

International Regulatory Update

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If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

[Chris Bates](#) +44 (0)20 7006 1041

[Nick O'Neill](#) +1 212 878 3119

[Marc Benzler](#) +49 69 7199 3304

[Thomas Pax](#) +1 202 912 5168

[Steven Gatti](#) +1 202 912 5095

[Martin Rogers](#) +852 2826 2437

[Mark Shipman](#) + 852 2826 8992

International Regulatory Update Editor

[Julia Milosh](#) +44 (0)20 7006 4171

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

Basel III: EBA reports on monitoring exercise

The EBA has published its first [report](#) on the results of the Basel III monitoring exercise, as a follow-up to the comprehensive European quantitative impact study conducted to analyse the impact of the new requirements and published in December 2010. The report summarises the results using consolidated data from European banks as of 30 June 2011.

The monitoring exercise provides an impact assessment of the following aspects: (1) changes to banks' capital ratios and estimates of any capital shortfalls; (2) changes to the definition of capital that result from the new capital standard (Common Equity Tier 1); (3) changes in the calculation of risk-weighted assets; (4) the capital conservation buffer; (5) the leverage ratio; and (6) the liquidity coverage ratio and the net stable funding ratio.

CRD 4: Danish EU Council Presidency publishes compromise proposals; EBA consults on draft regulatory technical standards on own funds; ESRB sets out principles for macro-prudential policies

The Danish EU Council Presidency has published compromise texts for the proposed fourth package of amendments to the Capital Requirements Directive (CRD 4), comprising a directive governing access to deposit-taking activities and the prudential supervision of credit institutions and investment firms and a regulation on prudential requirements for credit institutions and investment firms.

In advance of the texts being finalised, the EBA has published a [consultation paper](#) on draft regulatory technical standards on own funds as part of the future CRD 4 implementation process. Amongst other things, the consultation paper covers: (1) Common Equity Tier 1 capital; (2) additional Tier 1 capital; (3) deductions from Common Equity Tier 1 capital and from own funds in general; (4) general requirements like indirect holdings arising from index holdings, supervisory consent for reducing own funds; and (5) transitional provisions for own funds in terms of grandfathering.

Comments are due by 4 July 2012. Separate consultations on a number of remaining regulatory technical standards on own funds will follow in the second half of 2012.

In addition, the European Systemic Risk Board (ESRB) has published a [letter](#) intended to help EU legislators to further develop the legal basis for policies to address future threats to EU financial stability within CRD 4. The ESRB supports

the establishment of a set of commonly defined prudential rules on the supervision of banks within the EU, based on the full implementation of the Basel III agreement as endorsed by the leaders of the G20. However, the ESRB considers it essential from a macro-prudential perspective that these rules can be tightened temporarily, by both EU and Member State authorities, in order to tackle future threats to the financial system and to the flow of credit to the economies of the EU. According to the ESRB, that calls for a framework which provides for discretion – with safeguards – for these authorities to act in this way where necessary.

In its letter, the ESRB identifies the following three principles to underpin this macro-prudential framework: (1) flexibility to undertake a broad range of actions; (2) scope to act early and effectively; and (3) efficient coordination of actions by Member States.

[Proposed directive – Presidency compromise](#)
[Proposed regulation – Presidency compromise](#)

European Commission consults on future of European insolvency law

The European Commission has launched a [consultation](#) examining the current EU insolvency regime, ten years on from the introduction of the EU Insolvency Regulation (EUIR). The consultation seeks input from stakeholders on how the EUIR is operating at present and seeks suggestions on how it can be improved.

Comments are due by 21 June 2012.

Prospectuses: European Commission proposes amendments to delegated regulation

The European Commission has published a [proposed delegated regulation](#) amending its Regulation EC 809/2004 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements. The amendments to Regulation EC 809/2004 are required under the amended Prospectus Directive.

The delegated regulation has not yet entered into force and is subject to the right of the European Parliament and the EU Council to express objections, in accordance with Article 290 (2) of the Treaty on the Functioning of the European Union and Article 24c of the amended Prospectus Directive.

Crisis management: European Commission publishes discussion paper on debt write-down tool

The European Commission has published a [discussion paper](#) on the debt write-down tool (bail-in) which will form part of its proposals for an EU framework for the management of failing credit institutions and investment firms. The paper is intended to provide the basis for discussions with stakeholders on a number of outstanding points, as part of the final steps before the Commission prepares its forthcoming legislative proposal on recovery and resolution. The Commission has indicated that these discussions will take place over the next four weeks.

Amongst other things, the discussion paper covers: (1) the point of entry into resolution; (2) the purpose and scope of the debt write-down tool; (3) implementation of debt write-down – hierarchy of claims; (4) whether there is a need to establish a minimum requirement for eligible liabilities; (5) recovery and reorganisation measures to accompany debt write-down; and (6) the timing for the application of the debt write-down tool.

