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| **Bulletin No. 134**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20134%20October%202008.htm#h1)
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| **1. Recent Corporate Law and Corporate Governance Developments**  |  | ext Section |

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| **1.1 Guidance on audit committees**On 15 October 2008, the UK Financial Reporting Council published updated Guidance on Audit Committees. The revised guidance encourages audit committees to consider the risks associated with their external auditor leaving the market and to disclose more information about the process by which the auditor was selected in the company's annual report, and provides guidance on the factors to be considered if a group is considering engaging firms from more than one network to work on the audit. These changes have been made in response to the recommendations of the Market Participants Group's report on promoting choice in the audit market, published in October 2007. The Guidance on Audit Committees (formerly known as the Smith Guidance) was first published in 2003 and provides guidance to listed companies on the composition, role and responsibilities of the audit committee. Boards are not required to follow the guidance, but it is intended to assist them when implementing the relevant provisions of the Combined Code on Corporate Governance. The audit committee guidance is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Guidance%20on%20Audit%20Committees%20October%202008.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.2 CESR and CEBS publish their advice on the European Commission's review of commodities business** On 15 October 2008, the Committee of European Securities Regulators (CESR) and the Committee of European Banking Supervisors (CEBS) published their advice in response to the Joint Call for Technical Advice issued by the European Commission in December 2007 concerning the regulatory treatment of firms that provide investment services in relation to commodity and exotic derivatives. Following up on previous work, as well as industry input provided during a public consultation and two public hearings which took place during May to September 2008, CESR and CEBS have analysed whether the Markets in Financial Instruments Directive (MiFID) and the Capital Adequacy Directive (CRD) treatments of specialist commodity derivatives firms continue to support the intended aims of market and prudential regulation. CESR and CEBS have identified potential for market and regulatory failures with regard to commodity derivatives markets. Market failures may in particular result from asymmetric information and negative externalities. Potential regulatory failures may arise where regulation is not sufficiently adapted to the specificities of the commodity derivatives market or due to different regulatory treatments across the EU. The advice concludes with recommendations with regard to the future scope of the exemptions which exist in MiFID and the prudential treatment of specialist commodity derivatives firms. In relation to MiFID, CESR and CEBS see a case for revising the exemptions in Article 2(1)(i) and (k) of MiFID and to provide a very narrow exemption for the incidental provision of investment services related to commodity derivatives and an exemption for primarily non-financial firms which trade on their own account with sophisticated clients and to ensure a level playing field. Furthermore, CESR and CEBS recommend that the Commission consider whether an additional Article should be included into MiFID which would clarify that firms covered by the exemptions relating to commodity derivatives in Article 2 should not be prevented from being authorised as investment firms. Regarding the prudential treatment of specialist commodity derivatives firms, CESR and CEBS offer two options in their advice. One option would be to require specialist commodity derivatives firms to meet a high-level requirement to have adequate financial resources and qualitative risk management requirements. The second option proposes the full application of CRD to specialist commodity derivatives firms with an exemption from any prudential requirements for firms where this would not impede the overall aims of prudential regulation.  The advice is available at on the [CESR](http://www.cesr.eu/popup2.php?id=5306" \t "_new) website.etailed Contents**1.3 Australian government guarantee of deposits and wholesale funding** On 15 October 2008, the Australian Government introduced into Parliament several Bills that have the effect of guaranteeing deposits in authorised financial institutions. The government has also announced that it will guarantee wholesale funding by authorised financial institutions. The [Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Bill 2008 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=104128" \t "_default) introduces measures to implement a Financial Claims Scheme (FCS), including a three-year 100 per cent guarantee of deposits in authorised deposit-taking institutions (ADIs), and other arrangements to deal with distressed or failing financial institutions. Schedule 1 of the Bill amends the [Banking Act 1959 No. 6 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6665" \t "_default), the [Insurance Act 1973 No. 76 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6398" \t "_default) and other Acts to establish an FCS, administered by the Australian Prudential Regulation Authority (APRA), to provide depositors in authorised deposit taking institutions a full guarantee of their depositors for a period of three years. After three years the general provisions of the FCS will come into operation, limiting its operation to Australian denominated currency deposits. The Bill includes a mechanism to impose a cap on deposit coverage at that time. The Government has indicated that it will consider this issue at that stage. In addition, the FCS provides compensation to eligible policyholders with claims against a failed general insurer in the event of a general insurer failure.Schedule 1 of the Bill also includes:* appropriation arrangements for the FCS's administration and the advancing of funds to depositors and policyholders under the deposit guarantee and FCS; and
* arrangements for the recovery of funds advanced by the FCS and of administration costs through the sale of the closed institution's assets (see also recovery of funds via industry levies under the [Financial Claims Scheme (ADIs) Levy Act 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=104190" \t "Default) and [Financial Claim Scheme (General Insurers) Levy Act 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=104191" \t "Default).

