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# Foreign Issuers - Two Noteworthy Items

## SEC Staff to Review Current Reporting and Disclosure Regime for Foreign Private Issuers

In a keynote address at PLI – Eleventh Annual Institute on Securities Regulation in Europe held in London on March 8, 2012, Meredith Cross, the Director of the Division of Corporation Finance of the US Securities and Exchange Commission (the "SEC"), suggested that the regulatory approach taken by the SEC to the disclosure requirements applicable to foreign private issuers ("FPIs") may need to change in order to keep up with current market circumstances. Her remarks were directed, in particular, at the reporting and disclosure regime applicable to FPIs whose only trading market is in the United States.

In an address that also covered the SEC's extensive rulemaking mandate under the Dodd-Frank Act and its progress to date, the SEC's recent capital formation initiatives and a discussion of its disclosure review program, Ms. Cross reflected on whether the existing disclosure regime for FPIs was appropriate given the dynamics of today's market. Ms. Cross highlighted that while the number of FPI registrants has remained relatively stable over time, there has recently been a major change in their profiles. Today, an increasingly large number of FPIs are listed only in the United States and rely on the New York Stock Exchange or Nasdaq as their exclusive trading market. The Division of Corporation Finance has therefore queried whether the existing reporting regime for FPIs, which defers in large part to home market practice, continues to be appropriate.

Under the existing regime, FPIs are not subject to any specific independent ongoing SEC reporting obligations other than the annual report on Form 20-F or 40-F (for Canadian issuers). Material information published periodically by an FPI during the year in accordance with home country or home exchange requirements is also submitted to the SEC on Form 6-K. According to Ms. Cross, the FPI reporting regime was premised on an assumption that an FPI's home jurisdiction is its principal price discovery market, and the level of disclosure that supports price discovery and trading in the home market should also support price discovery and trading in the US market.

Ms. Cross identified three questions she believes the Division of Corporation Finance should be addressing when considering these issues:

- Is the current 6-K reporting model the right model for these companies? Does it continue to be the right model for foreign private issuers in general?
- Should companies that are only listed in the United States, whose only price discovery market is an exchange in the United States, who have a significant shareholder base in the United States, and who have no applicable home country disclosure requirements, be subject to a reporting model that is different than a US company? Should these companies not be required to provide quarterly financial information and 8-K level current reporting?
- Should any of these questions apply to foreign private issuers that are also listed on a foreign exchange?

In short, the Division of Corporation Finance is concerned to ensure that the reporting requirements applicable to FPIs provide appropriate investor protections.

Ms. Cross did not provide a schedule for the Division of Corporation Finance's deliberations on these issues. Nor did she note the myriad issues that will need to be considered alongside any proposed changes, such as whether any changes to the system will detract from the US market's attractiveness to FPIs going forward. Ms. Cross stated that the views she expressed in her address do not necessarily represent the views of the SEC. However, her observation that it may be appropriate to treat FPIs that rely exclusively on the US market as US domestic registrants appears in line with the Division of Corporation Finance's recent policy change that revoked such FPIs' ability to file registration statements on a non-public basis. If you wish to review further information regarding these issues, you may refer to our client publication entitled "SEC Changes Its Policy Regarding Confidential Filings by Foreign Issuers" at http://www.shearman.com/files/Publication/fb678a8d-c57b-4b1b-9f82-f14de16f98a2/Presentation/PublicationAttachment/a15b4f84-2e65-4c0b-be44-3b9c11370b5c/SEC-Changes-Its-Policy-Regarding-Confidential-Filings-by-Foreign-Issuers-CM-121211.pdf.

Ms. Cross's full keynote address can be accessed at http://www.sec.gov/news/speech/2012/spch030812mc.htm.

## New York's Second Circuit Interprets the "Domestic Transactions" prong of the US Supreme Court's 2010 Morrison v. National Australia Bank Ltd. Decision

In *Absolute Activist Value Master Fund Limited v. Ficeta*,[1] ("*Absolute Activist*") the United States Court of Appeals for the Second Circuit (the "Court") considered whether purchases and sales by foreign funds of securities issued by US companies through a US broker dealer satisfied the "domestic transactions in other securities" prong of the US Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd*.[2] ("*Morrison*"). The *Absolute Activist* case arose out of a "pump and dump" scheme in which foreign investors were solicited to purchase securities directly from US companies. After the initial purchases, defendants artificially inflated the stock prices by trading and re-trading the penny stocks, often between and among the funds, each time trading at a higher price to create the illusion of trading volume.

The complaint alleged fraud claims under Exchange Act section 10(b) and rule 10b-5 thereunder and under common law. The district court, on December 22, 2010, dismissed the complaint in its entirety, ruling that it lacked subject matter jurisdiction over the case pursuant to *Morrison*. The Court reviewed *de novo* the district court's dismissal and held that the district court erred in dismissing the complaint for lack of subject matter jurisdiction and agreed with the district court that the plaintiff's complaint failed to state claims under section 10(b) because the complaint did not sufficiently allege the existence of domestic securities transactions.

In interpreting the "domestic transactions" prong of *Morrison*, the Court held that a transaction would satisfy the "domestic transaction in other securities" prong when either an irrevocable liability to purchase or deliver a security is incurred within the United States or when title is transferred within the United States. The Court advised that the broker's location, the type of securities and location of the conduct does not necessarily show that either a contract is executed or title is passed within the United States.

The Court granted plaintiffs the right to amend their complaint to suggest that "irrevocable liability was incurred or title was transferred within the United States."

[1] 2d Cir. Docket No. 11-0221-cv (March 1, 2012).

[2] 130 S. Ct. 2869 (2010).

The decision can be accessed at http://www.ca2.uscourts.gov/decisions/isysquery/7fdf7966-f43a-46df-9c27-140dce7b22ce/12/doc/11-221_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/7fdf7966-f43a-46df-9c27-140dce7b22ce/12/hilite/.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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