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International Regulatory Update

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UK Ministry of Justice issues guidance about commercial organisations preventing bribery

The Ministry of Justice has published its final guidance under section 9 of the Bribery Act 2010 about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing. Section 7 of the Act creates a criminal offence of a failure to prevent bribery on the part of commercial organisations. The Act provides a statutory defence to a charge where a commercial organisation can demonstrate that it has put adequate bribery prevention procedures in place, and section 9 requires the Secretary of State to publish guidance in this area.

The government published a consultation paper (CP11/10) setting out its proposed guidance in September 2010 and, along with its final guidance, it has now published the responses it received and a post-consultation report. In addition, the Director of Public Prosecutions and the Director of the Serious Fraud Office have issued joint guidance for prosecutors on the Bribery Act 2010. The purpose of the guidance is to set out the Directors' approach to deciding whether to bring a prosecution under the Act.

The Bribery Act 2010 enters into force on 1 July 2011.

Quick start guide

European Commission publishes proposed directive on credit agreements relating to residential property

The European Commission has published a proposal for a directive on credit agreements relating to residential property, covering all loans which allow the consumer to borrow money in order to buy a home as well as certain loans to consumers to renovate a home. It also covers all loans to consumers that are guaranteed by a mortgage or another comparable security.

Under the proposal, lenders and credit intermediaries would be required to: (1) make general information available at all times on the range of credit products they offer; (2) provide personalised information to consumers through a European Standardised Information Sheet (ESIS); (3) give explanations and meet certain standards for the provision of advice; and (4) assess the consumer's ability to repay, based on information provided by the borrower.

FAQs
Working paper on national measures and practices to avoid foreclosure procedures

Short selling and CDS: Hungarian EU Presidency publishes compromise proposal

The Hungarian EU Council Presidency has published a revised compromise text, dated 25 March 2011, for the proposed regulation on short selling and certain aspects of credit default swaps.

ECON Committee reports on corporate governance in financial institutions

The European Parliament's ECON Committee has published a report which calls for the establishment in all financial institutions of an effective governance system, with adequate risk management, compliance, internal audit functions, strategies, policies, processes and procedures. The report also calls for the establishment of mandatory risk committees or equivalent arrangements at the board level for all economically significant financial institutions and at the parent company board level for all economically significant financial groups.

In addition, the report urges the EU supervisors, in consultation with the relevant national authorities, to develop competence criteria for a 'fit and proper person' test to assess the suitability of individuals for controlled functions, taking into account the nature, complexity and size of the financial institution. It also requests that the European Commission develop legislation requiring large financial institutions to submit their boards to regular external evaluation.

ISDA requests proposals for commodity OTC derivatives trade repository

ISDA has issued a request for proposals to establish a commodity OTC derivatives trade repository as part of its efforts to improve transparency in the OTC derivatives markets. ISDA has invited proposals from service providers for the creation of a trade reporting repository that will record all financial commodity OTC derivative trade types, that will meet all current and future regulations governing repositories and provide a structure to report and provide access to information to applicable regulators.

Proposals are due by 25 April 2011.

FSA consults on use of non-EEA rules in calculating group capital requirements

The FSA has published a consultation paper (CP11/06) setting out its proposals for removing the rules permitting the use of non-EEA regulators' rules in calculating the group capital requirements of a UK banking/investment firm group on a standardised approach under the Capital Requirements Directive.

The FSA is proposing to revoke the equivalence rules in BIPRU 8. This will mean that, for the purpose of aggregating the capital requirements of a non-EEA subsidiary into the consolidated capital requirements of a UK consolidation group, firms will use the FSA rules rather than local (i.e. non-EEA) rules in calculating the capital requirements of that subsidiary. The proposed Handbook changes are designed to ensure that the group capital requirements of a UK banking/investment firm group, on a standardised approach, are calculated under FSA rules.

The FSA is proposing that the rule changes come into force on 30 December 2011. Comments are due by 30 June 2011.

FSA, OFT and FOS establish new consumer protection committee

The FSA, Office of Fair Trading (OFT) and Financial Ombudsman Service (FOS) have published a feedback statement (FS11/2) summarising the responses to their joint March 2010 discussion paper (DP10/1). In light of the feedback received, the FSA, OFT and FOS have proceeded with their proposal to establish a new coordination committee to scan for emerging risks, including risks with the potential to turn into widespread problems. This replaces the wider implications process.

