

International Regulatory Update

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CEBS publishes guidelines for joint assessment and joint decision regarding the capital adequacy of cross-border groups

CEBS has published the final text of its guidelines for the joint assessment of the elements covered by the supervisory review and evaluation process and joint decision regarding the capital adequacy of cross-border groups (GL 39). CEBS expects that the guidelines will assist EEA supervisory authorities to co-operate in supervisory colleges to meet the requirements of the revised Capital Requirements Directive (CRD 2).

As the revised CRD 2 entered into force on 31 December 2010, the relevant members of the colleges for EEA headquartered banking groups will be expected to reach joint decisions on the risk based capital adequacy before the end of 2011. CEBS expects its members to fully implement these guidelines by 31 March 2011, in order to allow colleges to use the guidelines in their assessments of cross-border banking groups' capital adequacy.

[Guidelines \(GL 39\) – December 2010](#)
[Guidelines \(GL 39\) – April 2010](#)
[Feedback document](#)

AIFM Directive: CESR extends deadline for responses on implementing measures

CESR/ESMA has extended the deadline for responses to its [call for evidence](#) on implementing measures on the AIFM Directive. Responses are now due by 14 January 2011. CESR had originally invited contributions by 7 January 2011.

CESR was seeking stakeholders' input to assist it and its successor, ESMA, in the development of draft advice to the European Commission on the content of the implementing measures, which will be published for consultation in 2011.

Securities Law Directive: consultation deadline extended and roadmap published

The European Commission has extended its deadline for responses to its [consultation](#) on the Securities Law Directive and will take into account late answers coming in before 21 January 2011. The Commission launched its consultation on 5 November 2010 to seek stakeholders' views on the harmonisation of the legal framework for securities holding and transactions. The consultation paper contains a list of principles which the Commission would like to submit to stakeholders for further evaluation before preparing a legislative proposal.

In addition, the Commission has revised its [roadmap](#) for the Securities Law Directive, indicating that the expected date of adoption of the legislative proposal is now the first quarter of 2011.

Corporate governance in financial institutions: Commission roadmap on follow-up to Green Paper

The European Commission has published a [roadmap](#) outlining the follow-up to its Green Paper on corporate governance in financial institutions. The expected date for any future legislative or non-legislative proposals is now May 2011.

The Commission had published a [Green Paper](#) for consultation in June and a corresponding [feedback statement](#) in November 2010.

OTC derivatives and market infrastructures: Belgian EU Presidency reports on progress

The Belgian EU Presidency has published a [progress report](#) on the proposed regulation on OTC derivatives and market infrastructures.

The main outstanding issues relate to: (1) the mandatory clearing obligation; (2) the scope of the clearing requirements; (3) the competent authorities for authorisation and ongoing supervision and oversight; (4) the elaboration of technical standards; (5) third country central counterparties; (6) segregation and portability; and (7) central counterparty interoperability arrangements.

European Parliament plenary session adopts resolution on regulation of trading in financial instruments

The European Parliament's plenary session in Strasbourg has [adopted a resolution](#) on the regulation of trading in financial instruments and dark pools, which was proposed in Kay Swinburne's August 2010 report.

Amongst other things, the resolution calls on the EU Commission to strengthen market infrastructures across all trading venues and clearing systems to enable them to cope with future risk through enhanced transparency, improved resilience and regulatory oversight of all aggregated trades.

Basel Committee consults on Pillar 3 disclosure requirements on remuneration

The Basel Committee on Banking Supervision has issued for consultation its [Pillar 3 disclosure requirements for remuneration](#).

The proposed Pillar 3 disclosure requirements on remuneration add greater specificity to the disclosure guidance on this topic that was included in the supplemental Pillar 2 guidance issued by the Basel Committee in July 2009. In particular, banks will be requested to disclose qualitative and quantitative information about their remuneration practices and policies covering the following areas: (1) governance/committee structures; (2) the design/operation of the remuneration structure, and frequency of review; (3) the independence of remuneration for risk/compliance staff; (4) risk adjustment methodologies; (5) the link between remuneration and performance; (6) long-term performance measures (deferral, malus, clawback); and (7) types of remuneration (cash/equity, fixed/variable).

