The Banking Regulation Review

Fourth Edition

Editor
Jan Putnis

Law Business Research

The Banking Regulation Review

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Banking Regulation Review, 4th edition
(published in April 2013 – editor Jan Putnis).

For further information please email
Adam.Sargent@lbresearch.com

The Banking Regulation Review

Fourth Edition

Editor
Jan Putnis

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

MARKETING MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

PUBLISHING ASSISTANT
Lucy Brewer

PRODUCTION COORDINATOR
Lydia Gerges

HEAD OF EDITORIAL PRODUCTION
Adam Myers

CHIEF SUBEDITOR
Jonathan Allen

SUBEDITORS
Caroline Rawson, Anna Andreoli

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2013 Law Business Research Ltd
www.TheLawReviews.co.uk
No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers and the editor accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of March 2013, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-59-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET BA-HR DA

AFRIDI & ANGELL

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ANDERSON MŌRI & TOMOTSUNE

ARTHUR COX

BONELLI EREDE PAPPALARDO

BREDIN PRAT

BUN & ASSOCIATES

CHANCERY CHAMBERS

CLAYTON UTZ

CONSORTIUM – TABOADA & ASOCIADOS

CONSORTIUM CENTRO AMÉRICA ABOGADOS

DAVID GRISCTI & ASSOCIATES

DAVIES WARD PHILLIPS & VINEBERG LLP

DAVIS POLK & WARDWELL LLP

DE BRAUW BLACKSTONE WESTBROEK

DLA PIPER WEISS-TESSBACH RECHTSANWÄLTE GMBH

ELVINGER, HOSS & PRUSSEN

F.O. AKINRELE & CO

FERRERE ABOGADOS

GERNANDT & DANIELSSON

GIDE LOYRETTE NOUEL AARPI

HANNES SNELLMAN

HENGELER MUELLER

KADIR, ANDRI & PARTNERS

KBH KAANUUN

KIM & CHANG

LENZ & STAEHELIN

LS HORIZON LIMITED

MATTOS FILHO ADVOGADOS

MAYORA & MAYORA, SC

MIRANDA CORREIA AMENDOEIRA & ASSOCIADOS

MKONO & CO ADVOCATES

MORATIS PASSAS LAW FIRM

MOURANT OZANNES

MULLA & MULLA & CRAIGIE BLUNT & CAROE

NAGY ÉS TRÓCSÁNYI ÜGYVÉDI IRODA

NAUTADUTILH

PAKSOY

PELIFILIP SCA

PIMENTA DIONISIO E ASSOCIADOS

RUSSELL McVEAGH

SHALAKANY LAW OFFICE

SKUDRA & UDRIS

SLAUGHTER AND MAY

SYCIP SALAZAR HERNANDEZ & GATMAITAN

T STUDNICKI, K PŁESZKA, Z ĆWIĄKALSKI, J GÓRSKI SPK

URÍA MENÉNDEZ

VASIL KISIL & PARTNERS

VIEIRA DE ALMEIDA & ASSOCIADOS

WASELIUS & WIST

WEBBER WENTZEL

ZHONG LUN LAW FIRM

CONTENTS

Editor's Preface xi
Jan Putnis

Chapter 1 INTERNATIONAL INITIATIVES 1
Jan Putnis and Tolek Petch

Chapter 2 ANGOLA 34
Mafalda Oliveira Monteiro and Bruno Sampaio Santos

Chapter 3 AUSTRALIA 45
Louise McCoach and David Landy

Chapter 4 AUSTRIA 85
Wolfgang Freund

Chapter 5 BARBADOS 95
Trevor A Carmichael QC

Chapter 6 BELGIUM 104
Anne Fontaine

Chapter 7 BOLIVIA 115
Carlos Pinto-Meyer and Cristian Bustos

Chapter 8 BRAZIL 123
José Eduardo Carneiro Queiroz

Chapter 9 CAMBODIA 129
Bun Youdy

Chapter 10 CANADA 145
Scott Hyman, Carol Pennycook, Derek Vesey and Nicholas Williams

