

# 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](#) +44 (0)20 7006 1139

[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](http://www.cliffordchance.com)

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## European Commission publishes legislative proposals for audit market reform

The European Commission has published its proposals for a regulation on the quality of audits of public-interest entities and a directive to enhance the single market for statutory audits. The proposals are intended to enhance the quality of statutory audits in the EU and restore confidence in audited financial statements, in particular those of banks, insurers and large listed companies.

The proposals envisage measures which include: (1) mandatory rotation of audit firms; (2) mandatory tendering; (3) restrictions on non-audit services; (4) European supervision of the audit sector; (5) enabling auditors to exercise their profession across the EU; and (6) proportionate application for smaller auditors.

[Proposed regulation](#)  
[Proposed directive](#)  
[Impact assessment](#)  
[FAQs](#)

## George Osborne announces national loan guarantee scheme

The Chancellor of the Exchequer George Osborne has delivered his [2011 Autumn Statement](#) to Parliament.

Amongst other things, Mr. Osborne announced that the government will introduce a national loan guarantee scheme designed to make up to GBP 20 billion of guarantees for bank funding available over two years. The scheme is intended to allow banks to offer lower cost lending to smaller businesses with turnover of up to GBP 50 million. It will focus on new loans and overdrafts in order to help increase the supply of credit in the economy. Mr. Osborne emphasised that, in considering banks' access to the scheme, the government will take into account banks' commitment to smaller businesses.

The government will also make available an initial GBP 1 billion through a Business Finance Partnership, which will invest in smaller and mid-sized businesses in the UK through non-bank channels. The partnership will initially focus on co-investment with the private sector through loan funds, which will lend directly to mid-sized businesses in the UK. The government will begin the process of allocating funds early in 2012. Mr. Osborne indicated that the government will also consider options for investing through other non-bank lending channels, and welcomes proposals.

In addition, Mr. Osborne announced that the government will amend the regulations for UK covered bonds in order to provide greater transparency for investors and help banks use covered bonds to raise funding. The government also intends to establish an industry working group to explore how to further develop access to non-bank lending channels, including forms of bond issuance, for SMEs and mid-sized businesses. The group will be led by the Department for Business, Innovation and Skills (BIS) and will report by Budget 2012.

Mr. Osborne also welcomed, in principle, the Independent Commission on Banking's (ICB's) suggestions for a ring-fence around retail banks, bail-ins, and measures to increase competition in retail banking. He indicated that the government is considering a variety of options for implementing the ICB's recommendations and will respond before the end of 2011 with more detail.

Finally, Mr. Osborne announced that the rate of the bank levy will increase to 0.088% from 1 January 2012.

[Link to supplementary documents](#)

## State aid: European Commission extends crisis rules for banks

The European Commission has published a [communication](#) on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis.

The Communication updates and prolongs the crisis-related State aid measures that enable EU Member States to support their financial sector, which were introduced at the end of 2008/beginning of 2009 in the wake of the financial crisis. The Commission considers that, despite the [banking package](#) agreed by the European Council (Heads of State or Government) on 26 October 2011, the requirements for State aid to be approved pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union will continue to be fulfilled beyond the end of 2011.

### **CRD 3: EBA consults on draft guidelines on incremental default and migration risk charge and stressed value at risk**

The EBA has published for consultation: (1) [draft guidelines on the incremental default and migration risk charge \(IRC\)](#); and (2) [draft guidelines on stressed value at risk \(VaR\)](#).

The two consultation papers are in response to the revised Capital Requirements Directive (CRD3 – as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies) and the amendments relating to stressed VaR and to the IRC in the trading book. CRD 3 requires the EBA to monitor the range of practices in these areas and to draw up guidelines in order to ensure convergence of supervisory practices.

Comments are due by 15 January 2012.

### **Basel Committee on Banking Supervision consults on internal audit function in banks**

The Basel Committee on Banking Supervision has published a [consultative document](#) which contains revised supervisory guidance for assessing the effectiveness of the internal audit function in banks. The new document replaces the 2001 document '[Internal Audit in Banks and the Supervisor's Relationship with Auditors](#)', taking into account developments in supervisory practices and in banking organisations and incorporating lessons drawn from the financial crisis.

