

# International Regulatory Update

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- Recent Clifford Chance briefings: CFTC releases cross-border swaps guidance; The Eurozone crisis and exchange controls; and more. [Follow this link to the briefings section.](#)

### Commission publishes legislative proposals on PRIIPs, UCITS V and IMD 2

The European Commission has published a package of legislative proposals intended to improve consumer protection in financial services.

The Commission's proposal for a regulation on packaged retail investment products (PRIIPs) introduces the Key Information Document (KID), which will provide information on the product's main features, as well as the risks and costs associated with the investment in that product. The KID will follow a common standard as regards structure, content, and presentation to allow consumers to use the document to compare different investment products and ultimately choose the product that best suits their needs. The products for which a KID will be required include all types of investment funds, insurance-based investments and retail structured products, in addition to private pensions.

The Commission's proposal for a directive amending Directive 2009/65/EC on Undertakings for Collective Investment in Transferable Securities as regards depositary functions, remuneration policies and sanctions (UCITS V) address the following three areas: (1) defining the tasks and liabilities of all depositaries acting on behalf of a UCITS fund; (2) new rules on the remuneration of UCITS managers; and (3) a common approach to how core breaches of the UCITS legal framework are sanctioned.

The Commission's proposal for a revision of the Insurance Mediation Directive (IMD 2) is intended to upgrade consumer protection in the insurance sector by creating common standards across insurance sales and ensuring proper advice. Amongst other things, the scope of the revised IMD will be extended to all sellers of insurance products, including insurance companies that sell directly to consumers. The Commission has indicated that other market players who sell insurance products on an ancillary basis will be included in a proportionate manner in the scope of the revised IMD.

[Proposed regulation on Key Information Documents for investment products \(Provisional version\)](#)  
[FAQs – Key Information Documents for PRIIPs](#)  
[Proposed UCITS V Directive \(Provisional version\)](#)  
[FAQs – Revision of the UCITS Directive](#)  
[Proposed IMD 2 \(Provisional version\)](#)  
[FAQs – Revision of the Insurance Mediation Directive](#)

### ESMA publishes compliance table regarding its guidelines on systems and controls in an automated trading environment

ESMA has published a [guidelines compliance table](#) indicating which competent authorities comply or intend to comply with its guidelines for trading platforms, investment firms and competent authorities on systems and controls in an automated trading environment, which were first published on 21 December 2011.

The guidelines are intended to clarify the obligations of trading platforms and investment firms under the existing EU legislative framework. In particular, the guidelines cover: (1) the operation of an electronic trading system by a regulated market or a multilateral trading facility; (2) the use of an electronic trading system, including a trading algorithm, by an investment firm for dealing on own account or for the execution of orders on behalf of clients; and (3) the provision of direct market access or sponsored access by an investment firm as part of the service of the execution of orders on behalf of clients.

### Market abuse: EU Council Presidency reports on outstanding issues and publishes compromise text regarding proposed directive on criminal sanctions

The EU Council Presidency has published a [note](#) on the outstanding issues and a new [compromise text](#) in relation to the proposal for a directive on criminal sanctions for insider dealing and market manipulation.

In particular, the note discusses: (1) the description of the offences; (2) the *ne bis in idem* principle (double jeopardy); (3) the privilege against self-incrimination; and (4) the approximation of the levels or types of penalties for the offences covered by the Directive.

### **Short selling and CDS: Commission adopts package of implementing measures**

The European Commission has adopted a package of four implementing measures to specify technical aspects of the regulation on short selling and credit default swaps (CDS), which entered into force on 25 March 2012 and will apply from 1 November 2012.

On 29 June, the Commission adopted an implementing regulation laying down Implementing Technical Standards which details technical rules on, amongst other things: (1) information on significant net short positions; (2) the requirements for agreements to borrow that ensure settlement of shares can be effected when due; (3) the requirements for arrangements and measures to ensure settlement in due time of short sales of shares; (4) the details of arrangements with third parties relating to short sales of sovereign debt to ensure a reasonable expectation that settlement of the sovereign debt can be effected when due; (5) the types of third parties, including investment firms and central counterparties, and the requirements they must meet to be eligible to enter into arrangements with short sellers to ensure settlement; (6) the format for the periodic information on net short positions and (7) the technical rules for ESMA to determine whether the principal trading venue of a share is inside or outside the EU.

On 29 June the Commission adopted a delegated regulation on Regulatory Technical Standards, based on draft regulatory technical standards submitted by ESMA. This regulation sets out the detail of the information on short positions that must be notified to competent authorities and disclosed to the public. It also specifies what information competent authorities must report on a quarterly basis to ESMA, and the method of calculation of turnover for ESMA to determine the principal trading venue of shares.

