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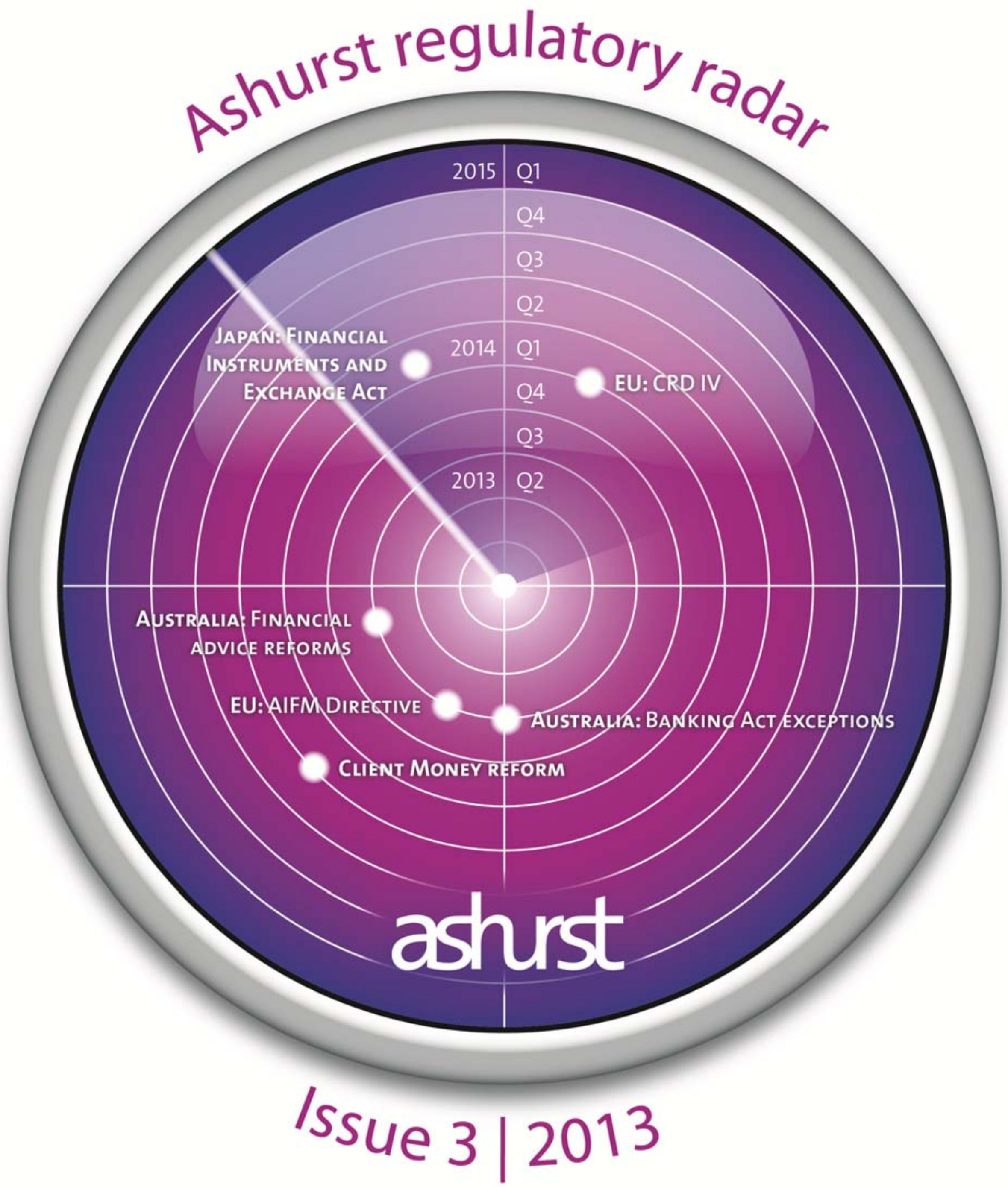


Australia Belgium China France Germany Hong Kong SAR Indonesia (Associated Office) Italy Japan Papua New Guinea Saudi Arabia Singapore Spain Sweden United Arab Emirates United Kingdom United States of America

# Foreword

## Welcome to the third 2013 edition of the Ashurst Global Regulatory Radar.

**The UK's assault on Europe**

It has been a really interesting few months for the UK Government and the Financial Conduct Authority (FCA). They have taken on and challenged the European regulators and have done so in three instances:

**AIFMD**

Here, the FCA has rejected European rules in relation to the applicability of passporting rights. Under AIFMD, fund managers cannot offer typical MiFID services on a cross-border basis. The FCA has said that it will allow AIFMD managers to apply to passport these activities. However, it has warned that other regulators may not accept such request.

**Short selling**

The FCA has clarified the definition of a market maker for the purpose of the short selling regulations. The FCA's position is that it is possible to make a market in unlisted securities. This departs from ESMA's position that the security must be listed somewhere.

**Bonuses**

The UK Government has lodged a legal challenge with the European Court of Justice over new European rules on pay in the banking sector. The Government has attacked rules which it says will "*undermine responsibility in the banking system rather than promote it*". It is the UK Government's view that the latest European legislation in this area should be about building on work to make banks safe rather than focusing on bonus caps which the UK Government says will lead to increases in fixed salaries, which may do the opposite.

These measures demonstrate the UK's willingness to distinguish itself from European regulators where it feels it is important to do so. It will be interesting to see how these play out over time, particularly in the context of MiFID II and indeed CRD4 being brought into being.