Schedule 2 of the Bill amends the Banking Act 1959 to establish arrangements to improve statutory management of ADIs and the recapitalisation of an ADI. Schedule 3 of the Bill amends the [Insurance Act 1973](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6398" \t "Default) to establish arrangements to provide for the judicial management of general insurers and facilitate the recapitalisation of a general insurer. Schedule 4 of the Bill amends the Life Insurance Act 1995 to establish arrangements to improve judicial management of life insurers and facilitate the recapitalisation of a life insurer. Schedule 5 of the Bill amends the [Financial Sector (Business Transfer and Group Restructure) Act 1999](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14018" \t "Default) to establish enhanced arrangements to facilitate the transfer of assets and liabilities between institutions. The Bills are available on the [Parliament of Australia](http://www.aph.gov.au/bills/index.htm%22%20%5Ct%20%22_new) website. etailed Contents**1.4 Principles and practices for sovereign wealth funds** On 11 October 2008, the International Working Group of Sovereign Wealth Funds (IWG) published its 'Generally Accepted Principles and Practices for Sovereign Wealth Funds'. According to the IWG, the principles respond to key macroeconomic, financial market, and investment issues raised by the rapid growth in the size and number of sovereign wealth funds globally. Implementation of the Principles by sovereign wealth funds will promote a better understanding of their institutional and operational practices. There are 24 principles which deal with matters such as the legal framework for these funds and their disclosure practices.The principles are available on the [IWG](http://www.iwg-swf.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.5 Economic survey of Australia 2008** On 10 October 2008, the Organisation for Economic Co-Operation and Development (OECD) published the 2008 Economic Survey of Australia.Major topics dealt with in the report are:* key challenges;
* raising labour supply;
* enhancing educational performance;
* enhancing the functioning of product and labour markets; and
* improving water management.

The next Economic survey of Australia will be prepared for 2010. The 2008 survey is available on the [OECD](http://www.oecd.org/dataoecd/40/39/41411272.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.6 Report of the Financial Stability Forum on enhancing market and institutional resilience** On 10 October 2008, the Financial Stability Forum (FSF) published its 'Report on Enhancing Market and Institutional Resilience'. The report builds on the recommendations submitted by the FSF in April 2008 to G7 Finance Ministers and Central Bank Governors for addressing the weaknesses that have produced the present crisis and for strengthening the financial system going forward.  The actions endorsed by the G7 for implementation by end-2008 include, as detailed in the report, further measures to strengthen standards and oversight of bank capital and liquidity, risk management standards in financial institutions, valuation practices and accounting standards. Alongside this, the FSF will address additional issues, building on the work of its member authorities and international bodies. It will:* Monitor and address the international interaction and consistency of emergency arrangements and responses being put in place to address the current financial crisis.
* Work to mitigate sources of pro-cyclicality in the financial system. Work has been set in train on the scope for improvements to the capital regime, loan-loss provisioning practices, compensation arrangements, and the management of interactions between valuation and leverage.
* Reassess the scope of financial regulation, with a special emphasis on institutions, instruments and markets that are currently unregulated.
* Work to better integrate macroeconomic oversight and prudential supervision, to help translate more effectively systemic concerns into concrete supervisory and regulatory responses.