On 5 July the Commission adopted a delegated act which specifies the cases in which sovereign CDS are considered covered, and therefore not banned in accordance with the short selling regulation. The delegated act also sets out technical rules on: (1) how to calculate the significant short positions that must be disclosed to regulators or the market; (2) how short positions are calculated and reported by fund

managers managing several funds, or different entities within a group; (3) the levels at which short positions in sovereign debt must be notified to regulators; (4) the thresholds for different financial instruments, ranging from illiquid shares to financial derivatives, which can trigger a short term suspension of short selling by regulators; (5) the decline in liquidity which triggers the possibility for Member States to suspend restrictions on uncovered short sales of sovereign debt; and (6) the criteria to be taken into account when determining what constitutes an adverse development or event.

On 5 July the Commission also adopted a delegated regulation on Regulatory Technical Standards, based on draft regulatory technical standards submitted by ESMA. This sets out the technical details of how to calculate the significant fall in value which can trigger a short term suspension of short selling in certain financial instruments.

[Commission's short selling page](#)  
[29 June Implementing Technical Standards](#)  
[29 June Regulatory Technical Standards](#)  
[5 July Delegated Regulation \(Delegated Act\)](#)  
[5 July Delegated Regulation \(Regulatory Technical Standards\)](#)

### **Cyprus EU Council Presidency unveils work programme**

On 1 July 2012, Cyprus took over the EU Council's six-month rotating Presidency. The Cyprus EU Council Presidency has published its work programme, which sets out the items on the EU Council's agenda in the second half of 2012 and which items will be priorities for the Cyprus Presidency.

Amongst other things, these priorities include strengthening financial regulation and supervision and particular attention will be given to: (1) the MiFID review; (2) the Crisis Management and Bank Resolution Framework; (3) the revision of the Credit Rating Agencies Regulation; (4) the Omnibus II Directive; and (5) the Capital Requirements Directive and Regulation (CRD 4).

[Presidency Financial Services page](#)

### **OTC derivatives and market infrastructures: EU Council approves regulation**

The EU Council has [formally adopted](#) the Regulation on OTC Derivatives, Central Counterparties and Trade Repositories. The regulation will enter into force 20 days after its publication in the Official Journal and will apply from the end of 2012.

#### **ACER publishes decision on REMIT registration format and consults on recommendations to Commission on records of transactions and data collection**

The Agency for the Cooperation of Energy Regulators (ACER) has published a [consultation paper](#) setting out its recommendations to the European Commission as regards the records of wholesale energy market transactions, including orders to trade, which it considers necessary to effectively monitor wholesale energy markets, and as regards the implementing acts on data collection under Article 8 of the Regulation on Energy Market Integrity and Transparency (REMIT). Articles 8(2) and (5) confer powers to the Commission to adopt implementing acts as regards data collection by ACER.

Comments are due by 31 July 2012.

ACER has also published its [decision](#) on the format through which national regulatory authorities shall transmit information on market participants to ACER, as required under Article 9(3) of REMIT.

#### **ESMA publishes final guidelines on certain aspects of MiFID requirements for suitability and compliance**

ESMA has published final sets of guidelines on MiFID 1 suitability requirements and on compliance function requirements. The suitability requirements focus on the need for firms to have in place appropriate policies and procedures in order to know their clients when recommending suitable investment choices. The compliance function requirements are intended to enhance clarity and foster convergence in the implementation of the MiFID organisational requirements relating to certain aspects of the compliance function.

Competent authorities will have two months following the publication of the official translations to confirm their compliance or intention to comply, with reasons for non-compliance where applicable, to ESMA. The guidelines will then apply 60 days after the end of the reporting period for competent authorities. Financial market participants are not required to report whether they comply with these guidelines.

[Guidelines on certain aspects of the MiFID suitability requirements](#)

[Guidelines on certain aspects of the MiFID compliance function requirements](#)

#### **Basel Committee consults on monitoring indicators for intraday liquidity management**

The Basel Committee on Banking Supervision has published a [consultation paper](#) on proposed indicators which are intended to allow banking supervisors to monitor a bank's intraday liquidity risk management and its ability to promptly meet payment and settlement obligations, both in normal times and in stressed scenarios. The paper sets out a proposed monitoring framework which includes: (1) the detailed design of the monitoring indicators for a bank's intraday liquidity risk; (2) stress scenarios; (3) key application issues; and (4) the reporting regime.