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# Asia Pacific

## Australia

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### Future of financial advice

The financial services industry continues to grapple with the implications of the Future of Financial Advice reforms, many elements of which commenced with effect from 1 July 2013. Among the reforms is a ban on conflicted remuneration (which is in some way similar to other regulators' initiatives, such as RDR in the UK), that is a ban on the giving of monetary and non-monetary benefits to Australian financial services licensees and their representatives who provide financial product advice to retail clients, where those benefits could reasonably be expected to influence the choice of financial product recommended or the advice given.

Of course, with a provision that has such a wide import, there are a series of exceptions available from the definition of conflicted remuneration. One of those exceptions is for "stamping fees" , traditionally the fee paid to a broker for securing a client's agreement to acquire financial products, evidenced by the broker's stamp being placed on the application form.

The carve-out for stamping fees is, however, quite specific and is currently causing a degree of angst among certain entities seeking to raise capital and brokers and advisers. A benefit is not taken to be conflicted remuneration under the stamping fee exception if:

- the benefit is given to a provider by or on behalf of an entity in relation to the provider dealing in an approved financial product issued by the entity; or
- the benefit is given to a provider by or on behalf of an entity in relation to the provider dealing in an approved financial product issued by the entity and the provider gives the benefit directly or indirectly to a representative of the provider.

One of the major limitations of the exception is that it is restricted to benefits given in relation to dealings in an approved financial product. This includes (among other things) Government bonds, shares in companies, interests in managed investment schemes and options to acquire those shares or interests. However, the stamping fee exception does not apply to an "investment entity", that is, an entity that taken with its subsidiaries or joint venture entities provides a return to shareholders or members based on:

- its investment in financial products or
- owning real property, other than for the purpose of developing the property

unless the entity is an "infrastructure entity" (i.e. it provides returns from owning or operating an infrastructure asset of the kind in the list contained in the regulation).

That means that, generally, the A-REIT industry and listed investment companies are now unable to make payments to brokers who assist to secure applications for shares and interests from retail clients.

There are also other technical issues with the "stamping fee exemption" as drafted. Because it only creates an exception for benefits given in connection with dealings with retail clients, the Australian Securities and Investments Commission has announced that it will not take action against a person in relation to the payment and receipt of a stamping fee to the extent the provider has subscribed for the approved financial product on its own behalf or the dealing in the approved financial product is on behalf of a person who is not a retail client. This no-action position also extends to circumstances where the provider, directly or indirectly, gives the benefit to a representative of the provider. The no-action position does not extend to "investment entities", so offers no relief from the current position for listed or unlisted property trust operators or listed investment companies.

With a change of Government in Australia, we now wait to see whether lobbying efforts by the A-REIT and broking industries will have any effect in bringing about legislative change. Meanwhile, the press continue to report on difficulties faced by those seeking to successfully float new property fund vehicles in a post-FOFA (Future of Financial Advice reforms) environment.

### Revised policy on the operation of foreign banks in Australia

**Background**
Under the Banking Act 1959 (Cth) (Banking Act), banks (including foreign banks) are required to be

authorised by the Australian Prudential Regulation Authority (APRA) as authorised deposit-taking institutions (ADIs) in order to conduct banking business in Australia.

On 14 April 2011, APRA issued a letter (April 2011 Letter) outlining its approach to foreign banks operating in Australia that are not authorised by APRA as ADIs. The April 2011 Letter outlined a number of conditions and limitations to the foreign bank's activities in Australia and with Australian customers and counterparties.

By its letter dated 19 September 2013 (September 2013 Letter), APRA issued further guidance on its position to foreign banks conducting business in Australia. It sought to clarify the conditions set out in the April 2011 Letter and also set out its revised position on the application of section 66 of the Banking Act which prohibits the use of certain restricted words such as "bank" to foreign banks.

**Permitted activity**

In its April 2011 Letter, APRA outlined its approach to foreign banks conducting business with Australian counterparties from offshore offices or branches. APRA's policy expectation was that foreign banks soliciting and operating an active business in Australia should be subject to Australian prudential regulation and supervision, regardless of where the business is booked.

However, APRA indicated that it would take a "no-objection position" in respect of a foreign bank conducting business with Australian counterparties from offshore offices in certain circumstances.

The September 2013 Letter has revised the conditions set out in the April 2011 Letter and APRA's new position is that it would not object to a foreign bank conducting business with Australian counterparties from its offshore offices provided:

- the foreign bank does not maintain an office or permanent staff in Australia, including staff employed by an entity within the banking group that conducts non-banking business on its behalf in Australia;
- the foreign bank is not soliciting business from retail customers in Australia;
- all business contracts and arrangements are clearly transacted and booked offshore;
- the foreign bank does not engage in advertising or allow bank staff to physically solicit business in Australia; and
- where offshore staff of the foreign bank meet with clients and potential clients in Australia, it is for the limited purpose of arranging or executing documentation in relation to the business of those clients.

Under these conditions, a foreign bank must not solicit business from retail customers in any manner, but it may advertise or engage in the solicitation of wholesale clients from offshore.

**Section 66 of the Banking Act**

Section 66 of the Banking Act prohibits a person from using the word "bank" in Australia in connection with a financial business carried on in Australia or elsewhere, without APRA's consent.

APRA's previous position in relation to the application of section 66 of the Banking Act to foreign banks under the April 2011 Letter was that the foreign bank was not permitted to use the word "bank" (including when that word appears in the bank's name) in Australia, even if its activities fell within the categories of activity to which APRA did not object. That presented a challenge for foreign banks to even send transaction documents and administrative documents such as account statements to Australian customers and counterparties, even where the activities were permitted under APRA's no-objection position.

