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Briefing note

International Regulatory Update

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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.

FSB reports on progress in implementing framework for systemically important financial institutions

The Financial Stability Board (FSB) has published the following three documents on the latest steps in implementing its policy framework for addressing the systemic and moral hazard risks associated with systemically important financial institutions (SIFIs):

- an updated list of global systemically important banks (G-SIBs) based on end-2011 data;
- a progress report on resolution of systemically important financial institutions; and
- a progress report on increasing the intensity and effectiveness of SIFI supervision.

The FSB notes that progress in reforming national resolution regimes and advancing recovery and resolution planning for G-SIFIs is encouraging overall. The FSB has further work underway to support implementation of its 'Key Attributes of Effective Resolution Regimes for Financial Institutions'. This includes the development of an assessment methodology for the Key Attributes and further guidance on the application of the Key Attributes to the resolution of non-banks, including insurers, investment firms and financial market infrastructures. The FSB intends to publish draft guidance on key aspects of recovery and resolution planning for consultation in the near future.

FSB reports on implementation of OTC derivatives market reforms

The Financial Stability Board (FSB) has published its fourth six-monthly progress report on the implementation of OTC derivatives market reforms. The report takes stock of the readiness of market infrastructure across the FSB's member countries to provide clearing services, collect and disseminate trade data and provide organised trading platforms for OTC derivatives. The report also reviews the progress made by standard-setting bodies and national and regional authorities towards meeting the G20 commitment.

The report concludes that regulatory uncertainty remains the most significant impediment to further progress and to comprehensive use of market infrastructure. The FSB has indicated that jurisdictions should put in place their legislation and regulation promptly and in a form flexible enough to respond to cross-border consistency and other issues that may arise, adding that regulators need to act by end-2012 to identify conflicts, inconsistencies and gaps in their respective national frameworks, including in the cross-border application of rules.

Comments are due by 30 November 2012.

FSB task force reports on enhancing banks' risk disclosures

The Financial Stability Board (FSB) has welcomed the publication of the Enhanced Disclosure Task Force's report on enhancing the risk disclosures of banks.

The report identifies seven fundamental principles for enhancing the risk disclosures of banks, and sets out a number of recommendations intended to enable users to better understand the following:

- a bank's business models, the key risks that arise from them and how those risks are measured;
- a bank's liquidity position, its sources of funding and the extent to which its assets are not available for potential funding needs;
- the calculation of a bank's risk-weighted assets (RWAs) and the drivers of changes in both RWAs and the bank's regulatory capital;
- the relationship between a bank's market risk measures and its balance sheet, as well as risks that may be outside those measures; and

- the nature and extent of a bank's loan forbearance and modification practices and how they may affect the reported level of impaired or non-performing loans.

The task force also highlights a number of examples of leading or best practice disclosures to assist banks in adopting the recommendations in the report, and provides illustrations of particular instances where investors have suggested that consistency of presentation would improve their understanding of the disclosed information and facilitate comparability among banks.

Basel Committee reports to G20 Finance Ministers and Central Bank Governors on Basel III implementation

The Basel Committee on Banking Supervision has published its report to G20 Finance Ministers and Central Bank Governors on Basel III implementation by its member jurisdictions. The report will be considered at the meeting of G20 ministers and governors in Mexico City on 4-5 November 2012.

The report covers all three levels of the Committee's Basel III implementation review programme:

- Level 1 – ensuring the timely adoption of Basel III;
- Level 2 – assessing regulatory consistency with Basel III; and
- Level 3 – assessing the consistency of outcomes (initially focusing on banks' calculation of risk-weighted assets).

FSA issues policy statement on large exposures regime and groups of connected clients and connected counterparties

The FSA has published a Policy Statement (PS12/21) reporting on the main issues arising from its January 2012 Consultation Paper (CP12/01) on:

- changes to the FSA Handbook definition of connected counterparties, and the basis for aggregating exposures to connected counterparties when applying large exposure limits;
- new guidance on the treatment of large exposures to structured finance vehicles; and
- a change to the Handbook guidance in BIPRU 10.6.33G on the institutional exemption.