Chapter 11 CAYMAN ISLANDS 161
Richard de Basto

Chapter 12 CHINA 172
Wantao Yang and Borong Liu

Chapter 13 DENMARK 193
Mikkel Fritsch and Tanja Lind Melskens

Chapter 14 EGYPT 205
Aly El Shalakany

Chapter 15 EL SALVADOR 215
Oscar Samour and Aquiles Delgado

Chapter 16 EUROPEAN UNION 226
Jan Putnis and Michael Sholem

Chapter 17 FINLAND 250
Tarja Wist and Jussi Salo

Chapter 18 FRANCE 262
Olivier Saba, Samuel Pariente, Jennifer Downing, Jessica Chartier and Hubert Yu Zhang

Chapter 19 GERMANY 295
Thomas Paul and Sven H Schneider

Chapter 20 GREECE 309
Dimitris Passas and Vassilis Saliaris

Chapter 21 GUATEMALA 332
María Fernanda Morales Pellecer

Chapter 22 GUERNSEY 346
John Lewis and Helen Wyatt

Chapter 23 HONG KONG 358
Laurence Rudge and Peter Lake

Chapter 24 HUNGARY 376
Zoltán Varga and Tamás Pásztor

Chapter 25 INDIA 389
Shardul Thacker

Chapter 26 INDONESIA...... 403
Ferry P Madian and Yanny Meuthia S

Chapter 27 IRELAND...... 426
William Johnston, Robert Cain, Eoin O'Connor and Niall Esler

Chapter 28 ITALY...... 440
Giuseppe Rumi and Andrea Savigliano

Chapter 29 JAPAN...... 452
Hirohito Akagami and Wataru Ishii

Chapter 30 JERSEY...... 464
Simon Gould and Sarah Huelin

Chapter 31 KOREA...... 476
Sang Hwan Lee, Chan Moon Park and Hoin Lee

Chapter 32 KUWAIT...... 489
Haifa Khunji and Basem Al Muthafer

Chapter 33 LATVIA...... 503
Armands Skudra

Chapter 34 LUXEMBOURG...... 514
Franz Fayot

Chapter 35 MALAYSIA...... 534
Andri Aidham bin Dato' Ahmad Badri, Julian Mahmud Hashim and Tan Kong Yam

Chapter 36 MALTA...... 544
David Griscti and Clint Bennetti

Chapter 37 MOZAMBIQUE...... 555
Paulo Pimenta and João Leite

Chapter 38 NETHERLANDS...... 565
Joost Schutte, Annick Houben and Mariken van Loopik

Chapter 39 NEW ZEALAND...... 579
Guy Lethbridge and Debbie Booth

Chapter 40 NICARAGUA 592
Rodrigo Taboada R

Chapter 41 NIGERIA........ 605
Adamu M Usman and Jumoke Onigbogi

Chapter 42 NORWAY 620
Terje Sommer, Richard Sjøqvist and Markus Nilssen

Chapter 43 PHILIPPINES 632
Rafael A Morales

Chapter 44 POLAND 648
Tomasz Gizbert-Studnicki, Tomasz Spyra and Michał Bobrzyński

Chapter 45 PORTUGAL........ 662
Pedro Cassiano Santos

Chapter 46 ROMANIA 679
Alexandru Birsan, Carmen Peli and Alexandra Manciulea

Chapter 47 SOUTH AFRICA........ 692
Johan de Lange and Matthew Gibson

Chapter 48 SPAIN 704
Juan Carlos Machuca

Chapter 49 SWEDEN 732
Niclas Rockborn and Nils Unckel

Chapter 50 SWITZERLAND 750
Shelby R du Pasquier, Patrick Hünerwadel, Marcel Tranchet and Valérie Menoud

Chapter 51 TANZANIA........ 773
Wilbert B Kapinga, Rehema A Khalid and Kamanga W Kapinga

Chapter 52 THAILAND 783
Montien Bunjarnondha and Rahat Alikhan

Chapter 53 TURKEY 798
Serdar Paksoy and Nazlı Bezirci

Chapter 54 UKRAINE 810
Denis Lysenko and Yulia Kyrpa

Chapter 55 UNITED ARAB EMIRATES... 822
Amjad Ali Khan and Stuart Walker

Chapter 56 UNITED KINGDOM... 830
Jan Putnis, Benjamin Hammond and Nick Bonsall

Chapter 57 UNITED STATES 868
Luigi L De Ghenghi and Reena Agrawal Sahni

Chapter 58 VIETNAM 948
Samantha Campbell, Pham Bach Duong and Nguyen Thi Tinh Tam

