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31 October - 4 November 2011

International Regulatory Update

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ISDA sets out standard credit support annex proposal

ISDA has outlined key provisions to its standard credit support annex (SCSA) proposal, which is intended to increase efficiency and improve standardisation in the OTC derivatives markets. The SCSA proposal contains the operational mechanics of the current CSA, but amends the collateral calculation so that derivative exposures and offsetting collateral are grouped into like currencies, or 'silos'. The SCSA contemplates the sole use of cash as eligible collateral for variation margin (securities will still be permitted for independent amounts). Each currency silo is evaluated independently to generate a required movement of collateral in the relevant currency. According to ISDA, this aligns bilateral collateral structures and economics to be more consistent with the London Clearing House (LCH) and other clearing houses that adopt consistent margin approaches.

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The proposal also considers implementation issues, including the operational and technology impact of introducing the SCSA and the relationship between the new SCSA, existing CSAs and counterparty-level netting sets for termination and other purposes.

Presentation slides

Basel Committee consults on capitalisation of bank exposures to central counterparties

The Basel Committee on Banking Supervision has published a second consultation paper on the capitalisation of bank exposures to central counterparties (CCPs). The Committee's proposals cover both capital requirements for default fund exposures and trade-related exposures to CCPs. The Committee intends to finalise the rules around the end of 2011 and expects that they will be implemented in its member jurisdictions by January 2013.

Comments are due by 25 November 2011.

FSB publishes recommendations to strengthen oversight and regulation of shadow banking

The Financial Stability Board (FSB) has published a report setting out its recommendations on strengthening the oversight and regulation of shadow banking, as requested at the November 2010 G20 Summit. The report covers proposed approaches for monitoring the shadow banking system and proposed regulatory measures to address concerns related to the shadow banking system. It includes recommendations, informed by a monitoring exercise during summer 2011 to review recent trends and developments in the global shadow banking system, as well as a regulatory mapping exercise to take stock of existing national and international initiatives.

The FSB has also launched five work streams to assess the case for further regulatory action.

Wolfsberg Group issues guidance on prepaid and stored value cards

The Wolfsberg Group has published its latest guidance on prepaid and stored value cards, which considers the money laundering risks and mitigants of physical prepaid and stored value card issuing and merchant acquiring activities, and supplements the Wolfsberg Group guidance on credit/charge card issuing and merchant acquiring activities of 2009.

UK opts out of proposed European Account Preservation Order

The UK government has decided not to opt in to the European Commission's proposal for a regulation creating a European Account Preservation Order, which was published on 25 July 2011. The announcement follows the Ministry of Justice's August 2011 consultation paper (CP14/11) which sought views on how the UK should approach the proposal and whether it would be in the national interest for the UK to opt in to the proposed regulation.

The government has noted that there was widespread concern about the lack of adequate safeguards for defendants. Issues highlighted included that the threshold for obtaining an order is too low, that there is no requirement for the claimant to provide any security to compensate a defendant for losses suffered from the wrongful grant of an order, and that there should be more discretion for courts when deciding whether to issue an order or the amount for which it should be granted. Fears were also expressed about the possible dangers posed to companies which are in the process of restructuring or rescue where the freezing of a bank account could undermine the rescue and make insolvency more likely. Finally, concerns were raised about the burdens the proposal is likely to place on both the government and banks, in particular through the provisions of access to information on bank accounts.

Although the government has decided that the UK should not opt in to the proposal now, it intends to participate in the negotiations in the hope that sufficient changes will be made to enable a post-adoption opt in.

Written Ministerial Statement

FSA issues policy statement on strengthening capital standards

The FSA has published a policy statement (PS11/12) reporting on the main issues arising from its May 2011 consultation paper (CP11/09) on strengthening capital standards, which set out updated proposals for implementing changes to the Capital Requirements Directive (CRD3 – as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies).

PS11/12 also sets out the FSA's final rules in this area. In particular, it covers: (1) strengthening capital requirements in the trading book; (2) higher capital requirements for re-securitisations; and (3) other CRD changes – Pillar 3, prudent valuation and technical amendments.

The rules and guidance included in PS11/12 will come into force on 31 December 2011, and the changes to firms' reporting will take effect for reporting periods ending on or after that date.

Sharman Panel recommends improvements to reporting of going concern and liquidity risks

The Financial Reporting Council (FRC) has published the preliminary report and recommendations of the Sharman Panel of Inquiry. The inquiry, which is being led by Lord Sharman of Redlynch, was launched in March 2011 to identify lessons for companies and auditors addressing going concern and liquidity risks.

Amongst other things, the Panel of Inquiry is recommending that the FRC should establish protocols with the Department for Business, Innovation and Skills (BIS) and other regulatory authorities that will enable it to take a more systematic approach to learning lessons relevant to the scope of its functions when significant companies fail, through assessing the underlying circumstances.

