SHEARMAN & STERLING LLP

Governance & Securities Law Focus

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In this newsletter, we provide a snapshot of the principal European, US and selected global governance and securities law developments of interest to European corporates and financial institutions, both with and without a US listing.

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EU DEVELOPMENTS

ESMA Consultation on Proxy Advisors

On 22 March 2012, the European Securities and Markets Authority ("ESMA") launched a consultation about the role of proxy advisors in Europe, i.e., companies providing proxy voting, advice on voting and corporate governance ratings to institutional investors.

The consultation is concerned with issues of transparency relating to the work of proxy advisors and the potential conflicts of interest they face when they provide consultancy services to the same companies in respect of which they also offer advice and services to investors. ESMA asks for views on whether:

- any regulatory action at all is required, or
- if it should be left to Member States or industry bodies to develop appropriate standards, or
- if any "soft" regulation, including any ESMA guidelines, should be adopted, or
- if binding EU rules should be introduced.

The consultation closes on 25 June 2012 following which ESMA will publish details of the feedback that it receives and its proposals, if any, for further action.

The consultation is available at: http://www.esma.europa.eu/node/57732.

The previous quarter's Governance & Securities Law Focus newsletter is available here.

EC Consultation on Gender Imbalance on Corporate Boards

On 5 March 2012, the European Commission announced a consultation on measures to address the continuing gender imbalance on European corporate boards. The consultation looks at both:

- how the imbalance should be addressed, in terms of:
  - the corporate entities (listed or having a certain size) and their board members (executive or non-executive) who should be subject to any regulation, and
  - the possible percentages (e.g., 20% to 60%) and time frames that might be set to address the imbalance, and
- what action should be taken to enforce or encourage improvement of the current position, whether by way of self-regulatory or regulatory action and the sanctions for non-compliance.

The consultation closes on 28 May 2012 and is available at: http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/28051_consultation_questions_en.doc.

Prospectus Directive – ESMA's Further Advice

On 1 March 2012, ESMA published its final advice on further delegated acts in relation to the Amended Prospectus Directive, having published draft advice in December 2011 and having delivered advice on a first set of delegated acts in October 2011. The final advice covers requirements with regards to the consent to use a prospectus in a retail cascade offering as well as certain provisions of the Prospectus Regulation.

It has revised its earlier draft advice in a few areas:

- in relation to the issuer's consent for use of the prospectus in a retail cascade, ESMA has modified its recommendations to allow for a "general consent" to any financial intermediary (including those whose identity is not known by the issuer), as well as for an "individual consent" to be given to specific intermediaries; and
- in relation to amendments to the Prospectus Regulation, ESMA has modified its advice in relation to profit forecasts and estimates, including preliminary statements, so that, for example, preliminary statements can be based on underlying assumptions and can be treated as "agreed" by the auditor if the auditor is confident that they are substantially consistent with the issuer's final figures.

ESMA's final advice is available at: http://www.esma.europa.eu/content/ESMA%E2%80%99s-technical-advice-possible-delegated-acts-concerning-Prospectus-Directive-amended-Di-0.

In this context, on 2 April 2012, the European Commission published a draft delegated regulation amending the Prospectus Regulation to take into account ESMA's earlier advice on the first set of delegated acts. ESMA is now considering the remaining issues in the list of delegated acts that have been referred to it.

The European Commission's draft regulation is available at: http://ec.europa.eu/internal_market/securities/docs/prospectus/20120330-delegated-regulation_en.pdf.

European Company Law Reform

On 20 February 2012, the European Commission launched a consultation on the future of European company law, both with respect to its general approach and on certain more specific issues, to identify any areas where improvements can be made to facilitate business growth.

Questions raised include:

- what should be the main objectives of European company law?
- should the focus be more on the distinction between listed and unlisted companies, rather than public and private companies?
- should existing legal forms for European companies be reviewed and new ones considered?
- are changes required to facilitate cross-border mobility for companies, including with respect to cross border de-mergers?
- should there be new rules in relation to "groups of companies"?

- should the existing Second Company Law Directive capital maintenance regime be reviewed?

The consultation closes on 14 May 2012. A copy of the consultation is available at: http://ec.europa.eu/internal_market/consultations/2012/company_law_en.htm.

ESMA Guidance on Dividend Policy as Inside Information

On 9 January 2012, ESMA published a Q&A paper in relation to the common operation of the Market Abuse Directive with respect to the disclosure of information about an issuer's dividend policy, including changes thereto, and its effect, particularly on listed derivatives of the issuer's shares.

The paper reminds issuers of earlier CESR guidance that certain information about dividends and changes to dividend policy can constitute inside information and that such information must be disclosed promptly, even where the proposed changes are still subject to further consideration or approval by a general shareholders' meeting. Care must be taken to ensure that such information does not become the subject of selective or unintended disclosures.

A copy of the Q&A paper is available at: http://www.esma.europa.eu/content/Questions-and-Answers-common-operation-Market-Abuse-Directive.

ECON Draft Reports on MAD II

As part of the proposals to revise the Market Abuse Directive ("MAD"), ECON has published draft reports on each of the proposals.

- As reported in our January 2012 Newsletter, in October 2011, the European Commission published its proposals to replace MAD with a Regulation on insider dealing and market manipulation ("MAR") and a Directive on criminal sanctions for insider dealing and market manipulation ("CSMAD"), which together are known as "MAD II".

The draft reports propose amendments to the European Commission's proposals including:

- the introduction of a 'trading window' which will prohibit managers from conducting proprietary transactions during certain periods;
- a change to the definition of inside information, where a 'reasonable investor who regularly deals on the market' is 'likely' to consider the use of such information by an individual as a breach of the reasonable standard of behaviour expected from the individual in such a position 'in relation to that market'; and
- the creation of a new offence of 'abusive order entry.'

The MAR report is available at: http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-485.914&format=PDF&language=EN&secondRef=01.

The CSMAD report is available at: http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-485.917&format=PDF&language=EN&secondRef=02.

EU Short Selling Regulation

Regulation 236/2012 on Short Selling and certain aspects of Credit Default Swaps (the "Regulation") was published in the Official Journal of the European Union on 24 March 2012, and is now in force. It will apply in full from 1 November 2012. We reported on the Regulation in our January 2012 Newsletter.

