So then

CLIFFORD

CHANCE

Briefing note

International Regulatory Update

12-16 March 2012

IN THIS WEEK'S NEWS

- Freezing and confiscation of proceeds of crime: European Commission proposes directive
- ECB working paper on composite indicator of systemic stress published
- IOSCO consults on exchange traded funds regulation
- IMF publishes working paper on capital regulation, liquidity requirements and taxation in a dynamic model of banking
- FSA consults on regulating bidding for emissions allowances
- Lord Turner discusses shadow banking and financial instability
- Executive remuneration: BIS consults on enhanced shareholder voting rights
- Guidelines Monitoring Group issues guidance on good practice reporting by portfolio companies
- AIFMD: UK government consults on policy options for implementation
- Czech National Bank sets out new prudential rules for banks
- German government parties submit joint proposal with respect to commodity derivatives markets and high frequency trading
- HKEx to implement risk management reform measures for clearing houses
- 2012 FIEA amendment – Japan's FSA submits Bill to Diet
- FSC to introduce reporting regime for large volume short selling
- SGX consults on proposed changes to reporting and registration of negotiated large trades
- MAS consults on proposed rules for issuance of covered bonds by banks
- ASIC consults on regulatory approach to platforms
- CFTC Chairman Gensler discusses Dodd-Frank financial reforms

Clifford Chance's International Regulatory Update is a weekly digest of significant regulatory developments, drawing on our daily content from our Alerter: Finance Industry service.

If you would like to continue to receive International Regulatory Update or would like to request a subscription for a colleague, please click here.

To request a subscription to our Alerter: Finance Industry service, please email Online Services.

If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

Chris Bates +44 (0)20 7006 1041

Nick O'Neill +1 212 878 3119

Marc Benzler +49 69 7199 3304

Thomas Pax +1 202 912 5168

Steven Gatti +1 202 912 5095

Martin Rogers +852 2826 2437

Mark Shipman + 852 2826 8992

International Regulatory Update Editor

Julia Milosh +44 (0)20 7006 4171

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street, London, E14 5JJ, UK
www.cliffordchance.com

- Recent Clifford Chance briefings: ING's landmark victory brightens the outlook for State aid recipients; and more. Follow this link to the briefings section.

Freezing and confiscation of proceeds of crime: European Commission proposes directive

The European Commission has published a proposal for a directive on the freezing and confiscation of proceeds of crime in the European Union. Amongst other things, the proposal seeks to lay down clearer and more efficient rules for confiscating assets not directly linked to a specific crime, but which clearly result from similar criminal activities by the convicted person (extended confiscation). The proposal also seeks to strengthen the rules on the confiscation of assets that are transferred from the suspect to a third party who should have realised that they derive from crime (third-party confiscation).

Impact assessment
FAQs

ECB working paper on composite indicator of systemic stress published

The European Central Bank (ECB) has published a working paper which introduces a new indicator of contemporaneous stress in the financial system named Composite Indicator of Systemic Stress (CISS). According to the authors, the main methodological innovation of the CISS is the application of basic portfolio theory to the aggregation of five market-specific subindices created from a total of 15 individual financial stress measures. The aggregation accordingly takes into account the time-varying cross-correlations between the subindices. The CISS puts relatively more weight on situations in which stress prevails in several market segments at the same time, capturing the idea that financial stress is more systemic and thus more dangerous for the economy as a whole if financial instability spreads more widely across the whole financial system. Applied to euro area data, the authors determine within a threshold VAR model a systemic crisis-level of the CISS at which financial stress tends to depress real economic activity.

The ECB has indicated that the views expressed in the paper are those of the authors and do not necessarily reflect those of the ECB.

IOSCO consults on exchange traded funds regulation

IOSCO has published a consultation report on regulatory issues regarding exchange traded funds (ETFs). The proposed principles address ETFs that are organised as collective investment schemes and are not intended to encompass other exchange-traded products that are not organised as collective investment schemes.

In particular, the proposed principles relate to: (1) ETF classification and disclosure; (2) the marketing and sale of ETF shares; (3) the structuring of ETFs; and (4) the broader risk of liquidity shocks and transmission across correlated markets.

