

# International Regulatory Update

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## IN THIS WEEK'S NEWS

- CRD 4: EBA consults on draft regulatory technical standards in relation to credit valuation adjustment risk
- Banking union: ECOFIN Council holds preliminary exchange of views on establishment of single European banking supervisor
- OTC derivatives and market infrastructures: EU Council publishes consolidated text
- Basel Committee and IOSCO consult on margin requirements for non-centrally-cleared derivatives
- Bank of England issues statement on correspondence with Federal Reserve Bank of New York and BBA in relation to LIBOR
- MiFID review: House of Lords EU Select Committee reports on Commission proposals
- FINMA consults on Collective Investment Schemes Bankruptcy Ordinance
- National People's Congress consults on amendments to Securities Investment Fund Law
- HKMA and SFC publish consultation conclusions and supplemental consultation on proposals to regulate OTC derivatives market
- Japan's FSA issues final version of cabinet office ordinances on mandatory clearing and trade data storage and reporting obligations for OTC derivatives
- Korea amends derivatives-linked securities selling restrictions
- SEC and CFTC approve rules and interpretations on key terms for regulating derivatives
- CFTC reopens public comment period on margin requirements for uncleared swaps
- Recent Clifford Chance briefings: CFTC and SEC approve Final Rule and Interpretation for Swap Product Definitions; and more. [Follow this link to the briefings section.](#)

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#### **CRD 4: EBA consults on draft regulatory technical standards in relation to credit valuation adjustment risk**

The EBA has published a [consultation](#) paper on draft regulatory technical standards for credit valuation adjustment risk on the determination of a proxy spread and the specification of a limited number of smaller portfolios. The consultation paper relates to the European Commission's legislative proposals for a fourth package of amendments to the Capital Requirements Directive (CRD 4).

The proposed draft regulatory technical standards elaborate on specific elements of the calculation of own funds requirements for credit valuation adjustment risk. In particular, they specify how a proxy spread should be determined for the purposes of identifying LGDMKT for the calculation required by Article 373(1), and the criterion of 'a limited number of smaller portfolios' referred to in Article 373(4).

Comments are due by 19 September 2012. The regulatory technical standards must be submitted to the Commission by 1 January 2013.

#### **Banking union: ECOFIN Council discusses establishment of single European banking supervisor**

The ECOFIN Council has published a [press release](#) setting out the main results of its meeting on 10 July 2012.

Amongst other things, the Council discussed the follow-up to be given to the European Council's meeting on 28 and 29 June as regards work on the establishment of a genuine economic and monetary union, and the process to be followed in establishing a single European banking supervisor. With respect to the banking union, the President of the European Council has been invited, with the Presidents of the European Commission, the Eurogroup and the European Central Bank, to develop a specific and time-bound work programme, with an interim report in October and a final report at the end of 2012.

Establishment of a single banking supervisor will depend in the first instance on the presentation of proposals by the Commission, scheduled for autumn 2012.

#### **OTC derivatives and market infrastructures: EU Council publishes consolidated text**

The EU Council has published a [consolidated version](#) of the regulation on OTC derivatives and market infrastructures, in advance of the final text being published in the Official Journal. The Council gave its formal approval to the regulation on 4 July 2012.

The regulation will enter into force 20 days after its publication in the Official Journal and will apply from the end of 2012.

#### **Basel Committee and IOSCO consult on margin requirements for non-centrally-cleared derivatives**

The Basel Committee on Banking Supervision and IOSCO have published a [consultation paper](#) on margin requirements for non-centrally-cleared derivatives. The paper sets out a set of high-level principles on margining practices and treatment of collateral, and proposes margin requirements for non-centrally-cleared derivatives.

These policy proposals are articulated through a set of key principles that primarily seek to ensure that appropriate margining practices will be established for all non-centrally-cleared OTC derivative transactions. These principles will apply to all transactions that involve either financial firms or systemically important non-financial entities. The proposals are also intended to prevent regulatory arbitrage and achieve international consistency with regard to margin requirements and their implementation. The Basel Committee and IOSCO also plan to conduct a quantitative impact study (QIS) during the consultation period.

