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Briefing note

International Regulatory Update

19 December 2011 – 3 January 2012

IN THIS WEEK'S NEWS

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- Pilot scheme for RMB qualified foreign institutional investors announced
- RBI amends capital adequacy standards guidelines
- RBI publishes circular on credit default swaps guidelines for corporate bonds
- RBI issues final guidelines on internal rating based approach for calculating credit risk capital charge
- RBI sets up working group to enhance secondary market liquidity in G-Sec and interest rate derivatives markets
- Bank of Thailand grants permission for foreign banks to establish subsidiaries in Thailand
- US federal agencies extend comment period on Volcker Rule proposal
- SEC adopts accredited investor definition
- Federal Reserve proposes enhanced prudential standards
- CFTC issues final order amending effective date for swap regulation
- Recent Clifford Chance briefings: A year-end retrospective on suitability – back to basics; and more. Follow this link to the briefings section.

CRD 4: ECON Committee publishes draft reports

The European Parliament's ECON Committee has published two draft reports on the European Commission's legislative proposals for a fourth package of amendments to the Capital Requirements Directive (CRD 4). Amongst other things, the draft reports raise concerns about the alignment of the proposed requirements for the management and capitalisation of counterparty credit risk with the proposed regulation on OTC derivatives and market infrastructures.

The reports also note that the treatment of CVA is currently conducted by the Basel Committee on Banking Supervision with regards to methodological and technical issues, and argue that an observation period until 2013 would allow taking into account the work being undertaken by the Basel Committee and ensure consistency.

In addition, the reports stress that corporate governance provisions have to ensure that there is no conflict of interest and that remuneration policy is aligned with the long term interest of an institution. In particular, the draft report on the proposed directive suggests that the establishment of an absolute cap on the top salaries in relation to the average salary of each financial institution should be discussed during the legislative process.

Draft report on proposed regulation
Draft report on proposed directive

Basel Committee consults on regulatory capital disclosure requirements

The Basel Committee on Banking Supervision has published a consultation paper which contains a set of requirements for banks to disclose the composition of their regulatory capital. The proposed requirements are intended to improve the transparency and comparability of banks' capital bases, including on a cross-border basis.

Basel III established a number of high level disclosure requirements to improve transparency of regulatory capital and enhance market discipline, and the consultation paper sets out more detailed Pillar 3 disclosure requirements. In particular, the consultation paper proposes:

- a common template for banks to use to report the breakdown of their regulatory capital when the transition period for the phasing-in of deductions ends on 1 January 2018;
- a three-step approach for banks to follow in order to ensure that the Basel III requirement to provide a full reconciliation of all regulatory capital elements back to the published financial statements is met in a consistent manner;
- a common template for banks to use to meet the Basel III requirement to provide a description of the main features of capital instruments;
- how banks should meet the Basel III requirement to provide the full terms and conditions of capital instruments on their websites and the requirement to report the calculation of any ratios involving components of regulatory capital; and
- that banks use a modified version of the proposed post 1 January 2018 template during the transitional phase.

Comments are due by 17 February 2012.

Bank of England publishes discussion paper on instruments of macroprudential policy

The Bank of England has published a discussion paper which analyses a range of macroprudential tools that the Financial Policy Committee (FPC) discussed at its September 2011 meeting. The Committee is seeking feedback on this analysis. The proposed powers of the permanent FPC include an ability to make recommendations to the Prudential Regulation Authority (PRA), the Financial Conduct Authority (FCA) and other bodies. In addition, it is proposed that the Committee should have powers of direction through which it could require specific actions by the PRA and FCA.

At the time of its September 2011 meeting, the FPC judged that, in order to fulfil its proposed statutory responsibilities, it would require a narrow range of directive powers over a set of specific macroprudential tools that could help it tackle key sources of systemic risk. The Committee identified three broad categories of policy tool over which it thought it might initially need to have directive powers: (1) those that affect the balance sheets of financial institutions; (2) those that affect the terms and conditions of transactions in particular financial markets; and (3) those that influence market structures.

The discussion paper sets out an analysis provided by Bank of England and FSA staff to the FPC to facilitate its discussions. It explains how the considered tools might be helpful in meeting the FPC's objectives, assessing empirical evidence on their likely effectiveness, and describing practical considerations including the potential for leakage and regulatory arbitrage. The Committee is seeking feedback on this interim analysis ahead of its March 2012 meeting.

