

International Regulatory Update

26 – 30 March 2012

IN THIS WEEK'S NEWS

- MiFID review: ECON Committee reports on Commission proposals
- Short selling and CDS: Regulation published in Official Journal; ESMA publishes draft technical standards
- Single euro payments area: regulation on credit transfers and direct debits published in Official Journal
- OTC derivatives and market infrastructures: European Parliament approves proposed regulation
- Market abuse review: ECON Committee reports on proposed regulation and criminal sanctions directive
- EFC publishes new collective action clause for euro area government securities
- House of Lords EU Committee reports on proposals for financial transaction tax
- FSA issues guidance on financial promotions
- Finance Bill 2012 introduced into Parliament
- HMRC consults on possible changes to income tax rules on interest
- FSA consults on Financial Services Compensation Scheme rule changes
- City of London publishes report on financial transaction tax
- FSA issues policy statement on CASS Resolution Pack
- OTC derivatives: Bank of England publishes paper on determining central clearing eligibility
- BaFin establishes electronic notification platform for net short positions
- FSTB consults on proposed amendments to Inland Revenue Ordinance and Stamp Duty Ordinance to promote Islamic bond market
- OTC derivatives: Hong Kong Legislative Council publishes paper on progress in regulation of market
- OTC derivatives: Malaysian authorities publish concept paper on proposed recordkeeping and reporting requirements
- Basel III: Reserve Bank of New Zealand consults on further elements of capital adequacy requirements
- US Federal agencies propose revisions to leveraged finance guidance

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MiFID review: ECON Committee reports on Commission proposals

The European Parliament's ECON Committee has published draft reports by Markus Ferber MEP, dated 16 and 27 March 2012, on the European Commission's MiFIR and MiFID proposals.

[Draft MiFID report](#)

[Draft MiFIR report](#)

Short selling and CDS: Regulation published in Official Journal; ESMA publishes draft technical standards

The [regulation](#) on short selling and certain aspects of credit default swaps (CDS) has been published in the Official Journal. It entered into force on 25 March 2012 and will apply from 1 November 2012.

The regulation contains a ban on uncovered sovereign CDS, i.e. buying CDS protection otherwise than for hedging purposes, but subject to a limited power for national regulators temporarily to suspend the ban when it interferes with sovereign debt markets. It also includes new rules on reporting of net short positions to regulators and to the market and new powers for the ESMA to coordinate Member State actions.

In addition, ESMA has published its [draft regulatory and implementing technical standards](#) in relation to the regulation on short selling and certain aspects of credit default swaps (CDS).

The draft technical standards were submitted to the European Commission on 31 March 2012. The Commission now has three months to decide whether to endorse ESMA's draft technical standards. ESMA has indicated that a further regulatory technical standard on the method of calculation of the fall in value of a financial instrument required under Article 24(8) of the regulation will be submitted together with the technical advice in April 2012.

Single euro payments area: regulation on credit transfers and direct debits published in Official Journal

The [SEPA regulation](#) has been published in the Official Journal. The regulation sets 1 February 2014 as the migration deadline for credit transfers and (in respect of

most requirements) for direct debits. It further provides for a phasing out of multilateral interchange fees, which currently apply to direct debit transactions in certain Member States, by 1 February 2017 for national payments. It also phases out, at the latest by 1 February 2016, the requirement to provide the business identifier code (BIC), with only the IBAN remaining as the account identifier for cross-border and national payments.

OTC derivatives and market infrastructures: European Parliament approves proposed regulation

The European Parliament's plenary session has approved the proposed regulation on OTC derivatives and market infrastructures. The draft regulation had been provisionally agreed by Parliament and Council negotiators on 9 February 2012. The regulation now needs to be formally adopted by the Council and will enter into force 20 days after its publication in the Official Journal.

Before the rules are implemented, the European Supervisory Authorities (ESAs) need to develop technical standards. The ESAs are required to submit these standards to the European Commission by 30 September 2012. The Commission expects to adopt these new standards by the end of 2012, in line with G20 commitments. Central counterparties will have to apply for authorisation under the new European regime at the latest six months after the adoption of the technical standards by the Commission. In the meantime, CCPs must continue to comply with national rules on authorisation. The date of application of the reporting obligation and clearing obligations will be determined in the new technical standards to be developed by 30 September 2012.