IMF publishes working paper on capital regulation, liquidity requirements and taxation in a dynamic model of banking

The IMF has published a working paper which studies the impact of bank regulation and taxation in a dynamic model with banks exposed to credit and liquidity risk. The paper describes an inverted U-shaped relationship between capital requirements and bank lending, efficiency, and welfare, with their benefits turning into costs beyond a certain requirement threshold. By contrast, the paper concludes that liquidity requirements reduce lending, efficiency and welfare significantly. According to the authors, the costs of high capital and liquidity requirements represent a lower bound on the benefits of these regulations in abating systemic risks. On taxation, the authors conclude that corporate income taxes generate higher government revenues and entail lower efficiency and welfare costs than taxes on non-deposit liabilities.

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

FSA consults on regulating bidding for emissions allowances

The FSA has published a consultation paper (CP12/06) on regulating bidding for emissions allowances under Phase Three of the EU Emissions Trading Scheme (ETS). CP12/06 sets out the FSA's proposals on how it will authorise and supervise certain firms intending to bid on auction platforms, as this practice becomes a regulated activity in certain circumstances.

Comments are due by 19 April 2012.

Lord Turner discusses shadow banking and financial instability

FSA Chairman Lord Turner has given a speech to the Cass Business School, during which he discussed how the shadow banking sector contributed to the financial crisis, warned of the risks it still poses to financial stability, and highlighted the importance of a sufficiently comprehensive and radical policy response.

He argued that some of the particular forms which shadow banking took in the pre-crisis period had declined in importance, but that the underlying factors which drove shadow banking development were still present, and unless checked by appropriate regulation, would produce instability in future. According to Lord Turner, these underlying factors include: (1) the desire of investors to hold more liquid short term assets than the private financial system can safely provide; (2) the tendency of financial innovation continuously to create additional complexity and opacity, and to make the system more interconnected and vulnerable to shocks; and (3) the increasing role of short term secured finance, such as the repo markets, which when combined with mark-to-market accounting and continuous revaluation could 'hardwire' potential instability into the financial system.

Lord Turner reaffirmed the determination of the Financial Stability Board (FSB) to tackle shadow banking issues and ensure that adequate responses to the associated risks are put in place. He stressed that any response would need to be flexible, because in a complex financial system, individual firms will continually innovate new products and new relationships between firms which reduce the risks to the individual firms but which can make the system as a whole more risky.

Slides

Executive remuneration: BIS consults on enhanced shareholder voting rights

The Department for Business, Innovation and Skills (BIS) has published a consultation paper setting out its proposals to give shareholders greater influence on the issue of executive remuneration through enhanced voting rights. The main components of this are: (1) an annual binding vote on future remuneration policy; (2) increasing the level of support required on votes on future remuneration policy; (3) an annual advisory vote on how remuneration policy has been implemented in the previous year; and (4) a binding vote on exit payments of more than one year's base salary.

Under the proposals, companies will have to report each year on how they have responded to shareholder concerns and taken previous votes into account.

Comments are due by 27 April 2012.

Consultation paper

Guidelines Monitoring Group issues guidance on good practice reporting by portfolio companies

The Guidelines Monitoring Group (GMG), established to review the private equity industry's conformity with the Walker Guidelines, has published a guide intended to assist private equity owned portfolio companies to improve the transparency and disclosure in their financial and narrative reporting by highlighting good practice examples.

AIFMD: UK government consults on policy options for implementation

HM Treasury has published an informal discussion paper inviting initial views on a number of the high level policy decisions that will need to be taken as part of the transposition of the AIFM Directive in the UK. The Directive is due to be transposed into national law by 22 July 2013.

The Treasury is seeking feedback from UK-based fund managers that deem at least part of their regular business as managing AIFs (including UCITS management companies if they manage AIFs as well), discretionary investment managers, operators of unregulated collective investment schemes, investment companies that do not employ an external fund manager, depositaries and custodians holding the assets of AIFs, prime brokerage facilities, investors, trade bodies, and others interested in the Directive and its transposition.

Amongst other things, the discussion paper covers: (1) requirements for AIFs falling below the Directive's threshold for full authorisation; (2) interaction with proposed regulations on venture capital and social entrepreneurship funds; (3) the application of the approved persons regime; (4) the extent to which AIFs should be marketed to retail investors; and (5) the private placement regime.

