CLIFFORD
CHANCE

Briefing note

International Regulatory Update

15 – 19 October 2012

IN THIS WEEK'S NEWS

- Banking union: European Council adopts conclusions on completing the Economic and Monetary Union
- FSA sets out journey to the Financial Conduct Authority
- ECB guideline on expanding eligible collateral published
- CRD IV: German Federal Government introduces draft implementing Act
- EU Short Selling Regulation: BaFin publishes FAQs
- CSRC's Amended Rules on Establishment of Foreign-invested Securities Companies and Amended Trial Rules on Establishment of Subsidiaries by Securities Companies in effect
- CSRC issues administrative measures on supervising non-listed public companies
- HKEx announces amendments to clearing houses rules
- Singapore introduces Bills to implement policy proposals to increase safeguards for the investing public and to regulate OTC derivatives
- DFSA consults on proposed changes to anti-money laundering and ancillary service provider regime
- SEC proposes rules on capital, margin and segregation requirements for security-based swap dealers and major security-based swap participants
- FDIC issues final rule regarding contract enforcement
- FDIC issues final rule on stress test requirements
- OCC issues notice of proposed rulemaking concerning retail foreign exchange rule
- CFTC publishes guidance on reporting of cleared swaps
- Recent Clifford Chance briefings: CFTC staff letter offers relief to certain securitization vehicles by specifying criteria for exclusion from the definition of commodity pool; and more. Follow this link to the briefings section.

Clifford Chance's International Regulatory Update is a weekly digest of significant regulatory developments, drawing on our daily content from our Alerter: Finance Industry service.

If you would like to continue to receive International Regulatory Update or would like to request a subscription for a colleague, please click here.

To request a subscription to our Alerter: Finance Industry service, please email Online Services.

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

Banking union: European Council adopts conclusions on completing the Economic and Monetary Union

The European Council (Heads of State or Government) has conclusions on completing the Economic and Monetary Union (EMU). The leaders stated that there needs to be a move towards an integrated financial framework, open to the extent possible to all Member States wishing to participate. Accordingly, the European Council invited legislators to proceed with work on the proposals on the Single Supervisory Mechanism (SSM) as a matter of priority, with the objective of agreeing on the legislative framework by 1 January 2013. Work on the operational implementation will take place in the course of 2013.

The European Council also noted that it is important to ensure a level playing field between those Member States which take part in the SSM and those which do not, in full respect of the integrity of the single market in financial services. The European Council also indicated that an acceptable and balanced solution is needed regarding changes to voting modalities and decisions under the European Banking Authority (EBA) Regulation, taking account of possible evolutions in the participation in the SSM, that ensures non-discriminatory and effective decision-making within the Single Market. On this basis, the EBA should retain its existing powers and responsibilities.

In addition, the European Council called for the rapid adoption of the provisions relating to the harmonisation of national resolution and deposit guarantee frameworks on the European Commission's legislative proposals on bank recovery and resolution and on national deposit guarantee schemes.

Furthermore, the European Council highlighted the Commission's intention to propose a single resolution mechanism for Member States participating in the SSM once the proposals for a Recovery and Resolution Directive and for a Deposit Guarantee Scheme Directive have been adopted. When an effective single supervisory mechanism is established, involving the ECB, for banks in the euro area the ESM could, following a regular decision, have the ability to recapitalise banks directly.

European Council Conclusions from 18-19 October 2012 meeting

FSA sets out journey to the Financial Conduct Authority

The FSA has launched a paper, 'Journey to the FCA', which sets out how the new Financial Conduct Authority (FCA) will operate. The paper summarises what the new regulatory scheme will look like and gives details about the scope of the FCA's work, the new powers available to it and how it intends to exercise them. There is also coverage of how the new authorisation process will work in practice, and how the FCA intends to ensure all firms continue to meet the standards expected of them for authorisation and how it will act when firms fail to do so. In addition, details are given about the role and operation of the new Policy, Risk and Research division, as well as how the FCA intends to maintain relationships with other regulators and stakeholders.

The FCA is expected to commence its work in early 2013, when it will receive new powers from the Financial Services Bill that is currently going through Parliament. In the interim, the FSA is consulting on its proposed approach for the FCA in a consultation period that runs until 14 December 2012. Views can be expressed on any part of the document through the document itself, although the FCA is seeking particular input in respect of competition and gathering and receiving information (Annex A).

The FSA has also issued a statement setting out how it will approach applications for authorisation until the cutover to the FCA/PRA. Applications made by firms which in future will be dual regulated will, during this intervening period, be dealt with by two case officers, one from the Conduct Business Unit and one from the Prudential Business Unit, mirroring the process which will be adopted by the FCA and PRA after cutover.

