

The heavyweight

Comprehensive coverage of this month's
banking and insolvency law

March 2010

Looking forward

Developments scheduled for the months ahead

Date	Item
Spring 2010	The EC will publish a “European Innovation Plan”, which will include “measures to transform the venture capital landscape”.
1 April 2010	Corporation Tax Act 2010 comes into force.
9 April 2010	Replies required to CEBS consultation paper CP37 on the review of its Guidelines on the recognition of External Credit Assessment Institutions.
9 April 2010	Consultation on Cross-sectoral Internal Governance issues by CESR, CEBS and CEIOPS closes.
12 April 2010	The European Parliament’s Economic and Monetary Affairs Committee might vote on AIFM.
19-22 April 2010	Vote by the European Parliament on amendments to the Prospectus Directive.
21 April 2010	Replies required to OFT consultation paper on duty to give information to debtors.
22 April 2010	Replies required to consultation by FSA on plans to reform the PPI market.
27 April 2010	Hearing of European Parliament's Economic Affairs Committee on resolution on policy measures aimed at ensuring safer derivatives markets.
1 May 2010	The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2010 No 1063 come into force.
3 May 2010	There might be talks between the European Parliament, the Council and the European Commission on AIFM.
June 2010	The EC is expected to submit to the European Parliament a report on assignment and subrogation that might result in the amendment of Rome 1.
14-17 June 2010	The European Parliament will hold a plenary sitting on the Capital Requirements Directive 3, AIFM and Financial Supervision.
15 June 2010	Responses required to FSA consultation on changing the rules about recording conversations on mobile phones that would have required to be recorded on landlines.

Date	Item
18 June 2010	The Department for Business, Innovation and Skills consultation on proposed changes to the scheme for registration of company charges closes.
18 June 2010	Replies required to Her Majesty's Treasury's public consultation on the Terrorist Asset-Freezing Bill.
July 2010	Single Customer View – formal verification required.
July 2010	European Market Infrastructure Draft Directive expected.

Table of Contents

Bank accounts.....	7
Financial ombudsman.....	7
Recent banking complaints involving 'set off'.....	7
Personal current accounts.....	7
Unarranged overdrafts	7
Draft Terrorist Asset-Freezing Bill.....	7
Public consultation.....	7
Budget	8
Issues affecting the FS sector	8
Systemic risk, governance & remuneration	8
Retail issues	8
Mortgages	8
Savings	8
Tax issues.....	9
Framework for competition in financial services	9
Mutuals	9
Comment by the BBA	9
Capital markets.....	10
Debt capital markets	10
Extension of the statutory regime for issuer liability	10
Secured lending markets	11
The new rules of the game.....	11
Islamic financial services.....	11
Tahawwut (Hedging) Master Agreement.....	11
Islamic Financial Services Board consults	11
Cards	11
Regulation of credit and store cards	11
Review	11
Competition	12
Scotland's banking, building society and financial services sector.....	12
Next steps for Post Office banking announced.....	13
BBA statement on new financial services to be offered by the Post Office.....	13
Consumer	13
Consumer Credit Directive	13
Implementing regulations	13
OFT publishes irresponsible lending guidance	13
Joint action by FSA, OFT and FOS	14
"Consumer complaints (emerging risks and mass claims)"	14
Retail Distribution Review	14
FSA consultation.....	14
Contract	14
Assignment	14
Rome I Regulation Art 14 review	14
Currency	15
Euros as legal tender	15
Data protection	15
Mobile phones and recording	15
Consultation to change the rules	15
Data Sharing	16
Sharing EU banking information with the US.....	16
"The SWIFT data sharing deal: progress or procrastination"	16

European Commission prepares new negotiations with US on transfer of bank data for counter-terrorism purposes	16
Derivatives	16
Reform	16
Regulating the derivatives markets	16
“The future regulation of derivatives markets: is the EU on the right track?”	17
OTC Derivatives Markets	17
Further Industry Commitments	17
Documentation	17
ACT Borrower's Guide	17
LMA Investment Grade Documents	17
Corporation Tax Act 2010	18
Update references	18
Execution	18
“The execution of deeds by a company: the current position in England and Wales”	18
Energy	18
CRC Energy Efficiency Scheme	18
Financial stability	18
Bank rescue measures and guarantee schemes	18
European Commission overview	19
Cross-border banks	19
Recommendations for strengthening cross-border bank resolution frameworks	19
Investment banks	19
ISDA response to the HM Treasury consultation on a resolution regime for investment banks	19
European Commission	19
Cross-Border Crisis Management in the Banking Sector	19
Sovereign risk shakes markets	20
BIS Quarterly Review	20
Depositor protection	21
“Northern Rock, depositors and deposit insurance coverage: some critical reflections”	21
Financial Risk Outlook 2010 and Digests	21
Treasury Select Committee	21
TSC hearing - too big to fail	21
Committee on the Global Financial System	22
Report on lessons from funding market disruptions	22
Ensuring long-term stability for building societies	22
Building Society Capital and related issues: March 2010 a discussion paper	22
Financing	22
LMA	22
Par/distressed trading: Comparison Table	22
Venture Capital	23
Cross-border venture capital in the European Union	23
Fraud	23
FSA Fighting mortgage fraud	23
Information From Lenders	23
Money laundering	23
Controls in overseas jurisdictions	23
Money laundering vulnerabilities of Free Trade Zones	24
Remedies against banks	24
“The interrelated liability in equity of financial institutions used in the furtherance of fraud: three bases for liability in equity”	24
Insolvency	24
Centre of Main Interests	24
Case upholds <i>Eurofoods</i>	24
Lehmans	25
FSA Statement to the US bankruptcy court examiner	25
UNCITRAL	25
Practice Guide on Cross-Border Insolvency Cooperation	25
Amending insolvency law	25

The Insolvency (Amendment) Rules 2010 No 686.....	25
The Insolvency (Amendment) (No. 2) Rules 2010 No 734	26
Insolvency (Scotland) Amendment Rules 2010	26
MVL to compulsory winding up.....	26
“Converting an MVL to a compulsory winding up on just and equitable grounds”	26
Insurance	26
Payment Protection Insurance	26
The assessment and redress of PPI complaints.....	26
New standard forms for all PPI complaints.....	27
Mutuals	27
Industrial and Provident Societies are no more	27
Proposals for change in the Budget.....	27
Use of derivatives by mutual funds	27
Lending.....	28
Lending to Individuals	28
January 2010.....	28
Breach of confidentiality agreement case.....	28
Remedies	28
Litigation.....	29
Class actions.....	29
“UK Financial Services Bill ‘class action’”	29
Constructive trustees	29
Payment under mistake of fact	29
Partnerships	29
LLPs strike off, dissolution and restoration	29
Payment systems	30
Cheques.....	30
Submission to the Treasury Select Committee.....	30
Comment.....	31
The end of cheques?	31
Payment Services.....	31
Your questions on PSD.....	31
Banking alternatives in the wake of the banking crisis	31
The Banking Act 2009 (Inter-Bank Payment Systems) (Disclosure and Publication of Specified Information)	
Regulations	32
Powers of attorney	32
Regulation	32
Client Assets Sourcebook.....	32
FSA consultation.....	32
Liquidity.....	33
Liquidity calibration statement	33
MiFID	33
Protocol on market transparency calculations	33
Rating agencies.....	34
EU regulation Q&A	34
Recognition of External Credit Assessment Institutions	34
Reform	34
UK financial regulation - after the crisis.....	34
Single Customer View.....	35
Table of verification requirements.....	35
Security.....	35
Mortgages	35
Responses to consultation on extending FSA mortgage regulation.....	35
Registration of charges (companies and LLPs).....	36
Consultation	36

Bank accounts

Financial ombudsman

Recent banking complaints involving 'set off'

The Financial Ombudsman has included a piece in its recent newsletter on trends in complaints about set off and comments the complaints tend to centre on whether the bank acted fairly in the way it used the right of set off. It comments on the application in retail banking since 1 November 2009 of the FSA's conduct of business regime that requires banks to provide a service which is prompt, efficient and fair to the customer. It also comments the Lending Standards Board has also recently drawn attention to the importance of using set off fairly. The Financial Ombudsman says that when considering complaints about set off, they will look at the period leading up to the set off to see what discussion the bank had with its customer about repaying the outstanding debt and, as usual, provides illustrative case studies.

