

International Regulatory Update

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SHORT SELLING UPDATE

CONSOB updates FAQs on restrictive measures on net short positions and reporting requirements

The Commissione Nazionale per le Società e la Borsa (CONSOB) has published an updated version of its frequently asked questions on CONSOB resolution No. 17902 on restrictive measures on net short positions, as extended by resolution No. 17951. In addition, CONSOB has updated its FAQs on the reporting obligations introduced by CONSOB resolution No. 17862.

Amongst other things, the FAQs provide for additional requirements in order to benefit from the market maker/liquidity provider exemption, in the context of regulated markets and multilateral trading facilities.

[Updated FAQs on resolution No. 17902 – 30 September 2011 \(Italian\)](#)

[Updated FAQs on resolution No. 17902 – 30 September 2011 \(English\)](#)

[Updated FAQs on resolution No. 17862 – 30 September 2011 \(Italian\)](#)

[Updated FAQs on resolution No. 17862 – 30 September 2011 \(English\)](#)

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OTHER NEWS

OTC derivatives and market infrastructures: ECOFIN Council reaches agreement on proposed regulation

The ECOFIN Council has published a [press release](#) setting out the [main results](#) of its meeting on 4 October 2011.

Amongst other things, the Council set out its position with a view to negotiations with the European Parliament on the proposed regulation on OTC derivatives and market infrastructures. According to the ECOFIN Council, the [Presidency compromise proposal dated 23 September 2011](#) allows room for further technical work, in the context of trialogue negotiations with the Parliament, on how to negotiate and bring into force arrangements with third countries.

European Parliament study on cumulative impact of regulatory initiatives on European banking sector published

The European Parliament has published a [study](#) which assesses the cumulative impact of various current regulatory initiatives on the European banking sector. In particular, the initiatives considered include the revision of the Capital Requirements Directive (CRD 4), regulating OTC derivatives, short selling and credit default swaps, regulating credit rating agencies, the reform of deposit guarantee schemes and investor compensation schemes, the MiFID review, financial transaction taxes and other bank levies, additional capital requirements for systemically important financial institutions, and bank restructuring and resolution procedures.

The report notes that, while the direct impact on the real economy through a change in credit supply by banks is expected to be small, it is difficult to judge the overall indirect influence of the measures on increasing stability. To this end, the report proposes the following six stability objectives and assesses the expected impact of the measures on each: (1) the reduction of procyclicality; (2) the reduction of misguided incentives; (3) the creation of a level playing field; (4) the internalisation of social costs; (5) increasing transparency; and (6) increasing consumer/investor confidence.

OTC derivatives and market infrastructures: trade associations call for open access requirements

The Investment Management Association (IMA), the British Bankers' Association (BBA), the Association for Financial Markets in Europe (AFME), the International Swaps and Derivatives Association (ISDA), the European Fund and Asset Management Association (EFAMA), the Association of Corporate Treasurers, and the European Association of Corporate Treasurers (EACT) have published a [joint letter](#) to Michel Barnier, EU Commissioner for the Internal Market and Services, in which they express their concern that the proposed regulation on OTC derivatives and market infrastructures does not take account of the likely concentration of clearing provision.

The letter warns that choice and efficiency in clearing services in the EU may diminish dramatically if the trend towards concentration in the provision of clearing and trading services continues, and if this remains unchecked by regulation that ensures access to such infrastructures by other infrastructures. Specifically, the trade associations believe that the proposed regulation on OTC derivatives and market infrastructures contains insufficient safeguards in this respect, and that such safeguards as exist are not applied across all financial instruments but only to a limited set of OTC derivatives.

The letter urges the EU Commission to introduce explicit and detailed open access requirements – governing clearing of all financial instruments – in the regulation on OTC derivatives and market infrastructures now and in MiFID in due course. The letter emphasises that such open access requirements should ensure that a clearing house must accept instruments for clearing regardless of the venue on which they are traded, and that a venue must provide data feeds and other assistance to any clearing house that wants to clear the instrument in question.

FSB consults on common data template for global systemically important banks and approves policy measures

The Financial Stability Board (FSB) has published a [consultation paper](#) seeking views on a set of options and proposals to introduce a new common data template for global systemically important banks. In particular, the paper focuses on improving the data on financial linkages between major banks and on their exposures and funding dependencies. The proposals are designed to meet recommendations 8 and 9 of the IMF/FSB report on the financial crisis and information gaps, which was endorsed by the G20 in November 2009.

Comments are due by 8 November 2011. The FSB intends to draw on the feedback received to refine its cost-benefit analysis and to narrow down the current range of options in order to develop a final data template.

