

International Regulatory Update

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Trade associations raise concerns about workload confronting ESAs

The Association for Financial Markets in Europe (AFME), the Alternative Investment Management Association (AIMA), the European Association of CCP Clearing Houses (EACH), the European Banking Federation (EBF), the Futures and Options Association (FOA), the International Capital Market Association (ICMA) and the International Swaps and Derivatives Association (ISDA) have published a [joint letter](#) to Michel Barnier, EU Commissioner for the Internal Market and Services, Sharon Bowles, Chairman of the EU Parliament's Economic and Monetary Affairs Committee (ECON), and Bjarne Corydon, the Danish Minister of Finance.

The trade associations raise concerns at the cumulative workload confronting the European Supervisory Authorities (ESAs) in the context of the technical and implementing measures to be prepared by them as part of the EU financial regulatory reform agenda. To address this concern, the associations recommend that timelines for level 2 implementation, as set out in level 1, should not be defined in absolute date-specific terms, but by specifying a period for ESA drafting, starting from the date when the level 1 measure is adopted or enters into force. The letter argues that the ESAs should be given a period of no less than 12 months post-adoption or entry into force to draft standards.

Furthermore, to the extent that it may be considered impracticable for the ESAs to complete all of the envisaged mandates to a high quality within a particular timeframe (given available resources), the associations suggest that a principle of prioritisation be incorporated in the level 1 mandates. The letter adds that, if all tasks cannot be achieved over a specific period, a phased approach should be taken, and that ideally the legislators should consider conferring powers on the European Commission to extend the implementation deadlines in justified instances.

Corporate restructuring: European Commission launches consultation

The European Commission has published a [Green Paper](#) to identify successful practices and policies in the field of restructuring and adapting to change. The results will feed into the Commission's upcoming employment package and the Commission hopes that they will improve further cooperation between workers and employers' representatives, government, local and regional authorities and the EU institutions. The consultation is also intended

to identify specific restructuring measures that could help deal with employment and social challenges, and help European companies improve competitiveness.

Comments are due by 30 March 2012.

IOSCO publishes principles on suspension of CIS redemptions

IOSCO has published a [report](#) setting out principles which are intended to provide a standard against which both regulators and the industry can assess the quality of regulation and industry practices concerning suspensions of redemptions for open-ended collective investment schemes (CIS).

The principles generally cover all types of open-ended CIS which offer a continuous redemption right, and apply irrespective of whether they are offered to institutional or retail investors. They are addressed to those entities responsible for the overall operation of the CIS and, in particular, its compliance with the legal/regulatory framework in the respective jurisdiction. IOSCO has emphasised that the delegation of activities may not be used to circumvent the principles, and that there should be compliance with the principles whether activities are performed directly or through a third party.

Amongst other things, the principles cover the management of liquidity risk, ex-ante disclosure to investors, criteria/reasons for the suspension, and the decision to suspend.

IOSCO and CPSS publish final report on requirements for OTC derivatives data reporting and aggregation

IOSCO and the Committee on Payment and Settlement Systems (CPSS) have published their [final report](#) on the OTC derivatives data that should be collected, stored and disseminated by trade repositories. The report addresses Recommendation 19 in the Financial Stability Board's October 2010 report on implementing OTC derivatives market reforms, which called on the CPSS and IOSCO to consult with the authorities and the OTC Derivatives Regulators Forum in developing minimum data reporting requirements and standardised formats, and the methodology and mechanism for data aggregation on a global basis. The requirements and data formats set out in the report apply to both market participants reporting to trade repositories and to trade repositories reporting to the public and to regulators.

Client Assets Sourcebook: FSA issues policy statement on custody liens

The FSA has published a [policy statement \(PS12/02\)](#) which reports on the main issues in relation to custody liens arising from its July 2011 [consultation paper \(CP11/15\)](#) on proposals to amend the Client Assets Sourcebook (CASS). PS12/02 also sets out the FSA's final rules on liens in custody agreements. In particular, PS12/02 addresses the taking of certain liens or rights over omnibus clients accounts, and liens or rights over assets held in overseas jurisdictions.

