



EVERYTHING MATTERS

# FINANCIAL SERVICES REGULATION

## Exchange – International Newsletter

Issue 10 – July 2011

### INTRODUCTION

#### WELCOME

DLA Piper's Financial Services International Regulatory team welcomes you to the tenth edition of 'Exchange – International' – an international newsletter designed to keep you informed of regulatory developments in the financial services sector.

This issue includes updates from the US, Austria, Sweden, the Netherlands and the UK as well as news of forthcoming European legislation. Our aim is to assist you in providing an overview of developments outside your own jurisdiction which may be of interest to you. Areas of particular interest in this edition include the delay in implementation of UCITS IV in Austria, and the proposed Netherlands legislation containing additional powers for financial stability and the winding up of financial institutions.

Please click on the links below to access updates for the relevant jurisdictions.

Your feedback is important to us. If you have any comments or suggestions for future issues, we would be very glad to hear from you.

### CONTENTS

[Europe](#) | [Austria](#) | [Netherlands](#) | [Sweden](#) | [UK](#)

[United States](#)

[Contact US](#)

### USEFUL INFORMATION

If your colleagues would like to be added to our mailing list to receive future client alerts or newsletters, please email [amy.hammick@dlapiper.com](mailto:amy.hammick@dlapiper.com) with their contact details. For recent publications, legal updates and an overview of our Litigation & Regulatory capabilities please see our [global website](#).

### CONTACTS

#### Editor

**Elisabeth Bremner**

London

T +44 (0)20 7796 6230

[elisabeth.bremner@dlapiper.com](mailto:elisabeth.bremner@dlapiper.com)

#### Europe

**Mathias Hanten**

Frankfurt

T +49 (0)69 271 33 381

[mathias.hanten@dlapiper.com](mailto:mathias.hanten@dlapiper.com)

**Michael McKee**

London

T +44 (0)20 7153 7468

[michael.mckee@dlapiper.com](mailto:michael.mckee@dlapiper.com)

#### US

**Jeffrey L. Hare**

Washington D.C.

T +1 202 799 4375

[jeffrey.hare@dlapiper.com](mailto:jeffrey.hare@dlapiper.com)

**James I. Kaplan**

Chicago

T +1 312 368 7027

[jim.kaplan@dlapiper.com](mailto:jim.kaplan@dlapiper.com)

[Next Page >](#)

# EUROPE



## EU COUNCIL ADOPTS AIFMD

On 27 May 2011, the EU Council announced its adoption of the text of the Alternative Investment Fund Managers Directive (“**AIFMD**”).

The AIFMD text was agreed at first reading with the European Parliament, which adopted the AIFMD in November 2010. An official version will be published in the Official Journal of the EU and will enter into force 20 days after publication. Member states will then have to transpose the AIFMD provisions into domestic law within two years.

## EU PARLIAMENT’S ECONOMIC AND MONETARY AFFAIRS COMMITTEE VOTES ON EMIR

On 24 May 2011, the EU Parliament published a press release in relation to its Economic and Monetary Affairs Committee’s vote on the proposed European Market Infrastructure Regulation (“**EMIR**”). According to the press release, the committee has rejected suggestions by some member states that all derivatives should fall within the scope of EMIR, and proposes that the majority of the EMIR requirements should apply only to over-the-counter (“**OTC**”) derivatives, with reporting obligations to apply to all derivatives. It is also proposed that a “special regime” should be applied to pension funds in relation to the clearing obligation, provided that national capital requirements provide a guarantee similar to cleared contracts.

It is also proposed that clearing should be mandatory from the date EMIR enters in force. The European Securities and Markets Authority (“**ESMA**”) has been asked to assess how retrospective reporting could be introduced if the information were essential to supervisory authorities. It is acknowledged, however, that applying clearing obligations retrospectively would be difficult from a legal perspective.

A draft version of EMIR has been approved by the committee and will be voted on by the Parliament on 5 July 2011.

## BCBS REVISES BASEL III TEXT

On 1 June 2011, the Basel Committee on Banking Supervision (“**BCBS**”) announced that it has finalised the Basel III capital treatment for counterparty credit risk (“**CCR**”) in bilateral trades.

In December 2010, the BCBS published the Basel III rules relating to capital requirements for CCR exposures. These rules included capital rules for credit value adjustment (“**CVA**”) risk, which is defined by the BCBS as “the risk of loss caused by changes in the credit spread of a counterparty due to changes in its credit quality”.

The level and reasonableness of the Basel III standardised CVA risk capital charge included in the rules published in December 2010 was subject to a final impact study. Following completion of the impact study, the BCBS has decided to reduce the weight applied to CCC-rated counterparties from 18% to 10%, having reached the view that the December 2010 proposals for the standardised CVA risk capital charge could be disproportionate for certain low-rated counterparties.

The BCBS has issued a revised version of the December 2010 rules to reflect this change (in paragraph 104). All other aspects of the regulatory capital treatment for CCR and CVA risk remain unchanged from the December 2010 version of the rules.

According to the press release accompanying the revised rules, the BCBS now intends to finalise its proposals on capitalisation of bank exposures to central counterparties (“**CCPs**”) by the end of 2011.



## ESCB RESPONDS ON EU BANK RECOVERY AND RESOLUTION FRAMEWORK

On 31 May 2011, the European Central Bank (“**ECB**”) published the response of the European System of Central Banks (“**ESCB**”) to the Commission’s consultation on the technical details of a proposed EU bank recovery and resolution framework. The ESCB is made up of the ECB and the national central banks of the EU member states.

The ESCB proposes that the framework should contain the following:

- An improved and harmonised set of preventative and resolution tools. The ESCB considers that the Commission should provide more detail on the conditions required to trigger resolution.
- A legally robust set of safeguards for stakeholders, given that a resolution authority will have the power to transfer assets and liabilities of a failing entity to another entity.
- Clearly defined roles for national authorities, with mechanisms for co-ordination at an EU level.
- Financing arrangements to limit the exposure of public budgets to future crises. The ESCB considers that the use of resolution funds should not lead to bail-outs for previous shareholders.