Appendix 1 ABOUT THE AUTHORS.. 969

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS.. 1007

EDITOR'S PREFACE

2012 may be remembered as the year when practical reality caught up with those who thought that the financial crisis that emerged in Western economies in 2007 would result in more effective cooperation between financial regulators across the world. By one measure – the number of new initiatives and proposals for reform – the amount of cross-border financial regulatory activism has never been higher. But by more useful measures – moves towards solutions to the 'too big to fail' problem through the development of effective cross-border resolution mechanisms for banking groups and international cooperation on reform of OTC derivatives regulation – the optimism of the past has faded a little.

Questions are increasingly asked about whether the obstacles to truly productive cross-border regulatory cooperation – political imperatives, different incentives and straightforward differences of view – will ever be surmounted in ways that make international banking groups fundamentally safer. Media speculation in January 2013 that US regulators might not allow banks to assume cross-border regulatory cooperation in the resolution plans that they prepare in 2013 would, if substantiated, highlight this trend.

These apparently negative developments have not made the period since the publication of the last edition of this book in April 2012 any less interesting. It is also worth noting that most of the challenges that we have seen – new law and regulation that creates difficult questions of cross-border consistency and extraterritoriality, differing regulatory philosophies between major financial jurisdictions and the sheer slowness and unpredictability of developments – have rational, if depressing, explanations. For example, fundamental differences between the insolvency law of major jurisdictions, coupled with cross-border recognition issues and disagreements over how to pay for resolution, are nothing if not formidable barriers to the development of workable group-wide resolution plans for banking groups.

However, the past 12 months have not been a period of complete failure of regulatory reform either. Progress has been made, for example, in the enactment of legislation regarding OTC derivatives, most notably the European Market Infrastructure

Regulation (EMIR) in the European Union. But, as noted above, cross-border cooperation in this area remains an issue: it seems that hardly a month goes by without the discovery of a previously unremarked-upon anomaly between the rules in this area in different countries.

Bank liquidity regulation has continued to be the subject of intense debate in 2012, culminating in the Basel Committee's announcement in January 2013 of its decision to relax and to recommend the gradual phasing in of the liquidity coverage ratio ('LCR') for banks. Taking into account the fundamental influence that the LCR will have on many banks' business models, this was a welcome sign of pragmatism and also a sign of the Basel Committee's willingness to move the debate on liquidity forward.

Despite the challenges that have arisen in bank resolution initiatives, legislation and rules are developing in this area in multiple jurisdictions, with, for example, the publication of the draft European Union Recovery and Resolution Directive ('the RRD') in June 2012.

The European Union is, at the time of writing, enjoying a period of respite from the problems that it faced from the eurozone crisis in 2012, but it would be very optimistic to say that those problems have been brought under control. The European Commission is placing much emphasis on finalising the legislation implementing Basel III (CRD IV) and the RRD as soon as possible in 2013, notwithstanding that each of these initiatives may ultimately be affected profoundly by the parallel 'banking union' proposals for the eurozone.

In the United States, the main rules implementing Basel III are also expected to be substantially finalised in 2013. The significance of the restructuring of the financial regulatory regime in the United States, principally under the rules that are emerging from the framework established by the Dodd-Frank Act, continues to unfold and looks set to dominate the careers of a generation of regulators, bankers and their advisers.

The realisation dawned on many banks in 2012 that regulatory reform will be a longer and more drawn-out process than had been anticipated. For this reason, 2012 may also be remembered as the year when the banking sector in Europe, the United States and some other parts of the world began to think seriously about structural change in the long term, accepting that restructuring will have to take place against a backdrop of continuing regulatory reform. We have begun to see more group reorganisations, disposals, and the severe downsizing or closure of some businesses in banking groups, as well as opportunistic acquisitions. Four principal factors have contributed to these developments:

a A little more certainty, or at least the perception of a little more certainty, about rule-making (or, at least, the direction of rule-making) when compared to the past.

b The continuing urgent need that many banking groups have for capital and liquidity, and the related need to ensure that capital is deployed in the most efficient and profitable ways.

c Some specific legal and regulatory initiatives driving structural change, such as the US Volcker Rule (although this rule has not yet been fully defined at the time of writing) and some emerging (though not yet in force) 'ring-fencing' proposals in parts of Europe (so far principally in the United Kingdom and France).

d Continuing regulatory attacks on complexity and actual or perceived barriers to resolution of banking groups.

