IN BRIEF

Cross-border euro payments are now significantly cheaper, according to a European Commission report. Regulation 2560/2001 requires that a bank's charge for payment up to €50,000 to an account in another member state must be the same as it would be to make a payment in the country, provided the international bank account number (IBAN) and bank identifier code (BIC) are given. The report shows that charges for cross-border euro payments have reduced significantly since the introduction of the regulation, and that this has not directly led to any substantial increase in charges for domestic payments. A €100 cross-border transfer would have cost on average €24 before the rules were introduced, and now costs on average €2.50.

The use of IFRS accounts for SEC reporting has come a step closer. In a speech, SEC Chairman Christopher Cox predicted that IFRS and US GAAP would some day compete freely in US capital markets, and that the two accounting systems would operate side by side. The SEC is seriously contemplating a system in which not only foreign issuers, but also domestic issuers, will have that choice. Cox added: "Whether or not complete convergence is susceptible of practical implementation in the short term, the elimination of the present reconciliation requirement is not dependent upon the FASB and the IASB resolving all major differences between their regimes. Rather, it requires sustained progress toward that goal."

Committee on Uniform Securities Identification Procedures (CUSIP) numbers for syndicated loans have existed in the US markets since 2003, through a joint effort between the CUSIP Service Bureau and the US Loan Syndications and Trading Association (LSTA). The Loan Market Association is now in discussion about introducing an equivalent in Europe.

A user's guide to Islamic finance documents has been published by the Loan Market Association. The guide provides descriptions of the features of Islamic finance and how terms commonly seen in loan documents are imported into a typical Islamic facility. It is intended to help develop a wider understanding of issues that arise in all types of Islamic financing transactions.

Google Checkout, a new payment service from Google, has been launched in the UK. Checkout will compete with auction site eBay's Paypal service and the mainstream card processing services used by many online merchants.

INTRODUCTION

By Martin O'Donovan
ACT Assistant Director, Policy and Technical

Although government has been in the news recently for ignoring advice on pensions, it is really nothing new.

Take Edmund Halley of comet fame (despite not being the first to observe it), whose career was remarkably inventive and varied. To be better informed at your next office quiz night, you should note he made extended voyages to the South Atlantic, investigated the trade winds and monsoons, made advances in the fields of gravity, magnetism and geometry, invented the diving bell, measured the distance from the earth to the sun and, as treasurers will be glad to hear, refined some earlier work on life expectancies.

His study, published in 1693, provided the mathematical underpinning for pricing annuities on a life expectancy basis. Sadly, the government of the day ignored Halley and carried on selling annuities at the same price to everyone, regardless of age, until 1789, on the basis that everyone's life expectancy was exactly the same: 14 years.

Moody's backtracks on banks

Ratings agency Moody's has revised its methodology for incorporating its Joint-Default Analysis (JDA) into its bank ratings and as a result has downgraded the ratings of 44 banks it only recently upgraded.

The JDA approach gave considerable weight to the probability of governmental support to banks because of their critical role in a country's economy (see *The Treasurer*, April 2007, page 9). The dearth of defaults on bank deposits reflects intervention by regulatory authorities – through liquidity provisions, 'lifeboats', accounting forbearance, and so on.

Responding to the market reaction, Moody's has now decided to restrict external support estimates in order to limit the lift from support. As a result, bank deposit ratings will more closely reflect intrinsic financial strength, as measured in the Bank Financial Strength Rating (BFSR).

Local currency debt and deposit ratings will still show the effect of external implied support but should now be more meaningful for users. If users want to ignore that support, they can instead focus on the BFSR.

Governments, regulators and standard setters – and in recent times the rating agencies too – normally consult widely on any new proposals. While this might seem a bothersome process, as this story clearly illustrates, proper consultation is preferable to misjudging the market. ■

Review of disclosure liability kicks off

The government's review of the liability regime for false or misleading statements is under way, so issuers may find themselves subject to more claims.

In some ways this is an unusual exercise. The government wants to amend or extend the scope of the statutory damages regime for corporate disclosures and the liability prevailing under FSA rules implementing the Transparency Directive, and included a power to do so in the Companies Act 2006. However, it has yet to decide what those changes should be.

Professor Paul Davies QC has been asked to review the position and seek market opinions. The government will then consult during the summer on the proposed changes before legislating.

The aim is to ensure the efficient dissemination of corporate information to markets and investors. The current UK regime is aimed at balancing the interests of investors and issuers. The key questions to be considered therefore derive from legal definition as well as market/common practice. These include:

- Should any overall regime extend to non-regulated markets, such as AIM and Plus? Recent criticism of regulatory standards in these markets suggest these elements will be tightened.
- Should the law extend to ad hoc statements and if so, what are ad hoc statements?
- Is liability to be extended to disclosures that are accurate but late?
- Are increased costs to companies and regulators commensurate with the risks mitigated?

The ACT broadly supports the intent and direction of this review and will respond accordingly, but it will also stress the importance of not cutting off the flow of information by pushing companies into excessive verification processes prior to making announcements. ■

Letters of comfort guidance

The ACT has issued a guide to answer the practical queries that can arise when deciding on, negotiating or drafting a letter of comfort.

