

International Regulatory Update

8 – 11 May 2012

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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: New Dutch export credit guarantee scheme – initial observations; and more. [Follow this link to the briefings section.](#)

Recovery plans and resolution packs: FSA publishes feedback statement

The FSA has published a feedback statement setting out the approach it is taking on recovery plans and resolution packs. The feedback statement follows the FSA's August 2011 consultation paper (CP11/16) on a proposed requirement for certain financial services firms to prepare and maintain recovery and resolution plans. The feedback statement sets out what relevant firms are expected to do while final rules are being adjusted to take into account developments in the international arena. A draft of the core rules has been published with the feedback statement, and final rules will be published in autumn 2012.

The FSA has indicated that its decision to delay the final rules is due to a number of international developments which are relevant to recovery and resolution plans, notably the expected proposal by the European Commission for a directive on recovery and resolution. However, the FSA indicated that it is confident that the development and submission of recovery plans and resolution packs will continue as planned. Large firms involved in the pilot exercise will submit their recovery plans and resolution packs by the end of June 2012, as agreed with their supervisors, and the FSA expects firms to continue to work with the authorities on developing recovery plans and resolution packs, taking into account the draft core rules and updated information pack.

[Recovery and Resolution Plans page](#)

[FS12/01](#)

[Draft Core Rules](#)

[Information Pack](#)

[FAQs](#)

[Consultation paper \(CP11/16\)](#)

Financial transaction tax: European Commission publishes explanatory notes

The European Commission has published a set of [seven explanatory notes](#) that provide the results of further analysis and clarifications on how the proposed EU financial transaction tax (FTT) would work in practice. In particular, the explanatory notes cover: (1) the tax contribution of the financial sector; (2) the territoriality of the tax; (3) relocation; (4) revenue estimates; (5) macroeconomic effects; (6) tax collection; and (7) pension funds.

Under the Commission's September 2011 [proposal for a directive](#) on a common system of financial transaction tax in the EU, the FTT would be levied on all transactions on financial instruments between financial institutions when at least one party to the transaction is located in the EU. The exchange of shares and bonds would be taxed at a rate of 0.1% and derivative contracts at a rate of 0.01%.

The Commission has proposed that the FTT should come into effect from 1 January 2014.

Credit rating agencies: Danish EU Council Presidency publishes compromise proposal

The Danish EU Council Presidency has published a [compromise text](#), dated 7 May 2012, on the proposal for a regulation amending Regulation (EC) No 1060/2009 on credit rating agencies.

ESMA publishes 2012 regulatory work programme

ESMA has published its [2012 regulatory work programme](#), which provides information on the planned technical standards, technical advice and guidelines and recommendations it intends to issue in 2012.

Transaction reporting: ESMA issues call for evidence

ESMA has issued a [call for evidence](#) on transaction reporting, which invites interested parties' views on: (1) what elements ESMA should consider in its work on guidelines on harmonised transaction reporting under MiFID; and (2) what areas of the OTC derivatives guidelines issued by CESR in October 2010 need to be updated.

ESMA intends to define its further work on guidelines on harmonised transaction reporting on the basis of the responses it receives, with a full public consultation accompanied by a cost-benefit analysis to follow.

Comments are due by 4 June 2012.

International derivatives regulators issue joint statement on regulation of OTC derivatives markets

Leaders and senior representatives from authorities with responsibility for the regulation of the OTC derivatives markets in their respective jurisdictions have met and have issued a [joint statement](#). The meeting was hosted by the Ontario Securities Commission and also included representatives from the Australian Securities and Investments Commission, the Comissao de Valores Mobiliarios of Brazil, the European Commission, the European Securities and Markets Authority, the Hong Kong Securities and Futures Commission, the Japan Financial

Services Agency, l'Autorité des Marchés Financiers du Québec, the Monetary Authority of Singapore, the Swiss Financial Market Supervisory Authority, the United States Commodity Futures Trading Commission, and the United States Securities and Exchange Commission.

The purpose of the meeting was to provide a forum for discussion among OTC derivatives regulators responsible for introducing rules designed to give effect to implementing new international standards relating to OTC derivatives. The authorities discussed a range of implementation issues, including pre- and post-trade transparency, margin for uncleared derivatives, coordination of clearing mandates, access to data in trade repositories, and cross border clearing house crisis management. The participants welcomed the opportunity for continued discussion and sharing of information on implementation of OTC derivatives reform, with a view to further align regulatory requirements where possible.

The authorities committed to continue to engage in bilateral discussions as necessary in their efforts to implement new requirements for OTC derivatives.

