

Governance & Securities Law Focus



In this newsletter, we provide a snapshot of the principal US, European and selected international governance and securities law developments of interest to corporates and financial institutions.

The previous quarter's Governance & Securities Law Focus newsletter is available [here](#).

Financial regulation developments are available [here](#).

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US DEVELOPMENTS

SEC Developments

Revised Statement on WKSI Ineligible Issuer Waivers

On 12 March 2014, the Division of Corporation Finance of the Securities and Exchange Commission (“SEC”) published a revised statement on waivers of ineligible issuer status under the rules for qualifying as a “well known seasoned issuer” (“WKSI”). WKSI status provides large issuers that regularly access the US capital markets with certain flexibilities in the communications and registration process, including automatic effectiveness of registration statements, which are not subject to SEC review.

To qualify as a WKSI, an issuer may not be an “ineligible issuer”. Rule 405 of the Securities Act of 1933 defines an “ineligible issuer” to be, among other things, an issuer that has (or whose subsidiary has) been convicted of a felony or misdemeanor specified in four enumerated provisions under Section 15 of the Securities Exchange Act of 1934 or violated the antifraud provisions of the federal securities laws.

The revised statement updates the SEC statement issued in 2011, which provided guidance on what constitutes “a showing of good cause” for purposes of an ineligible issuer waiver request. The revised statement provides a more detailed framework of what factors the SEC will take into consideration when granting waivers of ineligible issuer status.

The revised statement is available at:

<http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm>

SEC Updates its Conflict Minerals Guidance

On 7 April 2014, the SEC updated its conflict minerals guidance by issuing new compliance and disclosure interpretations. The new compliance and disclosure interpretations address a number of frequently asked questions primarily related to the requirement for issuers to obtain an independent private sector audit of their conflict minerals report filed on Form SD. The independent private sector audit requirement applies to issuers that manufacture products containing tantalum, tin, tungsten or gold sourced from the Democratic Republic of the Congo or adjoining countries, subject to a temporary two-year exemption for products which an issuer is unable to determine are DRC conflict free.

The updated guidance is available at:

<http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm>

SEC Guidance on Cyber Security

On 26 March 2014, the SEC held a round table discussion on cyber security-related issues, including a panel session on disclosure. The conference discussion about disclosure did not add much to a disclosure guidance from 2011 on this topic. Instead, most of the discussion revolved around what could change. Relevant points and suggestions included:

- companies would benefit from having a board member knowledgeable in cyber security issues;
- some panellists (not SEC members) suggested having a requirement to have a cyber-security committee or have the audit committee monitor cyber security issues;
- some panellists complained that companies have not been disclosing company or industry specific risks and have been using too much boiler plate;

- some panellists encouraged the SEC to provide more guidance. Others pushed back and said there is already enough guidance and companies are better positioned to determine the necessary disclosure; and
- disclosure often does not have an impact on share price but can lead to significant litigation costs as a result of frivolous law suits.

The presentation is available at:

<http://www.sec.gov/news/otherwebcasts/2014/cybersecurity-roundtable-032614.shtml>

US Corporate Governance

ISS Governance QuickScore 2.0

In January 2014, the Institutional Shareholder Services (“ISS”) published an update to its Governance QuickScore, a scoring and screening solution designed to help institutional investors identify risk within portfolio companies. The ISS Governance QuickScore includes governance factors and other technical specifications that will be used by ISS to score public companies for the 2014 US proxy season. The ISS Governance QuickScore uses a “four pillar” approach to assess governance attributes of public companies: board structure, shareholder rights, compensation/remuneration and audit.

The updated ISS Governance QuickScore 2.0 includes additional factors for scoring companies and more frequent updates to companies’ scores, which will now be scored on an ongoing basis based on a company’s public disclosures throughout the calendar year.

Further detail on the ISS Governance QuickScore 2.0 is available at:

<http://issgovernance.com/quickscore>

NYSE Publishes Annual Foreign Private Issuer Compliance Memo

On 7 March 2014, the New York Stock Exchange (“NYSE”) published a memo highlighting recent developments and ongoing policies applicable to foreign private issuers listed on the NYSE. The purpose of the memo is to provide a summary of NYSE policies and rules that most commonly apply to foreign private issuers.

The memo summarises the features of egovdirect.com, the NYSE’s complimentary, interactive compliance website, which includes a customised version for foreign private issuers.

The memo also includes guidance on the following topics:

- record dates, shareholder meeting/proxy matters, redemptions and conversions of listed securities and other notifications to the NYSE;
- annual financial statement requirement;
- corporate governance requirements;
- transactions requiring supplemental listing applications (such as the issuance of additional shares); and
- timely alert/material news policy.

The NYSE foreign private issuer compliance memo is available at:

<http://www.nyse.com/pdfs/NYSEFPImemo.pdf>

Sanctions

US and EU Sanctions Relating to the Ukrainian Crisis

Both the United States and the European Union have issued calibrated Ukraine-related sanctions as a direct response to the recent political upheaval in Ukraine. Although both US and EU sanctions target certain persons for escalating the Ukrainian crisis, there is a budding rift in the international sanctions community. Specifically, the economic, structural and legal limitations of the EU make it unlikely that the EU will match US sanctions (already authorised but not issued) that directly target the Russian economy.

Although the initial US and EU sanctions targeting the Russian Federation appear to have been in close lock step, a closer review of who has been designated under each regime reveals a different story. There are a total of 64 persons designated in the two regimes, but only 18 persons (less than 29%) are designated under both regimes. Indeed, 13 members of President Vladimir Putin's inner circle have been designated only under US sanctions.

If the Ukrainian crisis persists, there may be additional divergence due in large part to: (i) the EU's unanimous vote requirement to impose any sanction; (ii) the degree that the EU and Russian economies are intertwined – the Russia Federation conducts 14 times more business with the EU than it does with the US; and (iii) the EU's Iranian designations having been successfully challenged in Member States' judicial systems.