APRA has now changed its policy in respect of the application of section 66. The September 2013 Letter indicates that APRA would not consider that a foreign bank is in breach of section 66 if it uses a restricted word such as "bank", including in its corporate name, when dealing with clients and counterparties in Australia, to the extent that the foreign bank conducts its business with Australian customers and counterparties under the prescribed conditions.

Under this new policy, APRA also would not consider that the foreign bank is in breach of section 66 where it uses the restricted words to register security interest over property in Australia under the Personal Property Securities Act 2009 (Cth).

This revised stance on the application of section 66, however, does not extend to unlicensed foreign banks wishing to use a restricted word to register as a foreign company. In that situation, APRA would only provide an exemption for the limited activities of a representative office.

Accordingly, a foreign bank which is not an authorised ADI must also ensure its activities in Australia do not amount to "carrying on business in Australia" which would attract the requirement to register as a foreign company under Part 5B.2 of the Corporations Act 2000 (Cth).

# Hong Kong

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## Sponsors face increased obligations as new rules come into force in Hong Kong

The Securities and Futures Commission (SFC) has published a new Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (Code). The provisions of the Code became effective on 1 October 2013. On the same day, changes to the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited (Listing Rules) came into effect, together with other consequential amendments[1]. The combined effect of these changes is to introduce a stringent new regulatory regime for sponsors in respect of listing applications made on or after this date.

The changes came about in response to concerns that the work of sponsors has sometimes been found wanting, in the wake of the SFC's decision in 2012 to impose a HK$42m fine and revoke the licence of Mega Capital (Asia) Company Limited (Mega Capital) in relation to the listing of Hontex International Holdings Company Limited in 2009, following its finding that Mega Capital had conducted substandard due diligence and that the prospectus included false and misleading information regarding the company's financial position.

**The changes**
The Code features a new section 17 that deals purely with the obligations of sponsors. The SFC requires that when submitting an application the sponsor should have:

- performed all reasonable due diligence and included all material information in the initial draft prospectus (Application Proof)[2];
- satisfied itself that the information in the Application Proof is substantially complete except in relation to matters that can only be dealt with at a later date[3];
- concluded that the applicant has established procedures, systems and controls which enable the applicant and its directors to comply with their legal and regulatory obligations on an ongoing basis, and that the applicant's directors have the experience, qualifications and competence necessary to enable them to comply with their obligations; and
- verified all information included in experts' reports (such as those of auditors and valuers) included in the prospectus and have concluded there are no reasonable grounds to believe that the information in the experts' reports is untrue, misleading or contains material omissions[4].

In tandem, the changes to the Listing Rules include the provision that where the Stock Exchange or the SFC return an Application Proof to the applicant because it is not substantially complete, there will be a moratorium of eight weeks before any new application can be submitted. The names of the sponsor and the applicant of any such returned applications will be published on the Stock Exchange's website[5].

**Sponsor liability**
It is likely that the SFC will push ahead with plans in the coming weeks to clearly identify sponsors as being liable, together with directors and others who authorise the issue of a prospectus, under section 40 (civil liability for misstatements in a prospectus) and section 40A (criminal liability for misstatements in a prospectus) of the Companies Ordinance (Cap 32). The SFC proposes that criminal liability should apply if the person knew or was reckless as to whether the statement was untrue and that the untrue statement was materially adverse from an investor's perspective. While the SFC has stated[6] that the proposed criminal liability provisions under section 40A would only apply to a sponsor firm, it has left open the possibility that where directors or officers have participated in or consented to the commission of the offence, these individuals may be prosecuted for aiding and abetting, counselling or procuring the commission of an offence under section 89 of the Criminal Procedure Ordinance (Cap 221).

Together with the increased use by regulators of civil remedies to obtain redress for investors in respect of breaches of the securities legislation, and the introduction of the continuous disclosure regime for price-sensitive information, the proposed changes indicate the increasingly aggressive stance being adopted by regulators in Hong Kong with regard to enforcement.

**Notes:**
1 Amendments to the Corporate Finance Adviser Code of Conduct and the Additional Fit and Proper Guidelines for Corporations and Authorized Financial Institutions applying or continuing to act as Sponsors and Compliance Advisers also took effect on 1 October.
2 The revised rules require sponsors to be formally appointed two months before the filing to allow the sponsor to have sufficient time to conduct due diligence.
3 A sponsor will also be required to publish the Application Proof on the Stock Exchange website at the time the application is submitted, although the implementation date for this requirement has been

deferred until 1 April 2014. The change is designed to ensure that sponsors publish near-complete first drafts.

4 The sponsor should also consider the expert's qualification, experience and independence, the scope of work, the assumptions underlying the expert report and should critically review the expert's opinion in the context of all other information known to the sponsor about the listing applicant.

5 The implementation of this provision has also been deferred until 1 April 2014.

6 Consultation Conclusions on the Regulation of IPO Sponsors, 12 December 2012, paragraph 41.

## Japan


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### Revision to major shareholding reporting system

On 12 June 2013, the Act for Partial Amendment to the Financial Instruments and Exchange Act, etc. (Act) was enacted, which includes a revision to the current major shareholding reporting system.

Under the major shareholding reporting system, a person or entity who becomes a holder of more than 5 per cent of the shares or other equity securities of a listed company or certain other entities (Major Shareholder) is required to file a major shareholding report with a local finance bureau through the Electronic Disclosure for Investors' NETwork (EDINET). A Major Shareholder is also required to file an amendment report if, after filing a major shareholding report, its shareholding percentage in the entity increases or decreases by 1 per cent or more or there is a change to certain material matters in the report (such as name or address of the Major Shareholder).

