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Briefing note

International Regulatory Update

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IN THIS WEEK'S NEWS

- Shadow banking: FSB consults on initial integrated set of policy recommendations
- EMIR: FSA Director sets out estimated implementation timeline
- MiFID review: EU Council Presidency publishes compromise texts
- Market abuse regulation: EU Council Presidency publishes compromise text
- UCITS IV: ESMA publishes opinion on interpretation of Article 50(2)(a)
- UCITS V: Cyprus EU Council Presidency publishes compromise text
- Basel III: Basel Committee updates FAQs on counterparty credit risk rules
- IOSCO publishes recommendations for securitisation regulation
- FSA consults on new capital regime for self-invested personal pension operators
- Kay review: UK government sets out steps to reform equity markets
- Amended Prospectus and Transparency Directives: French implementing regulations published
- FINMA sets out new strategic goals
- FINMA makes additional changes to its circular on banks' credit risks
- National Bank of Ukraine announces new rules for foreign currency transactions
- SAFE issues notice on foreign exchange administration of foreign-invested partnerships
- SAFE issues notice on adjusting foreign exchange administration policies for direct investment
- Singapore Parliament passes Securities and Futures (Amendment) Bill 2012 to regulate OTC derivatives
- Australian government announces rule changes and further consultation on market structure, dark liquidity and high frequency trading
- US Treasury issues final determination on foreign exchange swaps and forwards
- Recent Clifford Chance briefings: US Treasury exempts foreign exchange swaps and forwards from regulation as swaps; and more. Follow this link to the briefings section.

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Shadow banking: FSB consults on initial integrated set of policy recommendations

The Financial Stability Board (FSB) has launched a consultation on an initial integrated set of policy recommendations to strengthen oversight and regulation of the shadow banking system.

In particular, the FSB has published the following consultation documents:

- a report entitled 'An Integrated Overview of Policy Recommendations', which sets out the FSB's overall approach to shadow banking issues and provides an overview of its recommendations across five specific areas;
- a report entitled 'Policy Framework for Strengthening Oversight and Regulation of Shadow Banking Entities', which sets out a high-level policy framework to assess and mitigate bank-like systemic risks posed by shadow banking entities other than money market funds (MMFs); and
- a report entitled 'Policy Recommendations to Address Shadow Banking Risks in Securities Lending and Repos' that sets out 13 recommendations to enhance transparency, strengthen regulation of securities financing transactions, and improve market structure.

Comments are due by 14 January 2013. The FSB expects to publish final recommendations in September 2013.

The FSB has also published its second annual Global Shadow Banking Monitoring Report. The 2012 report has broadened its coverage to include 25 jurisdictions (all 24 FSB member jurisdictions and Chile), compared with 11 jurisdictions in 2011, and includes analyses on interconnectedness between banks and non-bank financial entities as well as on a specific non-bank financial subsector, namely finance companies.

EMIR: FSA Director sets out estimated implementation timeline

David Lawton, Director of Markets at the FSA, has given a speech outlining some of the challenges in implementing the regulation on OTC derivative transactions, central counterparties and trade repositories (EMIR).

In particular, Mr. Lawton noted that there continues to be uncertainty around the timing of implementation. While emphasising that accurate forecasts cannot be given as yet because the timing is subject to a large number of dependencies, he set out his current estimate on the timetable as follows:

- entry into force of level 2 – late Q1 2013;
- first clearing obligations – Q4 2013;
- reporting requirement – July 2013 for credit and interest rate derivatives, January 2014 for all other classes, and 90 days for backloading; and
- collateralisation of non-cleared trades – consultation likely H1 2013.

Mr. Lawton also noted that there is still uncertainty around the interpretation of some of the rules in EMIR, but argued that there are some advantages to uncertainty, and that it may be beneficial not to codify interpretations too early on.

Mr. Lawton also provided some practical advice for firms on how to prepare for implementation, including:

- establishing clearing arrangements;
- getting ready for the non-margin aspects of bilateral risk mitigation;
- where appropriate, establishing connectivity with one or more trade repositories to facilitate reporting;
- reviewing existing operational processes to ensure they conform with the new technical standards;
- establishing appropriate segregation arrangements; and
- where appropriate, considering possible exemptions to be relied on.

