SHEARMAN & STERLING LLP

A QUARTERLY NEWSLETTER FOR CORPORATES AND FINANCIAL INSTITUTIONS

Governance & Securities Law Focus

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In this issue:

In this newsletter, we provide a snapshot of the principal Asian, US, European and selected global governance and securities law developments of interest to corporates and financial institutions.

The previous quarter's Governance & Securities Law Focus newsletter is available here.

ASIAN DEVELOPMENTS

HKEx publishes Amended Listing Rules to Complement the New IPO Sponsor Regime

On 23 July 2013, The Stock Exchange of Hong Kong Limited ("Stock Exchange") published amendments to the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited ("Listing Rules") and a series of guidance materials to complement the new rules for IPO sponsors issued by the Securities and Futures Commission ("SFC"). The new requirements will apply to listing applications submitted on or after 1 October 2013.

Our earlier article in the January 2013 issue of Governance & Securities Law Focus sets out a summary of the SFC's new sponsor rules under the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission ("Code of Conduct"). The enhanced sponsor responsibilities under the Code of Conduct, together with the Listing Rules amendments, are expected to have significant impact on the ways IPOs are conducted in Hong Kong.

Some of the key amendments to the Listing Rules are set out below:

Sponsor must be Appointed at least 2 Months before Listing Application

A sponsor must notify the Stock Exchange of its appointment and a listing application must not be submitted less than two months from the date the sponsor is formally appointed. Where there is more than one sponsor, the two-month period will commence on the date the last sponsor is formally appointed.

8-week Moratorium on Returned Listing Applications

A new applicant must submit a draft listing document ("Application Proof") in both English and Chinese to the Stock Exchange together with the listing application. A sponsor is required to complete all reasonable due diligence on the applicant before submitting a listing application and the Application Proof must be substantially complete except for information that by its nature can only be finalized and incorporated at a later date. If the Stock Exchange returns a listing application on the basis that the Application Proof is not substantially complete, the applicant can only submit a new listing application after eight weeks.

Requirement to Publish Application Proofs on HKEx's Website to Commence on 1 April 2014

The Stock Exchange has introduced a six-month suspension period for public filing of Application Proofs. With effect from 1 April 2014:

- Application Proofs submitted to the Stock Exchange will be published on the HKEx's website; and
- if a listing application is returned, the applicant's name, the sponsor's name and the return date will be published on the HKEx's website.

Initial 3-day check

From 1 October 2013 to 30 September 2014 ("Transitional Period"), the Stock Exchange will carry out an initial 3-day check on each Application Proof before deciding whether to accept the listing application for detailed vetting. An Application Proof will only be published on the HKEx's website after completion of the 3-day check and any application which fails to satisfy the 3-day check will be returned.

During the first six months of the Transitional Period, the SFC and the Stock Exchange will review the effectiveness of having a 3-day check before publication of Application Proofs to see if the arrangement should continue for the remainder of or after the Transitional Period.

Exemption from Publication of the Application Proof

To address market concerns that public filing of Application Proofs may discourage listing applications from companies listed overseas, an applicant that has been listed on a "recognised overseas exchange" for not less than five years and has a market capitalization of not less than US$400 million is exempt from the public filing requirement. A "recognised overseas exchange", for this purpose, means the main market of one of the 15 overseas exchanges recognised by the Stock Exchange, including the New York Stock Exchange (NYSE Euronext (US)), the London Stock Exchange (premium segment, LSE), the Australian Securities Exchange (ASX), the Tokyo Stock Exchange (TSE) and the Singapore Exchange (SGX).

The Stock Exchange may also waive or modify, on a case-by-case basis, the publication requirement in the case of a spin-off from an overseas listed parent.

Streamlined Regulatory Commenting Process

The Stock Exchange will adopt a streamlined regulatory commenting process focusing on major issues such as eligibility, suitability, sustainability, compliance with law and regulations, and any material disclosure deficiencies.

The Stock Exchange has also issued new/updated guidance letters on disclosure requirements for listing documents and documentary requirements for each stage of an IPO transaction. Document submission has been accelerated and a number of documents previously required to be submitted in stages, *e.g.*, final or advanced drafts of the profit forecast and cash flow forecast memoranda, are required to be submitted together with the listing application starting from 1 October 2013.

The Listing Rules amendments and the guidance materials issued by the Stock Exchange are available at:

http://www.hkex.com.hk/eng/rulesreg/listrules/listsptop/nsrr/newrg_index.htm

Our January 2013 issue of Governance & Securities Law Focus is available at:

http://www.shearman.com/governance--securities-law-focus-asia-edition-january-2013-01-31-2013/

US DEVELOPMENTS

SEC Developments

SEC Adopts Rules Allowing General Solicitation in Private Securities Offerings

On 23 September 2013, US Securities and Exchange Commission ("SEC") rule changes permitting general solicitation and general advertising in private placements and offerings became effective. The rule changes fulfil a requirement of the Jumpstart Our Business Startups Act ("JOBS Act").

The rule changes specifically are to: (i) SEC Rule 144A, which allows resales of securities to certain large institutional investors known as "qualified institutional buyers", or QIBs, without registration and is the exemption invoked by underwriters in private offerings, and (ii) Rule 506, which provides a safe harbour for issuers from registration if, among other things, securities are sold only to "accredited investors" and up to 35 other investors. "Accredited investors" are a broader category of investors than QIBs that still must meet certain size/value/worth thresholds.

In the case of Rule 144A resales, the rule now states that only sales, as opposed to both offers and sales, must be made to QIBs or to purchasers reasonably believed to be QIBs. As a result, the Rule 144A exemption will be available even if general solicitation is actively used in the marketing process or occurs inadvertently, as long as the ultimate sales are only to QIBs.

In the case of offerings exempt under Rule 506, general solicitation will be permitted as long as the issuer takes "reasonable steps to verify" that purchases are made by accredited investors or purchasers reasonably believed to be accredited investors at the time of sale. Sales to 35 non-accredited investors are no longer allowed if general solicitation is conducted. The "reasonable steps to verify" determination is left flexible and depends on the facts and circumstances, with the SEC outlining some relevant factors and verification methods.

The SEC has made clear that, in a global offering conducted by an issuer pursuant to both Rule 144A (in order to exempt the US offering from registration) and Regulation S (to exempt the non-US offering from registration), conducting general solicitation by itself will not adversely impact the availability of Regulation S to exempt the non-US offering. In this context, general solicitation will not be construed as "directed selling efforts" prohibited by Regulation S.

The SEC also adopted rule changes, now effective, which disqualify felons and other bad actors from being able to rely on the Rule 506 safe harbour.

In a separate release dated 10 July 2013, the SEC proposed new data collection measures that expand the filing requirements under Rule 506, including requiring the temporary submission of general solicitation materials to the SEC. The comment period for these proposals is open until 4 November 2013.

Our related client publication, which contains more detail on the mechanics of the exemptions after these changes, is available at:

http://www.shearman.com/files/Publication/5492b2dc-9107-4281-ac23-98ea53a3ef4b/Presentation/PublicationAttachment/a1876a48-c459-4456-a4be-7602758d5372/SEC-Adopts-Rule-Changes-Allowing-General-Solicitation-in-Priviate-Placement-Under-Rule%20506.pdf

SEC Proposes Long-Awaited Pay Ratio Rules

On 18 September 2013, the SEC proposed rules to require public companies to disclose the median annual total compensation of all employees other than the chief executive officer ("CEO"), the annual total compensation of the CEO, and the ratio of these two amounts ("pay ratio rules"). Total compensation is to be calculated in the same manner as in the summary compensation table under Regulation S-K. These rules implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").

While the proposed pay ratio rules exempt foreign private issuers from the requirements, they reflect the increasing focus by regulators globally on the need for more transparency in executive compensation disclosure. Smaller reporting companies and emerging growth companies are also exempt from these requirements.

Summary of the Proposed Pay Ratio Rules

The proposed pay ratio rules require a registrant to disclose the median annual total compensation of its entire employee population (other than the CEO), the annual total compensation of the CEO, and the ratio of the two. The disclosure would be required in filings that mandate executive compensation disclosure under Item 402 of Regulation S-K, including annual reports on Form 10-K for US issuers and registration, proxy and information statements.

Exempt Companies

The proposed rules cover only those registrants required to provide summary compensation disclosure under Item 402(c) of Regulation S-K, and therefore exempt foreign private issuers and smaller reporting and emerging growth companies.

Covered Employees

The median total compensation must be determined based on a measure of all of a registrant's employees, including temporary, seasonal, part-time and non-US employees and those employed by direct and indirect subsidiaries, but, notably, excluding independent contractors and leased employees. The rules allow, but do not require, registrants to annualise compensation for permanent employees employed for less than the registrant's full fiscal year but do not allow annualising for seasonal or temporary employees. The rules prohibit full-time equivalent adjustments for part-time employees and cost-of-living adjustments.

The SEC has requested information on non-US data privacy laws and regulations that may impact the collection or transfer of employee data.

Calculation Date and Covered Time Period

The proposed rules generally require registrants to determine the median by reference to those employed as of the last day of the registrant's fiscal year, a calculation date consistent with the date used to determine the named executive officers under Item 402 of Regulation S-K.

Identifying the Median

In response to concerns that calculating the annual total compensation of all of a registrant's employees under the Item 402 rules would be unduly burdensome if not impossible, the proposed rules require instead a comparison of the compensation of a "median employee" to the compensation of the registrant's CEO. The SEC, moreover, has proposed a flexible approach for identifying the median employee and determining median total compensation. The proposed rules give registrants discretion to determine a methodology for identifying the median employee, including the use of statistical sampling, random sampling, reasonable estimates of total compensation or a reasonable determination of the median employee through a review of more readily identifiable figures, such as total direct compensation (including salary, hourly wages and any performance-based pay).

The SEC acknowledges that the proposed rules may place a disproportionately higher burden on large multinational companies and companies that operate across multiple industries. Nevertheless, the SEC reasons that, overall, the use of sampling would help to minimise costs and the time necessary to identify the median.

Instead of requiring all registrants to conform to a single methodology for determining the median, the proposed pay ratio rules require the consistent application of a particular methodology by each registrant.

Total Compensation

Once a registrant has identified the median employee, it would be required under the proposed rules to determine that employee's total compensation in accordance with Item 402(c) (the rules governing the summary compensation table). However, the SEC included in the proposed rules the option to use "reasonable estimates" to calculate the annual total compensation or any elements of total compensation for employees other than the CEO.

Disclosure of Methodologies

Registrants would be required under the proposed rules to briefly disclose the methodology used and any material assumptions, adjustments or estimates used to identify the median or determine total compensation or any elements of total compensation. The proposed rules allow for reasonable supplemental information, including additional pay ratios (*i.e.*, comparing pay of other employee groups), as long as the supplemental information is clearly designated as supplemental and would not confuse investors.

Proposed Transition Period

Registrants would be required to comply with the pay ratio rules with respect to the first fiscal year commencing on or after their effective date. The disclosure would need to be included in the registrant's Form 10-K, proxy statement or registration statement no later than 120 days after the end of the relevant fiscal year. Thus, if the pay ratio rules were to go into effect in 2014, a registrant with a fiscal year ending 31 December would first be required to comply with the rules with respect to the 2015 fiscal year and would be required to include the disclosure for the first time in its Form 10-K, proxy statement or registration statement filed in 2016.

For newly public companies, the proposed rules require initial compliance with respect to compensation for the first fiscal year commencing on or after the date the company becomes subject to the reporting requirements under the US Securities Exchange Act of 1934 ("Exchange Act").

Our related client publication is available at:

http://www.shearman.com/sec-proposes-long-awaited-pay-ratio-rules-09-24-2013/

Noteworthy US Securities Law Litigation

United States v. Vilar: Court Limited Prosecution under Section 10(b) of the Exchange Act for Securities Fraud Outside the US

In September 2013, a federal appeals court extended the holding of the US Supreme Court's landmark decision in *Morrison v. National Australia Bank* to criminal cases and ruled that a defendant could not be prosecuted under Section 10(b) of the Exchange Act for fraud in connection with securities transactions outside of the United States.

In *Vilar*, two investment managers who ran both US-based and foreign-based investment funds were convicted of securities fraud for lying to their clients about the nature and quality of certain investments. On appeal, the defendants argued that their convictions should be overturned because the transactions underlying their convictions occurred outside the United States and, under *Morrison*, the extraterritorial transactions could not support a criminal conviction under Section 10(b). The federal appeals court agreed with the defendants and held that *Morrison* applied with equal force to both civil and criminal securities fraud cases. Despite agreeing that

Morrison applied, the court affirmed the defendants' convictions because it found that at least some of the securities transactions at issue in the appeal occurred in the United States.

This decision further clarifies the reach of *Morrison* and is the first federal appellate court decision to extend the holding of *Morrison* to criminal violations of Section 10(b).

Asadi v. G.E. Energy (USA), L.L.C.: Court Clarified Scope of Dodd-Frank's Whistleblower and Anti-Retaliation Protections

In July 2013, a federal appeals court ruled that, in order to qualify for protection from retaliation under Dodd-Frank's whistleblower-protection provisions, an individual must report the securities law violation to the SEC. The individual cannot obtain such protection if he reports the information to his employer only.

In *Asadi*, a GE Energy executive who was working in Iraq reported to his supervisor and the GE Energy ombudsperson that he was concerned that GE Energy was violating the FCPA. Shortly after making the internal report, he received a negative performance review and a demotion, and was later fired. Asadi filed a complaint in federal court that alleged that GE Energy violated Dodd-Frank's whistleblower-protection provision by terminating him following his internal report of possible FCPA violations. The district court dismissed his complaint.

On appeal, Asadi argued that Dodd-Frank has two conflicting and ambiguous provisions because, although the definition of whistleblower in the statute requires an individual to report a securities law violation to the SEC, the anti-retaliation provision does not and, according to Asadi, the anti-retaliation provision should control his retaliation claim. The federal appeals court rejected Asadi's argument and ruled that there was no conflict between the two provisions because the anti-retaliation provision applies only to an individual who first qualifies as a whistleblower and, in order to qualify as a whistleblower, an individual must report a securities law violation to the SEC.