The document addresses supervisory expectations for the internal audit function in banking organisations and the supervisory assessment of that function. In particular, it seeks to promote a strong internal audit function within banking organisations and to provide guidance for the supervisory assessment of this function. The document also encourages bank internal auditors to comply with and to contribute to the development of national and international professional standards, and it promotes due consideration of prudential issues in the development of internal audit standards and practices.

Comments are due by 2 March 2012.

### **Trade associations respond to Basel Committee consultation on capitalisation of bank exposures to CCPs**

The British Bankers' Association (BBA), the Futures and Options Association (FOA), the Global Financial Markets Association (GFMA), the Institute of International Finance (IIF), and the International Swaps and Derivatives Association (ISDA) have published their [response](#) to the Basel Committee on Banking Supervision's second [consultation paper](#) on the capitalisation of bank exposures to central counterparties (CCPs), which was published in November 2011.

Amongst other things, the trade associations argue that the current proposals discourage the propagation of central clearing, in contrast to the policy objective stated by the G20, fail to provide incentives for CCPs to invest in the improvement of their risk systems and methodologies, and disincentivise default fund contributions and thereby create an increase in systemic risk. They also urge the Basel Committee to instigate a parallel reporting process during a predefined observation period, so that the calculations, including the hypothetical capital calculated under the Current Exposure Method can be observed and subject to further analysis.

### **FSA consults on proposed guidance on traded life policy investments**

The FSA has published [proposed guidance](#) on traded life policy investments, which warns that these products are generally unsuitable for the majority of UK retail investors and should therefore not be promoted to them. The FSA intends to consult on a ban of all marketing, including marketing delivered in the context of financial advice, of traded life policy investments to mass market retail investors in 2012, as part of a review of the rules relating to unregulated collective investment schemes. The proposed guidance is intended as an interim measure until the new rules are introduced.

Comments are due by 23 January 2012.

### **Austrian regulator announces measures to strengthen banking groups' capital adequacy**

Austria's Financial Market Authority (FMA) and the Austrian National Bank have announced a set of measures intended to strengthen banking groups' capital adequacy and to improve Central, Eastern and Southeastern Europe subsidiary banks' refinancing options.

In particular, the FMA has indicated that: (1) the Basel III rules will be implemented fully as soon as they take effect on 1 January 2013 (the participation capital subscribed under the bank support package will be included in the capital base); and (2) from 1 January 2016, banks will be obliged to hold an additional common equity tier 1 ratio of up to 3%, depending on the risk inherent in the respective business model.

[Press release \(English\)](#)  
[Press release \(German\)](#)

### **French regulator consults on transposition of Prospectus and Transparency Directive in its general regulation**

The Autorité des marchés financiers (Financial Markets Authority) (AMF) has launched a [consultation](#) on the transposition of the Directive amending the Prospectus and Transparency Directives. The Directive, which came into force on 12 December 2010, needs to be implemented by Member States on 1 July 2012 at the latest. The AMF intends to implement in its general regulation measures which do not require any legal or regulatory changes to be made.

Comments are due by 28 December 2011.

### **Bundesrat passes Act Amending Financial Assets Intermediaries and Investment Law**

The Bundesrat (the second chamber of the German Federal Parliament) has passed the Act Amending the Financial Assets Intermediaries and Investment Law. The Act is intended to strengthen investor protection when dealing with unregulated investment products (the 'grey capital market') by improving the level of disclosure and information. Amongst other things, it covers: (1) stricter product regulation; (2) stringent requirements for distribution; and (3) improvements for investors concerning claims under sales prospectus liability rules.

The Act amends, amongst others, the Investment Act, the Banking Act, the Securities Trading Act and the Securities Sales Prospectus Act and recasts the Sales Prospectus Act. The Act will enter into force subject to execution by the President and publication in the Federal Law Gazette.

[Resolution \(German\)](#)

### **Dutch regulator consults on major holdings disclosure regime and methodology for calculating number of shares underlying cash-settled instruments**

In connection with the recent adoption by the Dutch Parliament of a Bill which extends the obligation to disclose major holdings and capital interests in listed companies to include certain cash-settled derivative instruments and other instruments with a similar economic effect, the Netherlands Authority for the Financial Markets (AFM) has issued a consultation document elaborating on the methodology to calculate the number of underlying shares of such instruments.