The guidance proposed in CP12/01 built on CEBS's December 2009 guidelines on the implementation of the revised large exposures regime under the amended Capital Requirements Directive (CRD 2 – as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management).

Having considered feedback from industry, the FSA intends to implement the proposals in CP12/01 subject to a number of amendments to the guidance.

FSA issues policy statement on data collection on remuneration practices

The FSA has published a Policy Statement (PS12/18) setting out its approach to data collection on remuneration practices and the reporting requirements for FSA-regulated firms. Amendments to the Capital Requirements Directive (CRD 3) introduced requirements for data collection on remuneration practices by Member State competent authorities and for transmitting such data to the European Banking Authority (EBA). In the UK, the Capital Requirements (Amendment) Regulations 2012 require the FSA to provide the EBA with remuneration data, as set out in CRD3. In July 2012, the EBA published guidelines setting out its expectations on the contents of two remuneration data sets to be submitted by firms annually.

PS12/18 sets out the rules the FSA has amended in the Remuneration Code (SYSC 19A) and the Supervisory Handbook (SUP 16). It also provides feedback on the responses the FSA received to the proposals in its August 2012 Consultation Paper (CP12/18).

FSA issues policy statement on CASS firm classification, oversight, reporting and mandate rules

The FSA has published a Policy Statement (PS12/20) setting out changes to its client assets policy, which are intended to strengthen the protection given to clients of regulated firms. PS12/20 reports on the main issues arising from the FSA's July 2012 Consultation Paper (CP12/15) on two areas of client assets policy, CASS oversight and reporting, and the mandate rules (CASS 8). It also sets out the FSA's final rules in this area.

Personal pensions: FSA sets out final rules on disclosures by SIPP operators and consults on inflation-adjusted illustrations

The FSA has published a consultation paper (CP12/29) which reports on the issues arising from Chapter 5 of its Quarterly Consultation CP12/5 and includes final rules on disclosure requirements for operators of self-invested personal pension schemes (SIPPs). CP12/29 also sets out the FSA's proposals for inflation-adjusted Key Features Illustrations (KFIs) for personal pensions.

Comments are due by 1 February 2013.

Short selling: FSA publishes forms for notifying and disclosing net short positions and confirms Handbook changes

The FSA has published the forms for notifying and disclosing net short positions under the EU Short Selling Regulation. In particular, the FSA has published the forms for:

- public disclosure of shares;
- cancellation of public disclosure of shares;
- private notification of shares;
- private notification of sovereign debt;
- private notification of uncovered position in sovereign CDS;
- cancellation notification of shares;
- cancellation notification of sovereign debt; and
- cancellation notification of uncovered position in sovereign CDS.

The FSA has also published a Policy Statement (PS12/19) setting out amendments to its Handbook relating to the EU Short Selling Regulation. PS12/19 also summarises the responses to the FSA's August 2012 Consultation Paper (CP12/21) on these Handbook changes. The FSA has indicated that the final instrument does not differ significantly from the consultation draft.

The regulation became directly applicable in the UK from 1 November 2012 and the Handbook changes also came into effect on the same date.

FSA consults on regulatory fees and levies for 2013/14

The FSA has published a consultation paper (CP12/28) which sets out proposed changes to how its fees and levies will be calculated for 2013/14.

To accommodate regulatory reform, the FSA is consulting on changes to its fees methodology so it can adapt it for the new Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) to fund their first period of operation.

In addition, to inform the review of the FCA's fees methodology to be undertaken during 2013/14, the FSA is seeking views on the proposed FCA fees governing principles.

Comments are due by 7 January 2013.

CRD 4: FSA issues statement on transitional provisions on capital resources

The FSA has issued a communication setting out its intended implementation of the transitional provisions in the draft fourth package of amendments to the Capital Requirements Directive (CRD 4) relating to own funds requirements, the grandfathering of capital instruments, and the application of regulatory adjustments to own funds. The FSA intends to consult on these proposals in due course once the CRD 4 legislation has been adopted, but has decided to give advance notice of its intentions specific to this area.