Accordingly, many banks are refocusing their businesses (or are currently planning how to do so) on what they consider to be the areas that will yield the highest returns relative to cost in regulatory capital and liquidity terms. Consistent with that objective, we are seeing intense competition for capital allocation between different businesses within banking groups and a more widespread appreciation of the relative capital cost (or capital efficiency) of different activities.

2012 was of course also marked by further recrimination about past practices in parts of the banking sector. Allegations that LIBOR and other benchmarks have been manipulated (or subject to attempted manipulation), continuing losses from mis-selling and other past misconduct continue to affect the sector. Attention has turned more recently to the ways in which banking groups quantify and present these problems in their financial statements.

An increasingly orthodox view among senior management of banking groups in Europe and the United States is to conclude that the only way through these difficulties is to adopt a 'whiter than white' approach to compliance. This involves banks taking the initiative to present a new way forward on compliance matters and breaking away from the more reactive stance that some of them held in the past. Some commentators have asked where this will lead. Will it result in banking groups that are so hobbled and diminished by internal policies and rules that innovation, efficiency and, ultimately, service to the 'real' economy, is put at risk? Observation would suggest that this is a concern unless banks keep in mind four critical objectives when developing their compliance strategy and relationships with financial regulators:

Compliance

The first and most obvious objective is to ensure that banking groups are and remain compliant with their legal and regulatory obligations. In many countries this involves developing a good understanding of the purpose and spirit of those obligations in addition to (or, in some cases, instead of) their literal meaning.

Predictability

It is desirable to maximise the predictability of relationships with financial regulators. Good and constructive relationships with regulators generally make it more likely that banks will see what is coming around the corner sooner and will be better able to find positive ways to plan ahead.

Influence

Constructive influence of regulatory policy development in areas affecting banks is also desirable, even if a bank achieves no more than a small proportion of the change that it would like to see. For this purpose I would include within the meaning of 'influence' the conveying of cogent arguments even where regulators do not act in response to them. This is simply because the route to influence for a bank includes convincing regulators that it has thoughtful and coherent ideas, even where political or other imperatives have the result that the regulator does not address the bank's concerns.

Flexibility and pragmatism
Flexibility and pragmatism in the relationships between banks and their regulators is critical. Inflexibility can lead to inappropriate or overly formulaic regulatory approaches to unexpected developments. Flexibility is often difficult to achieve but is worth pursuing in the interests of both banks and regulators, through regular informal contacts and exchanges of views with senior staff at regulators in addition to formal interactions.

Obvious-looking these objectives may be, but serious problems in relationships between banks and their regulators can usually be traced back to a failure to achieve at least one of them.

This updated edition contains submissions by authors provided for the most part between mid-January and mid-February 2013, covering 56 countries (in addition to the chapters on International Initiatives and the European Union). As ever, comments on this book from banks, regulators and governments are welcome.

My thanks go to the contributors to this book, who have once again taken time out from advising on important matters affecting the banking sector to update their chapters – 'update' meaning a fundamental revision in many cases.

Thanks are also due to Adam Myers, Lydia Gerges and Gideon Roberton at Law Business Research Ltd, for their continuing support in the preparation of this book.

Finally, the list of credits would not be complete without mention of the partners and staff of Slaughter and May, in particular Ruth Fox, Ben Kingsley, Peter Lake, Laurence Rudge, Nick Bonsall, Ben Hammond, Tolek Petch and Michael Sholem. Once again, they helped not only to make this book possible but also to keep it as painless a project as is currently possible in the field of banking regulation.

Jan Putnis
Slaughter and May
London
March 2013

Chapter 55

UNITED ARAB EMIRATES

Amjad Ali Khan and Stuart Walker[1]

I INTRODUCTION

The past year has seen a substantial improvement in the performance of banks and financial institutions in the UAE. Adequate provisions have been made for most non-performing loans, banks are once again aggressively competing for good assets and 2012 bank results show substantial improvement in profits.