Basel Committee consults on capitalisation of bank exposures to central counterparties

The Basel Committee on Banking Supervision has issued a [consultative paper](#) on the capitalisation of bank exposures to central counterparties (CCPs). In particular, the Committee's proposals relate to the capitalisation of default fund exposures. The Committee proposes that trade exposures to a qualifying CCP will receive a 2% risk weight. In addition, default fund exposures to a CCP will, in accordance with a risk sensitive waterfall approach (based on a CCP's actual financial resources and hypothetical capital requirements), be capitalised according to a method that consistently and simply estimates risk arising from such default fund.

The Committee has also announced that it will conduct an impact study to help in finalising and calibrating the CCP proposals. The impact study will be conducted in coordination with the Committee on Payment and Settlement Systems (CPSS) and the IOSCO Technical Committee.

Comments on the proposed rules text and other issues set out in the consultative document are due by 4 February 2011.

Basel Committee and FSB publish final report on macroeconomic impact of transition to stronger capital and liquidity requirements

The Financial Stability Board (FSB) and the Basel Committee on Banking Supervision have concluded their assessment of the macroeconomic impact of the transition to the new bank capital and liquidity standards. Their joint Macroeconomic Assessment Group's (MAG's) final report, which expands on the MAG's August 2010 interim report, provides an assessment of the transitional impact of the implementation of the stronger requirements set out in the 12 September 2010 statement of the Governors and Heads of Supervision.

The [final report](#) concludes that the transition to stronger capital standards is likely to have a modest impact on aggregate output.

UK Government launches consultation on consumer credit regulation

HM Treasury has issued a [consultation paper](#) on transferring the regulation of consumer credit from the Office of Fair Trading (OFT) to the new consumer protection and markets authority (CPMA). The Government announced the creation of the CPMA as part of its wider reform of the financial regulatory architecture in July 2010.

The consultation paper provides an overview of the consumer credit market, an analysis of the weaknesses the Government perceives in the current framework, and a detailed discussion of the objectives for reform.

[Impact assessment](#)

UCITS IV: HM Treasury and FSA consult on UK transposition

HM Treasury and the FSA have published a joint [consultation paper](#) setting out proposals for UCITS IV. This is a joint consultation as transposition will require amendments to legislation and to the FSA Handbook. The Government's proposals relate to 'master-feeder structures' and management company passports.

With respect to 'master-feeder' structures, the Government has indicated that it will launch a tax transparent vehicle to provide suitability for UCITS IV master funds. The Government will continue to develop the details of

such a vehicle in consultation with industry, before introducing the new regime in 2012. It has also indicated that it will seek to give certainty to industry on technical concerns for Master Feeder structure, such as the Genuine Diversity of Ownership and Controlled Foreign Companies as part of this process.

With respect to the introduction of a management company passport Management Company Passport, the Government has indicated that it will consult with industry to find an appropriate way of ensuring that there will be no adverse UK tax consequences for a foreign UCITS fund as a result of having a UK management company. This will be subject to ensuring appropriate parliamentary procedure and managing any risk to the Exchequer.

UCITS IV must be implemented into national law by all Member States by 1 July 2011. Responses are due by 21 March 2011.

[Annex A](#)

[Annex B](#)

[Annex C](#)

[Annex D](#)

[Annex E](#)

FSA publishes policy statement on strengthening capital standards

The FSA has published a [policy statement](#) (PS10/19) on strengthening capital standards, which provides feedback on the responses received to:

- chapters 11-13 of the [July 2010 consultation](#) (CP10/17) on implementing the Committee of European Banking Supervisors (CEBS) guidance on core tier one capital, large exposures, and operational risk under the revised Capital Requirements Directive (CRD2 and CRD3); and
- chapter 3 of the [October 2010 consultation](#) (CP10/22) on amendments to capital floors for firms using advanced approaches, residential mortgage Losses Given Default floors and covered bonds, as a result of the revised Capital Requirements Directive (CRD3).

PS10/19 also sets out the FSA's final rules in these areas. The new CRD2-related rules and guidance will come into force on 31 December 2010, and the CRD3 material on 1 January 2011.

New legal landscape for Belgian REITs

The long awaited Belgian [royal decree](#) on REITs has been published in the Belgian State Gazette. The new rules modernise the legal framework for Belgian REITs in light of developments in the financial markets and introduce a number of innovations, including: (1) the possibility for REITs to create subsidiaries and joint ventures which also benefit from the tax favourable REIT status; (2) more flexible rules to attract financing on the capital markets; and (3) changes to the organisation and operation of REITs.