In particular, the FSA has indicated that the minimum pace of transition set out in the CRD 4 legislation will not be accelerated, except where applying the minimum transitional provisions in CRD 4 would have the effect of weakening standards relative to what is in force in the UK prior to the CRD 4 implementation date.

In addition to Handbook requirements, certain high-impact firms currently report and disclose their capital position using the more stringent definition of Core Tier 1 (CT1) capital communicated by the FSA to the British Bankers' Association in 2009. The FSA's intended approach is to continue to monitor the capital position (including the capital resources) of these firms using the definition of CT1 communicated in 2009, until such a time as the measure of firms' CET1 capital resources under its implementation of the CRD 4 transitional provisions has become at least equally stringent.

Prudential Regulation Authority: Bank of England and FSA consult on designation of investment firms for prudential supervision

The Bank of England and the FSA have published a joint consultation paper on the designation of investment firms for prudential supervision by the Prudential Regulation Authority (PRA). The paper includes a draft policy statement setting out the current views of the Bank and the FSA on how the PRA will approach the designation of investment firms for prudential supervision. The draft policy statement sets out proposed factors to which the PRA will have regard when deciding whether to designate an investment firm and explains the rationale for these factors. The statement also sets out the procedural arrangements for making these decisions.

The consultation period ends on 4 January 2013.

Mortgage Market Review: FSA confirms new rules

The FSA has published a Policy Statement (PS12/16) summarising the feedback to its December 2011 Consultation Paper (CP11/31) on its proposals to reform mortgage market regulation and setting out its final rules in this area.

The majority of proposals published in December 2011 are unchanged but, in light of feedback received during the consultation, the FSA has re-thought its approach on a number of areas, including the following:

- transitional rules enabling lenders to make exceptions to the responsible lending rules for customers who need to remortgage;
- advised sales; and
- high net worth borrowers, and business customers borrowing against their home.

The majority of new rules come into effect on 26 April 2014. However, the FSA is introducing a new evidential provision from 26 October 2012 intended to ensure that borrowers who find themselves 'trapped' with their current lender, because they do not meet current tightened lending criteria, are treated fairly.

Mortgage Market Review Data Pack

Greek regulator extends short selling ban

The Hellenic Capital Market Commission (HCMC) has extended the temporary prohibition of short sales on the Athens Exchange for a three month period from 1 November 2012 until 31 January 2013. The ban applies to short selling of shares and units of Exchange Traded Funds admitted to trading on the Athens Exchange irrespective of the venue where the transaction is executed. It includes sales which are covered with subsequent intraday purchases, and applies to all depository receipts representing shares admitted to trading on the Athens Exchange.

ESMA has issued its opinion on the measures adopted by the HCMC, stating that it considers the prohibition to be appropriate and proportional to address the threats persisting in Greece and that its duration is justified.

Press release
ESMA opinion

Spanish regulator imposes 3 month ban on short selling and similar transactions

The Comisión Nacional del Mercado de Valores (CNMV) has imposed, effectively immediately, a precautionary ban on short selling transactions. The decision follows the CNMV's evaluation of the impact on the market of the measures restricting net short positions in Spanish shares adopted in July 2012 and extended by the decision of 18 October 2012. The ban will be maintained for a period of three months and until market close on 31 January 2013, inclusive, and may be extended or lifted, if considered necessary.

The precautionary ban will not apply to market-making in the terms provided in the EU Short Selling Regulation. The CNMV will supervise the market-making activities addressed by this exemption in the Spanish securities markets.

ESMA has issued its opinion on the measures adopted by the CNMV, stating that it considers the measure to be appropriate and proportional to address the threats persisting in Spain and that its duration is justified.

Link to decision
ESMA opinion

BaFin consults on draft circular on recovery plans for credit institutions

The German Federal Financial Supervisory Authority (BaFin) has published a draft circular on minimum requirements for the structure of recovery plans. BaFin intends to align the draft circular with the Financial Stability Board's 'Key Attributes of Effective Resolution of Financial Institutions' and the requirements set out in the European Commission's proposal for a Crisis Management Directive published on 6 June 2012.

