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1 - 5 August 2011

International Regulatory Update

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CRD IV: IMF staff criticises EU implementation of Basel III

The IMF has concluded its Article IV consultation with the United Kingdom, which included a Financial System Stability Assessment under the IMF's Financial Sector Assessment Program, analysing financial sector health and associated policies. Amongst other things, the IMF's staff report on the Article IV consultation notes that the European Commission's legislative proposals for further amendments to the Capital Requirements Directive (CRD 4) to implement the Basel III reforms into EU law fall short of IMF staff recommendations.

In particular, the report argues that the common standards under CRD 4 are too weak. The Commission suggested a common standard (maximum harmonisation) set at the level of Basel III minimum requirements, and softened the definition of core tier 1 capital relative to the Basel III recommendations in some areas. In contrast, the IMF's staff has called for common standards that exceed the Basel III minima, in light of prevailing balance sheet uncertainties and the lack of EU-wide resolution arrangements and a fully unified fiscal backstop.

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The report also states that more flexibility is needed for macroprudential policies and notes that national authorities are likely to need more flexibility to use a range of macroprudential tools, given the uncertainty surrounding the tools required for effective macroprudential policy and future macroprudential risks. In addition, the report highlights that the Commission's proposal lacks a firm commitment to implement the leverage ratio or net stable funding ratio in 2018, as agreed under Basel III.

The report calls for the legislation to be strengthened as it is finalised, including by creating stronger common standards and ensuring sufficient flexibility for macroprudential policies.

IMF staff report on 2011 UK Article IV Consultation
Selected Issues Paper
Financial System Stability Assessment
Report on the Observance of Standards and Codes
Spillover Report
Public Information Notice

Retail Distribution Review: FSA publishes new rules for platforms

The FSA has published a policy statement (PS11/09), which reports on the main issues arising from its November 2010 consultation paper (CP10/29) on platform services in the context of delivering the Retail Distribution Review (RDR) and sets out the FSA's final rules in this area.

Amongst other things, the new rules require:

- platforms and other nominee companies to transfer, within a reasonable time and in an efficient manner, assets held on behalf of customers to another person, when requested;
- platforms and other nominees to pass on fund information to the end investor;
- investment adviser firms using a platform service for the purposes of making a personal recommendation, or arranging the purchase of retail investment products for retail clients, to take reasonable steps to ensure that they use platforms services that present their retail investment products without bias;
- platforms to disclose to professional and retail clients any fees or commission they arrange to accept from third parties in relation to retail investment products – these should be disclosed in advance of the platform providing services to those clients; and
- nominees to respond to information requests by authorised fund managers for liquidity purposes.

The rules also extend the application of the RDR rules on facilitating payment of adviser charges to facilitation through platforms.

In respect of incentives, the FSA has decided that it would be desirable, in principle, to ban both cash rebates from product providers to investors and product provider payments to platforms. However, given the potential impact of these changes on the business models of platform service providers, the FSA has concluded that further research is needed to ensure that the implications for consumers are fully understood before proposing new rules.

European Commission publishes Info Letter on post trading

The European Commission has published the third edition of its Info Letter, which provides an update on the Commission's work on issues related to post trading and financial market infrastructures. Amongst other things, this edition includes discussion on: (1) the proposed regulation on OTC derivatives, central counterparties and trade repositories; (2) international work-streams on OTC derivatives; (3) trade repositories and access to data; (4) the harmonisation of central securities depositories (CSD) legislation; (5) the Securities Law Directive; (6) recognition of close-out netting agreements; and (7) the transposition of Directive 2009/44/EC on protection of settlement systems and financial collateral arrangements.

Ministry of Justice consults on UK approach to proposed European account preservation order

The Ministry of Justice has published a consultation paper (CP14/11) seeking views on how the UK should approach the European Commission's proposal for a regulation creating a European Account Preservation Order, which was published on 25 July 2011. In particular, the Ministry of Justice has invited views on whether it would be in the national interest for the UK to opt in to the proposed regulation, the potential advantages and disadvantages of the proposal, and whether it would provide a satisfactory procedure for the freezing of bank accounts across EU borders. The consultation paper also seeks views on specific provisions contained in the proposal to inform the UK's position on whether or not it should participate in the regulation.

Comments are due by 14 September 2011.

Impact Assessment

IMF publishes working paper assessing administrative feasibility of taxing financial transactions

The IMF has published a working paper which considers how a tax on financial transactions could be applied to the following three categories of financial instruments: (1) exchange-traded instruments; (2) OTC instruments; and (3) foreign exchange instruments. For each category, the paper examines the factors that would facilitate or complicate the administration of a financial transactions tax, the options for collecting the tax, the types of compliance risks that are likely to be encountered, and measures for mitigating these risks.