Use of the proposed indicators is intended to complement the guidance on intraday liquidity risk management set out in the Basel Committee's 2008 'Principles for Sound Liquidity Risk Management and Supervision'.

Comments are due by 14 September 2012.

#### **Basel Committee consults on framework for dealing with domestic systemically important banks**

The Basel Committee on Banking Supervision has published a [consultation paper](#) on a framework for dealing with domestic systemically important banks, which is intended to complement the framework for global systemically important banks published by the Basel Committee and endorsed by the G20 Leaders in November 2011.

The Committee has developed a set of principles on the assessment methodology and the higher loss absorbency requirement for domestic systemically important banks. The proposed framework takes a complementary perspective to the global systemically important banks framework by focusing on the impact that the distress or failure of banks will have on the domestic economy. However, the proposed domestic systemically important banks framework will take a principles-based approach, in contrast to the prescriptive approach of the global systemically important banks framework. This is intended to allow an appropriate degree of national discretion in the assessment and application of policy tools in order to accommodate the structural characteristics of individual jurisdictions.

The proposed domestic systemically important banks framework requires banks which have been identified as domestic systemically important banks by their national authorities to comply with the principles beginning in January 2016. The Basel Committee will introduce a peer

review process for the implementation of the principles to help ensure that appropriate and effective frameworks for domestic systemically important banks are in place across different jurisdictions.

Comments are due by 1 August 2012.

### **Basel Committee issues supervisory guidance on internal audit function in banks**

The Basel Committee on Banking Supervision has published [revised supervisory guidance](#) on assessing the effectiveness of the internal audit function in banks, which forms part of the Committee's ongoing efforts to address bank supervisory issues and enhance supervision through guidance that encourages sound practices within banks. The document replaces the 2001 document '[Internal audit in banks and the supervisor's relationship with auditors](#)'. It takes into account developments in supervisory practices and in banking organisations and incorporates lessons drawn from the recent financial crisis.

The document builds on the Committee's '[Principles for Enhancing Corporate Governance](#)', which require banks to have an internal audit function with sufficient authority, stature, independence, resources and access to the board of directors.

### **Basel Committee consults on principles for effective risk data aggregation and risk reporting**

The Basel Committee on Banking Supervision has published a [consultation paper](#) setting out principles for effective risk data aggregation and risk reporting. The proposed principles are intended to strengthen banks' risk data aggregation capabilities and risk reporting practices. The Basel Committee believes that implementation of the principles will strengthen risk management at banks and, in particular, global systemically important banks, thereby enhancing their ability to cope with stress.

Global systemically important banks are required to implement the principles in full by the beginning of 2016 at the latest. The Basel Committee also believes that the principles can be applied to a wider range of banks, in a way that is proportionate to their size, nature and complexity.

Comments are due by 28 September 2012.

### **LIBOR review: Chancellor announces terms of reference**

The Chancellor of the Exchequer, George Osborne, has announced the terms of reference of the review of the

operation of the London Interbank Offered Rate (LIBOR) regime. The government has asked Martin Wheatley, the Chief Executive designate of the Financial Conduct Authority, to review what reforms are required to the current framework for setting and governing LIBOR.

Mr. Osborne indicated that this will include looking at: (1) whether participation in the setting of LIBOR should become a regulated activity; (2) the feasibility of using actual trade data to set the benchmark; and (3) the transparency of the processes surrounding the setting and governance of LIBOR.

The review will also look at the adequacy of the UK's current civil and criminal sanctioning powers with respect to financial misconduct, and market abuse with regards to LIBOR. Finally, it will assess whether these considerations apply to other price-setting mechanisms in financial markets.

Mr. Osborne also confirmed that the government will propose amendments to the Financial Services Bill in autumn 2012 to ensure that fines paid by the financial services industry in future go to the Exchequer. The new arrangement will apply to fines received from 1 April 2012.

[Chancellor's statement \(2 July\)](#)

[Chancellor's statement \(28 June\)](#)

### **FSA issues finalised guidance on assessing suitability of replacement business and centralised investment propositions**

The FSA has published its [finalised guidance](#) on assessing the suitability of replacement business and centralised investment propositions. The FSA notes that, in preparation for the Retail Distribution Review, many firms are changing their business model and choosing to offer a centralised investment proposition (CIP). This includes portfolio advice services, discretionary investment management and distributor-influenced funds. The FSA recently carried out a thematic review to assess how this change has affected consumers. The guidance sets out the findings of this review and provides examples of the FSA's concerns around CIPs. In addition, it highlights suitability failings of wider relevance relating to replacement business which were identified in the review.