Speech by Martin Wheatley
PRA's approach to banking supervision
PRA's approach to insurance supervision

ECB guideline on expanding eligible collateral published

The European Central Bank has published its Guideline ECB/2012/23 (amending Guideline ECB/2012/18) on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral. The Guideline temporarily widens the criteria determining the eligibility of assets to be used as collateral in Eurosystem monetary policy operations, by accepting marketable debt instruments denominated in pounds sterling, yen or US dollars as eligible assets for monetary policy operations.

The Guideline will take effect from 9 November 2012.

CRD IV: German Federal Government introduces draft implementing Act

The German Federal Government has introduced a draft Act to implement the CRD IV package by amending German legislation, in particular the German Banking Act (KWG). The draft Act is intended to enter into force simultaneously with the CRD IV package on 1 January 2013.

Under the draft Act, German credit institutions and investment firms, will, amongst other things: (1) be subject to the CRD IV requirements even if they do not fall within the scope of the Directive and the Regulation; (2) have to comply with risk management and remuneration principles based on the EBA's 'Guidelines on Internal Governance (GL 44)'; and (3) be subject to reinforced administrative sanctions for non-compliance with existing and new rules.

The Federal Government has also expressed its intention to accelerate the rule-making at European level.

EU Short Selling Regulation: BaFin publishes FAQs

The German Federal Financial Supervisory Authority (BaFin) has published three FAQ sections concerning the EU Short Selling Regulation (SSR). The SSR entered into force on 25 March 2012 and will apply from 1 November 2012. The European Commission has adopted four delegated and implementing Regulations under the SSR whilst the German Federal Parliament passed an Act to implement the SSR on 27 September. ESMA has already made available an FAQ section on its website. BaFin's FAQs deal with the following three aspects of the SSR: (1) notifications of significant net short positions in shares; (2) restrictions on uncovered short sales in shares and sovereign debt; and (3) exemptions for market making activities and primary market operations.

BaFin has stated that it will make available an English version of the FAQs shortly and that it will update its short selling FAQs on a regular basis.

CSRC's Amended Rules on Establishment of Foreign-invested Securities Companies and Amended Trial Rules on Establishment of Subsidiaries by Securities Companies in effect

On 11 October 2012, the China Securities Regulatory Commission (CSRC) promulgated the 'Amended Rules on Establishment of Foreign-invested Securities Companies' and the 'Amended Trial Rules on Establishment of Subsidiaries by Securities Companies' to further open up the securities industry to more foreign capital, which became effective as of the same date. The Amended Rules are intended to materialise the commitments made by the PRC government during the fourth round of Sino-US strategic economic dialogue in May 2012.

Amongst others things, the changes include the following two key changes: (1) the limit for aggregated foreign shareholding or interests in a joint venture securities company, directly or indirectly, is raised from 33% to 49%; and (2) where a joint venture securities company applies for expanding its business scope, the required term of its continuous operation is shortened from 5 years to 2 years and the required term of its compliance record is shortened from 3 years to 2 years.

CSRC issues administrative measures on supervising non-listed public companies

On 28 September 2012, the China Securities Regulatory Commission (CSRC) issued measures to regulate the share transfer and issuance of non-listed companies whose shares are transferred publicly or the number of whose shareholders exceeds 200 through directional issuance/transfer to targeted offerees (non-listed public companies). The measures are the first national regulation applicable to non-listed public companies in China and will become effective as of 1 January 2013.

HKEx announces amendments to clearing houses rules

Hong Kong Exchanges and Clearing Limited (HKEx) has announced the amendments to its clearing houses rules to implement proposals to strengthen the risk management measures and align the risk management arrangements across the three clearing houses: the SEHK Options Clearing House Limited (SEOCH), the Hong Kong Securities Clearing Company Limited (HKSCC) and the HKFE Clearing Corporation Limited (HKCC).

Amongst other things, the amendments relate to: (1) operational clearing procedures for options trading exchange participants; (2) options clearing rules; (3) general rules of Central Clearing And Settlement System (CCASS); and (4) rules and procedures of HKCC.

The amendments will be effective from 5 November 2012.

Rule Update – Operational Clearing Procedures for Options Trading Exchange Participants of SEOCH
Rule Update – Options Clearing Rules of SEOCH
Rule Update – General Rules of CCASS
Rule Update – Rules and Procedures of HKCC

Singapore introduces Bills to implement policy proposals to increase safeguards for the investing public and to regulate OTC derivatives

The Minister for Trade and Industry and Deputy Chairman of the Monetary Authority of Singapore (MAS) have moved the Securities and Futures (Amendment) Bill 2012 and the Financial Advisers (Amendment) Bill 2012 for first reading in Parliament. The Amendment Bills represent the first of a two-phase review of the Securities and Futures Act (SFA) and Financial Advisers Act (FAA). The Bills implement policy proposals to increase safeguards for the investing public and to regulate OTC derivatives. The public consultations on the policy reforms and the draft Amendment Bills were conducted in May and August 2012. The MAS's responses to the public consultations have also been published.

