-Frank Act; (2) set out the registration requirements for security-based SEFs; (3) implement the 14 core principles for security-based SEFs that the legislation outlined; (4) establish the process for security-based SEFs to file rule changes and new products with the SEC; and (5) exempt security-based SEFs from the definition of 'exchange' and from most regulation as a broker.

Comments on the proposed rule are due by 4 April 2011.

US Financial Crisis Inquiry Commission reports on causes of financial crisis

The Financial Crisis Inquiry Commission (FCIC) has published the results of its investigation into the causes of the financial and economic crisis. The FCIC is a 10-member bi-partisan panel that was created to examine the causes, domestic and global, of the current financial and economic crisis in the United States. It was established as part of the Fraud Enforcement and Recovery Act (Public Law 111-21), which was passed by Congress and signed by the President in May 2009.

Amongst other things, the panel has concluded that the crisis was avoidable and was caused by: (1) widespread failures in financial regulation, including the Federal Reserve's failure to stem the tide of toxic mortgages; (2) dramatic breakdowns in corporate governance, including too many financial firms acting recklessly and taking on too much risk; (3) an explosive mix of excessive borrowing and risk by households and Wall Street that put the financial system on a collision course with crisis; (4) key policy makers ill prepared for the crisis, lacking a full understanding of the financial system they oversaw; and (5) systemic breaches in accountability and ethics at all levels.

RECENT CLIFFORD CHANCE BRIEFINGS

ATT Only – testing the water without taking the plunge

The London Stock Exchange has recently extended the scope of its Admission to Trading Only route to admission ('ATT Only'). The intention behind ATT Only is that issuers which aspire to undertake a full listing in London but which are not currently in a position to do so, for a valid reason such as regulatory constraints in their home jurisdictions, are able to 'test the water' and evaluate the merits of a future listing, whilst benefitting from immediate exposure to the London investment and trading community.

This briefing discusses ATT Only.

http://www.cliffordchance.com/publicationviews/publications/2011/01/att_only_-_testingthewaterwithouttakingth.html

UK Employment Update

The February 2011 edition of Employment News in Brief 2011 includes articles discussing, amongst other things: (1) new unfair dismissal and redundancy limits; (2) new rates of statutory maternity, paternity and sick pay; (3) out of time equal pay claims may be pursued in the High Court; (4) default retirement age to be retired; (5) shared flexible parental leave regime on the horizon; and (6) consultation on the reform of the Employment Tribunal system.

http://www.cliffordchance.com/publicationviews/publications/2011/02/uk_employment_update-february2011.html

The French Competition Authority launches a wide public consultation on new antitrust fining notice

On 17 January 2011, the French Competition Authority unveiled its draft notice on antitrust fines. Companies are invited to comment on this draft until 11 March.

This briefing discusses the draft notice.

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

SEC finalizes rules on say-on-pay, say-when-on-pay and say-on-golden parachutes votes under Dodd-Frank

On 25 January 2011, the Securities and Exchange Commission (SEC) adopted final rules to implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act that require shareholder advisory votes on certain executive compensation matters. The final rules generally adopt, but in certain cases, modify, proposed rules issued by the SEC on 18 October 2010.

This briefing paper discusses the final rules.

http://www.cliffordchance.com/publicationviews/publications/2011/02/sec_finalizes_rulesonsay-on-pay.html

Cross-Border Litigation Series – Lower Courts extend Morrison but SEC asserts Dodd-Frank Act overrules Morrison for enforcement actions

Approximately six months ago, the United States Supreme Court in Morrison v. National Australia Bank Ltd. changed the paradigm for extraterritorial application of Section 10(b) of the Securities Exchange Act of 1934. The Supreme Court jettisoned the long-standing conduct and effects test adopted by federal appeals courts, and replaced it with a new transactional test: 'whether the purchase or sale [of a security] is made in the United States, or involves a security listed on a domestic exchange.' Lower courts have applied Morrison's presumption against extraterritorial application of US federal law to factual circumstances and legal claims not at issue in Morrison. Although Congress quickly moved to reassert the primacy of the conduct and effects test for actions brought by the Securities and Exchange Commission (SEC), it did not reverse the effect of Morrison on private lawsuits. Moreover, the SEC has asserted that Morrison does not affect its ability to bring enforcement actions due to specific provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act that it claims were intended to overturn Morrison.