The ESCB’s view on the use of a debt write-down tool (or bail-in tool) is that this should follow the solution adopted by the Financial Stability Board (“**FSB**”). It also considers that the practical implications of bail-ins should be analysed, particularly the financial stability implications of a large-scale introduction of the bail-in approach.

## CONSUMER RIGHTS DIRECTIVE CARVES OUT FINANCIAL SERVICES CONTRACTS

On 23 June 2011, the EU Parliament approved and published the text of the new Consumer Rights Directive (the “**Directive**”). The Directive was initially intended to create a uniform set of consumer rights across the EU, but its major focus is now doorstep and distance selling, a significant decrease in scope.

The proposed Directive text was originally published in October 2008, and related to all contracts for the sale of goods or services from businesses to consumers. It only covered financial services contracts as far as the Commission considered it necessary in view of certain regulatory gaps. Only some of the rules under the proposed Directive, such as the rules on unfair contract terms, were therefore intended to apply to financial services contracts.

The text of the Directive recently approved by the Parliament, however, states that the Directive will not apply to contracts for financial services. Financial services are defined as “any service of a banking, credit, insurance, personal pension, investment or payment nature”. Recital 32 sets out that the Directive should not apply to financial services contracts as a result of the existing EU consumer protection legislation relating to consumer financial services. Instead, member states should be encouraged to “draw inspiration” from existing EU legislation in this area when legislating in areas not regulated at the EU level in such a way that a level playing field for all consumers and all financial services contracts is ensured.

# AUSTRIA



## DELAY IN IMPLEMENTATION OF UCITS IV IN AUSTRIA

The new Austrian Investment Fund Act 2011 (*Investmentfondsgesetz 2011* – “**InvFG 2011**”) shall replace the Investment Fund Act 1993 and transpose the UCITS IV Directive (Directive 2009/65/EC), as well as the Omnibus Directive (Directive 2010/78/EC) into Austrian law.

However, since June 2011 it has become clear that the implementation will not take place on due date of 1 July 2011, but on 1 September 2011. This raises the question of the effects of late implementation on other EC Member States.

Businesses and citizens can be deprived of their rights due to late implementation. Therefore, the European Commission is responsible for monitoring the transposition of directives, examines complaints of breaches of EU law and initiates infringement proceedings when they believe it is necessary.

We understand that the regulator will accept all documentation from foreign competent authorities in compliance with UCITS IV based on the Directive, prior to 1 September 2011. Unfortunately, the late implementation is likely to deprive Austrian business of their rights under UCITS IV since the Austrian Financial Market Authority (“**FMA**”) will not be able to send the relevant documentation of Austrian businesses to the foreign competent authorities without a law requiring them to do so or indicating how to effect this process.

The draft legislation can be accessed using the following link:

[http://www.bmf.gv.at/Finanzmarkt/RechtlicheGrundlage\\_753/Investmentfondsgesetz2011/InvFG2011\\_MR-TXT.pdf](http://www.bmf.gv.at/Finanzmarkt/RechtlicheGrundlage_753/Investmentfondsgesetz2011/InvFG2011_MR-TXT.pdf)

Please contact [bettina.hoertner@dlapiper.com](mailto:bettina.hoertner@dlapiper.com) for further information.

## LARGE EXPOSURES NOTIFICATIONS

Section 75 of the Austrian Banking Act (“**BWG**”) stipulates an obligation for credit institutions to report every large exposure to the Austrian National Bank. The goals of this provision are twofold: First, records about large exposure (*Großkreditevidenz*) contribute to the stability of financial markets by providing information on credit risk. Second, such records provide easily accessible and reliable information about the potential effective total liability of large credit debtors (*Großkreditnehmer*). Details of the notification are stipulated by a decree of the Austrian Financial Market Supervision Authority (*Großkreditmeldungs-Verordnung, GKM-V*).

To implement the amendments to directives 2006/48/EC (on the taking up and pursuit of the business of credit institutions) and 2006/49/EC (on the capital adequacy of investment firms and credit institutions) the BWG was amended on 30 April 2011 (federal law 118, 2010, BGBl I 118/2010). These amendments included amendments to Section 75 BWG and subsequently the GKM-V.



The most important amendments can be summarised as follows:

- There has been a clarification regarding the applicability of both Section 75 BWG and the GKM-V. The rules on the applicability for insurance companies were harmonised with the rules on applicability for credit institutions.
- The applicability of Section 75 BWG was expanded. Among others, exposure due to certain securitisations, certain derivatives and certain payment services are now also subject to the reporting obligation.
- In the GKM-V the reporting obligation was shifted from certain subsidiaries to their parent companies. The report must now be provided in the form of specific tables and charts. An exact identification is required for securitisations: the report must therefore include an ISIN or similar identification number. Finally the timeframe for reports was also adapted.

Please contact [jasna.zwitter-tehovnik@dlapiper.com](mailto:jasna.zwitter-tehovnik@dlapiper.com) for further information.

# NETHERLANDS



## THE PROPOSED NETHERLANDS INTERVENTION ACT

The proposed bill Special Measures Financial Companies Act (*Wet bijzondere maatregelen financiële ondernemingen*) (the “**Intervention Act**”) was published by the Netherlands legislator on 4 March 2011 for public consultation. The public consultation period expired on 6 May 2011, and the bill is now to be enacted. The draft bill provides for an addition to the legal instruments of the existing Netherlands Act on Financial Supervision (*Wet op het financieel toezicht*, “**AFS**”) and the Netherlands Bankruptcy Act (*Faillissementswet*). The purpose of this addition is to expand the tools for intervention in relation to financial institutions (such as banks and insurance companies) in order to prevent such institutions getting into financial difficulty. The Intervention Act is in line with developments within the European Union (“EU”) and in significant Member States, including Germany and the United Kingdom.

The existing intervention regulation in the Netherlands already contains two remedies for De Nederlandsche Bank (the “DNB”) to intervene when a financial institution gets into difficulty: the DNB can request the court to impose emergency regulation (*noodregeling*) or a liquidation order (*faillietverklaring*). The forthcoming Intervention Act will add two new categories of powers to the existing intervention regulation: (i) new powers for the DNB to intervene in individual financial institutions, and (ii) the opportunity for the Netherlands Minister of Finance to stabilise the financial system.