In particular, it has invited views on: (1) whether there are any additional tools that the Committee should be considering; (2) whether the Committee has focused on the right instruments in its preliminary discussions; and (3) whether the criteria that are set out to assess the merits of different tools are sensible and sufficient.

Comments are due by 10 February 2012.

UK government sets out plans to reform structure of banking

The UK government has published its response to the final report by the Independent Commission on Banking (ICB), which agrees with the ICB's recommended package of measures and sets out plans to reform the structure of banking in the UK. The government agrees with the ICB's recommendation that certain banking services – in particular, the taking of retail deposits – should only be provided by 'ring-fenced banks', and that these banks should be prohibited from undertaking certain investment banking activities.

With respect to the ICB's recommendations on loss absorbency, the government:

- intends to introduce higher equity requirements for large ring-fenced banks, and will seek sufficient flexibility in forthcoming EU legislation to do so;
- supports a mandatory, minimum leverage ratio for all banks, as recommended by the ICB, and believes there may be a case for applying a higher minimum leverage ratio to some larger banks;
- agrees that the resolution authorities should have a statutory bail-in power to assist in bank resolution, and will seek to ensure an agreement on including a robust bail-in power in the EU crisis management framework;
- supports the principle that systemically important banks hold a minimum amount of loss-absorbing capacity on a group-wide basis; however, the government has indicated that if a bank can show that its non-UK operations do not pose a risk to UK financial stability, this requirement should not apply to those operations;
- supports depositor preference, but believes that further analysis and consultation is needed on the scope of its application; and
- believes that supervisors should be able to require firms that are difficult to resolve to have additional loss-absorbing capacity.

The government will implement the ICB's advice in stages, with the full package of reforms completed by 2019. The Treasury has indicated that primary and secondary legislation related to the ring fence will be completed by May 2015 and that banks will be expected to be compliant as soon as practically possible thereafter. The government intends to publish a White Paper in spring 2012 setting out further detail on how the recommendations will be implemented. In advance of the White Paper, the government is open to views on how to implement these plans. Comments are due by March 2012.

George Osborne's statement

Denmark commences EU Council Presidency

Denmark has taken over the EU Council's six-month rotating Presidency. The Danish government will present the Presidency Programme in Copenhagen on 6 January 2012.

Danish Presidency homepage
Provisional agendas for Council meetings
Press release

ESMA issues guidelines on systems and controls in an automated trading environment

ESMA has published a final report which contains finalised guidelines for trading platforms, investment firms and competent authorities on systems and controls in an automated trading environment. The guidelines are intended to clarify the obligations of trading platforms and investment firms under the existing EU legislative framework.

In particular, the guidelines cover: (1) the operation of an electronic trading system by a regulated market or a multilateral trading facility; (2) the use of an electronic trading system, including a trading algorithm, by an investment firm for dealing on own account or for the execution of orders on behalf of clients; and (3) the provision of direct market access or sponsored access by an investment firm as part of the service of the execution of orders on behalf of clients.

The final report also contains a feedback statement on ESMA's July 2011 consultation on its draft guidelines on systems and controls in a highly automated environment for trading platforms, investment firms and competent authorities.

Final report and guidelines

Credit rating agencies: ESMA publishes regulatory technical standards

ESMA has published a set of regulatory technical standards (RTS) on credit rating agencies (CRAs), which detail the information that CRAs have to disclose and the rules they have to comply with in order to fulfil the requirements of the Credit Rating Agencies Regulation (1060/2009/EC).

ESMA has submitted the standards to the European Commission for adoption.

RTS on information for registration and certification of CRAs
RTS on presentation of information that CRAs must disclose under CRA regulation
RTS on assessment of compliance of credit rating methodologies with CRA regulation
RTS on content and format of ratings data periodic reporting to be requested from CRAs

ESMA consults on draft guidelines on certain aspects of MiFID requirements for suitability and compliance

ESMA has published for consultation its draft guidelines on certain aspects of the MiFID suitability requirements, which focus on the need for firms to have in place appropriate policies and procedures in order to know their clients when recommending suitable investment choices – the draft guidelines are intended to help investment firms improve their implementation of the requirements and strengthen investor protection.

In addition, ESMA has published its draft guidelines on certain aspects of the MiFID compliance function requirements, which are intended to enhance clarity and foster convergence in the implementation of the MiFID organisational requirements relating to certain aspects of the compliance function.