The FSA has indicated that firms must ensure that any custody agreement they enter into on or after 1 April 2012 complies with the new rules and that any custody agreement entered into before 1 April 2012 complies with these rules as soon as possible, but no later than 30 September 2012. PS12/02 notes that the FSA has not taken a position either for or against the use of omnibus accounts at present, but that it may in future investigate their use in line with developments in European legislation.

Bank of England responds to Treasury Committee and Joint Committee on Draft Financial Services Bill recommendations on accountability

The Court of the Bank of England has published its [response](#) to recommendations made by the Treasury Committee and the Joint Committee on the Draft Financial Services Bill on the accountability of the Bank of England. Amongst other things, the response notes that the new responsibilities for the Bank of England in the area of financial stability will need to be accompanied by new accountability mechanisms, and that at the centre of these should be direct accountability to Parliament through the Treasury Committee.

The Bank of England further proposes that this be supplemented by establishing an Oversight Committee, with direct access to the policymaking processes and papers in the Bank, and formed of non-executive directors. The role of this Committee would be to assess whether the processes employed in making financial stability policy decisions have considered a full range of options and have taken reasonable account of the relevant information, analysis (including of the lessons from the past), differing views amongst policymakers, and challenges from outside the Bank. The Oversight Committee would also commission reviews from experts outside the Bank of the performance of the Bank's financial stability policymakers. These reviews would recommend lessons for them, and the

Oversight Committee would also assess the Bank's response to these recommendations.

The Bank's response also addresses its financial stability role, noting that, although this gives the Bank operational responsibility for managing a financial crisis, all decisions in a crisis involving public funds, regardless of the amount, are for the Chancellor. The Bank, therefore, emphasises that the forthcoming crisis management memorandum of understanding between the Bank and the Treasury should establish a clear framework for co-ordination, and also establish a power for the Chancellor, when public funds are at risk and there is a serious threat to financial stability, to direct the use of the Bank's tools of crisis management. Finally, the Bank supports the Treasury Committee's recommendation that future Governors of the Bank should be appointed for a single eight-year term.

[Treasury Committee report \(8 November 2011\)](#)
[Joint Committee on the draft Financial Services Bill report \(19 December 2011\)](#)

FSA issues policy statement on auctioning of greenhouse gas emission allowances

The FSA has published [policy statement \(PS12/01\)](#) which reports on the main issues arising from its July 2011 [consultation paper \(CP11/14\)](#) on proposed amendments to its Recognised Investment Exchanges and Recognised Clearing Houses sourcebook (REC) and the Fees Manual (FEES).

The amendments are intended to complement the Treasury's implementation of a new regulatory regime applicable to platforms that will conduct auctions in emission allowances. The new regime is being put in place ahead of the start of EU procurement processes to select both a common EU auction platform and one or more national auction platforms. The Handbook amendments originate from the introduction of the EU carbon emission allowance auctioning regime that is being implemented under the Commission Auction Regulation (1031/2010). PS12/01 also sets out the FSA's final rules in this area, which came into effect on 22 December 2011. The FSA intends to hold a further consultation – on bidding on an auction platform – in spring 2012.

Treasury Committee reports on Financial Conduct Authority's accountability

The Treasury Committee has published a [report](#) on the accountability of the new Financial Conduct Authority (FCA). The government has proposed that, by the end of 2012, the

FCA will take over responsibility for conduct of business regulation from the FSA.

The report describes how the FCA fits into the proposed regulatory structure and also considers the objectives of the FCA. It reviews the proposed lines of accountability for the FCA and makes recommendations on how these might be improved. It outlines the FCA's place in the wider regulatory architecture before considering and making recommendations on the practicalities of the FCA, including its approach to supervision, staffing and coordination with industry. The report also considers the proposed new powers of the FCA, including early warning notices and product intervention, and discusses the possible pre-approval of some financial products.