From early 2012, the signs of recovery and growth were visible. Recently, the Emirate of Dubai and various government-owned entities have issued bonds at very attractive rates, the real estate sector, which was seriously affected during the recession, has revived, and the government of the Emirate of Dubai has announced large new real estate projects.

II THE REGULATORY REGIME APPLICABLE TO BANKS

i UAE

The regulatory framework for banking in the UAE is based on Federal Law No. 10 of 1980 concerning the Central Bank, the monetary system and the organisation of banking ('the Banking Law'). Under the Banking Law, the Central Bank was created and entrusted with the issuance and management of the country's currency and the regulation of the banking and financial sectors. The Banking Law provides for the licensing and regulation by the Central Bank of:

a Commercial banks: commercial banks are defined to include institutions that customarily receive funds from the public, grant loans, and that issue and collect cheques, place bonds, trade in foreign exchange and precious metals, or carry on other operations allowed by law or by customary banking practice.

1 Amjad Ali Khan and Stuart Walker are partners at Afridi & Angell.

b Investment banks and companies: investment banks and companies manage portfolios on behalf of individuals or companies, advise clients on raising or placing equity and debt, subscribe to equity and debt instruments, prepare feasibility studies for projects, market shares and debt instruments and establish and manage funds. Investment banks are distinguished from commercial banks principally in that they do not accept deposits for less than two years.

c Finance companies: finance companies provide corporate and consumer credit facilities but may not accept deposits from individuals.

d Financial intermediaries: financial intermediaries broker the purchase or sale of domestic or foreign shares or instruments.

e Monetary intermediaries: monetary intermediaries are foreign exchange dealers who purchase and sell currencies.

f Representative offices: representative offices are regional or liaison offices of foreign banks and financial institutions.

g Islamic banks, finance companies and investment companies: these institutions are regulated by the Central Bank under Federal Law No. 6 of 1985 regarding Islamic Banks, Financial Institutions and Investment Companies. Islamic banks undertake all the activities of a commercial bank and additionally can own assets financed by them. Islamic finance companies may provide personal and consumer, property, vehicle and trade finance, issue guarantees and enter into foreign exchange contracts with corporate entities, subscribe to shares, bonds and certificates of deposits, accept deposits from corporate entities and manage investment vehicles. All Islamic institutions must operate in accordance with the principles of Islamic shariah.

h Real estate banks and finance companies: these institutions specialise in funding real estate projects on a conventional or shariah-compliant basis.

The Banking Law does not apply to statutory public credit institutions, governmental investment institutions and development funds, private savings and pension funds and the insurance sector.

While the Central Bank is the principal regulatory authority of banks and financial institutions in the UAE, such entities are also subject to additional registration and licensing requirements at the federal and emirate levels. Also the Federal Companies Law governs all commercial companies incorporated in the UAE and all foreign companies with branch offices in the UAE.

All commercial banks incorporated in the UAE must be established as public shareholding corporations under the UAE Companies Law and must be majority-owned by UAE nationals. A majority of directors of such companies must be UAE nationals. While for monetary intermediaries and investment companies the minimum UAE national shareholding requirement is 51 per cent, for finance companies, commercial banks and investment banks the minimum UAE national shareholding requirement is 60 per cent. Although branches of foreign companies established in the UAE are required to appoint a UAE national as a national agent, foreign banks are not required to have an agent.

In recent years some banks incorporated in Member States of the Gulf Cooperation Council ('GCC') have been allowed to establish fully fledged branches. GCC banks have also been allowed to acquire controlling stakes in UAE banks and financial institutions.

The principal difference in the treatment of local and foreign commercial banks is that local banks are not subject to any taxation on their income, whereas foreign banks are subject to taxation at the emirate level. Normally this tax is 20 per cent of net income.