The broad amendment areas in the Securities and Futures (Amendment) Bill 2012 include: (1) imposing an obligation on issuers to classify investment products; (2) promoting more effective disclosure for retail investment products; (3) safeguarding the interests of investors in unlisted debentures; (4) enhancing and refining enforcement and market conduct provisions; and (5) strengthening the regulation of OTC derivatives markets.

The broad amendment areas in the Financial Advisers (Amendment) Bill 2012 include: (1) enhancing the MAS's powers to investigate and take regulatory action; (2) widening the scope of the provision on false and misleading statements; (3) extending civil liability to the financial adviser's (FA's) obligations to furnish product information to investors; and (4) empowering the court to have regard to the claimant's reasonable effort in resolving a dispute before commencing civil action in court.

The second phase of amendments for the SFA and FAA is targeted to be carried out in the second half of 2013. This will include amendments to extend the current regulatory regimes for market operators and capital market intermediaries to OTC derivatives, as well as amendments arising from broader policy reviews.

MAS' responses to feedback – Consultation on proposed amendments to the Securities and Futures Act and Financial Advisers Act
MAS responses to feedback – Consultation on proposed amendments to the Securities And Futures Act on regulation of OTC derivatives

DFSA consults on proposed changes to anti-money laundering and ancillary service provider regime

The Dubai Financial Services Authority (DFSA) has issued Consultation Paper No. 86 regarding proposed changes to the DFSA's Anti-money Laundering and Ancillary Service Provider Regime. The DFSA is proposing to replace its current Anti-money Laundering Module (AML) with a new AML module updated in line with the revised Financial Action Task Force (FATF) principles. AML will have general application for all persons who are subject to the DFSA's AML regime.

The DFSA has also consolidated its existing Ancillary Service providers (ASP) regime with its Designated Non-Financial Businesses and Professions (DNFBP) regime. In the future, law firms and accountancy firms providing services to Authorised Firms will no longer be considered ASPs but DNFBPs.

Comments are due by 16 December 2012.

SEC proposes rules on capital, margin and segregation requirements for security-based swap dealers and major security-based swap participants

In accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC has voted to propose capital, margin, and segregation requirements for security-based swap dealers and major security-based swap participants.

The proposed capital requirements for security-based swap dealers would generally be modelled closely on the net capital rule applicable to broker-dealers. The margin requirements for security-based swap dealers would generally be modelled on SRO margin requirements set for broker-dealers. With respect to segregation requirements, the proposal would establish requirements in addition to the statutory segregation requirements for cleared and non-cleared security-based swaps that would allow the collateral of counterparties to be commingled and segregated on an omnibus basis – that is, held in a single account subject to specific conditions. The SEC is also proposing to raise current capital requirements and impose new specific liquidity requirements for firms that use internal models to compute capital charges and are subject to an alternative net capital regime.

The proposed rules will be open for public comment for 60 days following their publication in the Federal Register, which is expected shortly.

SEC Fact Sheet

FDIC issues final rule regarding contract enforcement

The FDIC has issued a final rule in the Federal Register that allows the FDIC to enforce contracts of subsidiaries and affiliates of a covered financial company, in accordance with the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The act authorizes the FDIC, as receiver for a financial company that poses a systemic risk to the nation's economic stability, to enforce subsidiary and affiliate contracts in the face of company liquidation. The FDIC is permitted to maintain these contracts in full force notwithstanding the existence of clauses that allow for termination or other solutions based on the financial condition of the covered financial company. In accordance with the guidelines of the final rule, the FDIC as receiver is obliged to either transfer supporting financial obligations of the covered financial company to a qualified transferee within one business day, or provide adequate protection to the contract's counterparties.

The final rule will be effective 15 November 2012.

FDIC issues final rule on stress test requirements

The FDIC has published in the Federal Register a previously announced final rule to put into effect stress test requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Under the act, the FDIC is required to issue regulations whereby the FDIC-insured state non-member banks and FDIC-insured state-chartered savings associations with total consolidated assets of more than USD 10 billion will conduct annual stress tests, report the results to the FDIC and the Board of Governors of the Federal Reserve System and publish a summary of the results. In addition, large covered banks will be required to conduct annual stress test. However, implementation for institutions with total consolidated assets of more than USD 10 billion but less than USD 50 billion will be delayed until 30 September 2013.

