

E-Briefing – Detailed Version

(Covering the period from 14 February to 16 March 2009)

1. Professional Representation

1.1 Professional Rules and Regulation Committee (PR&RC)

The PR&RC recently responded to SRA Consultation Paper 14 (“New disciplinary powers for the SRA – public rebukes and fines”). (See <http://www.sra.org.uk/sra/consultations/1578.article> for the consultation document and [click here](#) for the response.) The CLLS document responded in detail to the questions contained in the consultation document, and also set out a number of concerns about the wording of the draft rules.

The PR&RC also recently responded to the SRA's consultation paper regarding amendments to rule 3 (conflicts of interest) and rule 4 (duties of confidentiality and disclosure) of the Solicitors' Code of Conduct 2007. (See <http://www.sra.org.uk/sra/consultations/1649.article> for the consultation document and [click here](#) for the response.) The response answered the detailed questions contained in the consultation paper, and made a number of other detailed points while supporting the principal proposals for change in the paper.

The PR&RC also commented on the Legal Services Board's (LSB) Draft Business Plan for 2009/10. (The LSB is the new, independent body responsible for overseeing the regulation of lawyers in England and Wales.) (See http://www.legalservicesboard.org.uk/news_publications/press_releases/2009/01_20_09.htm for the consultation document and [click here](#) for the response.) The response stated that the draft was a positive and well constructed document, and that the Committee had few comments on it. The response also stated, *inter alia*, that while the plan had a strong emphasis on “consumers”, the term had little resonance with firms whose clients were large corporate entities; that in carrying forward the plan the LSB should make reference to the outcomes of the Smedley review; and that the plan should state the primacy of the rule of law, administration of justice and the independence of the profession.

2. Specialist Committees & Working Groups

2.1 Company Law Committee

The CLLS Company Law Committee and the Law Society Company Law Committee recently issued a joint response to FSA CP08/21 (“Consultation on amendments to the Listing Rules and feedback on DP08/1”) (See http://www.fsa.gov.uk/pages/Library/Policy/CP/2008/08_21.shtml for the consultation document and [click here](#) for the response.) The Committee responded to the specific questions contained in the paper, and also stated:

We note the statement in paragraph 2.18 of the feedback statement that the FSA believes “any additional regulatory standards on GDRs [Global Depositary Receipts] over and above the EU minimum standards should be applied on a pan-European basis and driven by the EU Commission or the Committee of European Securities Regulators (CESR).

The EU Commission is currently reviewing the Prospectus Directive and we aim to engage with that process to ensure that the regulatory requirements for GDRs reflect their growing use as substitutes for equity investments.”

We are concerned at the implication that GDRs should be treated as equity. Imposing a higher degree of disclosure and due diligence on GDRs could, instead of ensuring GDRs are listed with better disclosure, deter emerging market GDR issuers from coming to EU markets

altogether. This would mean that investors who wanted exposure to the underlying shares would either have to buy the shares themselves in the local market; or the GDR would be packaged elsewhere, outside the EU (i.e. rather than giving EU investors more protection, it would remove the EU protections they currently enjoy under EU law).

GDRs are traded on a separate order book on the London Stock Exchange. We believe that investors do not invest in GDRs thinking that they are primary listed equity, but rather that they are locally listed equity with a GDR “wrapper” that is convenient for currency and settlement reasons (among other things). If this is not clear to the market, then it could be made clearer through the same education and labeling steps that the FSA is proposing in connection with the other changes proposed in the consultation paper.

Other steps to ensure that overseas companies' shares in GDR form are not confused with directly listed shares and for example, mis-sold to retail investors, would include appropriate provisions in the Conduct of Business Rules. We would also not object to a requirement for additional risk warnings on GDR prospectuses to make clear that the level of disclosure is not the same as for shares.

The CLLS Company Law Committee also recently responded to the review of the Prospectus Directive. (See

http://ec.europa.eu/internal_market/securities/prospectus/index_en.htm for the consultation and background documents and [click here](#) for the response.)

The response welcomed the Commission's initiative in bringing forward the proposals set out in the review, and agreed with a number of the proposals suggested in the review. The Committee also made a number of detailed points in response to the specific questions contained in the background document.

2.2 Planning & Environmental Law Committee

The Planning & Environmental Law Committee recently made a submission on Japanese knotweed (JK) in response to an HM Revenue & Customs technical note on changes to land remediation relief (LRR). (See

<http://www.hmrc.gov.uk/pbr2008/pbrn21.pdf> for the Technical Note and [click here](#) for the response.) The response looked at:

- Availability of LRR for land contaminated by JK, which occurs post-acquisition;
- Evidentiary difficulties in determining when contamination has occurred;
- Exclusion of removal to a landfill site as a method of “qualifying remediation”;
- Extension of LRR to other invasive plant species; and
- Draft Legislation
 - Section 1149 of the Corporation Tax Bill 2009 (“CTB 2009”)
 - Section 1147 of the CTB 2009

2.3 Regulatory Law Committee

The Regulatory Law Committee responded to the Consultation on EU proposals for a consumer rights directive. (See <http://www.berr.gov.uk/files/file48791.pdf> for the consultation document and [click here](#) for the response.) The response commented on the scope of the Directive, as well as the proposed definitions of “Distance contract”, “Durable Medium” and “Means of Distance Communication”.