<http://www.financial-ombudsman.org.uk/publications/ombudsman-news/84/84-banking-complaints-involving-setoff.htm>

Personal current accounts

Unarranged overdrafts

This report sets out the OFT's follow-up work on charges for unarranged overdrafts since the publication of its market study, *Personal current accounts in the UK*, in July 2008. It describes the work undertaken by the OFT to address its outstanding concerns around unarranged overdrafts in order to improve the operation of the market. It announces specific initiatives agreed with PCA providers to address concerns about control and responsibility, and outlines the significant changes in the market that will help lead to a better outcome for consumers.

http://www.offt.gov.uk/shared_offt/personal-current-accounts/oft1216.pdf

OFT1216: OFT, March 2010

BBA statement on OFT report on personal current accounts.

<http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=145&a=17437>

BBA, 16/03/2010

Draft Terrorist Asset-Freezing Bill

Public consultation

HMT has launched a public consultation on the Terrorist Asset-Freezing Bill, which was published in draft in February 2010 (the text of the Bill and explanatory notes appear in an annex in this document). The

consultation document sets out the Government's approach to terrorist asset freezing and its proposals for more permanent terrorist asset freezing legislation. Responses are required by 18 June 2010.

http://www.hm-treasury.gov.uk/d/consult_terrorist_assetfreezing_bill.pdf

Budget

Issues affecting the FS sector

Systemic risk, governance & remuneration

The Budget publishes principles to guide international work on a systemic risk tax.

The Government will formally consult on draft regulations to require enhanced disclosure of remuneration in the financial services sector, and will consider whether the tools available to shareholders to effectively control executive remuneration need to be strengthened, including early approval of the terms under which employees are remunerated.

The Government is to consider to what extent financial services firms' staff targets and incentives lead to poor outcomes for consumers and employees and how they can be reformed.

Retail issues

The Government will introduce a new right to open a basic bank account; increase the contribution made by the banks to the community lending sector. The Government "is determined to secure greater transparency in the coverage of retail banking services. It is exploring with the FSA the best way to ensure that the banks provide public information about the geographical distribution of banking services to personal and small business customers".

Mortgages

The Government intends to transfer the regulation of second charge mortgage lending to the FSA. HMRC will open discussions with mortgage lenders on the formal introduction of an income verification service for mortgage lenders.

Savings

From April 2011, and over the course of the next Parliament, ISA limits will be indexed annually in line with the RPI. It intends to consult on allowing AIM shares to be eligible as a tax-advantaged investment for retail savers. The first Saving Gateway accounts will be available in July 2010, and that Lloyds Banking Group, the Post Office and RBS intend to offer Saving Gateway accounts in 2010. The Government also expects that a significant number of credit unions will offer the accounts, and is continuing to discuss the Saving Gateway with other potential providers. The Government also intends to explore options for

widening access to matched savings accounts, with the intention of introducing additional support by the end of the next Parliament.

Tax issues

The Government has announced a discussion document on a principles-based approach to tackle avoidance schemes arising from the differing tax treatments of financial products within a group of companies and various measures to combat tax avoidance. It will introduce a power to enable the overhedging/underhedging provisions announced in the 2009 Pre-Budget Report to be extended in the case of banks and other financial traders to instruments other than loans and derivatives. Further to press speculation, it is confirmed that the Government will legislate to ensure that those who fail to declare income and gains from jurisdictions that do not exchange information automatically with the UK will face tougher penalties of up to 200% of the tax due. HMRC will also look further at what information it needs to collect on offshore assets, including offshore bank accounts.

Framework for competition in financial services

Current work on this is discussed in the Budget report, noting "through the divestments from LBG and RBS, and the exit of the Northern Rock bank business from the public sector, competition and diversity in the marketplace will increase substantially".

Mutuals

The proposals on these are noted under "Mutuals" below alongside other proposals affecting Mutuals and actual changes to the law affecting Industrial & Provident Societies.

http://www.hm-treasury.gov.uk/d/budget2010_chapter3.pdf

http://www.hm-treasury.gov.uk/d/budget2010_chapter5.pdf

<http://www.hmrc.gov.uk/budget2010/enforcement.htm> (for further details on tax issues)

Comment by the BBA

<http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=145&a=17470>

BBA, 24/03/2010

Capital markets

A consultative paper by the Bank of England

Extending eligible collateral in the Discount Window Facility and information transparency for asset-backed securitisations

This Bank of England consultation seeks views on broadening the range of collateral eligible in the Bank's Discount Window Facility, where the Bank has specific proposals to extend eligible collateral to include loan portfolios and the Bank's initiative to require greater transparency in relation to structured products as part of the eligibility criteria for instruments accepted in its operations.

<http://www.bankofengland.co.uk/markets/money/publications/condocmar10.pdf>

Bank of England, March 2010

Debt capital markets

Extension of the statutory regime for issuer liability

HM Treasury has published its response to the feedback received on its consultation (July 2008) on proposals to extend the issuer liability regime in section 90A of the Financial Services and Markets Act 2000.

It has published the final draft of The Financial Services and Markets Act 2000 (Liability of Issuers) Regulations 2010 (Regulations). Changes to the regime:

- Liability of issuers to persons disposing of or continuing to hold securities, in addition to those acquiring securities.
- Liability for dishonestly delaying the publication of information
- Extending the regime to cover all information published by (or the availability of which is announced by) the issuer by means of a recognised information service (or other authorised means when such a service is unavailable).

The Regulations provide that the new regime will apply in relation to information first published on or after 1 October 2010.

9 March 2010

Secured lending markets

The new rules of the game

This article comments the past year has been an interesting year for the secured lending markets in Europe, with both the securitisation and covered bond markets beginning the year in a state of unprecedented dislocation. The author examines the future of the secured lending markets in Europe.

G Davies: Int Sec Re, 12.09, 13 10.10.034

Islamic financial services

Tahawwut (Hedging) Master Agreement

The International Islamic Financial Market (IIFM) and the International Swaps and Derivatives Association (ISDA) have launched a Tahawwut (Hedging) Master Agreement that is the first standard contract documentation for transactions in Islamic derivatives, commodity murabaha-based profit-rate and currency swaps. It is the first financial industry framework document applicable to all jurisdictions where Islamic finance is practiced.

www.isda.org

ISDA press release 1 March 2010

Islamic Financial Services Board consults

In connection with the above, the Islamic Financial Services Board published for consultation draft guidance notes on the following:

- Risk management and capital adequacy standards for commodity murabaha transactions.
- The practice of smoothing the profits payout to investment account holders.

