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Briefing note

International Regulatory Update

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Wheatley Review of LIBOR publishes final report

The Wheatley Review of LIBOR has published its final report, which sets out a 10-point plan for reform.

In particular, the report recommends that:

- the authorities should introduce statutory regulation of administration of, and submission to, LIBOR, including an approved persons regime;
- the BBA should transfer responsibility for LIBOR to a new administrator;
- the new administrator should fulfil specific obligations as part of its governance and oversight of the rate, having due regard to transparency and fair and non-discriminatory access to the benchmark;
- submitting banks should immediately look to comply with the submission guidelines presented in the report;
- the new administrator should, as a priority, introduce a code of conduct for submitters;
- the BBA and the new administrator should cease the compilation and publication of LIBOR for those currencies and tenors for which there is insufficient trade data to corroborate submissions;
- the BBA should publish individual LIBOR submissions after 3 months to reduce the potential for submitters to attempt manipulation, and to reduce any potential interpretation of submissions as a signal of creditworthiness;
- banks, including those not currently submitting to LIBOR, should be encouraged to participate as widely as possible in the LIBOR compilation process;
- market participants using LIBOR should be encouraged to consider and evaluate their use of LIBOR; and
- the UK authorities should work closely with the European and international community and contribute fully to the debate on the long-term future of LIBOR and other global benchmarks.

The Wheatley Review has also published the responses it received to its August 2012 discussion paper.

The government intends to respond to the review when Parliament returns, and introduce any necessary legislation in the Financial Services Bill that is currently being considered by the House of Lords.

Responses to discussion paper – part 1
Responses to discussion paper – part 2
Responses to discussion paper – part 3
Martin Wheatley speech

OTC derivatives and market infrastructures: ESMA and EBA publish technical standards

ESMA has published its finalised draft regulatory and implementing technical standards on the regulation on OTC derivative transactions, central counterparties and trade repositories (EMIR), which set out the specific details of how EMIR's requirements are to be implemented.

Amongst other things, the draft technical standards:

- define the details of derivatives transactions that need to be reported to trade repositories, including the information to be provided to ESMA for the authorisation and supervision of trade repositories and the data to be made available to relevant authorities and the public;
- set out how the clearing thresholds will operate;
- set out the risk mitigation techniques for OTC derivatives that are not centrally cleared, such as timely confirmation, portfolio compression and reconciliation; and
- define a set of organisational, conduct of business and prudential requirements for CCPs including margin requirements, default fund, default waterfall, liquidity risk management, and investment policy of CCPs, as well as stress and back tests.

In addition, the EBA has published its finalised draft regulatory technical standards on capital requirements for central counterparties (CCPs) under EMIR. The EBA has also adopted an opinion on capital requirements for CCPs in order to highlight market developments and supervisory practices which should be taken into consideration for a future review of EMIR.

The European Commission now has three months to decide whether to endorse ESMA's and EBA's draft technical standards. The European Parliament and Council may also object to the technical standards before they enter into force. The standards will be formally adopted as Commission Delegated Regulations.

ESMA finalised draft regulatory and implementing technical standards
ESMA impact assessment
EBA finalised draft regulatory technical standards
EBA opinion

MiFID review: ECON Committee approves amendments to Commission proposals

The European Parliament's ECON Committee has approved the proposed amendments to the European Commission's proposals for a regulation on markets in financial instruments and amending the regulation on OTC derivatives, central counterparties and trade repositories (MiFIR) and a directive on markets in financial instruments repealing Directive 2004/39/EC (MiFID 2).

The Parliament's plenary session is expected to vote on the proposals during its 22-23 October 2012 session.

Press release

REMIT: Commission consults on implementation of data and transaction reporting framework for wholesale energy markets

The European Commission has published a consultation paper on the implementation of a data and transaction reporting framework for wholesale energy markets. The consultation has been launched to assist the Commission in the preparation of implementing acts to be adopted in accordance with Articles 8(2), 8(5) and 21(2) of Regulation (EU) No. 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency (REMIT).

Comments are due by 7 December 2012.

Final report: REMIT Technical Advice for setting up a data reporting framework (dated June 2012)

Financial conglomerates: Joint Forum issues principles for supervision

The Joint Forum, which comprises the Basel Committee on Banking Supervision, IOSCO and the International Association of Insurance Supervisors, has issued its final report on Principles for the Supervision of Financial Conglomerates.