This decision limits the circumstances under which individuals are protected by the anti-retaliation provision of Dodd-Frank and provides an incentive for individuals to report potential securities law violations directly to the SEC instead of reporting them first to their employers.

In Re ProShares Trust Securities Litigation: Court Interpreted Whether Certain Alleged Omissions were Material for Liability

In July 2013, a federal appeals court affirmed the dismissal of a securities class action under Section 11 of the Securities Act because the court found that the alleged omissions in the registration statements were not material.

In *ProShares*, the plaintiffs alleged that the registration statements for certain exchange-traded funds ("ETFs") failed to disclose the magnitude and probability of potential losses. The district court dismissed the case based on its conclusion that it was not possible to read the registration statements without understanding that the ETFs were risky and speculative investments. On appeal, the plaintiffs acknowledged that the prospectuses contained warnings that the value of long-term ETF investments may "diverge significantly" from the underlying indices, but argued that the "diverge significantly" disclosure did not warn investors of actual, substantial losses.

The federal appeals court rejected the plaintiffs' arguments and affirmed the district court's decision. The court noted that, although materiality will rarely be dispositive on a motion to dismiss, the Supreme Court has been careful not to set too low a standard of materiality for fear that management would bury shareholders in an "avalanche of trivial information." Consistent with this guidance, the court stated that the plaintiffs' efforts to find a meaningful distinction between "diverge significantly" and "actual loss" strains the plain meaning of the former phrase. The court held that the "significant divergence" disclosure, when read in context, put investors on notice that an ETF's value might move in a direction quite different from what an investor might otherwise expect.

ProShares may be helpful to defendants faced with allegations that focus narrowly on alleged omissions even though, when considered as a whole, the public disclosures adequately describe the overall risk.

More information on the *ProShares* case is available at:

http://www.shearman.com/second-circuit-addresses-materiality-of-alleged-omissions-at-the-pleading-stage/

Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund: Private Equity Funds May Be on the Hook for the Pension Liabilities of Portfolio Companies

A recent decision of the US Court of Appeals for the First Circuit makes it more likely that private equity funds could be liable for the pension obligations of the portfolio companies in which they invest. Key to the decision was the Court's conclusion that the private equity fund in question was a "trade or business" by virtue of its active role in the management of the business of its portfolio companies.

Under the Employee Retirement Income Security Act ("ERISA"), each "trade or business" under "common control" is liable for the ERISA liabilities of each member of the "controlled group" of companies. This is a two-part test. First, an entity must be a "trade or business" and under "common control" with another entity that is also a trade or business. Under part one of the test, private equity funds have traditionally taken the position that, as passive investors, the funds are not a "trade or business." Under the second part of the test, funds typically structure ownership to avoid "common control" under the complex but mechanical ownership rules prescribed by ERISA and the Internal Revenue Code for this purpose.

In Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund, the Court held that a private equity fund holding shares in a US portfolio company was a "trade or business" for purposes of ERISA. In reaching its conclusion, the Court applied a legal standard referred to as the "investment plus" test and, in applying this test, paid particular attention to the degree of involvement of the fund in the operation of its portfolio companies. The Court determined that the activities of the fund satisfied the "plus" component of the test.

In its analysis, the Court emphasised that the fund's limited partnership agreements and offering documents described the fund as actively involved in the management and operation of its portfolio companies.

The decision in *Sun Capital* creates potential ERISA liability risk for private equity funds that engage in active management. If a fund is significantly involved in the management and operation of its portfolio companies, the fund may be deemed a trade or business. If the fund, along with a portfolio company, is part of the same ERISA "controlled group," then there is the potential for the fund to be held responsible for the portfolio company's ERISA liabilities.

The Court remanded the case to the district court for a determination on, among other things, the question of common control.

Sun Capital has some important implications for private equity funds. Funds that maintain an active approach to the management of portfolio companies will be more likely to be considered as a trade or business under ERISA and will need, therefore, to consider more carefully the structuring of the actual portfolio company investment to avoid common control for purposes of ERISA. The managers of funds that have a more limited or passive role in the management of portfolio companies will want to review fund documents to remove or revise provisions that reserve more control over the businesses of portfolio companies than is actually exercised. Finally, funds that qualify as venture capital operating companies ("VCOCs") for purposes of ERISA will need to consider whether there is potential ERISA exposure in the companies in which they invest. A typical VCOC acquires management rights in its underlying portfolio companies and is, therefore, more vulnerable under *Sun Capital* to be considered a trade or business.

Our related client publication is available at:

http://www.shearman.com/private-equity-funds-may-be-on-the-hook-for-the-pension-liabilities-of-portfolio-companies-08-14-2013/

Recent SEC/DOJ Enforcement Matters

SEC Awards More Than $14 Million to Whistleblower

On 1 October 2013, the SEC announced an award of more than $14 million to a whistleblower whose information led to an SEC enforcement action that recovered substantial investor funds. The award is the largest made by the SEC's whistleblower program to date.

The SEC's Office of the Whistleblower was established in 2011 as authorized by Dodd-Frank. The whistleblower program rewards high-quality original information that results in an SEC enforcement action with sanctions exceeding $1 million, and awards can range from 10 per cent to 30 per cent of the money collected in a case.

By law, the SEC must protect the confidentiality of whistleblowers and cannot disclose any information that might directly or indirectly reveal a whistleblower's identity. Therefore, no details are available at present regarding the matter.

The SEC's first payment to a whistleblower was made in August 2012 and totalled approximately $50,000. In August and September 2013, more than $25,000 was awarded to three whistleblowers who helped the SEC and the US Department of Justice halt a sham hedge fund, and the ultimate total pay-out in that case once all sanctions are collected is likely to exceed $125,000.

First Solar Inc.: First Selective Disclosure Enforcement Action in Two Years

In September 2013, the SEC charged the former head of investment relations of First Solar Inc. with violating Regulation FD, which requires companies and individuals to disclose material non-public information publicly in a broad manner and not selectively. According to the SEC's order, the head of investor relations and several other executives learned that the company was unlikely to receive a much-anticipated loan guarantee from the US Department of Energy. Despite knowing that the company had not yet publicly disclosed this information, the head of investor relations disclosed to approximately twenty sell-side analysts and institutional investors that there was a low probability that the company would receive the loan guarantee. When First Solar broadly disclosed this information in a press release the next morning, its stock price dropped six per cent.

In resolving the administrative proceeding, the head of investor relations agreed to pay a $50,000 penalty and agreed to cease and desist from causing any future violations of Regulation FD.

Notably, the SEC did not bring an enforcement action against First Solar. The SEC indicated that it made this decision in recognition of the company's extraordinary cooperation with the investigation, its quick self-reporting of misconduct, and its remedial measures to address the improper conduct, including additional training for employees responsible for public disclosures.

This matter servers as a reminder to all public companies of the importance of robust compliance, disclosure and training procedures to mitigate a company's exposure to regulatory actions when things do go off-side.

To date, the SEC has brought 15 Regulation FD enforcement actions since its enactment in 2000. While foreign private issuers are exempt from Regulation FD, the SEC expects such issuers to conduct themselves in accordance with its basic underlying principles.

PCAOB Developments

Proposed Standards for Expanded Language in Auditor Reports

On 13 August 2013, the Public Company Accounting Oversight Board ("PCAOB") proposed two new auditing standards for expanded language in the auditor's report:

To require auditors to include a discussion of "critical audit matters" specific to the audit; and

To require auditors to provide their evaluation of "other information" that is in a company's annual report filed with the SEC.

The PCAOB is seeking comment on the proposed standards until 11 December 2013. If adopted, the standards will be applicable to audits of reporting companies, broker-dealers, investment companies, and employee stock purchase, savings and similar plans, and would be effective for audits of financial statements for fiscal years beginning on or after 15 December 2015.

Critical Audit Matters

The first proposed standard, *The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*, would retain the pass/fail model of audit reports, but would revise the auditor's report to require additional content by asking the auditor to report on "critical audit matters".

These are areas which involved the most difficult, subjective, or complex auditor judgments, or which posed the most difficulty to the auditor in obtaining sufficient appropriate evidence or in forming the opinion on the financial statements. In addition to identifying the critical audit matters, the audit report would be required to describe the considerations that caused the auditor to determine that the matter was a critical audit matter and to refer to the financial statement accounts and disclosures to which the critical audit matter relates.

The PCAOB has suggested that such matters would ordinarily be matters of such importance that they are included in engagement completion documents, reviewed by the engagement quality reviewer, and communicated to the audit committee.

Proposed Other Information Standard

Under existing PCAOB standards, the auditor has a responsibility to "read and consider" other information with no related reporting requirements. The second proposed standard, *The Auditor's Responsibilities Regarding Other Information in Certain Documents Containing Audited Financial Statements and Related Auditor's Report*, would apply the auditor's responsibility for other information specifically to a company's annual report filed with the SEC under the Exchange Act that contains the company's audited financial statements and the related auditor's report.

This would require the auditor to evaluate other information for a material misstatement of fact or a material inconsistency, or the manner of their presentation, in the audited financial statements, based on relevant audit evidence obtained and conclusions reached during the audit. "Other information" would include items such as risk factors, selected financial data, management's discussion & analysis, exhibits and certain information incorporated by reference. The audit report would be required to include a statement of the auditor's responsibility for the evaluation and the results of the evaluation.

The proposed auditing standards are available at:

http://pcaobus.org/Rules/Rulemaking/Docket034/Release_2013-005_ARM.pdf

Other

Shearman & Sterling 2013 Corporate Governance Surveys

In August 2013 we published the 11th edition of our annual surveys of the Governance and Director & Executive Compensation Practices of the Top 100 US Public Companies. These surveys provide in-depth analyses of practices and trends impacting corporate governance and shed light on how leading US companies are addressing important governance issues in the current environment.

For non-US companies, whether listed in the US or not, the practices and trends of the largest US companies provide instructive information in an increasingly convergent global corporate governance environment.

In our general corporate governance practices survey, we highlight trends in policies and practices of the Top 100 Companies relating to the composition and structure of their boards of directors. We also identify trends in the governance practices of the Top

100 Companies that apply more broadly, including in risk oversight policies, structural defences, political contribution policies and shareholder and management proposals.

Our executive compensation survey addresses how compensation and compensation disclosure practices are evolving in response to mandatory "say on pay" and increased shareholder engagement on matters of executive compensation. The director compensation survey discusses trends in non-employee director compensation practices over the past decade.

The 2013 Corporate Governance Practices Survey is available at:
http://www.shearmancorpgov.com/corporategovernance/coporate_governance_2013#pg1

The 2013 Executive Compensation Survey is available at:
http://www.shearmancorpgov.com/corporategovernance/corporate_compensation_2013#pg1

Our corporate governance website can be accessed at:

http://corpgov.shearman.com

EU DEVELOPMENTS

Opinion on ESMA's Powers under the Short Selling Regulation

On 12 September 2013 Advocate-general Jääskinen delivered his opinion in the case of the UK v. the Council of the European Union and European Parliament in which the UK contests the validity of Article 28 of the Short Selling Regulation. Article 28 gives the European Securities and Markets Authority ("ESMA") the power to require disclosure of short positions or to ban short selling of certain financial instruments in emergency situations. The Advocate-general considers that Article 28 should be annulled because Article 114 of the European Treaty is not the correct legal basis for conferring such powers on ESMA. The opinion of an advocate-general is not legally binding on the court. The judges will now consider all of the evidence as well as the opinion before giving judgment.

The opinion is available at:
http://curia.europa.eu/juris/document/document.jsf?text=&docid=140965&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=6255244

Reporting under EMIR Delayed

ESMA announced, on 13 September 2013, that registration of the first trade repository under the European Market Infrastructure Regulation ("EMIR") is not expected before 7 November 2013. Reporting under EMIR can only begin once a trade repository has been registered. Reporting is therefore not expected to begin until February 2014. In addition, the first central counterparty ("CCP") authorisation is not likely to occur before 15 October 2013. CCPs already clearing in Europe had until 15 September 2013 to submit their applications to ESMA for authorisation or recognition.

Separately, ESMA has requested the European Commission to allow a later start date for reporting of exchange traded derivatives ("ETDs") to trade repositories under EMIR. ESMA considers that without further guidance being issued on the reporting of ETDs, there is a risk that ETD reporting would not be consistent. To allow time for such guidance to be prepared and implemented, ESMA proposes to amend the existing technical standards by inserting a reporting start date of 1 January 2015.

ESMA's letter to the European Commission is available at:

http://www.esma.europa.eu/system/files/2013-1086_-_reporting_to_trade_repositories_-the_case_of_etds.pdf

ESMA Publishes Third Country Advice on Equivalence

ESMA published, on 3 September and 2 October 2013, technical advice to the European Commission on the equivalence of the derivative rules in the US, Canada, Japan, Australia, Hong Kong, Singapore, Switzerland, South Korea and India to the rules under EMIR. The scope of the advice covers requirements for CCPs and trade repositories, requirements for the clearing obligation, reporting obligation, non-financial counterparties, and risk mitigation techniques for uncleared trades. The European Commission is responsible for adopting implementing acts on equivalence for each jurisdiction.

The technical advice is available at:

http://www.esma.europa.eu/page/Post-trading-documents

ESMA Consults on the Clearing Obligation

On 12 July 2013, ESMA published a discussion paper on the clearing obligation under EMIR. The paper is a preliminary consultation paper to obtain views on the preparation by ESMA of draft regulatory technical standards ("RTS") on the clearing obligation and, in particular, to assist ESMA to develop its approach to determining which classes of OTC derivatives need to be centrally cleared and the phase-in periods for the counterparties concerned. The paper sets out ESMA's proposed approach to determining: (i) the characteristics of OTC derivatives that should be centrally cleared; (ii) the dates from which the clearing obligation would take effect; and (iii) the minimum remaining maturity of OTC derivative contracts referred to under EMIR. ESMA will consult on specific draft RTS once CCPs are authorised or recognised to clear each class of derivatives (the earliest date for such authorisation / recognition is 15 September 2013). A template for responses to the consultation is available, which respondents should use, if possible, although ESMA will accept responses in other formats.