Comments on both sets of draft guidelines are due by 24 February 2012.

CRD 4: EBA consults on draft implementing technical standards on supervisory reporting requirements

EBA has published a consultation paper (CP50) on draft implementing technical standards on supervisory reporting requirements for credit institutions and investment firms. CP50 relates to the European Commission's legislative proposals for a fourth package of amendments to the Capital Requirements Directive (CRD 4), which set out prudential requirements which are expected to be applicable as of 1 January 2013.

CP50 puts forward draft standards relating to Articles 95 (own funds and financial information) and 96 (losses stemming from lending collateralised by immovable property) of the proposed Capital Requirements Regulation. It specifies uniform formats, frequencies and dates of prudential reporting as well as IT solutions to be applied by credit institutions and investment firms in Europe.

Comments are due by 20 March 2012. EBA intends to finalise the draft standards and submit them to the Commission by 30 June 2012.

Basel Committee consults on application of own credit risk adjustments to derivatives

The Basel Committee on Banking Supervision has published a consultation paper on the application of own credit risk adjustments to derivatives. The Basel III rules are intended to ensure that a deterioration in a bank's own creditworthiness does not at the same time lead to an increase in its common equity as a result of a reduction in the value of the bank's liabilities. Paragraph 75 of the Basel III rules requires a bank to derecognise in the calculation of Common Equity Tier 1 all unrealised gains and losses that have resulted from changes in the fair value of liabilities that are due to changes in the bank's own credit risk.

The consultation paper proposes that debit valuation adjustments (DVAs) for OTC derivatives and securities financing transactions should be fully deducted in the calculation of Common Equity Tier 1. It also briefly reviews other options for applying the underlying concept of paragraph 75 to these products and the reasons these alternatives were not supported by the Basel Committee.

Comments are due by 17 February 2012.

Basel Committee consults on revised core principles for effective banking supervision

The Basel Committee on Banking Supervision has published for consultation its revised core principles for effective banking supervision, which update the 2006 principles and the associated core principles assessment methodology.

Amongst other things, the principles have been re-ordered, highlighting the difference between what supervisors do themselves and what they expect banks to do. Principles 1 to 13 address supervisory powers, responsibilities and functions, focusing on effective risk-based supervision, and the need for early intervention and timely supervisory actions. Principles 14 to 29 cover supervisory expectations of banks, emphasising the importance of good corporate governance and risk management, as well as compliance with supervisory standards.

Comments are due by 20 March 2012.

Comparison between 2006 and 2011 versions of core principles assessment methodology

ISDA, ICMA and AFME publish joint paper analysing impact of European sovereigns' collateral policies

ISDA, ICMA and AFME have published a joint paper which discusses the impact of the collateral policies of European sovereigns. The paper argues that these policies could significantly affect the liquidity and dynamics of the credit default swaps (CDS) market and create substantial additional bank liquidity requirements. It also estimates that European sovereign collateral policies may drive a significant percentage – approximately half – of the volume in the sovereign CDS market.

Joint Forum consults on principles for supervision of financial conglomerates

The Joint Forum, which comprises the Basel Committee on Banking Supervision, IOSCO and the International Association of Insurance Supervisors (IAIS), has published a consultation paper on principles for the supervision of financial conglomerates. The proposed principles, which revise the Joint Forum's 1999 principles, are intended to provide national authorities, standard setters and supervisors with a set of internationally agreed principles that support consistent and effective supervision of financial conglomerates and in particular those financial conglomerates that are active across borders. The principles cover supervisory powers and authority, supervisory responsibility, corporate governance, capital adequacy and liquidity, and risk management.

Comments are due by 16 March 2012.

Covering note

Remuneration Code: FSA publishes updated guidance on proportionality

The FSA has published 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 has therefore changed the boundary between tiers 2 and 3 for banks and building societies. The 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).

Joint Committee calls for amendments to UK Financial Services Bill

The Joint Committee on the draft Financial Services Bill has published its report, which calls for significant amendments to the Financial Services Bill. In particular, the Committee calls on the government to clarify the objectives, powers and accountability of the Financial Policy Committee (FPC), the Prudential Regulation Authority (PRA), and the Financial Conduct Authority (FCA). The report emphasises that while the Bill focuses on regulatory structure, it is the culture, focus and philosophy of a regulator that has the greater impact on how it performs, and that more needs to be done to foster a new regulatory culture.