The first category of powers to be included in chapter 3 of the AFS, concerns the power of the DNB to intervene in individual financial institutions in financial trouble. In addition to its existing powers under the Intervention Act, the DNB will also be empowered to transfer deposits, assets, liabilities, or shares of a troubled financial company to another company or entity, in case the solvency or liquidity of the financial institution shows signs of a dangerous development and no improvement is reasonably foreseeable. The first category of powers is aimed at the timely and orderly liquidation of banks and insurance companies when they are in irreversible financial difficulty. There are various

advantages to the new intervention regulation. First of all, the period in which depositors of the troubled bank have no access to their funds is shortened. Secondly, the costs of the deposit transfer will in many cases be less than the costs under the deposit guarantee scheme (*depositogarantiestelsel*). Moreover, the intervention regulation has a public utility function and it is indirectly in the interest of the stability of the financial system.

The second category of powers in the Intervention Act provides for the opportunity for the Minister of Finance to stabilise the financial system as a whole. This category of powers is to be included in chapter 6 of the AFS. Chapter 6 of the AFS includes two special powers for the Minister of Finance: (i) the power to immediately redress the financial problems of the financial institution (e.g. to deprive the shareholders temporarily of their voting rights) and, as a last resort, (ii) the power to expropriate (*onteigenen*) assets of the institution or shares of its shareholders. These powers of the Minister of Finance can only be used in the exceptional circumstance that there is serious and immediate danger to the stability of the financial system. Furthermore, there must be a direct link between the situation of the financial institution and the threat to the financial system.

The forthcoming Intervention Act will give considerable powers to the Minister of Finance and the DNB. At the same time financial institutions in financial difficulty will lose control over their business. Whether this is justified is debatable. Nevertheless, the proposed Intervention Act of the Netherlands legislator is in line with developments within the EU, which should contribute to the overall stability of the European financial system.

Please contact [rik.mellenbergh@dlapiper.com](mailto:rik.mellenbergh@dlapiper.com) for further information.

# SWEDEN



## NEW SWEDISH LEGISLATION ON INSURANCE BUSINESS

On 1 April 2011, a new Insurance Business Act (*försäkringsrörelselag*) entered into force in Sweden. The new law provides a linguistic and editorial modernization of the conduct of business rules for insurance companies, mutual insurance companies and insurance associations. Insurance associations have previously been unregulated in Sweden, but will become subject to the licence requirement and general conduct of business rules under the new act as well as to some of the other requirements applicable to insurance companies under the new rules. The new act also contains corporate requirements for the relevant group of companies.

Directive 2009/138/EG, (Solvency II) was not taken into account when these rules were adopted and a first draft of the local Swedish legislation based on Solvency II is likely to be presented at the end of 2011 at the earliest.

## PROPOSED SWEDISH LEGISLATION AND SWEDISH FSA REGULATION BASED ON UCITS IV

On 28 April 2011, government bill no 2010/11:135 on Investment Funds Issues (*Investeringsfondsfrågor*) was issued by the Swedish Government. Several changes to the Swedish Investment Funds Act (*Slag om investeringsfonder*) are proposed based on Directive 2009/65/EG (UCITS IV), and the associated EU implementation regulation and directives. Some Swedish specific changes are also proposed in the bill with the aim of making Swedish fund management business more effective.

Under the revised act, it will be possible for Swedish fund management companies to manage foreign UCITS funds incorporated in an EEA member state and for foreign companies to manage Swedish UCITS funds. Rules on cross border fusion of UCITS funds are also proposed, as well as rules simplifying the process for marketing UCITS funds within the EEA. It is also proposed that a UCITS fund should be able to invest all its capital in another UCITS fund.

The new legislation is due to enter into force on 1 August 2011, although the proposal has not yet been formally adopted by the Swedish Parliament.

Part of the UCITS IV Directive will be implemented in the Swedish FSA regulations. On 18 May 2011, the Swedish FSA published a new proposal on changes to the current Investment Funds Regulation, FFFS 2008:11 (*Föreskrift om investeringsfonder*), as well as FFFS 2005:11 Regulation and general guidelines on Insurance Intermediation Business (*Föreskrift om försäkringsförmedling*).

The most important changes in the proposal relate to the organisational requirements for fund management companies, but the risk management, administration and internal control of these companies are also in focus. In addition, it is proposed that the information requirements, in terms of information to be provided to the investors, will become stricter under the revised rules.

The new rules are due to enter into force on 1 August 2011, although they are not formally adopted by the Swedish FSA's board at this point.



## THE SWEDISH FSA'S SUPERVISION REPORT FOR 2010

On 24 May 2011, the Swedish FSA published its annual supervision report which is addressed to the Swedish Government and compiles the lessons the authority has learned from its supervision of the financial market during the past year, i.e. 2010 in this case.

In the report the Swedish FSA highlights three main areas: (i) increased focus on internal governance and control; (ii) the need for rules enabling banks to fail in a controlled manner and (iii) concentrated efforts to resolve problems related to the provision of financial advice in the Swedish market.

The Swedish FSA states in the report that it will review its regulations on governance and internal control going forward. During 2010, the Swedish FSA intervened against several companies due to deficiencies in the companies' internal governance and controls. In one decision, the Swedish FSA revoked a well known mid-size bank's licence to conduct banking business and securities operations. The decision was heavily debated in the media as many investors, both private individuals and corporations, were

negatively affected. Following that decision it also became clear to the Swedish FSA that there is a need for tools to handle banks in distress. The regular rules for bankruptcy and liquidation were found to be insufficient and the Swedish FSA highlights the need for further development of a special framework for handling banks in crisis in the report.

The authority also pays attention to the problems of the Swedish financial advice market in the report and, in particular, in relation to insurance intermediaries and the fee structures applied by those companies. The Swedish FSA has identified a conflict of interest between advice and commission-based payments and recommends that the Government considers a ban on commissions for intermediaries.

Please contact [lina.williamsson@dianordic.se](mailto:lina.williamsson@dianordic.se) for further information.