Under the current system, a Major Shareholder is not released from the obligation to file an amendment report until it files an amendment report due to decrease in its shareholding percentage by 1 per cent or more and the shareholding percentage at the time of such filing is 5 per cent or less. Therefore, for example, if a shareholder files a major shareholding report by acquiring 5.5 per cent of the shares of a listed company and then sells part of its holding equal to 0.6 per cent of the shares of such company, such shareholder may not file an amendment report and will not be released from the obligation to file an amendment report, even though its shareholding ratio is then below the 5 per cent threshold (i.e. 4.9 per cent).

However, under the new system, a Major Shareholder is also released from the obligation to file an amendment report if it files an amendment report due to a change to certain material matters in the report and the shareholding percentage at the time of such filing is 5 per cent or less.

The Act will come into effect before June 2014.

# Europe

## EU


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### Update on CRD IV

CRD IV builds on the existing CRD III rules and also introduces new prudential requirements. CRD IV increases the quality of capital that firms are required to hold, introduces capital buffers for some firms and also introduces an EU-wide liquidity regime. CRD IV was designed for banks yet it is also applied to investment firms in the EU. Importantly, the definition of "investment firms" in the CRD Regulation has been amended, so that there will be specific prudential requirements for different types of investment firms that carry out MiFID investment activities. This means that the overall outcome of CRD IV places more requirements on investment firms. The FCA has stated that it will seek to minimise this impact (although it is not yet clear as to the extent to which this will be achieved). Under CRD IV, the FCA is creating a new Prudential Sourcebook for Investment Firms (IFPRU) although this will follow the current BIPRU sourcebook "*as much as possible*".

**Important changes to regulatory reporting**

CRD IV (regulation) brings in a new EU-wide supervisory reporting framework for Financial Reporting (FINREP) and Common Reporting (COREP) that applies to IFPRU investment firms. COREP covers capital requirements, own funds and liquidity reporting whereas FINREP covers consolidated financial reporting for supervisory purposes based on

International Financial Reporting Standards. The introduction of COREP and FINREP will change how IFPRU investment firms report prudential supervisory information to the FCA. COREP will apply from 1 January 2014, whereas FINREP will apply from 1 July 2014.

**Remuneration**

CRD IV (generally) reproduces the remuneration provisions introduced by CRD III. However (as is well known) CRD IV introduces a bonus cap. It currently appears, however, that the FCA's view is that such cap should be subject to proportionality (meaning that most firms will not need to apply one): "*It is important to note that the remuneration rules under CRD III were already subject to the principle of proportionality… the application of certain remuneration requirements may vary in relation to certain types of investment firms based on 'their size, internal organisation and the nature, the scope and the complexity of their activities'*".

# France


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## Update on the transposition of the AIFMD

**AIFMD is now transposed into the French *Code monétaire et financier* and partly in the AMF General Regulation**

On 27 July and 30 July 2013 respectively, an order and two decrees were published which implement Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) into the French *Code monétaire et financier*.

On 13 August 2013, a ministerial decree transposing the requirements of the AIFMD with respect to fund managers and depositories into Book III of the General Regulation of the French *Autorité des marchés financiers* (AMF), was published. However, the AIFMD will be fully implemented only once Book IV of the AMF General Regulation has been amended to reflect the full requirements of the AIFMD with respect to alternative investment funds (AIF) covered by the AIFMD. The AMF launched a public consultation on 24 July 2013 on the amendments to be made to Book IV of its General Regulation. Such amended Book IV will in particular detail the passporting regime for AIFs, and is expected to be published later this year.

**AMF publishes a guide on the modernisation of French collective investment vehicles**

On 12 July 2013, the AMF published a guide (Modernisation Guide) on the modernisation measures made to French collective investments for the purposes of implementation of the AIFMD. This publication is part of the AMF doctrine developed to help the stakeholders in the AIF industry to understand and comply with the provisions of the AIFMD. Such doctrine also includes another guide published by the AMF on 16 April 2013, aimed at assisting existing French management companies with the implementation of the AIFMD.

The purpose of the Modernisation Guide is to present the amendments made to the categories of collective investments under French law as well as to the investment rules and techniques that apply to such collective investments.

Further to the implementation of the AIFMD into French law, French collective investments are now divided into:

- UCITS (*organismes de placement collectif en valeurs mobilières, OPCVM*), i.e. collective investment undertakings governed by French law provisions implementing the Directive 2009/65/EC;
- AIFs (*fonds d'investissement alternatifs, FIA)* which are collective investment undertakings governed by French law provisions implementing the AIFMD; and
- collective investments other than UCITS or AIFs, which are non-UCITS collective investments that are regulated by the AMF but do not qualify as AIFs within the meaning of the AIFMD.

The Modernisation Guide also provides explanation on the amendments which have been made to the investment techniques of collective investments such as those relating to:

- in respect of both UCITS and AIFs, the valuation of assets and risk diversification;
- in respect of AIFs only, the eligible assets and harmonisation of subscription thresholds; and
- in respect of UCITS only, the calculation of investment ratios.

**AMF publishes a position and a guide on the remuneration policies applicable to alternative investment fund managers**

On 2 August 2013, the AMF published a position and a professional guide which formally incorporate the ESMA guidelines on sound remuneration policies under the AIFMD (ESMA/2013/232) into French regulations.

This position applies to AIF managers (**AIFMs**) and to certain other persons that qualify as identified staff within the meaning of the ESMA guidelines ESMA/2013/232.