Written evidence

Mortgage Market Review: FSA consults on proposed package of reforms

The FSA has published a consultation paper (CP11/31) setting out its proposals to reform mortgage market regulation. C11/31 follows the FSA's Mortgage Market Review discussion paper (DP09/3), which was published in October 2009.

The FSA has indicated that under the proposed future regime:

- income will have to be verified in every mortgage application;
- lenders do not have to consider in detail what borrowers spend but cannot ignore unavoidable bills, such as heating and council tax;
- interest-only mortgages can still be offered as long as borrowers have a credible plan to repay the capital, but relying on hopes of rising property values is not enough;
- lenders will have to consider the impact of increases in interest rates in line with current market expectations;
- some applicants, such as those trying to consolidate debts with a mortgage, will have to get advice to ensure they understand the full implications and costs; and
- existing borrowers will be unaffected and lenders will have the flexibility to provide new mortgages to some existing customers even where they do not meet the new affordability requirements.

Comments are due by 30 March 2012. The FSA intends to publish its feedback statement and final rules in summer 2012 and to implement the proposals 12 months later.

Mortgage Market Review Data Pack

Treasury Committee launches inquiry into credit rating agencies

The Treasury Committee has launched an inquiry into credit rating agencies (CRAs). Amongst other things, the Committee has invited evidence on:

- whether the methodology used by CRAs is sound and transparent;
- whether CRAs have the right incentives, whether they have conflicts of interest on either the corporate or sovereign side, and whether they face adequate competition;
- how accountable the major CRA's are and what the appropriate role for independent ratings agencies is;
- what effect CRAs have on the efficient allocation of capital, and how investor behaviour is affected by rating changes;
- how embedded agency ratings are within the national and international regulatory frameworks and whether this is changing under new regulatory frameworks being introduced; and
- whether the European Commission's proposals on CRAs are based on the right objectives and whether they will achieve the Commission's aims.

Responses are due by 2 February 2012.

FSA consults on proposed guidance on regulated covered bond regime

The FSA has published proposed guidance under Regulation 42 of the Regulated Covered Bond Regulations 2008 setting out its expectations on systems and controls, the role of the signatory of the annual confirmation of compliance, and the content of management information, to help ensure that the relevant regulated covered bond issuers or owners are able to meet the standards and obligations under the regime set out in the regulations and the related provisions in the RCB Sourcebook.

Comments are due by 27 January 2012.

BaFin consults on draft circular on distribution of investment units

The Federal Financial Services Supervisory Authority (BaFin) has published for consultation a draft circular clarifying the scope of section 121 para 1 to 3 of the German Investment Act (InvG). Paragraphs 1 to 3 of section 121 of the InvG specify the requirements on sales documentation and information obligations in relation to the distribution of investment units within the meaning of the InvG.

The draft circular states that the requirements of section 121 paragraphs 1 to 3 of the InvG shall also apply to these intermediaries when providing services such as investment advice, investment broking, contract broking, financial commission business and own-account trading. Other services such as investment management, finance portfolio management, the distribution of unit-linked life insurances or financial instruments modeling investment units are currently exempted from the requirements of section 121 paragraphs 1 to 3 of the InvG by the draft circular.

Comment are due by 17 January 2012.

Belgium introduces financial stability bank levy

A law dated 28 December 2011, which introduces a financial stability bank levy and amends the existing deposit protection bank levy, has been published. The law introduces a financial stability bank levy that consists of an annual fee of 0.035% payable by banks on the amount of their total liabilities reduced by the amount of their regulatory capital and the amount of their deposits covered by the retail deposit protection scheme. The levy is payable to a new 'bank resolution fund' to be set up by the government to implement measures intended to reduce the economic and social impact of bank failures in Belgium.

The law also amends the existing deposit protection bank levy which was adopted in 2009, but annulled by the Constitutional Court with effect from 2012. The Court reached its judgment of 23 June 2011 on the grounds that the fee was discriminatory because its calculation did not take into account the degree of insolvency risk of each particular bank. Under the new calculation rules, the levy consists of an annual fee of 0.245% (reduced to 0.15% for 2013 and 0.10% thereafter) payable by banks on the amount of their deposits covered by the retail deposit protection scheme multiplied by a risk weighting factor varying from 75 to 200% depending on each bank's scoring on five solvency, liquidity and asset quality tests.