## HM TREASURY PUBLISHES WHITE PAPER AND BILL ON THE NEW UK REGULATORY STRUCTURE

On 16 June 2011, the Treasury published the [white paper](#): “A new approach to financial regulation: the blueprint for reform”, containing its proposals for financial services reform, and a draft of the proposed Financial Services Bill.

The draft Bill presents the key provisions for the government’s structural reform proposals. This includes measures necessary for the establishment of the new regulatory bodies: the Financial Policy Committee (“FPC”), the Prudential Regulation Authority (“PRA”) and the Financial Conduct Authority (“FCA”). These institutions will replace the FSA and take on most of its current responsibilities.

According to Sir Mervyn King’s Mansion House speech on 15 June 2011, the FPC will be both “doing and learning” as it devises its new macro-prudential policy instruments. The FPC will hold its first meeting and publish its first report in June 2011, making recommendations in areas where it believes the resilience of the system is subject to increasing risks. Sir Mervyn King stressed the importance of integrating the work of the PRA with that of the Bank of England, and indicated that the Bank’s market intelligence team would be working closely with the PRA.

The draft Bill largely amends existing legislation, and it is expected to make significant changes to the Financial Services and Markets Act 2000, the Bank of England Act 1999, and the Banking Act 2009. The Treasury expects pre-legislative scrutiny of the draft Bill to begin shortly. The Government hopes to introduce the Bill before Parliament by the end of the year.

## FSA GRANTS TEMPORARY EXTENSION FOR CERTAIN FIRMS HANDLING PPI COMPLAINTS

On 13 June 2011, the FSA agreed to temporary arrangements for Barclays, Lloyds Banking Group and RBS to handle Payment Protection Insurance (“PPI”) complaints. According to an FSA press release, the arrangements will extend the length of time that firms have been given to deal with both the existing backlog and the high volume of new complaints. Margaret Cole, interim managing director of the FSA’s Conduct of Business Unit, said that these temporary extension arrangements will allow firms to process the PPI complaints “properly and fairly”.

FSA rules provide that firms have to respond to PPI complaints within eight weeks. The extension provides additional time for firms to deal with PPI complaints that were put on hold pending the outcome of the BBA’s judicial review application in relation to PPI mis-selling, and also those received since the Court’s decision on the application was handed down in April. The arrangements are as follows:

- PPI complaints put on hold during the judicial review will receive a decision by the end of August 2011;
- PPI complaints received after the conclusion of judicial review but on or before 31 August 2011 will receive a response within 16 weeks; and
- PPI complaints received on or after 1 September and before 31 December 2011 will receive a response within 12 weeks.

The FSA has, however, imposed strict conditions on these temporary time extensions and firms will have to keep PPI complainants fully informed, as well as providing the FSA with regular reports on compliance. The press release states that the FSA expects PPI complaints-handling processes to return to the eight-week standard no later than 1 January 2012.



## FSA PUBLISHES ITS 2010/11 ANNUAL REPORT

On 13 June 2011, the FSA published its [Annual Report](#) for 2010/11. The report outlines the FSA's activities and performance against the priorities set out in its 2010/11 Business Plan and its statutory objectives. In his foreword to the report, FSA Chairman Lord Turner emphasised that 2010/11 has seen “*major progress*” on the changes and initiatives which are already underway at the FSA, alongside preparations for the major structural changes which will see the FSA replaced by the FCA, the PRA and the Financial Policy Committee FPC. The PRA and FCA will absorb most of the functions currently performed by the FSA.

Hector Sants, Chief Executive of the FSA, stressed that, while continuing to operate in a “climate of economic fragility”, the principal focus has been “*maintaining the high level of supervisory activity required to ensure the stability of firms in the system*”. He also stated that “considerable progress” was made in advancing the FSA's “new proactive approach to consumer protection”. Overall, he concluded, the FSA has made “good progress” against its objectives.

The Report highlights four main areas of progress for the FSA in 2010/11, as follows.

**1. The execution of its credible deterrence and enforcement approach.** This has involved a more aggressive approach towards the prosecution of both criminal offences and civil breaches of FSA rules.

**2. The launch of a radically new approach to the protection of retail customers.** This has involved a willingness by the FSA to intervene earlier in order to identify and resolve problems before they occur. The Retail Conduct Risk Outlook, published in February 2011, illustrates how the FSA will seek to identify emerging market developments that could pose risks to consumers. The Report illustrates progress on securing greater redress for consumers, highlighting the recent PPI litigation and initiatives such as the Retail Distribution and Mortgage Market Reviews.

**3. The continued development of a more intensive approach to the prudential supervision of banks.** This builds upon the FSA's Supervisory Enhancement Programme, placing emphasis upon the strengthening of the FSA's capital regime through the establishment of a comprehensive stress-testing framework and other programmes, which will help implement supervisory processes and the supporting technical skills.

**4. Continued progress in developing new global standards for the prudential regulation of banks.** This has included greatly enhanced requirements for capital, liquidity and resolution through the Financial Stability Board and the Basel Committee. The Report states that the FSA is actively committing increased resource, including senior management time, to the new European Supervisory Authorities (“ESAs”), which were created in January 2011 as key policy-making forums. In relation to this, the FSA has secured senior representation on all three of the new ESAs. The FSA has also worked to ensure the effective implementation in Europe of the Solvency II directive and the upcoming Capital Requirements Directive (“CRD IV”) which will implement Basel III.

## PROPOSED CHANGES TO CONSUMER INSURANCE LAW

On 16 May 2011, the Consumer Insurance (Disclosure and Representations) Bill had its first reading in Parliament. The Bill removes the obligation on consumers to disclose all necessary information before an insurance policy is issued, and instead places the burden onto insurers, obliging them to obtain specific information about their customers. The proposed legislation represents the first major change to consumer insurance law for over a century, and potentially provides greater protection to consumers entering into insurance contracts.

The Marine Insurance Act 1906 states that if an insured person has not disclosed material information to its insurer which would affect the insurer's decision about



## UPDATE ON THE INDEPENDENT COMMISSION ON BANKING'S FINAL REPORT

On 14 June 2011, the Independent Commission on Banking (“ICB”) published a [press release](#) following its meeting on 13 June 2011.