The position also applies to third country AIFMs marketing AIFs in France on the basis of the private placement regime but only with respect to the ESMA guidelines on disclosure on remuneration.

## Law on the separation and regulation of banking activities is in force

On 27 July 2013, was published the law on the separation and regulation of banking activities (Law). The main reforms introduced by the Law pertain to the separation of proprietary trading activities from the core activities of some institutions, the enhancement of the powers of supervisory authorities and other regulatory institutions in the financial sector, and the creation of a new regime for the recovery and resolution of some banking and financial institutions.

To read our full briefing on the Law please click here and, specifically regarding the impact on close-out netting, please click here.

## France amends the regime applicable to credit institutions

On 28 June 2013, Order no. 2013-544 relating to credit institutions and financing companies (Order) was published. The Order was adopted to prepare the entry into force of Regulation 575/2013/EU on prudential requirements for credit institutions and investment firms (known as CRR) which aims to harmonise the definition of credit institutions and to apply the same prudential rules to such institutions within the European Union.

The Order has a deferred entry into force set at 1 January 2014.

In order to align the definition of credit institutions under French law with the definition resulting from the CRR, the Order defines credit institutions as legal entities the activity of which consists in carrying on, for their own account and by way of business, both the activity of taking repayable funds (or deposits) from the public and that of granting credits. Therefore, only those entities performing both credit and deposit-taking activities will be eligible to the status of credit institutions.

The Order also creates financing companies (*sociétés de financement*), a new category of banking services providers which are not credit institutions but are licensed to perform credit activities. Financing companies are regulated entities licensed to carry on credit activities for their own account by way of business within the terms and limits of their licence. In addition, financing companies can be also licensed to provide payment services, to issue and manage electronic money and to provide investment services. However, the scope of activities available to financing companies is reduced compared to credit institutions to the extent that financing companies cannot take repayable funds from the public nor perform certain ancillary banking operations. Financing companies are licensed by and subject to the supervision of the *Autorité de contrôle prudentiel et de résolution* (ACPR). They are subject to some rules governing credit institutions (such as banking secrecy rules) as well as to some other rules specifically governing financing companies (e.g. prudential requirements). One of the major differences between credit institutions and financing companies lies in the European passport regime which will not be available to financing companies.

The Order creates another category of credit institutions which are specialised credit institutions (*établissements de crédit spécialisés)*. Pursuant to the Order, specialised credit institutions are credit institutions, and therefore must be licensed for both credit and deposit-taking activities, which can only perform the activities within the limits resulting from legal and regulatory provisions specific to them. Specialised credit institutions will benefit from the European passport regime to the extent that they will constitute a category of credit institutions.

The reforms introduced under the Order will impact a number of entities currently licensed as financial companies (*sociétés financières)* which, under the current regime, constitute a category of credit institutions the activities of which are limited by their licence or applicable laws and regulations. The Order abolishes the status of financial companies and sets forth transitional provisions to allow existing financial companies to adapt to one of the newly created regimes.

Pursuant to the transitional provisions of the Order, entities licensed as financial companies before 1 January 2014 will, as of this date, be deemed to be licensed as specialised credit institutions (or payment institutions if the entities are licensed solely for the activity of money transfers), unless the entity applies to be a financing company before 1 October 2014.

As regards companies that request their licence from 1 January 2014, these will not be able to be licensed as specialised credit institutions if they do not receive deposits from the public.

Pursuant to the transitional provisions of the Order, entities currently licensed as financial companies before 1 January 2014 will also be able, until 1 October 2014, to file an application with the ACPR to be licensed as financing companies. Entities that choose this option and which already benefit from a licence for the provision of investment or payment services, will be automatically licensed as investment services providers or, as the case may be, payment services providers as from the date they are licensed as financing companies by the ACPR.

Finally, the Order amends the definition of repayable funds (which were previously referred to as funds received from the public); and issues of debt securities could fall with the new definition of repayable funds, subject to terms and limits to be further determined by decree. Thus, the flexibility granted to entities currently licensed as financial companies to benefit from the status of credit institutions will in the future depend upon the scope of products thus determined to be repayable funds.

### AMF publishes a position on remuneration received in respect of marketing and portfolio management of financial instruments

On 10 July 2013, the AMF published a position-recommendation on remuneration received in respect of the marketing of financial instruments and portfolio management activities. Some of the provisions of this document apply as from the publication of the position-recommendation while some others will apply on a deferred basis.

This position-recommendation applies to investment services providers and to financial investment advisers (*conseillers en investissement financier*), when they provide investment and ancillary services in France while marketing financial instruments, including marketing of collective investment schemes, or carrying on individual portfolio management activity.

The position-recommendation reflects the recommendations of CESR under its report CESR/10-295 on inducements. The position-recommendation provides in particular guidance on the following issues:

- internal inducements identification and classification procedures;
- client information on inducements received; and
- enhancement of the quality of the service provided to the clients and of the capacity to act in the best interest of the clients.

# Italy


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### Consob calls for more transparency on equity investments of trusts in listed companies

On 2 August 2013, Consob issued a communication (Communication) on disclosure requirements applicable to equity investments held by trusts in listed companies.

The purpose of the Communication is to improve transparency of ownership structures with a view to granting protection to investors as well as ensuring the smooth and regular functioning of the financial markets.