1 March 2010

Cards

Regulation of credit and store cards

Review

The Government has published its response to the earlier consultation with a "joint commitment" by the Government and card companies.

It sets out five new consumer rights:

- right to repay (consumers' repayments will always be put against the highest rate debt first - for consumers opening new accounts the minimum payment will always cover at least interest, fees and charges, plus 1% of the principal to encourage better repayment practice);
- right to control (consumers will have the right to choose not to receive credit limit increases in future and the right to reduce their limit at any time and better automated payment options);
- right to reject (consumers will be given more time to reject increases in their interest rate or their credit limit);
- right to information (consumers at risk of financial difficulties will be given guidance on the consequences of paying back too little; and
- all consumers will be given clear information on increases in their interest rate or their credit limit (including the right to reject) and right to compare (consumers will have an annual statement that allows for easy cost comparison with other providers).

In addition, consumers who are at risk of financial difficulties will be protected through a ban on increases in their credit limit as well as the ban on increases in their interest rate, and card companies will work with debt advice agencies to agree new ways they will provide targeted support to consumers at risk to help improve their situation before they are in too deep.

The Government and the card companies have agreed that these will come into effect by the end of 2010.

<http://www.bis.gov.uk/news/features/2010/3/credit-cards-consultation-response>

Competition

Scotland's banking, building society and financial services sector

This report by the Economy, Energy and Tourism Committee calls on the Office of Fair Trading to investigate the level of competition in banking in Scotland, focusing on personal accounts, mortgages and business banking services. It also calls on the Scottish Government to develop a more detailed vision for the sustainable growth of the financial sector in Scotland; and recommends the reorganisation of the Financial Services Advisory Board to establish a body which is more representative and includes other businesses and consumers.

<http://www.scottish.parliament.uk/s3/committees/eet/reports-10/eer10-03-vol01.htm>

SP Paper No.405 (Session 3): Scottish Parliament Economy, Energy and Tourism Committee, March 2010

Next steps for Post Office banking announced

The government have announced a major expansion of the financial services offered by the Post Office, “in a drive to put banking back into the heart of communities and making the Post Office network of 11,500 branches more sustainable.” He also announced £180m of new funding for the Post Office.

<http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=412768&NewsAreaID=2>

BIS, 29/03/2010

BBA statement on new financial services to be offered by the Post Office.

<http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=145&a=17484>

BBA, 29/03/2010

Consumer

Consumer Credit Directive

Implementing regulations

It has been announced that regulations implementing the Consumer Credit Directive (2008/48/EC) have been laid before Parliament. Agreements signed after 1 February 2010 must comply with the new legislation. This is to allow UK lenders a transitional period during which to make necessary changes to comply with the new regulations, but lenders can start to comply with the legislation from 30 April 2010. The regulations will work in conjunction with the Office of Fair Trading’s “Irresponsible lending guidance” for lenders (see below).

<http://www.berr.gov.uk/Policies/consumer-issues/consumer-credit-and-debt/consumer-credit-regulation/ec-consumer-credit-directive>

OFT publishes irresponsible lending guidance

The Office of Fair Trading has published the final version of its irresponsible lending guidance for creditors. Publication of the guidance follows consultation in July 2009.

The OFT aimed to make clear to creditors and consumers the kind of behaviour that the OFT considers irresponsible lending practices under section 25 of the Consumer Credit Act 1974 (CCA). It covers each stage of the lending process, from the pre-contract stage of advertising credit through to the handling of arrears and default on agreements. Some provisions of the guidance will not be effective until 1 January 2011 or 1 February 2011. The main reason for this delay is due to implementation of the Consumer Credit Directive (2008/48/EC). The guidance will be reviewed.

OFT 31 March 2010

Joint action by FSA, OFT and FOS

"Consumer complaints (emerging risks and mass claims)"

Against the background of HM Treasury's White Paper, "Reforming Financial Markets", (July 2009) which called for improvements to the processes for consumer complaints and redress in the financial services sector, the FSA have, with the Office of Fair Trading, and the Financial Ombudsman Service, published a discussion paper "Consumer complaints (emerging risks and mass claims)" (DP 10/1).

The FSA/OFT/FOS propose the creation of a coordination committee of FSA, OFT and FOS executives to coordinate analysis of new and emerging risks and to decide whether such risks should be addressed through regulatory action or through consumer complaints.

This is intended to be an improvement of the existing "wider implications" process.

11 March 2010

Retail Distribution Review

FSA consultation

The Financial Services Consumer Panel has responded to the FSA's December 2009 consultation (CP09/31) on delivering the Retail Distribution Review (RDR).

http://www.fs-cp.org.uk/publications/pdf/cp0931_response.pdf

FSCP, March 2010

Contract

Assignment

Rome I Regulation Art 14 review

FMLC comments on a Ministry of Justice Discussion Paper concerned with the legal position of third parties in cases where a contractual claim has been assigned to another party and, in particular, the effectiveness of an assignment against third parties and the priority of the assigned claim over the rights of third parties. It is noted that this is in the context of a report that the EC is expected to submit to the European Parliament by June 2010 on assignment and subrogation, which FMLC believes is likely to be accompanied by a proposal to amend the Rome I Regulation.

<http://www.fmlc.org/papers/Issue137March10.pdf>

FMLC Issue 137 - EC review of Article 14: Assignment

Currency

Euros as legal tender

Commission Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:083:0070:0071:EN:PDF>

OJ 2010, L83/70

Data protection

Mobile phones and recording

Consultation to change the rules

The FSA proposes to introduce a rule requiring firms to take reasonable steps to prevent employees or contractors from using “private communication equipment” (mobile telephone or other mobile handheld electronic communication devices) which may not be recorded due to privacy laws, to make “relevant” communications. Should a decision be taken to remove the exemption, the FSA would allow a sufficient transition period for firms to make the necessary changes and anticipates a transition period of a year from the time a decision is taken. It does not expect this to happen until Q4 2010.

In March 2008, FSA published rules in PS08/1 on recording voice conversations and electronic communications. These rules became effective from March 2009. Mobile phones and mobile communications (except emails) were excluded from these rules. Their exclusion was primarily based on concerns that the technology to capture these communications was insufficiently developed. However, FSA stated in PS08/1 that it would review this exclusion towards the end of 2009. As part of this review it has met with technology suppliers, trade associations and economic consultants to test the feasibility (both from a technology and cost perspective) of applying a taping requirement to mobile phones.

This CP seeks feedback on a proposal to remove the exemption for relevant communications (except emails) “...made with, sent from or received on a mobile telephone or other mobile handheld electronic communication device”. Removing this exemption would require firms to tape relevant communications on mobile phones issued by the firms for business use.

Responses are required by 15 June 2010.

http://www.fsa.gov.uk/pubs/cp/cp10_07.pdf

Data Sharing

Sharing EU banking information with the US

“The SWIFT data sharing deal: progress or procrastination”

This article describes how the Society for Worldwide Interbank Financial Telecommunication (SWIFT) made negative headlines when it was revealed the organisation shared sensitive EU banking information with US authorities, without having informed the EU Commission and other relevant institutions. The authors discuss recent developments and examine the EU-US data sharing agreement.