IMF publishes working paper on bank capitalisation as a signal

The IMF has published a [working paper](#) on bank capitalisation as a signal. The paper notes that the level of a bank's capitalisation can effectively transmit information about its riskiness and therefore support market discipline. However, the paper also notes that asymmetry in information may induce exaggerated or distortionary behaviour, with banks vying with one another to signal confidence in their prospects by keeping capitalisation low, and that banks' creditors often cannot distinguish among them – tendencies which, the paper argues, can be seen across banks and across time. According to the author, prudential policy is warranted to help offset these tendencies.

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

FSMA issues communication on MiFID supervisory tools

The Financial Services and Markets Authority (FSMA) has issued a communication describing the MiFID supervisory tools which it uses as part of its supervision of conduct of business rules. The communication applies to Belgian regulated entities (banks, investment firms and

management companies of collective investment undertakings) and to Belgian branches of non-EEA regulated entities providing MiFID services. It also applies in part to Belgian branches of EEA regulated entities.

In practice, the FSMA will require regulated entities to submit, from 2013, an additional report to the FSMA on a yearly basis setting out a 'mapping' of the MiFID activities performed by that entity (whilst this rule will only apply as of 2013, regulated entities are encouraged to submit their first report on 30 June 2012). It will also require entities to perform a complete review, over a period of 3 to 5 years, of internal processes relating to the application of MiFID conduct of business rules.

[Communication \(French\)](#)

[Communication \(Dutch\)](#)

BaFin consults on draft revised MaRisk

The German Federal Financial Supervisory Authority (BaFin) has published a [consultation paper](#) on a [draft revised version](#) of the Minimum Requirements for Risk Management (MaRisk). The draft implements requirements proposed under the revised Capital Requirements Directive (CRD 4) and the guidelines on internal governance published by the EBA.

Amongst other things, the draft revised version of the MaRisk covers: (1) the introduction of a capital planning process (amendment to module AT 4.1) to evaluate future impacts on the risk-bearing capacity concept; (2) the introduction of a risk limit system and additional indicators for the early detection of risks (amendment to module AT 4.3.2); (3) requirements for the risk controlling function will be pooled in module AT 4.4.1 with emphasis on the qualification and role of the managing risk controlling officer; (4) the mandatory establishment of a compliance function for institutions that are not providing investment services (amendment to module AT 4.4.3); and (5) the introduction of a new liquidity transfer pricing system implementing the CEBS Guidelines on Liquidity Cost Benefit Allocation (BTR 3).

Comments are due by 4 June 2012.

FINMA consults on new Insurance Bankruptcy Ordinance

The Swiss Financial Market Supervisory Authority (FINMA) has [launched a consultation](#) on the new FINMA Insurance Bankruptcy Ordinance (IBO-FINMA). FINMA is responsible for overseeing the bankruptcy proceedings of insurance companies subject to the Insurance Supervision Act, but

the Act only provides a rudimentary framework for bankruptcy proceedings. The new IBO-FINMA sets out a more detailed framework that is intended to protect insurance policy holders and enhance the legal certainty of the system.

Comments are due by 30 June 2012.

DFSA consults on proposals to regulate credit rating agencies

The Dubai Financial Services Authority (DFSA) has published [Consultation Paper No. 82](#) setting out its proposals to regulate credit rating agencies (CRAs) operating in or from the DIFC by making the activity of 'operating a credit rating agency' a regulated financial service. An entity undertaking credit rating activities from a place of business in the DIFC would be required to be licensed as a CRA even if the credit ratings it prepares are disseminated to the public or distributed by subscription by another entity, or if it undertakes only some of the credit rating activities that culminate in the production of a credit rating. The consultation paper proposes an exemption for credit scoring performed in connection with lending by institutions or governments to consumers.

The consultation paper sets out a bespoke regulatory regime for CRAs, in order to reflect the differences between their activities and the activities performed by other authorised firms. It proposes the introduction of a number of specific requirements and principles in order to promote the quality and integrity of the rating process and service (including as regards mitigation of conflict of interest). This includes requirements for rigorous and systematic methodologies and models to be employed by competent and experienced rating analysts who have access to relevant high-quality information, coupled with requirements to monitor and review credit ratings on a continuing basis. The credit ratings themselves must reflect all available relevant information, must not contain any misrepresentations and must not be misleading. The consultation paper also proposes additional transparency and disclosure requirements (e.g. where a credit rating is based on limited data).

Comments are due by 12 June 2012.