US authorities have taken a carrot and stick approach to sanctioning persons under the Ukrainian orders. On the one hand, prior guidance and recent releases from US authorities have made it clear that the 50% rule is being strictly interpreted, i.e., if a specially designated national and blocked person ("SDN") holds more than 50% of any entity, then that entity would automatically be blocked as well. But in the absence of a clear 50% ownership interest, the entity is not likely to be blocked. On the other hand, US Executive Order 13662 (dated 20 March 2014) authorises (and thus threatens) sanctions on entire sectors of the Russian economy, including financial services, energy, metals and mining, engineering, and defence and related materiel. Thus, US authorities are indicating that they will not block an entity not clearly owned by an SDN (i.e., the carrot), but they may impose sanctions on any person (individual or entity) they desire based on their political calculations (i.e., the stick). Based on this approach, we would expect any future US sanctions to be targeted towards the specific interests of President Putin, his cronies, or specific sectors of the Russian economy likely to impact either of those interests.

Our related client publication is available at:

<http://www.shearman.com/~media/Files/NewsInsights/Publications/2014/04/Ukraine-Related-Sanctions-LIT-040114.pdf>

OFAC Publishes Guidance on Sanctions Relief for Iran

On 30 January 2014, the US Department of the Treasury's Office of Foreign Assets Control ("OFAC") published guidance relating to the provision of certain temporary sanctions relief in order to implement the joint plan of action reached on 24 November 2013 among the United States, the United Kingdom, France, Russia, China, and Germany (the "P5+1") and the Islamic Republic of Iran, issued on 20 January 2014. This guidance sets out how the US Department of State and the US Department of the Treasury will implement sanctions relief relating to certain activities and associated services taking place exclusively during the six-month period beginning on 20 January 2014, and ending 20 July 2014.

Under the joint plan of action, the United States will not impose sanctions on non US persons involved in transactions or services in Iran completed prior to 20 July 2014. The petrochemical, auto, gold and precious metals, civil aviation and crude oil industries are affected by the relief.

Further information on developments in US sanctions against Iran is available at our Iran Sanctions website:

<http://www.shearman.com/en/services/practices/iran-sanctions>

Noteworthy US Securities Law Litigation

Chadbourne & Parke LLP v. Troice et al.: SLUSA Does Not Preempt State Law Claims Where Alleged Misrepresentation or Omission is Not Sufficiently Related to Purchase or Sale of a Covered Security

On 26 February 2014, the US Supreme Court ruled that the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”) does not preclude class action lawsuits asserting state law claims unless the alleged misrepresentations or omissions were material to a person’s decision to buy or sell a security covered by SLUSA.

In the years before SLUSA was enacted, there was concern that a flood of securities cases would be brought under state law to avoid the strictures of the recently enacted Private Securities Litigation Reform Act of 1995, which, in an effort to curb abuses, created a number of hurdles for securities plaintiffs. SLUSA was enacted to prevent class action plaintiffs’ lawyers from filing state causes of action in state courts as a substitute for filing federal causes of action in federal courts. SLUSA, therefore, prohibits securities class actions “based upon the statutory or common law of any State” when plaintiffs allege “a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security.” In relevant part, “covered” securities are those traded on a national exchange.

In *Troice*, plaintiffs alleged that defendants induced them into purchasing certificates of deposit (which are not covered by SLUSA) by misrepresenting that the certificates were backed by less speculative, covered securities. The Court ruled that SLUSA did not preempt plaintiffs’ state law claims. SLUSA preempts state law claims only when the alleged misrepresentation or omission was material to the decision of a person (other than the alleged perpetrator of the fraud) to buy or sell a covered security. Because in *Troice* the alleged misrepresentation – that uncovered certificates of deposit were backed by covered securities – merely related to covered securities, but did not result in any covered securities changing hands, SLUSA did not preempt plaintiffs’ state law claims.

This ruling is consistent with the underlying purpose of the federal securities statutes, which seek to protect investor confidence in national securities markets, while allowing states to regulate frauds that are traditionally of state concern. Plaintiffs are likely to use *Troice* in future cases to support arguments against dismissal pursuant to SLUSA on the grounds that the misrepresentation or omission that they are alleging is not sufficiently related to the purchase or sale of a covered security.

Halliburton Corporation v. Erica P. John Fund, Inc.: Oral Arguments Heard in Supreme Court Case That Could Have Far-Reaching Implications for Class Certification in Securities Fraud Cases

On 5 March 2014, the US Supreme Court heard oral argument in what is referred to as *Halliburton II*. The Court’s ruling in *Halliburton II* could have far-reaching implications for plaintiffs seeking class certification in securities fraud cases.

In order to certify a class, securities fraud plaintiffs must satisfy certain requirements under Federal Rule of Civil Procedure 23. Rule 23(b)(3) makes class action treatment available where questions of law or fact common to class members predominate over any questions affecting only individuals. In the 1980s, defendants often argued that securities fraud cases were not suitable for class certification because each member of the proposed class had to prove the element of reliance – i.e., that it relied on the defendants’ alleged misrepresentation or omissions when purchasing the security. In *Basic v. Levinson* (1988), the Supreme Court rejected this argument and held that the prices of shares traded on well developed markets reflect all material, publicly available information. According to the Court, this economic doctrine, known as the efficient market hypothesis, justified a presumption that all investors who buy or sell such a security are relying on any public misrepresentation when making their trades. Securities plaintiffs have relied on

this rebuttable “fraud-on-the-market” presumption to satisfy the predominance requirement of Rule 23(b)(3) for the last 26 years.

While some observers have suggested that, based on past opinions, at least four of the Supreme Court justices may be prepared to overturn the fraud-on-the-market hypothesis, the consensus after oral argument appears to be that the plaintiffs have a good chance of prevailing. Questioning from several justices suggested that because market efficiency is an issue common to all members of the putative class, it is appropriate to defer determination of market efficiency until after the class certification stage of the case. If the Court’s eventual ruling reflects that view, challenges to the fraud-on-the-market presumption based on a lack of market efficiency could be held inappropriate at the class certification stage. That result would be consistent with the Court’s recent rulings in *Wal-Mart v. Dukes* (2011) and *Amgen v. Connecticut Retirement Plans and Trust Funds* (2013), which, when read together, suggest that the only issues courts must resolve at the class certification stage are those not amenable to class-wide proof.

The Court should issue a decision by July 2014.