Non-resident banks grant bilateral credit facilities and also participate in syndications in the UAE. They are not deemed to be resident, domiciled or carrying on business in the UAE and are not liable to pay tax in the UAE merely on account of such bilateral facilities or participation in syndications. The confidentiality of customer information by banks is not specifically provided for under the Banking Law, but the principle is recognised as a customary banking practice, and, implicitly, under certain regulations issued by the Central Bank. The Central Bank has wide powers to obtain information.

ii Emirates Securities and Commodities Authority

The Emirates Securities and Commodities Authority ('SCA') regulates the securities markets in the UAE. All UAE banks are listed on one of the two onshore markets: the Abu Dhabi Exchange and the Dubai Financial Market. The SCA licenses all brokers, consultants and custodians who provide services related to listed securities. In July 2012, the SCA issued the much-anticipated new UAE Investment Fund Regulation. The Investment Funds Regulation transfers regulatory responsibility for the licensing and marketing of investment funds and for a number of related activities from the Central Bank to the SCA. The sale, marketing and promotion of foreign securities and funds in the UAE and the establishment of domestic funds requires the consent of the SCA.

iii DIFC

The DFSA has adopted a regulatory approach modelled, at least in part, on the FSA in the United Kingdom. The DFSA does not grant banking licences *per se*; it authorises financial service providers to undertake specific financial services. The relevant financial services in respect of banks would include providing credit and accepting deposits. There are approximately 30 international banking institutions with a registered presence in the DIFC. Of these, only a very small number have actually applied for the authorisation to accept deposits. This reluctance to be a 'true' bank can be traced to two reasons. One, historically, DIFC entities were not able to deal with retail customers. This restriction was lifted recently but the business models of the vast majority of institutions within the DIFC has been to focus on corporate clients or high-net-worth individuals. The other reason that banks have been reluctant to apply for the 'accepting deposits' authorisation is that they remain unable to deal in dirhams or accept deposits from the UAE markets. Most of the banks that have set up in the DIFC have done so as branches of overseas companies; this has been done for capital adequacy reasons. Recently, however, it has been the policy of the DFSA to encourage banks to incorporate new subsidiaries within the DIFC and capitalise those subsidiaries to an acceptable level.

III PRUDENTIAL REGULATION

i UAE

The Central Bank has issued regulations on a whole range of issues and ensures compliance with such regulations on the basis of a bank-examiner type approach.

In 2009, the Central Bank issued regulations requiring UAE commercial banks to increase their minimum capital requirement by 30 June 2010 from 11 to 12 per cent.

In 2011, the Central Bank issued a new regulation regarding loans and services to individual customers. The main aim of such regulation was to control the excessive lending by commercial banks and finance companies and to control the pricing of service fees charged by banks. The new regulations enable individual customers to borrow up to 20 times their salary or monthly income and require that repayment instalments should not exceed one-half of the borrower's gross salary or other regular income from a specific source.

In July 2012, the Central Bank issued a circular on liquidity as part of a phased implementation of Basel III. Its implementation was due to commence in January 2013 but has been postponed until further consideration of the requirements of the regulations. The qualitative requirements require banks to comply with 12 criteria when setting up their liquidity risk management and governance frameworks. Quantitative requirements require compliance with four ratios: a liquid assets ratio, uses (of funds) to stable resources ratio, a liquidity coverage ratio and a net stable funding ratio. Lenders are required to hold 10 per cent of their liabilities in 'high-quality liquid assets' from 1 January 2013. However, the implementation of the regulations are kept on hold for the time being. The rules also prescribe the manner in which different categories of assets are to be risk-weighted.

New restrictions have been introduced by the Central Bank with regard to lending to government and government-owned entities. Banks cannot lend sums exceeding 100 per cent of their capital to governments and their related companies or more than 25 per cent to an individual borrower. The rules also prescribe the manner in which different categories of assets are to be risk-weighted. However, upon representation from the banks, the Central Bank has apparently agreed to keep the implementation of the regulations on hold for the time being. The Central Bank has stated that the risk-to-assets ratio is only one of the factors it will consider when assessing the capital adequacy of each bank. It will also take into consideration such factors as the geographical or business sector, credit concentration, policies, procedures and internal control systems of the lending bank.

Additionally, the Central Bank has issued specific circulars on capital adequacy requirements for banks in the UAE. Until 1993, all commercial banks were required to maintain a capital-to-assets ratio of 1:15. This was widely regarded as being inadequate. In 1993, the Central Bank issued new risk-based capital adequacy rules based on the 1988 recommendations of the Basel Committee on Banking Regulations and Supervisory Practices. These rules require all commercial banks to maintain a risk-to-assets ratio of 10 per cent.