Under the draft circular, credit institutions which have been identified as systemically important in Germany are required to draw up recovery plans. This applies on the level of a group of institutions as well as on the level of each individual institution.

Comments are due by 30 November 2012.

CSSF issues circular on authorisation and organisation of Luxembourg UCITS management companies

The Commission de Surveillance du Secteur Financier (CSSF) has published Circular 12/546 concerning the authorisation and organisation of Luxembourg UCITS management companies subject to Chapter 15 of the Law

of 17 December 2010 relating to undertakings for collective investment, as well as of Luxembourg investment companies which have not designated a management company within the meaning of Article 27 of the Law of 17 December 2010 relating to undertakings for collective investment (SIAGs).

The Circular replaces previous CSSF Circulars relative to UCITS management companies and SIAGs. It also integrates additional clarifications and requirements (e.g. as regards the two conducting officers, the use of own funds and the delegation rules) so that all the rules and guidelines for the application filing and daily operations of UCITS management companies and SIAGs are now contained in a single document.

Circular 12/546 has entered into force with immediate effect. However, existing UCITS management companies and SIAGs will have until 30 June 2013 to comply with the relevant substantial requirements which the circular introduced.

Dutch Ministry of Finance consults on implementation of revised Financial Conglomerates Directive

The Ministry of Finance has issued a consultation paper (available only in Dutch) on its legislative proposal for the implementation of Directive 2011/89/EU on financial conglomerates (FICOD 1). The Directive coordinates the group supervision of banks and insurance undertakings which form part of a financial conglomerate, aiming to avoid overlap and lacunas in supervisory regimes. FICOD 1 also provides additional rules for financial conglomerates.

FICOD 1 amends four older Directives:

- the Financial Conglomerates Directive (2002/87/EC);
- the revised Banking Consolidation Directive (2006/48/EC);
- the Directive on insurance undertakings in an insurance group (98/78/EC); and
- the Solvency II Directive (2009/138/EC).

Comments are due by 23 November 2012. FICOD 1 needs to be implemented in national legislation by 10 June 2013, except for the provisions relating to the AIFM Directive, which need to be implemented by the implementation deadline for the AIFMD, i.e. 23 July 2013.

Japanese regulator extends temporary restrictions on short selling activities and relaxation of share buyback regulations

Japan's Financial Services Agency (FSA) has announced that it is extending the temporary restriction on short selling activities and the relaxation of the share buyback regulations until 30 April 2013.

Under the temporary restriction on short selling activities:

- 'naked' short selling activities, where shares are sold without first borrowing or arranging to borrow the relevant shares, are prohibited; and
- any investor that holds a short sale position of 0.25% or more of the outstanding shares in the relevant listed entity has an obligation to report their short sale position to the stock exchange via a broker.

Under the temporary relaxation of the share buyback regulations:

- the daily cap for share buybacks by a listed company is increased to 100% of the average daily number of shares traded over the preceding four-week period; and
- share buybacks by a listed company can be made at any time during trading hours.

Press release (Japanese)
Press release (English)

MPFA issues circular on preparation for implementation of new MPF intermediary regulatory regime

The Mandatory Provident Fund Schemes Authority (MPFA) has issued a circular on preparation for the implementation of the new mandatory provident fund (MPF) intermediary regulatory regime. This is the sixth circular in the current series concerning the implementation of the Mandatory Provident Fund Schemes (Amendment) Ordinance 2012.

Amongst other things, the circular sets out the following:

- Guidelines on MPF Intermediary Registration and Notification of Changes – the new guidelines which set out the specified application forms, notification forms and the specified qualifying examinations for registration purposes; and
- Guidelines on Annual Returns to be Delivered by Registered Intermediaries – the new guidelines which set out the specified forms for the annual returns and the specified date on which the reporting period begins for this purpose.