In addition, a few days prior to the launch of the consultation, the FSB held a meeting to discuss financial regulatory reforms ahead of the G20 summit in November 2011. Amongst other things, the FSB reviewed and approved a package of policy measures to be submitted to the G20 to address the 'too big to fail' problems posed by systemically important financial institutions. The policy package will include:

- a new international standard for the features all national resolution regimes should have to enable failing financial institutions to be resolved safely and without exposing the taxpayer to the risk of loss;
- a requirement that individual globally systemically important financial institutions have recovery and resolution plans, informed by resolvability assessments, and that home and host authorities develop institution-specific cooperation agreements and cross-border crisis management groups;
- additional loss absorbency requirements for those banks determined to be globally systemically important financial institutions, based on the methodology developed by the Basel Committee on Banking Supervision for assessing the global systemic importance of banks;
- measures to enhance the intensity and effectiveness of supervision, in particular of systemically important financial institutions – recommendations will include improved data systems for risk management at globally systemically important financial institutions and assessments of the adequacy of supervisory resources; and
- the enhancement of international standards for the robustness of core financial market infrastructures.

[Press release](#)

FSA issues finalised guidance on mortgage forbearance and impairment provisions

The FSA has published finalised [guidance](#) which sets out the FSA's findings during a prudential review of firms' mortgage forbearance and impairment provisions processes, and sets out actions the FSA wants firms to take. The review considers forbearance processes wherever they arise in the firm, whether in customer services, operations, debt management, credit risk or finance functions. It includes consideration of internal reporting of forbearance activities, impairments and provisions to management committees and boards, and external disclosures of credit risk exposure and impairment provisions.

The guidance provided in the document covers the following: (1) the provision of forbearance support for customers undergoing financial stress; (2) the recognition of impairment within the book through management committees and Board reporting; and (3) the disclosure of impairment and its recognition through loss provisions in external reporting.

FSA consults on financial resources requirements for recognised bodies

The FSA has published a [consultation paper \(CP11/19\)](#) setting out proposed changes to the guidance it provides in relation to the financial resources it considers investment exchanges and clearing houses should hold to mitigate operational and other risks.

In particular, the FSA is proposing to: (1) make it clearer what regulatory capital is for; (2) strengthen the 'standard approach' as an objective proxy for the cost of orderly closure by standardising the meaning of 'operating expenses'; (3) set the 'standard approach' as a floor to the financial resources requirement, by not allowing alternative bespoke arrangements; (4) replace existing supervisory practices in relation to the use of a 'liquidity buffer' with specific risk-based processes, designed to ensure that a recognised body is adequately protected against business losses likely to arise in stressed but plausible market conditions; and (5) introduce guidance on measuring group risk as a component of the financial resources calculation.

Comments are due by 6 January 2012.

FSA issues finalised guidance on remuneration

The FSA has published a ['Dear CEO' letter](#) containing finalised guidance in relation to the revised Remuneration Code. The Code was revised to take into account changes required by the revised Capital Requirements Directive (CRD3 – as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies) and came into force on 1 January 2011. The letter sets out the FSA's plans for monitoring implementation of the Code during the coming remuneration round.

There are two versions of the letter. The version for firms in proportionality tier 1 sets out a detailed approach to monitoring their implementation of the Code, including the need for firms to submit a Remuneration Policy Statement within a given timeframe. The version for firms in tiers 2, 3 and 4 sets out a less onerous approach.

The FSA has indicated that in the case of a small number of tier 2 firms, supervisors are likely to tailor the assessment approach more closely to the firm, taking account of its business model and risk profile.

In addition, the Annex to the letter contains guidance on:

- the definition of 'Code staff' and, in particular, how to identify staff whose remuneration falls into the 'same bracket' as senior management, control staff and risk takers and who have a material impact on the firm's risk profile;
- long-term incentive plans to provide clarity on what the FSA expects to see in a long-term incentive plan that is used to pay part of variable remuneration; and
- the structure of alternative instruments – the Code requires firms to pay part of variable remuneration in shares or equivalent instruments, and the guidance is intended to provide clarity for firms that cannot or do not wish to pay in shares on what the FSA expects to see in those alternative instruments.

[Template for self-assessment of compliance with Remuneration Code \(for firms in proportionality Tier 1\)](#)
[The Remuneration Code – Code staff list for Tier 1 firms](#)

SFC consults on proposed guidelines regarding anti-money laundering and counter-terrorist financing

The Securities and Futures Commission (SFC) has issued a [consultation paper](#) on proposed guidelines on anti-money laundering and counter-terrorist financing to replace its existing Prevention on Money Laundering and Terrorist Financing Guidance Note.