Amongst other things, the guidance covers: (1) the factors firms should consider when deciding whether a recommendation to switch a client's investment is in the client's best interests; (2) the steps firms should take when designing or adopting a CIP; and (3) the FSA's



expectations of firms to ensure that individual recommendations to invest into a CIP are suitable.

#### [Summary of feedback received](#)

#### **HM Treasury consults on sanctions for directors of failed banks**

HM Treasury has published a [consultation paper](#) on sanctions for the directors of failed banks. The paper seeks comments on a proposal to introduce a 'rebuttable presumption' that the director of a failed bank is not suitable to be approved by the regulator to hold a position as a senior executive in a bank. If an individual has been a director in a failed bank, there would be a presumption that they should not be holding a similar position in another financial institution, unless it can be shown that they had no responsibility for the failure of the bank and acted properly. The government intends to consider whether to include any necessary legislation in the Financial Services Bill. The measure could be supported by complementary reforms: which the regulators could take forward to clarify management responsibilities and change the regulatory duties of bank directors.

The consultation also covers the possibility of introducing criminal sanctions for serious misconduct in the management of a bank. If this proposal is taken forward, the government would include the necessary legislation in another Bill during the present Parliament.

Comments are due by 30 September 2012.

#### **FSA consults on changes to platforms market**

The FSA has published a [consultation paper \(CP12/12\)](#) setting out its proposals regarding payments to platforms and cash rebates from providers to consumers. In [Policy Statement PS11/09](#), the FSA noted that it would be desirable, in principle, to ban payments by product providers to platforms and cash rebates to consumers. CP12/12 sets out the FSA's policy proposals and draft rules for the Handbook, taking into account the findings of research recently conducted on the platform market.

In particular, the FSA is consulting on preventing platforms in both the advised and non-advised market from being funded by product providers. Platforms would only be remunerated through a platform charge agreed and paid by the consumer. It is also consulting on banning cash rebates from product providers to consumers using platforms on a non-advised basis.

The FSA also confirms its position on banning cash rebates to consumers for all advised sales of retail investment products.

Comments are due by 27 September 2012.

#### **Luxembourg law implementing amended Prospectus Directive published**

The [Law of 3 July 2012](#), implementing the amended Prospectus Directive (2010/73/EU), has been published.

Amongst other things, the Law of 3 July 2012:

- introduces a new definition of what constitutes key information and the inclusion of key information in the summary about the securities in order to aid investors when considering whether to invest;
- amends the definition of qualified investors and aligns it with that of professional clients for the purposes of MiFID;
- increases the number of people to whom securities may be offered under the exemption in article 5 of the Prospectus Law from fewer than 100 to fewer than 150 people;
- increases the 'wholesale' denomination for both the Prospectus Law and the Transparency Law to EUR 100,000 and, similarly, the amount of the exemption for purchasing of securities to EUR 100,000.

#### **CSRC consults on pilot measures on asset management business for selected clients by fund management companies**

The China Securities Regulatory Commission (CSRC) has published a [consultation draft](#) on the 'Pilot Measures on Asset Management Business for Selected Clients by Fund Management Companies' and the relevant rules for public comment.

Amongst other things, under the proposals: (1) the investment scope of the fund management scheme will be expanded; (2) the limits on the investment ratio will be removed; and (3) the limit on the performance fees will be removed.

Comments are due by 30 July 2012.

#### **HKMA and SFC issue fining guidelines under Anti-Money Laundering Ordinance**

The Hong Kong Monetary Authority (HKMA) has issued its ['Guideline on Exercising Power to Impose Pecuniary Penalty'](#) by notice in the Gazette under the Anti-Money Laundering and Counter-Terrorist Financing (Financial

Institutions) Ordinance (AMLO). The guideline sets out the factors that the HKMA will normally consider in determining whether to impose a pecuniary penalty on an authorised institution and the amount of the penalty if the authorised institution contravenes a specified provision as defined by the AMLO.

The Securities and Futures Commission (SFC) has also [published](#) in the Gazette its disciplinary fining guidelines under the AMLO. The fining guidelines indicate the manner in which the SFC proposes to exercise the power to impose a pecuniary penalty on a licensed corporation under the AMLO. The SFC has indicated that it will consider all the circumstances of the particular case and the considerations set out in the fining guidelines when considering whether to impose a fine and the size of any fine.

The guidelines are effective from 1 July 2012.

#### **KRX announces amendments to enforcement rules of derivatives market business regulation**

The Korea Exchange (KRX) has published a [notice](#) announcing certain amendments to the Enforcement Rules of the Derivatives Market Business Regulation. Amongst other things, the amendments relate to the following derivative market provisions: (1) correction of trading error; (2) publication of quotation data; (3) quotation price unit; (4) remaining quote quantity; and (5) expected matching price.