Daimler AG v. Bauman: US Supreme Court Limits US State Jurisdiction over Non-US and Out-of-State Companies

On 14 January 2014, the US Supreme Court ruled that an out of-state or foreign corporation is subject to general jurisdiction in a particular state only where its contacts are so “continuous and systematic” that it is “at home” in that state.

In *Bauman*, the plaintiffs were Argentine nationals asserting claims against Daimler AG’s predecessor company on the grounds that its Argentine subsidiary violated the Alien Tort Act by allegedly collaborating with security forces in perpetrating kidnappings, tortures, and killings during Argentina’s “dirty war.” The plaintiffs asserted that a federal court in California had personal jurisdiction over Daimler AG because of the California contacts of Mercedes-Benz USA, LLC, its US subsidiary. Mercedes-Benz USA is incorporated in Delaware and has its principal place of business in New Jersey. The Court ruled that, although Mercedes-Benz USA distributes and sells Daimler vehicles throughout the country, including in California, it would violate due process to find Daimler AG amenable to general jurisdiction in California. In all but “exceptional cases,” a corporation is subject to general jurisdiction only in the state where it is incorporated or has its principal place of business.

Bauman could prove helpful in limiting the exposure of non-US companies to lawsuits in the US. Although companies will still be subject to jurisdiction in the US based on a specific transaction or incident (which suffices to confer “specific jurisdiction” in the state where such transaction or incident took place), this decision has limited the ability of plaintiffs to choose their forum based on a theory that the defendant was merely doing business in that forum.

Recent SEC/DOJ Enforcement Matters

FCPA Opinion Release 14-01: Regarding the Transparent Transition of an Executive to and from a Government Position

On 17 March 2014, the US Department of Justice released its opinion on an FCPA request by an undisclosed US financial services company and investment bank. The question at issue was whether the foreign subsidiary of the company could buy back the minority interest of a former executive, who had become a senior government official in a ministry responsible for doing business with and regulating the foreign subsidiary.

The DOJ said it would not prosecute the company because the foreign subsidiary took a number of appropriate precautions before buying back the stock, and thus showed that it was not attempting to buy influence from a foreign official. *First*, the former executive “ceased to have any role or function” at the foreign subsidiary “other than as a passive shareholder” upon his departure for the government. *Second*, the former executive appropriately “recused

himself from any decision concerning the award of business [to the company] or [its] affiliates . . . and has not involved himself in any supervisory or regulatory matters with respect to” the company or its affiliates. *Third*, the company hired a global accounting firm to determine the value of the former executive’s stock, which “provide[d] additional assurance that the payment reflect[ed] the fair market value of [the former executive’s interest], rather than an attempt to overpay . . . for a corrupt purpose.” *Finally*, the DOJ noted that severing the relationship was prudent because it prevented an ongoing conflict of interest.

The DOJ’s opinion should give companies comfort that, when transparent, transitions of executives to and from government positions can be managed appropriately in a way that does not subject the company to potential FCPA investigation or prosecution.

Employment Benefits Updates

Recent Diversity Mandates Impacting US Financial Regulators and Financial Institutions

The lack of employment diversity in the financial services sector has been well documented. Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Section 342”) was adopted to help correct racial and gender imbalances at financial institutions and their regulators by prescribing inclusion requirements at the specified US government agencies that regulate the financial services sector,¹ entities that contract with the agencies and the private businesses they regulate. Even though Section 342 is not applicable to foreign private issuers, its requirements could evolve as a benchmark for all corporates generally.

The Statutory Requirements of Section 342 of Dodd-Frank

Pursuant to Section 342, each agency has established an Office of Minority and Women Inclusion, or OMWI. The OMWIs and their appointed directors are charged with:

- developing diversity standards for the agency’s workforce;
- increasing participation of minority- and female-owned businesses in the agency’s programs and contracts; and
- assessing the diversity policies and practices of the financial entities regulated by the agency.

The Proposed Standards

Six of the regulating agencies² have proposed joint standards (the “Proposed Standards”) for assessing the diversity policies and practices at their regulated entities as required by Section 342.

The proposing agencies did not mandate an examination or supervisory assessment process, but instead focused on self-assessment and public disclosure. A model assessment process would include a quantitative and qualitative self-evaluation of the entities’ diversity and inclusion policies and a voluntary report of the findings to the governing

¹ The agencies include: (1) the Office of the Comptroller of the Currency, (2) the Board of Governors of the Federal Reserve System, (3) the Federal Deposit Insurance Corporation, (4) the National Credit Union Administration, (5) the Bureau of Consumer Financial Protection, (6) the Securities and Exchange Commission, (7) the Department of the Treasury, (8) the Federal Reserve Banks and (9) the Federal Housing Finance Agency.

² The Department of the Treasury, the Federal Reserve Banks and the Federal Housing Finance Agency did not participate in the Proposed Standards.

agency. Further, the entity would include on its public website information regarding its efforts to comply with the Proposed Standards, annual reports and other disclosure documents.

The Proposed Standards cover the following four key categories of assessment to be implemented in a manner reflective of the entity's size and other characteristics.

- *Organisational Commitment to Diversity and Inclusion.* A diversity and inclusion policy should be approved and supported by senior management and the board, which should receive regular progress reports. A senior level officer who oversees and directs diversity efforts should be appointed and should ensure that there is regular equal employment and diversity and inclusion education and training. Finally, the entity must take proactive steps to promote a diverse pool of candidates for senior leadership and board positions.
- *Workforce Profile and Employment Practices.* Management should be held accountable for the success of diversity and inclusion efforts. Entities should adopt metrics to evaluate and assess workforce diversity and inclusion efforts, in all areas of employment across all levels of the organisation. Policies and practices that create diverse applicant pools for both internal and external opportunities should be implemented, including (1) participation in conferences and other events and (2) outreach to organisations and educational institutions primarily aimed at serving minority and female populations.
- *Procurement and Business Practices—Supplier Diversity.* Steps that can be taken in this regard include adopting (1) a supplier diversity policy providing for a fair opportunity for minority- and women-owned businesses to compete in the procurement of business and services, (2) procedures to evaluate and assess supplier diversity and (3) practices to promote a diverse supplier pool, including publicising procurement opportunities and outreach to minorities and women.
- *Practices to Promote Transparency of Organisational Diversity and Inclusion.* Transparency in an entity's diversity and inclusion program is crucial to attaining the objectives of Section 342. Information on the entity's commitment to diversity and inclusion, its plans for achieving its goals, its progress against those goals and the metrics it uses to measure success should be made available to the public on the entity's website and annual shareholder reports.