DFSA consults on proposed changes to PIB Module

The Dubai Financial Services Authority (DFSA) has published [Consultation Paper No. 83](#) regarding proposed changes to the PIB Module of the DFSA Rulebook. The proposed changes are designed to bring the DFSA's PIB

module into closer alignment with the Basel III capital adequacy framework. Due to the extensive nature of the suggested changes, the DFSA is proposing that the current PIB Module be revoked and replaced in its entirety.

Amongst other things, the proposed changes relate to: (1) the prudential categorisation of authorised firms; (2) capital requirements; (3) the capital conservation buffer; (4) capital resources; and (5) Pillars 2 and 3.

Comments are due by 1 August 2012. The DFSA is provisionally planning to implement the new PIB Module in October 2012.

Stock Exchange of Hong Kong implements changes to eligibility criteria for designated securities for short selling

The Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEx), is implementing changes to the short selling criteria for designated securities available for short selling to reflect developments in the securities market following a review conducted earlier in 2012. As a result of the review, the eligibility criterion related to the market capitalisation and turnover velocity (the ratio of aggregate turnover during the preceding 12 months to market capitalisation) will be increased from HKD 1 billion to HKD 3 billion and from 40% to 50% respectively.

The new regulation for short selling eligibility criteria has been approved by the Securities and Futures Commission (SFC) and will take effect on 3 July 2012. Investors and exchange participants may refer to Regulation 18 of the Eleventh Schedule of the Rules of the SEHK for details.

[Press release](#)

SFC consults on proposals to enhance sponsors' regulatory regime

The Securities and Futures Commission (SFC) has published a [consultation paper](#) on proposals to enhance the regulatory regime of sponsors. The proposals, combining new and existing sponsor requirements, will become part of the Code of Conduct for Persons Licensed by or Registered with the SFC. The SFC plans to implement the proposed changes as soon as practicable.

Amongst other things, the proposals cover the following areas: (1) submission of listing application by sponsors; (2) due diligence by sponsors; (3) sponsor's responsibility for disclosure; (4) sponsor's resources and management; (5)

number of independent sponsors for each listing; and (6) liability of sponsors for untrue statements in a prospectus.

Comments are due by 6 July 2012.

Securities and Futures (Futures Contracts) Notice 2012 gazetted

The Financial Secretary of Hong Kong has announced the gazettal of the Securities and Futures (Futures Contracts) Notice 2012, under section 392 of the Securities and Futures Ordinance (SFO). The notice prescribes that, for the purpose of certain provisions of the SFO, any structured product set out in the schedule to the notice is to be regarded as a future contract so that the structured product, when cleared and novated through a recognised clearing house, may constitute a market contract and accordingly enjoy the insolvency override protection conferred under the Division of Part III of the SFO.

The notice will come into operation on 27 June 2012.

[Gazette notice](#)

RBI issues final guidelines on securitisation transactions

Following the Monetary Policy Statement 2012-13 announcements relating to securitisation guidelines, the Reserve Bank of India (RBI) has issued its final guidelines on securitisation transactions. The guidelines prescribe a minimum lock-in-period and minimum retention criteria for securitised loans originated and purchased by banks and non-banking financial companies (NBFCs). The guidelines also cover the prudential treatment of transfer of assets through direct assignment of cash flows and the underlying securities, if any.

The guidelines are organised in the following three sections: section A contains the provisions relating to securitisation of assets – a separate circular will be issued in due course on reset of credit enhancements in case of securitisation transactions; section B contains stipulations regarding the transfer of standard assets through direct assignment of cash flows; and section C enumerates the securitisation transactions which are currently not permissible in India.

[Notification](#)

[Annex – Final guidelines](#)

CFTC proposes order amending effective date for swap regulation

The CFTC has proposed an order extending the effective date for swap regulation. The order, which extends the

effective date for swap regulation until 31 December 2012, or until the CFTC's rules and regulations go into effect, whichever is sooner, will provide an extension from certain provisions of the Commodity Exchange Act. Those provisions would otherwise 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. The new order also narrows the scope of the original order because some rules, for example the further definition of swap dealer and major swap participant, have already become effective.

The CFTC is requesting comments on the new order, which would allow the clearing of agricultural swaps, and remove any reference to the exempt commercial market, and exempt board of trade grandfather relief previously issued by the CFTC. Comments are due 14 days after publication of the proposal in the Federal Register, which is expected shortly.

