

# International Regulatory Update

16 – 20 April 2012

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### **IOSCO and CPSS issue new standards for financial market infrastructures**

IOSCO and the Committee on Payment and Settlement Systems (CPSS) have published three documents intended to promote global efforts to strengthen financial market infrastructures (FMIs):

- a report setting out principles for financial market infrastructures;
- a consultation paper on an assessment methodology for these new standards; and
- a consultation paper on a disclosure framework for the standards.

The principles apply to all systemically important payment systems, central securities depositories, securities settlement systems, central counterparties and trade repositories. The new principles introduce new or more demanding requirements in areas including: (1) the financial resources and risk management procedures an FMI uses to cope with the default of participants; (2) the mitigation of operational risk; (3) the links and other interdependencies between FMIs through which operational and financial risks can spread; (4) achieving the segregation and portability of customer positions and collateral; (5) tiered participation; and (6) general business risk.

Comments on the consultation papers are due by 15 June 2012. CPSS and IOSCO members are aiming to adopt the new standards by the end of 2012. FMIs are expected to observe the standards as soon as possible.

[Link to principles for financial market infrastructures, assessment methodology and disclosure framework](#)

### **Short selling and CDS: ESMA publishes technical advice on possible delegated acts**

ESMA has published its [technical advice](#) to the European Commission on possible delegated acts concerning the regulation on short selling and certain aspects of credit default swaps (CDS).

In particular, the advice covers:

- the definition of when a natural or legal person is considered to own a financial instrument for the purposes of the definition of short sale;
- the net position in shares or sovereign debt covering the concept of holding a position, the case when a person has a net short position and the method of calculation of such a position including when different

entities in a group have long or short positions or for fund management activities related to separate funds;

- cases in which a CDS transaction is considered to be hedging against a default risk or the risk of a decline of the value of the sovereign debt and the method of calculation of an uncovered position in a CDS;
- the initial and incremental levels of the notification thresholds to apply for the reporting of net short positions in sovereign debt;
- the parameters and methods for calculating the threshold of liquidity on sovereign debt for suspending restrictions on short sales of sovereign debt;
- what constitutes a significant fall in value for various financial instruments and also specifies, in the form of a draft regulatory technical standard, the method of calculation of such falls; and
- the criteria and factors to be taken into account by competent authorities and ESMA in determining when adverse events or developments arise.

### **EBA consults on draft guidelines on assessing suitability of management body members and key function holders**

The EBA has published a [consultation paper](#) which contains its draft guidelines on the assessment of the suitability of members of the management body and key function holders. The proposed guidelines set out the process, criteria and minimum requirements for assessing the suitability of those persons, and are intended to ensure the quality of the assessments made.

The draft guidelines contain provisions to be followed by both credit institutions and competent authorities when assessing the suitability of persons and set out the criteria for the assessment and documentation requirements for institutions. They also contain a notification requirement and provide that, in cases where a member of the management body is not suitable, the credit institution and, if necessary, the competent authority must take appropriate action.

The scope of the guidelines is not limited to members of the management body, but extends to the members of the supervisory function and to key function holders. Financial and mixed financial holding companies are also included in the guidelines.

Responses are due by 18 July and a public hearing will be held on 1 June 2012.

### **G30 report on effective governance of financial institutions published**

The G30 has published its latest [report](#), 'Toward Effective Governance of Financial Institutions', which argues that further improvements in corporate governance at major financial services firms are crucial to securing greater financial stability. Amongst other things, the report discusses ways to strengthen the governance functions of the board of directors. It concludes that splitting the roles of CEO and Chairman should be strongly encouraged, although a combined role may be acceptable if the board appoints a lead or senior independent director with the responsibility and authority to act as though s/he were the non-executive chairman under circumstances that call for greater independence.

According to the authors, a functional governance system requires the following elements: (1) a board of directors that carries out its vital role; (2) a set of management protocols for governing and controlling operations in huge and complex organisations that assures clear management accountability; (3) a constructive and rigorous supervisory arrangement; and (4) shareholders who have an appropriate voice and who exercise their rights and obligations.

#### [Executive Summary](#)

### **Hector Sants issues letter on MF Global and special administration regime**

Hector Sants, FSA Chief Executive, has written a [letter](#) to Andrew Tyrie, Chairman of the Treasury Committee, about MF Global UK Limited and the special administration regime (SAR). In the letter, which is dated 19 March 2012, Mr. Sants provides an update on the current client assets position, reasons for the failure of MF Global, and comments on the initial lessons learnt around the operation of the SAR and the UK client assets framework.

### **De Wit Committee publishes final report on responses to financial crisis**

The Dutch Parliamentary Inquiry Committee set up to investigate the causes of, consequences and official responses to the financial crisis has published its [final investigative report](#). The De Wit Committee's report discusses the appropriateness of the emergency measures taken by the Dutch cabinet at the height of the financial crisis.