Section 342 expressly provides that it should not be construed to impose any requirement on, or otherwise affect the lending policies and practices of, any regulated entity or require any specific action based on the findings of an assessment. Accordingly, the Proposed Standards do not impose consequences if an entity does not implement appropriate diversity and inclusion policies. They simply state that the agency will use the information as a resource for carrying out their diversity and inclusion responsibilities. The comment period on the Proposed Standards closed on 7 February 2014 and the agencies received more than 45 comments.

While Section 342 and the Proposed Standards may impact employment and recruiting practices in the financial services industry, many institutions have already implemented programs and policies that should satisfy the standards. Nevertheless, the regulated entities should revisit their current policies and initiatives in light of the Proposed Standards and the final standards once promulgated.

Our related client publication, discussing initiatives in both the US and the EU, is available at:

<http://www.shearman.com/en/newsinsights/publications/2014/03/recent-diversity-mandates>

EU DEVELOPMENTS

European Commission Proposes to Introduce Shareholder "Say on Pay" Policy and Other Corporate Governance Initiatives

On 9 April 2014, the European Commission published a proposal for the revision of the Shareholder Rights Directive, a recommendation on corporate governance reporting and a proposal for a Directive on single-member private limited

liability companies. These proposals implement key actions identified in the Commission's communication on long-term financing of the European economy (also covered in this newsletter).

The proposed revisions to the Shareholder Rights Directive are aimed at enhancing long-term sustainability of listed companies in the EU and creating an attractive environment for shareholders. Key revisions include:

- A "say on pay" policy requiring each listed company in the EU to put its remuneration policy to a binding shareholder vote at least every three years. Once the remuneration policy has been approved by shareholders, a company will not be permitted to pay remuneration to directors other than in accordance with that approved policy. Shareholders will also have the right to vote on a company's remuneration report, which describes how the remuneration policy has been applied in the last year. The vote on the remuneration report will be an advisory-only vote and not binding.
 - While no binding cap on executive remuneration at an EU level is proposed, the remuneration policy will need to set a maximum level for executive pay. Companies will also need to explain how their remuneration policy contributes to their long-term interests and sustainability, and how the pay and employment conditions of employees were taken into account when setting the policy including explaining the ratio between average pay of full-time employees and that of executives. The policy may in exceptional circumstances not refer to such a ratio but shall in that case explain why no such ratio has been included and what equivalent measures have been implemented. This proposal for new "say on pay" requirements would, at first sight, appear to be quite closely modelled on the UK's existing system of binding shareholder votes on director remuneration.
- Stronger transparency requirements for institutional investors and asset managers on their investment and engagement policies. In particular, they will be required to develop a policy on shareholder engagement and publicly disclose its implementation and outcome.
- Requiring shareholder approval of related party transactions representing more than 5% of the company's assets or transactions which can have a significant impact on profits or turnover.
- Enhancing transparency of proxy advisors by requiring them to disclose certain key information related to the preparation of their voting recommendations and their management of conflicts of interest.
- Imposing obligations on intermediaries to facilitate identification of shareholders and the exercise of their rights, especially in cross-border situations (44% of shareholders of EU listed companies are from another EU Member State or outside of the EU).

The recommendation on corporate governance reporting provides guidance to listed companies, investors and other interested parties, aimed at improving the overall quality of corporate governance statements published by companies.

Finally, the proposed Directive on single-member private limited liability companies introduces a new company law form, *Societas Unius Personae (SUP)*, for the standardised creation of companies with a single shareholder across the EU. Member States will be required to provide for this in their national legislation. The Directive prescribes various requirements for SUPs, such as: they must be capable of being incorporated online; they can only ever have one member with one share (minimum value of €1) which cannot be split and they must pass solvency and balance sheet tests before making distributions.

The Commission's proposals are available at:

http://ec.europa.eu/internal_market/company/modern/index_en.htm

European Commission Publishes Communication on the Long-Term Financing of the European Economy

On 27 March 2014, the European Commission published a communication to the European Parliament and the Council on the long-term financing of the European economy. The communication is a follow-up to the Commission's green paper on the same subject which was consulted on a year ago.

To meet the long-term financing needs of the European economy, the Commission is proposing a set of concrete actions focusing on:

- mobilising private sources of long-term financing;
- making better use of public funding;
- developing European capital markets;
- improving SMEs' access to financing;
- attracting private finance to infrastructure delivering Europe 2020 (the EU's ten-year growth and jobs strategy); and
- enhancing the wider framework for sustainable finance.

The Commission proposes to develop European capital markets through:

- the Commission delegated act provided for in Markets in Financial Instruments Directive ("MiFID") 2, which will ensure that the requirements for SME growth markets minimise the administrative burden for issuers on these markets while maintaining high levels of investor protection;
- undertaking a study on whether, following the improvements introduced by MiFID 2 for non-equity securities, further measures are necessary to enable the creation of a liquid and transparent secondary market for the trading of corporate bonds in the EU;
- assessing the implications and effects of the rules of the Prospectus Directive by the end of 2015. This will include in particular an assessment of the proportionate disclosure regime for SME issuers and companies with reduced market capitalisation; and
- conducting a study by the end of the year to map out the private placement markets in Europe against other locations/practices, analyse their key success drivers and develop policy recommendations on how this success can be more widely replicated in the EU.

To enhance the wider framework for sustainable finance, the Commission's proposed measures include:

- considering a proposal for the revision of the Shareholder Rights Directive to better align long-term interests of institutional investors, asset managers and companies;
- considering a recommendation aimed at improving the quality of corporate governance reporting, a report on incentives for institutional investors and asset managers to take better account of environmental, social and governance information in their investment decisions and a study on fiduciary duties and sustainability; and
- assessing employee share ownership across the EU with a view to identifying problems with and addressing cross-border implementation of such schemes.