FSA defers implementation of significant influence controlled functions

The FSA has issued a statement in relation to its plans to introduce a number of new significant influence controlled functions (SIFs) and changes to the scope and definition of certain already existing SIFs within its approved persons regime. These changes were announced in the FSA's September 2010 policy statement (PS10/15) on effective governance standards within firms.

The FSA had expected that firms would submit applications or notifications on behalf of individuals to perform these new SIFs via its Online Notifications and Applications (ONA) system. However, the FSA has indicated that there is currently a considerable programme of work underway on ONA and that it has been unable to complete the necessary changes to allow it to accept these applications and notifications from 1 May 2011. As a result, it is deferring the implementation of these changes to the approved persons regime until further notice.

The FSA has emphasised that this deferral should not be interpreted as a change of policy, and that it will ensure firms have two months' notice of any new implementation date.

BaFin updates guidance note on proprietary trading and trading for own account under KWG

The German Federal Financial Supervisory Authority (BaFin) has published an updated guidance note on proprietary trading and trading for one's own account under the German Banking Act (Kreditwesengesetz) (KWG). Section 1 para 1a sentence 2 number 4 of the KWG, which defines licensable trading for one's own account, was amended in November 2010 by the 'Act Implementing the Amended Banking and Capital Requirements Directives'. The amendment was aimed at financial services institutions that exclusively provide factoring, leasing and currency trading services. These financial services institutions can engage in proprietary trading without requiring a licence for this activity. All other credit institutions and financial services institutions require a licence to engage in proprietary trading.

Amongst other things, the guidance note covers: (1) the differences and inter-relation between proprietary trading and trading for one's own account; (2) exemptions from the licence requirements under section 2 para 6 sentence 1 of the KWG; and (3) contact information for questions about the guidance note.

Dutch Central Bank issues feedback statement on sound remuneration policies

The Dutch Central Bank (DCB) has published a feedback table in relation to its October 2010 consultation paper on sound remuneration policies of financial institutions. Market participants' comments have been incorporated into its 'Regulation on sound and controlled Remuneration Policies', which was issued in December 2010 to implement the remuneration rules required by the revised Capital Requirements Directive (CRD 3 – as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies). The regulation reflects the DCB's new powers to set measures with regard to the remuneration policies of financial institutions. In its feedback statement, the DCB addresses, amongst other thing: (1) the scope of the regulation (e.g. its applicability to insurers); (2) the interplay between the regulation and CRD 3; and (3) market

participants' concerns about the applicability of the rules to non-Dutch branches or off-shore subsidiaries of Dutch financial institutions.

FINMA consults on amendments to circular on rating agencies

The Swiss Financial Market Supervisory Authority (FINMA) has launched a consultation on proposed amendments to its circular on rating agencies. The circular contains the conditions on which rating agencies are recognised for the purposes of using their ratings for calculating the capital requirements of banks and securities dealers. The proposed modifications will extend the circular's scope to recognise rating agencies for the purposes of insurance companies (e.g. investment provisions for tied assets) and collective investment schemes (investment techniques and the use of derivatives) as well. Thus, rating agencies would be recognised for all financial institutions that are subject to FINMA supervision.

The proposed amendments take into account the IOSCO 'Code of Conduct Fundamentals for Credit Rating Agencies' and the 'Regulatory framework for more resilient banks and banking systems' adopted by the Basel Committee on Banking Supervision in December 2010 (Basel III). However, as before, rating agencies recognised by FINMA will not be subject to its supervision under Article 3 of the Financial Market Supervisory Act.

The consultation period ends on 13 May 2011.

ASIC consults on minor modifications in converting ASX and SFE guidance

The Australian Securities and Investments Commission (ASIC) has published a consultation paper (CP 152) setting out its proposals to modify five Australian Securities Exchange (ASX) guidance notes and one Sydney Futures Exchange (SFE) procedure, determination and practice note. The changes are intended to help market participants comply with ASIC market integrity rules for the ASX and ASX 24 (formerly SFE) markets. The paper focuses on the general operational obligations of ASX and ASX 24 market participants. It does not propose changes to the existing obligations under the market integrity rules.

Responses are due by 13 May 2011.