Based on the new rules, trusts which hold a significant equity investment (pursuant to article 120 of Legislative Decree 58/1998 (Italian Financial Act)) in the share capital of a company listed on the Italian stock exchange or which take part in a shareholders' agreement (pursuant to article 122 of the Italian Financial Act) will be subject to additional disclosure obligations towards Consob compared to those already applicable under the transparency regime currently in force. In particular, when trusts notify that they have exceeded the relevant thresholds, they must communicate to Consob, among other things, the identity of all parties involved in the trust, any powers to intervene in managing the equity investments, any overlapping between the parties (natural or legal persons) involved and parties (natural and legal persons) which are part of the investment chain involved in the trust.

### Joint communication of the Bank of Italy and Consob – rules for alternative investment fund managers pending the transposition into Italian law of the AIFM Directive

Consob and the Bank of Italy have issued a joint communication (Joint Communication) on the rules for alternative investment fund managers under the AIFM Directive 2011/61/EU (AIFMD).

The Joint Communication, after referring to the provisions of the AIFMD that are self-executing (e.g. those relating to grand-fathering and fund manager cross-border operation), provides guidance and clarification as to the rules applicable pending the transposition of the AIFMD, for which the deadline was 22 July 2013.

The Joint Communication specifies, among other things, that the authorisation procedure laid down in Article 42, paragraph 5, of Legislative Decree No. 58 of 24 February 1998, as amended (Original Authorisation Procedure) will continue to apply to the marketing in Italy of investment funds (AIF) managed by an entity (AIFM) established in an EU Member State other than Italy (EU) in which the AIFMD *has not yet been transposed* into the national legal framework.

Where the EU AIFM is, instead, established in a Member State in which the AIFMD *has been transposed* into the national legal framework and which intends to market in Italy to professional investors or to operate an Italian AIF, the notification procedures referred to in article 32 and article 33, as applicable, of the AIFMD will find application.

Finally, with regards to the marketing into Italy of (a) AIFs managed by an entity established in a third country (non-EU AIFM) and (b) non-EU AIFs managed by an EU AIFM, the Joint Communication clarifies that until the date of entry into force of the national laws and regulations implementing the AIFMD, the Original Authorisation Procedure will continue to apply.

# Spain

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## Suitability and appropriateness tests

**Circular 3/2013 of 12 June of the National Securities Markets Commission (CNMV), on certain disclosure of information directed at clients regarding the determination of their adequacy to invest in financial instruments**
This rule establishes mandatory obligations for entities providing investment services (reception and transmission of orders, investment advice and individualised management of investment portfolios). In particular, it modifies and broadens pre-trading and post-trading disclosure requirements to clients when they are subject to the MiFID procedures known as suitability and appropriateness tests.

## Internal control procedures imposed on investment firms

**Draft Circular of the CNMV on organisational requirements regarding internal control obligations imposed on entities that provide investment services**
The wording of this draft Circular has taken into account ESMA's guidelines published on 24 February 2012 on "*systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities*" as well as the previous Spanish Circular 1/1998 of 10 June on internal control systems and continuous evaluation of risks.

This drafting requires internal control systems to be in three units: compliance, internal audit and control risk. It also establishes the obligations and competences of each unit and the reporting scheme to the Board of Directors and the CNMV.

## Anti Money Laundering Regulation

More than three years behind schedule, the Spanish Ministry of Economy and Competitiveness published a legislative consultation that develops Law 10/2010, of 28 April, on Anti Money Laundering and Terrorist Financing.

The draft Regulation sets out due diligence measures imposed on entities as well as other obligations and procedures to be implemented and followed by them.

# Sweden

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## Capital Requirements – CRD IV/CRR

The Swedish process of implementing Directive 2013/36/EU (CRD IV) and Regulation (EU) No 575/2013 (CRR) (together, CRD IV Package), is ongoing and a governmental Official report was presented in September 2013. It is, among other things, proposed that a new act on capital buffers will be adopted together with a new act on supervision of credit institutions and investment firms (implementing CRR). Set out below are examples of features of the proposed Swedish implementation of the CRD IV Package.

The legislative inquiry proposes that all capital buffers in CRD IV should be implemented into Swedish law. It has also been proposed that the provisions regarding the capital conservation buffers and relevant provisions regarding the countercyclical capital buffers will apply from the date that CRD IV is implemented into Swedish law (i.e. applying a shorter transitional period than the general period set out in CRD IV). The purpose of these proposals is to ensure that Swedish institutions are well capitalised in order to decrease the risk of a new financial crisis and consequently reduce potential costs for taxpayers.

In this respect it is worth noting that the Swedish legislator has proposed to exercise the possibility set out in the preamble to CRR and to impose equivalent requirements on undertakings that do not fall within the scope of CRR. This means that a wider definition of "credit institutions" than the definition in CRR will be maintained in Swedish regulation. It is therefore proposed that those credit institutions and investment firms that are currently subject to the requirements of the Swedish Capital Adequacy and Large Exposures Act will also be subject to the requirements in CRR. The definition of credit institutions in the Capital Adequacy and Large Exposures Act includes, among other things, banks and credit market undertakings.

The new capital adequacy regulations will be gradually implemented between 2014 and 2019. A government bill in respect of the CRD IV Package is expected to be presented in the beginning of 2014 with the aim of the new Swedish Acts entering into force in July 2014.

### National report on money laundering

A number of Swedish authorities and organisations (including the Swedish Financial Supervisory Authority, the Economic Crime Authority and the Tax Agency) have submitted a national report on money laundering to the Swedish Government identifying certain risk areas and need for action in the Swedish system for the enforcement of money laundering rule. The requirement to conduct a risk evaluation on a national level follows from the FATF Recommendations issued by the Financial Action Task Force and the purpose of the report is to form the basis of the Government's strategy for enforcing money laundering rules in Sweden. There is also a risk evaluation regarding financing of terrorism and a report on this matter will be presented by the end of March 2014.