The communication is available at:

http://ec.europa.eu/internal_market/finances/docs/financing-growth/long-term/140327-communication_en.pdf

ESMA Consults on Draft Regulatory Technical Standards on Major Shareholdings and Financial Instruments Subject to Notification

On 21 March 2014, the European Securities and Markets Authority (“ESMA”) published for consultation various draft regulatory technical standards (“RTS”) on the financial instruments subject to the notification of major shareholdings regime.

These cover the various areas that the amended Transparency Directive (as reported in our January 2014 update) requires ESMA to develop RTS on, and include for example:

- the method of calculating voting rights for financial instruments with similar economic effect to holding shares and entitlements to acquire shares and which are referenced to a basket of shares or an index; and
- the methods of determining delta for the purposes of calculating of voting rights relating to financial instruments which provide exclusively for a cash settlement.

The Transparency Directive also requires ESMA to establish an indicative list of financial instruments that are subject to the notification requirements. ESMA has set out in its consultation paper the proposed content of this list and the processes for updating it.

Responses to the consultation are requested by 30 May 2014. ESMA intends to submit the draft RTS to the Commission by 27 November 2014 for endorsement.

The consultation paper is available at:

http://www.esma.europa.eu/system/files/esma-2014-300_consultation_paper_on_draft_rts_on_major_shareholdings.pdf

European Commission Publishes Draft Delegated Regulation on Supplementary Prospectuses

On 7 March 2014, the Commission published a delegated regulation on the specific situations that require the publication of a supplement to a prospectus. The regulation essentially endorses ESMA’s draft RTS on this as reported in our January 2014 update, with minor drafting and clarifying amendments.

The regulation will now have to be approved by the European Parliament and the Council, and if approved, will be published in the Official Journal. The regulation will enter into force 20 days after publication.

The draft delegated regulation is available at:

<http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-1392-EN-F1-1.Pdf>

European Parliament Adopts the Omnibus II Directive with Amendments

On 12 March 2014, the European Parliament published the provisional edition of a legislative resolution passed on 11 March 2014 to adopt, with amendments, the Commission’s proposed Omnibus II Directive, which amends the Prospectus Directive and the Solvency II Directive in respect of the powers of the European supervisory authorities. The adopted text will now have to be approved by the Council.

The European Parliament altered the Commission’s proposed amendment to Article 5(4) of the Prospectus Directive so that the competent authority of the relevant home Member State is now required to communicate the final terms of any offer that are not included in the base prospectus or supplement to the competent authority of the host Member State and ESMA (instead of the communication being made by the issuer, offeror or person asking for admission to trading on a regulated market).

The European Parliament has also amended the deadline for ESMA's submission to the Commission of draft RTS under the Prospectus Directive to 1 July 2015.

The adopted text is available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20140311+SIT-02+DOC+WORD+V0//EN&language=EN>

Narrative Reporting: Committee of Permanent Representatives Endorses Council and European Parliament Agreement on Proposed Directive Regarding Disclosure of Non-Financial and Diversity Information

On 26 February 2014, the Committee of Permanent Representatives endorsed an agreement between the Council and the European Parliament on a draft directive for the disclosure of nonfinancial and diversity information by certain large companies. The agreement will now have to be formally endorsed by the Council and the European Parliament.

The agreement approves a directive proposed by the Commission on 16 April 2013. This directive will be incorporated into the directive on the annual financial statements and reports of certain types of undertakings, which was adopted on 26 June 2013. It will apply to public interest entities (i.e. listed undertakings, banks, insurance companies or undertakings which are of significant public relevance because of the nature of their business, size or corporate status) with over 500 employees. Approximately 6,000 public interest entities in the EU are expected to fall under the scope of this directive.

The directive requires these entities to disclose in their annual report information on policies, risks and results relating to environmental, social and employee-related matters, respect for human rights, anticorruption and bribery matters. These entities are also required to provide information (including objectives, implementation and results obtained) on their diversity policy in the corporate governance statement. The approach to such narrative reporting is intended to be flexible and nonintrusive. Companies may use existing national or international reporting frameworks and are only required to disclose concise, useful information necessary for an understanding of their development, performance, position and impact of their activity. If they consider that some policy areas are not relevant for them, they will be allowed to explain why this is the case, rather than being obliged to produce a policy. Furthermore, disclosures may be provided at group level rather than by each individual affiliate within a group.

The Commission will consider, in a report to be delivered by 21 July 2018, the possibility of requiring large undertakings to produce, on an annual basis, a country-by-country report for each Member State and third country in which they operate, containing information on profits made, taxes paid on profits and public subsidies received. The report will also take into account developments to increase transparency in financial reporting carried out at an international level.

The proposed directive is available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0207:FIN:EN:PDF>

The Council's press release is available at:

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/141189.pdf

The Commission's statement is available at:

http://europa.eu/rapid/press-release_STATEMENT-14-29_en.htm

European Commission Publishes First EU Anticorruption Report

The Commission published its first EU anticorruption report, addressed to the Council and European Parliament, on 3 February 2014. The report includes a description of corruption-related trends across the EU, a focus on one cross-cutting issue of particular relevance at an EU level (which is public procurement in this first report) and the results of Eurobarometer surveys of 2013 on perceptions and experience of corruption. Country chapters for each of the 28 Member States are also annexed to the report. These highlight selected key issues of relevance to the particular Member State and identify steps for addressing corruption there more effectively. The next report will be published in two years.

The report is available at:

http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf

European Parliament's Non-Legislative Resolution on Employee Financial Participation

The European Parliament adopted a non-legislative resolution on 14 January 2014 to encourage the establishment and development of employee financial participation schemes. These schemes typically take one of three forms: profit sharing (cash-based, deferred or in shares), individual employee share ownership (employee shares or stock options) or employee stock ownership plans. The resolution calls for the lifting of barriers to these schemes, which include taxation issues and transnational obstacles faced by schemes offered to employees across several Member States.

The resolution is available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0465&language=EN>

Proposed Regulation for Responsible Sourcing of Conflict Minerals

On 5 March 2014, the Commission proposed a regulation to develop an integrated EU approach for the responsible sourcing of conflict minerals. The proposed regulation will now have to be approved by the European Parliament and the Council.