FSTB consults on proposals to enhance regulation of mandatory provident fund intermediaries

The Financial Services and the Treasury Bureau (FSTB) has submitted a paper to the Legislative Council Panel on Financial Affairs setting out its proposals to enhance the regulation of mandatory provident fund intermediaries.

According to the FSTB, the legislative proposals establish a statutory regulatory regime for mandatory provident fund intermediaries before the implementation of the Employee Choice Arrangement to better protect the interests of more than 2.5 million MPF scheme members. The FSTB intends to table a Bill at the Legislative Council in 2011, and aims to complete the legislative amendments by mid-2012.

Amongst other things, the paper sets out legislative proposals to: (1) enhance the regulation of the sales and marketing activities of mandatory provident fund intermediaries; (2) provide for the establishment and operation of a platform by the Mandatory Provident Fund Schemes Authority; and (3) enhance the deterrent against default contributions by employers.

Comments are due by 30 April 2011.

Credit rating agencies: MAS consults on proposed regulation

The Monetary Authority of Singapore (MAS) has published a consultation paper setting out its proposals to regulate credit rating agencies (CRAs). The regulation of CRA activities is proposed in line with global developments, and to conform to international standards and practices.

Amongst other things, the MAS is proposing to regulate CRAs under the existing Capital Markets Services (CMS) licensing regime of the Securities and Futures Act (SFA). Under the proposals, 'providing credit rating services' will be added into the SFA as a regulated activity. Those who carry on the business of providing credit rating services will be required to hold a CMS licence under section 82 of the SFA, and will need to comply with existing regulations, guidelines and notices under the SFA that apply to all CMS licensees.

The proposed regulatory regime will also include a code of conduct for CRAs that applies specifically to CMS licensees providing credit rating services. The MAS has indicated that the proposed code is based largely on the 'Code of Conduct Fundamentals for Credit Rating Agencies' issued by the International Organization of Securities

Commissions (IOSCO) and is intended to promote the quality and integrity of the rating process, strengthen CRA analytical independence and investor protection, and enhance the protection of non-public information.

Comments are due by 22 April 2011.

Consultation paper

Appendix A – Draft Definition
Appendix B – Draft Code of Conduct for Credit Rating Agencies

US agencies consult on proposed rule on incentive compensation

The Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Agency, the National Credit Union Administration, the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision, and the Securities and Exchange Commission (SEC) have issued for comment a joint proposed rule intended to ensure that regulated financial institutions design their incentive compensation arrangements to take account of risk.

The proposed rule, which is being issued pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, would apply to certain financial institutions with more than USD 1 billion in assets. It also contains heightened standards for the largest of these institutions.

The agencies are proposing that financial institutions with USD 1 billion or more in assets be required to have policies and procedures to ensure compliance with the requirements of the rule, and submit an annual report to their federal regulator describing the structure of their incentive compensation arrangements. The agencies are proposing that larger financial institutions, generally those with USD 50 billion or more in assets, defer at least 50% of the incentive compensation of certain officers for at least three years and that the amounts ultimately paid reflect losses or other aspects of performance over time.

Comments are due within 45 days from the date of publication in the Federal Register, which is expected shortly.

Press release

FRB consults on proposed rules concerning financial market utilities

The Board of Governors of the Federal Reserve System (FRB) has requested comment on a proposed rule implementing two provisions of Title VIII of the Dodd-Frank Act related to the supervision of financial market utilities designated as systemically important by the Financial Stability Oversight Council.

The proposed rule establishes risk-management standards governing the operations related to the payment, clearing, and settlement activities of designated financial market utilities, except those registered as a clearing agency with the Securities and Exchange Commission (SEC) or as a derivatives clearing organization with the Commodity Futures Trading Commission (CFTC). It also establishes requirements and procedures for advance notice of material changes to the rules, procedures, or operations of a designated financial market utility for which the FRB is the primary supervisor under Title VIII of the Dodd-Frank Act.

Comments are due within 45 days from the date of publication in the Federal Register, which is expected shortly.

FINRA consults on proposed rule governing outsourcing arrangements

The Financial Industry Regulatory Authority (FINRA) has issued Regulatory Notice 11-13 requesting comment on proposed FINRA Rule 3190 (Use of Third-Party Service Providers). The proposed rule is intended to clarify a member firm's obligations and supervisory responsibilities regarding outsourcing arrangements.