The consultation closes on 4 May 2012, following which the government will develop formal policy positions for future consultation.

Czech National Bank sets out new prudential rules for banks

The Czech National Bank has published a draft decree amending Decree No. 123/2007 Coll., setting out prudential rules for banks, credit unions and investment firms. The draft decree sets out additional prudential rules for banks. In particular, the limits of permitted exposure of investment portfolios to banks and investment firms within the same group will decrease. Banks will also be subject to new obligations to inform the Czech National Bank about intra-group transactions including, amongst other things, transfers of a credit risk to the bank exceeding certain thresholds and transfers of the whole or part of an enterprise to the bank.

German government parties submit joint proposal with respect to commodity derivatives markets and high frequency trading

The government parties CDU/CSU and FDP have filed a joint proposal for adoption by the federal Parliament (Bundestag) to fight price volatility on the commodity derivatives markets and strengthen the regulation and transparency of OTC derivatives markets.

The proposal invites the federal government (Bundesregierung), in connection with implementing the changes of the MiFID review, to work towards:
(1) enhancing transparency on commodity derivatives markets; (2) instituting adequate intervention measures such as position limits; (3) regulating high frequency trading and making high frequency traders subject to financial market supervision; and (4) enhancing the regulation of agriculture derivatives.

In connection with implementing changes to the Market Abuse Directive, the federal government is invited to work towards the inclusion of commodity derivatives in the scope of the market abuse regulation.

The federal government is also invited to engage on an international level to enhance transparency in connection with investments of institutional investors in financial market transactions with physical underlyings and in physical markets.

HKEx to implement risk management reform measures for clearing houses

Hong Kong Exchanges and Clearing Limited (HKEx) has published its consultation conclusions regarding the clearing houses' risk management reform proposals it announced in July 2011. In particular, HKEx plans to implement the following proposals contained in the consultation paper: (1) the introduction of a standard margin system and a dynamic guarantee fund at Hong Kong Securities and Clearing Company (HKSCC); (2) the revision of certain price movement assumptions in clearing houses' stress testing; (3) the revision of the counterparty default assumptions in the stress testing; and (4) the revision of the collateral assumptions at the HKFE Clearing Corporation (HKCC) and the SEHK Options Clearing House (SEOCH).

In addition to the relief measures included in the original proposal, HKEx will also introduce a number of operational refinements as a result of market suggestions. The refinements are intended to provide additional flexibility to the operation and working capital management of clearing participants across the three clearing houses.

HKEx has indicated that the implementation of the main proposals, including changing stress testing assumptions for all three clearing houses and the introduction of margining and the dynamic guarantee fund for HKSCC, are scheduled for the third quarter of 2012 subject to system readiness, and that detailed implementation and communication plans will be announced in due course.

FAQs

2012 FIEA amendment – Japan's FSA submits Bill to Diet

The Financial Services Agency of Japan (FSA) has submitted a Bill to the Diet to amend the Financial Instruments and Exchange Act (FIEA). Amongst other things, the Bill includes proposed reforms toward a 'comprehensive exchange'. Currently, a financial instruments exchange (such as stock exchange) cannot list commodities. The FSA is proposing that it and other relevant ministries allow financial instrument exchanges to list certain commodities in order to enhance the convenience and increase the competitiveness of the Japanese financial market. In order to implement the 'comprehensive exchange' reforms, the FSA is also proposing a streamlining of regulations on the handling of certain commodities by financial instruments business operators (such as securities firms) and central counterparties. These reforms are expected to come into force within one and a half years of the Bill being passed by the Diet and published as a law.

The Bill also sets out the FSA's proposals for the mandatory use of electronic trading platforms for OTC derivatives. The FSA will require financial instruments business operators (such as securities firms) and registered financial institutions (such as banks) to use electronic trading platforms when they enter into certain OTC derivatives, to be specified in a Cabinet Office Ordinance. Initially, Yen-denominated plain vanilla interest rate swaps are likely to be specified in the Cabinet Office Ordinance. This reform is expected to come into force within three years of the Bill being passed by the Diet and published as a law.