In the intervening period, certain transitional measures will apply in respect of entering into sovereign CDS. Market participants will be able to enter into sovereign CDSs as long as any uncovered positions are unwound or covered by 1 November 2012. However, until the final Level 2 measures are published by ESMA, it is not clear what positions will be regarded as "covered".

Once the Regulation is fully in force, any new transactions resulting in uncovered positions in sovereign CDS will not be permitted, unless the competent authority of a particular Member State temporarily waives the restriction on its own sovereign debt instruments.

ESMA published a Final Report and draft regulatory ("RTS") and implementing technical standards ("ITS") on 30 March 2012. The Final Report includes a summary of the responses received during the consultation period together with a description of any material changes to the proposed technical standards. The European Commission must now decide whether to endorse these technical standards, which it has three months to do.

The official text of the Regulation is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:086:0001:0024:EN:PDF.

The ESMA Final Report, the RTS and the ITS are available at: http://www.esma.europa.eu/content/Draft-technical-standards-Regulation-EU-No-2362012-European-Parliament-and-Council-short-sel.

ESMA on Non-EEA Regulatory Frameworks for CRAs

ESMA has released further details of its progress in assessing the regulatory frameworks of non-EEA jurisdictions for the purposes of EU Regulation (EC) No 1060/2009 on Credit Rating Agencies.

ESMA has announced that it considers the regulatory frameworks for credit rating agencies ("CRAs") in the US, Canada, Hong Kong and Singapore to be in line with European rules. It is required to evaluate whether the requirements of third-country CRA regimes are "as stringent as" the European ones under the Regulation.

The effect of this announcement is that after 30 April 2012, European financial institutions can continue to use credit ratings issued by CRAs from these countries for regulatory purposes.

ESMA also warned market participants to take precautionary measures before 30 April 2012 in respect of certain other countries for which CRAs have applied for endorsement, as it is likely that credit ratings issued in those countries cannot be endorsed after 30 April 2012.

- The relevant countries are Chile, China, Costa Rica, Dubai, India, Indonesia, Israel, Panama, Russia, South Africa, Sri Lanka, Taiwan, Thailand, Tunisia, Turkey and Venezuela.

The ESMA press release is available at: http://www.esma.europa.eu/node/57482.

ESMA Consultation on AIFMD

On 23 February 2012, ESMA published a discussion paper on the Alternative Investment Fund Managers Directive (AIFMD). According to the paper, ESMA sees merit in working to ensure the alignment of supervisory practices among European national competent authorities in the interpretation of certain key concepts of AIFMD and is therefore seeking the views of external stakeholders on the policy orientations it has identified in order to progress its work to achieve a harmonised application of the Directive. In addition, any feedback received will also be used in drafting the regulatory technical standards (RTS) required by Article 4(4) of the Directive. The formal proposals for the draft RTS will be published in a consultation paper in the second quarter of 2012 and are to be submitted to the European Commission for endorsement by the end of 2012.

The discussion paper and responses submitted to ESMA are available at: http://www.esma.europa.eu/consultation/Key-concepts-Alternative-Investment-Fund-Managers-Directive-and-types-AIFM.

EU Reforms to the Derivatives Market Progress

In our January 2012 Newsletter, we reported on the failure to agree on a final text of the proposed European Markets Infrastructure Regulation ("EMIR") and the resulting delay to the reforms to the over-the-counter derivative markets. On 29 March 2012, the European Parliament approved the text of EMIR, which is due to be formally approved at the next meeting of the Economic and Financial Affairs Council ("ECOFIN"), before being published in the Official Journal, possibly in May 2012.

EMIR introduces provisions to improve transparency and reduce the risks associated with the OTC derivatives market and establishes common rules for central counterparties ("CCPs") and for trade repositories. It has been identified that common rules are required in the case of CCPs in view of the shift of risk management from a bilateral to a central process for OTC derivatives and in the case of trade repositories because of the increase in information that needs to be reported to them.

The European Commission has published a list of Frequently Asked Questions which set out an explanation of the basic points of the Regulation. The European Commission has committed to fully adopting draft regulatory technical standards, prepared by the European Supervisory Authorities, by the end of 2012.

The approved text of EMIR is available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20120329+SIT-01+DOC+WORD+V0//EN&language=EN.

The FAQs are available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/232&format=HTML&aged=0&language=EN&guiLanguage=en.

EMIR Draft Regulatory Technical Standards

The responses to consultations on two sets of draft regulatory technical standards relating to EMIR have been published.

The European Supervisory Authorities ("ESAs") consultation on the planned regulatory technical standards covering risk mitigation techniques for OTC derivatives not cleared by central counterparties sought views on:

- the exchange of margin;
- segregation of collateral;
- margin calculations; and
- eligible forms of collateral.

The consultation closed on 2 April 2012 and the ESAs will now consider the responses received in its consultation and prepare revised standards to be included in a consultation paper, which is expected to be published during the summer of 2012.

The ESA discussion paper and responses received are available at: http://www.esma.europa.eu/consultation/Joint-Discussion-Paper-Draft-Regulatory-Technical-Standards-risk-mitigation-techniques-.

Separately, ESMA held a consultation on its draft regulatory technical standards and implementing technical standards which it is required to develop under EMIR. ESMA is currently preparing draft technical standards to be included in a consultation paper which is expected to be published during the summer of 2012.

The ESMA discussion paper and responses are available at: http://www.esma.europa.eu/consultation/Consultation-Draft-Technical-Standards-Regulation-OTC-Derivatives-CCPs-and-Trade-Reposi#responses

GERMAN DEVELOPMENTS

Proposed Amendments to the German Corporate Governance Code

On 1 February 2012, the Commission of the German Corporate Governance Code (*Deutscher Corporate Governance Codex*) published a list of proposed amendments to the Code. Among others, and in addition to editorial adjustments and supplementary details, the following changes regarding recommendations and proposals of the Code were made:

- The previous proposal that under certain circumstances the Supervisory Board should meet without members of the Management Board being present has been converted into a recommendation.
- The previous proposals that the chairman of the Supervisory Board should not be identical with the chairman of the Audit Committee and that the chairman of the Audit Committee should be independent and not a former member of the company's Management Board have been converted into recommendations.
- The recommendation on the range of matters with respect to which the chairman of the Supervisory Board should regularly consult with the Management Board has been broadened by adding certain aspects of planning, risk valuation and compliance. As a result, this catalogue is now identical with the information duties of the Management Board towards the Supervisory Board.
- With respect to the composition of the Supervisory Board, it is now recommended that the number of independent members is taken into consideration. Furthermore, such number has to be published in the corporate governance report. The wording of the recommendation that the Supervisory Board is to include "what it considers an adequate number" is now changed to "a reasonable number" of independent members. In addition, the Commission proposes to expand the negative definition of independence to include business or personal relationships with third parties, provided that such relationships with third parties may cause a material conflict of interest. Previously, only relationships with the company or the management board were taken into account.