V Bange & L Hooper: E-finance & payments law & policy, 02.10, 14 10.10.031

European Commission prepares new negotiations with US on transfer of bank data for counter-terrorism purposes

The Commission has adopted a draft mandate for negotiating bank data transfers with the United States government under the Terrorist Financing Tracking Programme. The Commission wants to complete an agreement this summer to limit gaps in security.

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/348&format=HTML&aged=0&language=EN&guiLanguage=en>

CEC, 24/03/2010

Derivatives

Reform

Regulating the derivatives markets

The European Parliament's Economic Affairs Committee has discussed the first draft of a resolution on policy measures aimed at ensuring safer derivatives markets. It argues that the price of these products has been undervalued due to underestimated risks; it advocates more independence of central clearing houses from their users and says they should not compete with each other on risk assessment. It concludes that "although international regulation of this area would be the ideal, the existence of different viewpoints on the global stage means that the EU should also be prepared to go it alone". MEPs must present their amendments by 24 March 2010 and a hearing will be held on 27 April. The vote in committee on the draft resolution will take place on 4 May.

http://www.europarl.europa.eu/news/expert/infopress_page/042-70068-064-03-10-907-20100305IPR70067-05-03-2010-2010-false/default_en.htm

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-438.493+01+DOC+PDF+V0//EN&language=EN>

“The future regulation of derivatives markets: is the EU on the right track?”

HoL EU Select Committee - Sub-Committee A

This report examines the EC's Communications on "Ensuring efficient, safe and sound derivatives markets". Overall, it welcomes the "apparent direction of the EC's proposals, but notes that it intends to return to the subject in the next Parliament.

<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/93/93.pdf>

OTC Derivatives Markets

Further Industry Commitments

ISDA have submitted a letter to global supervisors jointly with market participants and industry associations. In a press release, ISDA point out the letter is the sixth in a series that publicly details how the industry will work to further strengthen the robustness of the OTC derivatives market infrastructure, improve transparency and build a more resilient risk management framework. The letter details commitments regarding central clearing, transparency, standardization, operational efficiency targets, and collateral:

ISDA 1 March 2010

Documentation

ACT Borrower's Guide

LMA Investment Grade Documents

The “ACT Borrower's Guide to the LMA Investment Grade Documents” is published by the Association of Corporate Treasurers for corporate borrowers and has been updated. The full text is only available to ACT members but here is a general description of it on the occasion of its revision. It explains the LMA investment grade loan facility documentation with particular emphasis on the advantages and disadvantages for borrowers and points for negotiation. The Guide is in three parts:

- Part I is an overview including the amendments made to the investment grade agreements in 2009 and the market conditions provisions of 2009
- Part II is a commentary on the provisions of the Agreement.
- Part III covers some of the LMA ancillary documentation, including the Confidentiality Letters.

<http://www.treasurers.org/loandocumentation/investmentgrade>

Corporation Tax Act 2010

Update references

The Act rewrites some corporation tax legislation in the Income and Corporation Taxes Act 1988 and other legislation. It doesn't change the law but if a draft document carries a reference to ICTA, it had better be updated to reflect the rewritten legislation.

The Act received Royal Assent on 3 March 2010 and will come into force on 1 April 2010.

Execution

“The execution of deeds by a company: the current position in England and Wales”

This article sets out the law on the execution of deeds by companies. It discusses how to ascertain that an individual has the proper authority to execute a deed on a company's behalf.

P Gilmour: [2010] 31(1) Co Law, 3 09.51.077

Energy

CRC Energy Efficiency Scheme

The CRC Energy Efficiency Scheme comes into force on 1 April 2010. The first annual reporting year and first footprint year for the CRC begins on this dates. CRC participants will need to:

- keep an accurate record of energy use to produce a comprehensive report at the end of the year (a Footprint Report)
- compile an evidence pack which includes all data used to produce the Footprint Report.

This first year is a reporting only year so CRC participants do not need to buy allowances now, but accurate monitoring now should assist participants assess the number of allowances they might need in April 2011.

The Scheme might affect the financial viability of borrowers and the value of secured assets.

For more information, including a guide to qualification for CRC, see:

<http://www.law-now.com/law-now/2009/crcenergyefficiencyschemeapr2010.htm>

Financial stability

Bank rescue measures and guarantee schemes

European Commission overview

The European Commission has updated its table summarising the rescue measures for financial institutions, including guarantees and recapitalisation measures which have been put in place by Member States at a national level to cope with the global financial and economic crisis. The table is clear and well set out and includes links to relevant Commission communications providing guidance to Member States and decisions adopted by the Commission in 2008, 2009 and 2010 under EC Treaty state aid rules in relation to the various national support packages. The updated version of the table is dated 26 February 2010.

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/52&format=HTML&aged=0&language=EN&guiLanguage=en>

26 February 2010

Cross-border banks

Recommendations for strengthening cross-border bank resolution frameworks

BIS final Report and Recommendations of the Cross-border Bank Resolution Group.

<http://www.bis.org/press/p100318.htm>

BIS, 18/03/2010

Investment banks

ISDA response to the HM Treasury consultation on a resolution regime for investment banks

HM Treasury consulted on a resolution (recovery or orderly wind-up) regime for investment banks (http://www.hm-treasury.gov.uk/d/consult_investmentbank161209.pdf). ISDA's reply focuses on Chapter 7 of the consultation document "*Managing complex creditor positions*". This consultation marks the start of further discussions to be conducted by HMT over the coming months.

http://www.isda.org/uploadfiles/_docs/UK_ISDA_response_HMT_investment_firm_consultation_Mar10.pdf

European Commission

Cross-Border Crisis Management in the Banking Sector

ISDA has submitted its response to the European Commission communication on cross-border crisis management in the banking sector.

http://www.isda.org/speeches/pdf/EU_ISDAResponse_to_EU_Commission_Communication_CrossBorderCrisisMgmt_Jan10.pdf

http://ec.europa.eu/internal_market/bank/crisis_management/index_en.htm (original communication of 20 October 2009).

The Commission has published an overview of the results of the public consultation. Chapter 13 of the document is of particular interest from the perspective of financial contracts:

http://ec.europa.eu/internal_market/consultations/docs/2009/banking_crisis_management/replies_summary_en.pdf

ISDA 20 January 2010

Sovereign risk shakes markets

BIS Quarterly Review

The BIS Quarterly Review for March 2010 gives an overview of recent developments in financial markets. It attributes the fall in asset prices between mid-January and mid-February to, among other factors, the unevenness of the global economic recovery and concerns about sovereign credit risk in the light of large fiscal deficits.

<http://www.bis.org/press/p100301.htm>

BIS, 01/03/2010

Depositor protection

“Northern Rock, depositors and deposit insurance coverage: some critical reflections”

This article reviews the problems surrounding the Northern Rock episode and the response of the authorities, leading to changes to depositor protection arrangements in the UK. It re-examines the “legal underpinnings” of the bank and unsecured creditor relationship. Attention is focused on the status of depositor creditors and the obligations of banks to them.

D Singh & J R LaBrosse: JBL, issue 2.10, 5510.09.007

Financial Risk Outlook 2010 and Digests

Macroeconomic background and outlook looks at how fiscal and monetary policy support has limited the scale and duration of the global recession, and the future impact of its removal; Financial Stability and Prudential Risks and Issues highlights the importance of effectively managing prudential and financial stability risks for all stakeholders in the financial system, including a discussion of the new regulatory frameworks being developed to strengthen firms’ capital and liquidity management under stressed conditions and FSA’s updated stress test; Market Risks and Issues explores risks derived directly from the crisis and other ongoing risks to which regulators and market participants need to respond; Retail Conduct Risks and Issues identifies retail conduct of business risks, including some which “are rooted in enduring features of retail financial services markets: such as business models that cross subsidise loss-making core products and very high margin products”.