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

HFSB consults on proposed amendments to Hedge Fund Standards

The Hedge Fund Standards Board (HFSB) has published a consultation paper (CP3/2011) setting out a series of proposed amendments to the Hedge Fund Standards. The Standards were originally developed in the context of the UK regulatory environment and they include specific references to the FSA's 'Principles for Businesses'. According to the HFSB, this approach was followed because the majority of hedge fund managers in Europe are based in the UK and were therefore familiar with the FSA's regulatory regime.

The proposed amendments are intended to ensure that the Standards are equally relevant to a broader international constituency and are not perceived as being tied to a particular national regulatory regime. In addition to internationalising the Standards, the consultation paper proposes changes to strengthen disclosure and risk management practices.

Comments are due by 28 October 2011.

Hedge Fund Standards with proposed amendments

OECD consults on draft principles on financial consumer protection

The OECD has published a set of draft 'High-level Principles on Financial Consumer Protection' for consultation. The principles are designed to assist governments and regulators in G20 countries and other interested economies to enhance financial consumer protection. The OECD has emphasised that they are intended to complement, and do not substitute any, existing international principles and/or guidelines. In particular, the principles do not address sectoral issues dealt with by standard setters such as the International Organization of Securities Commissions, the Basel Committee on Banking Supervision, or the International Association of Insurance Supervisors.

Comments are due by 31 August 2011. Based on comments received, a further draft will be discussed by members of the OECD-led Task Force on Financial Consumer Protection at their next meeting on 14 September 2011. A final draft will then be submitted to the French G20 Presidency, to be transmitted to the G20 Finance and Central Bank Governors meeting on 14 October 2011.

FSA issues guidance on derivative risk management practices

The FSA has published finalised guidance on derivative risk management practices across the investment management industry. The guidance is based on the results of an FSA survey of asset managers' derivative risk management practices. Amongst other things, the survey found that firms had differing definitions of market and counterparty risk and, as a result, the oversight processes varied greatly in frequency, content, and depth of analysis, particularly regarding unsettled trades, margin money and prime broker collateral monitoring.

The finalised guidance sets out the FSA's expectations as regards derivative risk management practices documentation, oversight structures, counterparty risk monitoring, derivative pricing, legal documentation, and collateral and margin management.

ASIC makes rules for capital and related requirements for ASX and ASX 24 markets

The Australian Securities and Investments Commission (ASIC) has made market integrity rules for capital and related requirements for the ASX market and the ASX 24 market, formerly known as the Sydney Futures Exchange market. The rules transfer to ASIC ASX's pre-existing capital and related requirements for the two

markets, following the transition in market supervision responsibility from ASX to ASIC in August 2010. The rules amend the existing ASIC market integrity rules for the two markets by inserting three new chapters for capital, reporting and margins. Concurrently, ASX's pre-existing capital, reporting and margin requirements in the ASX and ASX 24 Operating Rules have ceased to operate.

ASIC has also released new 'Guidance on ASIC market integrity rules for capital and related requirements: ASX and ASX markets' (RG 226), which provides advice on the operation of these rules. Finally, ASIC has published a report (REP 244) summarising the feedback to its consultation paper on proposed ASIC market integrity rules for capital and related requirements in the ASX, ASX 24 and Chi-X markets (CP 161), which first proposed making these rules.

ASIC intends to make market integrity rules shortly for capital and related requirements for the Chi-X market, which is anticipated to start operating on or after 31 October 2011. ASIC intends to model these rules on the market integrity rules for capital and related requirements for the ASX market, in order to ensure a level playing field for the two equity markets.

MPFA issues consultation conclusions and proposals on enhanced regulations for MPF intermediaries

The Mandatory Provident Fund Schemes Authority (MPFA) has issued its consultation conclusions and detailed proposals on the consultation paper 'Enhanced Regulation of Mandatory Provident Fund (MPF) Intermediaries', which was published for comments on 28 March 2011. According to the MPFA, there is general support for enhancing the regulation of MPF intermediaries before the implementation of the Employee Choice Arrangement (ECA), with he majority of respondents not indicating their disagreement with the proposal that the statutory regulatory regime be modeled on the existing administrative regulatory arrangements.

The MPFA also received comments on how to ensure regulatory consistency and create a level playing field under the proposed regulatory model, the scope of regulated activities that would require MPF registration, the conduct requirements to be imposed on registered MPF intermediaries, and the transitional arrangements for the pre-existing MPF intermediaries.