MiFID review: EU Council Presidency publishes compromise texts

The Cyprus EU Council Presidency has published new compromise texts for the proposals for a directive on markets in financial instruments repealing Directive 2004/39/EC (MiFID 2) and a regulation on markets in financial instruments and amending the regulation on OTC derivatives, central counterparties and trade repositories (MiFIR).

Proposed directive – Presidency compromise
Proposed regulation – Presidency compromise

Market abuse regulation: EU Council Presidency publishes compromise text

The Cyprus EU Council Presidency has published a new compromise text for the proposed regulation on insider

dealing and market manipulation, which updates the existing framework provided by the Market Abuse Directive.

UCITS IV: ESMA publishes opinion on interpretation of Article 50(2)(a)

ESMA has published its opinion on the interpretation of Article 50(2)(a) of the Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS IV). ESMA's opinion indicates that UCITS may only invest in units or shares of collective investment undertakings as defined in Article 50(1)(e) of the Directive.

ESMA expects that any portfolio adjustments required to ensure compliance with its opinion will be made taking into account the best interests of investors and at the latest by 31 December 2013.

UCITS V: Cyprus EU Council Presidency publishes compromise text

The Cyprus EU Council Presidency has published a compromise text for the proposal for a directive amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities as regards depositary functions, remuneration policies and sanctions (UCITS V).

Basel III: Basel Committee updates FAQs on counterparty credit risk rules

The Basel Committee on Banking Supervision has published an updated version of its frequently asked questions on the Basel III counterparty credit risk rules. The Committee has agreed to periodically review frequently asked questions and publish answers, along with any technical elaboration of the rules text and interpretative guidance that may be necessary, in order to promote consistent global implementation of Basel III.

IOSCO publishes recommendations for securitisation regulation

IOSCO has published its final report on global developments in securitisation regulation, which proposes a series of recommendations aimed at ensuring securitisation markets develop, but on a sound and sustainable basis. The Financial Stability Board (FSB) is in the process of reviewing reforms of securitisation markets, as part of its ongoing work for the G20 on the shadow banking sector. In this context, the FSB requested that IOSCO conduct a stock-taking exercise on certain aspects of securitisation, including risk retention, transparency and standardisation, and develop policy recommendations as necessary.

IOSCO has analysed the various standards being implemented, and has considered the extent to which different approaches to regulatory reform might result in impediments to cross border activity. Based on this analysis, IOSCO identifies in its report a series of recommendations for consideration by regulators and policy makers.

These recommendations cover a roadmap toward convergence and implementation of approaches to incentive alignment, in particular regarding risk retention requirements. They build on recent developments in standardised templates for asset level disclosure and other disclosure-related initiatives to assist informed investment decisions. The report also sets out further issues for consideration to support sound regulation of sustainable securitisation markets.

FSA consults on new capital regime for self-invested personal pension operators

The FSA has published a consultation paper (CP12/33) setting out its proposals for a new capital regime for self-invested personal pension SIPP operators. In particular, the FSA has identified the following two weaknesses in its current prudential framework for SIPP operators: (1) that the level of operators' expenditure is not necessarily aligned to the size and nature of the assets they administer; and (2) that some asset types are more difficult and costly to transfer during a wind-down scenario than others.

The FSA is proposing to update its current framework to address these weaknesses and to ensure that operators hold enough capital of sufficient quality to facilitate an orderly wind-down if they choose or need to exit the market, and to update its reporting requirements for operators to reflect this.

Comments are due by 22 February 2013.

Kay review: UK government sets out steps to reform equity markets

The UK government has published its response to Professor John Kay's report from his independent review of investment in UK equity markets and its impact on the long-term performance and governance of UK quoted companies. The government response endorses Professor

Kay's ten principles for equity markets to which market practitioners, government and regulatory authorities should have regard, and the report's directions for market participants which follow from these principles.