[Proposed Extension Order – Second Amendment to 14 July 2011 Order for Swap Regulation](#)

CFTC Commissioner O'Malia publishes draft timetable for Dodd-Frank rulemaking

CFTC Commissioner Scott D. O'Malia has published a chart listing the remaining Dodd-Frank Act-related rules, orders and guidance that the CFTC must adopt or issue, as well as a timetable of when he estimates the CFTC will vote on those rules, orders and guidance. Mr. O'Malia has indicated that the list and timetable are based on his own knowledge as well as on conversations with CFTC staff.

[O'Malia statement](#)

[Draft CFTC 2012 Rulemaking Schedule](#)

UPCOMING CLIFFORD CHANCE EVENT

Bagel Briefings – Basel III: Practical Effects on Financial Market Participants

Clifford Chance cordially invites you to a discussion about the practical effects of Basel III on financial market participants. Partners Jeff Berman and Nick O'Neill of our US Financial Regulatory Group will outline the key changes to capital standards under Basel III and describe some of the practical effects on credit intermediaries and end-users across various parts of the financial markets.

The briefing will take place at 8am on 16 May 2012 at Clifford Chance's New York offices at:

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

To register, please click on the link below. In the meantime, please feel free to contact NYSEminars@CliffordChance.com if you have any queries.

Registration page
<http://inform.cliffordchance.com/vf/7631k9391V7565Gx88>

Bagel Briefings – Spring 2012 Legal Development Series invitation
<http://inform.cliffordchance.com/ve/ZZ28918282Cz61HM60M1/VT=0/stype=dload/OID=21235173427691>

RECENT CLIFFORD CHANCE BRIEFINGS

UK Employment Update

This May 2012 edition of UK Employment Update reviews two key decisions of the Supreme Court in relation to age discrimination. It also examines a case that illustrates the importance of ensuring adequate post-termination restrictive covenants in employment contracts. Finally, it reports on a decision that clarifies the interaction between overlapping Employment Tribunal and High Court Proceedings and outlines the employment law related items in the Queen's Speech.

http://www.cliffordchance.com/publicationviews/publications/2012/05/uk_employment_update-may2012.html

Landlords lose out as Court sheds light on the payment of rent during administration

Over the last 18 months we have seen an increasing number of insolvencies in the retail/consumer products sector. Whilst reduced consumer spending and over-leverage have undoubtedly contributed to such demise, a further factor in most of these cases has been an increasingly unmanageable rent burden. Against that background, the recent decisions of first instance in Goldacre and Luminar have considered the question of whether and, if so, when, rent should be payable as a priority expense following a tenant's administration.

This briefing discusses these decisions.

http://www.cliffordchance.com/publicationviews/publications/2012/05/landlords_lose_outascourtshedslightonth.html

New Dutch export credit guarantee scheme – initial observations

On 27 April 2012 the Dutch Ministry of Finance issued a press release in which it announced that the existing Export Credit Guarantee Scheme of the Netherlands originally promulgated on 10 November 2009 (as amended) will be made more attractive for Dutch exporters and will be replaced by a new Export Credit Guarantee Scheme. The New Scheme will be carried out on behalf of the Dutch State by Atradius Dutch State Business and will come into force on 1 June 2012 until (initially) 31 December 2014.

It is recognised that it has become more difficult for Dutch exporters to obtain long term funding at an attractive price from banks as compared to their foreign competitors. Exporters in other European countries are benefiting from state instruments that are available to support export financing. The Dutch Cabinet hopes that with the New Scheme, Dutch exporters will be more successful in securing orders abroad.

This briefing provides some initial observations on the new scheme.

http://www.cliffordchance.com/publicationviews/publications/2012/05/new_dutch_exportcreditguaranteescheme.html

Modifications to the Belgian liquidation procedure

On 7 May 2012 the laws of 19 March and 22 April 2012 modifying and simplifying certain aspects of the procedure for liquidating Belgian companies were published.

In 2006, the Belgian legislator amended the rules on liquidation procedures in an attempt to prevent the most obvious forms of abuses. The Law of 2006 imposes stricter monitoring by and transparency requirements to the Commercial Court. Practice quickly showed that the Law of 2006 had left many gaps in the procedure and uncertainties on its interpretation.

The Laws therefore implement some clarifications and simplifications of the Law of 2006, most importantly with respect to: (1) the conditions for a dissolution and liquidation in one day; and (2) the confirmation of the appointment of a liquidator and the interim acts by the liquidator. Other modifications are mainly procedural. The new provisions are applicable to all Belgian companies and will apply as of 17 May 2012, it is however not specified if they will only apply to newly dissolved companies or also to ongoing liquidation procedures.

This briefing discusses the new provisions.

http://www.cliffordchance.com/publicationviews/publications/2012/05/modifications_tothebelgianliquidationprocedure.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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Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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