The MPFA has also published a set of frequently asked questions (FAQs) on the prohibitions related to 'regulated activities'. To assist the industry with MPF registration matters, the MPFA has published a Handbook on MPF Intermediary Registration.

The MPFA requires all corporate intermediaries to ensure that the new guidelines are circulated to all individual intermediaries sponsored by them (to be known as subsidiary intermediaries from 1 November 2012), and that they put in place procedures and controls to ensure compliance with the Mandatory Provident Fund Schemes (Amendment) Ordinance 2012.

MAS consults on draft Financial Holding Companies Bill

The Monetary Authority of Singapore (MAS) has published a consultation paper on the draft Financial Holding Companies Bill. This follows the MAS' February 2012 consultation paper on the proposed regulatory framework for financial holding companies (FHCs), which set out the considerations in designating an FHC for regulation and the regulatory approach to FHCs and financial groups held under an FHC. In addition to policy proposals that were previously consulted on, the draft Bill contains a new requirement for designated FHCs to have a chief executive who is principally responsible for the conduct and management of activities at the FHC group.

The MAS has indicated that draft regulations and notices setting out detailed requirements pursuant to relevant sections in the Financial Holding Companies Act will be issued for consultation at a later date. These regulations and notices will set out rules and standards on, amongst other things: (1) capital requirements; (2) prudential limits, including large exposures, equity investment and property investment limits; (3) corporate governance; and (4) submission of information.

Comments are due by 26 November 2012.

SGX consults on proposed rules and refinements to enhance transparency of clearing house processes

The Singapore Exchange (SGX) has published two consultation papers on proposed new rules and refinements to enhance the transparency of the clearing and settlement processes of its securities and derivatives markets. The proposed amendments are intended to help market participants better understand their rights and obligations. The amendments cover topics such as margins and collateral provided to the clearing house, actions to be taken to manage the default of a clearing member, and processes by which customers can have their trades settled during such an event.

The rule additions and refinements are set out in two consultation papers, one for the securities market and the other for the derivatives market. Comments on both consultation papers are due by 8 November 2012.

Consultation Paper on Proposed Rule Amendments and Refinements to Enhance Transparency of CDP Processes
Consultation Paper on Proposed Rule Amendments and Refinements to Enhance Transparency of SGX-DC Processes

Australian regulators report on domestic OTC derivatives market

The Australian Prudential Regulation Authority (APRA), the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA) have published a joint report on the Australian OTC derivatives market.

The report evaluates the risk management practices of market participants in the domestic OTC derivatives market after consultation with industry participants in July 2012. Regulators have indicated that they would like to see the adoption of central clearing for the majority of OTC derivative transactions, but recognise central clearing may not be suitable for all products and participants. Accordingly, the report promotes the adoption of centralised clearing in a flexible manner to be led by industry.

The Corporations Legislation Amendment (Derivative Transactions) Bill 2012 is currently before Parliament and if passed, will provide regulators with powers to impose mandatory trade reporting, central clearing or trade execution obligations for specified classes of products and participants. It is expected that the Bill will be passed by the end of 2012 in order for the government to meet its deadline for implementing the reforms agreed to at the Pittsburgh G20 summit. The report foreshadows that regulators may use these powers to implement its recommendations as mandatory obligations if the existing industry-led adoption stalls.

Regulators have indicated additional market reports and stakeholder consultation will be undertaken to determine whether any further regulatory intervention is warranted to enhance the efficiency, integrity and stability of the Australian OTC derivatives market.

UPCOMING CLIFFORD CHANCE EVENT

Annual Global Funds Conference

We cordially invite you to attend Clifford Chance's Annual Global Funds conference, which will take place at Clifford Chance's offices in 10 Upper Bank Street, London from 3.30pm to 6.15pm on 4 December 2012.

Significant changes to both EU and US legislation are having a profound effect on the way in which funds industry practitioners in all four corners of the globe will operate in the future. In light of the extra-territorial nature of much of the new regulation, we are once again bringing together experts from Europe, the US and Asia who will consider these issues comparatively, looking at the challenges fund industry participants face in developing approaches and policies to achieve global compliance, the effects these changes and the market in general are having on the global fundraising environment, as well as some of the opportunities arising from regulatory change.