In addition, the Bill includes proposed reforms of the regulations concerning market manipulation. The FSA is proposing that the scope of the administrative surcharge (kachokin) regime be expanded. The administrative surcharge is a monetary penalty imposed by the FSA for certain breaches of regulations made under the FIEA. In response to the growing complexity of recent cases, the FSA is proposing changes to the regulations that would capture a third party who assisted in the preparation of disclosure documents containing misstatements and any person who conducted market manipulation for the account of a third party. By contrast, the FSA has proposed a relaxation of the insider trading regulations in connection with mergers and certain business transfers. The reforms are expected to come into force within one year of the Bill being passed by the Diet and published as a law.

FSC to introduce reporting regime for large volume short selling

The Financial Services Commission (FSC) has announced plans to introduce a reporting framework for large volume short selling. The new reporting framework is intended to make domestic regulations on short selling more compatible with global principles, in particular with the 'Principles for Short Selling Regulation' proposed by the IOSCO in June 2009.

Under the proposed reporting framework, it will be mandatory for investors to report short positions that exceed a certain threshold to both market authorities and Korea Exchange (KRX). The FSC will be revising the Enforcement Decree of the Financial Investment Services and Capital Markets Act (FSCMA) to incorporate the mandatory reporting provision. Further details such as the trigger level, frequency, and timing of reporting will be reflected in the 'Regulation on Financial Investment Business', which is scheduled to be implemented within the third quarter of 2012.

SGX consults on proposed changes to reporting and registration of negotiated large trades

The Singapore Exchange (SGX) has published a consultation paper on its proposed changes to the reporting and registration of negotiated large trades (NLTs) in the derivatives market.

To enhance the reporting process for market participants, the SGX is proposing to: (1) introduce a new functionality to enable the registration of NLTs through QUEST API; and (2) extend registration hours on the eNLT system to 8.00 pm (Singapore time) for all SGX-DT contracts. The SGX intends to implement the proposed changes in the third quarter of 2012.

Comments are due by 26 March 2012.

MAS consults on proposed rules for issuance of covered bonds by banks

The Monetary Authority of Singapore (MAS) has issued a consultation paper on proposed rules relating to the issuance of covered bonds by banks incorporated in Singapore. The MAS is proposing that banks incorporated in Singapore may issue covered bonds subject to the aggregate value of assets in the cover pool being capped at 2% of the value of the total assets of the bank, as well as other requirements. The proposed requirements are set out in the draft Notice to Banks in Annex A of the consultation paper.

Comments are due by 10 April 2012.

ASIC consults on regulatory approach to platforms

The Australian Securities and Investment Commission (ASIC) is reviewing its regulatory approach to investment platforms and has published a consultation paper (CP 176) setting out its proposals to revise Regulatory Guide 148 'Investor directed portfolio services' (RG 148) and accompanying class order relief. Platforms are managed investment schemes (MISs) for holding and dealing with investments selected by clients.

Investment platforms are a growing segment of the investment funds market in Australia. ASIC is proposing that clients should be entitled to the same rights concerning their investments through those vehicles that they would have had if they had invested directly. ASIC's current policy was developed in 2000 and treats platforms as financial products. Since that time, platforms have become a significant means by which retail investors access a range of financial products. In addition, ASIC expects the Australian government's Future of Financial Advice (FOFA) reforms, which are due to come into effect later in 2012, to significantly change the platforms sector.

Comments are due by 20 April 2012.

CFTC Chairman Gensler discusses Dodd-Frank financial reforms

CFTC Chairman Gary Gensler has given a speech at the FIA International Futures Industry Conference, in which he discussed the implementation of Dodd-Frank mandated financial reforms. In particular, he indicated that:
(1) mandatory clearing could be introduced as early as

summer 2012; (2) he expects the CFTC to seek public input on the cross-border application of Dodd-Frank in spring 2012 – i.e., that a paper on extraterritoriality may be published before the end of June 2012; and (3) the CFTC is working with market participants to determine whether additional collateral protection provisions are necessary.

In addition, Mr. Gensler emphasised that financial reform will require more than the implementation of the Dodd-Frank Act. He noted that in 2012, the CFTC is also looking at ideas to enhance futures and swaps customer protections and to adapt its oversight of these markets to accommodate a changing market structure.