The AFM has proposed to base the calculation of the number of underlying shares, e.g. the shares underlying contracts for differences, equity swaps, cash-settled call options or put options, on the delta adjusted method. The delta of an equity derivative represents how the change in price of the derivative relates to the change in price of the underlying equity. If the value of a derivative perfectly mirrors a change in the underlying share price, then the delta is 1 (full correlation).

Furthermore, the AFM has proposed a method to assess whether economic stakes in listed companies held through indices or other baskets of shares should be subject to the notification duty. The AFM has proposed that a derivative referenced to a basket or index be disclosable if the relevant securities represent 1% or more of the class in issue, and 20% or more of the value of the securities in the basket/index. A derivative referenced to a basket or index where the relevant securities fall below the relevant thresholds would still be considered to have similar economic effect to a qualifying instrument (and therefore require disclosure) if the use of the financial instrument was connected to the avoidance of disclosure.

Comments are due by 16 December 2011.

[Consultation document \(Dutch\)](#)

### **Dutch Parliament approves legislative proposal to extend major holdings disclosure regime to cash settled instruments**

The Dutch Parliament has approved a legislative proposal which extends the obligation to disclose major holdings and capital interests in listed companies (laid down in the Dutch Financial Supervision Act) to include

certain cash-settled derivative instruments and other instruments that may lead to a sudden, previously undisclosed change of control over a listed company.

In particular, in connection with the requirement to disclose major holdings, a person will be deemed to possess shares in a relevant listed company if he/she: (1) holds a financial instrument of which the value rise depends, in whole or in part, on the value rise of shares or related distributions, and which does not give a direct right to settle in shares (e.g. contracts for differences and total return equity swaps); (2) may be required to acquire shares as a result of having sold a put option; or (3) has concluded another contract with a similar economic effect to holding shares.

The Dutch government decided to extend the current major holdings disclosure regime to cover such instruments on the basis that they may be used to secretly accumulate substantial economic positions in listed companies. The explanatory notes to the bill state that the new disclosure requirements are similar to those in the UK and France.

The bill also provides that market participants should make an initial notification within four weeks following enactment if their stake in a listed company exceeds 5% at that time, provided that the stake has not previously been disclosed or if the enactment of the bill results in a different calculation.

The bill is expected to enter into force on 1 January 2012.

[Bill \(as approved by Parliament\)](#)  
[Explanatory Notes](#)

### **Swedish regulators propose new capital requirements for banks**

The Swedish Financial Supervisory Authority (Finansinspektionen), the Swedish Ministry of Finance and the Swedish Central Bank (Riksbank) have published their proposals for new minimum requirements for Swedish banks. They are proposing higher requirements for major Swedish banks than those stipulated under Basel III. In particular, they are proposing that the common equity Tier 1 capital of the four major Swedish banks should be at least 10% as of 1 January 2013 and 12% as of 1 January 2015. These thresholds include a capital conservation buffer of 2.5%, but not a countercyclical buffer.

The Swedish Ministry of Finance will now draw up the legislation needed in order for the proposals to be implemented.

[Statement \(Swedish\)](#)  
[Statement \(English\)](#)  
[Q&As \(Swedish\)](#)  
[Q&As \(English\)](#)

### **RBI implements guidelines on credit default swaps for corporate bonds**

The Reserve Bank of India (RBI) has announced that it has decided to implement the guidelines relating to the introduction of credit default swaps for corporate bonds effective from 1 December 2011. The RBI originally issued the 'Guidelines on Credit Default Swaps (CDS) for Corporate Bonds' on 23 May 2011. Although these guidelines were to be effective from 24 October 2011, it was decided on 20 October 2011 that the implementation would be postponed to facilitate putting in place the necessary infrastructure. The RBI has observed that the necessary infrastructure is now ready.

The RBI has also reminded Market-makers that they must report their CDS trades with both the users and other market-makers on the reporting platform of CDS trade repository within 30 minutes from the deal time. The market makers must also report their CDS trades in corporate bonds within 30 minutes of the trade to the Clearing Corporation of India Limited (CCIL) trade repository CCIL online reporting engine.