Amongst other things, the rule would establish that when a member firm outsources a function or activity related to its business as a regulated broker-dealer to a third-party service provider, this does not relieve the firm of its obligation to comply with applicable securities laws and regulations and FINRA and Municipal Securities Rulemaking Board (MSRB) rules. The rule would also require that the firm cannot delegate its responsibilities for, or control over, any outsourced functions or activities, and that members outsourcing functions must have supervisory procedures, including due diligence measures, to ensure that arrangements with third-party service providers are reasonably designed to achieve compliance with applicable securities laws and regulations and FINRA and MSRB rules.

Comments are due by 13 May 2011.

FDIC and FRB issue notice of proposed rulemaking on resolution plans and credit exposure reports

The Board of Directors of the Federal Deposit Insurance Corporation (FDIC) has approved a notice of proposed rulemaking for certain organizations to file and report resolution plans and credit exposure reports as required in Title I, Section 165 of the Dodd-Frank Act. The notice of proposed rulemaking is to be issued jointly with the Board of Governors of the Federal Reserve System (FRB).

The proposed rule requires periodic submission of: (1) a plan for the rapid and orderly resolution under the Bankruptcy Code in the event of material financial distress or failure of a covered company (resolution plan); and (2) a report on credit exposures to other significant non-bank financial companies and significant bank holding companies (credit exposure report).

Resolution plans would have to be submitted within 180 days of the effective date of a final regulation, and credit exposure reports would have to be filed 30 days after the end of each calendar quarter.

Comments on the proposed rule are due within 60 days from the date of publication in the Federal Register, which is expected shortly.

FRB proposes risk-retention rule for asset-backed securities

The Federal Reserve Board (FRB) has issued a proposed rule that would require sponsors of asset-backed securities (ABS) to retain at least 5% of the credit risk of the assets underlying the securities.

The rule, which will be proposed jointly with five other federal agencies, would provide sponsors with various options for meeting the risk retention requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The FRB has indicated that, in drafting the proposed rule, the agencies sought to ensure that the amount of credit risk retained is meaningful, while taking into account market practices and reducing the potential for the rule negatively to affect the availability and cost of credit to consumers and businesses.

Comments must be received by 10 June 2011. The notice will be published in the Federal Register following approval by all agencies including the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), the Federal Housing Finance Agency, and the Department of Housing and Urban Development.

US agencies consult on proposed risk retention rule

The Board of Governors of the Federal Reserve System (FRB), the Department of Housing and Urban Development, the Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Agency, the Office of the Comptroller of the Currency (OCC), and the Securities and Exchange Commission (SEC) have published for comment a joint proposed rule that would require sponsors of asset-backed securities (ABS) to retain at least 5% of the credit risk of the assets underlying the securities and would not permit sponsors to transfer or hedge that credit risk.

The proposed rule also includes descriptions of loans that would not be subject to these requirements, including asset-backed securities that are collateralized exclusively by residential mortgages that qualify as 'qualified residential mortgages' (QRMs). Under the proposal, QRMs' eligibility would be determined by evaluating such criteria as borrower credit history, payment terms, and loan-to-value ratio, designed to ensure they are of very high credit quality.

The proposed rule would also recognise that the 100% guarantee of principal and interest provided by Fannie Mae (the Federal National Mortgage Association) and Freddie Mac (the Federal Home Mortgage Loan Corporation) meets their risk-retention requirements as sponsors of mortgage-backed securities for as long as they are in conservatorship or receivership with capital support from the US government.

Comments are due by 10 June 2011.

RECENT CLIFFORD CHANCE BRIEFINGS

New ESMA Recommendations for Mineral Companies

On 23 March 2011, ESMA published a feedback statement setting out its recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses as they relate to mineral companies.

This briefing discusses the new recommendations.

http://www.cliffordchance.com/publicationviews/publications/2011/03/new_esma_recommendationsformineralcompanies0.html

Fast track to London for Israeli issuers

On 23 March 2011, ESMA published a framework for third country share prospectuses, which sets out how third country issuers can meet the requirements of the Prospectus Directive. The framework allows prospectuses from non-EU countries, drawn up in accordance with third country legislation, to have a 'wrap' added, so that the resulting document meets the requirements of the Directive.