At the meeting, the ICB reviewed and discussed further analysis of the options for reforms of the UK banking sector which aim to promote financial stability and competition. These options were outlined in the ICB’s interim report, published in April 2011, and include provision for a retail ring-fence for systemically important banks, as well as measures to improve loss absorbency and promote competition in UK retail banking.

The ICB also took note of the evidence recently provided by members of the ICB to the Treasury Select Committee, as part of the Committee’s inquiry into the ICB’s interim report.

The consultation period for the interim report closes on 4 July 2011 and the ICB has agreed to publish its final report and recommendations to the government by 12 September 2011.

In his speech at Mansion House on 15 June 2011, Chancellor of the Exchequer, George Osborne, endorsed the ICB’s proposals concerning retail banking, specifically:

- Bail-in procedures for failing banks rather than bail-outs, in order that private investors, rather than taxpayers, will bear losses; and
- Ring-fencing of retail banking operations.

Mr Osborne stressed that whilst he was not trying to pre-empt the ICB’s final conclusions, the government would judge any proposals against the principles that all banks should be able to fail safely without affecting vital services or impacting

whether to give insurance or not, the contract can be avoided. This would apply even if the insured person is unsure of what an insurer would consider to be material. This rule has been excluded from the proposed legislation and replaced with a provision requiring consumers to “take reasonable care not to make a misrepresentation to an insurer before entering into a consumer insurance contract.” Misrepresentation would include failing to comply with an insurer’s request for information.

Reasonable care would have to be determined in light of all the relevant circumstances, and the Bill clarifies that the standard of care required is that of a reasonable consumer. However, if the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account. A misrepresentation that is shown to have been made dishonestly is always to be taken as showing a lack of reasonable care.

If the consumer has made a misrepresentation, the burden of proof will be on the insurer to prove that, without the misrepresentation, the insurer would not have entered the transaction, or if it would, it would have done so on different terms.

If the misrepresentation was deliberate or reckless, the Bill provides that the insurer may avoid the contract and refuse all claims (i.e. the insurer can treat the contract as if it did not exist), without needing to return any of the premiums paid, unless it would be unfair to the consumer to retain them. If the misrepresentation was merely careless, the remedy will depend on what the insurer would have done had the consumer not made such a representation.

The Bill has been welcomed in parliament for its increased protection for consumers, although, according to the Treasury, insurers are also in favour of the proposals, recognising the need for a change to the law. If the Bill is successful, however, it is expected to make it more difficult for insurers to refuse to make payment on claims.



upon the taxpayer. He emphasised that any reforms must be applied in a manner that is uniform across the entire banking sector, and consistent with EU and international law.

He also confirmed that the FCA will have a primary duty to promote competition, in addition to its objective of protecting consumer interests.

### **CHIEF EXECUTIVE'S SPEECH AT FSA'S ANNUAL PUBLIC MEETING**

On 23 June 2011, the FSA held its Annual Public Meeting, in which the FSA provides an account of its performance during the previous financial year.

Chief Executive Hector Sants summarised the FSA's performance in 2010/11. He discussed the reform of the FSA, and its replacement by the new regulatory bodies, the PRA and FCA. He noted that the FSA had made a significant contribution to HM Treasury's February 2011 consultation document setting out the rationale and key elements of the new structure.

Mr Sants explained that the FSA had made internal changes to its structure in anticipation of the "twin peaks" approach to regulation in the UK following the implementation of the PRA and FCA. This has been achieved through the formation of the new Prudential and Conduct Business Units, which are intended to form the core of the PRA and FCA respectively.

Mr Sants described the reforms to the UK's financial regulatory system as a "complex and challenging process". The establishment of the interim FPC, the third strand of the reforms, took place after the 2010/11 year end, meaning that supporting it would be a key element of this year's agenda, rather than last year's.

There was also discussion of the FSA's Business Plan for 2010/11. In 2010/11, the FSA set 40 milestones, with 90% being delivered in full by year end, and 4 being reprioritised.

Four major initiatives were outlined for the coming year, as follows:

1. Reform of the prudential regime through the Basel process and implementation through the Capital Requirements Directive;
2. Development of Solvency II;
3. Continued implementation of the Retail Distribution Review; and
4. Development of the Mortgage Market Review.

### **ENFORCEMENT**

#### **FSA censures BDO for its failings as sponsor**

On 31 May 2011, the FSA censured BDO LLP for its failings as a sponsor to Shore Group PLC's proposed acquisition of Puma Brandenburg Limited. This is the first time the FSA has exercised its powers under Section 89 FSMA 2000 to censure sponsors under the Listing Rules.

The FSA determined that BDO was in breach of Listing Rules 8.3.3R (duty to act with due care and skill in relation to a sponsor services) and 8.3.5R (duty to deal with the FSA in an open and co-operative way at all times).

It was found that BDO had submitted letters to the UKLA stating that the transaction was a class 1 transaction, despite indications that it was a reverse takeover, and that BDO had failed to communicate effectively with the UKLA before announcing the



transaction. The FSA also found that generally, BDO had failed to provide the objective oversight which is required of a sponsor advising a client on its responsibilities under the Listing Rules. On this basis the FSA concluded that BDO's conduct did not satisfy the requirements for a sponsor under the Listing Rules.

Marc Teasdale, head of department, UKLA said: *“Sponsors provide important protections for investors and the market under the Listing regime. They are entrusted to provide sound and expert guidance to issuers on their obligations, and are relied upon to be open with the UKLA. BDO failed in its responsibilities as a sponsors on this transaction and we are sending a clear message with this public censure about the importance we attach to the sponsor role.”* The partner who lead the relevant transaction no longer works for BDO.

### **FSA publishes its Enforcement Annual Performance Account for 2010/11**

On 13 June 2011, the FSA published its [Enforcement Annual Performance Account](#) (“**EAP Account**”) for 2010/11 alongside its 2010/11 Annual Report.

The EAP Account provides an account of the fairness and effectiveness of the FSA's enforcement process during 2010/11. This is based partly on feedback from firms and practitioners that have been involved in the enforcement process, and highlights the FSA's enforcement strategy generally.

