

International Regulatory Update

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Prudential Regulation Authority: Bank of England and FSA set out future approach to banking supervision

The Bank of England and the FSA have published a [joint paper](#) which sets out the current thinking on how the future Prudential Regulation Authority (PRA) will approach the supervision of banks, building societies, credit unions and investment firms. The paper was unveiled at a joint Bank of England/FSA conference on the future of prudential regulation, at which Hector Sants, chief executive of the FSA and PRA chief executive designate, and Andrew Bailey, FSA director of UK banks and building societies and PRA deputy chief executive designate, both gave speeches.

[Hector Sants](#) indicated that the new regulatory model will be based on forward looking judgments and will be underpinned by the fact that the PRA has a single objective to promote the stability of the UK financial system as a whole, albeit through the mechanism of the supervision of individual firms. He emphasised that the PRA's purpose is fundamentally different from that of previous regulatory regimes and will lead to a significantly different model of supervision to that which was in use pre-2007.

[Andrew Bailey](#) indicated that the PRA will use a new framework to assess risks to financial stability. In particular, he stated that key elements in that risk assessment framework will include: (1) the potential impact on the financial system of a firm coming under stress or failing; (2) the impact on the viability of a firm's business model of the macroeconomic and business risk context; and (3) a firm's overall safety and soundness, which may act to mitigate the potential risk a firm poses to financial stability.

The PRA will be responsible for supervising both insurance companies and deposit-takers. The Bank of England and the FSA plan to publish a companion paper in June 2011 to cover the PRA's approach to supervising insurance companies.

Commissioner Almunia calls on competition authorities to take lead on regulatory developments

Joaquín Almunia, Vice President of the European Commission and Commissioner for Competition Policy, gave a [speech](#) at the tenth annual conference of the International Competition Network, during which he called on competition authorities to intervene more proactively in the discussion about how markets should work.

Mr. Almunia argued that competition authorities should use their unique position to feed the debate about the value of well functioning markets and, when necessary, how they should be regulated. In particular, he called on competition authorities to become more involved in the design of a modern and effective regulatory framework for these markets. He added that regulation should lay down the principles of efficient and stable markets and that the competition authorities' expertise can help devise a regulatory framework that prevents anticompetitive behaviour from arising.

Credit rating agencies: ESMA submits technical advice to Commission on fees for supervision

ESMA has published a [final report](#) which sets out a summary of the responses to ESMA's April 2011 consultation on the fee structure for CRA supervision and registration in the EU. The report includes ESMA's technical advice to assist the European Commission in formulating a regulation by delegated act on fees for credit rating agencies (CRAs).

Short selling and CDS: ECOFIN Council agrees general approach

The ECOFIN Council has [agreed](#) a general approach to inform its negotiations with the European Parliament on the proposed regulation on short selling and certain aspects of credit default swaps (CDS). The aim is to enable the text to be adopted at first reading.

Energy trading: Council of European Energy Regulators consults on Europe-wide wholesale trading passport

The Council of European Energy Regulators (CEER) has published for consultation its [draft advice](#) on the introduction of a Europe-wide Energy Wholesale Trading Passport. CEER's draft advice sets out a framework for dealing with shortcomings regarding regulatory access to trading on electricity and gas wholesale markets. It provides recommendations on whether harmonisation of wholesale market trading access conditions is needed and, if so, what the best instrument to achieve it would be. The final advice is intended to support policy makers at the EU and national levels to make informed decisions on next steps.

Responses are due by 17 June 2011.

IOSCO finalises principles to address dark liquidity

The IOSCO Technical Committee has published its [final report](#) which sets out principles designed to guide regulators, venues and general users of dark liquidity. The principles address: (1) pre-trade and post-trade transparency; (2) incentives for using transparent orders; (3) reporting to regulators; (4) information available to market participants about dark pools and dark orders; and (5) regulation of the development of dark pools and dark orders.

IOSCO intends to review these principles in light of market and regulatory developments.

FSB launches second peer review on compensation and invites stakeholder feedback

The Financial Stability Board (FSB) has [launched](#) its second peer review to assess the progress made by national authorities and significant financial institutions in implementing the FSB 'Principles for Sound Compensation Practices' and their implementation standards, as well as the impact on compensation practices at financial institutions of national policy measures taken to implement the principles and standards. The review will assess the different approaches to implementing the principles and standards by surveying supervisors and regulators and by surveying a sample of major firms directly. The responses of supervisors and regulators, and aggregated responses of firms will be analysed and discussed by the FSB later in 2011.

In addition to the information to be collected via the surveys, the FSB has invited feedback from financial institutions, industry associations, and other stakeholders on their experiences regarding compensation practices, either in a particular country or across several countries, including comments on: (1) gaps in regulatory and supervisory oversight; (2) progress and potential challenges faced by firms in implementing the FSB's principles and standards; and (3) how market practices have evolved in recent years, including possible examples of leading practices in compensation structures and policies.