At the same time, ESMA announced that it considers that a prospectus drawn up in accordance with Israeli laws and regulations, together with a wrap containing a number of supplementary disclosures, can constitute a valid prospectus under the Prospectus Directive, and that Israeli issuers may use such prospectuses in connection with an application for admission of shares to trading on any EU regulated market.

This briefing discusses these two announcements.

http://www.cliffordchance.com/publicationviews/publications/2011/03/fast_track_to_londonforisraeliissuers.html

Bribery Act compliance deadline of 1 July 2011 now fixed by publication of final guidance to companies

The Ministry of Justice has published its long overdue final guidance on anti-bribery compliance procedures. Consideration of this guidance is essential for any commercial organisations that want to maintain a defence to the new corporate criminal offence under the Bribery Act of failing to prevent bribery. At the same time the government has confirmed that the Bribery Act will be brought into force on 1 July 2011. Joint guidance by the Director of the Serious Fraud Office and the Director of Public Prosecutions has also been published.

This briefing provides an overview of the guidance.

http://www.cliffordchance.com/publicationviews/publications/2011/03/bribery_act_compliancedeadlineof1july2010.html#

The Bribery Act 2010 – action points for employers

This briefing provides a succinct list of action points that employers should consider to ensure that they have adequate procedures in place to prevent bribery by individuals performing services on their behalf, failing which an organisation may be liable for the new offence of failing to prevent bribery which comes into effect on 1 July 2011 and in relation to which unlimited fines may be imposed.

http://www.cliffordchance.com/publicationviews/publications/2011/04/the_bribery_act_2010actionpointsforemployers.html

Implementing Lord Justice Jackson's proposals for the civil courts – the bear necessities

The government has announced which of the proposals made by Lord Justice Jackson in his report on costs in English civil litigation it intends to implement. Success fees and ATE insurance premiums will no longer be recoverable, lawyers will be able to enter into contingency fee agreements, and there will be a hardline proportionality test for all costs claimed from the losing party. The package's real target is personal injury claims, but the proposals will have an effect on commercial litigation.

This briefing discusses the government's proposals.

http://www.cliffordchance.com/publicationviews/publications/2011/03/implementing_lordjusticejacksonsproposalsfo.html

Coeur Défense – what's new?

On 8 March 2011, the Cour de Cassation, the French Supreme Court, quashed the decisions of the Paris Court of Appeal that had nullified the opening of safeguard proceedings in relation to Heart of La Défense SAS (Hold SAS) and its sole shareholder Sàrl Dame Luxembourg (Dame Lux). The safeguard proceedings of these two companies, which were initiated in November 2008, have therefore been reinstated. However, another case, initiated by the appeal of the Public Prosecutor against the safeguard plan restructuring the debts of Hold SAS and Dame Lux, is still pending and will now be heard by the Paris Court of Appeal.

This briefing provides an update of the landmark case after the recent decision of the Cour de Cassation.

http://www.cliffordchance.com/publicationviews/publications/2011/03/coeur_defense_whatsnew.html

Cross-Border Litigation Series – CFTC requests comment on its proposed interpretations of statutory disruptive practices

As part of last year's financial reform legislation, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress amended the Commodity Exchange Act (CEA) to prohibit trading practices it deemed 'disruptive to fair and equitable trading' on registered futures and swaps markets. These new prohibitions will become effective on 16 July 2011.

This briefing discusses a Proposed Interpretive Order, issued by the CFTC on 18 March 2011, to clarify the application of a section that empowers the CFTC to promulgate whatever rules it deems reasonably necessary to prohibit the statutory disruptive trading practices, as well as any other trading practice that is 'disruptive of fair and equitable trading'.

http://www.cliffordchance.com/publicationviews/publications/2011/03/cross-border_litigationseriescftcrequest.html

An update on RMB internationalisation and Hong Kong's position as the major offshore RMB centre

Clifford Chance has prepared its latest update on legal developments in both China and Hong Kong on the road to the internationalisation of the RMB, which discusses, among other issues, the sources of offshore RMB funds, existing and potential investment channels into China, and prospects for the future.

English version
http://www.cliffordchance.com/publicationviews/publications/2011/03/an_update_on_rmbinternationalisationandhon0.html

Chinese version
http://www.cliffordchance.com/publicationviews/publications/2011/03/an_update_on_rmbinternationalisationandhon.html