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IN BRIEF

- The European supervisory authorities have agreed that Fitch Ratings, Standard & Poor's and Moody's Investors Services qualify as **external credit assessment institutions (ECAIs)** for the purpose of mapping ratings onto the capital requirements directive risk weightings.

- The **AIM rules on accounting equivalence** and permissible accounting standards for non-EEA issuers have been amended and clarified by the LSE in the light of the European Commission's proposals.

- The DTI is seeking views on the **transition arrangements** for existing companies arising from certain parts of the Companies Bill. The document explains the forthcoming changes affecting company constitutions, share capital, annual general meetings, company secretaries, and directors' conflicts of interest. See: **www.dti.gov.uk/files/file33125.doc.**

- New guidance notes from the **Joint Money Laundering Steering Group** came into effect from 1 September. The new guidance changes the way that financial services firms in the UK manage money laundering/terrorist financing risk. It enables financial services firms to take a sharper, risk-based approach in the international fight against financial crime, affecting the way many firms operate and deal with customers. For example, different firms may take differing approaches to meeting the legal requirement to verify corporate and individual identities. See: **www.jmlsg.org.uk.**

- A final report on banking industry practices for the **measurement and management of large exposures** has been published by the Committee of European Banking Supervisors, covering single-name concentration risk, other forms of concentration risk such as sectoral or geographical, connected counterparties, stress-testing or scenario analysis, and the use of credit risk mitigation.

- The directive modifying the **4th and 7th company law directives** has now been published in the *Official Journal*. EU member states have until 5 September 2008 to implement the changes. The directive establishes collective board responsibility for financial statements and annual reports, enhances transparency in related parties' transactions and off-balance sheet arrangements, and introduces a requirement for a corporate governance statement to be produced by publicly traded companies.

INTRODUCTION

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

The scope of treasury responsibilities is very wide, from operations right through to overall financial strategy. Therefore the range of relevant news items, proposed changes in laws, regulations and practices, ACT representations made and miscellaneous odds and ends that we feel worth including on these pages is equally wide. If an item catches your attention, you may need to investigate it further for yourself since we cannot always give the full story. Alternatively, by all means contact me and I should be able to direct you to a more comprehensive source. In other instances our website will tell the full story, and this is the case with the ACT guidance on mandate letters for syndicated loans. The full version is on the website and worth logging as useful reference for the future. ■

Guide to LMA mandate letters for syndicated loans

The ACT has updated its borrowers' guide to the Loan Market Association's (LMA) documentation by adding a new section covering the mandate letter. The mandate letter is a critical document for the borrower at the start of the process of arranging a loan facility, since, together with the term sheet annexed to it, it determines the key terms on which the syndicate will be assembled and funding provided.

The LMA mandate letter was drafted without the benefit of any input from the ACT, so it is much more bank-friendly than most borrowers may find acceptable. Because the terms shape the final agreement, treasurers must give careful consideration to the mandate letter.

The ACT's new guide, prepared with the assistance of legal firm Slaughter & May, explains the specifics that borrowers should negotiate for a more balanced agreement.

Historically, it has been accepted that the undertakings of the mandated lead arrangers and underwriters to arrange and underwrite may not be enforceable, as they may not be sufficiently certain and are subject to documentation. However, market understanding is that the obligation to underwrite a facility or use best efforts to arrange one imports a strong commitment. This means that borrowers can usually accept market practice except in circumstances such as a takeover bid where "certain funds" are required. For this reason there are two forms of mandate – a "best efforts" one and an "underwritten" one.

On the other hand, borrowers should be aware that the obligations placed on them by the LMA forms of mandate letter are likely to be sufficiently precise to be enforceable against them.

Conditions (Para 2)

The offer to arrange and underwrite the facility is subject to satisfying a list of conditions that allow the mandated lead arrangers and underwriters to terminate on a breach of any of them. Here, there is a notable omission of materiality qualifying the conditions.

Market practice often involves the borrower acknowledging that it bears responsibility for the accuracy of the information memorandum, its agreement that it will give representations (on terms to be agreed) in the facility agreement, and the right of the mandated lead arrangers and underwriters to terminate if the information provided is materially inaccurate or incomplete.

In practical terms borrowers may not be able to give these assurances, but they can sometimes agree subject to a qualification, such as that it is not inaccurate to an extent that would materially affect a potential lender's decision to participate.

Material adverse change (Para 4)

The obligations of the banks under mandate letters are typically subject to a condition that "no material adverse change" occurs.

The LMA language here is heavily weighted in favour of the lenders. For example:

- The test is subjective. Instead the borrower should insist on objectivity, or at least that the mandated lead arranger's opinion must be a reasonable one.

- The scope of "material adverse change" is very wide. The events triggering it could be

FSA updates UK-listed issuers

The September issue of the Financial Services Authority's *List* publication is packed with important news and clarifications for UK-listed issuers, including:

Class tests. These are figures used to classify assets and profits. When testing if a transaction meets the size criteria, any class 2 or larger transactions completed since the year-end should be adjusted for, by both the issuer and the target.