Responses are due by 15 June 2011.

ICMA publishes 2011 Global Master Repurchase Agreement and associated legal opinions

The International Capital Market Association (ICMA) has [announced](#) the publication of the 2011 version of the Global Master Repurchase Agreement (GMRA), as well as updated legal opinions on the enforceability of the agreement, which cover the use of the GMRA for repo transactions in over 60 jurisdictions. This follows a review of the 2000 version of the GMRA as part of the ICMA European Repo Committee's response to the financial crisis.

Amongst other things, the revisions to the agreement include the following: (1) amended methodology in calling an Event of Default; (2) expansion of the Act of Insolvency definition; (3) increased flexibility as regards the default valuation time; (4) introduction of the concept of margin percentage; (5) introduction of a cash equivalent amount for margin maintenance where equivalent margin securities are not available; and (6) introduction of a set-off clause.

FSA consults on proposed guidance on reporting derivative transactions conducted through derivative exchange platforms

The FSA has published [proposed guidance](#) on reporting of on-exchange derivative transactions conducted through exchange platforms. In particular, the FSA has revised the guidance to: (1) remove the need to distinguish between transactions for fungible and non-fungible derivative instruments conducted through exchange platforms; (2) reflect more accurately the status of the transactions and make it easier for firms to integrate it into their transaction reporting systems; and (3) extend the guidance from Alternative Instrument Identifier (Aii) derivative transactions to all derivative transactions (ISIN and Aii) conducted through EEA derivative exchange platforms.

Comments are due by 2 June 2011.

BaFin publishes updated notes on definition of investment advice and on investment broking under KWG

The German Federal Financial Supervisory Authority (BaFin) and the Deutsche Bundesbank have published an updated [note on the definition of investment advice](#). Amongst other things, it covers: (1) personal recommendations related to transactions with specific financial instruments; (2) recommendations made to a client or its representatives; (3) recommendations based on the assessment of the personal circumstances of the investor or presented as suitable for the investor; (4) publication of the recommendation through 'distribution channels' or to the public; and (5) advice as regards investment fund units.

BaFin has also published an updated [guidance note on investment broking](#) under section 1 para 1a sentence 2 no 1 of the German Banking Act (KWG). Investment broking is defined as the broking of business involving the purchase and sale of financial instruments. BaFin is of the view that investment broking also includes an activity which involves the bringing together of two or more parties thereby bringing about a transaction between those parties.

UCITS IV: AMF consults on changes to Book IV of its general regulation

The French Financial Markets Authority (AMF) has published a [consultation paper](#) on measures to implement the provisions of the UCITS IV Directive, which will modify Book IV of the AMF's general regulation on collective investment schemes.

In particular, the amendments to Book IV address: (1) the application of the cross-border notification procedure for French funds that seek to market their units or shares abroad; (2) the application of authorisation systems for cross-border mergers of UCITS and 'master-feeder' structures; and (3) the replacement of the simplified prospectus with a key investor information document (KIID).

Responses are due by 6 June 2011.

Dutch legislator adopts framework for state participations

The Upper House of the Dutch Parliament has [adopted](#) a Bill establishing a framework for state participations in financial institutions. The Act limits the government's influence on participations in certain financial institutions which were obtained by the Dutch state during the financial crisis in 2008. A trust office will hold all shares currently held by the Dutch state and issue corresponding participations. The Minister of Finance will be able to give instructions to the trust office, including voting instructions. These instructions may be given under extraordinary circumstances. In addition, the Minister will have to approve certain decisions made by the trust office, including decisions regarding the remuneration policy of the financial institution or the issuance of shares.

The Minister intends to sell all or most of the participations within the next five years. The Act is expected to enter into force in June 2011 and will be withdrawn when the last participations are sold.

Dutch Minister of Finance designates liquidity contracts as accepted market practice

The Dutch Minister of Finance, Jan Kees De Jager, has adopted a [regulation](#) pursuant to which transactions under certain liquidity contracts that relate to shares or participations in closed-end investment institutions which are admitted to trading on a Dutch regulated market or a Dutch multilateral trading facility are exempted from the prohibition on market manipulation, provided that the reasons to enter into the transactions are legitimate.

The regulation entered into force on 13 May 2011 and is referred to as the 'Regulation Accepted Market Practices FSA'.

UCITS IV: Bank of Italy and CONSOB consult on implementation

CONSOB and the Bank of Italy have published a [joint consultation paper](#) on amendments to second-level provisions which are intended to implement the UCITS IV Directive in Italy. Amongst other things, the consultation paper proposes to modify CONSOB Resolution No. 16190/2007 on intermediaries by amending the provisions relating to: (1) cross-border operations of investment fund undertakings; (2) rules of conduct and decision-making procedures; (3) inducements; and (4) marketing of investment undertakings.