[Additional written evidence](#)

FSA issues finalised guidance on using switching terms in mortgage contracts

The FSA has published finalised [guidance](#) on using switching terms in mortgage contracts under the Unfair Terms in Consumer Contracts Regulations 1999. The FSA has been considering terms in interest-only mortgage contracts that allow firms to switch consumers from an interest-only mortgage to a repayment mortgage. The guidance statement sets out why the FSA believes some switching terms in standard consumer contracts may pose a risk of being considered unfair, or of not being expressed in plain and intelligible language, under the Unfair Terms in Consumer Contracts Regulations 1999.

AMF issues recommendation on financial information

The Autorité des marchés financiers (AMF) has published its [recommendation n°2011-18](#) regarding certain items of financial information to be considered in particular in the context of the publication of results to the financial markets. The recommendation supplements the AMF's recommendation n° 2011-16 on financial statements for 2011, as well as that published on 29 October 2009 on risk factors.

The AMF reminds issuers that some items of detailed information which are usually considered to be non-sensitive may, in the current context, where the situation may differ substantially between one geographical zone and another (or one sector and another), become significant. As such, the AMF believes that these items require simultaneous notification to the whole market. The AMF therefore recommends that issuers adjust their financial information accordingly and provide more detailed

information, especially when presenting results and publishing annual reports and registration documents.

The recommendation deals with two items of information more specifically: (1) information on sensitive geographical zones and operational sub-sectors when communicating results to the market; and (2) the presentation of specific risk factors in registration documents.

The recommendation is currently only available in French.

[Press release](#)

Swiss Federal Council consults on amendments to Anti-Money Laundering Act

The Federal Council has [launched](#) a consultation on a revision of the Anti-Money Laundering Act. Under the proposed revision, the Money Laundering Reporting Office (MLRO) would obtain the right to exchange financial information with foreign equivalents. At present, the MLRO has no right to provide financial information to foreign authorities and, given the lack of reciprocity, does not receive such information either. According to the Federal Council, the proposed revision would improve the fight against money laundering and terrorist financing and strengthen the integrity of the Swiss financial market. The proposal would also be in line with the recommendations of the Financial Action Task Force (FATF) that all financial intelligence units must be able to exchange all available information without restrictions by national secrecy laws.

Comments are due by 20 April 2012.

FINMA consults on Banking Insolvency Ordinance

The Financial Market Supervisory Authority (FINMA) has [launched](#) a consultation on the revision of the Banking Insolvency Ordinance. The new Ordinance would specify the detailed regulation of restructuring proceedings and the restructuring plan for banks.

Amongst other things, the proposed revision of the Ordinance includes: (1) provisions for FINMA to ensure that, in an insolvency case, individual essential banking services are transferred to other legal entities to protect the financial system and the economy; (2) provisions for FINMA to trigger debt-to-equity swaps and statutory bail-ins in order to generate the capital required for restructuring; and (3) provisions for FINMA to temporarily suspend existing contractual termination rights of the bank's counterparties in certain cases.

According to FINMA, the draft version of the Ordinance complies to a large extent with the recommendations of the Financial Stability Board (FSB).

Comments are due by 2 March 2012.

HKMA announces adjustments to renminbi risk management limit and net open position

The Hong Kong Monetary Authority (HKMA) has issued a [circular](#) to authorised institutions to introduce adjustments to the renminbi (RMB) risk management limit and net open position. In view of the development of RMB sovereign bonds issued in Hong Kong by Mainland China's Ministry of Finance and the market liquidity of RMB bonds traded in the Mainland China interbank bond market, the HKMA has decided to allow the holdings of these investments to be included in the calculation of the RMB risk management limit. In addition, the RMB net open position limit has been adjusted to 20% from 10%.

For the purpose of prudential supervision, the HKMA has requested participating authorised institutions to report supplementary information in relation to their RMB risk management limits to the HKMA starting from the position of January 2012, in addition to their regular return reporting on RMB activities. In addition, the HKMA has reminded all authorised institutions to continue to adopt prudent measures in managing their foreign exchange and liquidity risk when engaging in RMB activities.

