

18 AUGUST 2016

# FINANCE AND BANKING ALERT

## IN THIS ISSUE

### 31 AUGUST DEADLINE LOOMS: NEW OTC DERIVATIVES REGULATIONS

The latest draft of the Financial Sector Regulation Bill (Twin Peaks Bill) was released on 21 July 2016 for further comment by interested parties. The deadline for submissions is 31 August 2016. National Treasury simultaneously released its responses to the comments made on the previous draft of the Twin Peaks Bill (originally published during October 2015). The consequential amendments to the South African Financial Markets Act, 2012 (FMA) contained in the Twin Peaks Bill were also published together with the long-awaited subordinate legislation to the FMA.

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Included in the draft regulations published for comment were:

- the code of conduct for OTC Derivatives Providers;
- the requirements and duties of a Trade Repository; and
- the criteria for authorisation of an OTC Derivatives Provider, (together the New Regulations).

Unfortunately a second draft of the Margin Requirements for Non-Centrally Cleared OTC Derivatives was not published as anticipated.

Copies of the New Regulations are available at: <http://www.treasury.gov.za/otc/>

## **Amendments to the New Regulations**

As anticipated, the Twin Peaks Bill has amended the FMA so that, until 31 December 2021, an “associated clearing house” may be licensed to perform the functions of a central counterparty, notwithstanding the fact that the clearing house is not independent. Such an associated clearing house must also be approved by the Reserve Bank and the Prudential Regulatory Authority. This means that JSE Clear (the clearing house operated by the JSE Limited) would be able to provide a local clearing solution for OTC derivatives in South Africa for a period of time. However, as of 1 January 2022, only an independent

clearing house, which is also licensed as a central counterparty (CCP) will qualify to provide clearing services under the FMA.

Chapter 4 of the draft regulations to the FMA (FMA Regulations) previously dealt with the securities services that an external central securities depository (CSD) were permitted to provide (namely custody and administration of securities and settlement services). Chapter 4 to the FMA Regulations, specifically regulation 7, now sets out the requirements for a local CSD that has made an arrangement with an external CSD to operate in South Africa. These requirements include providing rules and procedures that mitigate against a conflict of laws between the local and external CSD, a prohibition on the local CSD from extending credit to an external CSD and a prohibition on a transfer of external securities.

The provisions relating to the shareholding and ownership requirements of a CCP have been amended. While the FMA Regulations still require that a CCP provides details of its shareholders, the new provisions require scrutiny of all “related parties” so that the Financial Sector Conduct Authority (FSCA) can be satisfied that any relationship between the CCP and a “related party” will not prevent the effective exercise of the supervisory functions of the FSCA. For purposes of the FMA Regulations a related party has the same meaning as

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*Interested parties have been invited to submit their comments on the New Regulations by no later than 31 August 2016.*



in the Companies Act, No 71 of 2008 (controlling companies and shareholders, subsidiaries, fellow subsidiaries, persons who can materially influence the policy of the company and so on). For a CCP to establish any subsidiaries or associates, the prior written approval of the FSCA will be required.

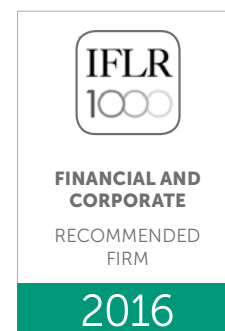
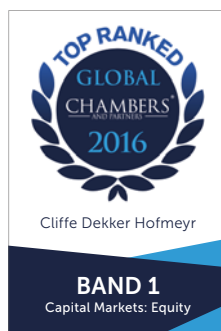
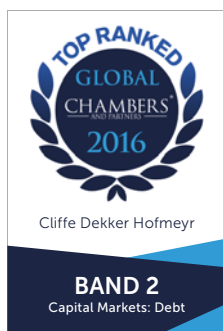
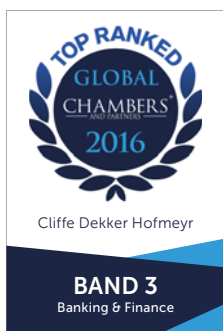
There have not been many changes to the latest draft of the code of conduct for OTC Derivatives Providers (Code of Conduct). The Code of Conduct previously provided a confirmation schedule setting out the timeframes within which a client and counterparty were required to confirm various transactions. Annexure A now includes an "Acknowledgement Schedule" which, although not referred to in the Code of Conduct, presumably provides identical timelines for parties to derivatives transactions to acknowledge transactions. The Code of Conduct allows OTC Derivatives Providers six months within which they must comply with the provisions from the date the Code of Conduct comes into force (which date is still to be determined).

In line with its G20 obligations to better regulate the OTC derivatives market, South Africa has finalised the licensing requirements for trade repositories. The Requirements

and Duties of a Trade Repository have now been circulated for the first time, and require that a Trade Repository must have "robust and publicly disclosed governance arrangements". These governance arrangements must include, among other things, the roles, responsibilities and structure of its senior management. The ability of a Trade Repository to manage systemic risk and ensure its own business continuity has been highlighted as a requirement. A Trade Repository must also establish a permanent and effective compliance function. Other provisions require scrutiny of all "related parties" so that the FSCA can be satisfied that any relationship between the Trade Repository and a "related party" will not prevent the effective exercise of the supervisory functions of the FSCA.

Interested parties have been invited to submit their comments on the New Regulations by no later than 31 August 2016. This is in line with the aim to have all of the documents mentioned above ready for consideration by the Standing Committee on Finance when Parliament reconvenes after the South African local government elections, which were held on 3 August 2016.

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