- The previous recommendation that members of the Supervisory Board should receive performance-related compensation in addition to fixed compensation is now stated only as a possibility. If the compensation is based on a performance-related model, such model should apply predominantly long-term performance criteria.

Eighth Amendment to the Act Against Restraints of Competition

On 30 March 2012, the German Federal Government published a draft bill of the eighth Act to amend the Act Against Restraints of Competition (*Entwurf eines achten Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*). The amending Act is aimed towards further reducing differences between German and European merger control law by implementing the "Significant Impediment to Effective Competition" test criterion ("SIEC-Test") into German law. Furthermore, the threshold for the presumption of an individual dominant market position (*Marktbeherrschende Stellung*) will be increased from 30% to 40%.

ITALIAN DEVELOPMENTS

Italian Law on Gender Quotas

Italian Law No. 120 of 12 July 2011 (the "Italian Law on Gender Quotas") that entered into force on 12 August 2011, introduced several changes to Legislative Decree No. 58 dated 24 February 1998 (the "Italian Securities Act") aimed at reserving to the least represented gender a minimum number of seats in the administrative and supervisory bodies of listed companies (the so-called "gender quotas") as a consequence of the perceived scant female representation in these key positions. Subsequently, CONSOB, the Italian securities regulator, adopted Resolution No. 18098 of 8 February 2012 to implement such changes in the Italian Securities Act and the regulations promulgated thereunder.

Based on the new rules on gender quotas, the by-laws of listed companies must now contain specific criteria relating to the appointment of directors and members of supervisory bodies sufficient to ensure a balance among genders. In particular, at least one-third of the board of directors and of the board of statutory auditors (or other supervisory body, as applicable) must be reserved to the least represented gender for three consecutive terms of office. In order to comply with such gender quota requirements, the by-laws must also contain specific provisions governing the replacement of members of the bodies whose duty is terminated during the term of office. Such gender quota requirement will apply to the first renewal of the supervisory bodies of listed companies, starting from August 2012. For the first term in office, however, the minimum gender requirement has been reduced to one-fifth.

The provisions on gender quotas do not apply to minority slates putting forward less than three candidates, in order to avoid that the selection of minority board representatives becomes too burdensome.

The same gender quota provisions will also apply to companies incorporated under Italian laws which, even though not listed, are controlled by the government or other government-related entities.

Simplified Prospectus Preparation and Disclosure Requirements

On 20 January 2012, CONSOB adopted Resolution No. 18079 (the "Resolution"), which introduced new rules aimed at, among others: (i) the simplification of the issuers' obligations in connection with the preparation of prospectuses for public offerings or admission to listing of securities; and (ii) the improvement of the quality of information provided to investors.

The Resolution, which also implemented the provisions of EU Directive 2010/73 in Italy, represents the first round of regulatory changes aimed at giving investors and issuers (in particular small companies) an easier access to the capital markets by significantly reducing the burden of the prospectus approval process and the issuers' on-going disclosure obligations. Further regulatory changes are currently under discussions in order to align the Italian securities regulatory system to the European regimes and streamline the ongoing obligations of listed companies.

In particular, among the several matters touched upon by the Resolution, the following rules have been implemented or amended:

- a so-called "pre-filing" procedure has been formally introduced and regulated, allowing issuers to present to CONSOB, before any formal filing, any potential peculiarities relating to the offer, in order

to evaluate their impact on the offer and on the prospectus and thereby expedite CONSOB's prospectus approval;

- the offer value thresholds below which an issuer is exempted from the obligation to publish a prospectus have been increased: (i) the maximum aggregate value of any offering for any kind of issuer and financial instrument has been doubled, raising from Euro 2.5 million to Euro 5 million; (ii) the minimum value of the financial products offered per investor and per separate offer (other than interests in investment companies or financial products issued by insurance companies) has been increased from Euro 50,000 to Euro 100,000; (iii) the minimum nominal value of the financial products offered (other than interests in investment companies or financial products issued by insurance companies) has been increased from Euro 50,000 to Euro 100,000; and (iv) the maximum annual value of issuances of plain vanilla instruments by banks has been increased from Euro 50 million to Euro 75 million;
- the maximum number of physical persons to whom an offer may be addressed without incurring the obligation to publish a prospectus has been increased from 100 to 150;
- the exemption relating to offerings to employees or ex-employees, directors or ex-directors of the company (or its controlling companies, controlled companies, companies subject to common control or affiliates) no longer requires that the company be listed for the exemption to apply, provided that it has its registered or principal office in one EU Member State; the new rules still require that an information document on the offering is made available to all beneficiaries. Two additional exemptions have been introduced for offerings of financial instruments to employees or ex-employees, directors or ex-directors of companies (or their controlling companies, controlled companies, companies subject to common control or affiliates) having their registered or principal office in a State outside the European Union provided that the company has either (i) financial instruments admitted to trading in a regulated market or (ii) financial instruments admitted to trading in a market of such non-European State, provided that, in such latter case, certain specific requirements are met;
- prospectuses can be drafted in a language different from Italian (provided that such alternative language is commonly used in international finance, i.e., English language) if (i) Italy is a host EU Member State, or (ii) Italy is the home Member State of an offer involving either equity or plain vanilla instruments which is carried out mainly in other States. Such a choice requires in any event that the summary note (*nota di sintesi*) be translated into Italian;
- the new regulatory rules introduced the definition of "key information" (*informazione chiave*) as the essential and appropriately structured information enabling the investors to understand the nature and the risks relating to their potential investment. Key information must be drafted in a non-technical language and included in the summary note (*nota di sintesi*).