RECENT CLIFFORD CHANCE BRIEFINGS

ING's landmark victory brightens the outlook for State aid recipients

On 2 March 2012, the General Court in Luxembourg handed down its judgment in relation to the classification of State aid provided to ING by the Dutch State in the context of the financial crisis. Proceedings were brought by the Dutch State and ING against the European Commission, disputing the level of aid received and (as far as ING's appeal was concerned) the restructuring measures required from ING to class the aid as compatible with the common market. The Dutch Central Bank acted as intervener in ING's appeal.

Michel Petite (Clifford Chance Paris), Steven Verschuur, Helen Gornall and Pier Posthuma de Boer (Clifford Chance Amsterdam) acted for the Dutch Central Bank. The case is highly significant as it is the first time that a central bank has intervened in proceedings before the European courts, providing expert evidence relating to matters of financial stability and the viability of ING during the crisis.

This briefing discusses the General Court's judgment.

http://www.cliffordchance.com/publicationviews/publications/2012/03/ing_s_landmark_victorybrightenstheoutlookfo.html

The new FATF 40 recommendations and the impact on Hong Kong and China – a framework for the future

Since 1991 Hong Kong has been an independent member of the Financial Action Task Force (FATF). The People's Republic of China is also one of the 36 members of FATF, having become a full member in June 2007. Anti-money laundering measures and combating financing of terrorism have been an increased focus of national regulators around the world. The continued need to further strengthen agreed international standards and the evolution of money laundering techniques has led the FATF to revise its International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (the Recommendations) following its recent plenary in February 2012.

This briefing relates to the latest 40 FATF recommendations and discusses the following issues:
(1) key changes to the FATF recommendations;
(2) legislative steps taken by Hong Kong since the FATF's Mutual Evaluation Report of Hong Kong in 2008;
(3) timetable for the implementation in HK of the recommendations; (4) FATF follow-up report on China; and (5) impact of the changes for HK firms.

http://www.cliffordchance.com/publicationviews/publications/2012/03/the_new_fatf_40_recommendationsandtheimpacto.html

Executive Remuneration – shareholders' say on pay

The UK government has formally launched its consultation on improving the governance arrangements surrounding executive pay.

This briefing discusses the proposed model that aims to enhance shareholders' influence over executive pay.

http://www.cliffordchance.com/publicationviews/publications/2012/03/executive_remunerationshareholderssayonpay.html

The Financial Transactions Tax introduced in France

The legislation on French Financial Transactions Tax (FTT) included in the First Amending Finance Bill for 2012 was adopted by the French Parliament on 29 February 2012. Three different taxes are introduced, as from 1 August 2012, relating to: (1) the acquisition of listed shares issued by large French companies; (2) high frequency trading; and (3) certain credit default swaps (CDS) on sovereign debt.

The FTT on acquisition of listed shares issued by large French companies is due irrespective of the tax residence of the parties involved (French or foreign seller or purchaser). The FTTs on high frequency trading and sovereign CDS aim at penalising what is considered harmful behaviour by frequency trading operators and speculation on sovereign debt. These taxes apply only when the activities are performed in France.

This briefing discusses the French FTTs.

http://www.cliffordchance.com/publicationviews/publications/2012/03/the_financial_transactionstaxintroducedi.html

Polish Legislation Newsletter

The Polish Legislation Newsletter summarises selected recent changes to Polish law. The January to February 2012 edition contains information on, amongst other things: (1) an Act amending the Act on Settlement Finality in Payment and Securities Settlement Systems and on the Terms of Supervision of Those Systems, the Act on Certain Forms of Financial Collateral and the Act – Bankruptcy and Recovery Proceedings Law; (2) an Ordinance on the Detailed Content of the Conditions of Issue of Investment Certificates Issued by a Closed-end Investment Fund that is not a Public Closed-end Investment Fund; and (3) an Ordinance on Investments Made by Closed-end Investment Funds in Derivatives and Certain Economic Rights.

http://www.cliffordchance.com/publicationviews/publications/2012/03/polish_legislationnewsletterjanuaryfebruar.html

Creation of the fund for financing payments to suppliers – Royal Decree-Law 7/2012, of 9 March

On 25 February 2012, the Official State Gazette published Royal Decree-Law 7/2012, of 9 March, creating the fund for financing payments to suppliers.

This briefing discusses the creation of the fund.

http://www.cliffordchance.com/publicationviews/publications/2012/03/creation_of_the_fundforfinancingpaymentst.html

www.cliffordchance.com