The HKMA is also reviewing the feasibility of expanding the scope for inclusion of RMB assets in the calculation of the prescribed liquidity ratios having regard to the development of the offshore RMB market in Hong Kong. Once the review is completed and adjustments are considered appropriate, the HKMA will issue a separate circular to advise authorised institutions of the outcome.

RBI issues detailed guidelines for QFI investments in Indian companies and single-brand retail trading

The Reserve Bank of India (RBI) has issued detailed [guidelines](#) on qualified foreign investors' (QFIs') investments in Indian companies. Amongst other things, the framework covers a new scheme allowing QFIs to purchase equity shares of Indian companies on a repatriation basis and the revised scheme for investment by QFIs in rupee denominated units of domestic mutual funds.

In addition, the RBI has issued directions permitting foreign direct investments up to 100% in single brand product trading under the government route, subject to specified terms and conditions.

Qualified foreign investors allowed to directly invest in Indian equity market

Following an [announcement](#) made on 1 January 2012 by the Indian government allowing qualified foreign investors (QFIs) to directly invest in Indian equity markets, the Securities and Exchange Board of India (SEBI) has issued a [circular](#) to registered intermediaries, recognised stock exchanges, and depositories setting out the detailed guidelines and procedures for QFIs to directly invest in equity shares in India. The circular states that QFIs who meet the prescribed know your customer (KYC) requirements may invest in equity shares listed on the recognised stock exchanges and in equity shares offered to the public in India, subject to the condition that such equity shares must be held in a dematerialised account opened with a SEBI registered qualified depository participant.

MAS introduces new regulatory framework for credit rating agencies

The Monetary Authority of Singapore (MAS) has introduced a new regulatory framework for credit rating agencies (CRAs) with effect from 17 January 2012. Under the new CRA regulatory framework, the provision of credit rating services will be regulated under the Securities and Futures Act.

CRAs will consequently have to be licensed under the Capital Markets Services licensing regime under the Act and be subject to licensing obligations. CRAs will be required to comply with existing regulations, guidelines and notices under the Securities and Futures Act that apply to all Capital Markets Services licensees. In addition, CRAs will also have to comply with a new Code of Conduct for CRAs that the MAS will introduce in conjunction with the establishment of a regulatory regime for CRAs. The MAS will also require Capital Markets Services licensees providing credit rating services to appoint and register under the Representative Notification Framework any individual who acts as their representative in providing credit rating services.

The MAS has given existing CRAs a transition period of 6 months to apply for the required licence under the new framework.

[Consultation paper responses](#)
[Link to CRA Code, regulations, guidelines and FAQs](#)

FDIC issues notice of proposed rulemaking on stress tests for certain FDIC insured banks

The FDIC has approved a [notice of proposed rulemaking](#) that would require certain large insured depository institutions to conduct annual capital adequacy stress tests. The proposal, which is intended to implement section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, would apply to FDIC-insured state non-member banks and FDIC-insured state-chartered savings associations with total consolidated assets of more than USD 10 billion. Since 30 September 2011, the FDIC has regulated 23 state non-member banks with total assets of more than USD 10 billion.

The term 'stress test' is defined in the notice of proposed rulemaking as a process to assess the potential impact of economic and financial conditions on the consolidated earnings, losses and capital of the bank over a set planning horizon, taking into account the current condition of the bank and its risks, exposures, strategies, and activities. The notice of proposed rulemaking also describes the content of the reports institutions are required to publish, and the timeline for conducting the stress tests and producing the required reports.

FDIC approves final rule on resolution plans

The FDIC has approved a [final rule](#) which will require insured depository institutions with USD 50 billion or more in total assets to submit to the FDIC periodic contingency plans for resolution in the event of the institution's failure. The FDIC believes that these resolution plans will inform its ability, as receiver, to resolve the institution in a manner that ensures that depositors receive access to their insured deposits within one business day of the institution's failure (two business days if the failure occurs on a day other than a Friday), maximizes the net-present-value return from the sale or disposition of its assets, and minimizes the amount of any loss to be realized by the institution's creditors. The plans will supplement the FDIC's own resolution planning work with information that would help facilitate an orderly resolution in the event of failure.