The consultation paper also sets out amendments to the Bank of Italy Resolution dated 14 April 2005 on collective asset management, which are intended to broaden the scope of the 'management company passport' in order to allow managing companies to set up and/or manage harmonised investment undertakings in other Member States. In addition, the notification regime has been simplified, allowing management companies to offer collective investment undertakings' shares/units as soon as the host member's authority has been notified.

Comments are due by 11 June 2011.

In addition, CONSOB has published a [consultation paper](#) on amendments to CONSOB Resolution No. 11971/1999 on issuers to take account of the introduction of a key investor information document (KIID), which repeals the requirement for a simplified prospectus.

Comments are due by 6 June 2011

Prospectus and Transparency Directives: CONSOB consults on implementation

CONSOB has published a [consultation paper](#) on amendments to CONSOB Resolution No. 11971/1999 on issuers, which are intended to implement changes to the Prospectus Directive and the Transparency Directive in Italy.

In order to enhance investor protection, the consultation proposes a new definition of the key information to be included in the summary and in the final terms, and new provisions to make it compulsory to publish the prospectus on the internet. A new definition of qualified investors is also included, in accordance with the MiFID definition. Other proposed amendments relate to: (1) the repeal of annual disclosures; (2) the approval of prospectuses and supplements (article 8 of Resolution No. 11971/1999); (3) the period of effectiveness of the prospectus, which commences on the day of its approval; (4) the prospectus language; and (5) the results and the performance of public offerings.

The consultation paper also sets out amendments to Resolution No. 11971/1999 intended to broaden the scope of the major shareholding disclosure regime. In particular, the proposed amendments extend the shareholding disclosure regime to cash-settled derivatives.

Comments are due by 6 June 2011.

FSC requires banks to put internal corporate governance rules in place

The Korean Financial Services Commission (FSC) has [announced](#) that all banks were required to have internal governance rules in place by 17 May 2011 and to publish a public notice of these rules on their and the Korea Federation of Bank's websites. The requirement is imposed pursuant to the amendments made to the Banking Act on 18 November 2010, requiring banks to establish and publicise their internal rules on corporate governance.

SEC proposes rules to increase transparency and improve integrity of credit ratings

The SEC has launched a consultation on [proposed rules and amendments](#) to increase transparency and improve the integrity of credit ratings and Nationally Recognized Statistical Rating Organizations (NRSROs).

Under the proposed rules, NRSROs would be required to: (1) report on internal controls; (2) protect against conflicts of interest; (3) establish professional standards for credit analysts; (4) publicly provide, along with the publication of the credit rating, disclosure about the credit rating and the methodology used to determine it; (5) enhance their public disclosures about the performance of their credit ratings; and (6) disclose third-party due diligence reports for asset-backed securities.

Comments will be accepted for 60 days following publication of the request in the Federal Register, which is expected shortly.

FINRA announces new implementation date for rules on know-your-customer and suitability obligations

FINRA has issued [Regulatory Notice 11-25](#), which announces a new implementation date of 9 July 2012 for FINRA's new consolidated rules governing know-your-customer and suitability obligations and includes additional guidance in response to industry questions and concerns.

New FINRA Rule 2090 (Know Your Customer) requires firms to use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer. New FINRA Rule 2111 (Suitability) requires a firm or associated person to have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile.

FINRA previously announced an implementation date of 7 October 2011 for the new rules and provided guidance regarding Rule 2090 and Rule 2111 in Regulatory Notice 11-02, issued in January 2011.

FDIC approves proposed rule on retail foreign exchange transactions

The FDIC has approved a [proposed rule](#) to adopt requirements for FDIC-supervised institutions that may participate in certain foreign exchange transactions with retail customers which fall under the provisions of section 742 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The proposed rule applies only to transactions with retail customers, and only to futures, options, and similar transactions, such as rolling spot trades. It does not cover forward contracts or spot contracts. The proposed rule focuses on the safety and stability of the underlying transactions through enhanced margin requirements and consumer protection through enhanced disclosure requirements among other elements. It creates requirements dealing with disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation.

Comments will be accepted for 30 days following publication of the request in the Federal Register, which is expected shortly.

SEC proposes amendments to rules on investment adviser performance compensation

The SEC has issued a [proposed rule](#) announcing that it intends to adjust the dollar amount thresholds over which certain investment advisers may charge performance-based compensation to 'qualified clients'. The proposed changes are intended to account for inflation.

The SEC has also proposed amendments to Rule 205-3 under the Investment Advisers Act of 1940 to: (1) provide that the SEC will issue an order every five years adjusting the dollar amount thresholds for inflation; (2) exclude the value of a person's primary residence from the test of whether a person has sufficient net worth to be considered a 'qualified client'; and (3) add certain transition provisions to the rule.