In addition, FSA has published “digests”:

http://www.fsa.gov.uk/pubs/plan/sdg_am.pdf (Asset Management)

http://www.fsa.gov.uk/pubs/plan/sdg_bnkg.pdf (Banking)

http://www.fsa.gov.uk/pubs/plan/sdg_ins.pdf (Insurance)

http://www.fsa.gov.uk/pubs/plan/sdg_ri.pdf (Retail intermediaries)

http://www.fsa.gov.uk/pubs/plan/financial_risk_outlook_2010.pdf

FSA, March 2010

Treasury Select Committee

TSC hearing - too big to fail

The FSA published “opening remarks” by Adair Turner before his appearance at a TSC hearing on 2 March 2010. He commented, “If the big UK banks which needed to be rescued in autumn 2008 had been multiple smaller banks, we might still have had just as much over exuberant lending to commercial real estate developers, funded by risky short-term wholesale deposits. Tighter capital and liquidity requirements on all banks, and new counter cyclical macro-prudential tools which constrain credit supply in the upswing, may be even more important than fixing the too-big-to-fail problem”.

For the full remarks:

<http://www.fsa.gov.uk/pages/Library/Communication/Statements/2010/hearing.shtml>

Committee on the Global Financial System

Report on lessons from funding market disruptions

The Committee on the Global Financial System has released a report entitled "The functioning and resilience of cross-border funding markets" prepared by a joint Study Group of the CGFS and the Markets Committee. The Group was chaired by Guy Debelle of the Reserve Bank of Australia.

<http://www.bis.org/press/p100325.htm>

BIS, 25/03/2010

Ensuring long-term stability for building societies

Building Society Capital and related issues: March 2010 a discussion paper

HM Treasury has published this discussion paper on building society capital and related issues.

The Government announced in its July 2009 White Paper, Reforming Financial Markets, the establishment of an expert group to advise on the strategic issues facing building societies, including particular challenges such as access to capital and funding (see Practice note, Reforming financial markets: the Government's White Paper). The group looked at four main workstreams: corporate governance, shared operational services, pooled funding and capital. The Government gave an update on the expert group's progress in its 2009 Pre-Budget Report and Budget 2010.

The discussion paper reflects on some of the challenges considered by the expert group in relation to capital issues and explores some of the potential ways forward. In publishing it, the Government is seeking the views of building societies, investors, members and other interested parties on options for securing the long term stability and growth of the building society sector.

http://www.hm-treasury.gov.uk/d/consult_buildingsoc_capital.pdf

HM Treasury, March 2010

Financing

LMA

Par/distressed trading: Comparison Table

A Comparison Table has been published by the LMA that identifies the key differences between

- the LMA Standard Terms and Conditions for combined par and distressed trade transactions;

- the LSTA Standard Terms and Conditions for distressed trade confirmations; and
- the LSTA Standard Terms and Conditions for par/near par trade confirmations

LMA website

Venture Capital

Cross-border venture capital in the European Union

This report by the EC provides a summary of the policy work in the period from 2005 to 2009 on removing obstacles to cross-border venture capital. The Commission has joined forces with the Member States to help create cross-border venture capital funds, stimulate cross-border operations and to work towards a more integrated European venture capital market. No significant results have been achieved yet but the Commission will continue the work. In spring 2010, it intends to publish a European Innovation Plan, which will include “measures to transform the venture capital landscape”.

http://ec.europa.eu/enterprise/newsroom/cf/document.cfm?action=display&doc_id=5646&userservice_id=1&request.id=0

European Commission, February 2010

Fraud

FSA Fighting mortgage fraud

Information From Lenders

This FSA webpage gives more detail on its Information From Lenders scheme. It includes links to the reporting documents firms can use to tell FSA about suspected fraud as well as a paragraph entitled “What we expect from lenders on mortgage fraud”.

http://www.fsa.gov.uk/pages/Doing/Regulated/supervise/mortgage_fraud.shtml

Money laundering

Controls in overseas jurisdictions

This notice advises on risks posed by unsatisfactory money laundering controls in a number of jurisdictions.

http://www.hm-treasury.gov.uk/d/press_24_10.pdf

HM Treasury, March 2010

Money laundering vulnerabilities of Free Trade Zones

This report aims to understand the size, scope, definition and role of Free Trade Zones worldwide and their role in the global economy. It identifies the money laundering and terrorist financing threats and vulnerabilities associated with Free Trade Zones; identifies the methods used to move and launder the proceeds the crime and/or finance terrorism using Free Trade Zones and suggests areas for further consideration.

<http://www.fatf-gafi.org/dataoecd/45/47/44888058.pdf>

Remedies against banks

“The interrelated liability in equity of financial institutions used in the furtherance of fraud: three bases for liability in equity”

This article analyses three equitable bases for a claim by a victim of fraud against a financial institution used in furtherance of the fraud:

- (1) a proprietary claim against the fraudster's assets held by the institution;
- (2) a personal, monetary claim against the institution itself in certain circumstances; and
- (3) a personal claim against the institution for its own dishonest assistance to the fraud.

It reviews case law defining the type of knowledge or conduct that would make it unconscionable for an institution to resist a claim and defences that could be available to the institution, including a limitation defence.

D Hayton: [2010] 31(4) Co Law 103 10.11.101

Insolvency

Centre of Main Interests

Case upholds *Eurofoods*

The Court of Appeal have upheld the decision at first instance in the High Court (July 2009) on the approach to be taken in establishing an insolvent company's Centre of Main Interests (COMI).

The case, an argument about the test to determine where a company's COMI is, considered two rival applications for recognition in the UK by two separate office-holders appointed over Stanford International Bank Limited (SIB). The liquidators appointed in Antigua took the view that they should be recognised in the UK on the basis that they maintained that SIB's COMI was in Antigua. The receiver appointed by the United States Securities and Exchange Commission took the view that SIB's COMI was in the US. The Court of Appeal agreed with the High Court that SIB's COMI was in Antigua; the Antiguan liquidation was

a foreign main proceeding; and the Antiguan liquidators were therefore to be recognised as the office-holders with authority in SIB's liquidation.

In upholding the original judgment, the Court of Appeal has endorsed the European Court of Justice decision in *Eurofood* and applied it outside the European context. An appeal to the Supreme Court is expected.

An analysis of the factors to establish COMI under the EC Regulation on Insolvency Proceedings 2000 or UNCITRAL can be found in our longer article on Law-Now at

<http://www.law-now.com/law-now/2010/stanfordcourtofappealmar10.htm>

Lehmans

FSA Statement to the US bankruptcy court examiner

The FSA has published the text of the statement it provided to Anton Valukas, the court appointed examiner of Lehman Brothers Holdings Inc, which is referred to in his wider report on the collapse of Lehman Brothers.

<http://www.fsa.gov.uk/pubs/other/lehman.pdf>

The Valukas report is at <http://lehmanreport.jenner.com/>

FSA, March 2010

UNCITRAL

Practice Guide on Cross-Border Insolvency Cooperation

UNCITRAL has published a Practice Guide on Cross-Border Insolvency Cooperation. It shows how agreements between courts or companies in different states can promote the efficient administration of insolvency proceedings where assets and creditors are located in more than one jurisdiction. The Guide analyses the terms of agreements used in recent practice and discusses cases that have seen the use of such agreements. The Practice Guide encourages the use of cross-border agreements of this kind, which it regards as useful supplements to the provisions of the UNCITRAL model law on cross-border insolvency.