Letters of comfort are used in many spheres of industry and commerce. The ones in the ACT guide are those provided by a parent company to suppliers of credit to a group member.

A letter of comfort may range from being an expression of goodwill, a representation or statement giving rise to a potential liability, through to an enforceable undertaking by way of guarantee or indemnity.

Treasurers therefore need to ensure such letters do not create unintended legal obligations, and must control the risk of liability arising in tort outside the comfort letter itself, by ensuring that all statements are factually accurate and expressions of opinion are made in good faith and reasonably based.

Clearly, a parent company that furnishes a letter of comfort rather than a guarantee will want to ensure the wording contains nothing as enforceable as a guarantee, collateral warranty or representation.

The conduct of the issuer of the letter must also be consistent with an intention of unenforceability. For instance, the courts may take the view that if a letter is subject to intense or prolonged negotiation, it would be an indicator that it was intended to create binding obligations. Likewise, an end date or statement of governing law is unhelpful.

The wording must survive scrutiny in all jurisdictions which may consider the letter, and not just the issuer's jurisdiction.

The minimum features of a letter of comfort are a statement of awareness, statement of shareholding and a disclaimer. This reassures a bank that proceeding with a local relationship will not damage the relationship at group level.

Some elements can be included to create binding obligations such as undertakings on confidentiality and the provision of information.

The guide debates points preferably excluded from letters of comfort, or the precautions to take if they need to be in. They include:

- Statements of support;
- Statement of continuing commercial relationship;
- Statements of financial involvement;
- Statement of responsibility for the subsidiary's policy, and so on;
- Internal control policies;
- Statements of condition; and
- Subsidiary solvency policy.

Some letters include the wording "It is currently our policy that members of the group manage their business so that they can expect to be able to meet their obligations as they fall due." This, or something beginning "it is our present policy", is arguably only a statement of current fact rather than a promise of future conduct. However, an Australian court has ruled (Banque Brussels Lambert SA v Australian National Industries Ltd, (1989) 21 NSWLR 502) that the statement "it is our practice to ensure…" is the same as "we promise to ensure…". It seems less likely that the English courts would take such a view.

The full version of the guide is available online (www.treasurers.org/technical/resources/comfort.pdf) and covers much more, including precedents, case law and a checklist of processes to work through at inception and for the life of a letter of comfort.

The ACT intends to extend the topics covered by special briefings and future guides. ■

IASB revises borrowing costs

The IASB has published a revised IAS 23 *Borrowing Costs*, which makes the capitalisation of borrowing costs associated with creating capital assets compulsory. Previously, this was an option, with the norm being costs immediately charged to profit and loss. The change is part of the drive for short-term convergence with US GAAP.

The ACT did not support the changes in the exposure draft, and some anomalies in the old standard still remain in the new version.

The IASB's rationale is that the cost of an asset will in future include all costs incurred in getting it ready for use or sale and that comparability is enhanced.

In the ACT's view these reasons are flawed. If a company does not have any borrowing or finances the creation of an asset from equity, it does not include any loss of interest earned on cash or the implied financing cost.

From a scan of the responses to the exposure draft the ACT's views were widely shared, in particular by the 100 Group of Finance Directors and the respected European Financial Reporting Advisory Group (EFRAG). There were three dissenting IASB members. ■

IN BRIEF

The meaning of 'reasonable endeavours' has been clarified in the High Court in Rhodia International Holdings & Anor v Huntsman International LLC. Previous cases had produced conflicting findings – for example, that 'all reasonable endeavours' equates to 'best endeavours', but in those cases the judges had not directed their minds specifically to the issue. The judge in Rhodia v Huntsman ruled that 'reasonable endeavours' imposed a less stringent obligation than 'best endeavours', and that a contract requiring a party to use reasonable endeavours to obtain a parent company guarantee obliged that party to take those steps even if they might be detrimental to its commercial interest. See **www.bailii.org/ew/cases/EWHC/Comm/2007/292.html**

Business Europe is the new name for Unice (Union of Industrial and Employers' Confederations of Europe), which is the European umbrella organisation for business associations in Europe. As an official EU social partner, Business Europe should be consulted by the European Commission on matters of social policy and the labour market. The UK's CBI is a member.

UCP 600 is to replace UCP 500 *Uniform Customs and Practices for Documentary Credits* from 1 July 2007, but with a transitional period. The new rules for letters of credit will not bring about any fundamental changes but aim to recognise the procedures and structures in use in the real world – for example, the role of a second advising bank. There are new standards for checking documents, with the time limit for checking discrepancies made more definitive at five days. Overall, UCP 600 is viewed as a better legal document.

PIRC's shareholder voting guidelines have been reissued for 2007 in an 11th edition. The guidelines are a statement of best practice from the independent governance research body – Pensions Investment Research Consultants. New for this year are expanded guidelines on the negotiation and authorisation of directors' service contracts, and a new section that sets out what effective narrative reporting by listed companies should involve.

Relevant accounts for the purposes of determining the ability of a company to pay a dividend have been under consideration in the High Court. The most recently filed annual accounts cannot be taken as the relevant accounts if a further accounting period has passed for which no accounts have yet been laid.