Comments are due by 11 July 2011.

SEC consults on assigned credit ratings

The SEC has issued a [request for comment](#) on the benefits of a system in which a public or private utility or a self-regulatory organization would assign a nationally recognized statistical rating organization to determine credit ratings for structured finance products. The Dodd-Frank Wall Street Reform and Consumer Protection Act requires the SEC to study assigned ratings as part of a larger examination of credit ratings.

Comments are due by 13 September 2011.

UPCOMING CLIFFORD CHANCE EVENT

Annual Global Funds Conference

You are cordially invited 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 3:30 pm to 6:00 pm on 27 June 2011.

We are bringing together a group of Clifford Chance specialists from Europe, the US and Asia for an afternoon of presentations and panel discussions. Some of the topics that we will be covering include: (1) a comparison of the FSA Remuneration Code to US remuneration proposals under Dodd-Frank; (2) market trading issues, including insider dealing and market abuse, as well as OTC derivatives clearing; (3) the growth of the 'shadow banking' industry in the funds space; (4) the UK Bribery Act, SEC pay-to-play rules and the US Foreign Corrupt Practices Act; and (5) a general update on the status of Dodd-Frank and the AIFMD.

The event will be followed by drinks and canapés. To register, please click on the link below or contact Fiona Grafton at fiona.grafton@cliffordchance.com.

<http://inform.cliffordchance.com/vf/7831j9592U7166DZ9593>

RECENT CLIFFORD CHANCE BRIEFINGS

ICMA publishes 2011 Global Master Repurchase Agreement

The Global Master Repurchase Agreement (GMRA) is used across the globe as the standard contract for documenting transactions in the international repo market. After reviewing the 2000 version of the GMRA in light of the financial crisis and the Lehman collapse, the International Capital Market Association (ICMA) has now published the new 2011 GMRA.

http://www.cliffordchance.com/publicationviews/publications/2011/05/icma_publishes_2011globalmasterrepurchases.html

Antitrust Review for March – April 2011

Clifford Chance has published the March – April 2011 issue of Antitrust Review, with commentary on the main developments in national and international antitrust law and policy.

http://www.cliffordchance.com/publicationviews/publications/2011/05/antitrust_reviewmarch-april2011.html

Contentious Commentary – a review for litigators

This newsletter provides a summary of recent developments in litigation. The newsletter is produced by lawyers in the litigation and dispute resolution practice at Clifford Chance.

http://www.cliffordchance.com/publicationviews/publications/2011/05/contentious_commentary-areviewforlitigator.html

UK Employment Update

The May 2011 edition of Employment News in Brief includes articles discussing, amongst other things: (1) the government's consultation on modern workplaces and its proposals to introduce a new shared flexible parenting regime in 2015, to extend the right to request flexible working to all employees, and its plans to clarify when statutory holiday may be carried forward to subsequent holiday years; (2) ex-employer liable for negligent comments in email; (3) sex discrimination – preferential redundancy scoring of maternity leavers is unlawful; (4) no requirement to advise on whether a compromise agreement constitutes a good deal or not; and (5) clarification on when written notice starts to run.

http://www.cliffordchance.com/publicationviews/publications/2011/05/uk_employment_update.html

Luxembourg Legal Update – May 2011

This third edition of Luxembourg Legal Update offers a regular 360° view on recent legal developments in Luxembourg. The newsletter provides a compact summary and guidance on the new legal issues which may impact your business, particularly in relation to banking, finance, capital markets, corporate, litigation, employment, funds & investment management and tax laws.

http://www.cliffordchance.com/publicationviews/publications/2011/05/luxembourg_legalupdate-may2011.html

Polish Legislation Newsletter

The Polish Legislation Newsletter summarises selected recent changes to Polish law. The April 2011 edition contains information on, amongst other things: (1) an Act amending the Civil Code and certain other Acts; (2) an Act on Private International Law; (3) an Act amending the Code of Civil Procedure; (4) an Ordinance of the Council of Ministers on the Exclusion of Certain Types of Vertical Agreements From the Prohibition on Anti-competitive Agreements; (5) a government Bill amending the Banking Law, the Act on Trading in Financial Instruments and the Act on Supervision of the Financial Market; and (6) a Member's Bill amending the Bankruptcy and Recovery Proceedings Law.

http://www.cliffordchance.com/publicationviews/publications/2011/05/polish_legislationnewsletterapril2011.html

India's New Merger Control Regime – Final Regulations Published

The Competition Commission of India has published finalised regulations governing the new merger regime that will enter into force on 1 June 2011. This briefing summarises the Indian merger control regime as updated by the new Regulations, and highlighting a number of important ambiguities that remain.

http://www.cliffordchance.com/publicationviews/publications/2011/05/india_s_new_mergercontrolregimefinal.htm

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