The Financial Services and the Treasury Bureau (FSTB) and the MPFA are proceeding with the drafting of the legislation, taking into account the comments received, and aim to introduce the Bill into the Legislative Council in the fourth quarter of 2011, with a view to completing the legislative process within the current Legislative Council term such that the ECA may commence in the second half of 2012.

FAQs

MAS requires intermediaries to assess investment knowledge and experience of retail customers

The Monetary Authority of Singapore (MAS) has introduced new requirements for intermediaries to formally assess a retail customer's investment knowledge and experience before selling certain investment products to that customer. The new requirements will apply to the sale of both listed and unlisted specified investment products (SIPs), with the exception of certain investment products.

Under the new measures, intermediaries must conduct a customer knowledge assessment to assess whether a customer has the relevant knowledge or experience to understand the risks and features of an unlisted SIP. In the case of listed SIPs, intermediaries have to conduct a customer account review to ascertain whether the customer has the relevant knowledge or experience to understand the risks and features of complex structures or derivatives, before approving the customer's account to trade such products. The intermediary needs to inform the customer if he is assessed as not possessing the relevant knowledge or experience. If the customer still intends to proceed with the transaction, the intermediary must offer advice to the customer. The MAS will not allow 'execution only' service in such cases.

The new requirements will come into effect on 1 January 2012. Intermediaries must comply with the new requirements in their dealings with all customers, new and existing.

RBI modifies guidelines on derivatives

The Reserve Bank of India (RBI) has issued a circular outlining modifications to its comprehensive guidelines on derivatives, which were issued on 20 April 2007, imposing additional requirements relating to the suitability and appropriateness policy for the offering of derivative products to users/customers.

Amongst other things, the additional requirements prohibit market-makers from undertaking derivative transactions or selling structured products to users that do not have properly documented policies regarding risk management. They also require banks, before offering derivative products to corporate clients, to obtain a resolution of the board of directors of the relevant corporate client authorising the entering into derivative transactions on behalf of the company. In addition, the requirements restrict a bank from acting as a market maker in a product which it cannot price independently.

SEBI proposes regulations for alternative investment funds

The Securities and Exchange Board of India (SEBI) has published a concept paper on its proposed SEBI (Alternative Investment Funds) Regulations. The draft SEBI (Alternative Investment Funds) Regulations are set out in the Annex to the concept paper. The proposed regulations are intended to: (1) regulate private pools of capital held by institutions or 'high net worth investors' as alternative investment funds (AIFs); (2) require portfolio managers who intend to pool assets such as for investing in unlisted securities to seek registration of such pools as an AIF; (3) subsume existing venture capital funds regulations in the AIF regulations; (4) create 'social venture funds' which will be targeted towards 'social investors' who are willing to accept 'muted' returns; and (5) regulate fund managers or investment managers of AIFs under a framework for regulation of investment advisors.

The Foreign Venture Capital Investor (FVCI) Regulations will be retained and not subsumed in the AIF regulations. However, the SEBI has indicated that the FVCI regulations may be amended to allow FVCIs to invest in different AIFs such as small and medium enterprises funds and social venture funds in addition to domestic venture capital funds.

Under the proposed AIF regulations, it would be mandatory for all types of private pools of capital or investment funds to seek registration with the SEBI. The funds under the regulations will be closed-ended and may be raised only through private placement through an information memorandum. In addition, the SEBI has indicated that the investment restrictions on different types of AIFs would be specified separately for each category of fund, as these would be the main differentiating criteria between the different types of funds.

BSP issues additional guidelines on internal capital adequacy assessment and supervisory review process for foreign bank branches

The Bangko Sentral ng Pilipinas (BSP) has issued a circular outlining additional guidelines on the internal capital adequacy assessment process (ICAAP) and the related supervisory review process (SRP) for foreign bank branches, which are supplemental to the provisions of the circular dated 15 January 2009.

Amongst other things, the supplemental guidelines provide that the guiding principles for the banks' ICAAP and SRP will apply to foreign bank branches on a proportionate basis. The BSP has indicated that it primarily will be interested in finding out how a foreign bank branch assesses its capital in relation to its business plans and operations in the Philippines. The guidelines also provide that the ICAAP of a foreign bank branch should cover risks arising from the occurrence of domestically-oriented scenarios and that a branch must include in its ICAAP the manner of capital allocation to it and the factors that influence that allocation.