Key features of the regulation include:

- Establishment of a voluntary, supply chain due diligence and self-certification procedure for importers of tin, tantalum and tungsten, their ores, and gold originating in conflicted-affected and high-risk areas.
- Importers who opt into this self-certification procedure will need to implement the Organisation for Economic Cooperation and Development (“OECD”) Due Diligence Guidance, provide audit assurances and disclose information to competent authorities in the Member States.
- The EU will use the disclosed information to issue, in consultation with the OECD, a list of smelters and refiners that are considered responsible suppliers. The list will be updated annually and will specifically identify smelters and refiners that source responsibly from conflict zones so as to incentivise legitimate trade and minimise the risk of EU companies financing armed groups.

The Commission is also proposing accompanying measures to further encourage the responsible sourcing of minerals. These include providing financial support to EU importers that elect to self-certify and to organisations promoting transparency and due diligence practices among smelters and refiners, and initiating policy dialogues with third countries and other stakeholders.

The proposed regulation is available at:

http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152227.pdf

ESMA Consults on Draft Guidelines on Alternative Performance Measures

ESMA published for consultation its draft guidelines on alternative performance measures (“APMs”) on 13 February 2014, used by issuers in any of their public regulatory (e.g. financial) disclosures. These are aimed at ensuring that issuers who provide APMs do so in a way that is appropriate and useful for users’ decision-making. The proposed guidelines are based primarily on, and will replace, the Committee of European Securities Regulator’s (“CESR”) Recommendation on Alternative Performance Measures, which has been in force since October 2005.

For the purposes of the guidelines, ESMA considers APMs to be any numerical measure of historical, current or future financial performance, which relates to the issuer’s financial position, comprehensive income or cash flows, and which is not a measure defined by the applicable financial reporting framework. The proposed guidelines will apply to issuers whose securities are admitted to trading on a regulated market and national competent authorities. They will regulate APMs included in all issued documents containing regulated information that are made publicly available (e.g. financial statements). ESMA is seeking feedback on whether the guidelines should apply to APMs published in prospectuses and related documents, which departs from the position under the current CESR Recommendation.

Responses to the consultation are requested by 14 May 2014. ESMA expects to publish final guidelines in the fourth quarter of 2014.

The consultation paper is available at:

http://www.esma.europa.eu/system/files/esma-2014-175_cp_on_the_draft_guidelines_on_apms.pdf

UK DEVELOPMENTS

Best Practice Principles for Proxy Advisors

On 7 March 2014, the Best Practice Principles Group, comprising members of the proxy advisory industry, published the Best Practice Principles for Providers of Shareholder Voting Research & Analysis (the “Principles”). The Principles were developed in response to an ESMA report which encouraged the proxy advisory industry to establish its own code of conduct, and were refined after consultation in the last quarter of 2013.

Proxy advisors research and analyse the corporate disclosures of listed companies with a view to informing investors’ voting decisions. The Principles address their service quality, conflicts-of-interest management and communication policies for communicating with issuers and other market participants. The Principles are supported by guidance that explains their background, relevance and application. Signatories to the Principles should adopt them on a comply-or-explain basis.

The Best Practice Principles Group will review the Principles and guidance no later than two years following their launch. ESMA will perform a separate review of the implementation of the Principles and their monitoring by the Best Practice Principles Group at the start of 2016.

The Principles are available at:

<http://bppgrp.info/wp-content/uploads/2014/03/BPP-ShareholderVoting-Research-2014.pdf>

Quoted Companies Alliance Review of Disclosures by Small and Mid-Sized Companies

On 4 March 2014, the Quoted Companies Alliance published a review of the corporate governance disclosures made by small and mid-sized quoted companies. It compared disclosures made by these companies against the standard of minimum disclosures set out in the Quoted Companies Alliance Corporate Governance Code for Small and Mid-Sized Quoted Companies 2013. The review concluded that these companies need to create a more effective link between the narrative on strategy and proceedings within the boardroom, and their directors need to become bolder in using the annual report and accounts to explain companies' actions to their shareholders and other stakeholders.

The review is available at:

http://www.thegca.com/article_assets/articledir_166/83407/QCAUHYCorporateGovReview_FINALemailversion.pdf

Guidelines Monitoring Group Publishes Updated Guidelines on Good Practice Reporting by Private Equity Portfolio Companies

On 5 February 2014, the Guidelines Monitoring Group published an updated version of its guidelines on good practice reporting by private equity portfolio companies. The guidelines have been updated with examples of good practice reporting drawn from portfolio companies' accounts over the last two years. The Guidelines Monitoring Group published these guidelines to monitor conformity of the UK private equity industry with the Guidelines for Disclosure and Transparency in Private Equity, which were the result of Sir David Walker's review on this subject in 2007 (the "Walker Guidelines").

The Guidelines Monitoring Group will also be reviewing how updated guidance issued by BIS and the FRC applicable to listed companies will be incorporated into the Walker Guidelines. The updated Walker Guidelines will be applicable for reporters in scope for September 2014 year end onwards and further guidance will be shared in the spring and finalised by June 2014.

The guidelines are available at:

http://walker-gmg.co.uk/sites/10051/files/pwc_gmg_good_practice_reporting_guide_february_2014_-_final.pdf

FCA Publishes Policy Statement on Rules for Primary Information Providers

The Financial Conduct Authority ("FCA") published a policy statement on the new statutory regime for Primary Information Providers ("PIPs") on 31 January 2014, following consultation. Resultant amendments to the Listing Rules and Disclosure and Transparency Rules also came into effect on this date.

PIPs were previously known as providers of Regulated Information Services ("RIS") and are the FCA-approved vehicles for issuers to disseminate regulated information to the markets in a timely and proper manner. The FCA's new statutory regime for PIPs is based largely on the existing framework for the approval and oversight of RIS as set out in the FCA's RIS Criteria.