The consultation closed on 12 September 2013. The discussion paper is available at:

http://www.esma.europa.eu/content/Template-Responses-Discussion-Paper-Clearing-Obligation-under-EMIR

European Commission Adopts Two Delegated Regulations under EMIR

On 12 July 2013, the European Commission adopted (i) a delegated regulation specifying the fees to be charged to trade repositories by ESMA; and (ii) a delegated regulation to include the central banks and debt management offices of Japan and the United States in the list of exempted entities under Article 1(4) of EMIR. Both regulations will enter into force 20 days after their publication in the European Official Journal. In relation to the second regulation, the European Commission states that it will continue to monitor the finalisation of OTC derivatives rules in other G20 jurisdictions and will exempt, if necessary, the central banks and debt management offices of other countries with the adoption of further similar delegated acts.

The delegated regulation specifying the fees to be charged is available at:

http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/130712_delegated-regulation-fees-esma_en.pdf

The delegated regulation to include the central banks and debt management offices of Japan and the United States is available at:
http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/130712_delegated-regulation-emir-central-banks_en.pdf

ESMA Consults on Draft RTS for Derivatives with Extraterritorial Effect under EMIR

On 17 July 2013, ESMA opened its consultation for draft RTS under EMIR on contracts having a direct, substantial and foreseeable effect within the European Union and non-evasion of the provisions of EMIR. The consultation clarifies the position on the application of EMIR central clearing or risk mitigation obligations to OTC derivatives contracts between non-EU counterparties which have a direct, substantial and foreseeable effect within the EU.

The obligations would apply only when (i) both counterparties to a transaction are established outside the EU; and (ii) the rules in both jurisdictions are not considered to be equivalent to EMIR; and either (a) one of the counterparties is guaranteed (above certain thresholds) by an EU financial counterparty; or (b) both counterparties execute the transaction via their EU branches. There are also anti-evasion provisions requiring business substance and economic justification for the use of non-EU counterparties to the transaction.

The European Commission has extended the deadline for ESMA to submit to the Commission the draft RTS on the cross-border application of EMIR from 25 September to 15 November. The extension has been given to allow ESMA sufficient time to analyse the responses to its consultation.

The consultation paper is available at:

http://www.esma.europa.eu/system/files/2013-892_draft_rts_of_emir.pdf

Our client note on this advice is available at:

http://www.shearman.com/files/Publication/883da34d-a9f3-498f-818c-779e72a639e8/Presentation/PublicationAttachment/6fa85fbd-d6af-4e31-9c53-921470cc7441/ESMA-Consults-on-Extraterritoriality-FIA-080513.pdf

RTS on CCP Colleges Published

The secondary legislation under EMIR setting out the operational organisation and governance of supervisory colleges that must be set up to consider the application of a CCP for authorisation was published in the European Official Journal (Commission Delegated Regulation (EU) No 876/2013 of 28 May 2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on colleges for central counterparties, "Delegated Regulation"). The Delegated Regulation came into force on 3 October 2013.

The Delegated Regulation is available at:

http://new.eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.244.01.0019.01.ENG

ESMA Publishes Updated FAQs on the Implementation of EMIR

On 5 August 2013, ESMA updated the FAQs on the implementation of EMIR. New questions included in the update relate to funds as counterparties to a derivative contract, back-to-back client contracts, the status of third country entities, portfolio reconciliation, dispute resolution requirements, the role of chief risk officer, chief compliance officer and chief technology officer in CCPs and allocation of resources by CCPs. Other issues covered in the update cover the calculation of the clearing threshold, timely confirmations, intragroup transactions in relation to Commission equivalence decisions, the hedging definition and segregation and portability.

The updated FAQs are available at:

http://www.esma.europa.eu/system/files/2013-1080_qa_iii_on_emir_implementation.pdf

European Commission Publishes Further Proposals to Fight against Fraud

On 17 July 2013, the European Commission published two legislative proposals to further strengthen the EU's fight against fraud:

- a proposal on the establishment of the European Public Prosecutor's Office, which aims to strengthen the procedural framework to deal with offences affecting the EU's financial interests, covering the status and structure of the new EU office

with investigation and prosecution functions, rules and procedures governing investigations, prosecutions and trial proceedings, judicial review and data protection; and

- a proposal on the European Union Agency for Criminal Justice Cooperation (or Eurojust) which aims to improve the operation and efficiency of the agency, which was first established in 2002 and which facilitates coordination and cooperation between Member State investigative and prosecutorial authorities.

These proposals link to the European Commission's legislative proposal on the fight against fraud for the financial interests of the EU by means of criminal law, published in July 2012, which sets out harmonised criminal law provisions for preventing and fighting fraud. All three proposals are now subject to the EU legislative process.

The proposals are available at:

http://ec.europa.eu/justice/criminal/files/regulation_eppo_en.pdf; and

http://ec.europa.eu/justice/criminal/files/regulation_eurojust_en.pdf

European Parliament Committees Propose Amendments to the Gender Balance Directive

On 11 July 2013, the Committee on Employment and Social Affairs of the European Parliament published its opinion on, and proposed amendments to, the proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures ("Gender Balance Directive") and requested that the Committee on Legal Affairs and the Committee on Women's Rights and Gender Equality, as the committees responsible, incorporate the amendments in their report. The key amendments were:

- The scope of the Gender Balance Directive should be extended to cover (i) all directors, not just non-executive directors; and (ii) large public undertakings, whether or not listed, as well as companies listed on stock exchanges;
- The selection pool of candidates for board positions should be included in the reporting obligations for companies who do not select women whilst they are still under-represented; and
- While Member States should be able to suspend the Gender Balance Directive if their national measures would also fulfil the aim of the Gender Balance Directive, the Gender Balance Directive should automatically come into force in 2017 for those Member States that have not reached an intermediate goal of 30% of seats on boards of the relevant entities being held by women.

The European Council Working Party on Social Questions met to discuss the proposals on 20 September 2013, and a plenary session of the European Parliament has been scheduled for 19 November 2013.

The text of the proposed amendments of the Committee on Employment and Social Affairs setting out their proposed amendments is available at:

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-508.089%2b02%2bDOC%2bPDF%2bV0%2f%2fEN

On 2 September 2013, the Committee on Legal Affairs and the Committee on Women's Rights and Gender Equality published its draft report on the Gender Balance Directive, which detailed which amendments the committees wish to see included in the proposed Gender Balance Directive, as listed below:

- The switch to cover all directors as detailed above was confirmed, but public undertakings in general, as opposed to only large public undertakings, were included in the amendments. A definition of 'public undertaking' remains outstanding from the committee;

- The committee has given numerous proposed amendments as to the scope of the Gender Balance Directive, including expanding the exception for small companies to companies that employ less than 500 persons, a new concept of 'family business' to be exempted from the Gender Balance Directive, and a new definition of listed companies as those whose shares, as opposed to securities, are admitted to trading on a regulated market in one or more Member States;
- The gender balance requirement has been proposed to be watered down to the extent the companies are required only to establish their own measures to attain the required gender balances by the target deadlines;
- A range of sanctions for non-compliance with the provisions of the Gender Balance Directive has been proposed, including partial exclusion from public procurement contracts and partial exclusion from the award of national aid.

The text of the proposed amendments of the Committee on Legal Affairs and the Committee on Women's Rights and Gender Equality is available at:

http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cj02/am/1001/1001418/1001418en.pdf

On 27 September 2013, the Committee on Economic and Monetary Affairs published its opinion on and proposed amendments to the Gender Balance Directive. The key amendments related to gender balance in EU institutions and the full text of the proposed amendments can be found at:

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-508.237%2b03%2bDOC%2bPDF%2bV0%2f%2fEN

The Gender Balance Directive proposal can be viewed at:

http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf

ESMA Consults on Guidelines on Enforcement of Financial Information

On 19 July 2013, ESMA published a consultation paper proposing amendments to guidelines relating to financial information enforcement by competent authorities under the Transparency Directive, Prospectus Directive and International Accounting Standards Regulation. This consultation follows a review of previous CESR (Committee of European Securities Regulators) principles and proposes to adopt these as ESMA guidelines which would require competent authorities to either comply with them or explain any non-compliance. ESMA's main areas of consultation are:

- Would an EU-wide approach to information enforcement avoid regulatory arbitrage?
- Should third country issuers reporting under IFRS style GAAP be subject to equivalent enforcement?
- Should the process for prospectus approval be amended to include ex-ante enforcement as regard financial information?
- What is the most appropriate selection criteria for review of issuers' financial information by competent authorities?
- Whether new types of enforcement action should be implemented, and the conditions for their use?
- Should EU-wide enforcement priorities and reporting be established to assist market participants, such as public disclosure of all enforcements against issuers on an anonymous basis?

Responses are due on ESMA's proposals on 15 October 2013, in order to allow ESMA to achieve its intended deadline for publishing guidelines in early 2014. The full text of the proposal is available at:

http://www.consob.it/documenti/Regolamentazione/esma_documenti/2013/esma_2013_1013.pdf

European Commission Amends Prospectus Regulation in relation to Convertible and Exchangeable Debt Securities

On 8 August 2013, the Regulation (EU) No 759/2013 of 30 April 2013 amending Regulation (EC) No 809/2004 as regards the disclosure requirements for convertible and exchangeable debt securities was finally published in the Official Journal of the European Union and came into force on 28 August 2013. The key amendments made by this regulation are:

- A provision is included to highlight the fact that, as is currently the case, the only information required to be disclosed for convertible or exchangeable securities is a statement setting out the type of the underlying security or index and details of where information on the underlying security or index can be obtained, as specified in item 4.2.2 of Annex XII (Minimum Disclosure Requirements for the Securities Note for Derivative Securities);
- Securities with warrants where the underlying shares have not been admitted to trading on a regulated market, and which give the right to acquire shares in the issuer or the issuer's group, are subject to the securities note schedule for derivative securities;
- Clarification is provided that where underlying shares are already admitted to trading on a regulated market, the share registration document schedule should not be used;
- The disclosure regime in Annex XIV (Additional Information Building Block on Underlying Share for some Equity Securities) now applies to securities exchangeable for third party shares which have not been admitted to trading on a regulated market, excluding item 2 (information required by the share registration document schedule);
- The share registration document is applicable to bonds convertible into shares of another member of the same group as the issuer which are not admitted to trading on a regulated market;
- Working capital and capitalisation and indebtedness statements are now required in the prospectus for all securities convertible or exchangeable into the shares of the issuer or an entity in its group where the underlying shares are not admitted to trading on a regulated market, provided they are an equity security as defined in the Prospectus Directive;
- Rights issues of debt securities convertible into new shares of the issuer are now subject to the proportionate disclosure schedules in Annex XXIII (Proportionate Schedule for Minimum Disclosure Requirements for the Share Registration Document for Rights Issues) and Annex XXIV (Proportionate Schedule for Minimum Disclosure Requirements for the Share Securities Note for Rights Issues); and
- Annex XVIII (Table of combinations) now contains the required schedules and building blocks required under the proportionate disclosure regime relating to convertible or exchangeable debt securities issued by small and medium-sized enterprises and companies with reduced market capitalisation.

The full text of Regulation (EU) No 759/2013 is available at:

http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:213:0001:0009:EN:PDF

Compromise Text Published on Proposed Statutory Audit Directive

There have been a number of non-binding compromise texts published by the European Council this quarter on the proposed Statutory Audit Directive, the most recent of which is available at the link below. It is still unclear when a subsequent draft of the proposed Directive will be published.

http://register.consilium.europa.eu/pdf/en/13/st13/st13149.en13.pdf

European Committee on the Internal Market and Consumer Protection Proposes Amendments to the Accounting Directives

On 12 September 2013, the Committee on the Internal Market and Consumer Protection published draft amendments that principally expand the requirements under the proposed EU Directive on disclosure of non-financial and diversity information. The key amendments are:

- The threshold at which companies are required to include non-financial information in their annual reports has been lowered to 250 employees from 500 employees, although small and medium enterprises are still exempt from additional requirements;
- The scope of non-financial information has been widened to include information regarding the impact of companies' activities on society, gender matters, social dialogue and the respect of trade unions' rights. The information relating to companies' activity impact on society shall also include the impact of activities undertaken by companies linked to the reporting company by business relationships such as joint venture initiatives, suppliers and subcontractors;
- A statement is also required to provide a description of the due diligence processes undertaken by the company in connection with its policies relating to non-financial matters, and of any significant incidents that occurred during the reporting period in relation to the non-financial matters;
- The European Commission shall adopt guidelines, before the end of 2015, containing Key Performance Indicators ("KPIs") to cover the matters for which non-financial information is required to be provided. The KPIs will be used to measure the impact of the company's activities and, regarding environmental matters, shall at least cover land use, water use, greenhouse gas emissions and use of materials;
- Companies which prepare reports which correspond with national, EU-based or international frameworks and which cover the non-financial information contained in the proposed Directive shall be exempt from the obligation to prepare the non-financial statement provided that the report provided is part of the annual report and contains the relevant KPIs;
- Information relating to gender has been removed from a "catch-all" body of information to be provided and given individual importance such that information relating to gender diversity in administrative, management and supervisory bodies is always provided; and
- Member States will be required to establish mechanisms to ensure compliance with the Directive by companies and to ensure disclosure of non-financial information.

The full text of the draft opinion is available at:

http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE516.976&format=PDF&language=EN&secondRef=01

UK DEVELOPMENTS

UK Legislation Implementing EMIR

The Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) (No. 2) Regulations 2013 ("Regulations"), which further implement the requirements of EMIR in the UK, were published on 5 August 2013. The Regulations include (i) further supervisory and enforcement powers for the Financial Conduct Authority ("FCA"); (ii) provisions facilitating the segregation of indirect client accounts at a clearing member and the transfer of indirect client accounts on the failure of a client providing indirect clearing services; (iii) requirements for recognised CCPs to maintain recovery plans setting out the measures that will be taken if the continuity of their services is disrupted; and (iv) requirements for CCPs to have rules

to allocate losses that threaten their solvency. The Regulations come into effect on 26 August 2013 except for the provisions relating to recovery plans and loss allocation which come into effect in 2014.