The response sets out a number of steps the government is taking to deliver on the Kay report's detailed recommendations, including:

- completing reform of corporate narrative reporting to be higher quality, simpler, more relevant to users and more focused on forward looking strategy;
- pursuing reforms to the EU Transparency Directive which will remove mandatory quarterly reporting; and
- promoting the revised edition of the Stewardship Code which emphasises that stewardship should encompass engagement by investors on company strategy.

The response also commits the government to publish an update, by summer 2014, setting out what further progress has been achieved by government and others, to consider Professor Kay's directions for regulatory policy and to deliver his specific recommendations.

Amended Prospectus and Transparency Directives: French implementing regulations published

An ordinance and two decrees of the Ministry of Economy, dated 8 November 2012, implementing Directive 2010/73/EU amending the Prospectus Directive (Directive 2003/71/EC) and the Transparency Directive (Directive 2004/109/EC) have been published in the Official Journal.

The ordinance amends various provisions of the French Financial and Monetary Code. Amongst other things, it specifies the threshold below which an offer of non-equity securities issued in a continuous or repeated manner by a credit institution is not subject to the obligations relating to the offering of securities to the public, whilst leaving it to the AMF general regulation to set the relevant threshold. Additional details are added to provisions relating to instances where the liability of an issuer may be called upon with regard to the summary of the prospectus. Likewise, the period during which the occurrence of a new event must be mentioned in a supplement to the prospectus is provided for. The threshold above which there is no periodic disclosure information for debt securities is increased from EUR 50,000 to EUR 100,000. However, the ordinance includes a grandfather clause in respect of debt securities with a denomination per unit of at least EUR 50,000 and admitted to trading on a regulated market prior to 31 December 2010.

While the first decree amends regulatory provisions of the French commercial code, the second one amends similar provisions in the French Financial and Monetary Code. The first decree increases from EUR 50,000 to EUR 100,000 the threshold above which an issuer can choose to hold the bondholders meeting in another Member State subject to certain conditions being met, with a grandfather clause for bondholders who hold securities admitted to trading prior to 31 December 2010. The second decree provides for a new definition of the term 'qualified investor' taken from Directive 2004/39/EC on markets in financial instruments. It also increases from 100 to 150 persons the threshold below which an offer of securities benefits from a prospectus exemption.

The new provisions entered into force on 10 November 2012.

Ordinance 2012-1240
Report relating to ordinance
Decree 2012-1242
Decree 2012-1243

FINMA sets out new strategic goals

The Swiss Financial Market Supervisory Authority (FINMA) has published its new strategic goals for the period 2013 to 2016. These strategic goals provide guidance for FINMA's supervisory activities and include the following:

- prudential supervision – to strengthen financial stability and crisis resistance through consistent compliance with internationally recognised prudential standards;
- promoting integrity, transparency and client protection – consistently to implement licensing procedures, promote transparency regarding the varying degrees of supervisory intensity and promote internationally recognised regulations on client and investor protection, in order to enhance Switzerland's reputation as a financial centre and promote fair business conduct and integrity on the part of financial market participants;
- national and international cooperation – to prioritise FINMA's resources effectively in its international activities and maintain efficient information flow and clarify decision-making powers at national level;
- regulation – to analyse existing regulations and legal trends, propose relevant amendments, support important proposed regulations and highlight FINMA's

concerns early and transparently, and to regulate only in so far as it is necessary in light of FINMA's supervisory goals; and

- FINMA as an authority – to perform FINMA's function with the help of competent employees, and to conduct an open, objective dialogue with its stakeholders and keep the public informed about its activities.

These strategic goals have been approved by the Federal Council.

FINMA makes additional changes to its circular on banks' credit risks

The Swiss Financial Market Supervisory Authority (FINMA) has announced that it is making changes to its circular 'Credit risks – banks' (FINMA-Circ. 2008/19). The changes are intended to clarify the way in which banks with credit risks must deal with central counterparties. The changes will be based on the standards recently adopted in this area by the Basel Committee. Apart from the changes already announced in FINMA's press release of 18 July 2012, the circular will include some additional minor corrections and adjustments.

The circular will come into force as planned on 1 January 2013.

National Bank of Ukraine announces new rules for foreign currency transactions

The National Bank of Ukraine (NBU) has issued two regulations exercising its new powers to influence foreign currency exchange markets.