The Panel also recommends that the FRC should harmonise and clarify the common purpose of the going concern assessment and disclosure process in the accounting standards and the UK Corporate Governance Code. It also indicates the FRC should require the going concern assessment process to focus on solvency risks as well as liquidity risks, whatever the business, including identifying risks to the entity's business model or capital adequacy that could threaten its survival, over a period that has regard to the likely evolution of those risks given the current position in the economic cycle and the dynamics of its own business cycles, and that it should also include stress tests of liquidity and solvency.

In addition, the report suggests that the FRC move away from a model where the company only highlights going concern risks when there are significant doubts about the entity's survival, to one which integrates the directors' going concern reporting with the directors' discussion of strategy and principal risks, and move away from the three category model for auditor reporting on going concern to an explicit statement in the auditor's report that the auditor is satisfied that, having considered the assessment process, they have nothing to add to the disclosures made by the directors about the robustness of the process and its outcome.

Comments on the Panel of Inquiry's recommendations are due by 31 December 2011 and the Panel intends to issue a final version in February 2012.

FSA consults on proposed guidance on retail product development

The FSA has published the findings of its review of firms' structured product design processes, along with proposed new guidance on retail product development. Between November 2010 and May 2011, the FSA assessed seven major providers of structured products and found that while there had been some improvements, weaknesses remain in the way firms are designing and approving structured products.

The FSA has published proposed guidance which sets out that firms should: (1) identify the target audience and then design products that meet that audience's needs; (2) stress-test new products to ensure they are capable of delivering fair outcomes for the target audience; (3) ensure a robust product approval process for new products; and (4) monitor the progress of a product throughout its life cycle.

Comments are due by 11 January 2012.

FSA and OFT consult on draft guidance on payment protection products

The FSA and the Office of Fair Trading (OFT) have launched a joint consultation on proposed guidance to firms in relation to payment protection products. In particular, the guidance identifies the following four areas of concern for providers to consider: (1) firms not properly identifying the target market for the protection product; (2) the protection not reflecting the needs of the intended consumers; (3) the benefit of a successful claim not matching the needs of the claimant; and (4) product features or pricing structures creating barriers to comparing products, exiting a policy or switching cover.

The guidance also sets out how the OFT considers the Consumer Credit Act applies to payment protection products such as debt freeze or debt waivers linked to a regulated credit agreement, and what firms can do to ensure compliance with the Act. Finally, the guidance provides examples of business practices in relation to payment protection products which the OFT is likely to regard as unfair or improper (whether unlawful or not) and may cast doubt on fitness to hold a consumer credit licence.

Comments are due by 13 January 2012

Remuneration Code: FSA consults on proposed change to guidance on proportionality

The FSA has published for consultation an updated version of its 'General guidance on proportionality: The Remuneration Code (SYSC 19a) & Pillar 3 disclosures on remuneration (BIPRU 11)'. The FSA has concluded that banks and building societies with capital resources between GBP 50m and GBP 100m present a sufficiently low remuneration risk as to warrant tier 3 treatment, and is therefore proposing a change to the boundary between tiers 2 and 3 for banks and building societies. The proposed guidance recommends that this boundary is raised from GBP

50mn capital resources to GBP 100mn for banks and building societies, aligning it with the corresponding boundary for BIPRU 730K firms (that is a full scope BIPRU investment firm).

Comments are due by 28 November 2011.

Spanish order on transparency and protection of users of banking services published

Order EHA/2899/2011, dated 28 October, on transparency and the protection of users of banking services, has been published in the Official Journal. The Order is intended to ensure an adequate level of protection for the clients of credit institutions, by implementing measures to ensure transparency in the provision of financial banking services. The Order applies to banking services provided in Spain to clients (natural persons) of Spanish credit institutions or of branches of foreign credit institutions. It does not apply to investment, pension schemes, and private insurance and reinsurance services.

Amongst other things, the Order is intended to: (1) concentrate in a single text the basic transparency regulations, to facilitate clarity and access; (2) update provisions concerning the protection of clients of banking services, in order to improve the transparency obligations and the conduct to be followed by credit institutions; and (3) introduce corresponding obligations so that the Spanish financial sector, in the interests of clients and of market stability, improves its standards on lending (e.g. through new mechanisms to evaluate the client's solvency).

The Order and most of its content will enter into force on 29 April 2011, with limited exceptions.

HKEx publishes consultation conclusions on review of corporate governance code and associated listing rules

The Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEx), has published the consultation conclusions relating to its December 2010 consultation paper on the review of the corporate governance code and associated listing rules. The consultation conclusions provide a summary of the amendments to the code of corporate governance and listing rules with their respective implementation dates.

Most of the listing rules amendments will be effective on 1 January 2012. In its first interim/half year or annual report covering a period after 1 April 2012, an issuer must state, in that report, whether it has, for that period, complied with the code provisions in the revised code as well as those of the former code. Issuers may also adopt the revised code at an earlier date than 1 April 2012.