In 2012 a circular was issued by the Central Bank to restrict mortgage loans to expatriates to 50 per cent of the value of a first home, and 40 per cent of the value of a second home. Loans to UAE nationals were capped at 70 per cent of the value of their

first home and 60 per cent of their second home. The banks in the UAE have urged the Central Bank to reconsider the caps and it has apparently agreed to do so.

ii DIFC

Relationship with the prudential regulator

Firms authorised by the DFSA are required to notify the DFSA of all matters of which it could reasonably expect to be notified. There are quarterly reporting requirements in respect of capital adequacy. The DFSA conducts themed reviews on a regular basis; previous reviews have focused on prevention of money laundering and terrorism financing. The DFSA has also focused on authorised firms' compliance with restrictions imposed on dealing with (1) Iranian counterparties arising from the UN sanctions relating to non-nuclear proliferation; and (2) political exposed persons. Recent reviews also looked at client take-on processes and suitability assessments.

Management of banks

The DFSA requires all financial institutions active in the DIFC to have adequate systems and controls in place to ensure that they are properly managed. There are a number of mandatory appointments (senior executive officer, chief financial officer, etc.). The individuals holding the mandatory appointment positions are subject to prior clearance by the DFSA. The DFSA does not impose any requirements or make any restrictions in respect of bonus payments to management and employees of banking groups.

Regulatory capital

Those firms holding authorisations to accept deposits and provide credit fall into prudential category 1 (being the highest of categories 1 to 5). Category 1 firms have a base capital requirement of US$10 million. The actual capital requirement may be significantly higher depending upon the volume of business being conducted and other factors set out in the DFSA Rulebook. As previously mentioned, historically, most banking groups established branches in the DIFC and were able to obtain waivers of the capital adequacy requirements on that basis. In short, they looked to their head office balance sheet as support for their DIFC functions. This approach is becoming less and less acceptable to the DFSA, particularly for smaller financial institutions coming from jurisdictions other than Tier I jurisdictions.

IV CONDUCT OF BUSINESS

i UAE

Local banks have a board of directors, a chief executive, a number of board committees and senior executives. There is currently no regulation of bonus payments to management; bonus payments have, however, not been of a magnitude that requires regulation.

UAE banks are all publicly listed companies and must comply with the Central Bank law, UAE companies law and Emirates Securities and Commodities Authority laws, all of which, *inter alia*, regulate management.

There is currently little or no regulation of bank holding companies or subsidiaries.

Banks are required to publish quarterly audited accounts and have their annual audited accounts approved by the Central Bank before they are published. Banks are required to obtain prior approval of the Central Bank to changes in directors, senior management, shareholders (holding over 5 per cent equity), constitutional documents and capital.

The Banking Law, along with the various circulars and notices issued from time to time by the Central Bank, govern the conduct of business by banks in the UAE. Any violations of the Banking Law or any of the circulars or notices issued by the Central Bank would attract fines and additionally could attract other penalties such as warnings, reduction or suspension of credit facilities granted to it, prohibition or restriction on carrying on certain activities or revocation of its licence to conduct banking business, depending upon the gravity of the offence. Accordingly, a bank may be subject to civil or regulatory liability under the Banking Law. There may also be occasions where a bank may be exposed to criminal liability under the UAE Federal Penal Code.

ii DIFC

The DFSA Rulebook contains a detailed conduct of business module. The Rulebook is essentially a principle-based system. For example, principle 1 (integrity) states that an authorised firm must observe high standards of integrity and fair dealing. Principle 5 (marketing conduct) states that an authorised firm must observe proper standards of conduct in financial markets. There are 12 principles, the final two being principle 11 (compliance with high standards of corporate governance), which states that an authorised firm must meet the applicable standards of corporate governance as appropriate considering the nature, size and complexity of the authorised firm's activities, and principle 12 (remuneration practices), which states that an authorised firm must have a remuneration structure and strategies that are well aligned with the long-term interests of the firm, and are appropriate to the nature, scale and complexity of its business. A bank operating in the DIFC will be subject to civil liability under the various DIFC laws, regulatory liability in respect of the applicable DIFC laws such as the Market Law and the Regulatory Law, plus the provisions of the DFSA Rulebook. Depending on the relevant customer documentation, a bank in the DIFC may also be exposed to civil liability under the laws of the UAE outside the DIFC. Finally, there may be occasions where a bank in the DIFC would be exposed to criminal liability (i.e., under the UAE Federal Penal Code).