The new regime set forth above became effective starting from 21 February 2012, except for certain of the exemptions from the obligations to prepare a prospectus for public offerings highlighted above, which will come into force in July 2012.

Moreover, the Resolution introduced new rules on disclosure obligations relating to the execution of extraordinary transactions. The Italian regulatory regime requires listed issuers to prepare information documents for extraordinary transactions (such as mergers, de-mergers, acquisitions and sales). Such requirement creates a competitive disadvantage for Italian listed issuers as compared to their European counterparts. The Resolution provides that listed issuers can decide to "opt-out" from this regime and choose not to comply with its requirements. Any such decision to opt-out must be disclosed to the public and included in the financial reports published by the issuers. Borsa Italiana, the Italian stock exchange, however, may require that certain listed companies elect not to opt-out. The provisions regarding the opt-out regime will become effective on 6 August 2012.

New Rules on Simplifying Statutory Auditors Requirements

As part of a set of new rules to boost the economy and increase competitiveness of the Italian corporate system,

the Italian government recently introduced new rules aiming at simplifying the internal control requirements of non-listed companies.

In particular, in order to simplify the governance structure of Italian companies and reduce operational costs, Law Decree No. 5 of 9 February 2012 (the "Law Decree No. 5") introduced significant changes to the old regime by providing (i) the possibility of entrusting the supervisory and controlling functions of an Italian "società per azioni" or "SpA" (a joint stock company) and of an Italian "società a responsabilità limitata" or "Srl" (a limited liability company) to a single statutory auditor, rather than to a board of statutory auditors, and (ii) with respect to Srls only, the possibility of entrusting such controlling functions also to an external auditor or external auditing company, as an alternative to the statutory auditors. The previous regime provided that for the SpA the appointment of a board of statutory auditors was always mandatory, while the Srl enjoyed a higher degree of flexibility and was required to appoint a board of statutory auditors only if certain conditions were met.

Law Decree No. 5, which has a transitional validity of 60 days from the date of its enactment, is in the process of being converted into law by the Italian Parliament and should be finally converted within April 2012. It is envisaged that the simplified requirements for the board of statutory auditors set forth in the Law Decree No. 5 will be maintained only for Srls, while the old regime may be reintroduced for SpAs.

Simplified Internal Control Procedures for Corporate Crimes

Another important new feature relates to the simplification of certain requirements applicable to Italian companies in connection with Legislative Decree No. 231 of 8 June 2001, as amended, (the "231 Decree"), the Italian statute establishing the criminal liability of non-physical persons (whether or not they have legal personality) for certain offences, including bribery and corruption, committed (or attempted) by their employees, managers and agents on the condition that such offences create a benefit for the entity itself. Pursuant to the 231 Decree, an entity may assert a defense if it adopted and effectively implemented, prior to the commission of the offences, a compliance programme sufficiently adequate to prevent the commission of offences of the kind indicated in the 231 Decree (the "Model"). As part of such programme, each company is required to establish an internal body having independent powers of initiative and control with the ongoing task of monitoring and auditing the Model and keeping it up to date (the "Compliance Body").

As part of the attempt to simplify the internal control structures of Italian companies, Law No. 183 of 12 November 2011 introduced the possibility that the functions of the Compliance Body can be entrusted and performed by the board of statutory auditors (or by the supervisory board or by the committee for internal controls, in the event that the company adopts the dualistic or monistic corporate structure, respectively).

New Rules on "Golden Shares" of Italian Government

Italian Law Decree No. 21 of 15 March 2012 (the "Golden Share Decree"), which became effective on 16 March 2012, has amended the previous rules on "golden shares" held by the Italian Government. The amendment follows mounting pressure from the European Commission, which had threatened to bring Italy before the European Court of Justice for maintaining laws that it believed were in breach of EU rules on the free movement of capital. The European Commission had already opened violation procedures against Italy before the European Court of Justice in 2009.

In particular, the Golden Share Decree grants the Italian Government certain powers to veto or condition the purchase of interests in the share capital of, or the adoption of shareholders or board resolutions on certain extraordinary transactions by, or involving a change of control of, Italian companies that carry out strategic activities in the field of defense and national security, or that own strategic assets in the energy, transportation and communications sectors. The "strategic" activities and assets will be determined through subsequent ministerial decrees.

The main difference to the previous regime is that the new rules and special powers set forth by the Golden Share Decree will be applicable to all companies operating in the fields of defence, national security, energy, transport or communications, regardless of whether such companies are directly or indirectly owned by the Italian Government. In addition, the exercise of such special powers by the Italian Government is subject

to stricter and more objective limitations and qualifications than before, in order to be compliant with EU laws and regulations.

The previous regime, and the by-law provisions implementing them, will cease to be effective beginning from the enactment of the ministerial decrees which will identify the assets and activities to be considered as strategic; any director appointed by the Italian Government in the companies under the previous regime will remain in office until the end of his or her term.

The Golden Share Decree also provides that the purchase by a non-EU party of an interest in a company owning strategic assets in the fields of defense, national security, energy, transport and communications is permitted only on the basis of reciprocity conditions.

The Golden Share Decree, which has a transitional validity of 60 days from the date of its enactment, will be submitted to the Italian Parliament for conversion into law.

UK DEVELOPMENTS

Narrative Reporting

In our October 2011 Newsletter, we reported on the Department for Business, Industry and Skills ("BIS")'s consultation on the future of narrative reporting in the UK. On 28 March 2012, BIS published its response to that consultation and noted that there was widespread support for most of its proposals.

In particular:

- BIS intends to work with the Financial Reporting Council ("FRC") and others to develop details of the content of its proposed Strategic Report and Annual Directors' Statement, which will replace the current Business Review and Directors' Report.
- As part of the UK Government's "Red Tape Challenge", BIS intends to remove unnecessary or duplicative disclosure requirements imposed by the UK Companies Act 2006 as well as requiring greater disclosure about the environmental and social impacts of business and information about the proportion of women on boards and in companies as a whole.
- With regards to remuneration, BIS expects that companies will want to include key information about pay in the Strategic Report even though in view of the UK Government's executive pay proposals discussed under "Executive pay" below, there will remain a need for a separate remuneration report.
- BIS noted that there was little support for the changes proposed with respect to the level of audit or assurance and that in any case amendments to the UK Corporate Governance Code and FRC's Audit Committee Guidance are likely to be made later this year to reflect FRC work in this area.