In particular, from 19 November 2012, Ukrainian companies will be required to convert at least 50% of their foreign currency export proceeds into Ukrainian Hryvnia. In addition, the period of time during which settlements under import and export transactions must occur has been shortened from 180 days to 90 days. These requirements will be effective for the next 6 months, but may be extended by the NBU.

In addition, a new draft law has been introduced in the Parliament of Ukraine, which would establish a 15% duty payable on foreign currency sale transactions entered into by individuals. The new duty would not apply to transactions undertaken by companies or settlement transactions using credit or debit cards. However, it is unclear if or when the draft law will be passed, as the Parliament has voted to postpone consideration of the new law.

Press release (Ukrainian)
Press release (English)

SAFE issues notice on foreign exchange administration of foreign-invested partnerships

The State Administration of Foreign Exchange (SAFE) has issued the 'Notice on Relevant Issues regarding Foreign Exchange Administration of Foreign-invested Partnerships' to regulate the foreign exchange administration of foreign-invested partnerships (FIPs) and facilitate foreign direct investment.

Amongst other things, the notice states that:

- a FIP shall apply for foreign exchange registration with the local SAFE branch within 30 days after obtaining its business licence;
- the foreign partners' capital contributions are required to be registered with the local SAFE branch, or such capital cannot be transferred or converted into RMB in China;
- once the foreign exchange registration and capital contribution registration are completed, a FIP may directly deal with a designated foreign exchange bank to open a foreign exchange account, purchase and transfer foreign currency funds and remit profits out of China; and
- all designated foreign exchange banks shall check the registration records of FIPs in the SAFE system when conducting any foreign exchange business for FIPs.

The notice will become effective on 17 December 2012.

SAFE issues notice on adjusting foreign exchange administration policies for direct investment

The State Administration of Foreign Exchange (SAFE) has issued the 'Notice on Further Improving and Adjusting the Foreign Exchange Administration Policies for Direct Investment', which is intended to simplify the foreign exchange administration of foreign direct investment and facilitate trade and investment in China.

Amongst other things, under the notice:

- foreign exchange administration has been generally relaxed for foreign direct investment – for example, SAFE approval is no longer required for the opening of certain accounts;

- foreign exchange administration for the re-investment of foreign-invested enterprises using legitimate funds has been further simplified;
- foreign exchange administration for re-investment of foreign-funded investment companies has been simplified, which will apply to foreign-invested PE/VC investment enterprise; and
- domestic companies are now allowed to make overseas loans through domestic foreign currency loans and foreign-invested enterprises may extend loans to their overseas parent companies subject to certain limitations.

The notice will become effective on 17 December 2012.

Singapore Parliament passes Securities and Futures (Amendment) Bill 2012 to regulate OTC derivatives

The Singapore Parliament has passed the Securities and Futures (Amendment) Bill 2012. The broad amendment areas in the Bill 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.

In his second reading speech before the passage of the Bill, Tharman Shanmugaratnam, the Minister for Finance, Deputy Prime Minister and Chairman of the MAS stated that a second phase of amendments for the Securities and Futures Act 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.

Australian government announces rule changes and further consultation on market structure, dark liquidity and high frequency trading

The Australian government has announced a package of market integrity rules targeted at algorithmic trading (automated order processing) on Australia's financial markets.

The changes provide for an immediate obligation on ASX and Chi X to enforce an extreme trading range for trades in securities. There will also be new data reporting requirements on operators from 2013. For market participants, the obligations from the market integrity rules will come into force over a 6 to 18-month period.

ASIC has also launched two task forces focusing on further consideration of dark liquidity and high frequency trading. The task forces aim to better understand the impact of dark liquidity and high frequency trading on Australian market integrity and quality, and where appropriate, make recommendations to address any problems identified.

The task forces are due to report in March 2013 and ASIC proposes to release a further consultation paper to seek stakeholder views before any further rule changes are implemented.