The Regulations are available at:

http://www.legislation.gov.uk/uksi/2013/1908/pdfs/uksi_20131908_en.pdf

FCA Consults on Amendments to the FS Handbook

On 6 September 2013, the FCA published its Quarterly Consultation with proposed amendments to the Financial Services Handbook ("FS Handbook") as a result of the Regulations. The proposed changes reflect: (i) the FCA's power to issue a statement of censure to persons in breach of EMIR requirements; (ii) the FCA's ability to direct the form, or require the verification of, information provided to the FCA for unconfirmed trades and outstanding disputes; and (iii) the FCA's power to gather information to determine compliance with the clearing obligation by third country entities caught by the EMIR provisions.

The FCA's Quarterly Consultation is available at:

http://www.fca.org.uk/static/documents/consultation-papers/cp13-09.pdf

ICSA Publish Revised Guidance On Matters Referred to Company Committees

On 2 July 2013, ICSA published revised guidance on terms of reference for a number of companies' committees, such as audit, remuneration, nomination, risk and executive committees, as well as guidance on matters reserved for the board. Principal changes to model terms of reference for committees include:

Audit Committee

- Recommendation that, as well as recent and relevant finance experience, at least one member of the committee has attained a professional qualification from a professional accounting body;
- Requirement for audit committees to invite finance directors to attend meetings on a regular basis;
- Limiting extensions of appointments to the committee to two successive three year periods following the initial three year period, provided members continue to be independent; and
- Some incremental expansion of committee duties and reporting responsibilities.

Remuneration Committee

- Limiting extensions of appointments to the committee to two successive three year periods following the initial three year period, provided members continue to be independent;
- Clarification that the objective of remuneration policies is, amongst other things, to attract, retain and motivate executive management of a sufficient quality required to run the company, paying them the requisite amount;
- Requirement to consider Association of British Insurers ("ABI") and National Association of Pension Funds guidelines when published; and
- Amendments to committee duties to include: (i) responsibility for remuneration policy for all executive directors (non-executive director remuneration is a matter reserved for the board); and (ii) recommending levels of senior management remuneration.

Nomination Committee

- Obligations to identify external search agencies used and their connection, if any, with the company, and to include a statement on board policy for diversity, including any targets and progress towards them, in the nomination committee report prepared ahead of the annual report.

Risk Committee

- Recommendation to consider the Kay Review of UK Equity Markets and Long-Term Decision Making and Periodic Peer Review Report on Risk Governance published by the Financial Stability Board in February 2013;
- Compulsory attendance of the chief risk officer at all committee meetings;
- Recommendation for boards to err on side of overlapping duties on critical questions, where duties could be performed by either risk or audit committees; and
- Giving the chief risk officer and the committee itself unfettered direct access to the chairman of the board.

The guidance also added the following, among other items, to the model schedule of matters reserved for the board:

- Approval of material unbudgeted capital or operating expenditures;
- Approving risk appetite statements;
- Approving fraud detection, bribery prevention, whistleblowing and human resources policies;
- Execution of major capital projects;
- Authorising permitted conflicts of interests; and
- Any decision likely to have a material impact on the company or group from any perspective, including, but not limited to, financial, operational, strategic or reputational impacts.

The full text of the ICSA guidance is available at:

https://www.icsaglobal.com/resources/guidance/audit-committees-terms-of-reference#

https://www.icsaglobal.com/resources/guidance/remuneration-committee-terms-of-reference#

https://www.icsaglobal.com/assets/files/pdfs/guidance/Guidance-notes-2013/terms-of-reference-for-the-risk-committee-Jun-2013.pdf

https://www.icsaglobal.com/assets/files/pdfs/guidance/Guidance-notes-2013/terms-of-reference-executive-committee-Jul-2013.pdf

https://www.icsaglobal.com/resources/guidance/matters-reserved-for-the-board-terms-of-reference#

ISDX Publishes Amended Rules for Issuers and Corporate Advisers Handbook

ICAP Securities and Derivatives Exchange Limited ("ISDX") is a recognised investment exchange that operates two primary markets, the ISDX Main Board (an EU-regulated market) and the ISDX Growth Market (a prescribed market), as well as the ISDX Secondary Market. On 8 July 2013, the ISDX published its amended Rules for Issuers and Corporate Advisers Handbook in relation to its Growth Market, based on consultation responses. The amendments came into force on 9 July 2013, subject to certain transitional provisions for existing issuers admitted to trading on that date.

- Amendments have been made to Appendix 1, which governs the disclosure requirements for admission documents. Issuers are now required to include a statement confirming whether or not their directors have complied with the recommendation not to combine more than one executive directorship and four non-executive directorships, or to hold more than eight non-executive directorships (excluding within the same group). Issuers admitted to trading as at 9 July 2013 will have until

9 January 2014 to comply with this amendment. Additionally, investment vehicles' business overview must confirm whether or not issuers will return cash to shareholders upon a failure to implement their investment strategy.

- New eligibility criteria for admission require issuers to achieve 20 out of a possible 50 points, awarded in the following five categories with a maximum of 10 points available in each category: (i) level of free float; (ii) past 12 months' revenue; (iii) past 12 months' EBITDA; (iv) revenue record during previous three years; and (v) size of assets.

Specific new eligibility rules are as follows:

- All issuers must now comply with a minimum free float of 10% on admission or allow for a subscription for shares in cash such that at least £250,000 of shares are in public hands at or immediately before admission. Investment vehicles will be subject to a higher threshold of £500,000 before they are admitted;
- The revenue threshold has been amended to be friendlier to smaller business and has halved from 1 point for every £200,000 to 1 point per £100,000;
- Issuers who are already admitted to trading will be subject to an assessment in January 2015 to ensure compliance with the new rules. Failure to comply will result in a withdrawal of their securities from the ISDX Growth Market;
- Investment vehicles must implement their investment strategy within two years of admission or be suspended from trading on the ISDX Growth Market; and
- Cash shells are prohibited from being admitted and any existing cash shells will be suspended unless they apply for re-admission as an investment vehicle before 9 January 2014.

In terms of issuers' continuing obligations:

- Issuers are not required to disclose related party transactions undertaken in the ordinary course of business and related parties will now include shareholders controlling 10% or more of an issuer's voting rights;
- A proposal that shareholder approval is required for discounts of 25% on certain placings has not been included; and
- In order to cancel an issuer's admission to trading, the issuer must obtain 75% shareholder approval in a general meeting called on a minimum of 20 business days' notice, subject to certain excepted cases.

ISDX is also amending its Corporate Advisers Handbook:

- The general obligations of corporate advisers are being revised, including with respect to due diligence and checks on new applicants; and
- Corporate advisers will be limited to acting for a maximum of ten issuers at any one time, with ISDX approval needed to waive this limit. Approval will be given only to firms with sufficient staffing levels to act for more than ten issuers.

The full text of the ISDX amended Rules and Corporate Handbook is available at:

http://www.isdx.com/files/pdf/consultations/FINAL-ISDX-Rules-for-Issuers-CLEAN.pdf

http://www.isdx.com/files/pdf/consultations/FINAL-ISDX-Corporate-Adviser-Handbook-CLEAN.pdf

ABI Publish Report On Equity Capital Markets

On 11 July 2013, the ABI published their "Encouraging Equity Investment" report into raising capital in UK equity markets. Responses showed that investors are happy with the current UK equity model but that a number of processes could be made more efficient. Below is a list of some of the key recommendations ABI made on how to improve efficiency of IPOs:

- Early engagement with investors up to a year in advance of an IPO which would help to address the information "asymmetry", currently in favour of issuers and vendors, caused by the lack of time after the announcement of an intention to float;
- Prospectus publication, without pricing information, could occur at an earlier stage of the IPO process and could occur one week in advance of a price range prospectus. This would require the removal of the delay between publication of connected research and the offer document, which would require FCA clarification that connected research is not part of the prospectus;
- In order to avoid the disadvantages of large syndicates, there should be a maximum of two bookrunners on transactions under £250 million, and a maximum of three for transactions with larger values;
- Issuers should ensure that shares are distributed to shareholders who are likely to hold shares for longer periods, with independent advisors where necessary;
- Encouragement for greater disclosure of all fees in the prospectus, including maximum incentive fees, advisors' fees and syndicate members' individual fees, preferably as a percentage of the size of the offering;
- Controlling shareholders (shareholders, whether individually or acting with others, with a 50% + one holding) should have liability for the prospectus for an IPO where the issuing company is applying for a premium listing;
- Prospectuses should include a responsibility statement from the controlling shareholders covering future conduct of the business and their future relationship with the company, and they should be liable to the same extent as the issuer for breach of these statements unless they have acted in good faith or can prove they did not induce the acts of the issuer which constitutes a breach;
- Independent boards should be installed at least one month prior to the announcement of an intention to float and should remain so following listing; and
- With regard to raising capital in the secondary markets, the ABI Guidelines and Statement of Principles should be revised to provide clarity on non-pre-emptive placings, open offers and rights issues to improve consultation with major existing institutional shareholders ahead of non-pre-emptive placings.

The full text of the ABI report is available at:

https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/Migrated/Investment%20and%20corporate%20governance/ABI%20Encouraging%20Equity%20Investment%20report.ashx

BIS Publishes Discussion Paper on Transparency and Trust

Following the 39th G8 summit in June 2013, the Department of Business, Innovation and Skills ("BIS") published its discussion paper on methods to enhance the transparency of UK company ownership and increasing trust in UK business, on 15 July 2013. The key proposals are:

- Creation of a register of beneficial owners of UK companies, with beneficial owners defined as individuals owning over 25% of a company's shares or voting rights or who otherwise exercise control over the company. An exemption for

companies traded on the Main Market of the London Stock Exchange is proposed. Also, the proposal does not opine on whether the register should be made public and has asked for comments on this point specifically;

- New statutory powers for companies to identify beneficial owners and obligations placed upon them to notify companies of their interests;
- Prohibition on new bearer shares and conversion to ordinary registered shares of existing bearer shares;
- Prohibition on nominee and corporate entities acting as directors;
- Powers for sector specific regulations to disqualify directors from such sectors;
- Amendments to the Company Directors Disqualification Act 1986 to include the power to disqualify UK directors found guilty of misconduct in relation to overseas companies;
- More powers to allow creditors to be compensated where directors have been reckless or fraudulent, such as allowing liquidators to sell or assign fraudulent and wrongful trading actions; and
- Removal of the time limit for disqualification proceedings in insolvency cases.

The consultation closed on 16 September 2013. The full text of the discussion paper is available at the link below, and earlier discussion on this UK initiative can be found in our July 2013 newsletter.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212079/bis-13-959-transparency-and-trust-enhancing-the-transparency-of-uk-company-ownership-and-increaing-trust-in-uk-business.pdf

Competition Commission Announces Provisional Remedies in Audit Market Investigation

On 22 July 2013, the Competition Commission announced provisional measures aimed at remedying the low levels of competition between established audit firms. The proposed remedies are:

- FTSE 350 companies should be required to put their statutory audit engagement out to tender at least every five years unless they can claim exceptional circumstances, in which case they may defer this requirement by two years. There will be a transition period of five years before this requirement comes into effect;
- All audit engagements in the FTSE 350 should be reviewed every five years by the Audit Quality Review team, a branch of the Financial Reporting Council ("FRC"), with findings communicated to shareholders by companies' audit committees. Larger mid-tier audit firms should be reviewed annually;
- Loan agreements should be prohibited from restricting a company's choice of auditor to categories or lists;
- Amendments to the UK Corporate Governance Code and Stewardship Code should be made to encourage higher levels of shareholder engagement, with an advisory vote on whether the information disclosed in the audit section of a company's annual report is sufficient;
- Powers to agree audit fees and the scope of work, make recommendations for auditor appointments and initiate the tender process should only be given to companies' audit committees; and
- The articles of association of the FRC should be amended to include a secondary objective to have due regard to competition.

The Commission also confirmed it will not consider imposing mandatory switching of the statutory auditor, or shareholder group/FRC responsibility for auditor reappointment as possible remedies. Comments on the provisional remedies were requested by 18 August 2013, and a final report is due from the Commission by 20 October 2013.

The full text of the provisional decision on remedies is available at:

http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/130724_provisional_decision_on_remedies.pdf

FCA Publishes Preliminary Guidance on Advancing Its Objectives

On 24 July 2013, the FCA published preliminary guidance on advancing its objectives, as required by amendments made to the Financial Services and Markets Act 2000 (as amended by the Financial Services Act 2012). Points of note include:

- The FCA's principal concerns relating to market integrity include the transparency of price information, especially in financial markets, market abuse and the orderly operation of financial markets;
- As a matter of policy, the FCA will prefer and adopt the most pro-competitive measures when addressing market integrity, provided these measures are compatible with its duties as a whole; and
- Supervision of market infrastructures that support financial instrument trading, the issuing of securities and the prevention of market abuse are the main thrust of the FCA's core markets regulatory activities.

The FCA currently intends to publish a feedback summary and final guidance in early 2014. The deadline for submission of comments on the preliminary guidance was 27 September 2013.