Public disclosure of summary results will begin with the 2014 stress test during the period of 15 June and ending 30 June 2015.

OCC issues notice of proposed rulemaking concerning retail foreign exchange rule

The Office of the Comptroller of the Currency (OCC) has published in the Federal Register a notice of proposed rulemaking which requests comments on a proposed rule that would amend OCC's retail foreign exchange rule for transactions with bank common trust funds, bank collective investment funds, and insurance company separate accounts and is making technical corrections to the rule.

Comments are due by 13 November 2012.

CFTC publishes guidance on reporting of cleared swaps

The CFTC has published guidance responding to frequently asked questions from market participants and other interested parties on the reporting of cleared swaps as required under part 45 of the Commission's regulations. The guidance is intended to help market participants to: better understand how to report cleared swaps, determine who has the obligation to report swaps, and understand the timing of reporting.

RECENT CLIFFORD CHANCE BRIEFINGS

What future for unilateral dispute resolution clauses?

It is common practice to insert into contracts unilateral choice-of-court clauses, granting to one party only the option to refer the dispute to one of several jurisdictions. Until now, the validity of this type of clauses did not seem problematic. However, their effectiveness has just been undermined by a decision from the Cour de cassation.

This briefing discusses the case.

http://www.cliffordchance.com/publicationviews/publications/2012/10/what_future_for_unilateraldisputeresolutio.html

A legal overview of foreign investment in Russia's strategic sectors

This briefing gives an overview of Russia's regulatory regime for foreign investment in strategic sectors of Russian industry. The regime is primarily regulated by the Federal Law № 57-FZ 'On the Procedure of Making Foreign Investments in Companies of Strategic Importance for National Defense and State Security' of 29 April 2008 (the 'Strategic Investment Law'), which came into force on 7 May 2008. The Strategic Investment Law consolidated the legal regime governing foreign investment in various Russian strategic industries and established a procedure for granting foreign investors access to such industries on a 'one stop shop' basis.

At the end of 2011, amendments to the Strategic Investment Law were adopted which clarified some, though not nearly all, of the issues that had been heavily debated in the business and legal community since the regime was first introduced. Russian case law also emerged which

helped to clarify the scope of application of the Strategic Investment Law, but also contributed to new uncertainties surrounding interpretation of the statutory requirements.

http://www.cliffordchance.com/publicationviews/publications/2012/10/a_legal_overviewofforeigninvestmenti.html

The dragon stirs – China amends Civil Procedure Law

On the 31 August 2012, the Standing Committee of the National People's Congress of the People's Republic of China (PRC) approved significant amendments to the PRC's Civil Procedure Law (the Amended CPL), which will come into effect as of 1 January 2013. The Amended CPL adopts some rules established in existing Supreme People's Court (SPC) judicial interpretations (SPC interpretations), creates new rules and aims to strengthen the effectiveness of interim relief, improve judicial transparency and increase enforceability of arbitral awards.

This briefing discusses the amendments.

http://www.cliffordchance.com/publicationviews/publications/2012/10/the_dragon_stirschinaamendscivilprocedurelaw.html

Equity REITs excluded from the definition of commodity pool

The CFTC's Division of Swap Dealer and Intermediary Oversight has issued interpretive relief that excludes any equity REIT that satisfies certain specified criteria from the definition of 'commodity pool' and regulation by the CFTC. As a result, the operators of equity REITs, including boards of directors and managers, will not need to register with the CFTC as 'commodity pool operators'. However, this exemption does not extend to mortgage REITs.

This briefing discusses the exclusion.

http://www.cliffordchance.com/publicationviews/publications/2012/10/equity_reits_excludedfromthedefinitiono.html

CFTC staff letter offers relief to certain securitization vehicles by specifying criteria for exclusion from the definition of commodity pool

The CFTC's Division of Swap Dealer and Intermediary Oversight has issued interpretive relief that excludes any securitization vehicle that satisfies five specified criteria from the definition of 'commodity pool'. As a result, the operators of these vehicles will not need to register with the CFTC as 'commodity pool operators' and the vehicles themselves will not be 'covered funds' for purposes of the Volcker Rule as a result of possible 'commodity pool' status. However, this relief does not extend to entities used in a significant number of structured finance transactions, including guarantor entities in covered bond structures, most ABCP conduits, and issuers in most CLO, CDO and synthetic securitizations.

This briefing discusses the guidance and criteria.

http://www.cliffordchance.com/publicationviews/publications/2012/10/cftc_staff_letteroffersrelieftocertai.html