Pilot scheme for RMB qualified foreign institutional investors announced

The China Securities Regulatory Commission (CSRC), the People's Bank of China (PBOC) and the State Administration of Foreign Exchange (SAFE) have jointly announced the 'Pilot Measures on Investment in Domestic Securities by Fund Management Companies and Securities Companies as Renminbi Qualified Foreign Institutional Investors'.

In addition, the CSRC has issued implementation rules to regulate the pilot program, which allows Hong Kong subsidiaries of PRC fund management companies and securities companies to use RMB funds raised in Hong Kong for investment in the PRC domestic securities as RMB qualified foreign institutional investors (RQFII).

The initial quota amount for the pilot program is approximately RMB 20 billion. The pilot measures and the implementation rules provide detailed eligibility requirements, application procedures for participation in the pilot program and obtaining of investment quota, investment scope, and control on remittance and repatriation.

The State Administration of Foreign Exchange (SAFE) has also issued a circular to standardise relevant practice relating to the pilot scheme for investment in domestic securities by fund management companies and securities companies as RMB qualified foreign institutional investors. The Circular also clarifies certain provisions, mainly in relation to the remittance and repatriation of funds. The circular is effective as of 20 December 2011.

RBI amends capital adequacy standards guidelines

The Reserve Bank of India (RBI) has published a circular amending the prudential guidelines on capital adequacy and market discipline regarding the new capital adequacy framework. The circular states that risk weight and capital requirements should be linked to the risk characteristics of each investment, irrespective of whether such investments are exempted from capital market exposure or not. As a result, the RBI has decided that banks' investments in the paid up equity of financial entities, even if they are exempted from capital market exposure norms, will be assigned a 125% risk weight or, if higher, the risk weight warranted by the external rating of the counterparty.

The new guidelines are applicable from 1 January 2012.

RBI publishes circular on credit default swaps guidelines for corporate bonds

The Reserve Bank of India (RBI) has issued a circular providing guidelines on credit default swaps for corporate bonds for non-banking financial companies (NBFCs). According to the circular, NBFCs can only participate in the CDS market as users. As users, they are permitted to buy credit protection only to hedge their credit risk on corporate bonds they hold. NBFCs are not permitted to sell protection and hence not permitted to enter into short positions in the CDS contracts. However, they are permitted to exit their bought CDS positions by unwinding them with the original counterparty or by assigning them in favour of the buyer of the underlying bond.

RBI issues final guidelines on internal rating based approach for calculating credit risk capital charge

The Reserve Bank of India (RBI) has issued final guidelines on the internal rating based approach for calculating the credit risk capital charge. The final version incorporates comments and suggestions on the draft guidelines that were issued in August 2011. To obtain final approval from the RBI, banks will not only have to ensure that they comply with these guidelines, but will also need to demonstrate a continuous endeavour to improve their credit risk management processes and systems.

Circular

RBI sets up working group to enhance secondary market liquidity in G-Sec and interest rate derivatives markets

The Reserve Bank of India (RBI) has announced the establishment of a working group to examine ways to enhance secondary market liquidity in government securities (G-Sec) and interest rate derivatives markets. The members of the working group include representatives from the market and RBI officials.

The terms of reference of the working group include, amongst other things:

- to analyse the evolution of the markets for G-Sec and interest rate derivatives in relation to their depth and breadth;
- to study the determining and influencing factors on liquidity of G-Sec and interest rate derivatives from the perspective of the primary market, the secondary market and the interest rate derivatives market;
- to examine the factors enabling and inhibiting the secondary market liquidity in the G-Sec market, especially across the sovereign yield curve, and suggest ways to strengthen and address them;
- to examine the factors enabling and inhibiting the growth of the interest rate derivatives market and suggest ways to strengthen and address them; and
- to suggest measures to promote retail participation in the G-Sec market.

Comments are due by 17 January 2012.

Bank of Thailand grants permission for foreign banks to establish subsidiaries in Thailand

The Bank of Thailand has, with the approval of the Minister of Finance, announced guidelines permitting foreign banks to apply for the establishment of a subsidiary in Thailand. The Bank of Thailand has indicated that the measure is intended to increase competition and enhance the efficiency of the financial system.