The policy statement sets out key clarifications in response to feedback from consultation, including:

- An issuer has the option of using an FCA-authorized PIP or an incoming European Economic Area ("EEA") information society service ("ISS"), which may or may not have been approved to disseminate information in another Member State. If an issuer chooses to use an incoming EEA ISS which has not been so approved, it will be required to provide an annual written confirmation to the FCA confirming that the information disseminated on its behalf has been done so in accordance with the Transparency Directive standards.

- In relation to the Listing Rule requiring an annual confirmation from an issuer regarding the dissemination of regulated information, some issuers will remain outside the scope of this requirement in relation to some types of regulated information. To respect 'home state' provisions in the Transparency Directive, issuers who do not have the UK as their 'home state' will not be subject to the annual notification requirement in respect of the dissemination of any information which falls within the Transparency Directive definition of regulated information.
- PIPs will not be required to provide the FCA with continual access to their systems.

An existing RIS that wishes to become approved as a PIP will have a six month transitional period during which it may continue to act as RIS while applying for approval. At the end of this period, an existing RIS that has not gained approval will no longer be able to disseminate regulated information in the UK on behalf of UK issuers.

The policy statement is available at:

<http://www.fca.org.uk/static/documents/policy-statements/ps14-02.pdf>

FCA Publishes Consultation Paper on Proposed Amendments to the Listing Rules in Relation to Sponsor Competence and Other Amendments to the Listing Rules and Prospectus Rules

On 30 January 2014, the FCA published a consultation paper on proposed amendments to the Listing Rules in relation to sponsor competence and other amendments to the Listing Rules and Prospectus Rules.

As the FCA believes that sponsors play a crucial role in guiding premium listing issuers and providing investors with confidence in the integrity and effectiveness of the premium listing regime, its proposed amendments seek to clarify its expectation of sponsors and the criteria for their approval. Proposed amendments include requiring sponsors to submit a sponsor declaration to the FCA and establishing key competencies which a sponsor is required to demonstrate in order to be competent.

The consultation paper also contains questions for market participants on joint sponsor arrangements. It also contains some proposals not related to sponsors. These comprise removing the Listing Rule requirement for a premium listed issuer to prepare a circular updating working capital statements produced by it in connection with class 1 circulars following the completion of the acquisition, 28 days after the acquisition. It is also proposing to introduce new Prospectus Rules which impose discrete obligations on an applicant to submit a compliant and factually accurate prospectus.

Responses to the consultation are requested by 30 April 2014. The FCA intends to publish its feedback in the last quarter of 2014.

The consultation paper is available at:

<http://www.fca.org.uk/static/documents/consultation-papers/cp14-02.pdf>

Increase in Number of Women on Boards of FTSE 350 Companies

Lord Davies' third annual progress report on women on boards (the "2014 Davies Review") and the Cranfield University School of Management's Female FTSE Board Report (the "2014 Cranfield Report") were both published on 26 March 2014. The reports reveal that the number of women on the boards of FTSE 100 companies has risen to 20.7% (from 17.3% in 2013) and 15.6% on FTSE 250 boards (from 13.3% in 2013), with only two all-male boards remaining in the FTSE 100 (against 21 in 2011). Lord Davies noted that, to reach the target of 25% female board representation by 2015, fewer than 50 women need to be appointed to FTSE 100 boards in the next 18 months but that "strengthening the

executive pipeline remains a longer term task.” A similar view was expressed in the 2014 Cranfield Report as it was revealed that the majority of female board appointments were to nonexecutive positions.

The 2014 Davies Review pointed out that although progress made shows that the voluntary approach has been successful in the UK, further specific action in a number of areas still needs to be taken. These include:

- FTSE 350 companies should report meaningful disclosures on gender diversity in their annual reports and on their websites;
- the two FTSE 100 and 48 FTSE 250 companies with all-male boards should take action to diversify their boards;
- FTSE 350 companies should ensure that at least one woman non-executive director sits on the nomination committee;
- FTSE 350 companies and executive search firms should ensure that at least one woman is on the short list for searches;
- investors should adopt a clear voting policy for companies that fail to set boardroom policies to increase gender diversity and should be prepared to vote against the re-election of chairmen and members of nomination committees that fail to take action on all-male boards; and
- FTSE 350 companies should identify and support their senior women and look at measures to address any potential organisational gender bias.

The 2014 Davies Review is available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/297519/bis-women-on-boards-2014.pdf

The 2014 Cranfield Report is available at:

<http://www.som.cranfield.ac.uk/som/dinamic-content/research/ftse/The%20Female%20FTSE%20100%20Women%20to%20Watch%202014.pdf>

BIS Consults on the UK’s Implementation of the Extractive Reporting Requirements of the Accounting Directive

The House of Commons Business, Innovation and Skills Committee (“BIS”) published a consultation paper on the UK’s implementation of Chapter 10 of the EU Accounting Directive, which requires large extractive companies and all listed extractive companies to publicly report on the payments they make to governments across the world. Information must be provided on both a country and project basis. Since the content of the report is fixed by the Directive, BIS is consulting on the format and frequency of the reports and the enforcement regime surrounding these requirements.

Responses to the consultation are requested by 16 May 2014. The government intends to publish its response within 12 weeks of that date and introduce the implementing regulations later this year.

The consultation paper is available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299454/bis-14-622-uk-implementation-of-the-eu-accounting-directive-chapter-10-extractive-industries-reporting-consultation.pdf

Remuneration Consultants’ Group Publishes Biannual Review of the Code of Conduct and the Annual Review of its Effectiveness and Implementation

On 27 January 2014, the Remuneration Consultants’ Group published its annual review of the effectiveness of its Code of Conduct (the “Code”) and the results of a biannual review of the content of the Code. The Code is voluntary and sets out the role of executive remuneration consultants and the professional standards by which they advise their clients. The Remuneration Consultants’ Group was formed to develop and steward the Code. The review highlights that references

to the Code in directors' remuneration reports published by FTSE 350 companies has increased by 15% since the previous review in 2011.