US Treasury issues final determination on foreign exchange swaps and forwards

The US Department of the Treasury has issued a final determination stating that foreign exchange (FX) swaps and forwards will not be subject to certain mandatory derivative requirements, including central clearing and exchange trading. Under the Dodd-Frank Act, the derivative market must comply with comprehensive reforms that aim to reduce risk and ensure stability in financial markets. However, the Treasury has concluded that the FX swaps and forwards market already operates with high levels of transparency, risk management, and financial stability. According to the Treasury, FX transactions pose significantly less counterparty credit risk than other derivatives.

Many of the Dodd-Frank Act's new transparency and business conduct requirements will still apply to FX swaps and forwards. In addition, the Treasury's final determination does not extend to other types of FX derivatives.

RECENT CLIFFORD CHANCE BRIEFINGS

Structuring international mergers and acquisitions through the Netherlands

Clifford Chance has prepared an M&A toolkit memorandum providing a high-level overview of the advantages of structuring international M&A transactions through the Netherlands. The Netherlands is considered one of the best holding jurisdictions in view of its tax system, including a full exemption on income and capital gains derived from subsidiaries, its extensive tax treaty network, its flexible corporate laws and high quality of corporate service providers.

The first part of the memorandum describes the tax advantages of the use of a Dutch private limited liability company (BV) or a Dutch public limited liability company (NV) as a holding company for a foreign investor considering investing in a foreign target company. The second part describes the advantages of the use of a Dutch cooperative as a Dutch holding company in the event that an investor is established in a non-EU jurisdiction that has not concluded a tax treaty with the Netherlands.

http://www.cliffordchance.com/publicationviews/publications/2012/11/structuring_internationalmergersan.html

English Schemes of Arrangement – now also available for Dutch companies?

On 12 November 2012 the Dutch newspaper, het Financieele Dagblad, reported that insolvencies of Dutch companies are often inevitable (for intrinsically viable companies) because minority creditors cannot be crammed down outside insolvency under current Dutch laws. Clifford Chance Amsterdam partner Jelle Hofland was quoted in this article referring to the possible usage of English schemes of arrangement, which allows such a cram down outside insolvency if certain requirements are met.

This briefing addresses the possibilities of recognition of a scheme of arrangement in the Netherlands, as it is still not likely that new Dutch legislation similar to the scheme will be implemented soon (where other European countries have already implemented their own local schemes of arrangement).

http://www.cliffordchance.com/publicationviews/publications/2012/11/english_schemes_ofarrangementnowals.html

Royal Decree 1559/2012, of 15 November, which establishes the legal regime applicable to asset management companies

On 16 November 2012, Royal Decree 1559/2012, of 15 November, which establishes the legal regime applicable to asset management companies, was published in Spain's Official State Gazette.

This briefing discusses the Royal Decree.

http://www.cliffordchance.com/publicationviews/publications/2012/11/royal_decree_15592012of15novemberwhic.html

UAE Investment Fund Regulations – SCA staff interpretations

The UAE Securities and Commodities Authority (SCA) has provided some much-anticipated clarification on the practical application of the new SCA Investment Fund Regulations (IFRs). The guidance was provided by senior members of the team responsible for drafting the IFRs during a well-attended workshop held on 20 November 2012 at the SCA's offices in Dubai.

As a general caveat, it should be noted that much of the guidance provided constitutes an indication of the SCA's current interpretation of the IFRs. The statements made are not binding on the SCA, and the interpretation of the rules may change over time. That said, we consider it unlikely that the SCA would materially change its approach to the application of the IFRs without prior indication.

This briefing provides an overview of the guidance.

http://www.cliffordchance.com/publicationviews/publications/2012/11/uae_investment_fundregulationsscastaf.html

US Treasury exempts foreign exchange swaps and forwards from regulation as swaps

The Secretary of the Treasury has issued a final determination under the Commodity Exchange Act (CEA) that excludes foreign exchange swaps and foreign exchange forwards from regulation as swaps under the CEA and from the definition of 'swap' under the CEA. As a result, these transactions will not be regulated under the CEA, other than with respect to certain reporting, business conduct and anti-evasion rules. However, the Secretary did not extend this determination to non-deliverable foreign exchange forwards.

This briefing discusses the final determination.

http://www.cliffordchance.com/publicationviews/publications/2012/11/us_treasury_exemptsforeignexchangeswapsan.html