[Circular to market participants \(30 November 2011\)](#)  
[Prudential guidelines on credit default swaps for all scheduled commercial banks \(30 November 2011\)](#)  
[Guidelines to standalone primary dealers on capital adequacy and exposure norms for credit default swaps \(30 November 2011\)](#)  
[Guidelines on Credit Default Swaps for Corporate Bonds \(23 May 2011\)](#)

### **OCC proposes guidance on due diligence requirements to be used in determining whether investment securities are eligible for investment**

The Office of the Comptroller of the Currency (OCC) has [proposed guidance](#) for national banks and federal savings associations to assist them in meeting due diligence requirements in assessing credit risk for portfolio investments. The guidance is intended to clarify the steps national banks ordinarily should take to demonstrate that they have properly verified that their investments meet the newly established credit quality standards under 12 CFR part 1 and the steps national banks and federal savings associations should take to demonstrate they met due diligence requirements when purchasing investment securities and conducting ongoing reviews of their investment portfolios.

The OCC has also reminded federal savings associations that they will need to follow Federal Deposit Insurance Corporation (FDIC) requirements when that agency promulgates credit quality standards under 12 U.S.C. 1831e. These standards determine whether national banks may purchase, sell, deal in, underwrite, and hold securities consistent with the authority contained in 12 U.S.C. 24(Seventh), and whether federal saving associations may invest in, sell, or otherwise deal in securities consistent with the authority contained in 12 U.S.C. 1464(c).

Comments are due by 29 December 2011.

### **OCC invites comment on proposed rulemaking to implement alternatives to external credit ratings**

The Office of the Comptroller of the Currency (OCC) has published a [notice of proposed rulemaking](#) implementing section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 939A directs all federal agencies to review, no later than one year after enactment, any regulation that requires the use of an assessment of creditworthiness of a security or money market instrument and any references to, or requirements in, such regulations regarding credit ratings. In addition, the agencies are required to remove any references to, or requirements of reliance on, credit ratings and substitute such standard of credit-worthiness as each agency determines is appropriate. The statute also requires the agencies to seek to establish, to the extent feasible, uniform standards of creditworthiness, taking into account the entities the agencies regulate and the purposes for which those entities would rely on such standards.

The notice invites comment on the OCC's proposal to revise its regulations pertaining to investment securities, securities offerings, and foreign bank capital equivalency deposits to replace references to credit ratings with alternative standards of creditworthiness. The OCC is also proposing to amend its regulations pertaining to financial subsidiaries of national banks to better reflect the language of the underlying statute, as amended by section 939(d) of the Dodd-Frank Act.

Comments are due by 29 December 2011.

### **FRB issues final rule on annual capital plans and launches 2012 review**

The Board of Governors of the Federal Reserve System (FRB) has issued a [final rule](#) requiring top-tier US bank holding companies with total consolidated assets of USD 50 billion or more to submit annual capital plans for review. Under the final rule, each year the FRB will evaluate institutions' capital adequacy, internal capital adequacy assessment processes, and their plans to make capital distributions, such as dividend payments or stock repurchases. The FRB will then approve dividend increases or other capital distributions for companies whose capital plans are approved by supervisors and which are able to demonstrate sufficient financial strength to operate as successful financial intermediaries under stressed macroeconomic and financial market scenarios, even after making the desired capital distributions.

The FRB has also announced the launch of the 2012 review and issued instructions to firms, including the macroeconomic and financial market scenarios it requires institutions to use to support the stress testing used in their capital plans. As part of the review, known as the Comprehensive Capital Analysis and Review (CCAR), in 2012 the FRB will carry out a supervisory stress test based on the same stress scenario provided to firms to support its analysis of the adequacy of firms' capital.

In addition, the FRB has issued instructions outlining the information it is seeking from firms and the analysis it will carry out for the CCAR in 2012. There are two sets of instructions: one for the 19 firms that participated in the CCAR in 2011, the other for 12 additional firms with at least USD 50 billion in assets that have not previously participated in a supervisory stress test exercise. The level of detail and analysis expected in each institution's capital plan will vary based on the company's size, complexity, risk profile, and scope of operations.



## RECENT CLIFFORD CHANCE BRIEFINGS

### The Eurozone crisis and loan agreements and Eurobond documentation

The Eurozone crisis continues to dominate the global economic landscape. What was unthinkable last month – a discussion about the possibility of a Eurozone member departing from the currency union – has now been touched on publicly by leaders of European member states at the heart of the European project. It has raised questions among market participants as to the implications of such an event for market standard documentation.

These two briefing papers look at a set of questions in the context of how loan documentation and eurobond documentation might (or might not) deal with such an eventuality, albeit an unlikely one.