A copy of BIS's response to its consultation on narrative reporting is available at: http://www.bis.gov.uk/assets/biscore/business-law/docs/f/12-588-future-of-narrative-reporting-government-response.pdf.

Equivalence of non-UK GAAP or IFRS Accounting Standards

On 28 March 2012, BIS issued a letter inviting views on a rather technical but, for some companies, potentially important (even if temporary) change in the accountancy framework that must be followed in the preparation of their individual and group accounts. BIS is considering allowing UK companies to prepare those accounts in accordance with generally accepted accounting principles ("GAAP") that have been deemed equivalent under EU Regulation 1959/2007. Following recent European Commission Decisions and Delegated Regulation, this now means Chinese, Canadian and South Korean GAAP as well as US and Japanese GAAP.

This concession would be granted to companies that do not have securities admitted to trading on a regulated EEA market but have securities admitted to trading on a non-EEA market which requires reporting in accordance with a GAAP that has been deemed equivalent under the above Regulation.

This measure might be of assistance to foreign companies considering "re-incorporating" in the UK who would otherwise have to switch to using UK GAAP or IFRS. It seems, however, that this concession would only be available for accounting periods ending on or after 1 October 2011 and beginning before 1 October 2014. Companies would have to state explicitly the basis of the preparation of their accounts and otherwise meet

the requirements of the relevant EU Accounting Directives (as well UK narrative reporting requirements).

Views were requested by 13 April 2012 and a copy of the letter is available at: http://www.bis.gov.uk/assets/biscore/business-law/docs/p/12-690-preparation-of-accounts-letter.pdf.

Executive Pay

On 14 March 2012, BIS published a consultation paper outlining proposals to give enhanced voting rights to shareholders over the remuneration of directors of UK incorporated quoted companies. Separately, BIS has consulted on proposals to improve the transparency of remuneration below the board level in financial services businesses.

The key proposals involve splitting the existing advisory shareholder vote on directors' remuneration into:

- a new binding vote on future remuneration policy, with a majority threshold requirement of more than just a simple majority of votes (although not necessarily as high as the 75% majority vote required for special resolutions); and
- an advisory vote on how remuneration policy has been implemented over the previous year.

In addition, all exit payments of more than one year's base salary would be subject to a binding vote. This could obviously impact on existing service contracts and require these to be revised.

With regards to the binding vote on future remuneration policy:

- if a company failed to receive the necessary shareholder support, it would have to continue with its existing policy or put new proposals to its shareholders within 90 days of failing to obtain support for its earlier proposals, and
- the new voting requirement would not have any direct impact on, but rather would have to complement, the shareholder vote currently required by the UK listing rules for premium listed companies with respect to the adoption of long-term incentive plans.

Responses to the consultation are required by 27 April 2012 and a copy of the consultation is available at: http://www.bis.gov.uk/assets/biscore/business-law/docs/e/12-639-executive-pay-shareholder-voting-rights-consultation.pdf.

Political Lobbying and Donations

On 14 March 2012, the International Corporate Governance Network ("ICGN") published a statement and guidance on political lobbying and donations, designed to provide:

- a framework as to how corporate political activity should best be governed, and
- investors with an agenda that they can raise with their investee companies on these topics.

The ICGN generally discourages companies from making monetary political donations but, recognising that in many jurisdictions such donations are legal and permitted, it calls for any such donations to be supported by a publicly transparent and robust governance framework overseen by the board.

The ICGN also supports shareholder votes on companies' political lobbying policies and their budgets for political donations.

A copy of the Statement and Guidance can be requested from the ICGN at: http://www.icgn.org/files/icgn_main/pdfs/best_practice/PLD/icgn_pld_mar2012_short.pdf.

Remuneration Committee Guidance

On 5 March 2012, the Quoted Companies Alliance ("QCA") which promotes the interests of quoted companies outside of the FTSE 350, published best practice guidance for the remuneration committees of such companies. The guide covers the objectives of the remuneration committee, factors to consider in setting remuneration policy, communicating with shareholders, remuneration committee membership, organisation and functions.

A copy of the guidance may be ordered via the QCA website at: http://www.theqca.com/shop/guides/53487/remuneration-committee-guide-for-smaller-quoted-companies-february-2012-downloadable-pdf.thtml.

PIRC's UK Shareholder Voting Guidelines 2012

On 24 February 2012, Pensions & Investment Research Consultants Ltd ("PIRC"), the prominent independent corporate governance adviser to institutional shareholders, published a new edition of its UK

shareholder voting guidelines. These run to 53 pages and cover, among others, board composition and performance, accounts and audit, shareholder voting and meetings, corporate structures and transactions, and directors' remuneration. The new guidelines reveal PIRC's concerns about:

- *Share buybacks* - its concerns seem to revolve around boards proposing buybacks with a mistaken belief as to the market's undervaluation of the company's equity, thereby resulting in terms that are not beneficial to the remaining shareholders. Its concern is causing PIRC to reserve its position on voting recommendations on this topic.
- *Intra-group transactions* - directors focusing too much on the business model and interests of the group as a whole and not enough on the holding company as a stand-alone entity. This can lead to a lack of rigour in approving and entering into intra-group transactions.
- *Non-executives* - boards that focus too much on the "CEO" credentials (at other companies) of non-executive appointments, which can discriminate against female representation on the board and lead to an overly "executive" focus amongst board members.
- *Annual re-election* - though annual re-election is in any case now the wide-spread norm for FTSE 350 issuers, PIRC is a firm supporter of this.
- *General meetings held on 14 days' notice* - PIRC does not support the calling of meetings on 14 days' notice, even though this is permitted by the UK Companies Act of 2006, subject to certain conditions, unless the meeting is required for the emergency raising of capital.
- *Preservation of capital* - in PIRC's view, this should be the primary aspiration of the board, backed up by specific board training related to capital maintenance issues.

A copy of the guidelines can be obtained from PIRC at: Publications | PIRC.