The final rule is intended to enable the FDIC to perform its resolution functions more efficiently by requiring the largest insured depository institutions to engage in extensive planning that will, in cooperation with the FDIC, enhance the FDIC's ability to reduce losses to the Deposit Insurance Fund and resolve the institutions in a manner that limits any disruption from their insolvency.

SEC staff issues guidance on European sovereign debt exposures

The SEC has published a [staff guidance](#) note from its Division of Corporation Finance expressing concerns about the risks to financial institutions from direct and indirect exposures to European holdings. The guidance note states that disclosure about the nature and extent of these exposures has been inconsistent in both substance and presentation, and that, as a result, disclosure concerning exposure to European sovereign debt has not been transparent and easily comparable for investors. The SEC staff has determined that investors would benefit from additional guidance to assist registrants in their assessment of what information about exposures to European countries they should consider disclosing and how they should disclose this information with the goal of greater clarity and comparability.

The SEC has indicated that, in determining which countries are covered by the disclosures called for in the guidance note, registrants should focus on those countries experiencing significant economic, fiscal and/or political strains such that the likelihood of default would be higher than would be anticipated when such factors do not exist, and to disclose the basis used for identifying the countries included in this disclosure.

RECENT CLIFFORD CHANCE BRIEFINGS

Update on Test Achats

The European Commission, following consultation with the insurance industry during 2011, has published guidelines to facilitate compliance with the Test Achats ruling at a national level. Insurers can now review their contract design and pricing against more substantive requirements, but some grey areas remain.

This briefing provides an overview of the Commission's guidelines.

http://www.cliffordchance.com/publicationviews/publications/2012/01/update_on_test_achats.html

Filling 'hollow tranches' – an alternative to the 'amend and extend'?

In recent years, many companies have chosen to take the 'amend and extend' approach to deal with looming maturities whereby, rather than seeking to execute a refinancing, they ask lenders to agree to extend the maturities and the availability of existing facilities in

exchange for paying a waiver fee and/or agreeing a pricing increase and, in some cases, revisiting documentary terms.

This briefing discusses an alternative approach for leveraged borrowers to deal with looming maturities under their existing facilities agreements without requiring all lenders to agree to an extension or a complete refinancing.

http://www.cliffordchance.com/publicationviews/publications/2012/01/filling_hollow_tranchesanalternativetoth.html

Restructuring – what’s next?

During 2011, the restructuring boom of the recent past gave way to a period of relative calm, but the early indications are that restructuring will dominate 2012 and the question of how to refinance debt from the last decade remains unanswered. Journalist Brian Thompson listened to Clifford Chance partners reflect on recent developments and look ahead to the next wave of work-outs.

http://www.cliffordchance.com/publicationviews/publications/2012/01/restructuring_whatsnext.html

Antitrust Review for November – December 2011

The November – December 2011 issue of Antitrust Review contains commentary on the main developments in national and international antitrust law and policy.

http://www.cliffordchance.com/publicationviews/publications/2012/01/antitrust_reviewnovember-december2011.html

Shareholders carry financial risk for bribery in companies in which they invest

The UK Serious Fraud Office (SFO) has, for the first time, obtained a civil recovery order against a shareholder of a company involved in historic bribery. The order, made under Part V of the Proceeds of Crime Act 2002, which enables the SFO and others to trace and recover ‘property obtained through unlawful conduct’, requires the shareholder concerned to repay GBP 131,204 received by way of dividends from Mabey & Johnson Limited, which was convicted of corruption offences and breaches of sanctions in September 2009.