Entry into force of the Luxembourg law of 17 December 2010 on undertakings for collective investment and implementing CSSF regulations

The law of 17 December 2010 relating to undertakings for collective investment has been published in the Luxembourg [Official Journal](#) on 24 December 2010 and entered into force on 1 January 2011.

The main purpose of the law of 17 December 2010 is to implement into national law the UCITS IV Directive, but it also introduces other amendments to the current Luxembourg investment fund legislation, including the law of 13 February 2007 on specialised investment funds. The new law will repeal the law of 20 December 2002 on undertakings for collective investment with effect from 1 July 2012 (with the exception of some tax provisions which will be repealed with effect from 1 January 2011).

Two separate regulations (n°10-4 and n°10-5) have also been adopted by the Luxembourg supervisory authority of the financial sector (CSSF) in view of the implementation of the Level 2 legislation adopted by the European Commission on 1 July 2010. The CSSF regulations have also been published in the Luxembourg Official Journal on 24 December 2010 and will enter into force on 1 January 2011.

Swiss Federal Council launches consultation on 'too big to fail' legislation

The Federal Council has [launched](#) a consultation on its legislative proposals for dealing with the systemic risks of big banks.

The Federal Department of Finance has indicated that, in order to implement the more stringent liquidity requirements, two new instruments need to be provided for in the Banking Act: (1) reserve capital and (2) convertible capital (contingent convertible bonds, or CoCos). The issue of CoCos in Switzerland is intended to reduce the legal risks in the case of an officially ordered conversion in a crisis. The Federal Council is proposing tax measures to promote the issue of bonds (and thus also CoCos) in Switzerland, and to boost the Swiss capital market. These include the abolition of the issue tax on debt capital and withholding tax changes.

The draft law also regulates the remuneration of those systemically important banks that have to rely, for any reason, on public funds.

The consultation will last until 23 March 2011. The legislation is expected to be submitted to Parliament in spring 2011, so that the bill can be considered by the first chamber during the summer session, and by the second chamber during the autumn session. The legislative amendments could come into force at the start of 2012 at the earliest.

HKEx consults on ex-entitlement trading

The Hong Kong Exchanges and Clearing Limited (HKEx) has published a [consultation paper](#) on its proposed changes to the current market practice of ex-entitlement trading. The consultation paper seeks views on whether shares should be traded ex-entitlement only after the entitlement has been approved by shareholders. At present, there is no restriction on the timing of the record date for a conditional entitlement in Hong Kong. HKEx has indicated that the proposed changes are intended to remove the risk of uncertainty and enhance the operation of the securities market. According to HKEx, the proposed changes would also bring Hong Kong in line with international and mainland China market practices.

Comments are due by 28 February 2011.

[Letter to main board listed issuers](#)

HKEx consults on proposed changes to Code on Corporate Governance Practices and associated listing rules

The Hong Kong Exchanges and Clearing Limited (HKEx) has published a [consultation paper](#) on proposed changes to the Code on Corporate Governance Practices and certain associated listing rules. The revised listing rules are intended to promote a higher level of corporate governance amongst issuers.

Amongst other things, the review and proposed rule amendments include measures to: (1) improve transparency by strengthening requirements for disclosure and communication with stakeholders; (2) enhance the quality of directors and company secretaries by requiring training; (3) require greater involvement in issuers' board committees by independent non-executive directors; (4) recognise company secretaries' contribution to corporate governance and define their role and function; and (5) place emphasis on the leadership role of the chairman of the board in corporate governance matters.

According to HKEx, some of the code provisions have been promoted to rules because of their importance and many recommended best practices have been upgraded to code provisions.

Comments are due by 18 March 2011.

[Letter to main board listed issuers](#)

HKEx consults on proposed changes to requirements for listing debt issues to professional investors

Hong Kong Exchanges and Clearing Limited (HKEx) has published a [consultation paper](#) on proposed changes to the requirements for debt securities for professional investors only, currently referred to in the rules as listing by selective marketing. The proposed changes are intended to bring HKEx more in line with the requirements of other stock exchanges and to allow it to offer processing times that are comparable to those exchanges. HKEx has clarified that none of the proposals will apply to debt offered to retail investors in Hong Kong.

Comments are due by 18 February 2011.