FRC Update on Country and Currency Risks in Financial Reports

On 17 February 2012, the FRC published an update on its guidance to directors of listed companies in relation to various exposure and impact issues that they may need to consider in order to provide a balanced and understandable assessment of a company's position and prospects in the context of increased country and currency risk. The guidance notes various legal (e.g., UK Companies Act 2006 requirements with respect to the business review to be included in directors' reports), regulatory (e.g., premium listing requirements with respect to the "going concern" disclosures in annual accounts) and IFRS requirements that may need to be considered by companies with material exposures to country and/or currency risk. The guidance is not intended to be comprehensive and so complements other recent guidance issued by other regulators, such as ESMA's "Sovereign Debt in IFRS Financial Statements" issued in November 2011.

A copy of the FRC's updated guidance is available at: http://www.frc.org.uk/images/uploaded/documents/Update%20for%20Directors%20Jan%2012%20FINAL.pdf.

FRC's "Comply or Explain" Report

On 15 February 2012, FRC published a report, based on discussions with senior investors and companies, on the current understanding of what best practice requires by way of "explanation" under the UK's "comply or explain" approach to corporate governance. The report has been produced against the background of the FRC's concern about the European Commission's recent Green Paper on corporate governance which raised for consideration a more prescriptive approach to corporate governance compliance. The report will be of value to companies when deciding how best to explain, contextualise and justify any non-compliance with provisions of the UK corporate governance code.

A copy of the report is available at: http://www.frc.org.uk/images/uploaded/documents/FRC%20explanations%20paper%20030112.pdf.

Changes to Listing Rules

On 26 January 2012, the Financial Services Authority ("FSA") published a consultation paper setting out draft changes to the UK listing rules covering five particular areas:

Reverse Takeovers. Under the UK listing rules, a reverse takeover will lead to a suspension of the listing of the acquiror as from announcement of the takeover, unless the FSA can be satisfied with the financial

information that the acquiror is able to make available to the market about the enlarged group.

The FSA is proposing limiting the current exemption from this "reverse takeover suspension" rule which applies to any takeovers involving listed companies, to takeovers where the acquiror and target are in the same listing category. The FSA is concerned to prevent, for example, non-premium listed targets using the exemption to obtain a premium listing by being taken over by premium listed acquirors. Certain other changes are proposed to reduce the information requirements that need to be met to avoid suspension and to reduce the eligibility requirements following the cancellation of a listing.

Sponsors. Premium listed companies must, under the UK listing rules, appoint a sponsor to advise them in relation to their compliance with the listing rules and to provide certain confirmations to the FSA under those rules in relation to certain transactions. The listing rules set out a number of requirements in relation to the role and approval and supervision of sponsors and the FSA is proposing extending requirements in a number of areas. These will include extending the sponsor's role in relation to related-party transactions, as well as more general changes to the responsibilities of sponsors.

Financial Information. A number of changes, some technical or to update rules with current FSA practice, are proposed with respect to the financial information requirements of the listing rules relating to premium listing applications and certain shareholder circulars.

Transactions. There are changes proposed to the rules relating to certain M&A and other transactions that trigger notification or shareholder approval requirements, many of which again mirror current FSA practice.

Externally-Managed Companies. The consultation paper notes the recent emergence of a new corporate structure under which a cash shell company is incorporated and listed with a view to acquiring target businesses to develop. Significant management functions are typically outsourced to an offshore advisory firm. Rule changes are proposed to deal with such companies and these include:

- making the principals of such advisory firms responsible for any prospectus published by the listed company and subject to the share dealing disclosure requirements under the FSA's disclosure and transparency rules, and
- precluding any companies with this type of structure from being eligible for a premium listing.

The consultation also takes the opportunity to raise some general questions with respect to the current functioning of the premium listing category, particularly in relation to companies with dominant or controlling shareholders.

Comments are requested by 26 April 2012 and a copy of the consultation is available at: http://www.fsa.gov.uk/static/FsaWeb/Shared/Documents/pubs/cp/cp12_02.pdf.

Comments on Review of Market Abuse Directive Proposals

On 1 February 2012, the UK Government published its comments on MAD II.

Concerns noted by the UK Government include:

- The practical application of the definition of inside information contained in MAR.
- Useful recitals in MAD have not been recast in MAR.
- The meaning of "intentionally" in the context of CSMAD, which only applies when there is evidence that market abuse has been committed intentionally.
- Whether CSMAD will apply automatically when there is proof of intent, or whether competent authorities will retain the discretion to apply an administrative or criminal penalty as they see fit.

The full report is available at: http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xlvii/428xlvii.pdf.

Kay Review Interim Report

The Interim Report of the Kay Review to examine investment in UK equity markets and its impact on the long-term performance and governance of UK-quoted companies was published on 29 February 2012. The Interim Report summarises the responses to the review's call for evidence and presents a broad discussion of the issues raised.

The comments and proposals discussed in the report signal areas of interest for the final report but do not

represent its provisional conclusions. The final report, including recommendations for action, will be presented to the Secretary of State for Business during the summer of 2012.

Further information on the Report and the Kay Review is available at: http://www.bis.gov.uk/kayreview.

Financial Services Bill

On 22 March 2012, a revised version of the Financial Services Bill 2010-12 (the "Bill") was published. The UK Government currently intends that the Bill will come into force later this year.

The Bill will abolish the current UK financial services regulator, the FSA, as well as making extensive changes to a variety of primary and secondary legislation including the Financial Services and Markets Act 2000, the Bank of England Act 1998 and the Banking Act 2009. The Bill also sets out in further detail the proposed role of the Financial Conduct Authority ("FCA"), the Prudential Regulation Authority ("PRA") and the Financial Policy Committee ("FPC"). These entities are the proposed successors to the current system of financial services regulation in the UK and will have the following roles: (a) the FCA will be tasked with protecting consumers and ensuring that those operating in the financial services sector comply with rules; (b) the PRA will take over responsibility for supervising the safety and soundness of individual financial institutions; and (c) the FPC will have overall responsibility for financial regulation and the monitoring of risks from the financial sector to the economy more generally.

The latest version of the Bill is available on the UK parliamentary website at: http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0323/cbill_2010-20120323_en_1.htm.

Anti-Bribery and Corruption Systems and Controls

On 29 March 2012, the FSA published the findings of its thematic review into anti-bribery and corruption ("ABC") systems and controls in investment banks.