The guidelines will be effective 15 days after the publication in the Official Gazette or in a newspaper of general circulation.

RECENT CLIFFORD CHANCE BRIEFINGS

New antitrust risks for private equity firms?

The European Commission has targeted a private equity house for potential fines for antitrust breaches allegedly committed by one of its portfolio companies. This briefing explains the key issues and looks at the risks for private equity firms and how they can be mitigated.

http://www.cliffordchance.com/publicationviews/publications/2011/08/new_antitrust_risksforprivateequityfirms.html

Lehman Update

This briefing discusses a number of key issues in relation to the Lehman proceedings taking place in the UK and US, including: (1) the Supreme Court decision on flip clauses; (2) Court of Appeal considers LBIE pension liabilities; (3) LBIE claims against affiliates continue; and (4) Second amended Chapter 11 plan filed.

http://www.cliffordchance.com/publicationviews/publications/2011/08/lehman_update_-_3august2011.html

Cross-Border Litigation Series – Two Federal Appeals Courts Weigh in on Corporate Liability under the ATCA

The question of corporate liability under the Alien Tort Claims Act (ATCA) continues to divide US federal courts, increasing the likelihood that the US Supreme Court addresses the issue in the near future. Under the ATCA, foreign plaintiffs have filed US claims against multinational corporations for allegedly aiding and abetting human rights violations by foreign governments outside the United States. In September 2010, the US Court of Appeals for the Second Circuit held in Kiobel v. Royal Dutch Petroleum that corporations are not liable under the ATCA, pointing towards greater restriction of these types of lawsuits. However, two federal appeals courts recently ruled that corporations can be held liable under the ATCA, creating a deep split in authority. The US Supreme Court will need to intervene to determine whether the controversial practice of suing corporations for money damages for alleged overseas human rights violations will remain viable.

This briefing discusses the rulings in Doe v. Exxon Mobil Corp and Flomo v. Firestone Natural Rubber Co. and their implications.

http://www.cliffordchance.com/publicationviews/publications/2011/08/cross-border_litigationseriestwofedera.html

Royal Decree 1145/2011, of 29 July, which amends the General Regulations on tax management and inspections activities and procedures (English)

On 30 July 2011, the Official State Gazette published RD 1145/2011 amending RD 1065/2007 regulating tax management and inspection activities and procedures. The entry into force of RD 1145/2011 represents a significant modification of the information obligations envisaged in Law 13/1985, of 25 May, for preferred securities and debt instruments issued in accordance with Law 13/1985. In addition, RD 1145/2011 amends the information procedure established for Public Debt securities, currently regulated by Royal Decree 1285/1991, of 2 August.

This briefing discusses the background and implications of RD 1145/2011.

http://www.cliffordchance.com/publicationviews/publications/2011/08/royal_decree_11452011of29julyr.html

Clifford Chance Asia Pacific regulatory risk update – July 2011

This briefing provides a short, high-level identification of areas of emerging or continuing regulatory risk that the firm has identified from advising the financial industry across Asia Pacific.

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

Horizontal mergers in the China context – the Uralkali/Silvinit potash merger and continuity of supply obligations

Since the Anti-Monopoly Law came into force nearly three years ago, the Ministry of Commerce (MOFCOM) has reviewed more than 240 transactions. It has prohibited one transaction, and intervened in six other cases imposing conditions. This is MOFCOM's eighth intervention and comes at a time when MOFCOM is soliciting comments on its draft guidelines on the assessment of mergers. The Uralkali/Silvinit decision offers guidance on MOFCOM's evolving approach to the assessment of horizontal mergers and behavioural remedies.

This briefing provides an overview of the conditional clearance decision and considering MOFCOM's approach to the assessment of competition effects in horizontal mergers. The briefing also highlights the possible implications of the decision for future cases.

http://www.cliffordchance.com/publicationviews/publications/2011/08/horizontal_mergersinthechinacontextth.html

CFTC and SEC Joint Roundtable on Extraterritorial Scope of Swaps Regulation

On 1 August 2011, the CFTC and the SEC jointly held a public roundtable discussion on international issues related to swaps regulations under the Dodd-Frank Act. The roundtable consisted of three sessions on the following topics: (1) cross-border transactions; (2) global entities; and (3) market infrastructure. Each session was moderated by CFTC and/or SEC staff and the participants included market participants representing dealer firms, investors, public interest groups, clearinghouses and derivatives exchanges.

This briefing summarises some key discussion points and issues.

http://www.cliffordchance.com/publicationviews/publications/2011/08/cftc_and_sec_jointroundtableonextraterritoria.html

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