Topics that we will be addressing include:

- an update on the current regulatory environment from the perspective of experts in Europe, the US and Asia;
- a panel discussion on the current fundraising environment, featuring leading European placement agents;
- a discussion on key enforcement/disciplinary issues affecting the sector; and
- an update on OTC derivatives reforms in the EU and the US and their impact on the funds industry globally.

The event will be followed by a cocktail reception. To register yourself and any interested colleagues for this seminar please click on the link below or contact Fiona Grafton at fiona.grafton@cliffordchance.com.

Registration form

RECENT CLIFFORD CHANCE BRIEFINGS

Dodd-Frank Act v. EMIR – Rules of Conduct

The US Dodd-Frank Act and the EU Regulation on OTC derivatives, central counterparties and trade repositories (EMIR) both introduce new rules of conduct for participants in the OTC derivatives markets.

In conjunction with ISDA, Clifford Chance has produced:

- a comparison of the CFTC rules on confirmations, portfolio reconciliation and compression and client documentation with the corresponding rules under EMIR http://www.cliffordchance.com/publicationviews/publications/2012/10/dodd-frank_act_vemirconfirmation.html
- a comparison of the CFTC rules imposing internal and external business conduct standards on swaps dealers and major swaps participants with the corresponding rules under the EU Markets in Financial Instruments Directive and EMIR http://www.cliffordchance.com/publicationviews/publications/2012/10/dodd-frank_act_vemirbusinessconductrules.html

Recognition of foreign insolvency judgments – Back to basics?

The English Courts have been moving enthusiastically towards a universal approach to all insolvencies, even though this carried them further than Parliament or international convention has so far been prepared to go. However, in refusing to recognise a default judgment given in a US insolvency in Rubin v Eurofinance S.A. [2012] UKSC 46, the Supreme Court has brought this movement to an abrupt halt.

This briefing discusses the decision.

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

Recent developments in Italian competition regulation

Following changes to the Italian competition regulations set out in Decree Law No. 1 of 24 January 2012 as converted into law, the Italian Competition Authority (the 'AGCM' or 'ICA') determined how the mandatory fee to be used to fund the ICA's activities would be calculated and paid (Resolution 23787/2012 of 18 July 2012) and, on 28 September 2012, clarified the scope of application of the new rules responding to the main questions received from the operators. Furthermore, on 12 September 2012, the AGCM released its annual update of the amounts of the turnover thresholds that trigger an obligation to notify the AGCM of mergers.

This briefing discusses these developments.

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

Sponsor-led take privates in Hong Kong – a partial alternative?

Publicly listed companies which are trading at a discount to their true market value have proved a valuable source of transactions for private equity sponsors in a number of jurisdictions around the world, notably the US, UK, Singapore and Australia. However, in Hong Kong, otherwise an open and generally very 'deal friendly' environment, this is definitely not the case. A combination of the shareholder dynamics in companies listed on the Hong Kong Stock Exchange (where the majority of companies have significant controlling shareholders) and a focus by the regulator and regulations on protecting minority shareholders (as evidenced by the 10% dissenting shareholder rule on schemes of arrangement not found in other jurisdictions) has resulted in there not being a single successful sponsor-led take private of a Hong Kong listed company to date.

Whilst it remains to be seen, when the Hong Kong Government's proposal to abolish the 'headcount test' finally attains the force of law, whether this will help drive potential acquirors from making voluntary offers to launching schemes of arrangement and in turn stimulate privatisations and result in successful schemes, there is within the current regulatory and legal framework in Hong Kong a potential alternative route to gaining a substantial stake in a listed company (without some of the attendant risks of a voluntary offer), one which has been rarely tested to date – partial offers.

This briefing discusses this alternative route.

http://www.cliffordchance.com/publicationviews/publications/2012/10/sponsor-led_takeprivatesinhongkong.html