This briefing discusses the order.

http://www.cliffordchance.com/publicationviews/publications/2012/01/shareholders_carryfinancialriskforbribery.html

Disclosure of contracts for differences and other cash-settled equity derivatives – a final update

Effective from 1 January 2012, the notification requirement for substantial shareholdings in Dutch listed companies has

been extended to include certain cash-settled financial instruments which have a similar economic effect to holdings of shares. In particular, the Dutch government has introduced the obligation to aggregate holdings of contracts for differences and other financial instruments with a similar economic effect. The new obligation also affects persons who have sold put options on shares in listed companies. The new rules have been introduced in the Netherlands in advance of an anticipated change of the Transparency Directive. The Netherlands Authority for the Financial Markets has published a policy rule in relation to the new notification requirements.

This briefing briefly describes the background of the new rules, the scope of the (amended) substantial shareholdings disclosure regime, the AFM’s policy rule and, finally, the initial notification requirement (under which notification may be required within four weeks following 1 January 2012).

http://www.cliffordchance.com/publicationviews/publications/2012/01/disclosure_of_contractsfordifferencesandtothe.htm

Polish Legislation Newsletter

The Polish Legislation Newsletter summarises selected recent changes to Polish law. The December 2011 issue contains information on, amongst other things: (1) an Act on Trading in Financial Instruments; (2) an Act on Investment Funds; (3) an Act amending the Telecommunication Law; and (4) an Act amending the Code of Civil Procedure and certain other Acts.

http://www.cliffordchance.com/publicationviews/publications/2012/01/polish_legislationnewsletternovemberdecembe.html

Employment agenda

This briefing highlights a number of significant changes in legislation relating to Italian labour law in force since January 2012.

English version

http://www.cliffordchance.com/publicationviews/publications/2012/01/employment_agenda0.html

Italian version

http://www.cliffordchance.com/publicationviews/publications/2012/01/employment_agenda.html

China's latest efforts to promote the financial leasing industry

Following China's published statement to develop the financial leasing industry in its 12th Five-Year Development Plan released in March 2011, the Ministry of Commerce (MOFCOM) and the National Development and Reform Commission have now issued important updates and regulatory changes in a first step towards achieving this goal.

This briefing introduces the latest MOFCOM guiding opinions which state the current principles for developing the financial leasing industry regulated under the MOFCOM regime, as well as the revised Industry Catalogue which removes prior restrictions on foreign investment in financial leasing businesses.

English version

http://www.cliffordchance.com/publicationviews/publications/2012/01/china_s_latest_effortstopromotethefinancia.html

Chinese version

http://www.cliffordchance.com/publicationviews/publications/2012/01/china_s_latest_effortstopromotethefinancia0.html

Japan opens to investment in renewable energy – New feed-in tariff system to be a major step for sector

In July 2012, when the Act on Special Measures concerning the Procurement of Renewable Energy by Operators of Electric Utilities (the Renewables Act) comes into force, the Japanese government will introduce a feed-in tariff (FiT) to encourage the use of renewable energy nationwide. Although the full details have yet to be released by the Ministry of Economy, Trade and Industry, the Renewables Act is a positive and important step for the nation's renewable energy sector.

This briefing provides an overview of the FiT system and outstanding issues.

http://www.cliffordchance.com/publicationviews/publications/2012/01/japan_opens_to_investmentinrenewableenergy0.html

The Asia Pacific Top 10 FCPA Cases of 2011

Continuing to focus an unblinking eye on the Asia Pacific region, US anti-corruption enforcement authorities resolved 10 investigations in 2011 against companies operating in that region under the Foreign Corrupt Practices Act (FCPA).

This briefing provides an overview of the cases which represent the FCPA enforcement trends we see globally.

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

Proposed Enhanced Prudential Requirements for US-Based Systemically Important Financial Institutions

On 20 December 2011, the Federal Reserve proposed regulations to implement the enhanced prudential standards mandated by Section 165 and the early remediation requirements mandated by Section 166 of the Dodd-Frank Wall Street Reform and Consumer Protection Act with respect to US-based systemically important financial institutions.

This briefing provides an overview of the proposed regulations and encourages covered companies to actively participate in the rulemaking consultative process.

http://www.cliffordchance.com/publicationviews/publications/2012/01/proposed_enhancedprudentialrequirementsfo.htm

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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