The full text of the FCA's Preliminary Guidance is available at:

http://www.fca.org.uk/static/documents/fca-approach-advancing-objectives.pdf

Takeover Panel Publishes Response Statement on Amendments To Takeover Code Relating To Profit Forecasts, Quantified Financial Benefits Statements And Material Changes In Information

On 24 July 2013, the Takeover Code Committee published responses to feedback received on proposals to amend the profit forecasts and quantified financial benefits statements provisions and the material changes in information provisions of the Takeover Code. The changes came into effect on 30 September 2013, and some of the key changes are:

- The definitions of "profit forecast" and "profit estimate" were amended to conform to the equivalent definitions in the FCA's Prospectus Rules, except that results in the definition of profit estimates were amended to refer to audited results. An explanatory note also provides that a reference to a "target" or "budget" will be considered a profit forecast regardless of language to the contrary unless it is purely aspirational;
- The definition of "quantified financial benefits statements" was amended to cover statements made by an offeror which quantify benefits expected to arise from other measures, or an alternative transaction, if the offer does not succeed;
- Profit forecasts and quantified financial benefits statements published during offer periods should state the "assumptions" on which they are based, and state the "bases of belief" supporting the merger benefits statement, as is currently required. Additionally, the new rule should apply to all quantified financial benefits statements published during offer periods, and the exemption for publication of additional statements for recommended securities exchange offers should be removed;
- The Takeover Panel will no longer apply the reporting regime to profit forecasts published by a securities exchange offeror following active consideration of an offer, but before an approach. In place of this, directors of the offeror will be required to: (i) repeat the forecast and confirm that it remains valid, confirm the accounting basis is consistent with company policy, repeat the assumptions made in the forecast and repeat the basis on which the forecast was compiled; or (ii) confirm the forecast is no longer valid and provide an explanation: or (iii) include a new forecast for the relevant period. This approach will be known as the "directors' confirmations" regime;

- Profit forecasts published before an approach with regard to a possible offer, and any ordinary course profit forecasts published during the offer period, will be subject to the directors' confirmation regime above;
- The Takeover Panel will be able to grant dispensation from the reporting requirements under the current rules for profit forecasts for future financial periods, but the confirmations required by the directors' confirmation regime would be required in either the offer document or offeree board circular;
- If a profit forecast is published for a future financial year for the first time during an offer period, a corresponding profit forecast for the current, and any intervening, financial year will also need to be published;
- The new rule will not apply where a party has published a profit ceiling only or where consideration securities will not represent a material proportion of the offeror's enlarged share capital or value of the offer, on grounds of being disproportionate;
- If any material changes occur in published information or any "new material information" becomes available, the parties are now required to announce this promptly. Also, any changes to information material to relevant documents or announcements are required to be disclosed; and
- The Takeover Panel may require a published document to be sent to offeree company shareholders with details of any material changes to information previously published.

The full text of the Takeover Code Committee's response statement is available at:

http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/RS201201.pdf

ABI Publish Report on Shareholder Engagement

On 25 July 2013, ABI published its report on shareholder engagement and corresponding improvements to corporate governance. The main recommendations from the report are:

- Companies should prioritise the principles of the UK Corporate Governance Code rather than simply complying with its specific provisions;
- The corporate governance section of companies' annual reports should include an introductory statement by the chairman;
- Companies should follow the six criteria ABI set out in its 2012 comply or explain report when explaining deviations from the Corporate Governance Code;
- Time commitments and requirements of non-executive directors should be reviewed with a view to increasing the involvement and role of non-executive directors in transactions; and
- An annual investor relations programme should be established by companies to increase transparency and include the intended schedule and type of meetings which are to be held to discuss corporate governance and stewardship issues.

The full text of the report is available at:

https://www.abi.org.uk/News/News-updates/2013/07/~/media/2492136445D547CD88F36 9756481E14A.ashx

Select Committee Report On Kay Review of UK Equity Market And Long-Term Decision Making

On 25 July 2013, a report was published by the House of Commons Business, Innovation and Skills Committee covering the Kay Review of UK Equity Market and Long-Term Decision Making and the responses of the Government to that review. The report calls for government guidance on targets to encourage voluntary action by investors, and for regulation where necessary to ensure

compliance with the recommendations of the Kay Review. The Government will respond to the Select Committee's report but no deadline has been set for a response. The full text of the report is available at:

http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/603/603.pdf

UKLA Publishes Sixth Primary Market Bulletin

On 30 July 2013, the UK Listing Authority ("UKLA") published its sixth Primary Market Bulletin. The key updates provided in the bulletin were:

- A practice note relating to the eligibility review process has been amended to clarify the availability of an opportunity to discuss eligibility before prospectus submission with the UKLA;
- A practice note relating to block listings has been amended to include guidance as to the number of issuers who may apply for block listings, and the evidence required from investment companies;
- The practice note on periodic financial information and inside information has been amended to highlight the impact of the announcement of preliminary results;
- The practice note on sponsor services has been amended to include certain clarifications relating to the obligation to inform the UKLA of any further information prior to either admission to listing or effective date of transfer; and
- The UKLA is also consulting on a draft Listing Principle 6, which requires companies to deal with the FCA in an open and co-operative manner, and a proposed technical note which sets out when issuers are required to contact the FCA at an early stage of a significant transaction. Factors which can demonstrate whether a transaction is significant are whether the FCA has a role, whether a decision is time critical and whether the FCA has time to disagree with the proposal. The UKLA has provided examples of transactions where early contact should be considered a reverse takeover (the practice note on takeovers has been amended accordingly) and class 1 disposals by issuers in financial distress. The above guidance is of particular importance in light of the £30m fine handed to Prudential by the FCA (formerly the FSA) in March 2013 for failing to deal with the FSA in an open and co-operative manner.

Responses were due on the consultations outlined above on 10 September 2013, and the UKLA will provide an update in its next Primary Market Bulletin. The full text of the sixth Primary Market Bulletin is available at:

http://www.fca.org.uk/static/documents/ukla/primary-market-bulletin-6.pdf

Narrative Reporting: The New UK Strategic Report, Directors' Remuneration Policy and Greenhouse Gas Emissions Reporting

On 1 October 2013, a number of provisions relating to the UK regime of narrative reporting came into force. The new regulations apply to accounting periods ending on or after 1 October 2013 and create three new reporting requirements:

- a new Strategic Report to replace the business review contained in the director's report;
- a directors' remuneration policy; and
- greenhouse gas emissions reporting in the directors' report.

The regime applies to all quoted UK incorporated companies, (*i.e.*, companies listed on EU-regulated markets, NYSE or NASDAQ) and the Strategic Report applies, with lesser content, to non-quoted companies. The principal requirements of the new regime are set out below:

Strategic Report:

- The Strategic Report has been introduced to replace both the business review section of directors' reports and also the summary financial statement options for companies, and its purpose is to help members assess the performance of directors with regard to their duty to promote the success of the company. It must be approved by the board and signed by a director or secretary and provided to the members. The existing exemption for small companies in relation to the business review will also cover the strategic report;
- Quoted companies are no longer under an obligation to disclose information about persons with whom they have contractual or other arrangements which are essential to their business;
- Quoted companies are now required to disclose in the Strategic Report information about: (i) the company's strategy and business model; (ii) human rights issues (and any related policies and their effectiveness); and (iii) gender statistics for directors, senior managers and employees; and
- The Financial Reporting Council is currently consulting on guidance for companies in preparing their Strategic Reports, and the deadline for submissions is 15 November 2013.

Directors' Remuneration Reporting:

- The Directors' Remuneration Report is now required to include a statement by the remuneration committee chairman summarising key decisions on director remuneration and any changes to remuneration which have occurred throughout the year;
- An annual implementation report is still required, detailing how the remuneration policy (see below) has been implemented during the previous year, and is subject to an annual advisory shareholder vote. The implementation report must also include, among other things, a single total figure of remuneration for each director. However, if the advisory vote fails, this will trigger the need for a binding shareholder vote on the directors' remuneration policy at the next AGM;
- A new directors' remuneration policy must be included which sets out in detail the future remuneration policy for directors (including loss of office payments). This policy is subject to a binding shareholder vote, which must occur at least once every three years, and any changes made to the policy will require further shareholder approval. Any payments which are inconsistent with the policy are unenforceable and will be held on trust for the company. In addition, any director who authorised the unlawful payment must indemnify the company for any loss suffered;
- In practice, December-year-end companies will need to obtain approval for their policy at their 2014 AGM; and
- Companies are required as of 1 October 2013 to disclose details of any payment made to a director following loss of office on their website as soon as reasonably practicable after the director's departure.

Greenhouse Gas Emissions Reporting:

- Quoted companies are now required to include in their Director's Report the annual quantity of emissions of all six greenhouse gases resulting from the global activities for which they are responsible and from their purchase of electricity, heat, steam or cooling for their own use;
- The methodologies used to calculate the emissions must be stated, although where it is not practical for the company to obtain the relevant information, it must explain which information has not been included and the reasons behind this; and
- Comparative data from the preceding financial year must be included to allow easy comparisons with previous data.

Earlier discussions on these developments can be found in several of our previous newsletters, including that of July 2013.

The full text of the regulations which have made the above changes is available at:

The Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013

http://www.legislation.gov.uk/uksi/2013/1981/pdfs/uksi_20131981_en.pdf

Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013

http://www.legislation.gov.uk/uksi/2013/1970/pdfs/uksi_20131970_en.pdf

The Enterprise and Regulatory Reform Act 2013

http://www.legislation.gov.uk/ukpga/2013/24

The Enterprise and Regulatory Reform Act 2013 Commencement Order 2013

http://www.legislation.gov.uk/uksi/2013/2227/made

FRC Strategic Review Guidance Consultation

http://www.frc.org.uk/Our-Work/Publications/Accounting-and-Reporting-Policy/Exposure-Draft-Guidance-on-the-Strategic-Report.aspx

FCA Publishes Consultation Paper On Arrangements For Disclosure Of Regulated Information

On 28 August 2013, the FCA published a consultation paper relating to arrangements for the disclosure of regulated information. The consultation paper covered:

- Amendments to the new regulatory regime for Primary Information Providers ("PIPs"), as proposed by an earlier consultation paper, to require notification by a PIP to the FCA and its clients of any disruption of a PIP's ability to disseminate or receive information;
- The enforcement guidance in relation to PIPs will be amended to include the FCA's ability to cancel PIP approval and the relevant factors for making this decision will be set out in the enforcement guidance.

The consultation paper also discussed the definition of a Regulatory Information Service ("RIS") based on the following proposed amendments to the FCA Handbook:

- Highlighting issuers' obligations for the secure and timely release of regulated information under the Transparency Directive;
- Allowing the release of regulated information by using an RIS that is either a PIP approved by the FCA or an incoming Information Society Service ("ISS"), whether or not approved in another EEA member state. Where an ISS is to be used which has not been approved in another EEA member state, additional independent steps will be required to demonstrate that Transparency Directive obligations have been met; and
- An issuer's audit committee, or equivalent body, will be required to provide annual written confirmation that the issuer has systems to ensure that its regulatory communications comply with Transparency Directive requirements.

28 October 2013 is the closing date for response to the consultation, after which the FCA will consider responses and publish new rules in due course to allow them to come into force in early 2014. The full text of the consultation paper is available at:

http://www.fca.org.uk/your-fca/documents/consultation-papers/cp13-08

FCA Publishes Quarterly Consultation Paper

On 6 September 2013, the FCA published it quarterly consultation paper No. 2 (CP 13/9) with (among other things) proposed amendments to the Prospectus Rules and elsewhere in the FCA Handbook. The amendments to the Prospectus Rules include providing guidance on the method and timing requirements for filing a prospectus including the requirement to upload a filed prospectus with the National Storage Mechanism. And secondly, an amendment to clarify that prospectuses must be filed with the FCA either simultaneously with being made to the public or within 24 hours of receipt of the notification;

The deadline for consultation responses regarding the Prospectus Rules was 6 October 2013. The full text of the consultation paper is available at:

http://www.fca.org.uk/static/documents/consultation-papers/cp13-09.pdf

DEVELOPMENTS SPECIFIC TO FINANCIAL INSTITUTIONS

Global Developments

ISDA Publishes the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol and Reporting Guidance Note

On 19 July 2013, ISDA published its 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol and Reporting Guidance Note. The objective of the note is to allow derivatives market participants to simultaneously amend the terms of an agreement covered by the Protocol to reflect certain portfolio reconciliation and dispute resolution obligations imposed by EMIR.

The ISDA Guidance Note is available at:

http://www2.isda.org/functional-areas/protocol-management/open-protocols/

ISDA Standard Amendment Agreement for EMIR Obligations Published

On 20 August 2013, ISDA announced the publication of the ISDA Standard Amendment Agreement – 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Form. The ISDA Standard Amendment Agreement can be used by market participants to comply with the obligations under EMIR on portfolio reconciliation, dispute resolution and disclosure on a bilateral basis.

The ISDA Standard Amendment Agreement is available at:

http://www2.isda.org/emir/

OTC Derivatives Regulators Issue Report to the G20

On 30 August 2013, authorities with responsibility for the regulation of over the counter ("OTC") derivatives markets in Australia, Brazil, the European Union, Hong Kong, Japan, Ontario, Quebec, Singapore, Switzerland and the United States issued a report regarding common understandings to improve the cross-border implementation of OTC derivatives reforms. The report is part of intensified efforts to address and resolve remaining cross-border conflicts before the St. Petersburg Summit, which will take place on 5-6 September 2013.

The report is available at:

http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/odrgreport.pdf

Final Framework for Margin Requirements for Uncleared Derivatives

The Basel Committee on Banking Supervision ("BCBS") and the International Organization of Securities Commissions ("IOSCO") published, on 2 September 2013, the final policy framework for minimum standards for margin requirements for uncleared derivatives. Financial firms and systemically important non-financial entities will be required to exchange initial and variation margin when entering into an uncleared derivative transaction. The standards include methodologies for calculating initial and variation margin and details of the requirements of assets held as collateral. The requirements for margin should be phased in from 1 December 2015.

The final policy framework is available at:

http://www.bis.org/publ/bcbs261.pdf

Guidance on Access to Trade Repository Data

The Committee on Payment and Settlement Systems (CPSS) and IOSCO published, on 12 August, their report on access to trade repository data for OTC derivative transactions. The report provides guidance to trade repositories and authorities for the development of access policies to deal with confidentiality concerns and access constraints. The report should be read in conjunction with the CPSS/IOSCO principles for financial market infrastructures ("PFMIs").