The Joint Forum has indicated that, in revising its principles, its aim was to focus on closing regulatory gaps, eliminating supervisory 'blind spots' and ensuring effective supervision of risks arising from unregulated financial activities and entities. The Joint Forum has also noted that these updated principles are structured in a manner that should facilitate their implementation across jurisdictions and over time.

FSA Managing Director sets out vision for conduct regulation and how it will affect asset managers

Martin Wheatley, Managing Director of the FSA and chief executive officer designate of the Financial Conduct Authority (FCA), has given a speech at the FSA's Asset Management Conference, in which he set out his vision for conduct regulation and how it will affect asset managers. In particular, Mr. Wheatley focused on the impact of charging, competition and understanding consumer behaviour.

Clive Adamson, Director of Supervision of the FSA's Conduct Business Unit, also spoke at the conference. In his speech, Mr. Adamson emphasised that the FCA will aim to move away from a primarily reactive style to be a more forward-looking regulator. Mr. Adamson also highlighted that the FCA will not have a one-size-fits-all approach and indicated that the FCA will separate firms into four new supervision categories – C1, C2, C3 or C4 – according to their impact on consumers and the market. C1 firms are those likely to be the largest, most complex firms with very large client assets or trading bases, whereas C4 firms are likely to be smaller firms with simpler business models and products. Mr. Adamson indicated that although the metrics are still in the final stages of being developed, the FSA is planning to write to all firms in early 2013 to let them know which category they will be in.

Martin Wheatley speech
Clive Adamson speech

Remuneration Code: FSA publishes updated guidance on proportionality

The FSA has published an updated version of its 'General guidance on proportionality: The Remuneration Code (SYSC 19a) & Pillar 3 disclosures on remuneration (BIPRU 11)'. The guidance sets out the FSA's approach to implementing the Remuneration Code and the Pillar 3 remuneration disclosure rules, and further clarifies how firms may comply with the Code and disclosure rules in a manner that takes account of their size, internal organisation and the nature, scope and complexity of their activities. The new framework replaces the original four-tier structure (based on capital resources) with three new 'levels' (based on total assets). The revised approach is intended to allow the FSA to focus its resources on the most significant firms who pose risks to financial stability.

Short selling: FSA provides information on UK notification process for market-making activities and primary market operations

The FSA has published a paper on the market maker and authorised primary dealer exemptions notification procedures under the EU regulation on short selling, which provides information for those firms wishing to notify the FSA of their intention to use these exemptions. The FSA has also published the forms for firms to use in sending notifications of intent to use the exemptions.

Under the regulation, which will be directly applicable in the UK from 1 November 2012, firms are able to notify their intention to employ the market maker exemption and the authorised primary dealer exemption in relation to specific financial instruments at least 60 days before the regulation comes into effect.

German Federal Government publishes draft High Frequency Trading Act

The German Federal Government has published a draft High Frequency Trading Act. The draft Act introduces a licence requirement for high frequency traders and regulatory restrictions on investment firms and fund management companies. It also provides sanctioning powers to the Federal Financial Regulatory Authority (BaFin) and the German exchanges' supervisory bodies. In addition, under the draft Act, certain activities in relation to high frequency trading will constitute market manipulation. The Federal Government has sought to align the draft Act with the European Commission's proposals for MiFID 2 and MiFIR. The Federal Parliament will now discuss the draft Act.

Press release

Dutch government consults on legislative proposal imposing general duty of care on financial services providers

The Dutch government has launched a consultation on the proposed Financial Markets Amendment Act 2014. The proposed Amendment Act contains a general duty of care for financial services providers, which is intended to act as a 'safety net' besides the current and future regulation of financial services. This duty of care will allow the Financial Markets Authority (AFM) to sanction financial service providers if they act outside the scope of specific rules that are aimed at protecting retail clients.

The general duty of care extends to the offering of, or advising on, all financial products other than financial instruments. A separate general duty of care already exists in respect of services relating to financial instruments, as follows from MiFID. The duty of care also covers the development of new financial products. Although roughly similar duties of care already stem from Dutch private law, the new duty of care will enable the AFM to use its supervisory powers when an entity is 'evidently' not acting in the best interest of its clients.

One of the other changes proposed by the Amendment Act concerns the obligation for Dutch private limited companies whose securities have been admitted to trading on a regulated market to make their annual accounts publicly available within four months after the end of the previous financial year. The current legislation is inconsistent on the four month period.