[The Eurozone Crisis and Loan Agreements](#)  
[The Eurozone Crisis and Eurobond Documentation](#)

### Public-to-private – a quick glimpse at transaction specifics

The current situation with respect to stock exchange markets is not one conducive to the promotion of investments in shares; however it could also be a source of opportunities. Many listed companies have a solid backbone and healthy financial founding, but the situation is such that often shares in these companies are undervalued. As a result, interesting investment possibilities can be created, and public-to-private (P2P) transactions are becoming more and more popular.

This briefing summarises the developments and legislation connected with P2P transactions.

<http://www.cliffordchance.com/publicationviews/publications/2011/12/public-to-private-aquickglimpsea.html>

### Regulation governing the acquisition of shares in Polish public companies

The acquisition of shares in a Polish public company is governed by the relevant provisions of the Act on Public Offerings, Conditions Governing the Introduction of Financial Instruments to Organised Trading and Public Companies of 29 July 2005, which came into force on 24 October 2005.

This briefing summarises the legislation in force as at May 2011.

[http://www.cliffordchance.com/publicationviews/publications/2011/12/regulation\\_governingtheacquisitionofsharesi.html](http://www.cliffordchance.com/publicationviews/publications/2011/12/regulation_governingtheacquisitionofsharesi.html)

### Shanghai VAT pilot

Shanghai will pilot a programme to replace the levy of business tax with value-added tax on selected transport and modern services with effect from 1 January 2012. The reform was approved by the State Council in October with subsequent joint release of the implementing rules and guidelines by the Ministry of Finance and the State Administration of Taxation on 17 November 2011.

This briefing discusses the reform's impact on the parties most likely to be affected and, more specifically, its impact on the aircraft finance and leasing sectors.

[http://www.cliffordchance.com/publicationviews/publications/2011/11/shanghai\\_vat\\_pilot.html](http://www.cliffordchance.com/publicationviews/publications/2011/11/shanghai_vat_pilot.html)

### An overview of Australian foreign investment regulation

The Australian Government encourages foreign investments that are consistent with the country's national interest. This briefing sets out requirements for obtaining Foreign Investment Review Board (FIRB) approval and the appropriate timing as well as guidelines for state owned enterprises and foreign governments.

[http://www.cliffordchance.com/publicationviews/publications/2011/11/an\\_overview\\_of\\_australianforeigninvestmen.html](http://www.cliffordchance.com/publicationviews/publications/2011/11/an_overview_of_australianforeigninvestmen.html)

## SHORT SELLING UPDATE

### Austrian Regulator extends temporary prohibition on naked short selling

Austria's Financial Market Authority (FMA) has [announced](#) the extension of its temporary prohibition on naked short selling in the cash market of shares of Erste Group Bank AG, Raiffeisen Bank International AG, UNIQA

Versicherungen AG and VIENNA INSURANCE GROUP AG Wiener Versicherung Gruppe until 31 May 2012. This measure is based on Article 48d par. 12 of the Börsegesetz (Stock Exchange Act). Only short-term naked short sale positions taken by market makers or specialists within the scope of their contractual obligations are exempt from the prohibition.

### **CONSOB publishes FAQs on restrictive measures on naked short selling and updates FAQs on reporting obligations on net short positions**

The Commissione Nazionale per le Società e la Borsa (CONSOB) has published a set of FAQs on the restrictive measures on naked short selling due to enter into force on 1 December 2011, as well as an updated version of its FAQs on reporting obligations on net short positions.

Amongst other things, the FAQs on the restrictive measures clarify that:

- the restrictive measures do not replace the ban on net short positions, which continues to apply until 15 January 2012;
- the restrictive measures do not apply to market makers, specialists and liquidity providers (consistently with what is stated in the FAQs on reporting obligations on net short positions); and
- 'naked short selling' means a sale which, upon submission of the relevant order, is covered neither by the 'right to receive' nor by the availability of the securities within the settlement date.

The FAQs further indicate that the 'right to receive' requirement is considered met in the following cases (the list is not comprehensive):

- receipt of the confirmation of the execution of a purchase order;
- exercise of the call option in case of physically settled transactions;
- exercise of the option rights in case of capital increase; and
- exercise of the conversion right of convertible bonds into shares.

[FAQs on restrictive measures \(Italian\)](#)

[Updated FAQs on reporting obligations \(Italian\)](#)

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