Comments are due by 28 September 2012. In particular, the Basel Committee and IOSCO have invited feedback on the scope, feasibility and impact of the margin requirements. Responses to the public consultation, together with the QIS results, will be considered in formulating a final joint proposal on margin requirements on non-centrally-cleared derivatives by the end of 2012.

#### **Bank of England issues statement on correspondence with Federal Reserve Bank of New York and BBA in relation to LIBOR**

The Bank of England has issued a [press release](#) in response to media reports of correspondence about LIBOR between Timothy Geithner, the former President of the Federal Reserve Bank of New York, Mervyn King, Governor of the Bank of England, and the BBA.

#### **MiFID review: House of Lords EU Select Committee reports on Commission proposals**

The House of Lords EU Select Committee has published its [report](#) on the European Commission's MiFID 2 and MiFIR proposals. The Committee concludes that while a review of the existing MiFID regulatory package is necessary, the proposals contain fundamental flaws that must be corrected as a matter of urgency if serious damage to the EU financial services industry is to be avoided.

Amongst other things, the report argues that:

- proposals on third country access would effectively create a 'fortress Europe', forcing countries such as the USA and China out of affected markets, to the detriment of EU consumers;
- whilst the Commission's desire for greater transparency is to be welcomed, an unsophisticated, 'one-size-fits-all' approach that ignores the sensitivity of information before a trade is made (pre-trade transparency) not only risks damaging liquidity and reducing competition, but could also have a serious effect on market innovation; and
- the new category of Organised Trading Facilities (OTFs), aimed at ensuring all organised trading is conducted on regulated venues, risks creating red tape through an overly complicated regulatory framework.

#### **FINMA consults on Collective Investment Schemes Bankruptcy Ordinance**

The Swiss Financial Market Supervisory Authority (FINMA) has launched a consultation on the Collective Investment Schemes Bankruptcy Ordinance (CISBO-FINMA), supplementing the basic bankruptcy framework in the Collective Investment Schemes Act (CISA). The draft Ordinance, which will be issued by FINMA, aims to provide for speedy and efficient bankruptcy proceedings. Apart from general implementing provisions, the Ordinance will contain provisions which are specific to the nature of the respective collective investment schemes. For example, in the case of funds in the form of SICAV, the interaction between the various sub-funds requires particular regulation, whereas if a fund management company becomes insolvent, it will be particularly important to segregate the fund assets.

Both the content and entry into force of the draft Ordinance are intended to be aligned with the currently undergoing revision of the CISA. Comments are due by 22 August 2012.

[Press release](#)  
[Key points](#)

#### **National People's Congress consults on amendments to Securities Investment Fund Law**

The Standing Committee of National People's Congress (NPC) has published a [consultation draft](#) on amendments to the Securities Investment Fund Law of the People's Republic of China. The consultation draft is intended to expand the current regulatory framework to cover privately

offered funds and introduce further measures to promote the development of the Chinese fund industry as a whole.

The consultation deadline is 5 August 2012.

#### **HKMA and SFC publish consultation conclusions and supplemental consultation on proposals to regulate OTC derivatives market**

The Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission (SFC) have jointly published their [consultation conclusions](#) on the proposed regulatory regime for the OTC derivatives market in Hong Kong.

The HKMA and SFC have also issued a [supplemental consultation paper](#) on the proposed scope of the new regulated activities to be introduced under the proposed OTC derivatives regulatory regime, and the proposed oversight of systemically important players.

Comments are due by 31 August 2012. The HKMA plans to table a Legislative Council bill by the end of 2012 to implement the new regime in 2013.