[Commissioner Barnier's statement](#)

FSB launches peer review on risk governance

The Financial Stability Board (FSB) has launched a peer review on risk governance across FSB member jurisdictions. The peer review will take stock of progress in addressing the weaknesses in risk governance identified during the recent financial crisis at both national authorities and firms. It will focus on the roles and interplay between the firm's Board members that oversee risk management, the enterprise risk management function and relevant aspects of the process for assessing the risk governance framework, processes and practices, either by internal audit or by third parties (e.g. external auditors, consultants). As part of the review, the FSB has invited feedback from financial institutions, industry associations and other stakeholders on their experiences and views regarding risk governance, either in a particular country or across several countries.

Feedback is due by 11 May 2012.

[Questionnaire for national authorities](#)

Basel III: Basel Committee reports on implementation

The Basel Committee on Banking Supervision has published its [second progress report on Basel III implementation](#). The report tracks the implementation of Basel II, Basel 2.5 and Basel III by Committee member

countries. It outlines the progress of individual member countries in transforming the Committee's regulatory standards into national law or regulation according to the internationally agreed timeframes.

The Committee has also commenced a programme of peer reviews to assess whether its members' national rules and regulations are consistent with the globally agreed minimum standards. These reviews are intended to identify differences that could raise prudential or level playing field concerns. The methodology used by the Basel Committee to conduct these consistency reviews has also been published. Reviews of the Basel rules adopted by the European Union, Japan and the United States are already underway.

The final component of the Committee's implementation programme entails a review of the results delivered by national rules to determine whether the outcomes are consistent across banks and jurisdictions. The Committee's initial focus is on the calculation of risk-weighted assets in both the banking book and the trading book. The initial findings of these reviews are expected to be presented to the Committee before the end of 2012.

[Basel III implementation progress page](#)

[Basel III regulatory consistency assessment programme](#)

Retail Distribution Review: FSA consults on proposed guidance on assessing suitability of replacement business and centralised investment propositions

The FSA has published [proposed guidance](#) on assessing the suitability of replacement business and centralised investment propositions. The FSA notes that, in preparation for the Retail Distribution Review, many firms are changing their business model and choosing to offer a centralised investment proposition (CIP). This includes portfolio advice services, discretionary investment management and distributor-influenced funds. The FSA recently carried out a thematic review to assess how this change has affected consumers. The proposed guidance sets out the findings of this review and provides examples of the FSA's concerns around CIPs. In addition, it highlights suitability failings of wider relevance relating to replacement business which were identified in the review.

Comments are due by 4 May 2012.

Basel III: FINMA consults on amendments to circular on capital buffers and capital planning

The Financial Market Supervisory Authority (FINMA) has launched a consultation on proposed amendments to its Circular 2011/2 'Capital buffer and capital planning – banks'. The proposed amendments follow the revision of the Capital Adequacy Ordinance, reflecting the new Basel III capital requirements.

Comments are due by 30 April 2012.

[Draft FINMA Circular 2011/2 'Capital buffer and capital planning – banks' \(German\)](#)
[Key points \(German\)](#)
[Relevant information about the consultation \(English\)](#)

RBI discussion paper on introduction of dynamic provisioning framework for banks in India published

The Reserve Bank of India (RBI) has published a [discussion paper](#) on the introduction of a dynamic provisioning framework for banks in India. In light of efforts being made at an international level to introduce countercyclical capital and provisioning buffers, the RBI has prepared the discussion paper on a countercyclical provisioning framework with parameters calibrated based on the credit history of Indian banks.

Comments are due by 15 May 2012.

MAS consults on proposed revisions to regulatory capital framework for holders of capital markets services licences

The Monetary Authority of Singapore (MAS) has published a [consultation paper](#) on proposed revisions to the regulatory capital framework for holders of capital markets services licences. The MAS has reviewed the current regulatory capital framework for capital markets services licensees, which is contained in the Securities and Futures (Financial and Margin Requirements for Holders of Capital Markets Services Licences) Regulations. The consultation paper sets out proposed changes arising from the review, which are intended to align the regulatory capital framework across capital markets services licensees and enhance the risk-based capital framework.

Comments are due by 3 May 2012.

Financial Stability Oversight Council approves rule to designate nonbank financial companies for enhanced oversight

The Financial Stability Oversight Council has [approved a final rule](#) and interpretive guidance concerning its authority

to require supervision and regulation of certain nonbank financial companies. The final rule and interpretive guidance details the process and analytical framework that the Council intends to use when determining whether a nonbank financial company should be subject to supervision by the Board of Governors and to regulations such as enhanced prudential standards and the requirement to prepare resolution plans. Under the final rule, nonbank financial companies will generally be assessed in a three-stage process in non-emergency situations.