Overall, the FSA considers that it delivered several “strong, visible results” in 2010/11, notably the publication of final notices which totalled £98.5 million in fines. This figure includes the fine of £33.3 million against JP Morgan Securities, and the fine of £2.8 million against Simon Eagle, the highest ever imposed against a firm and individual respectively.

In addition to these fines, the FSA also obtained five criminal convictions, secured £100 million in redress for consumers and prohibited 71 individuals from the financial service industry. Furthermore, it prevented thousands of people from becoming victims of boiler room fraud.

During 2010/11, the FSA received feedback from 9 firms and individuals, and certain key issues were identified, such as: concerns about the length of time for FSA enforcement investigations, mixed opinions about communication from the FSA during the enforcement process and concerns about the level of staff turnover on some case teams.

The FSA has said that it has carefully considered the key themes that have been raised, and it working hard to ensure that lessons are learned. The body intends to build upon existing momentum to further its long-term strategy of credible deterrence.

Please contact [michael.mckee@dlapiper.com](mailto:michael.mckee@dlapiper.com) or [elisabeth.bremner@dlapiper.com](mailto:elisabeth.bremner@dlapiper.com) for further information.



## THE FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA)

### How Non-US Financial Entities Should Navigate FATCA

The Foreign Account Tax Compliance Act, or “**FATCA**”, as it is colloquially known, refers to Chapter 4 of the US Internal Revenue Code (Code), which was enacted by the Hiring Incentives to Restore Employment (“**HIRE**”) Act on 18 March 2010. FATCA requires non-US foreign financial institutions (“**FFIs**”), including banks, investment banks, brokers, trust companies, investment funds, life insurance/reinsurance companies and all other investment vehicles, and non-US non-financial entities (“**NFFE**s”) to identify and disclose their US account holders and members or become subject to a new 30 percent US withholding tax (the “**FATCA withholding tax**”) with respect to payments of US source income and proceeds from the sale or disposition of US stocks and securities.

The fundamental purpose of FATCA is to identify US taxpayers who hold assets abroad, directly or through non-US entities, in order to counter US tax evasion. The ultimate goal of the legislation is for the United States to obtain information with respect to offshore accounts and investments beneficially owned by US taxpayers, rather than the collection of tax through the FATCA withholding tax.

FATCA will have a direct and profound impact on FFIs that have US proprietary investments, US account holders or US financial dealings. FATCA’s impact will be magnified by the cascading of international financial transactions flowing through financial entities. Each time an FFI receives or makes a payment that is a Withholdable Payment, it will be impacted by FATCA. Under US law, an FFI is a US withholding agent.

FATCA enters into force January 1, 2013. The US Internal Revenue Service (the “**IRS**”) has issued two Notices setting forth their preliminary thinking as to how FATCA will be implemented. The IRS is in the process of drafting regulations to provide more

comprehensive guidance. In the attached link ([link](#)), we provide a brief overview of FATCA, summarize significant issues that may affect the implementation of FATCA, briefly summarize Notice 2010–60, set forth a detailed overview of Notice 2011–34, and, finally, suggest how affected entities should proceed to decide how to navigate this important new legislation.

For a fuller discussion of FATCA, please see our [full article](#).

Please contact [alan.granwell@dlapiper.com](mailto:alan.granwell@dlapiper.com) for further information.

## OCC RELEASES PROPOSED RULE TO TRANSITION OTS AUTHORITY AND ESTABLISH PRE-EMPTION STANDARDS

On 25 May 2011, the Office of the Comptroller of the Currency (OCC) issued a proposed rule implementing certain significant requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Proposed Rule). Notably, the Proposed Rule addresses the transfer of regulatory functions from the Office of Thrift Supervision (OTS) to the OCC and amends the OCC’s federal pre-emption regulations for national banks and federal savings associations as required by Dodd-Frank. Comments on the Proposed Rule were due on 27 June 2011.

The Proposed Rule represents the first of multiple steps the OCC plans to take to facilitate the transition and integration of OTS and OCC regulations. In addition to the Proposed Rule, the OCC also plans to publish an interim final rule with request for comment, effective on Dodd-Frank’s designated transfer date of 21 July 2011, that confirms which OTS regulations the OCC has authority to promulgate and enforce, moves the OTS’s regulations into the OCC’s numbering system for the Code of Federal Regulations, and makes necessary technical amendments for provisions that are identical or materially the same between current OTS and OCC regulations.



Transfer of OTS functions. The Proposed Rule revises OCC regulations to include federal savings associations in the list of entities that the OCC supervises, examines, and regulates, and provides that the OCC has rulemaking authority over state savings associations. The Proposed Rule integrates existing OTS examination regulations into the OCC regulations, which will not increase the frequency or scope of a federal savings association's examination process, but will reassign the examination authority to the OCC. Importantly, the Proposed Rule explicitly recognises Dodd-Frank's mandate that "all OTS orders, resolutions, determinations, agreements, regulations, interpretive rules, other interpretations, guidelines, procedures and other advisory materials in effect the day before the transfer date" remain in effect for federal savings associations following the transfer date, unless overturned by other law, the OCC or a court. This provision, referred to as the "Savings Clause," is of particular importance to federal savings associations that are operating in reliance on a specific OTS legal opinion and propose to do so following the transfer date. Of course, such institutions should closely monitor OCC releases and guidance to confirm that relevant opinions are not subsequently rejected by the OCC.

Further, the Proposed Rule effectively repeals the OTS's assessment structure and incorporates federal savings associations into the OCC's existing regulatory assessment structure, which will subject savings associations to the same methodologies, rates, fees, and payment dates that apply currently to national banks. The practical effect of this measure is expected to increase the costs of assessments for some federal savings associations; however, the OCC has committed to assess fees for federal savings associations at the lower of the amount that would be due under the OTS or OCC calculations for the first two assessment cycles after the transfer date. Essentially, this provides savings associations with a phase-in period until September 2012.