10 March 2010

Amending insolvency law

The Insolvency (Amendment) Rules 2010 No 686

These Rules make amendments to the Insolvency Rules 1986. With a few exceptions, they apply in England and Wales only. They come into force on 6 April 2010. See next item.

http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100686_en.pdf

The Insolvency (Amendment) (No. 2) Rules 2010 No 734

Rules 3, 6 and 10 to 12 correct an error in cross-references in the Insolvency (Amendment) Rules 2010. Every reference to paragraphs in Schedule 1 numbered from 529 onwards is numbered one lower than it should be (so that, for example, paragraph 529 is incorrectly referred to as 528). These Rules substitute correct references for the incorrect ones. It would have made it easier for practitioners if the Amendment (No 2) Rules had amended the Insolvency Rules 1986 direct.

http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100734_en.pdf

Date in force: (6.4.10)

Insolvency (Scotland) Amendment Rules 2010

These Rules amend Scottish insolvency procedure for CVAs and administration.

SI 2010/688 in force from 6 April 2010

MVL to compulsory winding up

“Converting an MVL to a compulsory winding up on just and equitable grounds”

This case concerns a petition for the compulsory winding up of Internet Investment Corporation Ltd ('IIC') on just and equitable grounds, pursuant to s122(1)(g) of the Insolvency Act 1986 ('IA 1986'). The petitioner was a minority shareholder and the only significant investor in IIC, but since its inception he had been denied access to meaningful information about the use and deployment of his investment. The petitioner wanted to ensure that a proper investigation of the company's affairs was conducted.

M Furthner & I West of CMS Cameron McKenna, Corporate rescue and insolvency, 02.10, 41 10.12.045

Insurance

Payment Protection Insurance

The assessment and redress of PPI complaints

Feedback on CP 09/23 and further consultation

The FSA has published feedback to its plans to reform the PPI market and announced a further short consultation on its revised package of measures. These include proposed Handbook guidance on PPI complaint handling, and FSA statements on root cause analysis and non-complainants. This consultation exercise will allow the FSA to test its revised assessment of the cost of the whole package and its wider industry impact. The FSA has not included in this further consultation the rejected PPI complaint review rule proposed in CP09/23. It will wait until after its powers have been clarified under the Financial Services Bill before deciding how to proceed. Responses due by 22 April 2010.

<http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/039.shtml>

http://www.fsa.gov.uk/pubs/cp/cp10_06.pdf

New standard forms for all PPI complaints

The Financial Ombudsman Service has launched a PPI consumer questionnaire and a business response form, together with a guide.

http://www.financial-ombudsman.org.uk/publications/technical_notes/ppi/guide-to-PPI-forms.html

Mutuals

Industrial and Provident Societies are no more

The Co-operative and Community Benefit Societies and Credit Unions Act 2010 obtained Royal Assent on 18 March 2010. A date has not yet been set for it to come into force. The Act generally updates the law on IPSAs, changing the names of IPSAs to "co-operative society" or a "community benefit society" and requires any new society (other than a credit union) to be registered with the FSA. Re-names the Industrial and Provident Societies Acts. It applies the Company Directors Disqualification Act 1986 to industrial and provident societies and gives HM Treasury powers to apply certain aspects of company law to industrial and provident societies and to make provisions for credit unions corresponding to any provisions applying to building societies.

http://www.opsi.gov.uk/acts/acts2010/ukpga_20100007_en_1

Proposals for change in the Budget

In the Budget, the Government announced it intends to consult on whether rules should be changed so that members of failed industrial and provident societies (now, "co-operative society" or "community benefit society") which provide a financial service (insofar as they accept deposits in the form of withdrawable share capital) should qualify under FSCS and would have access to FOS. The Government also intends to seek views on raising the current share capital limit for such societies from £20,000 to £35,000.

Use of derivatives by mutual funds

The SEC is conducting a review to evaluate the use of derivatives by mutual funds, ETFs and other investment companies. The review will examine whether and what additional protections are necessary for those funds under the Investment Company Act of 1940.

<http://www.sec.gov/news/press/2010/2010-45.htm>

Lending

Lending to Individuals

January 2010

A statistical release from the Bank of England. Total net lending to individuals rose by £2.0 billion in January 2010. Within the total, net lending secured on dwellings increased by £1.5 billion, above the December increase of £1.2 billion and the previous six-month average of £1.0 billion. The number of loan approvals for house purchase (48,198) was lower than the December figure (58,223) and below the previous six-month average (55,924); approvals for remortgaging (23,611) and for other purposes (23,035) were also lower than in December and lower than their respective six-month averages.

Consumer credit increased by £0.5 billion, above the previous six-month average of a net repayment of £0.2 billion, and also above December's net increase of £0.3 billion. Credit card lending increased by £0.2 billion and other loans and advances increased by £0.3 billion.

<http://www.bankofengland.co.uk/statistics/li/2010/jan/index.htm>

See also: Analysis of bank and building society deposits from and lending to UK residents

<http://www.bankofengland.co.uk/statistics/abl/2010/jan/index.htm>

BoE, 01/03/2010

Breach of confidentiality agreement case

Remedies

Veroe & others v Rutland Fund Management Ltd & others [2010] EWHC 424 (Ch).

This case considered the possible remedies for breach of confidentiality and the circumstances in which it would be appropriate to order a damages award or an account of profits. The claimants had told the defendant Fund Managers about a possible acquisition target. The disclosures were protected under a confidentiality agreement, which the defendants breached by proceeding with the acquisition without involving the claimants, who claimed for breach of confidence. The claimants argued that, in view of the significant profits that the defendants had made from the acquisition, they were entitled to an account of profits (which would have been a greater amount than an award for damages). However the judge awarded damages based on the value of a notional reasonable agreement to buy a release from the claimants' rights under the confidentiality agreement, on the basis of existing case law that established circumstances in which the remedy for breach of confidence is restricted to an award of damages, and so a claimant could not choose an account of profits as the remedy.

Litigation

Class actions

“UK Financial Services Bill ‘class action’”

As we head towards a general election in the UK, it is looking increasingly likely the new Financial Services Bill will make it into law before parliament is dissolved, report Sarah Redlich and Maxine Cupitt, of CMS Cameron McKenna LLP.

<http://www.i-law.com/ilaw/doc/view.htm?id=243651>

S Redlich & M Cupitt: Insurance Day, 19.3.10, 6 10.12.075

Constructive trustees

Payment under mistake of fact

Deutsche Bank AG v (1) Alexander Vik (2) Vik Millahue Agrícola Y Vinedos Ltd

[2010] EWHC 551 (Comm) QBD (Comm) (Burton J) 19/3/2010

An order granting permission for service out of the jurisdiction of a claim by an investment bank engaging in prime brokerage services that money had been paid under a mistake of fact and, or, in a manner which caused them to be constructive trustees was discharged on the basis that the judge had erred in believing that the test in *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran (Service Outside Jurisdiction)* (1994) 1 AC 438 was satisfied.