Another proposed change expands the scope of the rules on asset segregation for investment funds. Amongst other things, an amendment to the rules on the obligatory use of separate entities that hold the legal ownership of assets is proposed.

Legislative proposal
Explanatory memorandum

Polish Financial Supervision Authority issues recommendations regarding offering of structured products

The Polish Financial Supervision Authority (PFSA) has published a set of recommendations regarding the offering of structured products such as unit-linked insurance policies, investment certificates or FX or commodity-linked notes to non-professional investors.

Amongst other things, the PFSA expects that offerors of structured products should: (1) provide investors with reliable information about the structured products; (2) ensure that personnel involved in the structured products offering is duly trained; (3) offer structured products appropriate to the investors' needs; (4) disclose all risk factors related to the structured products; (5) deliver to investors all the documents which are necessary to make an investment decision; and (6) distinguish the role of an insurance intermediary from the party that enters into an insurance agreement if it is a third-party benefit contract and involves an investment element.

Swiss Parliament approves partial revision of Collective Investment Schemes Act

The Swiss Parliament has approved the partial revision of the Collective Investment Schemes Act (CISA). Amongst

other things, the revisions to the CISA introduce: (1) a requirement for Swiss-based managers above a certain threshold of assets under management to be licensed by the Swiss Financial Market Supervisory Authority (FINMA); (2) a requirement for all distributors of funds in Switzerland (Swiss-based or foreign) to obtain authorisation from FINMA; (3) regulation of all forms of distribution, irrespective of whether made to the public or not; and (4) changes to the treatment of high net worth investors.

The effective date of the revised CISA has not been determined, but it is expected to enter into force in the first quarter of 2013.

Swiss Parliament session history (German)

Qatar Financial Centre Regulatory Authority issues proposals to strengthen regulatory regime

The Qatar Financial Centre Regulatory Authority has published two consultation papers:

- QFCRA CP No. 2012/01: Proposed Governance and Controlled Function Rules 2012; and
- QFCRA CP No. 2012/02: Proposed Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) regime amendments.

The proposed rules in QFCRA CP No. 2012/01 promote compliance with the recently revised principles established by the International Association of Insurance Supervisors (IAIS) and the Basel Committee on Banking Supervision. The proposed rules require that a governing body of a QFC authorised firm approve and establish; (1) a formal governance framework; (2) a risk management and internal controls framework; and (3) a remuneration policy.

The draft rules also propose a new controlled function for internal audit for QFC insurers, QFC banks (i.e. PIIB Category 1) and QFC Islamic banks (i.e. PIIB Category 5) and a new requirement for QFC banks and QFC Islamic banks to have a risk management function.

Comments are due by 12 November 2012.

The proposed rule in QFCRA CP No. 2012/02 promotes compliance with the recently revised FATF international standards. There are three areas the proposed rule is intended to amend: (1) minor and technical amendments to the rules arising as a result of revisions to FATF standards and recommendations; (2) amendments applicable to all firms with regard to the residency requirement for Money Laundering Reporting Officers; and (3) a revised regime for general insurance business forms contained in a new standalone rulebook.

Comments are due by 5 November 2012.

Short selling: ASIC reports on restrictions introduced in September 2008

The Australian Securities & Investments Commission (ASIC) has published a report into the short selling ban introduced in September 2008, which concludes that the measure met regulatory objectives and would be considered again if similar circumstances arose. ASIC has acknowledged that the ban may have contributed to reduced liquidity and increased price volatility, and also imposed compliance costs on many firms, but stated that the situation warranted the action.

The temporary ban on covered short selling was lifted for non-financial stocks in November 2008 and the ban on covered short selling of financial stocks was lifted in May 2009.

US Federal agencies reopen comment period on swap margin and capital proposed rulemaking

The Federal Reserve Board (FRB), the Farm Credit Administration (FCA), the Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Agency (FHFA), and the Office of the Comptroller of the Currency (OCC) have reopened the comment period on a proposed rule to establish margin and capital requirements for swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants for which one of the agencies is the prudential regulator, as required by sections 731 and 764 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The comment period had originally ended on 11 July 2011, but has now been reopened until 26 November 2012 in order to allow interested persons more time to analyse the issues and prepare their comments in light of the consultative document on margin requirements for non-centrally cleared derivatives recently published by the Basel Committee on Banking Supervision and IOSCO.