Federal pre-emption standards. Dodd-Frank makes several changes to national bank preemption standards, including uniform pre-emption standards for national banks and federal savings associations. The Proposed Rule makes two wholesale changes to the doctrine of federal preemption. First, the Proposed Rule eliminates federal pre-emption of state laws for national bank subsidiaries, agents, and affiliates. The related provision of Dodd-Frank, which obviates the Supreme Court's opinion in *Watters v. Wachovia*, has generated a number of inquiries regarding alternatives for mortgage and consumer lending activities currently conducted through a bank subsidiary. Considerations for restructuring of lending businesses include several factors, namely the geographic scope of the lending operations, the risk appetite of the bank for potential liability or litigation exposure associated with loan origination activities and the willingness to assume state-level entity and employee licensing and examination obligations for lending operations. At a very basic level, institutions are faced with the option of either (i) maintaining a lending subsidiary and absorbing the requisite state compliance obligations; or (ii) rolling-up the subsidiary's lending operations into the bank.

Second, the Proposed Rule subjects federal savings associations to the same pre-emption standards as those applicable to national banks. As of the transfer date, any determination made by a court or the OCC regarding federal pre-emption under the Home Owners' Loan Act with respect to federal savings associations must be made in accordance with pre-emption laws and legal standards applicable to national banks.

Importantly, Dodd-Frank addresses federal pre-emption with regard to one specific category of state laws – "state consumer financial laws." In drafting the Proposed Rule, the OCC examined whether Dodd-Frank's codification of the Barnett Standard requires the agency to make changes to its regulations. The Proposed Rule addresses only the



pre-emption of state consumer financial laws, presumably because the doctrine of federal pre-emption for other state laws remains unchanged.

Previously, the OCC had interpreted the Barnett Standard in its regulations and imposed a standard for pre-emption that required a state law to “obstruct, impair, or condition” a national bank’s powers in order to pre-empt the state law. This standard purportedly created ambiguities and misunderstandings; thus, the Proposed Rule eliminates references to that standard in the regulations. Instead, the Proposed Rule cites directly to the decision of the Supreme Court in Barnett, and thereby adopts a standard consistent with what was recently applied by the 11th Circuit Court of Appeals in *Baptista v. JPMorgan Chase Bank, N.A.* when the court held the appropriate pre-emption standard asks whether there is a significant conflict between state and federal statutes – referred to as the test for conflict

pre-emption. Thus, when rendering pre-emption determinations, the OCC must take into account the whole of conflict pre-emption analysis and not merely ask whether the state law “prevents or significantly interferes” with bank activities. Importantly, the Proposed Rule also preserves those existing OCC rules and precedents, including judicial decisions and interpretations, that are consistent with the conflict pre-emption analysis of Barnett.

Please contact [jeffrey.hare@dlapiper.com](mailto:jeffrey.hare@dlapiper.com) for further information.

# CONTACT US

For further information, please contact:

## ASIA

### CHINA – HONG KONG

#### Christopher Clarke

Partner

T +852 2103 0688

[christopher.clarke@dlapiper.com](mailto:christopher.clarke@dlapiper.com)

#### Adrian Elms

Associate

T +852 2103 0755

[adrian.elms@dlapiper.com](mailto:adrian.elms@dlapiper.com)

## EUROPE

### AUSTRIA

#### Bettina Hörtner

Senior Associate

T +43 | 531 78 1508

[bettina.hoertner@dlapiper.com](mailto:bettina.hoertner@dlapiper.com)

#### Jasna Zwitter-Tehovnik

Partner

T +43 | 531 78 1025

[jasna.zwitter-tehovnik@dlapiper.com](mailto:jasna.zwitter-tehovnik@dlapiper.com)

## BELGIUM

#### Koen Vanderheyden

Partner

T +32 (0)2 500 6552

[koen.vanderheyden@dlapiper.com](mailto:koen.vanderheyden@dlapiper.com)

#### Patrick van Eecke

Partner

T +32 (0)2 500 1630

[patrick.van.eecke@dlapiper.com](mailto:patrick.van.eecke@dlapiper.com)

#### Emma Greenow

Account Director

T +32 (0)2 500 1623

[emma.greenow@dlapiper.com](mailto:emma.greenow@dlapiper.com)

## CZECH REPUBLIC

#### Pavel Marc

Partner

T +420 222 817 402

[pavel.marc@dlapiper.com](mailto:pavel.marc@dlapiper.com)

## FRANCE

#### Anne Maréchal

Partner

T +33 (0)1 40 15 24 40

[anne.marechal@dlapiper.com](mailto:anne.marechal@dlapiper.com)

#### Jean L'Homme

Partner

T +33 (0)1 40 15 25 65

[jean.lhomme@dlapiper.com](mailto:jean.lhomme@dlapiper.com)

## GERMANY

#### Dr. Mathias Hanten

Partner

T +49 (0)69 271 33 381

[mathias.hanten@dlapiper.com](mailto:mathias.hanten@dlapiper.com)

#### Dr. Gunne W. Bähr

Partner

T +49 (0)221 277 277 283

[gunne.baehr@dlapiper.com](mailto:gunne.baehr@dlapiper.com)

## HUNGARY

#### András Nemescsói

Partner

T +36 | 510 1183

[andras.nemescsoi@dlapiper.com](mailto:andras.nemescsoi@dlapiper.com)

## ITALY

### Alessandro Corno

Partner

T +39 02 80 618 508

[alessandro.corno@dlapiper.com](mailto:alessandro.corno@dlapiper.com)

### Luigi Rizzi

Partner

T +39 06 68 880 1

[luigi.rizzi@dlapiper.com](mailto:luigi.rizzi@dlapiper.com)

### Marco Zechini

Partner

T +39 06 68 880 509

[marco.zechini@dlapiper.com](mailto:marco.zechini@dlapiper.com)

## NETHERLANDS

### Paul Hopman

Partner

T +31 (0)20 541 9952

[paul.hopman@dlapiper.com](mailto:paul.hopman@dlapiper.com)

### Rik Mellenbergh

Advocaat/

Professional Support Lawyer

T +31 (0)6 5168 3598

[rik.mellenbergh@dlapiper.com](mailto:rik.mellenbergh@dlapiper.com)

## NORWAY

### Karl-Fredrik Lindblom

Of Counsel

T +47 24 13 16 46

[karl.fredrik.lindblom@dlapiper.com](mailto:karl.fredrik.lindblom@dlapiper.com)