The Committee also responded to several FSA consultation papers, including:

- CP 08/19 (“Regulating retail banking conduct of business”). (See http://www.fsa.gov.uk/pages/Library/Policy/CP/2008/08_19.shtml for the consultation document and [click here](#) for the response.) The Committee's response answered the specific questions set out in the consultation paper;

- CP0 8/22 (“Strengthening Liquidity Standards”). (See http://www.fsa.gov.uk/pages/Library/Policy/CP/2008/08_22.shtml for the consultation document and [click here](#) for the response). The response did not comment on any policy aspects of the paper, but rather was concerned to ensure legal certainty in connection with the obligations that would be imposed on firms under the proposed text set out in Appendix 1 to the paper (draft BIPRU 12). The response commented on several aspects of draft BIPRU 12 which it was believed require further consideration and clarification, including:
 - Cross-border banks:
 - Compatibility of proposals with applicable law and regulation
 - Location and control of assets
 - Location of assets
 - Control of assets
 - Conditions to obtaining a liquidity waiver or modification
 - First-to-market regulation
 - Transparency
 - Scope and proportionality
 - Timing

- CP 08/23 (“Financial Stability and Depositor Protection – FSA responsibilities”). (See http://www.fsa.gov.uk/pages/Library/Policy/CP/2008/08_23.shtml for the consultation document and [click here](#) for the response.) The response did not comment on any policy aspects of the consultation paper, but rather focussed on ensuring that the obligations which would be imposed on firms, the standards of behaviour FSA would expect firms to meet and the likely steps which will be followed by FSA were clear and certain. The paper referred specifically to paragraphs 2.8 to 2.17 of the Consultation Paper and the FSA's "concern about the readiness of firms to deliver the information [we] require in a timely fashion".

- A December 2008 consultation paper entitled “Consultation on the Legislative Framework for the Regulation of Alternative Finance Investment Bonds (sukuk)” (a joint consultation between the FSA and HM Treasury outlining legislative proposals for the regulation of alternative finance investment bonds) (See <http://www.fsa.gov.uk/pubs/cp/sukuk.pdf> for the consultation document and [click here](#) for the response.) The response stated:
 - We welcome the Authorities' initiative to clarify the classification of *sukuk* under the UK's financial regulatory framework.
 - Of the four options proposed in the CP we favour Option 1 (introducing a specific regulatory definition of AFIBs) or Option 3 (including AFIBs as an existing specified instrument under RAO¹ Articles 77 and 78):
 - *Option 2* is inappropriate to a regulatory provision (particularly one defining the perimeter of regulation) and dangerous;
 - *Option 3*: this is superficially attractive but we consider involves too high a risk of affecting interpretation of the existing provisions of Articles 77, which depends in particular on all instruments in that category being debts; and
 - *Option 4* we consider untenable.

¹ Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, as amended, commonly referred to as the Regulated Activities Order.

- We consider the proposed definition unsatisfactory in various respects: it is important to amend this before introducing the AFIB provision, and to review its practical working in two or three years' time.

2.4 Revenue Law Committee

The Revenue Law Committee responded to the HMRC Consultation: "Taxation of the Foreign Profits of Companies: Draft Clauses". (See http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageLibrary_ConsultationDocuments&id=HMCE_PROD1_0_29074&propertyType=document for the consultation document and [click here](#) for the response.) The response commented on Schedule 1 (Corporation tax treatment of company distributions), Schedule 2 (Tax treatment of intra-group financing costs and income), Schedule 3 (Loan relationships and derivative contracts: anti-avoidance) and Schedule 5 (International movement of capital), as referred to in the consultation paper.

The Committee also responded to the HMT Consultation: "Principles based approach to financial products avoidance". (See http://www.hm-treasury.gov.uk/prebud_pbr08_productsavoidance.htm for the consultation document and [click here](#) for the response.) The Committee made a number of specific points in regards to the consultation paper, and stated generally that the revised consultation document and draft legislation showed that HMRC had taken into account many comments which were made in the first round of the consultation. The Committee further noted that in its representations of March 2008 on the December 2007 Consultation Document on the principles-based approach, it had raised concerns about the need for such legislation to reflect the law as it currently stands, be applied consistently, be sufficiently clear and certain and ensure that taxpayers are not required to place undue reliance on HMRC guidance in their interpretation or application of the law. The Committee further noted that while the "disguised interest" provisions appeared to have progressed, in its view the "transfer of income streams" provisions were still not sufficiently well developed to be brought into force. The Committee therefore recommended that the proposal to introduce principles based legislation for "transfers of income streams" should be dropped in its entirety.

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