Basel Consultation Paper on Capital Requirements for Bank's Equity Investment in Funds

On 5 July 2013, as part of its workstream to strengthen the oversight and regulation of shadow banking, the BCBS published a consultation paper setting out a proposed framework for a banks' equity investment in funds. The proposed framework applies to banks' equity investments in all types of funds, including off-balance sheet exposures, held in the banking book. The proposed framework is intended to take account of the risk of a fund's underlying investments and of its leverage.

The consultation paper is available at:

http://www.bis.org/publ/bcbs257.pdf

G20 Roadmap on Shadow Banking

On 9 September 2013, the G20 Roadmap towards strengthened oversight and regulation of shadow banking was published (dated 6 September 2013). The roadmap sets out steps to be taken by IOSCO, the Financial Stability Board ("FSB") and the BCBS over the next 2 – 3 years. Key initiatives include (i) measures to enhance transparency and risk monitoring; (ii) recommendations on standards of methodologies for calculating haircuts for non-centrally cleared securities financing transactions; (iii) an information-sharing process for all shadow banking entities; (iv) peer reviews on the implementation of the IOSCO recommendations on money market funds ("MMFs") and incentive alignment regimes; and (v) standards and processes for global data collection and aggregation for repo and securities lending markets.

The G20 Roadmap is available at:

http://en.g20russia.ru/Annex/20130906/782788554.html

FSB Policy Recommendations for Shadow Banking

On 29 August 2013, the FSB published two reports setting out additional policy recommendations to strengthen the oversight and regulation of shadow banking. The first report, entitled "Policy Framework for Addressing Shadow Banking Risks in Lending and Repos", includes proposals to dampen risks and pro-cyclical incentives associated with securities financing transactions such as enhanced transparency, regulation of securities financing, improvements to market structure, methodologies for calculating haircuts on uncleared securities financial transactions and a framework for numerical haircut floors. The second report, entitled "Policy Framework for Strengthening Oversight and Regulation of Shadow Banking Entities", proposes a framework to address risks posed

by shadow banking entities (other than money market funds, which entities are addressed separately in the IOSCO Policy Recommendations for MMFs). The FSB also published a report providing an overview of the policy recommendations on shadow banking which sets out the steps taken to date in specific areas as well as future work planned.

The FSB Report is available at:

http://www.financialstabilityboard.org/publications/r_130829a.pdf

FSB Publishes Guidance on Recovery and Resolution Planning

On 16 July 2013, the FSB published three guidance papers to help authorities and firms to prepare and implement the FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions ("Key Attributes"). The papers are: (i) Guidance on Developing Effective Resolution Strategies; (ii) Guidance on Identification of Critical Functions and Critical Shared Services; and (iii) Guidance on Recovery Triggers and Stress Scenarios. The FSB consulted on draft Guidance during 2012.

The guidance papers are available at:

http://www.financialstabilityboard.org/list/fsb_publications/tid_165/index.htm

FSB Consults on Assessment Methodology for Resolution Regime Compliance

On 28 August 2013, the FSB published for consultation the assessment methodology it proposes to use to assess the compliance of jurisdictions with the Key Attributes. The methodology aims to facilitate objective and consistent assessments of jurisdictions as well as help jurisdictions to implement legislation to comply with the requirements of the Key Attributes. The methodology includes assessment criteria for all sectors, including exchanges, clearing houses and settlement and payment systems.

The consultation paper is available at:

http://www.financialstabilityboard.org/publications/r_130828.pdf

Consultation on Recovery Plans for FMIs

On 12 August 2013, CPSS-IOSCO published a consultation which includes guidance to (i) financial market infrastructures ("FMIs") on how to develop plans that would enable them to recover from threats to their viability or prevent them from providing critical services to their participants; and (ii) authorities responsible with the development and implementation of recovery plans. The report supplements the CPSS-IOSCO PFMIs. The report is accompanied by a cover note that lists specific issues on which the committees seek comments during the public consultation, which ends on 11 October 2013.

The consultation paper is available at:

http://www.bis.org/publ/cpss109.pdf

FSB Consultation on Resolution Regimes for Non-bank Financial Institutions

The FSB is consulting on the application of the Key Attributes to non-bank financial institutions. The consultation document proposes guidance on the application of the Key Attributes for resolution of FMIs and insurers as well as the application of resolution regimes in the context of client assets. In addition, the FSB is also consulting on the sharing of information for resolution purposes between different countries on a high level basis as well as institution specific cross-border cooperation agreements. The consultations end on 15 October 2013.

http://www.financialstabilityboard.org/publications/r_130812a.pdf

BCBS Updated Framework for G-SIBs

On 3 July 2013, the BCBS published an updated framework for assessing global systemically important banks ("G-SIBs") and the higher loss absorbency requirement. The paper includes the phase-in arrangements for these requirements and the disclosures that banks above a certain size are required to make to enable the framework to operate on the basis of publicly available information. Included as an annex is a timetable for the G-SIB regime and the application of the higher loss absorbency requirement, until the point of the first review of the methodology, due in 2017. The initial framework document was published in November 2011.

The updated framework is available at:

http://www.bis.org/publ/bcbs255.pdf

BCBS Discussion Paper on the Regulatory Framework

On 8 July 2013, BCBS published a discussion paper, "The regulatory framework: balancing risk sensitivity, simplicity and comparability". The paper notes the reasons for the reform to the Basel Capital framework and puts forward ideas for further reform. Responses to the paper are invited by 11 October 2013.

The discussion paper is available at:

https://www.bis.org/publ/bcbs258.pdf

BCBS Consults on Disclosure Framework Relating to the Liquidity Coverage Ratio

The BCBS published a consultative document on 19 July 2013 on the disclosure framework for the liquidity coverage ratio ("LCR"). The LCR aims to promote the short-term resilience of the liquidity risk profile of banks by ensuring they have sufficient high-quality liquid assets. The disclosure framework focuses on shaping the disclosure requirements internationally active banks should follow once the LCR is introduced on 1 January 2015.

The consultation paper is available at:

http://www.bis.org/publ/bcbs259.pdf

FSB Consults on Risk Appetite Framework

The FSB has launched a consultation, published on 17 July 2013, on draft Principles for an Effective Risk Appetite Framework. The Principles aim to enhance supervisory oversight of all financial institutions, in particular systemically important financial institutions, and include the main components of an effective risk appetite framework, including a risk appetite statement, quantitative risk limits and clearly defined roles for directors, senior management and business lines.

The consultation paper is available at:

http://www.financialstabilityboard.org/publications/r_130717.pdf

IOSCO Publishes Final Principles for Financial Benchmarks

On 17 July 2013, IOSCO published its final report on Principles for Financial Benchmarks, a framework for benchmarks used in financial markets. The Principles cover governance, benchmark and methodology quality and accountability mechanisms. IOSCO consulted on the Principles in April 2013 following the investigations and enforcement actions for attempted manipulation of major interest rate benchmarks.

The Principles for Financial Benchmarks is available at:

http://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf

IOSCO Report on Supervisory Colleges for CRAs

On 30 July 2013, IOSCO published its final report recommending the establishment of supervisory colleges for internationally active credit rating agencies ("CRAs") and providing preliminary guidelines on how to constitute and operate those colleges. The aim of the CRA colleges is to share information in order to promote a better understanding of the risks faced or posed by an internationally active CRA and how those risks are being addressed.

The report is available at:

http://www.iosco.org/library/pubdocs/pdf/IOSCOPD416.pdf

Joint Forum Consults on Point of Sale Disclosure in the Insurance, Banking and Securities Sectors

On 15 August 2013, The Joint Forum published a consultation on point of sale disclosure in the insurance, banking and securities sectors. The consultation considers whether point of sale disclosures need to be further aligned across sectors and makes a number of recommendations to policymakers and supervisors to assist in the development and modification of their point of sale disclosure regulations. The consultation runs until 18 October 2013.

The consultation is available at:

http://www.bis.org/publ/joint32.pdf

EU Developments

European Commission Roadmap for Shadow Banking Reform

Following the 3 August 2013 announcement of its intention to adopt a communication on shadow banking, the European Commission published a Communication, on 4 September 2013, on shadow banking and addressing new sources of risk in the financial sector. The Communication is a roadmap of the measures the Commission has already taken in the area of shadow banking and proposed future steps. The Commission's actions on shadow banking aim to ensure that financial risks do not move to less highly regulated sectors following the financial regulatory reforms implemented in Europe over the last few years. Future proposals will focus on securities law and the recovery and resolution of CCPs.

The communication is available at:

http://ec.europa.eu/internal_market/finances/docs/shadow-banking/130904_communication_en.pdf

European Parliament Votes in Favour of Single Supervisory Mechanism

On 12 September 2013, the European Parliament adopted legislation which establishes the single supervisory mechanism ("SSM"), the first step towards the European Banking Union. The legislation comprises a (i) regulation which confers specific tasks on the ECB ("SSM Regulation"); and (ii) regulation amending the regulation that established the European Banking Authority ("EBA") (the regulation amending the EBA Regulation). Under the SSM, the ECB will be the prudential supervisor for EU banks in the Eurozone. Member States outside of the Eurozone may opt in to the SSM, resulting in the same shift in supervisory authority. The legislation is accompanied by a draft Inter-Institutional Agreement between the European Parliament and the ECB, which establishes procedures for accountability, access to information, confidentiality, investigations, the adoption of regulations and guidelines by the ECB and the selection of the ECB's supervisory board. The legislation will enter into force following formal approval from the European Council and publication in the Official Journal. The ECB will begin its new supervisory role 12 months after entry into force. The Inter-Institutional Agreement will come into force on the date it is signed or the date of entry into force of the SSM Regulation, whichever is the later.

The SSM Regulation is available at:

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0372+0+DOC+XML+V0//EN&language=EN#BKMD-8

The regulation amending the EBA regulation is available at:

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0371+0+DOC+XML+V0//EN&language=EN#BKMD-5

The Inter-Institutional Agreement is available at:

http://www.ecb.europa.eu/ssm/pdf/130912_IIA_final_draft.pdf

European Commission Publishes Single Resolution Mechanism Proposal

On 10 July 2013, the European Commission published its proposal for the Banking Union's Single Resolution Mechanism ("SRM"). The SRM is a component of the proposed Banking Union which will also include the Single Supervisory Mechanism and the recast directive on Deposit Guarantee Schemes. The Banking Union will apply to all Member States in the Euro area as well as any other Member States that opt in. The proposed SRM will apply the resolution rules set out in the Banking Resolution and Recovery Directive ("BRRD") (expected to be finalised in the European legislative process before the end of the year); however, the resolution authorities and the resolution process will be different. For banks, including banking groups, established in participating Member States, the resolution colleges provided for under the BRRD will be replaced by a Single Resolution Board ("SRB") and national authorities. For banks established in participating and non-participating Member States, the SRB will replace the national resolution authorities of participating Member States in the resolution college. For international banks, support to third country authorities will be as provided for in the BRRD, however, the SRB will have exclusive competency to conclude cooperation agreements on behalf of participating Member States. The resolution process will begin with the ECB, as prudential supervisor, notifying the European Commission, SRB and relevant national authorities that a bank is failing. The European Commission and SRB will decide whether to initiate resolution and the resolution measures applicable. National authorities will execute the resolution according to the resolution measures decided upon. There will also be a Single Resolution Fund, contributed to by all banks in participating Member States, which will only be used if costs cannot be borne by a bank's shareholders and creditors. The European institutions are aiming for the SRM to be implemented by 1 January 2015, alongside the proposed implementation of the BRRD.

The proposal is available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013PC0520:EN:NOT

ESMA Protocol for Notifications of Suspension or Removal of Financial Instruments from Trading

On 8 July 2013, ESMA published a Protocol on the notifications of suspension or removal of instruments from trading under the Markets in Financial Instruments Directive ("MiFID"), dated 4 July 2013. MiFID empowers (i) operators of regulated markets to suspend or remove from trading a financial instrument which no longer complies with its rules unless such action would cause significant damage to the investors' interests or the orderly functioning of the market; and (ii) national competent authorities ("NCAs") to require the suspension or removal of a financial instrument from trading whether on a regulated market or under other trading arrangements. When such action is taken, the market operator must notify the NCA and make a public announcement. The NCA must inform other NCAs. If an NCA takes such action, it must notify other NCAs, who must take similar action unless such action would cause significant damage to the investors' interests or the orderly functioning of the market. The ESMA protocol sets out different categories of trading suspensions, removals and restorations which fall within the ambit of these provisions as well as events that ESMA considers to fall outside the scope of the MiFID powers and notifications. In addition, NCAs should include the reason for the action in their notification to other NCAs.

The Protocol is available at:

http://www.esma.europa.eu/system/files/2013-894_protocol_on_notifications_of_mifid_art_41_suspensions_and_removals.pdf

European Commission Proposes Benchmark Regulation

On 18 September 2013, the European Commission published its proposed legislation for the supervision of benchmarks ("Benchmark Regulation"). The proposed Benchmark Regulation applies to all published benchmarks used to reference a financial instrument traded or admitted to trading on a regulated venue, or a financial contract and benchmarks that measure the performance of an investment fund. There are more detailed requirements for commodity and interest rate benchmarks as well as any benchmark that is in future determined by the Commission to be 'critical'. All benchmark administrators established in the EU will need to obtain authorization through a college of regulators. EU benchmark administrators will need to have governance and control systems in place to deal with conflicts of interest. Benchmark administrators located outside of the EU will need to obtain recognition, which will be subject to equivalence decisions, in order for its benchmarks to be used by any supervised entities in the EU. The proposed Benchmark Regulation also applies to entities that are already subject to EU regulation and supervision and that contribute to benchmarks. All contributors will be subject to codes of conduct established by administrators. The proposed Market Abuse Regulation includes provisions that make the manipulation of benchmarks a market abuse offence subject to fines. The proposed Benchmark Regulation is now subject to the EU legislative process. It is expected that the regulation will apply 12 months after it comes in force.