Amongst other things, the proposed guidelines are intended to provide guidance to the industry relating to the operation of the provisions of Schedule 2 of the enacted Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (AMLO), which is expected to come into effect on 1 April 2012. Schedule 2 of the AMLO aims to bring customer due diligence and record keeping requirements in line with international standards.

According to the SFC, the principal objective of the proposed guidelines is to assist licensed corporations in designing and implementing appropriate and effective policies, procedures and controls so as to comply with the requirements of the AMLO and other applicable anti-money laundering/counter-terrorist financing legislation and regulatory requirements. In addition, the guidelines include some examples of industry-specific suspicious transactions that may warrant enhanced scrutiny and reporting to the Joint Financial Intelligence Unit by licensed corporations.

Comments are due by 18 November 2011. The SFC intends to publish its consultation conclusions and a final version of the guidelines in early 2012.

Qatar Financial Centre Regulatory Authority consults on proposed Training, Competency and Miscellaneous Amendments Rules 2011

The Qatar Financial Centre (QFC) Regulatory Authority has published a [consultation paper](#) on its [proposed Training, Competency and Miscellaneous Amendment Rules 2011](#). The proposed rules are intended to supplement the current training and competency provisions applicable to approved individuals conducting certain controlled functions contained in the QFC Regulatory Authority's Individuals Rulebook (INDI).

In particular, authorised firms will be required to design, implement and maintain an appropriate and formalised training and competency programme in respect of authorised individuals. To this end, authorised firms will be required to continuously review an authorised individual's competence over a prolonged period and undertake periodic reviews of authorised individuals' training and development needs. The proposed rules also introduce self-contained and specific controlled function competency criteria which focus on three component elements: skills, knowledge and experience.

To ensure competency, the QFC Regulatory Authority is proposing to impose on authorised individuals continuous professional development requirements as well as mandatory qualification requirements.

The training and competency regime is proposed to commence on 1 January 2012 and from that date, all approvals to perform controlled functions will be subject to the full requirements of the proposed training and competency regime.

Comments are due by 6 November 2011.

RECENT CLIFFORD CHANCE BRIEFINGS

Mezzanine's Moment?

Will the current dearth of the availability of debt in the leveraged finance market eventually lead to the rebirth of mezzanine finance and, if so, on what intercreditor terms?

This briefing discusses the possible re-emergence of a market for mezzanine finance with real depth.

http://www.cliffordchance.com/publicationviews/publications/2011/10/mezzanine_s_moment.html

Registration of Charges – Change is Coming

The UK Government's efforts to modernise the system of registration for company charges continue with another round of consultation. Proposals to amend Part 25 of the Companies Act 2006 seek to clarify which charges should be registrable, and to simplify the method of filing by allowing for electronic filing of the entire charge instrument and a shorter statement of particulars. The plan is to introduce the new system in 2012. Meanwhile, in a U-turn, the Government has enacted Regulations which remove the requirement for overseas companies to register at Companies House security created by them over property situated in the UK.

This briefing discusses the proposed changes.

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

FATCA, fungibility and foresight – beware 18 March 2012

FATCA potentially imposes US withholding tax on, amongst other things, interest and principal paid by all US issuers and by non-US issuers that are 'financial institutions'. While the withholding is currently scheduled to be phased in over 2014 and 2015, FATCA contains a grandfather rule which excludes payments with respect to debt securities treated as outstanding on 18 March 2012. This may make it difficult for any issuer whose debt securities are potentially subject to FATCA withholding to tap (or re-open) after 18 March 2012 a series of debt securities issued and outstanding before this date.

This briefing highlights two situations in which notes that are covered by the grandfather rule could potentially lose their grandfathered status.

http://www.cliffordchance.com/publicationviews/publications/2011/10/fatca_fungibilityandforesight-beware1.html

Netting in Russia – FSFM publishes draft list of eligible cross-border master agreements

The Federal Service for Financial Markets (FSFM), the Russian securities market regulator, has published a draft of the regulation which sets out the list of eligible cross-border master agreements for close-out netting purposes.

This briefing discusses the draft regulation and comments on potential issues and next steps to be taken by the FSFM to make Russian close-out netting legislation operational.

http://www.cliffordchance.com/publicationviews/publications/2011/10/netting_in_russiafsfmpublishesdraftlisto.htm
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Doing business in Cape Verde

This briefing sets out a summary of certain legal aspects which should be taken into account when doing business in Cape Verde. The paper addresses: general information, financial data, the business environment, investment regulation and procedures, establishing a commercial entity, investment incentives, taxation, and investment treaties.

http://www.cliffordchance.com/publicationviews/publications/2011/10/doing_business_incapeverde.html

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