Timing of supplementary prospectus. A supplementary prospectus should be submitted to the UK Listing Authority (UKLA) as soon as possible after a trigger event occurs. The UKLA will then endeavour to fast-track the approval process. It is regarded as best practice to suspend the offer between the trigger event and the supplementary publication.

Should issuers of convertible bonds comply with Listing Rule 12? Chapter 12 covers the purchase of own equity securities, and convertibles will fall into this category. However, *List* notes that Chapter 12 applies only to a company that has a primary listing of its equity securities.

Financial information required for guarantors of debt issues. A guarantor will no longer have to include financial information as if it had a security admitted to a regulated market. This change was prompted by the conflict with accounting regulations whereby the guarantor is not required to report on an ongoing basis.

Cancellation of listing in relation to a takeover offer. A separate circular is not needed if an offer document gives notice of cancellation 20 days or more after the offeror obtains 75% acceptances. 50% acceptance would not meet the relevant rules.

Sponsor independence. Sponsors must always be independent of a listed company or applicant, and new Rule 8.3.6R(3) catches "all who are involved in the provision of sponsor services", which extends beyond the deal team and includes all who are in a position to influence the deal team's advice. The sponsor must submit a confirmation of independence.

Mineral expert's reports. Clarification is given on when a prospectus needs expert reports on the acquisition or disposal of mineral resources.

Transactions with sponsors who are part of the investment manager's group. Further clarification provided.

Annual information update. A reminder that issuers must make an information service announcement within 20 days of the annual financial statements (the full report and accounts rather than the prelims).

Contents of half-yearly report and preliminary statement of annual results. Companies reporting under IFRS can request certain waivers on information disclosures. ■

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narrowed to apply only if the event in question is likely to prejudice successful syndication.

- Although banks often want the "no material adverse change" condition to cover material adverse change in market conditions, borrowers usually point out that this type of *force majeure* provision is not justified where the deal is underwritten. It would be a concern if such a condition protected a bank from its own failure to price a loan correctly.

Clear market (Para 5)

- The borrower is asked to undertake, in general terms, not to raise other finance in the markets while the syndicate is being arranged, but the LMA "clear market" provision is much more onerous for borrowers than is typical. Aspects that could be negotiated include narrowing the meaning of "any other finance" to exclude finance raised in the debt and equity markets or below a materiality level, and setting a fixed cut-off date rather than being subject to the restriction for an uncomfortably long time.

Market flex (Para 6)

Although a "market flex" is regularly included in mandate letters, even in the sub investment-grade market the terms of the provision are usually narrower than those proposed by the LMA. The LMA advises users to consider whether it is appropriate to retain this provision, and most borrowers will be able to negotiate to their advantage here. A market flex can be successfully resisted altogether by investment-grade borrowers, or in circumstances where the risks involved do not justify it.

Points for negotiation will be the subjectivity of the applicable circumstances and its scope.

Borrowers will usually want to limit the flex to pricing, with specific caps, and the re-allocation of amounts between tranches, without altering the total amount of the facility.

The ACT's borrowers' guide covers many more points and in more detail, not least confidentiality – the mandate letter provides inadequate protection around information supplied by the borrower.

For the ACT guide, see www.treasurers.org/technical/lmaguide.cfm ■

IN BRIEF

▸ The European Commission has proposed a draft regulation to amend the **Prospectus Regulation** (809/2004) for financial information in prospectuses where the issuer has a complex financial history and information is required on entities other than the issuer itself. It also clarifies the rules where the issuer has changed its accounting reference date during the three-year period for which historical financial information is required.

▸ **Risk management and internal controls** were the subject of a position paper from the European Corporate Governance Forum. EU directives will require the audit committees of listed companies to monitor the effectiveness of internal controls and risk management and publish a corporate governance statement including a description of the main risk management systems and controls. The forum recognised that the general purpose of risk management and internal control was to manage rather than eliminate risks associated with the successful conduct of business, therefore any regulatory measures should be proportionate. In the forum's view, while boards are responsible for monitoring the effectiveness of internal control systems, there is no need to introduce a legal obligation for them to certify the effectiveness of internal controls at EU level.

▸ A bank can refuse to comply with instructions to pay money out of a customer's account where it suspects **money laundering**. In the recent Court of Appeal case K Ltd v National Westminster Bank and Others, the court found there could be no breach of mandate by the bank where compliance with a customer's instructions would have been an offence (under section 328 of the Proceeds of Crime Act 2002). Likewise, the customer's claim for an injunction against the bank would fail unless the customer persuaded the court that the bank had no such suspicion of money laundering. See: **www.bailii.org/ew/cases/EWCA/Civ/2006/1039.html.**

▸ The Committee of European Securities Regulators has published a set of frequently asked questions, providing answers to a range of everyday questions relating to the **prospectus directive and regulations**. See: **www.cesr.eu/index.php?docid=3882.**

▸ Guidance and FAQ on the **new global note structure** has been published by the ICMA. Click on Regulatory Policy at: **www.icma-group.org.**