The proposed Benchmark Regulation is available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0641:FIN:EN:PDF

UK Government Launches Legal Challenge to New EU Rules on Bonus Caps

On 25 September, the UK Government announced that it has lodged a legal challenge with the European Court of Justice on new EU compensation rules contained in the new European capital requirements legislation (made up of the Capital Requirements Regulation ("CRR") and the Capital Requirements Directive ("CRD"), together known as "CRD IV"). The UK Government contends that the provision for a bonus cap under CRD IV will undermine the current pay practices recently introduced which support financial stability. The challenge also raises (i) issues of compatibility of the bonus cap provisions with the EU Treaty; and (ii) issues over the powers of the EBA. Until the case has been decided, the UK is still obliged to implement all of the remuneration provisions in CRD IV.

The announcement is available at:

https://www.gov.uk/government/news/legal-challenge-launched-into-new-rules-on-bankers-pay

EBA, EIOPA and ESMA Publish RTS under Financial Conglomerates Directive

On 29 July 2013, the Joint Committee of three European Supervisory Authorities (EBA, European Insurance and Occupational Pensions Authority ("EIOPA") and ESMA) published draft RTS on the consistent application of calculation methods under the Financial Conglomerates Directive. The draft RTS define the appropriate application of calculation methods for the determination of required capital at the financial conglomerate level.

The draft RTS are available at:

http://www.eba.europa.eu/documents/10180/361408/JC+RTS+2013+01%28Draft+RTS+on+consistent+application+of+Article+6+2_FICOD%29.pdf

ESMA Consults on Draft RTS on Disclosure for Acquisitions of Investment Firms under MiFID

On 8 July 2013, ESMA published a consultation paper on draft RTS on information requirements for the assessment of acquisitions and increases in holdings in investment firms under the MiFID. Member States are required to make publicly available the

information necessary for them to assess a proposed acquisition of an investment firm. Such information must be provided to national authorities at the time of the initial notification of the proposed acquisition. The draft RTS must establish an exhaustive list of information that national authorities will need to assess a proposed acquisition. The draft RTS proposed by ESMA covers information relating to the acquirer, the proposed acquisition, financing of the acquisition and the new group structure and its impact on supervision. ESMA is required to prepare the draft RTS for submission to the European Commission for endorsement by 1 January 2014.

The consultation is available at:

http://www.esma.europa.eu/system/files/2013-918_cp_draft_rts_information_reqs_assessment_acquisitions_20130708.pdf

EBA Publishes Final Draft Technical Standards under CRD IV

The EBA has published several of the final draft technical standards that it is required to produce under CRD IV. The final draft technical standards relate to:

- own funds;
- supervisory reporting;
- credit risk adjustment; and
- close correspondence for own-issued covered bonds.

The final draft technical standards need to be adopted by the European Commission as EU regulations and are subject to the approval of the European Council and European Parliament before becoming directly applicable in the EU.

EBA Consults on Draft RTS under CRD IV

The EBA has further launched consultations on draft technical standards it is required to prepare under CRD IV. These consultations are in addition to those mentioned in our previous quarterly newsletter. The consultations cover the following areas:

- methods for identifying the geographical location of relevant credit exposures;
- the hypothetical capital of a CCP;
- prudent valuation; and
- the credit valuation adjustment risk.

EBA Launches Single Rulebook Q&A

On 4 July 2013, the EBA launched a Q&A toolkit for institutions, supervisors and other stakeholders to submit their questions on CRD IV, related Technical Standards and the EBA Guidelines.

The Q&A toolkit, which is regularly updated, is available at:

http://www.eba.europa.eu/single-rule-book-qa#search

EBA Publishes Recommendation on Preservation of Core Tier 1 Capital

On 22 July, the EBA published a recommendation on the preservation of core Tier 1 capital during the transition to the new CRD IV framework ("Capital Preservation Recommendation"). The Capital Preservation Recommendation recommends that national regulators ensure banks maintain a capital floor in terms of a nominal level of monetary units of core Tier 1 capital. If a bank's capital levels fall below the nominal floor they will be expected to produce credible plans for restoration. The Capital Preservation

Recommendation requires banks to submit their capital plans to national authorities by 29 November 2013. A list of banks to which the recommendation applies is annexed to the Capital Preservation Recommendation.

The Recommendation is available at:

http://www.eba.europa.eu/documents/10180/15953/EBA-Rec-2013-03_Recommendation_on_Capital_Preservation.pdf

EBA Consults on Draft Guidelines on Retail Deposits Subject to Different Outflows for the Purpose of Liquidity Reporting

On 1 August 2013, the EBA launched a consultation on draft Guidelines on Retail Deposits Subject to Different Outflows for the Purpose of Liquidity Reporting. The Guidelines propose to allocate retail deposits subject to different outflows to three different categories, depending on their underlying risk.

The consultation on draft Guidelines is available at:

http://www.eba.europa.eu/documents/10180/365082/EBA-CP-2013_34+%28CP+on+GL+retail+deposits+subject+to+different+outflows%29.pdf

EBA Launches Discussion on Possible Treatments of Unrealised Gains Measured at Fair Value

On 2 August 2013, the EBA published a discussion paper on the possible treatment of unrealised gains of assets and liabilities measured at fair value, other than including them in Common Equity Tier 1 without adjustment under the CRR.

The discussion paper is available at:

http://www.eba.europa.eu/documents/10180/366087/EBA-DP-2013-03+%28DP+Technical+Advice+unrealised+gains%29.pdf

EBA Publishes Second Interim Report on the Regulatory Consistency of Risk Weighted Assets

On 5 August 2013, the EBA published its second interim report on the regulatory consistency of risk weighted assets for credit risk in the banking book. The report details the consistency of risk weighted assets in sovereigns, institutions and large corporate exposures. The aim of this exercise is to identify material differences in risk weighted asset outcomes for portfolios which are specifically challenging for banks due to the limited availability of data.

The EBA's second interim report is available at:

http://www.eba.europa.eu/documents/10180/15947/EBA+Report+-+Interim+results+update+of+the+EBA+review+of+the+consistency+of+risk+weighted+assets.pdf

EBA Register of Credit Institutions

The EBA published, on 13 September 2013, the list of authorised credit institutions in the EU which it is required to publish under the current Capital Requirements Directive CRD III. The list will continue to be published by the EBA under the new CRD IV which will enter into force on 1 January 2014. In addition, from 2014, the list will also refer to entities which do not hold the required initial capital.

The list of authorised credit institutions is available at:

http://www.eba.europa.eu/documents/10180/16160/IPEBAFIR_201303_SORTED.PDF/1eb1b0d7-4ec5-416b-a36a-3b5532cfad63

European Commission Publishes Revised FAQs on CRD IV

The European Commission has published an update to its FAQs on CRD IV, initially published on 21 March 2013. The update, published on 16 July, includes: (i) new information on the role the EBA has in building a single rulebook; (ii) information on

whether the CRR provisions on credit valuation adjustment risk are in line with Basel III; (iii) more information on diversity of board composition and its importance for corporate governance; and (iv) information on measures in CRR that reduce the risks posed by shadow banking.

The revised FAQs are available at:

http://europa.eu/rapid/press-release_MEMO-13-690_en.htm

ESMA Discussion Paper on CRA III Implementation

ESMA published a discussion paper on implementing the latest amendments to the European Regulation on Credit Rating Agencies on 10 July 2013. ESMA is required to prepare three draft RTS: (i) on information on structured finance instruments; (ii) on the European Rating Platform; and (iii) on the fees charged by credit rating agencies to their clients. Comments in response to the discussion paper can be submitted until 10 October 2013.

The discussion paper is available at:

http://www.esma.europa.eu/system/files/2013-891_discussion_paper_on_cra3_implementation.pdf

European Commission's Proposals on Payment Services

On 24 July 2013, the European Commission published proposed legislation on payment services made up of (i) a revised Payment Services Directive ("revised PSD"); and (ii) a Regulation on Multilateral Interchange Fees ("MIFs"). The revised PSD, which will replace the current Payment Services Directive, aims to ensure consumers are better protected against fraud, abuse and payment incidents, increase consumer rights when transfers and money remittances are made outside of Europe and create a level playing field by including payment initiation services within its scope. The Regulation on MIFs proposes to introduce maximum levels of interchange fees for transactions based on consumer debit and credit cards and ban surcharges on these types of cards.

The revised PSD is available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0547:FIN:EN:PDF

The Regulation on MIFs is available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0550:FIN:EN:PDF

AIFMD Comes into Effect

The Alternative Investment Funds Managers Directive ("AIFMD") came into force on 22 July 2013. The provisions of the AIFMD are triggered on any offering or placement of interests in a fund to professional investors in the EEA. This is considered to be "marketing" under the AIFMD. Subject to transitional periods and certain exemptions, from 22 July 2013 any marketing will now trigger disclosure and reporting requirements.

The AIFMD is available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF

ESMA Publishes Guidelines on Key Concepts of the AIFMD

On 13 August 2013, the ESMA published Guidelines on the meaning of "alternative investment fund" or "AIF", as defined in Article 4(1)(a) of AIFMD. These guidelines apply to alternative investment fund managers ("AIFMs") and competent authorities from 13 October 2013.

The Guidelines are available at:

http://www.esma.europa.eu/content/Key-concepts-AIFMD

ESMA Publishes Remuneration Guidelines

On 3 July 2013, ESMA published its Guidelines on sound remuneration policies under the AIFMD. The Guidelines apply to national competent authorities and AIFMs, although only the guidelines on disclosure will apply to non-EU AIFMs which market to AIFs without a passport. The Guidelines will apply to the remuneration policies and practices for AIFMs and their relevant identified staff from 22 July 2103, subject to transitional provisions under the AIFMD. Competent authorities and market participants must make every effort to comply with the Guidelines.

The Guidelines are available at:

http://www.esma.europa.eu/system/files/2013-232_aifmd_guidelines_on_remuneration_-_en.pdf

European Commission Letter and EMSA Opinion on Draft RTS

ESMA published a letter on 18 July 2013 sent to it by the European Commission in which the Commission states that it agrees with all but one of the provisions in the draft RTS to determine the types of AIFMs. Article 1(2)(a) of the draft RTS suggests basing the distinction between open- and closed-end AIF on whether these funds offer redemptions and whether these redemptions are available at least once a year. The Commission questions whether the frequency of redemptions is an acceptable criterion in which to distinguish open- and closed-end AIFs.

The European Commission's letter is available at:

http://www.esma.europa.eu/system/files/ec_letter_to_esma_re_draft_rts_on_types_of_aifmd_4_july_2013.pdf

On 13 August 2013, ESMA published an Opinion on the draft RTS on types of AIFM under AIFMD. The Opinion is in response to the letter from the European Commission to ESMA in July stating that, in the Commission's opinion, the draft RTS proposed by ESMA on types of AIFMs did not fully comply with the AIFMD, because ESMA had based the distinction between open- and close-ended funds on whether the fund offers redemptions and whether the redemptions are available at least once a year. ESMA's Opinion includes revised draft RTS for consideration by the Commission. ESMA considers that the revised draft RTS will address the concerns raised by the Commission as well as retain some of the flexibility which was in the original draft RTS (which took into account existing market practice).

ESMA's opinion is available at:

http://www.esma.europa.eu/system/files/2013-1119_opinion_on_draft_rts_on_types_of_aifms.pdf

ESMA Publishes Opinion on Arrangements for Late Transposition of AIFMD

On 1 August 2013, ESMA published an opinion in which it sets out practical arrangements to address the late transposition of AIFMD in some Member States. The practical arrangements aim to limit the impact of late transposition on industry and investors. The opinion is limited in scope, focusing only on the provision of collective portfolio management services. ESMA is of the opinion that if the AIFMD has been transposed in the home Member State of an AIFM, the regulator in the host Member State of the AIFM may not refuse a valid notification under the AIFMD on the ground that the directive has not yet been transposed into the host Member State's laws. In addition, ESMA considers that AIFMs established in a Member State that has transposed the AIFMD should be able to manage an EU AIF in a Member State where the directive has not been transposed.

ESMA's opinion is available at:

http://www.esma.europa.eu/system/files/2013-1072_opinion_on_practical_arrangements_for_late_transposition_of_aifmd.pdf

European Commission Proposes MMF Regulation

The European Commission published, on 4 September 2013, a proposed regulation on MMF. The proposed MMF regulation covers MMFs domiciled or sold in Europe. The proposed rules include (i) defined levels of daily or weekly liquidity; (ii) labelling of funds

as either a short term MMF or a standard MMF; (iii) capital buffers for constant net asset value funds; (iv) customer profiling policies; and (v) internal credit risk assessments by MMF managers. The proposed MMF regulation will now become subject to the EU legislative process.

The proposed regulation is available at:

http://ec.europa.eu/internal_market/investment/docs/money-market-funds/130904_mmfs-regulation_en.pdf

EBA Publishes Report on Remuneration of Staff at EU Banks

On 15 July 2013, the EBA published a report setting out data on the remuneration of staff at EU banks who received more than Euro 1 million or more in total in 2010 and 2011. The data is aggregated by the EBA on the basis of figures provided by Member State regulators, categorized into different business areas and includes the main elements of remuneration received such as salary, bonus, long-term awards and pension contributions. According to the EBA, the highest figures in 2011 were reported for the UK (2,436 high earners), Germany (170), France (162) and Spain (125). The EBA intends to publish a more detailed report by the end of the year.

The EBA report is available at:

http://www.eba.europa.eu/documents/10180/16145/EBA-Report-High_Earner_results.pdf

EBA Consults on Draft RTS on Classes of Instruments Appropriate for Variable Remuneration

On 29 July 2013, the EBA launched a consultation on draft RTS setting out the classes of instruments that can be used for the purposes of variable remuneration under the CRR. The draft RTS set out requirements to ensure that an institution's credit quality is reflected in the instruments it issues and that they are appropriate for the purpose of variable remuneration. The consultation runs until 29 October 2013.