The FSA examined the effectiveness of the ABC controls of a group comprised of eight global investment banks and seven other smaller operations offering investment banking or similar activities (the "Group") for a period from August 2011. The FSA's findings included the following:

- most of the Group had not properly taken account of the FSA's existing rules relating to ABC;
- nearly half the Group did not have an adequate ABC risk assessment;
- information provided on ABC by the Group to senior management was generally poor; and
- most of the Group had not yet devised mechanisms for reviewing or monitoring the effectiveness of their ABC policies and procedures.

Overall, the FSA concluded that the investment banking sector has been "too slow and reactive in managing bribery and corruption risk". The FSA is now considering possible regulatory action against some members of the Group, and it has also launched a consultation on changes it is proposing to make to its guidance in this area.

The FSA's findings are available at: http://www.fsa.gov.uk/static/pubs/other/anti-bribery-investment-banks.pdf.

The press release accompanying the FSA's findings is available at: http://www.fsa.gov.uk/library/communication/pr/2012/035.shtml.

The FSA consultation paper on changes to its guidance is available at:

http://www.fsa.gov.uk/library/policy/guidance_consultations/2012/gc1205.

US DEVELOPMENTS

SEC Developments

In our 2010 and 2011 Newsletters, we reported on the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Reform Act") that was signed into law on 21 July 2010. The Reform Act requires rulemaking by the US Securities and Exchange Commission (the "SEC") to implement certain of its provisions. We are covering developments relating to the implementation of these Reform Act provisions by the SEC as well as other SEC developments in this section.

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 8 March 2012, Meredith Cross, the Director of the Division of Corporation Finance of the SEC, suggested that the regulatory approach taken by the SEC to the disclosure requirements applicable to foreign private issuers 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 foreign private issuers whose only trading market is in the United States. Ms. Cross highlighted that an increasingly large number of foreign private issuers 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 foreign private issuers, which defers in large part to home market practice, continues to be appropriate.

- Under the existing regime, foreign private issuers 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 a foreign private issuer 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 reporting regime for foreign private issuers was premised on an assumption that a foreign private issuer's home jurisdiction is its principal price discovery market, and that 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 foreign private issuers provide appropriate investor protections.

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

Our related client publication is available at: http://www.shearman.com/foreign-issuers---two-noteworthy-items-03-14-2012/.

Update on Conflict Minerals Rulemaking

In our previous Newsletters in 2011 and 2012, we reported on the SEC's proposed rules on conflict minerals, the related roundtable that was held in October 2011 and the SEC's updated rulemaking schedule that contemplates the adoption of the final rules during the period from January to June 2012.

On 6 March 2012, Ms. Schapiro, chairman of the SEC, speaking at a hearing in Washington, indicated that the final rules on conflict minerals would not be adopted until "the middle of the year". Due to the complexity of the rulemaking and the fact that it was "so out of the ordinary" for the SEC, Ms. Schapiro said the SEC would need at least "the next couple of months" to complete the final rules.

- According to Ms. Schapiro, the final rules will include a phase-in period to allow time for supply chain due diligence mechanisms to be developed and implemented. Due to the legal parameters given by Section 1502 of the Reform Act, the final rules will, however, not provide an exception for companies whose products use a small amount of conflict minerals, but will "try to give latitude and flexibility in some areas".

In this context, on 16 February 2012, members of US Congress had written a letter to Ms. Schapiro, commenting on the unpublished outline of the final rules on conflict minerals. The letter expressed the concern that the delay in the implementation of the final regulations was undermining the policy goals of Section 1502 of the Reform Act and that the content of the draft final rules was contravening Congress's legislative intent in the following ways:

- The draft final rules appear to allow reporting issuers to "furnish" as opposed to "file" any conflict minerals report with the SEC. Reports that are only "furnished" would not be subject to liability under Section 18 of the US Securities Exchange Act of 1934, as amended (the "Exchange Act") for "false and misleading" statements. It is the view of the authors of the letter that protecting investor interests by making companies liable for fraudulent or false reporting of conflicts minerals is critical and that therefore any conflict mineral reports must be required to be "filed".
- Secondly, the letter suggests that the draft final rules may contain a category of "indeterminate" country of origin that may exempt reporting issuers from the requirement to prepare a conflict minerals report, if they have made a reasonable inquiry, but were not able to determine conclusively that their conflict minerals did not originate in the Democratic Republic of Congo or adjoining countries. The letter stresses that investors and the public must be able to understand, and any report must clearly set out, the actions a company has taken to make a reasonable "country of origin" inquiry and that any rules that allow an "indeterminate" category would undermine the congressional intent of Section 1502 of the Reform Act.

SEC Issues Study on Cross-Border Private Securities Litigation

On 11 April 2012, the SEC issued its "Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934" as required by Section 929Y of the Reform Act. The study resulted from a number of significant legal developments:

- The US Supreme Court's landmark decision in *Morrison v. National Australia Bank*. In Morrison, the court adopted the "transactional test" and held that Section 10(b) and Rule 10b-5 do not apply extraterritorially, but apply only to (i) transactions in securities listed on domestic exchanges and (ii) domestic transactions in other securities.
- The enactment of the Reform Act, which in Section 929B reinstated the "conducts/effects" test for governmental actions and thereby provided the necessary affirmative indication of extraterritoriality for Section 10(b) actions involving transnational securities fraud actions brought by the SEC or the US Department of Justice ("DOJ").
- Section 929Y of the Reform Act directed the SEC to conduct a study to consider the extension of the cross-border scope of private actions under Section 10(b).

In attempting to identify policy considerations for US Congress to consider in determining whether to enact legislation regarding the cross-border scope of Section 10(b) private actions, the SEC advances a number of options in its study:

Options regarding the Conduct and Effects Test. The SEC proposes the enactment of conduct and effects tests for Section 10(b) private actions similar to the test enacted for actions by the SEC and DOJ. To avoid legislative overreach, the SEC proposes to narrow the conduct test's scope by requiring private plaintiffs to establish that their losses resulted *directly* from conduct within the United States. Alternatively, the SEC proposes that the conduct and effects test could be enacted only for US resident investors.