Partnerships

LLPs strike off, dissolution and restoration

Companies House have published answers to frequently asked questions on dissolving a limited liability partnership or restoring one to the register. The guidance note provides information on completing the most commonly used filings in this area and explains how a court order can restore the LLP to the register; how a former member may apply to the register to have the LLP restored; and how the business registrar may remove a LLP from the register if it is no longer carrying on business or in operation.

<http://www.companieshouse.gov.uk/about/pdf/gp4.pdf>

GPLLP3: Companies House, March 2010

Payment systems

Cheques

Submission to the Treasury Select Committee

Cheques have been in decline since 1990 and it is predicted that by 2018, only 2% of all transactions will be by cheque. The UK Payments Council were called on 16 March to appear before the TSC to present the issues. There follows a summary of their paper and some comment.

The future of cheque clearing was raised in the public consultation on the National Payments Plan 2008. The UK Payments Council had a choice to leave things alone or to manage the situation by identifying viable alternatives to cheques. Leaving things alone might have disadvantaged consumers who were least equipped to change. They point to improved overall economic efficiency with more efficient payment mechanisms and cost savings to banks and the economy. They estimate £750m would be saved in 2018 for business and the public sector and for banks, £200m.

To investigate reactions and alternatives, the Payments Council has divided up the interest groups into large corporate, SMEs, consumers and vendors/Intellect (the trade association for technology companies). The Council has established User Forums to gather evidence and report to the Board. They have researched and continue to consult as to why cheques are used and what are the barriers to alternatives. Small locally run clubs and charities and housebound individuals, attorneys operating under a donor's power are all being looked at.

The next few years are a review process. Progress will be measured by whether alternatives are "available, accessible and being used". It is not certain that cheques will be abolished in 2018. Milestones are:

- ▶ in 2014, there must be significant progress in reducing cheque use where alternatives are already available; there must be widespread awareness of the alternatives, and Payments Council members will have to have competed replacement strategies for the cheque payments they make in their own right.
- ▶ By 2016, alternatives to cheques have to be available to users for all significant types of payments where cheques continue to be used. The alternatives have to show themselves to be acceptable to users. The Payments Council has to make sure users least equipped to change are not disadvantaged.

The Council defend their strategy of setting a target date for closure before it has been decided whether there are acceptable alternatives by saying it acts to concentrate attention on the subject. They also have agreement that banks will not withdraw cheque facilities.

Comment

There is no attempt yet to define what the alternatives are or might be. The areas of particular challenge have been identified as small business, charities, and older people; person to person payments, payments to and by sole traders, charities accepting donations and (trusts) paying out grants, bursaries, etc.

The end of cheques?

A link is provided below to the uncorrected transcript of oral evidence at the hearings on 16 March 2010. Attendees included representatives from Consumer Focus, CAB, British Cheque and Credit Association, Age Concern and the Payments Council. In conclusion, John McFall noted

"we are not convinced that cheques are in terminal decline and I think you really have to reappraise that. It is still the second largest means of payment and even by 2016 there will still be two million cheques each day issued. Your cost benefit analysis appears to have all the benefits and none of the costs, so therefore I want you to look at that cost benefit analysis, subject it to independent scrutiny and share it with this Committee in the future. What we have heard from previous witnesses is that vulnerable groups, such as the elderly or housebound, seem to be affected, as well as small businesses and charities. ... You talk about market forces; this looks to us like forcing the market ... we will invite you back to ensure that there is going to be a meaningful consultation, we get this issue right, that choice is a fundamental issue for the consumer and the playing field is levelled between the consumer and the industry".

<http://www.publications.parliament.uk/pa/cm200910/cmselect/cmtreasy/uc477/uc47702.htm>

Payment Services

Your questions on PSD

This document has been updated, with new items indicated in red. New answers cover: in-scope institution; geographical coverage and definition of "payment system".

http://ec.europa.eu/internal_market/payments/docs/framework/transposition/faq_en.pdf

Banking alternatives in the wake of the banking crisis

This article considers how the far-reaching consequences of the global recession have led consumers to seek what they think are more secure and reliable financial products, especially in the case of payment products. It examines how the 2009 Payment Services Directive has made the offer of payment services more competitive.

P Templeman: E-commerce law and policy, 02.10, 10 10.10.029

The Banking Act 2009 (Inter-Bank Payment Systems) (Disclosure and Publication of Specified Information) Regulations

These Regulations, reported on previously, come into force on 9 April 2010. They concern the disclosure of information in connection with inter-bank payment systems to permitted persons.

http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100828_en.pdf

SI 2010/828

Powers of attorney

The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2010 No 1063

These Regulations amend the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007/1253).

The Explanatory Memorandum is available at

http://www.opsi.gov.uk/si/si2010/em/uksiem_20101063_en.pdf

The full text is available at http://www.opsi.gov.uk/si/si2010/pdf/uksi_20101063_en.pdf

Date in force: 1.5.10

Regulation

Client Assets Sourcebook

FSA consultation

The FSA have begun a consultation, "Enhancing the Client Assets Sourcebook". The aim of this is to ensure that clients have confidence their money and assets are safe and will be returned within a reasonable timeframe in the event that a firm becomes insolvent.

The consultation focuses on the following:

- Re-hypothecation of client assets

Creating a requirement that all prime brokerage agreements will contain a disclosure annex that will highlight relevant definitions and the contractual limit on re-hypothecation. These are provisions in the contract that apply when a firm can 'use' its clients' assets in specified circumstances;

- Increased reporting to clients

The FSA will require daily reporting on client money and assets holdings to all prime brokerage clients. This will mean that clients will know exactly what is happening to their assets, what transactions have been completed and, if relevant, which and how many of their assets have been re-hypothecated.

➤ Holding client money with group banks

Restricting the placement of client money deposits held in client bank accounts within a group to 20%. This will limit the amount by which a client is exposed to group credit risk.

➤ Prohibiting the use of general liens in custodial agreements

The FSA considers it unacceptable that a client's assets held with a custodian were subject to a lien exercised because of the debt of a completely unrelated group entity to the relevant custodian. This emerged as part of the Lehman insolvency and contributed to significant delays in the insolvency practitioners' ability to recover assets from deposits not under their direct control;

➤ Creating a new controlled function with specific responsibility for client money and assets

A senior individual within the firm should be responsible for oversight and protection of client assets and money. Proportionate to the size of the firm, this should be one named individual who may be interviewed for the post and who will hold an FSA significant influence controlled function; and Introducing a client money and assets return. This return will be reviewed and authorised on a monthly basis for medium-large firms and twice a year for small firms. This will provide the FSA with an overview of firm-specific CASS positions and an overview of UK firms' CASS holdings and will enable the FSA to make regulated interventions on a firm-specific or thematic basis.

http://www.fsa.gov.uk/pubs/cp/cp10_09.pdf

FSA Consultation Paper 10/9, March 2010

Liquidity

Liquidity calibration statement

The FSA believes it would be premature to increase liquidity requirements across the industry now. It will review the position later in the year with a further announcement in Q4 2010. The FSA continues to work with firms that are most affected by the new regime, focusing on the steps they are taking to mitigate liquidity risk.

<http://www.fsa.gov.uk/pages/Library/Communication/Statements/2010/liquidity.shtml>

MiFID

Protocol on market transparency calculations

This Protocol on the operation of CESR MiFID database concerns the practical cooperation arrangements between CESR Members and the CESR Secretariat in order to manage the calculation and publication of MiFID market transparency calculations.