The consultation paper is available at:

http://www.eba.europa.eu/documents/10180/361860/EBA-CP-2013-32-instruments-for-variable-remuneration.pdf

UK Developments

FCA Statement about Broker-Operated Systems Trading Physically Settled Gas and Power Forwards

On 11 September 2013, the FCA released a statement on broker-operated systems trading physically settled gas and power forwards. The statement notes that there is currently no common view among market participants on the correct characterisation of trading taking place on broker-operated systems offering physically settled gas and power forwards. The new regulatory obligations under EMIR mean that clarity is needed and the FCA is in discussions with brokers about their appropriate classification. The review and implementation of any changes necessary to improve market clarity must be finalised by 16 December 2013, by which time brokers must be able to satisfy the regulator that they have taken all necessary steps to differentiate between their multilateral trading facility ("MTF") and non-MTF services.

The FCA statement is available at:

http://www.fca.org.uk/news/statement-about-broker-operated-systems-trading-physically-settled-gas-and-power-forwards

UK Government Response to Report on Banking Standards

On 8 July 2013, the UK Government published its response to the Parliamentary Commission on Banking Standards ("PCBS") final report 'Changing banking for good'. The Government endorses the principal findings and intends to implement the key recommendations through new legislation, regulatory rules or guidance, and industry-led initiatives. There are some

recommendations that the Government does not agree with and the report sets out how the Government intends to achieve the aims of the PCBS through alternative means. The main recommendations that the Government plans to implement are:

- Introducing a new Senior Persons regime for senior bank staff;
- Introducing new banking standard rules to promote higher standards for all bank staff;
- Introducing a new criminal offence for reckless misconduct for senior bankers;
- Reversing the burden of proof making bank bosses accountable for breaches in their areas of responsibility;
- Amending remuneration rules to allow bonuses to be deferred for up to ten years and enable 100 per cent clawback of bonuses where a bank receives state aid;
- Amending corporate governance rules to ensure firms have the correct systems in place to identify risks and maintain standards on ethics and culture;
- Giving the Prudential Regulation Authority ("PRA") a secondary competition objective to enhance its role in ensuring banking markets are effective and deliver good outcomes for consumers;
- Requesting the new payments regulator, once established, to examine account portability and payment system ownership.

UK Government Consults on Draft Secondary Legislation for Banking Reform

On 17 July 2013, HM Treasury published a consultation paper on proposed secondary legislation under the proposed Banking Reform Bill (which is currently still subject to the UK legislative process). The consultation includes details on the 'location' of the ring-fence, including the scope of the ring-fence, the de minimis exemption from ring-fencing, the prohibitions on ring-fenced banks and the conditions for exemptions. The consultation is open until 9 October 2013.

The HM Treasury consultation paper is available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223566/PU1488_Banking_reform_consultation_-_online-1.pdf

Bank of England Consults on Procedures for Financial Market Infrastructure

The Bank of England ("BoE") published a consultation paper entitled "Proposed statutory statements of procedure in respect of the Bank of England's supervision of financial market infrastructures" on 4 September. Under UK legislation, the BoE is required to publish statements of procedure relating to decisions resulting in statutory notices and the publication of details of the statutory notices. The BoE is consulting on: (i) a proposed statement of procedure on the decision-making framework for giving warning notices and decision notices to recognised clearing houses and qualifying parent undertakings; and (ii) a proposed procedure on the publication of such statutory notice decisions. The consultation should be read in conjunction with the BoE's approach to supervision of financial market infrastructures.

The BoE consultation paper is available at:

http://www.bankofengland.co.uk/financialstability/Documents/fmi/cps.PDF

The BoE approach to supervision of financial market infrastructures is available at:

http://www.bankofengland.co.uk/financialstability/Documents/fmi/fmisupervision.pdf

UK Government Consults on Reporting Requirements under CRD IV

On 20 September 2013, HM Treasury published a consultation paper on the country-by-country reporting requirements under CRD IV. Credit institutions and investment firms are required to disclose their name, the nature of their activities, geographic

location, number of employees and their turnover, on a consolidated basis, by country where they have an establishment from 1 July 2014. Global systemically important institutions are required to disclose, confidentially, to the European Commission their pre-tax profit or loss, taxes paid and public subsidies received. HM Treasury proposes to apply the reporting requirements to all entities headquartered in the UK, UK subsidiaries and branches of institutions established in a third country. Responses to the consultation are due by 18 October 2013. HM Treasury intends to consult in November on draft legislation and guidance.

The HM Treasury consultation paper is available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/244163/PU1562_CBCR_1.pdf

FCA and PRA Consult on Proposed Handbook Changes under CRD IV

On 2 August 2013, the PRA launched a consultation in which it sets out the proposed changes to its Handbook brought about by CRD IV, as well as proposed supervisory statements which intend to give more information on the PRA's approach to certain CRD IV provisions. The proposals in the consultation apply to banks, building societies and PRA supervised investment firms.

On 31 July 2013, the FCA launched a consultation setting out proposed changes needed to its Handbook following the introduction of CRD IV. The firms to which this consultation applies are mainly those investment firms that are currently subject to capital requirements and some firms in the investor sector, such as management companies as defined in the AIFMD. The proposals do not apply to firms authorised by the PRA.

EU Member States are required to implement the requirements of CRD IV by 1 January 2014. The UK Government will be consulting separately on those aspects of the CRD IV that require either new, or amendments to existing, legislation.

The PRA consultation is available at:

http://www.bankofengland.co.uk/pra/Documents/publications/policy/2013/implementingcrdivcp513.pdf

The FCA consultation is available at:

http://www.fca.org.uk/static/documents/consultation-papers/cp13-06.pdf

PRA Statement on Liquidity

The PRA announced, on 28 August 2013, that it would be implementing the June 2013 recommendation of the Financial Policy Committee ("FPC") on the amount of liquidity held by banks and building societies. The new liquidity requirements apply to all major UK banks and building societies that met the 7% core equity capital standard in the recent PRA capital shortfall exercise and will apply until the full EU adoption of the LCR (likely to come into force in 2015).

The PRA's statement is available at:

http://www.bankofengland.co.uk/publications/Pages/news/2013/099.aspx

FSB Completes Peer Review of UK Financial System

The FSB published its peer review of the UK financial system on 10 September 2013. The peer review examined the UK's: (i) macro-prudential policy framework; (ii) micro-prudential supervisory approach; and (iii) supervision and oversight of central counterparties. While noting significant progress in the implementation of reforms, the FSB makes a number of recommendations for consideration by the UK authorities, including: (i) the FPC should build upon the technical expertise of the PRA and FCA on the prudential framework and supervisory practices in identifying and implementing policies to promote financial stability; (ii) the FPC should further develop its relationship with the FCA; (iii) the authorities should clarify the level of detail in the FPC's comply-or-explain recommendations; (iv) the PRA should take measures to assess the skill set of individuals monitoring firms, formalise sign-off of individual firms' risk assessments and supervisory strategies by risk specialists, ensure firms (large and small) are adequately covered and consider designating country risk specialists; (v) the PRA should ensure that supervised firms are aware

of any heightened concerns and accompanying intervention activities; and (vi) the Bank of England should promote the alignment of micro and macro-prudential objectives for CCP supervision and oversight.

http://www.financialstabilityboard.org/publications/r_130910.pdf

FCA on Banks' Control of Financial Crime Risks in Trade Finance

On 2 July 2013, the FCA published the results of its thematic review and a consultation paper on guidance relating to banks' control of financial crime risks in trade finance. The FCA found in its thematic review that firms generally had effective controls to ensure they were not dealing with sanctioned individuals or entities. However, most banks have inadequate systems and controls over dual-use goods and anti-money laundering policies and procedures are not strong enough. The draft guidance, which aims to make clear the regulator's expectations of firms' management of the financial crime risk associated with trade finance, improve the level of compliance across the sector, level the playing field for firms and ultimately lead to a reduction in financial crime, includes examples of what the FCA considers good and poor practices. Responses to the consultation are requested by 4 October 2013.

The results from the thematic review are available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223566/PU1488_Banking_reform_consultation_-_online-1.pdf

The FCA consultation paper is available at:

http://www.fca.org.uk/static/documents/guidance-consultations/gc13-03.pdf

UK Credit Rating Agencies Regulations

On 4 July 2013, the UK Credit Rating Agencies (Civil Liability) Regulations 2013 were published. The Regulations implement the latest amendments to the European Credit Rating Agencies Regulation by defining certain terms, providing for how certain terms will be interpreted and applied under UK law, applying a limitation period for such claims and determining which courts have jurisdiction. The UK Regulations come into effect on 25 July 2013. Article 35a was inserted into the EC Regulation by Regulation (EU) No 462/2013, and provides for the civil liability of credit rating agencies when an agency, either intentionally or with gross negligence, commits any of the infringements listed in Annex III to the EC Regulation.

JMLSG Consults on Proposed Amendments to Money Laundering Guidance

The Joint Money Laundering Steering Group ("JMLSG") is consulting on proposed amendments to its Money Laundering Guidance for the Financial Sector. The consultation is a result of the JMLSG's review of its Guidance. The proposed changes are available in a marked-up format. Responses are invited by 16 September 2013.

FCA Consults on Amending Client Assets Rules

The FCA published, on 12 July 2013, a consultation paper setting out its proposals to amend the rules in its Handbook on holding client assets and money and custody (CASS). The consultation is part of the FCA's Review of CASS following the LBIE and other insolvencies which exposed weaknesses in the regime. The consultation incorporates comments received on its discussion paper issued last year. Key proposals include:

- Amending the client money distribution regime to enable the insolvency practitioner of a firm that has begun insolvency proceedings to distribute client money based on the firm's records (rather than agreed claims of clients);
- Introducing multiple client pools;
- Introducing new disclosure requirements under which firms would need to disclose to clients at least annually the client assets protections provided to them;

- Increasing the scope of mandate rules by requiring firms to establish and maintain adequate records and internal controls for all mandates, not only written ones; and
- Implementing certain aspects of EMIR to allow for porting and amending rules to comply with liquidation of the assets and positions of indirect clients. These requirements apply directly to clearing members and their clients who are acting on behalf of their clients.

Responses to the consultation are due on 11 October 2013, except those relating to EMIR which are due on 12 August 2013. The FCA expects to publish its final rules on EMIR in this regard in September 2013. The final rules for the other areas are expected in the first half of 2014. The FCA's rules may change further depending on the outcome of the Government's current review of the Special Administration Regime for investment firms.

NYSE Euronext Subsidiary to Become New Administrator of LIBOR

On 9 July 2013, the appointment of NYSE Euronext Rate Administration Limited, a subsidiary of NYSE Euronext, as the new administrator for LIBOR was announced. The previous administrator was BBA LIBOR Limited, a subsidiary of the British Bankers Association (BBA). The transition is pending the approval of the FCA and is anticipated to be completed in early 2014. BBA LIBOR Limited will continue as administrator during the transitional period.

LIBOR Code of Conduct Published

On 15 July 2013, BBA Libor Limited, the current administrator of LIBOR, announced that it had published an interim LIBOR Code of Conduct for contributing banks and a related whistleblowing policy. Presumably the Code of Conduct and Whistleblowing policy will be adopted by NYSE Euronext Rates Administration Limited, the newly announced LIBOR administrator, upon transition from BBA Libor Limited. The FCA has confirmed the Code of Conduct as industry guidance.

FCA Annual Anti-money Laundering Report

On 25 July 2013, the FCA published its first annual anti-money laundering report which sets out the regulator's approach to its obligations relating to anti-money laundering and the trends in money laundering that the regulator sees in the firms it regulates. The FCA supervises all firms that are subject to the UK's Money Laundering Regulations 2007.

The Annual Report is available at:

http://www.fca.org.uk/static/documents/anti-money-laundering-report.pdf

FCA Final Guidance for Market Operators

On 23 August 2013, the FCA published final guidance for market operators (operators of recognised investment exchanges and of multilateral trading facilities). The guidance relates to a market operators' oversight of the systems and controls which their member firms operate to comply with the market operators' rules. The FCA emphasises the need for market operators to have effective risk management procedures in place at the time of approving new members and for these procedures to be maintained on an ongoing basis. Market operators, under FCA rules, must also have surveillance arrangements in place to assess potential market abuse. The FCA expects market operators to take the final guidance into account in complying with their regulatory obligations.

AIFMD: Further Legislation Published

On 17 July 2013, the UK Alternative Investment Fund Managers Regulations 2013 (2013 No. 1773) were published, together with an explanatory memorandum and transposition note. The Regulation was introduced to implement the majority of provisions in the AIFMD.

The Alternative Investment Fund Managers (Amendment) Regulations 2013 (SI 2013/1797) were published on 19 July 2013, together with an explanatory memorandum and transposition note. The explanatory memorandum notes that the Regulations relate to the authorisation of non-EEA managers of AIFs, the management and marketing of funds by such managers and the marketing of non-EEA AIFs by UK managers. The Regulations were made on 17 July 2013 and came into force on a range of dates from 22 July.

The Regulations are available at:

http://www.legislation.gov.uk/uksi/2013/1773/contents/made

FCA Consults on Remuneration Guidance

On 6 September 2013, the FCA published its Quarterly Consultation Paper in which it consults on guidance to the remuneration requirements under AIFMD and the corresponding ESMA Guidelines. The FCA proposes to add guidance provisions to the FS Handbook as well as publish non-handbook guidance on this issue. The proposed guidance covers timing of compliance, proportionality and the treatment of payments to partners or members of an AIFM. The consultation closes on 6 November 2013.

Extension of the SRR

On 26 September, HM Treasury published a consultation on the secondary legislation relating to the extension of the special resolution regime ("SRR") to investment firms, UK clearing houses and group companies, together with four draft statutory instruments. The SRR currently includes deposit-taking institutions such as banks and building societies. The Financial Services Act 2012 widened the SRR to include undertakings in the same group as a failing entity, investment firms and CCPs. The draft legislation aims to implement those and related amendments. The consultation closes on 21 November 2013.

The consultation paper is available at:

https://www.gov.uk/government/consultations/secondary-legislation-for-non-bank-resolution-regimes/secondary-legislation-for-non-bank-resolution-regimes

This newsletter is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this publication, you may contact your usual Shearman & Sterling representative or any of the following:

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