## POLAND

### Patryk Laskorzynski

Partner

T +48 22 540 7456

[patryk.laskorzynski@dlapiper.com](mailto:patryk.laskorzynski@dlapiper.com)

## ROMANIA

### Sabin Volciuc-Ionescu

Senior Associate

T +40 372 155 820

[sabin.volciuc-ionescu@dlapiper.com](mailto:sabin.volciuc-ionescu@dlapiper.com)

## SLOVAKIA

### Eva Skottke

Senior Associate

T +421 2 592 021 11

[eva.skottke@dlapiper.com](mailto:eva.skottke@dlapiper.com)

## Radoslava Rojkova

Senior Associate

T +421 2 5920 2114

[radoslava.rojkova@dlapiper.com](mailto:radoslava.rojkova@dlapiper.com)

## SPAIN

### Miguel Bermúdez de Castro

Partner

T +34 91 788 7333

[miguel.bermudezdecastro@dlapiper.com](mailto:miguel.bermudezdecastro@dlapiper.com)

## SWEDEN

### Lina Williamsson

Partner

T +852 2103 0688

[lina.williamsson@dlanordic.se](mailto:lina.williamsson@dlanordic.se)

## UK

### **Elisabeth Bremner**

Partner

T +44 (0)20 7796 6230

[elisabeth.bremner@dlapiper.com](mailto:elisabeth.bremner@dlapiper.com)

### **Michael McKee**

Partner

T +44 (0)20 7153 7468

[michael.mckee@dlapiper.com](mailto:michael.mckee@dlapiper.com)

## MIDDLE EAST – DUBAI

### **Carlo Fedrigoli**

Legal Consultant

T +971 4438 6343

[carlo.fedrigoli@dlapiper.com](mailto:carlo.fedrigoli@dlapiper.com)

## UNITED STATES

### US – BALTIMORE

#### **Megan Kraai**

Partner

T +1 410 580 4186

[megan.kraai@dlapiper.com](mailto:megan.kraai@dlapiper.com)

### US – CHICAGO

#### **Jim Kaplan**

Partner

T +1 312 368 7027

[jim.kaplan@dlapiper.com](mailto:jim.kaplan@dlapiper.com)

### US – LOS ANGELES

#### **Nicolas Morgan**

Partner

T +1 310 595 3146

[nicolas.morgan@dlapiper.com](mailto:nicolas.morgan@dlapiper.com)

### US – NEW YORK

#### **Matthew Yoon**

Partner

T +1 212 335

[matthew.yoon@dlapiper.com](mailto:matthew.yoon@dlapiper.com)

### US – WASHINGTON D.C.

#### **Richard Coll**

Of Counsel

T +1 202 799 4433

[richard.coll@dlapiper.com](mailto:richard.coll@dlapiper.com)

### Luis Mejia

Partner

T +1 202 799 4572

[lou.mejia@dlapiper.com](mailto:lou.mejia@dlapiper.com)

### Jeffrey Hare

Partner

T +1 202 799 4375

[jeffrey.hare@dlapiper.com](mailto:jeffrey.hare@dlapiper.com)

### Frank M. Conner III

Partner

T +1 202 799 4221

[frank.conner@dlapiper.com](mailto:frank.conner@dlapiper.com)

## FINANCIAL SERVICES TEAM

DLA Piper's dedicated Financial Services team offers specialist legal expertise and practical advice on a wide range of contentious and advisory issues. The team can assist clients on contentious legal matters including: internal and regulatory investigations, enforcement actions and court proceedings in the financial services sector. There is also an experienced advisory practice which gives practical advice

on all aspects of financial regulation, including the need for authorisation, regulatory capital, preparation for supervision and thematic visits, conduct of business issues and financial promotions.

## DLA PIPER REGULATORY & GOVERNMENT AFFAIRS GROUP

[Find out more](#) about DLA Piper's global Regulatory & Government Affairs group.

**IMPORTANT NOTE TO RECIPIENTS:** We may supply your personal data to other members of the DLA Piper international legal practice (which may be situated outside the European Economic Area ("EEA")) so that we or they may contact you with information about legal services and events offered by us or them subject to your consent.

It is our policy not to pass any of your personal data outside of the DLA Piper international legal practice or use your personal data for any purposes other than those indicated above.

If you no longer wish to receive information from DLA Piper UK LLP and/or any of the DLA Piper members, please contact [louise.boydell@dlapiper.com](mailto:louise.boydell@dlapiper.com)

The email is from DLA Piper UK LLP and DLA Piper SCOTLAND LLP.

This publication is intended as a general overview and discussion of the subjects dealt with. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper UK LLP and DLA Piper SCOTLAND LLP will accept no responsibility for any actions taken or not taken on the basis of this publication.

Please note that neither DLA Piper UK LLP or DLA Piper SCOTLAND LLP nor the sender accepts any responsibility for viruses and it is your responsibility to scan or otherwise check this email and any attachments.

DLA Piper UK LLP is a limited liability partnership registered in England and Wales (registered number OC307848) which provides services from offices in England, Belgium, Germany, France, and the People's Republic of China. A list of members is open for inspection at its registered office and principal place of business, 3 Noble Street, London EC2V 7EE. DLA Piper Scotland is a limited liability partnership registered in Scotland (registered number SO300365) which provides services from offices in Scotland. A list of members is open for inspection at its registered office and principal place of business, Rutland Square, Edinburgh, EH1 2AA.

Partner denotes member of a limited liability partnership.

DLA Piper UK LLP is a law firm regulated by the Solicitors Regulation Authority. DLA Piper SCOTLAND LLP is a law firm regulated by the Law Society of Scotland. Both are part of DLA Piper, an international legal practice, the members of which are separate and distinct legal entities.

For further information, please refer to <http://www.dlapiper.com/global/termsconditions/>

If you have finished with this document, please pass it on to other interested parties or recycle it, Thank you.

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

DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at [www.dlapiper.com](http://www.dlapiper.com)

Copyright © 2011 DLA Piper. All rights reserved. | JUL11 | 2117961