<http://www.cesr.eu/popup2.php?id=6485>

CESR, March 2010

Rating agencies

EU regulation Q&A

CESR has published a Q&A on common positions agreed by CESR Members. It is intended that this document will be updated on a regular basis.

<http://www.cesr.eu/popup2.php?id=6490>

Recognition of External Credit Assessment Institutions

Consultation paper on draft revised guidelines

CEBS has published its consultation paper CP37 on the review of its Guidelines on the recognition of External Credit Assessment Institutions of 20 January 2006. To ensure consistency between Regulation (EC) No 1060/2009 on Credit Rating Agencies and the CRD, Articles 81(2) and 97(2) of the CRD have been amended to avoid duplication of work and reduce the burden of the recognition process where an External Credit Assessment Institution is registered as a Credit Rating Agency at Community level.

CEBS has reviewed its Guidelines on the recognition of External Credit Assessment Institutions to make clear that for Credit Rating Agencies, which are registered under the Regulation, the only criteria that should be assessed in the External Credit Assessment Institutions' initial recognition process and on-going review are the technical criteria on 'Credibility and Market Acceptance' and 'Transparency and Disclosure' with respect to their individual credit assessments. The remaining technical criteria are assessed during the registration process under the Regulation on Credit Rating Agencies and are considered to be satisfied for the purposes of the External Credit Assessment Institutions' recognition process. In addition, drawing on the experience of CEBS members in the application of the Guidelines, CEBS has taken this opportunity to review its common understanding of the technical criteria set out in Part 2 of Annex VI of the CRD and proposes limited amendments to its understanding of the requirements on 'Credibility and Market Acceptance' and 'Transparency and Disclosure' with respect to the individual credit assessments. Responses are required by 9 April 2010.

<http://www.c-ebs.org/documents/Publications/Consultation-papers/2010/CP37/CP37.aspx>

Reform

UK financial regulation - after the crisis

Hector Sants, the outgoing CE of the FSA, delivered the annual Lubbock Lecture at Oxford University's Saïd Business School in which he discussed the FSA's operating model and its new approach to conduct. He made the following points: the FSA intends to "[make] the retail market work better for consumers; [avoid] the crystallisation of conduct risks that exceed our risk tolerance; and [deliver] credible deterrence

and prompt and effective redress for consumers. He noted "the 'old-style' FSA rarely intervened until there was clear evidence that something had gone wrong. It was a retrospective form of regulation. Intervention needed to be based on observable historical facts ... The new outcomes-based approach, however, is centred on intervening in a proactive way, and judging the future decisions of firms based on business model and other analysis. Moving into making judgements is undoubtedly more difficult. The FSA will now 'take a view'. That may well be disputed by firms and require greater engagement".

http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2010/0312_hs.shtml

Speech by Hector Sants 12 March 2010

Single Customer View

Table of verification requirements

Since last year, the Financial Services Compensation Scheme have proposed that deposit takers put systems in place to enable them to produce a single customer view, so that they will be able to report on request the aggregate balance held by each eligible depositor. The FSCS has now published the table on the link below with an overview of verification requirements for deposit takers subject (or not subject) to the SCV electronic requirements.

http://www.fscs.org.uk/uploaded_files/SCV/verification_rules_summary.pdf

Security

Mortgages

Responses to consultation on extending FSA mortgage regulation

Her Majesty's Treasury have published a summary of the responses it has received to its November 2009 consultation on extending the scope of FSA regulation of mortgages.

Transfer of second-charge lending to the FSA

As most consultation respondents were supportive of this proposal, HM Treasury has decided to go ahead with transferring the regulation of second-charge mortgages from the Office of Fair Trading to the FSA. This will lead to the creation of a single regulator for all residential mortgage lending and ensure that there is more consistent regulation. In addition the Government has now decided to include existing second-charge loans in the transfer to the FSA. The commencement date of the legislation needed to implement the transfer will be aligned with changes to the FSA's regulation of first-charge mortgages that may follow from its mortgage market review.

FSA regulation of buy-to-let mortgages

Most respondents agreed there is evidence that the operation of some of the buy-to-let market has suffered from significant market failure and that this demands Government intervention. However, many

lenders and property professionals expressed concerns that the form of regulation proposed could impose unnecessary burdens on the operation of the private rented sector and, in view of these, the Government has decided to explore changes to the form of regulation proposed and consult again later in 2010.

► FSA regulation of the onward sale of mortgage portfolios

While respondents were in favour of the objective of protecting consumers from possible detriment when mortgage portfolios are sold on to unregulated entities such as hedge funds, certain technical aspects of the proposals raised issues relating to interactions with mortgage securitisation markets. The Government has, therefore, decided to publish revised proposals later in 2010.

Registration of charges (companies and LLPs)

Consultation

The Department for Business, Innovation and Skills opened consultation on 12 March on proposed changes to the scheme for registration of company charges set out in the Companies Act 2006. The proposals concern: what charges should be registered, whether there should be a time limit for registration, and the consequences of both registration and of the failure to register; the procedures for registration of a charge, including the effect of the conclusive certificate and the safeguards that would be needed for electronic registration; how, what and where third parties be able to discover information about a company's charges; the application of the requirements to entities other than companies incorporated under UK company law, in particular how the scheme should be modified for application to overseas companies; the circumstances in which charges registered in a specialist register might be treated as if also registered at Companies House; and the costs and benefits of the proposals.

The consultation closes on 18 June 2010.

<http://www.bis.gov.uk/companycharges-consultation>

BIS, March 2010



Editor: Ruth Pedley, Client Counsel, CMS Cameron McKenna LLP.

Please contact Ruth for further information or feedback on this bulletin:
Ruth.Pedley@cms-cmck.com

020 7367 2098

You are entitled to sign up to our free electronic information service,
Law Now www.law-now.com

For more timely delivery of smaller pieces of information, go to Ruth's
blog at www.banklawblog.wordpress.com

This bulletin is the property of the firm and must not be reproduced
without consent.

©CMS Cameron McKenna LLP

Law-Now™

CMS Cameron McKenna's free on-line information service

Receive expert commentary and analysis on key legal issues affecting your business. Register for free email alerts and access the full Law-Now archive at www.law-now.com

CMS Cameron McKenna LLP
Mitre House
160 Aldersgate Street
London EC1A 4DD

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Cameron McKenna LLP is a limited liability partnership registered in England and Wales with registration number OC310335. It is able to provide international legal services to clients utilising, where appropriate, the services of its associated international offices. The associated international offices of CMS Cameron McKenna LLP are separate and distinct from it. We use the word "partner" to refer to a member, or an employee or consultant with equivalent standing and qualifications.

Further information about the firm can be found at www.cms-cmck.com

CMS Cameron McKenna LLP is a member of CMS, the organisation of nine European law firms providing businesses with legal and tax services in 28 jurisdictions, with 54 offices in Western and Central Europe and beyond. CMS aims to be recognised as the best European provider of legal and tax services. Clients say that what makes CMS special is a combination of three things: strong, trusted client relationships, high quality advice and industry specialisation. CMS combines deep local expertise and the most extensive presence in Europe with cross-border consistency and coordination.

The members of CMS are in association with The Levant Lawyers with offices in Beirut, Abu Dhabi, Dubai and Kuwait City.

Further information can be found at www.cmslegal.com

© CMS Cameron McKenna LLP 2010

Registered address: Mitre House, 160 Aldersgate Street, London EC1A 4DD.