Despite the fact that it is difficult to quantify the extent of money laundering in Sweden, the report indicates that money laundering is likely to be widespread and that multi-billion amounts are converted into cash. Cash intensive businesses and currency exchange undertakings are two examples of areas considered as being subject to great risks with respect to money laundering.

Specific vulnerabilities in the Swedish system for enforcement of money laundering have been identified in the report, including among other things (i) insufficient facts regarding money laundering, (ii) relatively limited international exchange regarding operational supervision within the area of money laundering, (iii) a shortfall in observance of relevant regulations (e.g. in actions for identifying and counteracting the risks of being used for money laundering), (iv) difficulties in obtaining good customer knowledge, (v) difficulties in investigating certain types of money laundering, such as money received from alternative money transferors or new payment methods, and (vi) the difficulty of preventing transfers of black money into and out of Sweden.

# UK

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### Reform of the UK client money regime

The FCA has outlined its plans to reform the CASS regime with proposed new rules on client money (including disbursements), custody and mandate rules, and new disclosure requirements.

This marks the start of a series of reforms to clarify and update the current UK regime in light of recent insolvencies and industry feedback. It will primarily affect firms that are subject to the client assets source book (CASS). The new system aims to achieve better results for consumers and increase confidence in financial markets.

The client assets regime is built on a framework of insolvency and company legislation. Of key relevance to insolvencies of investment firms that hold client assets is the Special Administration Regime (SAR) review. Earlier this year, a government-commissioned independent review of the SAR reported on the status of its objectives and whether more could be done to speed the return of client assets. The review issued several recommendations, including introducing a mechanism to facilitate the rapid transfer of customer relationships and positions. The changes to the client assets regime will be dependent on whether the Government accepts the recommendations of the SAR review.

## FCA issues guidance on managing conflicts and inducements

The FCA has issued guidance for providers of retail investment products when they enter into arrangements with third parties relating to the distribution of their products. The FCA has previously banned payments from providers to firms advising UK retail clients in relation to these products. This latest guidance intends to capture other conflicts which might arise between the interests of product providers and those of underlying investors.

**Conflicts**

The following potential conflicts must be managed in the same way as actual conflicts:

- Where the inclusion of product providers on a panel is influenced by additional services provided by that adviser firm (e.g. free IT software).
- Exclusivity between a provider and an adviser which is based on the commercial interests of the adviser rather than on the needs of its clients.
- Long-term multi-year distribution agreements which secure a significant revenue stream.
- Clauses which allow a provider to negotiate a reduced level of payment for a reduce level of services in the event the provider loses a place on a panel/in the event of a material reduction in sales of a provider's products.
- Arrangements which result in higher than "reasonable profit" for a distributor.
- Staff within distribution firms who have a role in guiding advisers on the benefits/features of a product who also have a role in negotiating distribution agreements.

**Inducements**

The FCA's implementation of the MiFID inducement rule requires any payment of commission or a non-monetary benefit to be designed to enhance the quality of the service to the underlying client. This recognises that conflicts arising from some payments/benefits offered/accepted by firms can be managed so as not to be prejudicial to investors' interests. These payments/benefits:

- must be reasonable and proportionate;
- must be of a limited scale and nature;
- need not be relied on by an advisory firm in order to continue to provide services to an underlying client; and
- must not result in a channelling of business from an advisory firm to a provider.

The FCA has given some guidance on the types of payments/benefits which it deems could be designed to enhance investors' interests as follows:

- IT development and maintenance – provider firms can make cash payments/provide other assistance to advisers not in the same immediate group for the development of software necessary to operate software provided by the provider but only to the extent that such benefits will generate equivalent cost savings for the provider or the investor and the quality of service to the investor is reasonably expected to be enhanced.
- Training – training must be made available to all advisory firms (even if on a first-come, first-served basis). Reasonable costs for attending receiving the training can be reimbursed but providers should not be incentivising advisers by other means.
- Conferences and seminars – where a contribution by the provider is for genuine business purposes and is reasonable and proportionate.
- Hospitality – must be of a reasonable value. Expensive or multi-day events will not be permitted. Sponsorship of adviser events by providers should also be carefully considered.
- Promotional activity – costs associated with placing promotional materials in adviser publications must be no more than market rate and exclude distribution costs.
- Meetings with advisory firms – payments by providers to advisory firms for meetings will generally be prohibited.
- Management information and data research services – payments for MI should not include a profit margin for the advisory firm and should be restricted to the reimbursement of reasonable costs incurred.

The important message for firms is that it is still questionable whether straightforward commission payments to distributors will comply with the MiFID inducement rule. At the very least, firms must be able to justify that the payment is proportionate to the costs incurred by the distributor in providing the services and must not represent any wider business benefit. Provider firms must also ensure that the distributor is under a contractual obligation not to pass a proportion of the payment to any third party where this might prejudice an investor's interests.

### Special resolution of banks, investment firms and group companies

The UK Government is proposing to implement resolution powers over institutions other than banks including investment firms, parent undertakings of banks and investment firms, subsidiary undertakings of banks and investment firms, central counterparties, and insurers. The UK is pressing ahead with domestic legislation given the uncertainty around the timetable for introducing any European legislation as a result of the Recovery and Resolution Directive (RRD).