[Press release](#)

[FAQs](#)

[Statement by Commissioner Barnier](#)

Market abuse review: ECON Committee reports on proposed regulation and criminal sanctions directive

The European Parliament's ECON Committee has published draft reports by Arlene McCarthy MEP on the European Commission's proposal for a regulation on insider dealing and market manipulation and a directive on criminal sanctions for insider dealing and market manipulation.

[Draft regulation report](#)

[Draft directive report](#)

EFC publishes new collective action clause for euro area government securities

The Economic and Financial Committee's Sub-Committee on EU Sovereign Debt Markets has published the new collective action clause to be used as of 1 January 2013 in all euro area government securities with a maturity above one year. This will apply to both foreign and domestic law governed securities and includes an aggregation feature. The introduction of the model CAC is not expected to affect any euro area government security issued prior to 1 January 2013 unless such securities include a collective action clause which allows for their modification on an aggregate basis as contemplated under the model CAC (currently this is thought to apply only to the English-law governed bonds recently issued by the Hellenic Republic as part of its PSI transaction, which include a form of collective action clause based on the new model CAC.)

[Overview page](#)

[Collective action clause](#)

[Supplemental provisions](#)

[Supplemental explanatory note](#)

House of Lords EU Committee reports on proposals for financial transaction tax

The House of Lords European Union Sub-Committee on Economic and Financial Affairs has published a [report](#) which argues that the UK government should not agree to the European Commission's proposals for a financial transaction tax (FTT). The Committee believes that the FTT proposed by the Commission is flawed and will fail to fulfil the Commission's stated objectives. According to the report, the proposals place the City of London under severe threat and are likely to force financial institutions to relocate away from the UK and the EU as a whole.

FSA issues guidance on financial promotions

The FSA has published new guidance on financial promotions to consolidate previous messages to fund managers and others about what it considers to be fair, clear and not misleading in advertising, and how past performance can be dealt with. The guidance comments on the importance of financial promotions both for consumers and as an indication of how firms treat their customers. It discusses compliance with the fair, clear and not misleading rule, and issues of balance. In particular, the guidance covers 'image' advertising and the past performance rules.

In addition, the FSA has published separate guidance on advertising ISAs, and advertisements for investment

professionals. The FSA has also published a summary of the feedback it received to its consultations on both sets of guidance.

[Finalised guidance – Financial Promotions, Fund Performance and Image Advertising](#)

[Finalised guidance – Advertising ISAs & Adverts for Investment Professionals](#)

[Summary of feedback received](#)

Finance Bill 2012 introduced into Parliament

The UK government has published the [Finance Bill](#), which will enact tax measures announced in the March 2011 and March 2012 Budgets.

Amongst other things, the Bill includes provisions on:

- the reform of controlled foreign companies (CFC) rules;
- improvements to the real estate investment trust regime;
- the bank levy rate and amendments;
- the taxation of insurance companies;
- tackling tax avoidance and evasion;
- increasing the tax-free personal allowance to GBP 8,105 from April 2012;
- reducing the additional rate of income tax to 45% from April 2013; and
- cutting the corporation tax rate to 24% in 2012 and 23% in 2013.

[Explanatory notes](#)

HMRC consults on possible changes to income tax rules on interest

HM Revenue & Customs (HMRC) has published a [consultation paper](#) on possible changes to income tax rules on the taxation of interest received, and on deduction of income tax from interest paid.

In particular, the paper invites comments on the following proposals:

- a change to the exemption from the requirement to deduct tax from quoted Eurobonds for certain intra-group transactions – the paper invites views on amending the quoted Eurobond exemption so that it would not apply where the Eurobond is issued to a fellow group company, and listed on a stock exchange on which there is no substantial or regular trading in the Eurobond;

- a new rule in Chapter 2 of Part 4 of the Income Tax (Trading and Other Income) Act 2005 to determine the interest component in compensation payments;
- new rules in Chapters 2 and 3 of Part 15 of the Income Tax Act 2007 to provide for deduction of tax at source from the interest component in compensation payments;
- in relation to the rules on deduction of income tax, the abolition of the concept of 'yearly interest', and a change to the meaning of the term 'yearly interest arising in the UK';
- a new rule to put the tax treatment of 'interest in kind' beyond doubt; and
- a new 'disguised interest' rule to address income tax avoidance in relation to interest.