The report includes several recommendations regarding the stability of the Dutch financial sector and the powers of the

Dutch supervisors and government to intervene, if necessary. In particular, the Committee suggests the imposition of a ringfence for all savings and lending activities of Dutch banks. The Minister of Finance and the Dutch Central Bank (DNB) have so far taken the view that banks should only be made ringfence-ready.

### **Australian Council of Regulators consults on OTC derivatives changes**

The Australian Council of Regulators has published a [consultation paper](#) on the framework implementation of G20 commitments on OTC derivatives in Australia. The framework does not introduce any trade reporting, central clearing or trade execution obligations for OTC derivatives transactions. Rather, the framework creates the mechanism for the Australian Securities and Investment Commission (ASIC) to mandate clearing and reporting (and implement supporting regulations and rules). Trade reporting, clearing and execution obligations will be created only after further market analysis and additional consultation is undertaken by ASIC and other Council agencies.

At this stage, the move to clearing and the form of central counterparty (CCP) is to be left to market led outcomes. The view has been taken that Basel III prudential obligations and additional margin requirements for non-cleared derivatives will drive the market towards clearing and CCPs will develop organically in response. There is no requirement for the CCPs to be developed onshore. However, if an offshore CCP becomes systemically important, ASIC will be given powers to require it incorporate onshore and subject it to ASIC and Australian Reserve Bank regulation.

Responses are due by 15 June 2012.

### **FSA further extends temporary restrictions on short selling activities and relaxation of share buyback regulations**

The Japanese Financial Services Agency (FSA) has announced that it is extending the temporary restriction on short selling activities and the relaxation of the share buyback regulations until 31 October 2012.

Under the temporary restriction on short selling activities:

- 'naked' short selling activities, where shares are sold without first borrowing or arranging to borrow the relevant shares, are prohibited; and
- any investor that holds a short sale position of 0.25% or more of the outstanding shares in the relevant listed

entity has an obligation to report their short sale position to the stock exchange via a broker.

Under the temporary relaxation of the share buyback regulations:

- the daily cap for share buybacks by a listed company is increased to 100% of the average daily number of shares traded over the preceding four-week period; and
- share buybacks by a listed company can be made at any time during trading hours.

[Announcement \(Japanese\)](#)

[Announcement \(English\)](#)

#### **FSA publishes finalised Basel III compliant administrative notices**

On 7 February 2012, the Japanese Financial Services Agency (FSA) published draft administrative notices setting out capital requirements for internationally active financial institutions in Japan and inviting public comments by 7 March 2012. The FSA has now published the finalised administrative notices together with its response to the comments.

The content of the administrative notices reflects the rules contained in Part 1, sections I and II of the Basel III rules text, 'A global regulatory framework for more resilient banks and banking systems'. The FSA has also announced that it will publish a set of Q&As to provide further details, although it has not indicated when they will be published.

The new administrative notices will take effect on 31 March 2013.

[Press release \(Japanese\)](#)

[Press release \(English\)](#)

#### **New York Fed publishes staff report on shadow banking**

The Federal Reserve Bank of New York (FRBNY) has published a [staff report](#) on shadow banking regulation. The report was developed by New York Fed staff through a review of recent literature on shadow banking, and it attempts to provide a conceptual framework for its regulation.

The report explains that shadow banks conduct credit intermediation without direct, explicit access to public sources of liquidity and credit guarantees. According to the report, shadow banks contributed to the credit boom in the early 2000s and collapse during the financial crisis of 2007-09. The report notes that, since the financial crisis,

regulatory reform efforts have sought to strengthen the stability of the shadow banking system. The report finds that, despite significant efforts by lawmakers, regulators, and accountants, progress in achieving a more stable shadow banking system has been uneven.

#### **CFTC and SEC approve final rules to further define 'swap dealer', 'major swap participant' and 'eligible contract participant'**

The CFTC and the SEC have approved their final 'entity definitions' rule setting the definitions for the terms swap/security-based swap dealer (SD), major swap/security-based swap participant (MSP) and eligible contract participant (ECP). The adopting release provides certain interpretive guidance on the SD definition and clarifies that the SEC's dealer-trader distinction may be applied for identifying SDs.

The rules provide exclusions for swaps in connection with originating loans, swaps between affiliates and certain hedging swaps as defined in an interim final rule adopted alongside the SD definition. The final rule's SD definition also provides an exemption for an entity engaging in a de minimis quantity of swaps as provided for in the Dodd-Frank Act. During the initial phase-in period, the de minimis threshold effectively would be USD 8 billion in aggregate gross notional amount of the swaps entered into over the prior 12 months. If the Commissions take no further action, the phase-in period will end after five years and the de minimis threshold will be reduced to USD 3 billion.