The Government proposes narrowing the scope of the Special Resolution Regime (SRR) powers to those investment firms that are required to hold initial capital of €730,000 as specified in the Capital Adequacy Directive. This specifically excludes the following types of firms:

- UCITS investment firms;
- BIPRU 50K firms; and
- BIPRU 125K firms.

There are approximately 250 €730,000 investment firms in the UK. Non-€730,000 investment firms will continue to either enter into a normal insolvency procedure, or enter into the Special Administration Regime (SAR) in the event of failure. This approach is consistent with the draft European RRD.

The SSR provides three "stabilisation options" that allow the authorities to intervene, at pre-insolvency stage, to achieve an orderly resolution of a failing institution:

- Transfer of the firm or all or part of the firm's business to a private sector purchaser.
- Transfer of all or part of the firm's business to a bridge bank owned by the Bank of England.
- Transfer of the firm, or its holding company, into temporary public ownership.

The Banking Act 2009 confers "stabilisation powers" which can be used to implement the "stabilisation options". A "stabilisation power" may be exercised, over a deposit-taking institution or investment firm, only if the PRA (or in relevant cases, the FCA) is satisfied that the following general conditions are met:

- The firm is failing, or is likely to fail, to satisfy the threshold conditions.
- Having regard to timing and other relevant circumstances, it is not reasonably likely that, ignoring the stabilisation powers, action will be taken that will enable the firm to satisfy the threshold conditions.

The stabilisation powers will be extended to banking (or investment firm) group companies (BGCs). A group undertaking will only qualify as a BGC if it is established in the UK. The following entities will qualify as banking (or investment firm) group companies:

- Subsidiaries of the failing institution.
- Parents which are "financial holding companies".
- Subsidiaries of the "resolution group holding company".

Therefore group powers extend to parent undertakings which are financial in nature, but not to parents that may fit above both financial services and non-financial services sub-groups as part of a mixed conglomerate.

All subsidiaries of a resolution group holding company are BGCs (if established in the UK).

Entities that facilitate capital market arrangements, such as covered bond SPVs, are excluded from being a BGC for the purposes of the stabilisation powers.

# America

## US

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### Finally, the final rule on Municipal Advisor Registration

One of the many things that the Dodd-Frank Act required was the federal registration of advisors to municipal entities. From the beginning, there has been a great deal of confusion and consternation regarding exactly who should be required to register, particularly in light of the fact that the scope of the rule was potentially very broad and that many entities providing advice to municipalities were already registered with the SEC as investment advisors. Three and a half years and one very confusing temporary rule later, the Securities and Exchange Commission (SEC) finally adopted a rule establishing a permanent registration regime for municipal advisors. The new rule requires a municipal advisor to permanently register with the SEC if it provides advice on the issuance of municipal securities or about certain "investment strategies" or municipal derivatives. In particular, the rule clarifies who is and is not a "municipal advisor" and offers guidance on when a person is providing "advice" for purposes of the municipal advisor definition.

## Registration exemptions

As with many regulatory regimes, the most controversial and important aspect of the rule relates to who is carved out of the registration requirements. The final rule exempts employees and appointed officials of municipal entities from registration, and narrows the application of the term "investment strategies" to apply only to the investment of proceeds from the sale of municipal securities rather than to all public funds. Further, instead of the proposed approach that would have required individuals associated with registered municipal advisory firms to register separately, the final rule requires these firms to furnish information about these individuals.

The final rule establishes exemptions from the municipal advisor definition for certain people engaging in specified activities. The following people are not required to register as a municipal advisor:

**Public officials and employees**
Public officials do not have to register to the extent that they are acting within the scope of their official capacity. This exemption covers people serving as members of a governing body, an advisory board, a committee, or acting in a similar official capacity as an official of a municipal entity.

**Underwriters**
Brokers, dealers, and municipal securities dealers serving as underwriters do not have to register if their advisory activities involve the structure, timing and terms of a particular issue of municipal securities.

**Registered investment advisors**
Registered investment advisers and associated persons do not have to register if they provide investment advice regarding the investment of the proceeds of municipal securities or municipal escrow investments.

**Registered commodity trading advisors**
Registered commodity trading advisors and their associated persons do not have to register if the advice they provide relates to swaps.

**Attorneys**
Attorneys do not have to register if they are providing legal advice or traditional legal services with respect to the issuance of municipal securities or municipal financial products.

**Engineers**
Engineers do not have to register if they provide engineering advice such as feasibility studies and cash flow analysis and similar activities related to engineering aspects of a project.

**Banks**
Banks do not have to register to the extent they provide advice on certain identified banking products and services (such as deposit accounts, extensions of credit, or bond indenture trustee services).

**Accountants**
Accountants do not have to register if they are providing accounting services that include audit or other attest services, preparation of financial statements, or issuance of letters for underwriters.

**Independent registered municipal advisors**
People who provide advice in circumstances in which a municipal entity has an independent registered municipal advisor with respect to the same aspects of a municipal financial product or issuance of municipal securities generally do not have to register.

**Swap dealers**
Registered swap dealers under CFTC rules do not have to register as municipal advisors if they provide advice with respect to swaps in circumstances in which a municipal entity is represented by an independent advisor.

## Registration forms

The final rule requires municipal advisory firms to:

- File all forms through the SEC's public online filing system (EDGAR).
- File Form MA to register as a municipal advisor.
- File Form MA-I for each individual associated with the firm who engages in municipal advisory activities.

The rule requires municipal advisors to register on a staggered basis beginning 1 July 2014. The expiration date of the current, temporary rule will be extended in order to allow municipal advisors to continue to remain temporarily registered during the staggered compliance period.

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