Comments are due by 22 June 2012.

FSA consults on Financial Services Compensation Scheme rule changes

The FSA has published a [consultation paper \(CP12/07\)](#) setting out proposed changes to some of the rules in its Compensation sourcebook (COMP) that govern the operation of the Financial Services Compensation Scheme (FSCS). The proposed package of measures is intended to enable the FSCS to handle claims in a more streamlined way and to address loss of client money because of the failure of a financial services firm.

In particular, the proposed rule changes are intended to help the FSCS when the value of a claimant's investment is uncertain. The FSA is proposing to give the FSCS additional flexibility in appropriate circumstances to pay full compensation where, under present rules, consumers would have to wait an excessively long time to receive full compensation. CP12/07 also proposes a number of other changes to streamline the FSCS's claims handling, including simplifying eligibility criteria. Finally, CP12/07 discusses the need to ensure that, within the existing framework for protecting policyholders, the FSA's rules would be workable in practice in the event of an insurer, in particular a life insurer, failing.

Comments on most of the proposals in CP12/07 are due by 26 June 2012 and the FSA intends to provide feedback on these proposals by the end of September. However, to give firms sufficient time to update their communications, the FSA has reduced the consultation period to one month for the proposed removal of the FSCS's telephone number from the information deposit-takers must give depositors. Comments on this proposal are due by 26 April 2012 and

the FSA intends to make the rules for this change in May 2012.

City of London publishes report on financial transaction tax

The City of London has published a [report](#) on financial transaction taxes. The report, which was prepared for the International Regulatory Strategy Group, reviews selected impact assessments and analyses relating to financial transaction taxes and, in particular, the European Commission's proposal for an EU financial transaction tax. It argues that while the proposed EU FTT will not effectively address many of the key objectives of policymakers, and is unlikely to raise significant incremental tax revenues, it will give rise to behavioural changes and market distortions that will cause permanent damage to EU economies, and that legislators would therefore be unwise to support it.

The City of London has emphasised that the report is intended as a basis for discussion only.

FSA issues policy statement on CASS Resolution Pack

The FSA has published a [policy statement \(PS12/06\)](#) which reports on the main issues in relation to the CASS Resolution Pack arising from its August 2011 [consultation paper \(CP11/16\)](#) on recovery and resolution plans.

PS12/06 also sets out the FSA's final rules requiring certain firms to maintain and be able to retrieve a CASS Resolution Pack, which contains documents and records that would help an insolvency practitioner return client money and safe custody assets more quickly following an investment firm failure. Firms have until 1 October 2012 to comply with the CASS Resolution Pack rules.

The FSA has indicated that it will set out its response to the other matters covered in CP11/16 in due course.

OTC derivatives: Bank of England publishes paper on determining central clearing eligibility

The Bank of England has published a [paper](#) on determining central clearing eligibility of OTC derivatives. The paper notes that suitability for mandatory central clearing is likely to depend on product and process standardisation, but also on market liquidity. According to the authors, liquidity is an important constraint and may require central counterparties (CCPs) to modify risk management models. The paper further states that systemic risk reduction benefits associated with central clearing can only be achieved when CCPs have robust risk management processes. The authors argue that novation to CCPs is unlikely to be

practical where operational processes are not automated, while risk modelling and default management become particularly challenging when products are illiquid. As a result, they conclude that there may be a natural boundary for the central clearing obligation, with less liquid products, or products for which operational process remain bespoke and less-automated, unlikely to be suitable for a central clearing obligation.

The Bank has emphasised that the views expressed in the paper are those of the authors, and not necessarily those of the Bank of England.