#### **Japan's FSA issues final version of cabinet office ordinances on mandatory clearing and trade data storage and reporting obligations for OTC derivatives**

The Financial Services Agency of Japan (FSA) has published the revised and final version of the cabinet office ordinances (COOs) in respect of mandatory clearing obligations and trade data storage and reporting obligations for OTC derivatives, together with its responses to comments received through a public consultation procedure in relation to the COOs.

These requirements were introduced by amendments to the Financial Instruments and Exchange Act (Act No. 25 of 1948, the FIEA) in May 2010. Those parts of the amendments to the FIEA and the relevant cabinet office ordinances and the administrative notice are to be effective on 1 November 2012. However, under the COOs, there will be transitional measures for transactions entered into between 1 November 2012 and 31 March 2013 (which have the effect of delaying implementation of trade data storage and reporting obligations).

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

#### **Korea amends derivatives-linked securities selling restrictions**

Further to the announcement by the Financial Services Commission (FSC) in February 2012, the amendments to

the 'Enforcement Decree of the Financial Investment Services and Capital Markets Act' have now been published. Amongst other things, the amendments set out the revised rules relating to the trading of derivatives-linked securities issued by foreign issuers.

The relevant provisions will come into effect on 30 September 2012.

[Decree](#)

#### **SEC and CFTC approve rules and interpretations on key terms for regulating derivatives**

The SEC and the CFTC have approved [rules and interpretations](#) for important definitions related to derivative products. For the purposes of regulating the OTC derivatives market, the terms 'swap' and 'security-based swap' have been further defined, and whether a particular instrument is a 'swap' regulated by the CFTC or a 'security-based swap' regulated by the SEC. In addition, 'mixed swaps', and 'security-based swap agreements' are also addressed. The rules become effective 60 days after their publication in the Federal Register.

Gary Gensler, CFTC Chairman, has issued a [statement](#) of support for the final rules. Mr. Gensler noted that, through the Dodd-Frank Act, Congress has provided that non-financial entities, such as farmers, ranchers, manufacturers and other end-users, should be able to choose whether or not to clear swaps that hedge or mitigate commercial risks. The CFTC's final rule implements this exception for non-financial entities, establishing criteria for hedging or mitigating commercial risk and imposing minimal reporting requirements for those swaps that come under the end-user exception.

#### **CFTC reopens public comment period on margin requirements for uncleared swaps**

The CFTC has reopened the comment period for a rule proposed in April 2011 with respect to margin requirements for uncleared swap transactions. The comment period was reopened at the same time as the Basel Committee on Banking Supervision and IOSCO released their consultative paper on uncleared swap margin. CFTC Chairman Gary Gensler announced that the rule was being reopened so that the CFTC could hear further from market participants in light of work being done to internationally harmonize an approach to margin.

Comments will be accepted by CFTC until 14 September 2012.

[Gary Gensler's statement](#)

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **Asian asset management moves into new markets and products – industry survey reveals changing sentiments**

In a recently released survey of asset management professionals conducted by Clifford Chance and AsianInvestor, three key themes emerged: Asian investors are diversifying away from equities, the marked decline of Europe as a source of assets and as an investment destination, and a more sober assessment of RMB investment opportunities.

Whilst the move away from equities to other asset classes can largely be attributed to the current market volatility and sentiment over the Eurozone crisis, the other two themes warrant a deeper look at why these trends have emerged and the implications for the asset management industry in Asia.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/asian\\_asset\\_managementmovesintonewmarketsandn.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/asian_asset_managementmovesintonewmarketsandn.html)

### **Employee Benefits News**

The July 2012 edition of Employee Benefits News focuses on the Government's revised proposals on the reform of executive remuneration for quoted UK companies. The Government believes the reforms will strengthen the hand of shareholders in challenging excessive remuneration whilst not imposing unnecessary regulatory burdens. There are a number of differences between the revised proposals and those which were consulted on previously, particularly in relation to shareholder voting powers. Some of the revised proposals may be more palatable to companies. However, they still represent a significant increase in shareholder power and some of the new requirements may cause controversy in practice.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/employee\\_benefitsnewsletterjuly2012.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/employee_benefitsnewsletterjuly2012.html)