UPCOMING CLIFFORD CHANCE EVENTS

Bagel Briefings – Fall 2012 Legal Development Series

Clifford Chance cordially invites you to its Fall 2012 Bagel Briefings – Legal Development Series, which will run from 24 October until 12 December 2012.

Partners from across the Clifford Chance network will present on a wide range of hot topics, including:

- Minimizing Exposure To and Liability From Earn-out Provisions;
- Jumpstart Our Business Startups Act (JOBS Act) – Update on Latest Trends;
- Short Selling Around the World;
- OTC Derivative Regulation – Recent Developments; and
- The Implications of Ethical Conflicts for Corporate Counsel.

Each briefing will take place at 8am at Clifford Chance's New York offices at:
31 West 52 Street
New York, NY 10019
4th Floor Conference Centre.

Breakfast will be served. To register, please contact nyseminars@cliffordchance.com or click on the link below.

Bagel Briefings – Fall 2012 Legal Development Series invitation
http://f.datasrvr.com/fr1/812/27239/Bagel_Briefings_-_Fall_2012.pdf

Registration page
http://emailcc.com/s/821832376cf3afec85c40a6eb82df7275d5c1ab9

RECENT CLIFFORD CHANCE BRIEFINGS

The Wheatley Review on LIBOR: publication of the final report

The final report of the Wheatley Review on LIBOR was published on 28 September 2012. The report concludes that LIBOR should be retained as a benchmark, but, as expected, recommends a comprehensive reform of LIBOR, which includes replacing the BBA with a new independent administrator of LIBOR. Given the different contexts (as well as the number and types of transactions) in which LIBOR is used, the report raises various questions which should be considered by market participants as to the implications of the recommendations for existing and future transactions.

This briefing outlines the ten-point plan for reform set out in the report. It concludes by setting out some of the matters which should be considered by market participants involved in LIBOR linked transactions.

http://www.cliffordchance.com/publicationviews/publications/2012/09/the_wheatley_reviewonliborpublicationofth.html

Solvency II Update

Since our last briefing in January 2012, there have been several developments relating to the proposed new Solvency II regime, although perhaps not as much progress as we might have expected at that time. Many steps still remain to be taken on the path to Solvency II implementation and we understand that there are significant outstanding issues in political negotiations.

This briefing provides an update on developments, their implications, outstanding issues and expected next steps.

http://www.cliffordchance.com/publicationviews/publications/2012/09/solvency_ii_update.html

SFC's claim of alleged insider dealing struck out by Hong Kong's Court of First Instance as 'an abuse process'

In a recent decision by the Court of First Instance of Hong Kong, (the High Court), Securities and Futures Commission (SFC) v Lee Sung Ho and Others (HCA 2177A/2011), the High Court has struck out the SFC's claim (writ) of alleged insider dealing against one defendant, discharged worldwide interim injunctions granted in relation to three other defendants and awarded costs against the SFC in favour of all six defendants. In the judgment of 5th September 2012, Mr. Justice Barma described the SFC's writ against one of the defendants as being 'at best, speculative' and further stated that 'the SFC's assertion that the transactions were not genuine ones did not appear to have any solid basis'. The High Court affirmed the SFC's power to pursue substantively claims for insider dealing through the court, rather than the slower process of a full investigation and then a referral to the Market Misconduct Tribunal. However, the case suggests that bringing direct court proceedings, particularly where started with interim injunction relief, can carry greater risks for the SFC.

This briefing discusses the decision.

http://www.cliffordchance.com/publicationviews/publications/2012/09/sfc_s_claim_of_allegedinsiderdealingstruckou.html

CMA warns unlicensed entities against conducting securities business in the Kingdom of Saudi Arabia

The Saudi Arabian Capital Market Authority (CMA) has issued a warning to all institutions that are not Authorised Persons, or Exempt Persons (as defined in the Securities

Business Regulations), against undertaking securities business in Saudi Arabia. The CMA's warning reflects the legal position provided by the laws and regulations governing the securities industry in Saudi Arabia. The securities industry in Saudi Arabia is governed by the Capital Market Law and its implementing regulations.

Clifford Chance and Al-Jadaan & Partners have jointly prepared this briefing, which discusses the CMA's warning.

http://www.cliffordchance.com/publicationviews/publications/2012/09/cma_warns_unlicensedentitiesagainstconductin.html