BaFin establishes electronic notification platform for net short positions

Section 30i paragraph 1 of the German Securities Trading Act and the Regulation on the Sale of Net Short Positions have entered into force. These provisions introduce further obligations regarding notification and disclosure requirements for net short positions and establish an electronic notification system. Users can register in advance to use the electronic notification system without delay. The relevant forms can be found on the Federal Financial Services Supervisory Authority's (BaFin's) platform for notification and publication.

[BaFin publication regarding the notification procedure \(in German\)](#)

[BaFin publication regarding the notification platform \(in German\)](#)

FSTB consults on proposed amendments to Inland Revenue Ordinance and Stamp Duty Ordinance to promote Islamic bond market

The Hong Kong Financial Services and the Treasury Bureau (FSTB) has issued a [consultation paper](#) on proposed amendments to the Inland Revenue Ordinance and Stamp Duty Ordinance intended to promote the development of an Islamic bond (sukuk) market in Hong Kong. In particular, the proposed legislative amendments are intended to level the playing field for common types of sukuk as compared to their conventional counterparts in terms of profits tax, property tax and stamp duty liabilities.

Comments are due by 28 May 2012. Subject to market feedback, the FSTB intends to introduce the relevant amendment bill into the Legislative Council in the 2012-13 legislative session.

OTC derivatives: Hong Kong Legislative Council publishes paper on progress in regulation of market

The Legislative Council has published a [paper](#) submitted jointly by the Financial Services and the Treasury Bureau (FSTB), the Securities and Futures Commission (SFC) and the Hong Kong Monetary Authority (HKMA), which provides an update on the progress in developing a regulatory regime for the OTC derivatives market and highlights the need to introduce interim measures to facilitate voluntary clearing of OTC derivatives transactions to enhance Hong Kong's market competitiveness, ahead of the introduction of a more comprehensive clearing regime.

The paper notes that the HKMA and SFC will provide further clarification and refinements of their proposals presented in the joint consultation paper issued on 17 October 2011, and intend to publish the consultation conclusions in the second quarter of 2012. The FSTB, SFC and HKMA intend to table the relevant Gazette Notice on the interim measures to support voluntary clearing of OTC derivatives transactions at the Legislative Council for negative vetting in May 2012, and aim to introduce the relevant Bill into the Legislative Council in the fourth quarter of 2012.

OTC derivatives: Malaysian authorities publish concept paper on proposed recordkeeping and reporting requirements

The Bank Negara Malaysia (BNM) and the Perbadanan Insurans Deposit Malaysia (PIDM) have jointly published a [concept paper](#) on proposed recordkeeping and reporting requirements for OTC derivatives. The concept paper invites comments on the proposal for institutions to maintain and report data relating to OTC derivatives in a standardised form so as to facilitate regulatory and supervisory assessment.

In particular, the implementation of the recordkeeping and reporting requirement is intended assist BNM and PIDM in monitoring exposures of regulated institutions to OTC derivatives and conducting resolution activities, including but not limited to making the determination on the transfer of the OTC derivatives portfolio of a failing member institution of PIDM to a bridge institution or a qualified third party during a resolution.

Detailed requirements and templates for recordkeeping and reporting are also set out in the concept paper.

Comments are due by 30 April 2012.

Basel III: Reserve Bank of New Zealand consults on further elements of capital adequacy requirements

The Reserve Bank of New Zealand has published a [consultation paper](#) on further elements of Basel III capital adequacy requirements in New Zealand. In particular, the new paper covers: (1) the operation of the conservation buffer; (2) the countercyclical buffer; and (3) loss absorbency – minimum requirements to ensure that all classes of capital instruments fully absorb losses at the point of non-viability. The paper also proposes transitional arrangements.

Comments are due by 13 April 2012. The Reserve Bank intends to consult on the remaining elements of Basel III separately. These include counterparty credit risk, addressing reliance on external credit ratings, and disclosure requirements.

US Federal agencies propose revisions to leveraged finance guidance

The Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) have invited comments on proposed revisions to the interagency leveraged finance guidance issued in 2001. Transactions covered by this guidance involve a borrower with a degree of financial or cash flow leverage that significantly exceeds industry norms as measured by various debt, cash flow, or other ratios.