Australian Treasury consults on clawback of executive remuneration where financial statements are materially misstated

The Australian Treasury has issued a [discussion paper](#) on a proposal to 'clawback' remuneration paid to company directors and executives where a company's financial statements are materially misstated. The discussion paper seeks comments on whether a clawback requirement should be introduced in Australia, and if so, how it should be implemented.

A clawback would involve the creation of an obligation for directors and executives to repay to the company any remuneration that is based on financial information that turns out to be materially misstated. This would either take the form of a recoupment of remuneration already paid to the executive, or a cancellation of an outstanding but unvested and unpaid future award. Under the proposals, the corporate regulator would also have the power to commence legal action in order to recover these funds.

Comments are due by 30 March 2011.

SEC and CFTC publish proposed rules concerning further definition of 'swap dealer' and related terms

In accordance with Section 712(d)(1) of Title VII of the Dodd-Frank Act, the CFTC and the SEC, in consultation with the Board of Governors of the Federal Reserve System, have published in the Federal Register proposed rules and interpretative guidance to further define the following terms: (1) swap dealer; (2) security-based swap dealer; (3) major swap participant; (4) major security-based swap participant; and (5) eligible contract participant.

Comments on the proposed rules are due by 22 February 2011.

[Federal Register Notice](#)

SEC proposes rules on exempt security-based swap clearing

The SEC has [announced](#) that, in accordance with Title VII of the Dodd-Frank Act, it has voted to propose a new rule detailing requirements for end-users when they engage in a security-based swap transaction that is not subject to mandatory clearing. The proposed rule specifies the steps that end-users must follow to notify the SEC of how they generally meet their financial obligations when engaging in a security-based swap transaction exempt from the mandatory clearing requirement. The SEC is also seeking comments on whether to provide an additional exception for certain financial institutions that would permit those institutions to use the exception to mandatory clearing that is available to end-users.

In addition, the SEC has [announced](#) that it is proposing rules required under the Dodd-Frank Act that would set out the way in which clearing agencies provide information to the SEC about security-based swaps that the clearing agencies plan to accept for clearing.

Comments on both proposals are due up to 45 days following publication in the Federal Register, which is expected shortly.

RECENT CLIFFORD CHANCE BRIEFINGS

EU court jurisdiction proposals: torpedoed torpedoed?

The European Commission has published proposals to amend the Brussels I Regulation, which governs the jurisdiction of courts in EU member states over those domiciled within the EU and the enforcement of judgments. The Commission aims to enhance the status of jurisdiction and arbitration agreements, and to reduce the formalities required to enforce cross border judgments. More radically, the Commission also wants to abolish member states' existing rules on their courts' jurisdiction over those domiciled outside the EU, and to replace them with a single set of rules. The Commission hopes to remove what it perceives to be advantages enjoyed by those in member states with liberal jurisdictional regimes at the cost of those with more restrictive jurisdictional regimes. The effect of this proposal may, however, be to place all EU businesses at an equal disadvantage.

This briefing discusses the proposals.

http://www.cliffordchance.com/publicationviews/publications/2010/12/eu_court_jurisdictionproposalstorpedoe.html

New EU Rules for Cooperation Between Competitors

The European Commission has adopted revised guidance and block exemptions governing the application of EU competition law to 'horizontal' cooperation agreements between actual and potential competitors.

This briefing paper discusses the new guidance.

http://www.cliffordchance.com/publicationviews/publications/2010/12/new_eu_rules_forcooperationbetweencompetitors.html

Lehman Update

Ordinary creditors of LBIE face a longer wait for a dividend, as the LBIE administrators grapple with another series of setbacks which have recently befallen the insolvent LBIE estate. On 10 December the English court ruled that pension liabilities arising under the moral hazard powers contained within the Pensions Act 2004, would rank as administration expenses ahead of all creditors except those with fixed charge security. On the same day it also allowed the administrators a further 2 years in which to pay their initial dividend to LBIE's creditors. Later in the month, the administrators also faced defeat in court over certain interest rate swaps which they indicated would mean a loss of over GBP 60 million to the estate.

This briefing discusses a number of key issues.

http://www.cliffordchance.com/publicationviews/publications/2010/12/lehman_update_-_29december.html

High yield to the rescue?