This briefing discusses the impact of Morrison and the cases following it.

http://www.cliffordchance.com/publicationviews/publications/2011/02/cross-border_litigationserieslowercourt.html

Netting in Russia – Light at the End of the Tunnel

This briefing paper discusses the proposed amendments to the Russian Securities Market Law, the Insolvency (Bankruptcy) Law and the Credit Organisations Insolvency (Bankruptcy) Law that are currently being considered by the State Duma of the Russian Federation (the lower chamber of the Russian Parliament). While we do not generally issue client briefings on draft legislation, the importance and the possible impact of this draft law on the Russian financial markets warranted an earlier circulation. The discussion in the briefing is based on the draft legislation that was adopted by the State Duma in the third reading.

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

Taking Security in the Russian Federation

There are six types of security expressly referred to in the list of security in the Civil Code of the Russian Federation: (1) pledge or mortgage; (2) suretyship; (3) bank guarantee; (4) possessory lien; (5) security deposit; and (6) penalty.

Although this list is stated not to be exhaustive (for example, the Civil Code provisions on factoring contemplate an assignment of a claim by way of security), the legal status of other forms of security such as an assignment is not clear. Of the listed types of security, only the pledge or mortgage allows the creation of a non-possessory security interest in an asset, and affords a creditor the status of a secured creditor in the insolvency of the pledgor or mortgagor.

This is an updated version of our July 2009 briefing paper describing those types of security that are commonly used for cross-border financing transactions with a Russian element.

http://www.cliffordchance.com/publicationviews/publications/2009/07/taking_security_intherussianfederation.html

The Dodd-Frank Act and the Proposed EU Regulation on OTC Derivatives – Impact on Asian Institutions

This briefing provides an overview of the impact of the US Dodd-Frank Act and the proposed EU Regulation on OTC derivatives, with a particular focus on how these changes will impact on institutions in Asia participating in the OTC derivatives markets. (The information in this briefing is correct as at 21 December 2010.)

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

New Arbitration Law for Hong Kong

On 10 November 2010, the Hong Kong Legislative Council passed the Hong Kong Arbitration Bill. The objective of the Arbitration Bill is to reform the current Arbitration Ordinance (Cap. 341), with a view to making the law of arbitration more user-friendly to arbitration users and the arbitration regime in Hong Kong more consistent with widely accepted international arbitration practices and development. After the Secretary for Justice completes the formality of publishing a notice in the Government Gazette, the new Arbitration Ordinance will come into effect. It is anticipated that this will happen within the next several months.

This briefing discusses the Arbitration Bill.

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

CBRC further revises the banking derivatives rules

The China Banking Regulatory Commission has just published the revised Measures on the Administration of Derivatives Transactions by Banking Financial Institutions, which became effective retroactively from 5 January 2011.

This briefing examines the ways in which the Measures seek to further improve regulation of derivatives transactions, most notably through a new classification system for derivatives transactions and tiered licensing regime for banking financial institutions engaged in such transactions. The briefing also looks at how the Measures monitor the launch of new derivatives products and strengthen risk management with a view to effectively addressing market risk, credit risk, operation risk and legal and compliance risk that commonly arise from derivatives transactions.

http://www.cliffordchance.com/publicationviews/publications/2011/02/cbrc_further_revisesthebankingderivativesrules.html

Clifford Chance's International Regulatory Update is a new weekly digest of significant regulatory developments, drawing on our daily content from our Alerter: Finance Industry service. ***If you would like to continue to receive International Regulatory Update or would like to request a subscription for a colleague, please click here.*** *To request a subscription to our Alerter: Finance Industry service, please email Online Services.*