In response to changes in the market, the agencies are suggesting revisions to the following five areas: (1) establishing a sound risk management framework; (2) underwriting standards; (3) valuation standards; (4) pipeline management; and (5) reporting and analytics.

Comments are due by 8 June 2012.

[Proposed guidance](#)

RECENT CLIFFORD CHANCE BRIEFINGS

New product documentation for Mubadalatul Arbaah (Profit Rate Swaps)

Today marks a further milestone in the development of standardised documentation for the Islamic finance industry with the publication by ISDA and the International Islamic Financial Market (IIFM) of template product documentation for Mubadalatul Arbaah (Profit Rate Swaps) designed to be used with the ISDA/IIFM Tahawwut Master Agreement.

This briefing provides an overview of the new template product documentation.

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

UK withholding tax – new HMRC proposal to significantly restrict exemptions

HMRC has launched a consultation on the UK Income Tax treatment of interest, with particular focus on withholding tax. This is relevant for UK companies which pay interest and other companies paying interest which has a UK source, but will be particularly significant for UK companies paying interest overseas and to UK companies which currently take advantage of the Quoted Eurobond exemption. Changes are also proposed to the PIK Note rules.

This briefing discusses HMRC's proposals.

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

The Lehmans Supreme Court Judgment and Client Money – Further Reflections

Now that the Supreme Court has given its judgment on certain issues concerning client money held by Lehman Brothers International (Europe) Limited at the time its administration proceedings commenced, we seem to have some clarity on the application of the CMR to client money held by a firm in the context of MiFID business where such firm is insolvent. However, as indicated by the fact that the conclusions on two of the three issues were only determined by a majority of three to two, the issues are not clear-cut. Moreover, the points regarding which there is now a clear ruling are likely to give rise to further questions.

This briefing discusses the Supreme Court judgment and its implications.

http://www.cliffordchance.com/publicationviews/publications/2012/03/the_lehmans_supremecourtjudgmentandclien.htm

Sovereign Debt Crisis – Implications for contractual arrangements governed by German law

The sovereign debt crisis has led to new political considerations. Even the possibility of a European Member State exiting the eurozone has been debated. The potential consequences on contractual relationships in case of a Member State exiting the eurozone are unclear.

Contracts have usually not been drafted with any such potential exit in mind and are therefore silent on this point. Absent specific and binding legal guidance, effects on contracts under private law have to be developed from existing conflict of laws rules and general principles of interpretation. The wording of the contract is key and, in particular, a precise definition of the currency of payment can avert the most disadvantageous contractual consequences.

This briefing analyses the impact on contractual arrangements governed by German law.

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

SAFE issues new rules on share incentive plans offered by overseas listed companies

The State Administration of Foreign Exchange has issued a new Circular (Circular 7) to clarify the extent of its supervision over the implementation of share incentive plans (SIPs) in China by overseas-listed companies. Unlike prior regulations which were confined to regulating share option plans and employee share ownership plans, Circular 7 now applies to all kinds of SIPs permitted by law. It also applies to employees who are non-PRC nationals having resided in China for more than a year on a continuous basis. Fewer documents are now required to be filed by the domestic agent for foreign exchange registration in respect of SIP participation by the employees. However, Circular 7

requires all changes and cancellations of foreign exchange registration for SIP participation to be made within a specific timeframe and also shortens the time frame for submitting a report on the status of SIP implementation.

This briefing discusses the new rules.

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

FSTB, SFC and HKMA publish a joint paper on progress of the regulatory reforms in the Hong Kong OTC derivatives market

On 27 March 2012, the Financial Services and the Treasury Bureau (FSTB) of the Hong Kong Special Administrative Region, the Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission (SFC) jointly published 'Progress in the Regulation of Over-the-counter Derivatives Market'. The paper is expected to be tabled for discussion at the meeting of the Panel on Financial Affairs of the Legislative Council of the Hong Kong Special Administrative Region on 2 April 2012.

This briefing looks at the voluntary clearing framework, and the proposed timeline for implementation of the mandatory clearing and reporting obligations, establishment of a Hong Kong CCP and trade repository and the implementation of voluntary clearing services.

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

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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