The final rule defines terms used in the Dodd-Frank Act's definition of MSP and ECP including an exclusion for positions held for 'hedging or mitigating commercial risk' under the first part of the MSP definition.

[Fact Sheet](#)

[Q&A](#)

## **UPCOMING CLIFFORD CHANCE EVENT**

### **Bagel Briefings – Resolution and Recovery Planning – Dodd-Frank 'Living Wills'**

Clifford Chance cordially invites you to a discussion about the resolution and recovery planning required under Dodd-Frank. The requirement under the Dodd-Frank reforms that large financial institutions prepare so-called 'living wills' in the event of their failure presents a host of challenging legal and practical problems. Partners Rick Antonoff, Nick O'Neill and Thomas Pax of our global regulatory and

insolvency practices will discuss the requirements and some of the more complex challenges they pose to covered institutions and their professionals.

The briefing will take place at 8am on 25 April 2012 at Clifford Chance's New York offices at:

31 West 52 Street  
New York, NY 10019  
4th Floor Conference Centre.

[Registration page](#)  
[Bagel Briefings – Spring 2012 Legal Development Series invitation](#)

Please feel free to contact [NYSEminars@CliffordChance.com](mailto:NYSEminars@CliffordChance.com) if you have any queries.

## RECENT CLIFFORD CHANCE BRIEFINGS

### Are improvements to EU insolvency law required?

The European Commission has recently launched a consultation examining the current EU insolvency regime, ten years on from the introduction of the EU Insolvency Regulation (EUIR). This initiative is taking place in the context of the Commission's wider measures to promote 'Justice for Growth'. The consultation seeks input from stakeholders on how the EUIR is operating at present and seeks suggestions on how it can be improved. The consultation provides stakeholders with an excellent opportunity to participate and influence the development of insolvency law at an EU level.

This briefing highlights some of the key issues.

[http://www.cliffordchance.com/publicationviews/publications/2012/04/help\\_improvementstoEUinsolvencylawrequired.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/help_improvementstoEUinsolvencylawrequired.html)

### Employee Benefits Newsletter April 2012

The April 2012 edition of Employee Benefits News considers how the reduction in the highest rate of income tax from 50% to 45% (from 6 April 2013) should prompt more companies to consider deferrals of income tax using share plans. It also outlines other Budget announcements, including moves by the Government to re-invigorate UK-tax approved share plans.

Tax-related changes for share plans will not be the only item on corporate agendas. As reported in our March 2012 briefing note, the Government has launched a consultation on shareholder voting rights on executive remuneration.

This edition of the newsletter sets out some of our initial thoughts on the implications of these shareholder voting proposals for executive share plans. It seems relatively certain that, once the scope of the revised voting regime has been finalised, some changes to share plan rules will be required.

This edition also highlights the use of 'private-equity style' plans in listed companies as an alternative to standard long-term incentive arrangements, and reminds readers of the changes to the PAYE withholding requirements for share plans since 6 April 2012.

Newsletter

[http://www.cliffordchance.com/publicationviews/publications/2012/04/employee\\_benefitsnewsletterapril2012.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/employee_benefitsnewsletterapril2012.html)

Executive Remuneration: shareholders' say on pay

[http://www.cliffordchance.com/publicationviews/publications/2012/03/executive\\_remunerationshareholderssayonpay.html](http://www.cliffordchance.com/publicationviews/publications/2012/03/executive_remunerationshareholderssayonpay.html)

### Contentious Commentary – a review for litigators

This newsletter provides a summary of recent developments in litigation. Headlines in this edition include, amongst other things: (1) Brokers can look after their own interests when closing out; (2) Commercial parties can determine the allocation of risks themselves; (3) Hiding a breach of contract brings benefits; (4) Beneficiary is the decision maker for rectification; (5) No terms to be implied in the ISDA Master Agreement; (6) Venue and seat of arbitration synonymous; and (7) Lehman client money decision upheld;

[http://www.cliffordchance.com/publicationviews/publications/2012/04/contentious\\_commentary-april2012.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/contentious_commentary-april2012.html)

### Recourse claims are future claims' – Dutch Supreme Court judgment relevant for enforcement and structuring of new transactions

On 6 April 2012 the Dutch Supreme Court rendered a judgment in a case involving the statutory limitation period of recourse claims of one joint and several debtor against another joint and several debtor. The judgment includes an important consideration about the moment on which recourse claims are deemed to come into existence.

This briefing discusses the judgment and its implications.