V FUNDING

i UAE

Under the Banking Law, commercial and investment banks must have a minimum paid-up capital. All foreign banks are required to allocate capital for their UAE operations. At least 10 per cent of the annual net profits of banks is required to be allocated to a special reserve, until such reserve equals 50 per cent of the bank's paid-up capital or, in the case of a foreign bank, the amount allocated as capital for its UAE operations.

ii DIFC

There is no Central Bank or equivalent within the DIFC and therefore banks registered within the DIFC must fund their activities through support from other branches of their international operations or debt issuance programmes of their own. As previously mentioned, deposit taking is not a significant source of funding for any institution in the DIFC.

VI CONTROL OF BANKS AND TRANSFERS OF BANKING BUSINESS

i UAE

There is no specific definition of control (except in relation to determination of large exposures). 'Control' is generally viewed as a majority shareholding interest, a right to appoint the majority of the board of directors of a bank, or both. Any change in such control requires the prior approval of the Central Bank.

Transfer of customer relationships (e.g., deposits, loans, credit cards, accounts, investment products) generally requires customer consent. There is no statutory mechanism for transfer of such relationships.

ii DIFC

Any material change of control in a DFSA-authorised firm requires prior approval from the DFSA.

The DFSA Rulebook does not include detailed provisions regarding the methods by which banks may transfer all or part of their business (comprising deposits and possibly loan agreements and other assets) to another entity without the consent of the customers concerned. The ability of an institution to do this would be governed by the assignment clauses in their contractual documentation as interpreted in accordance with the DIFC Contract Law.

VII THE YEAR IN REVIEW

i UAE

The UAE Central Bank has taken action to regulate excessive lending by the banks to retail customers, to governments and government-owned entities and generally to the real estate sector.

ii DIFC

Recent policy and legislative changes in the DIFC include: the revamping of the markets regime to better align with the European Union's regime; the development of a corporate governance regime to align the governance requirements with international standard setters, particularly Basel and IAIS; drafting of prudential requirements to implement the Basel II and III framework; the introduction of a regulatory regime for credit rating agencies; and the enhancement of the DFSA's shariah governance regime.

VIII OUTLOOK AND CONCLUSIONS

As international standard-setters continue to upgrade their regimes it is anticipated that the DFSA will further amend the DIFC regulatory landscape to ensure closer adherence to those international standards.

For its part, the Central Bank has taken various steps in the last two years in an effort to avoid the excessive leveraging that greatly affected the severity of the downturn of the UAE economy in 2009.

Appendix 1

ABOUT THE AUTHORS

AMJAD ALI KHAN

Afridi & Angell

Amjad Ali Khan is the managing partner of Afridi & Angell. He represents foreign and local clients including banks and leading multinationals in banking, financial and corporate transactions in the UAE and abroad. He specialises in banking and financial services including project finance, syndicated loans, treasury products and Islamic banking transactions.

Mr Khan has considerable experience in undertaking conventional, Islamic and private banking transactions. He has been involved in several project finance transactions in the UAE. He is also a regular speaker at banking seminars.

STUART WALKER

Afridi & Angell

Mr Walker regularly advises on financial services regulation, corporate finance, mergers and acquisitions and employment matters. Mr Walker leads the field in advising parties during Dubai Financial Services Authority ('the DFSA') investigations and where necessary, negotiating settlements on their behalf. He was instructed by the first authorised firm to be fined by the DFSA and has since gone on to advise in connection with the majority of all DFSA investigations resulting in a public outcome.

Mr Walker is the co-author of the UAE chapter of *Financial Services Regulation in the Middle East* (Oxford University Press, 2008), and has contributed articles to various publications including *International Financial Law Review*. He is a regular contributor to Euromoney's *Global Banking & Financial Policy Review*.

AFRIDI & ANGELL
Level 35, Emirates Towers Offices
Sheikh Zayed Road
PO Box 9371
Dubai
United Arab Emirates
Tel: +971 4 330 3900
Fax: +971 4 330 3800
akhan@afridi-angell.com
swalker@afridi-angell.com
www.afridi-angell.com