### **Court of Appeal has confirmed the non-taxability of unrealised gains based on changes in fair value of trading securities**

In the recent decision of the Hong Kong Court of Appeal in *Nice Cheer Investment Limited v Commissioner of Inland Revenue*, the Court clarified the issue of whether a company's unrealised gains arising out of the changes in the fair value of its trading securities are subject to being assessed for profits tax pursuant to section 14(1) of the Inland Revenue Ordinance.

This briefing discusses the decision.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/court\\_of\\_appeal\\_hasconfirmedthenon-taxabilit.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/court_of_appeal_hasconfirmedthenon-taxabilit.html)

### **Burma/Myanmar Sanctions Update**

More than 3 months after the Obama Administration first announced that it would ease US economic sanctions against Myanmar, the necessary implementing measures have now occurred. They create substantial new opportunities for US financial and economic activity in Myanmar but also establish an extensive and burdensome reporting regime for US investors in that country.

This briefing discusses the measures.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/burma\\_myanmar\\_sanctionsupdate.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/burma_myanmar_sanctionsupdate.html)

### **SAMA Committee restructuring**

The Committee for the Settlement of Banking, operating under the aegis of the Saudi Arabian Monetary Agency has been, for the three decades it has been in existence, a critical element in the Kingdom's judicial landscape for banks needing to enforce against defaulting customers. With its jurisdiction over banking disputes and its application of its own particular principles to disputes (which include giving effect to the transaction agreed between the parties and the upholding of recognised, international banking practices), it allows banking claims to be enforced in a way which would not be possible were the cases to be heard in the general court system of the Kingdom.

There has, however, been an element of ambiguity around the Committee's exact status and the parameters of its mandate. Can it properly be considered a court, for example? In practice it has always borne many of the characteristics of a court, but the market was surprised in

2011 when the Board of Grievances, petitioned by a bank customer seeking to prevent enforcement of a judgment from the Committee against him, took the view that the Committee judgments were not those of a court and therefore should not be enforced by the relevant executive authorities. A subsequent Royal Order helped by clarifying that the Committee's judgments should be considered final and preventing any court from hearing disputes relating to them without prior, specific royal approval, but these underlying ambiguities remained.

A further, new Royal Order (number 37441 dated 1 July 2012) will be a welcome development in clarifying the status of the Committee along with its powers and processes.

Clifford Chance and Al-Jadaan & Partners have jointly prepared a briefing paper discussing the new Royal Order.

Please contact Mhairi Appleton by email at [mhairi.appleton@cliffordchance.com](mailto:mhairi.appleton@cliffordchance.com) for a copy of this briefing.

### **CFTC and SEC approve Final Rule and Interpretation for Swap Product Definitions**

At a meeting held on 10 July 2012, the CFTC voted to issue final rules pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act further defining the terms 'swap', 'security-based swap', 'mixed swap', and 'security-based swap agreement' (Product Rule). SEC unanimously approved the Product Rule in a private meeting. Once the Product Rule is published in the Federal Register, the timetable will be fixed for compliance with several of the critical rules imposing substantive obligations with respect to swaps. The CFTC also issued a final rule regarding the end-user exemption from the swap clearing requirement (End-user Rule) and a proposed rule exempting certain swaps entered into between cooperatives and their members from the clearing requirement (Proposed Cooperative Exemption).

This briefing provides an overview of points discussed during the meeting, based on the fact sheet and Q&A released by the CFTC and the discussions themselves. This overview is subject to the release of the final text of the Product Rule.

[http://www.cliffordchance.com/publicationviews/publications/2012/07/cftc\\_and\\_sec\\_approvefinalrulean.html](http://www.cliffordchance.com/publicationviews/publications/2012/07/cftc_and_sec_approvefinalrulean.html)

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