[http://www.cliffordchance.com/publicationviews/publications/2012/04/recourse\\_claimsarefutureclaimsdutchsuprem.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/recourse_claimsarefutureclaimsdutchsuprem.html)



### **Prudent pension investments – Court nullifies Dutch Central Bank instruction**

The Court of Rotterdam recently nullified a binding instruction given by the Dutch Central Bank (DNB) relating to the application of the prudent person rule. The DNB had instructed a pension fund to reduce its investments in gold from 13% to 3% of its total investments. The Court also ruled that it will investigate whether the DNB is liable for losses incurred by the pension fund, said to be estimated at approximately EUR 10 million.

This briefing discusses the Court's decision.

[http://www.cliffordchance.com/publicationviews/publications/2012/04/prudent\\_pension\\_investmentscourtnullifie.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/prudent_pension_investmentscourtnullifie.html)

### **Implementation of the extraordinary mechanism for paying suppliers of Spain's Autonomous Communities**

On 17 April 2012, the Official State Gazette published Order PRE/774/2012, of 16 April, containing the Decision of the Government Delegate Commission for Economic Affairs dated 22 March 2012, on the implementation of the mechanism for paying suppliers of Spain's Autonomous Communities.

This briefing discusses the Order.

[http://www.cliffordchance.com/publicationviews/publications/2012/04/implementation\\_oftheextraordinarymechanismfo.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/implementation_oftheextraordinarymechanismfo.html)

### **Extraordinary financing mechanism for paying suppliers of Spain's Autonomous Communities**

On 14 April 2012, the Official State Gazette published the Decision dated 13 April 2012 of the General Secretariat for Regional and Local Coordination, which in turn published Decision 6/2012, dated 6 March, of the Fiscal and Financial Policy Council, which establishes the general conditions of an extraordinary financing mechanism for the payment of suppliers to the Autonomous Communities.

This briefing provides an overview of the financing mechanism.

[http://www.cliffordchance.com/publicationviews/publications/2012/04/extraordinary\\_financingmechanismforpayin.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/extraordinary_financingmechanismforpayin.html)

### **The Civil Code reloaded**

On 2 April 2012 the Russian President submitted to the State Duma a draft bill on amendments to the Civil Code of the Russian Federation which is expected to change significantly 'the rules of the game' for all areas of business, from corporate relationships and M&A to the real estate

market, banking activities and structured finance products (securitisation).

This briefing provides a brief overview of the most salient of these changes.

[http://www.cliffordchance.com/publicationviews/publications/2012/04/the\\_civil\\_code\\_reloadedenglish.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/the_civil_code_reloadedenglish.html)

### **US Supreme Court limits suits against organizations under torture statute**

The Supreme Court has issued a unanimous decision in *Mohamad v. Palestinian Authority*, No. 11-88, holding that companies and other organizations cannot be sued under the US Torture Victim Protection Act (TVPA). That statute creates a federal private right of action for torture and extrajudicial killing committed by '[a]n individual' acting under color of foreign law. 28 U.S.C. § 1350 & note. In short, the Court held that 'individual' means a natural person, not a legal entity or organization. The case marks an important limitation on liability of corporations and others for acts committed outside the United States.

This briefing discusses the decision.

[http://www.cliffordchance.com/publicationviews/publications/2012/04/u\\_s\\_supreme\\_courtlimitssuitsagainst.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/u_s_supreme_courtlimitssuitsagainst.html)

### **The Federal Reserve issues Volcker Rule Conformance clarification**

The Federal Reserve Board has issued a policy statement clarifying the manner in which the Volcker Rule prohibitions would apply and would be enforced during the statutory two-year Conformance Period. Despite public statements by Ben Bernanke, the Chairman of the Federal Reserve Board, and others concerning the regulators' expectations with respect to compliance with the Volcker Rule upon its effectiveness, such expectations remained largely shrouded in mystery. The guidance now provided by the Federal Reserve is a welcome formal statement that does provide a useful indication of the regulators' expectations during the Conformance Period.

This briefing discusses the policy statement, which notes that the regulators will generally expect 'good-faith' compliance efforts to be made during the Conformance Period.

[http://www.cliffordchance.com/publicationviews/publications/2012/04/the\\_federal\\_reserveissuesvolckerrul.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/the_federal_reserveissuesvolckerrul.html)

## A Comprehensive look at the proposed FATCA Regulations

The US Treasury Department and the IRS recently published proposed regulations implementing the Foreign Account Tax Compliance provisions of the Hiring Incentives to Restore Employment Act of 2010 (FATCA), which provide guidance on how the IRS will apply new US tax compliance rules beginning in 2014 to non-US banks, financial intermediaries and investment vehicles. The

purpose of FATCA is to force non-US banks, financial intermediaries, investment vehicles and certain insurance companies to report information on accounts held by US persons to the IRS.

This briefing provides an overview of the proposed regulations.

[http://www.cliffordchance.com/publicationviews/publications/2012/04/a\\_comprehensive\\_lookattheproposedfatc.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/a_comprehensive_lookattheproposedfatc.html)

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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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