Under the guidelines, only foreign banks that operated a branch in Thailand before 15 December 2011 are allowed to convert their branch into a subsidiary. The subsidiary can operate a maximum of 20 branches and 20 offsite ATMs across the country. The applicant must have a strong financial standing with good operating performance and must have expertise in international finance. The branch of the applicant must have paid-up capital of no less than 10 billion Thai baht, maintain a capital adequacy ratio of no less than 12% and a non-performing loans ratio of not exceeding 3.5%, have a good rating under the Bank of Thailand's rating assessment and have a good risk management system.

Foreign banks that operate as a branch in Thailand can submit an application to the Bank of Thailand between 4 January 2012 and 28 December 2012. The Bank of Thailand expects its review process to take no longer than 5 months.

US federal agencies extend comment period on Volcker Rule proposal

The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the SEC have extended the comment period for a proposal to implement section 619 (commonly referred to as the Volcker Rule) of the Dodd-Frank Wall Street Reform and Consumer Protection Act until 13 February 2012.

SEC adopts accredited investor definition

As part of the implementation of the Dodd-Frank Act, the SEC has adopted a revised definition of 'accredited investor' for use in connection with certain exemptions from the securities offering registration requirements of the Securities Act of 1933. One way individuals may qualify as 'accredited investors' is by having a net worth, alone or together with their spouse, of at least USD 1 million. The Dodd-Frank Act requires that the value of a person’s primary residence be excluded from the net worth calculation used to determine the person’s 'accredited investor' status.

The adopted rule clarifies that the value of the primary residence is excluded, as is any indebtedness secured by the person’s primary residence, but: (1) only up to the estimated fair market value of the primary residence; and (2) only if such debt was not borrowed during the 60 days preceding the purchase of securities in the exempt offering (unless such borrowing occurred in connection with the acquisition of the primary residence).

The rule will become effective 60 days after its publication in the Federal Register.

Final rule

Federal Reserve proposes enhanced prudential standards

The Board of Governors of the Federal Reserve System (FRB) has proposed regulations to implement the enhanced prudential requirements of Section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act related to: (1) risk-based capital and leverage; (2) liquidity; (3) single-counterparty credit limits; (4) overall risk management and risk committees; (5) stress tests; and (6) debt-to-equity limits.

The proposal also includes rules to implement the early remediation requirements in Section 166 of the Dodd-Frank Act related to establishing measures of financial condition and remediation requirements that increase in stringency as the financial condition of a covered company declines.

The proposed regulations will apply to US bank holding companies with total consolidated assets of USD 50 billion or more and nonbank financial companies designated for supervision by the FRB as systemically important. Non-US banking organizations that conduct US banking operations are subject to the enhanced prudential requirements of Section 165 of the Dodd-Frank Act but are not covered companies under the proposed regulations. The Board has indicated that it is developing a framework for the application of the enhanced prudential requirements of Section 165 to non-US banking organizations separately and intends to publish proposed regulations in that regard shortly.

CFTC issues final order amending effective date for swap regulation

The Commodity Futures Trading Commission (CFTC) has issued a final order regarding the effective date for swap regulation. On 14 July 2011, the CFTC granted temporary exemptive relief from certain provisions of the Commodity Exchange Act that otherwise would have taken effect on 16 July 2011, the general effective date of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. On 25 October 2011, the CFTC proposed to extend this exemptive relief beyond the 31 December 2011 expiration date.

The final order addresses the comments received on the October notice of proposed amendment and extends the expiration date of the exemptive relief to 16 July 2012.

RECENT CLIFFORD CHANCE BRIEFINGS

Transaction Services Newsletter – December 2011

Transaction Services Newsletter is a bi-monthly publication designed for business and legal professionals working in cash management and securities services.

Amongst other things, this final edition for 2011 provides an overview of the European Commission's legislative agenda.

http://www.cliffordchance.com/publicationviews/publications/2011/12/transaction_servicesnewsletter-december2011.html

Bank of England's Market Operations – Update December 2011

The Bank of England has released further details of eligibility criteria for CMBS, SME CLOs and ABCP in its Discount Window Facility.

This briefing examines the terms of the notice.

http://www.cliffordchance.com/publicationviews/publications/2011/12/bank_of_england_smarketoperationsupdat.html

A year-end retrospective on suitability – back to basics

Looking back at 2011, no one would deny that the FSA has made significant inroads in delivering on its promise to intervene in retail (including wealth management) markets to prevent consumer detriment and secure redress for consumers. Since January 2011, there have been four high profile enforcement actions in the wealth management sector, netting over GBP 30 million in fines and well over this figure in compensation for customers. The FSA's reason for action is the failure of wealth managers to ensure that they make suitable recommendations.