The review is available at:

<http://www.remunerationconsultantsgroup.com/assets/Docs/RCG%20Review%20of%20the%20Code.pdf>

London Stock Exchange Consults on Proposed Changes to the AIM Rules for Companies and the AIM Rules for Nominated Advisers

On 27 January 2014, the London Stock Exchange issued AIM Notice 38 to consult on proposed changes to the AIM Rules for Companies (the "AIM Rules") and the AIM Rules for Nominated Advisers (the "Nomad Rules"). The majority of the proposed changes are administrative or clarificatory in nature. There are, however, a few more substantive changes. Proposed amendments to the AIM Rules include additions to the list of information that must be available on a website, including details of the corporate governance code that the AIM company has decided to apply, how it complies with that code, or if no code has been adopted, disclosure of that fact. Proposed amendments to the Nomad Rules include proposed amendments to eligibility rules on change of control of a nominated adviser and continued eligibility of qualified executives.

Responses to the consultation were requested by 3 March 2014. The London Stock Exchange intends that the new rules will come into effect during 2014.

The AIM Notice 38 is available at:

<http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/aim-notice/aimnotice38.pdf>

GC100 Responds to FRC Consultation on Risk Management, Internal Control and the Going Concern Basis of Accounting

On 24 January 2014, the GC100 responded to the Financial Reporting Council's ("FRC") consultation paper on Draft Guidance to Directors on Risk Management, Internal Control and the Going Concern Basis of Accounting ("Integrated Code Guidance"), reported in our January 2014 newsletter. The GC100 noted that the Integrated Code Guidance presents a very extensive list of what boards and management teams are now expected to do, but lacks explanation of how they are to be done. It thus finds that this Guidance is less helpful than its 2005 predecessor. The GC100 then goes on to set out its response to specific questions raised in the consultation paper and proposes certain drafting changes.

The GC100's response is available at:

<https://frc.org.uk/Our-Work/Publications/FRC-Board/Consultation-Paper-Risk-Management.-Internal-Contr/Responses-to-consultation/GC100.aspx>

Takeover Panel Publishes Practice Statement on Directors' Irrevocable Commitments and Letters of Intent

The Takeover Panel Executive published a Practice Statement on 17 January 2014 to clarify the way in which it interprets and applies Rule 21.2 of the Takeover Code in relation to irrevocable commitments and letters of intent given by offeree company shareholders who are also offeree directors. The Executive clarified that such person is permitted to enter into an irrevocable commitment or letter of intent to accept an offer (or to vote in favour of a scheme of arrangement) with respect to the shares in the offeree company that he holds or controls. Such person is not permitted to

enter into any other type of offer-related arrangement with the offeror or the offeror's concert parties, and these include commitments:

- not to solicit a competing offer;
- to recommend an offer to offeree company shareholders;
- to notify the offeror if the director becomes aware of a potential competing offer;
- to convene board meetings and/or vote in favour of board resolutions which are necessary to implement the offer;
- to provide information in relation to the offeree company for due diligence or other purposes;
- to assist the offeror with the satisfaction of its offer conditions;
- to assist the offeror with the preparation of its offer documentation; and
- to conduct the offeree company's business in a particular manner during the offer period.

However, provisions that are aimed solely at giving effect to a commitment to accept the offer (or vote in favour of the scheme) are permitted. The Executive should be consulted at the earliest opportunity if there is any doubt as to whether a proposed irrevocable commitment or letter of intent is in compliance with Rule 21.2.

The Practice Statement is available at:

<http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PS27.pdf>

Taskforce Issues Publication on Cyber Security in Corporate Finance Transactions

In January 2014, a taskforce consisting of senior representatives from associations including the Institute of Chartered Accountants in England and Wales, the Association of Corporate Treasurers and the Cabinet Office issued a publication titled "Cyber-Security in Corporate Finance". The publication outlines key cyber security risks in corporate finance transactions and suggests how companies can manage or eliminate them.

The publication is available at:

<http://www.icaew.com/~media/Files/Technical/Corporate-finance/Corporate-finance-faculty/tecpln12526-cyber-web.pdf>

FRC Reports on Fraud Risks and Laws and Regulations in Audit

On 23 January 2014, the FRC published its report on fraud risks and laws and regulations in audit, which sets out the principal findings of the second thematic inspection review of the FRC's Audit Quality Review team during 2013. The findings from its first thematic review were published in December 2013 and reported on in our January 2014 newsletter.

Key messages to audit firms included:

- increasing their focus on identifying fraud risk factors when planning and conducting the audit; and
- improving their identification and assessment of the laws and regulations affecting the entity, in particular those that may have an impact on the financial statements.

Audit committees are encouraged to discuss fraud risk factors and relevant laws and regulations with their auditors.

The report is available at:

<https://www.frc.org.uk/Our-Work/Publications/Audit-Quality-Review/Audit-Quality-Thematic-Review-Fraud-Risks-and-Laws.pdf>

Deferred Prosecution Agreements

Deferred Prosecution Agreements (“DPAs”) are now available to prosecutors in the UK. This follows the final version of the joint code of practice on DPAs being published by the Director of Public Prosecutions and the Director of the Serious Fraud Office on 14 February 2014.

As we reported in our July 2013 newsletter, DPAs are agreements entered into between a prosecutor and a company where the prosecutor has agreed to bring but not immediately proceed with a criminal charge against the company, subject to successful compliance by the company with agreed terms and conditions as set out in the DPA. DPAs are therefore an alternative to criminal prosecution or civil enforcement (such as civil recovery orders under the Proceeds of Crime Act 2002).

The code of practice has (among other things) given guidance on some of the potential terms and conditions that may form part of a DPA. One of those terms could be the appointment of a monitor to assess and monitor an organisation’s internal controls, advise on necessary improvements to its compliance programme and report any specified misconduct to the prosecutor. For these purposes, the monitor will have complete access to all relevant aspects of the organisation’s business. However, the appointment of a monitor will depend on the factual circumstances of each case and must be fair, reasonable and proportionate.

DPAs have been available to prosecutors from 24 February 2014. However, there remains some uncertainty as to the practical implementation and future use of DPAs, not least given the required amount of judicial involvement in the approval of DPAs under the relevant legislation. It remains to be seen to what extent organisations and prosecutors will be prepared to agree the terms of a DPA, and whether the courts will then approve those terms.

The code of practice is available at:

<http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf>

The SFO’s press release is available at:

<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/deferred-prosecution-agreements-new-guidance-for-prosecutors.aspx>

CONTACTS

This newsletter 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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