#### **Korea to introduce short position reporting rules**

The Financial Services Commission (FSC), Financial Supervisory Service (FSS) and Korea Exchange (KRX) are planning to introduce a rule that will make short position reporting to regulators mandatory with effect from 30 August 2012. An investor, as opposed to a brokerage house, who has an open short position resulting from short sales that amounts to or exceeds the threshold of 0.01% of the issued share capital of a listed company at the end of each trading day, would have an obligation to report the short position to the regulators. An investor who runs a number of units under investment strategies independent from each other would be required to aggregate the short positions in a particular stock of all units.

The reporting requirement applies only to short positions resulting from trading shares listed on the exchange. Short positions created via trading of other securities or derivatives will be excluded. Short sale positions incurred from market makers' activities to provide liquidity in the markets will not be counted for the threshold positions.

The regulators have indicated that a notice on amendments to the Regulation on Financial Investment Services will be published for 40 days from 27 June to 5 August 2012 and the proposed reporting rule will be submitted to the FSC for its approval in August 2012 so that it can enter into effect from 30 August 2012.

[Press release](#)

#### **CFTC approves proposed interpretive guidance on cross-border application of Dodd-Frank Act swaps provisions**

The CFTC has requested public comments on [proposed interpretive guidance](#) regarding the cross-border application of the swaps provisions of Title VII of the Dodd-Frank Act and the CFTC's regulations. The proposed guidance interprets Section 2(i) of the Commodity Exchange Act (CEA), which states that the swaps provisions of the CEA shall not apply to activities outside the United States unless those activities have a direct and significant connection with activities in, or effect on, commerce of the United States or they contravene rules passed to prevent evasion of the Title VII rules. The guidance will be open for public comment for 45 days after publication in the Federal Register, which is expected shortly.

#### **Federal Reserve and FDIC detail process for receiving and evaluating initial banking resolution plans**

The Dodd-Frank Act mandates that bank holding companies with total consolidated assets of USD 50 billion or more, as well as nonbank financial companies designated by the Financial Stability Oversight Council for supervision by the Federal Reserve Board (FRB), must submit resolution plans annually for review by the Federal Deposit Insurance Corporation (FDIC) and the FRB. US bank holding companies with USD 250 billion or more in total nonbank assets and foreign-based bank holding companies with USD 250 billion or more in total US nonbank assets must submit their initial resolution plans on or before 2 July 2012.

Following the submission of the resolution plans, the FDIC and FRB will: (1) release the public section of the resolution plans by close of business on 3 July 2012; (2) preliminarily review the plan for informational completeness within 60 days; and (3) review each plan for its compliance with the requirements of the rule.

[Press release](#)

## RECENT CLIFFORD CHANCE BRIEFINGS

### The Eurozone crisis and exchange controls

Contingency planning around the Eurozone crisis inevitably turns to the possibility of exchange controls, whether in the context of a default by a Eurozone member state or a departure from the Eurozone. What are exchange controls and how will they affect a party's ability to enforce its contractual rights?

This briefing considers the legal framework surrounding exchange controls, what agreements they could affect, and how.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/the\\_eurozone\\_crisisandexchangecontrols.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/the_eurozone_crisisandexchangecontrols.html)

### UK Employment Update

The July 2012 edition of Clifford Chance's UK Employment Update examines the options open to an employer that discovers an employee's gross misconduct after exercising its right to terminate by making a payment to the employee in lieu of their notice. In addition, the Update reviews a case on the 'worker' status of an LLP partner and the FSA's decision to issue a prohibition notice as a consequence of the judge's findings in a high profile team-poaching case.

Finally, it looks at the government's proposals in relation to settlement agreements, collective redundancy consultation and compulsory equal pay audits.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/uk\\_employment\\_update-july2012.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/uk_employment_update-july2012.html)

### CFTC releases cross-border swaps guidance

On 29 June 2012, the CFTC released its long-awaited draft interpretive guidance on the 'Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act'. The release provides important clarification on the CFTC's proposals for regulating swap transactions involving US and non-US counterparties.

Simultaneously, the CFTC released a proposed exemptive order to provide temporary relief from compliance with certain regulatory requirements regarding swaps activity. The order allows certain swap dealers and major swap participants to delay compliance with some of the otherwise mandatory requirements relating to swaps activity with non-US counterparties.

This briefing discusses the CFTC's proposals.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/cftc\\_releases\\_cross-borderswapsguidance.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/cftc_releases_cross-borderswapsguidance.html)

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