In contrast, wealth managers have a clear appreciation of the importance of suitability – suitability goes to the heart of the relationship between advisor and client and is a key focus for firms. Yet the industry has repeatedly failed to deliver it. What has gone wrong and how should wealth managers finally get suitability right?

This briefing provides a year-end retrospective on suitability.

http://www.cliffordchance.com/publicationviews/publications/2011/12/a_year-end_retrospectiveonsuitabilitybackt.html

New Italian tax measures – notional interest deduction and new IRAP allowances

On 6 December 2011, the Italian government issued a Decree Law 201 containing a set of extraordinary measures to address the financial crisis and stabilise public finances. The new measures include a new notional interest deduction on new equity injections and new deductions in computing the IRAP taxable basis. The existing municipal property tax will be replaced with a new property tax.

This briefing outlines the new relevant provisions.

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

Changes to the enforcement regime for Russian security

At the end of November 2011 the Russian Parliament adopted a law amending the procedure for the enforcement of Russian security. The law was officially published on 7 December 2011 on the official legal information website of the Russian Federation and will become effective within ninety days of its official publication.

This briefing discusses the changes to the enforcement regime for Russian security.

http://www.cliffordchance.com/publicationviews/publications/2011/12/changes_to_the_enforcementregimeforrussia.html

Renminbi Qualified Foreign Institutional Investor scheme launched

On 16 December 2011, the China Securities Regulatory Commission, the People's Bank of China and the State Administration of Foreign Exchange jointly issued a set of measures to launch the long-awaited Renminbi Qualified Foreign Institutional Investor (RMB QFII) scheme. This scheme is important as it diversifies the investment channels for RMB in Hong Kong and improves the utilisation of offshore RMB funds.

This briefing provides a quick overview of the scheme, the eligibility requirements for an RMB QFII licence, the permissible investment scope of an RMB QFII and China's control measures on the remittance and repatriation of funds.

http://www.cliffordchance.com/publicationviews/publications/2011/12/renminbi_qualifiedforeigninstitutionalinvesto.html

Latest amendments to the TMK Law and their impact

Recent changes made to the Act on Securitisation of Assets (often called the TMK Law) provide a further relaxation to the securitisation regime in Japan. This follows progressive amendments made over the course of the 13 years since the law was introduced designed to make the practical operation of the law easier. In particular, the most recent amendments clarify the position of acquisition of additional assets and refinancing loans, abolish certain notification requirements and the need to notify minor amendments to the asset liquidation plan, and provide for a one-stage appraisal process.

This briefing describes these changes, which will be welcomed by market participants.

http://www.cliffordchance.com/publicationviews/publications/2011/12/latest_amendmentstothetmklawandtheirimpact.html

Recent trends in the sale of foreign securities in Japan

In order to sell foreign securities to multiple investors in Japan, it has traditionally been necessary to prepare disclosure materials in Japanese. The time and cost involved in translating such documents can be somewhat of a burden to the issuer. However, in recent amendments to the Financial Instruments and Exchange Act (the FIEA), the sale of securities using English materials has become possible to a certain extent. Further, an additional amendment to the FIEA which was promulgated on 25 May 2011 (expected to become effective on 1 April 2012) aims to expand the scope of the English disclosure system, which will lead to a wider variety of options for foreign issuers.

This briefing provides a general overview of the following three systems which will allow disclosure and sales materials to be produced in English for the sale of foreign securities: (1) foreign securities uridashi (implemented upon the amendment to the regulations on secondary distribution of securities (uridashi), and effective from 1 April 2010); (2) Tokyo Pro-Bond Market (from May 2011); and (3) the English disclosure system (to become effective on 1 April 2012).

http://www.cliffordchance.com/publicationviews/publications/2011/12/recent_trends_inthesaleofforeignsecuritie0.html

NY State Court rules that common law claims are not pre-empted by Martin Act

On 20 December 2011, the New York Court of Appeals held that New York State's 'blue sky' law, the Martin Act, does not pre-empt private plaintiffs from bringing traditional common law claims, including breach of fiduciary duty and gross negligence.

This briefing highlights the practical consequences of the decision in Assured Guaranty (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.

http://www.cliffordchance.com/publicationviews/publications/2011/12/ny_state_court_rulesthatcommonlawclaimsar.html