How are higher capital costs of lending, renewed appetite for yield and significant capital inflow into funds fuelling a resurgence of interest in high yield bonds? Journalist John Rolinson recorded the changing scenario painted by Clifford Chance experts.

http://www.cliffordchance.com/publicationviews/publications/2010/12/high_yield_to_therescue.html

ISDA's Master Agreement – it does what it says on the tin

It is a condition precedent to payments due under transactions governed by the ISDA Master Agreement that the recipient is not subject to an Event of Default, such as insolvency. This condition precedent suspends, rather than extinguishes, the payment obligation. If the Event of Default is later cured, the payment obligation may still arise. However, it must be cured before the transaction would ordinarily terminate; if not, the payment obligation will never arise. In reaching this conclusion, the High Court resisted arguments by Lehman's administrators that terms should be implied into the Master Agreement or that suspension offended the anti-deprivation principle. The Agreement means what it says.

This briefing discusses Lomas and others (Administrators of Lehman Brothers International (Europe)) v JRB Firth Rixson, Inc.

http://www.cliffordchance.com/publicationviews/publications/2010/12/isda_s_master_agreementitdoeswhatitsays_o.html

CBFA issues 'good practices' guidelines for financial intermediaries in public offers of corporate bonds in Belgium

The Belgian Banking, Finance and Insurance Commission (CBFA) has issued a paper setting out certain 'good practices' guidelines for financial intermediaries in transactions involving corporate bond issues. According to the CBFA, certain individuals wishing to subscribe to bonds publicly issued in Belgium have, in recent transactions, encountered difficulties, and the proposed guidelines aim to address these difficulties.

This briefing discusses the 'good practices' guidelines.

http://www.cliffordchance.com/publicationviews/publications/2010/12/cbfa_issues_goodpracticesguidelinesfo.htm

Schemes of Arrangement to be introduced into Spanish Insolvency Law

Spain's Ministry of Justice has published a Draft Bill announcing amendments to the Spanish Insolvency Law. The approval of the Draft Bill is the first step of the amendment. At the earliest, the law could enter into force in late 2011. The amendments now planned are limited in scope. Rather than being designed to overhaul the

Insolvency Law, they are instead intended to provide solutions or technical improvements to some aspects where regulatory gaps or defects were previously detected. Its Preamble refers to the amendments as an 'update' of insolvency legislation.

This briefing discusses the reforms.

http://www.cliffordchance.com/publicationviews/publications/2010/12/schemes_of_arrangementtobeintroducedint0.html

Luxembourg Quarterly Update

This edition of the Luxembourg Quarterly Update discusses the following developments: (1) some recent developments impacting the UCITS industry, including the forthcoming UCITS revision (UCITS V) and the proposed change to the MiFID non-complex classification currently applicable to UCITS; (2) the agreement reached at EU level on the adoption of the AIFM Directive; (3) the new task force on asset management set up by the Centre for European Policy Studies and the European Capital Markets Institute; (4) the entry into force of the revised Prospectus Directive; (5) the latest initiatives relating to packaged retail investment products (PRIPs); (6) the establishment of the new EU financial supervisory architecture; and (7) some selected legal and regulatory developments affecting Luxembourg investment vehicles.

http://www.cliffordchance.com/publicationviews/publications/2010/12/luxembourg_quarterlyupdaterelatingt.html

Withholding tax on interest and taxation of funds

This briefing may be good news for European investment and pension funds interested in lending to Polish companies. On 1 January 2011, an amendment to the Corporate Income Tax Act will come into force, expanding a tax exemption to include the income of investment funds and pension funds with their seats in the countries of the European Union and European Economic Area (EEA). This exemption will also apply to withholding tax on revenue (income) paid out to those funds, including interest on the funds' receivables from Polish entities.

http://www.cliffordchance.com/publicationviews/publications/2010/12/withholding_tax_oninterestandtaxationoffunds.html

SEC Expected to Issue Final Whistleblower Rules

On 17 December 2010, the comment period ended for the SEC's proposed rules implementing the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The SEC whistleblower provisions have been controversial, generating significant criticism from public companies and regulated entities subject to SEC jurisdiction. Because the rules are likely to dramatically increase the number of whistleblower actions, companies subject to the Foreign Corrupt Practices Act (FCPA) should understand and prepare for the program's potential consequences.

This briefing discusses the proposed rules.

http://www.cliffordchance.com/publicationviews/publications/2010/12/us_regulatory_updatesecexpectedtoissuefinal.html

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