Amendments to the Main Board Rules
Amendments to the GEM Listing Rules
FAQs
Letter to issuers

ASIC consults on term deposits relief

The Australian Securities and Investments Commission (ASIC) has published a consultation paper (CP 169) on proposals for relief to enable authorised deposit-taking institutions (ADIs) to issue term deposits of up to two years that can only be broken on 31 days' notice, while being subject to the same regulatory requirements as 'basic deposit products' in the Corporations Act 2001.

CP 169 follows the launch of the Australian Prudential Regulation Authority's (APRA's) consultation on the implementation of Basel III in Australia in September 2011. According to ASIC, term deposits for up to two years issued by authorised deposit-taking institutions (ADIs) that are only breakable on 31 days' notice would achieve recognition of the 31-day term under the Basel III liquidity standards.

Comments are due by 23 December 2011

SEC adopts rule on confidential private fund risk reporting

The SEC has adopted a new rule requiring registered investment advisers with at least USD 150 million in private fund assets under management (covered advisers) to periodically file new Form PF. The SEC believes that information reported on Form PF will help the Financial Stability Oversight Council monitor risks to the financial system.

The rule divides covered advisers into two categories – 'large private fund advisers' and smaller private fund advisers. More stringent reporting requirements apply to large private fund advisers than to smaller private fund advisers. For example, many large private fund advisers must file Form PF on a quarterly rather than yearly basis and provide more information on Form PF than smaller private fund advisers.

Compliance with the new Form PF filing requirements will involve a two stage phase-in. The SEC has indicated that most private fund advisers must begin filing Form PF following their first fiscal year or fiscal quarter, as applicable, on or

after 15 December 2012. Covered advisers with USD 5 billion or more in private fund assets must begin filing Form PF following their first fiscal year or fiscal quarter, as applicable, on or after 15 June 2012.

The SEC is expected to publish the text of the new rule and an accompanying press release shortly.

RECENT CLIFFORD CHANCE BRIEFINGS

European Regulatory Reform Progress Report

The EU agenda for regulatory reform in the financial sector continues to take shape. The EU has played a leading role in the development of the G20's action plan to respond to the financial crisis and many of the actions being taken aim to implement the G20 plan. However, not all initiatives are crisis driven. A number of reviews of existing EU legislation were already scheduled to take place and the European Commission continues to develop proposals to further integrate the Single Market. Since we published the June 2011 edition of this Progress Report, a number of significant initiatives have evolved.

This November 2011 edition of the Progress Report outlines the progress on this regulatory reform agenda, indicating the current status, next main steps and estimated implementation date for each measure. In addition, the report highlights significant new developments and outlines the major legislative proposals scheduled to be issued this year and next.

http://www.cliffordchance.com/publicationviews/publications/2011/11/european_regulatoryreformprogressreport-.html

The New French regime on repurchase of debt securities

France has enacted new set of rules to facilitate the possibility for a French issuer to repurchase debt securities (including short term instruments). A new French law allows a French issuer to repurchase debt securities without being obliged to cancel them and the French securities regulator (Autorité des marchés financiers) has amended its general regulation to allow an issuer to repurchase or to make tender offers on its bonds by instituting simplified procedures.

This briefing provides an overview of these two amendments and describes the new regime applicable to the repurchase of debt securities.

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

SFC consultation paper on proposed anti-money laundering and counter-terrorist financing guidelines

On 1 April 2012, the new Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (AMLO) will come into effect, which introduces a new legislative framework on the obligations of financial institutions to take appropriate measures to combat money laundering and terrorist financing activities. The AMLO will be supplemented by guidelines issued by the four relevant regulatory authorities, namely the Securities and Futures Commission (SFC), the Hong Kong Monetary Authority (HKMA), the Insurance Authority and the Customs and Excise Department. The AMLO intends to address the perceived deficiencies in Hong Kong's anti-money laundering regime and to align Hong Kong's customer due diligence and record-keeping requirements with international standards, namely those of the Financial Action Task Force (FATF).

This briefing provides an overview of the SFC's anti-money laundering and counter-terrorist financing guidelines.

Please contact Mhairi Appleton at mhairi.appleton@cliffordchance.com for a copy of this briefing.

Further Consultation on the Securities and Futures (Short Position Reporting) Rules ends on 4 November

On 18 October 2011, the Securities and Futures Commission (SFC) published its consultation conclusions and further consultation on the Securities and Futures (Short Position Reporting) Rules. This followed earlier consultation and conclusion papers published in May 2011, March 2010 and July 2009. The SFC is seeking further comments to the proposed Securities and Futures (Short Position Reporting) Rules by 4 November 2011. The SFC intends to move quickly to implementing the short position reporting regime and plans to publish conclusions to its further consultation as soon as possible. The rules will be tabled for negative vetting by the Legislative Council upon publication of the consultation conclusions. Subject to the legislative process, the SFC targets to implement the short position reporting requirement by the end of Q1 2012.

This briefing discusses the SFC's consultation conclusions and further consultation.

Please contact Mhairi Appleton at mhairi.appleton@cliffordchance.com for a copy of this briefing.