In Stage 1, the Council will apply uniform quantitative thresholds to identify those nonbank financial companies that will be subject to further evaluation. In Stage 2, the Council will analyze the nonbank financial companies identified in Stage 1 using a range of information available to the Council primarily through existing public and regulatory sources. In Stage 3, the Council will contact each nonbank financial company that the Council believes merits further review to collect information directly from the company that was not available in the prior stages. Each nonbank financial company that is reviewed in Stage 3 will be notified that it is under consideration and be provided an opportunity to submit written materials related to the Council's consideration of the company for a proposed determination.

The rule and guidance will be published in the Federal Register shortly, and the Council will immediately initiate the process of evaluating nonbank financial companies.

Federal Reserve seeks comment on proposed rulemaking to establish requirements for determining whether a company is predominantly engaged in financial activities

The Board of Governors of the Federal Reserve System (FRB) has [requested comments](#) on a proposed amendment to its notice of proposed rulemaking issued on 11 February 2011 to set up requirements for determining whether a company is 'predominantly engaged in financial activities'.

Under Title 1 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, a company generally can be designated for FRB supervision by the Financial Stability Oversight Council only if 85% or more of the company's revenues or assets are related to activities that are financial in nature under the Bank Holding Company Act.

Comments are due by 25 May 2012.

Federal agencies issue guidance clarifying effective date for Dodd-Frank 'push-out rule'

The Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) have issued [guidance](#) clarifying that the effective date of section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, also known as the 'swaps push-out rule', is 16 July 2013. The guidance has been issued in response to inquiries which the agencies have received seeking clarification about the effective date of the rule. Section 716 prohibits certain types of federal assistance, such as discount window lending and deposit insurance, to a swaps entity, subject to specified exceptions.

RECENT CLIFFORD CHANCE BRIEFINGS

Draft Prospectus Directive Regulation changes published – what are the consequences?

The Prospectus Directive regime in Europe is in the process of being amended by virtue of Directive 2010/73/EU, which gives Member States until 1 July 2012 to implement the necessary measures by domestic legislation. At the same time, the Prospectus Directive Regulation, which stipulates the detailed contents of prospectuses under this regime and which does not require implementing legislation but has direct effect in Member States, is also in process of amendment. On 30 March 2012, the European Commission published a draft of the first amending regulation. The draft amending regulation is due to have effect from 1 July 2012.

This briefing considers its principal consequences.

http://www.cliffordchance.com/publicationviews/publications/2012/04/draft_prospectusdirectiveregulationchange.html

The ISDA Master Agreement – from here to eternity

The ISDA Master Agreement should be interpreted strictly in accordance with its written terms, without implying additional rights or obligations that are not expressly spelt out, according to the Court of Appeal. In particular, a payment obligation is suspended if the potential recipient is subject to an Event of Default (e.g. insolvency), but the obligation is never extinguished. The Master Agreement does not provide for extinction, and there is no basis to imply a term to that effect since the parties have not provided for it expressly. As a result, a payment obligation

could revive if the Event of Default is cured at any stage, however far in the future the cure takes place.

This briefing discusses the Court of Appeal's judgment.

http://www.cliffordchance.com/publicationviews/publications/2012/04/the_isda_master_agreementfromheretoeternity.html

Client assets – the FSA CASS Resolution Pack

The FSA's Policy Statement PS12/6 'The CASS Resolution Pack' was published on 26 March 2012 and sets out the changes to be made to the Client Assets sourcebook ('CASS') to introduce requirements for a CASS Resolution Pack. These changes will take effect on 1 October 2012. In theory, the Resolution Pack requirements should not be difficult to comply with, on the basis that firms should have the relevant records in place anyway, but there are some points which may cause difficulties.

This briefing highlights some of these points.

http://www.cliffordchance.com/publicationviews/publications/2012/03/client_assets_thesacassresolutionpack.html

UK Employment Update

The April 2012 edition of UK Employment Update reviews an important TUPE case that highlights the risks associated with a post-transfer relocation. It also examines recent decisions on accelerating an employee's termination date, what selection criteria may be used to choose who should be appointed to a new role following a redundancy exercise and how cost savings alone cannot justify discriminatory treatment. Finally, it reports on a Court of Appeal judge's warning about the inappropriate use of suspension.

http://www.cliffordchance.com/publicationviews/publications/2012/04/uk_employment_update-april2012.html

Age pyramid for collective dismissals

The law of 29 March 2012 introduces the concept in Belgian law of an age pyramid that must be respected when selecting those employees who will fall under the scope of a collective dismissal. Whereas companies currently have, to a large extent, the flexibility to determine which employees fall within the scope of a collective dismissal, this flexibility will be substantially limited under the new regime. The rationale of the legislator is to limit the impact of collective dismissals on older employees and attempt to increase the employment levels of these older employees within the Belgian market. Under the current regime, social plan negotiations often focus on

end-of-career scenarios for older employees in order to avoid dismissals of younger (less expensive) employees.

This briefing discusses the new regime.

http://www.cliffordchance.com/publicationviews/publications/2012/04/age_pyramid_for_collectivedismissals.html

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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