The FSF states that in view of market developments, implementation of certain of the recommendations needs to accelerate:* Market participants need to move ahead urgently to put in place central counterparty clearing for over-the-counter (OTC) credit derivatives and achieve more robust operational processes in OTC derivatives markets.
* Accounting standards setters must conclude their work promptly to enhance and converge guidance on valuation of instruments in inactive markets, and accounting and disclosure standards for off-balance sheet activities and related risks.

In addition, the FSF calls on:* Credit rating agencies (CRAs) to enhance their efforts to comply with the FSF recommendations, including by making industry-wide proposals for providing differentiated information or ratings for structured products.
* Private sector organisations that have recommended improvements to industry practices to establish frameworks for rigorously monitoring and reporting on their timely implementation.

The report is available on the [FSF](http://www.fsforum.org/press/pr_081009f.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.7 Report on banks' transparency**  On 9 October 2008, the Committee of European Banking Supervisors (CEBS) published the findings of an analysis following up on the application of its recommendations in the 'Report on banks' transparency on activities and products affected by the recent market turmoil' published on 18 June 2008.In the follow-up report, CEBS compares the disclosures by the 22 banks covered in the analysis (19 of which are from the EU) in their 2008 second quarter results with the good practices CEBS identified in the June report, which were endorsed at the July ECOFIN meeting. These good practices cover disclosures on the impact of the market turmoil on results and on exposure levels - which are in line with the recommendations of the Financial Stability Forum (FSF) - as well as information on business models, risk management practices, and accounting and valuation practices.The main findings of the follow-up report are:* Around 80% of the banks provide detailed disclosures on the impact of the market turmoil and on exposure levels. For about half of the banks this is an improvement in comparison to the last assessment, especially in terms of granularity. CEBS is of the view that for these areas the disclosures are moving towards the good practices identified in the June report.
* Disclosures on business models and to a lesser extent on risk management practices as well as accounting and valuation practices are less detailed. Most institutions included in the sample still have to improve their disclosures in these areas, although CEBS realises that the timing of the June report may not have allowed all institutions to take the CEBS good practices wholly into account.

The report conveys the following main messages:* Institutions need to make further efforts to bring their disclosures into line with the good practices identified in the June report. This includes making explicit statements when the exposures and the impact of the market turmoil are very small or zero. These efforts should lead to satisfactory results in forthcoming disclosures.
* The good practices continue to be particularly relevant and helpful in contributing to restoring confidence, especially in the current market conditions, and should be further promoted by CEBS's members.

The report is available on the [CEBS](http://www.c-ebs.org/formupload/69/691c71d6-85cc-4c2c-81e3-a287fb7c2a4b.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.8 Global competitiveness rankings**On 8 October 2008, the World Economic Forum published the Global Competitiveness Report 2008-2009. The United States is ranked first, Switzerland is in second position followed by Denmark, Sweden and Singapore. European economies continue to prevail in the top 10 with Finland, Germany and the Netherlands following suit. The United Kingdom, while remaining very competitive, has dropped by three places and out of the top 10, mainly attributable to a weakening of its financial markets. The People's Republic of China continues to lead the way among large developing economies, improving by four places this year and joining the top 30. All of the BRIC economies figure in the top half of the ranking, with China followed by India, Russia and Brazil. Several Asian economies perform strongly with Japan, Hong Kong SAR, Republic of Korea and Taiwan, China in the top 20. In Latin America, Chile is the highest ranked country, followed by Panama, Costa Rica and Mexico.  A number of countries in the Middle East and North Africa region are in the upper half of the rankings, led by Israel, Qatar, Saudi Arabia, United Arab Emirate |

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