Options to Supplement and Clarify the Transactional Test. In addition to the enactment of some form of conduct and effects tests, the SEC proposes four options to supplement or clarify the transactional test established by *Morrison*. Private actions under Section 10(b) would be allowed:

- for the purchase or sale of any security that is of the same class of securities registered in the United States, irrespective of the actual location of the transaction;
- against securities intermediaries such as broker-dealers and investment advisers that engage in securities fraud while purchasing or selling securities overseas for US investors or providing

other services related to overseas securities transactions to US investors;

- if the investor can demonstrate that they were fraudulently induced while in the United States to engage in the transaction, irrespective of where the actual transaction takes place; or
- for an off-exchange transaction that takes place in the United States, which would be the case if either party made the offer to sell or purchase, or accepted the offer to sell or purchase, while in the United States.

The SEC Study is available at: http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf.

JOBS Act Will Liberalise Publicity for Rule 144A Offerings and Ease Certain Rules for Emerging Growth Companies

On 5 April 2012, the US President signed the Jumpstart Our Business Startups Act (the "JOBS Act") into law. The enactment of the JOBS Act will relax certain of the requirements and restrictions around securities offerings and public reporting obligations. These changes will apply to both US domestic and foreign private issuers.

The most significant modifications provided by the JOBS Act for foreign issuers accessing the US capital markets include immediately effective changes to the offering process for SEC-registered IPOs and ongoing reporting obligations for companies with less than US$1 billion in gross revenues (so-called "Emerging Growth Companies" or "EGCs"), including an exemption for up to five years from the SOX Section 404 requirement to obtain an annual attestation report from a registered public accounting firm; and enhanced publicity for Rule 144A offerings and the facilitation of public offerings of US$50 million or less to be implemented by SEC rulemaking.

Liberalisation of Publicity for Rule 144A Offerings and Certain Private Placements. In a significant change to existing securities law and practice, the JOBS Act directs the SEC, within 90 days after enactment, to revise Rule 144A to permit offers to be made to persons other than Qualified Institutional Buyers ("QIBs"), including through general solicitation and advertising, provided that the securities are only resold to persons the seller reasonably believes are QIBs. The JOBS Act also requires the SEC, within 90 days after enactment, to revise its rules to permit general solicitation and advertising for offerings made under Rule 506 of Regulation D, provided that all the purchasers of the securities are accredited investors. This change does not increase the 35 non-accredited investors limit currently permitted under Rule 506. In addition, under certain conditions, entities that act as intermediaries for private placements under Rule 506 of Regulation D will not be required to register as broker-dealers.

While some of the changes mandated by the JOBS Act are effective as of its signing into law, general solicitation and advertising in connection with Rule 144A offerings and Rule 506 private placements will not be permitted until the SEC revises the applicable rules. Issuers and sellers of securities should establish compliance procedures, including verification procedures to be provided by the SEC in its rules, to avoid sales to ineligible investors. Importantly, the JOBS Act has not altered the scope of the anti-fraud liability provisions of the US Securities Act of 1933, as amended (the "Securities Act") and the Exchange Act applicable to disclosures provided to investors, nor does it appear to address the prohibition of "directed selling efforts" in offshore offerings conducted pursuant to Regulation S under the Securities Act, which could limit the benefits of the changes for foreign private issuers conducting side-by-side Rule 144A and Regulation S offerings.

Capital Raising and SEC Reporting Obligations. The JOBS Act also contains provisions that relax certain restrictions in connection with IPOs and other capital raising transactions and ongoing SEC reporting obligations as follows:

- *Process for IPOs and Other Offerings by Emerging Growth Companies.* The JOBS Act significantly changes the process for IPOs and, in certain respects, other offerings by EGCs. These changes include the relaxation of restrictions relating to communications prior to and during a securities offering, the publication of research reports, financial statement requirements and the ability to submit IPO registration statements on a confidential basis.
- *Reporting and Other Requirements for EGCs.* The JOBS Act reduces some public company reporting

and other requirements for EGCs for a defined transition period of up to five years post-IPO.

- *Maximum Number of Shareholders for Private Companies*. The JOBS Act increases the threshold for the number of shareholders at which a company must register as an SEC reporting company to either 2,000 shareholders of record or 500 shareholders of record who are not accredited investors.
- *Crowdfunding*. The JOBS Act creates an exemption in the Securities Act for crowdfunding offerings that seek small investments from many investors. The JOBS Act limits these offerings to not more than US$1 million in any 12-month period and directs the SEC to issue rules within 270 days after enactment to implement the new crowdfunding provisions.
- *Offerings of US$50 Million or Less*. The JOBS Act directs the SEC to create an exemption for public offerings of securities of US$50 million or less over a 12-month period.

Executive Compensation. The JOBS Act also exempts EGCs from compliance with various requirements relating to executive compensation, many of which were implemented pursuant to the Reform Act. These requirements that are not all applicable to foreign private issuers, include:

- to hold a "say-on-pay" advisory stockholder vote on compensation of named executive officers (including the corresponding "say-on-pay frequency" vote);
- to make "pay versus performance" disclosure comparing the compensation actually paid to the named executive officers and the issuer's financial performance;
- to provide "internal pay equity disclosure" showing the ratio between the median compensation of the issuer's employees and its chief executive officer; and
- in connection with a merger or acquisition, (i) to provide disclosure on "golden parachute" payments payable to named executive officers and (ii) to hold a non-binding stockholder vote on such payments.

EGCs are also permitted to comply with the reduced compensation disclosure requirements that apply to small businesses with a public float of less than US$75 million, which reduce the number of named executive officers from five to three (the chief executive officer and two other most highly compensated executive officers); limit summary compensation table disclosures to two years; eliminate the compensation discussion and analysis as well as the grants of plan-based awards, option exercises and stock vested, non-qualified deferred compensation and pension benefits tables; and eliminate the disclosure of the relationship between compensation and risk, if required.

Our related client publication on the "JOBS Act: Focus on Foreign Private Issuers" is available at:

http://www.shearman.com/jobs-act-focus-on-foreign-private-issuers-04-17-2012/.

Our client publication on the SEC's frequently asked questions is available at:

http://www.shearman.com/sec-division-of-corporation-finance-addresses-jobs-act-questions-04-17-2012/.

SEC Grants Global No-Action Relief from Exchange Act Obligations for RSUs

On 13 February 2012, the SEC's Division of Corporation Finance issued a generally applicable no-action letter indicating that it will not object if certain companies do not register restricted stock units ("RSUs") issued to employees, directors and some consultants under Section 12(g) of the Exchange Act, if certain conditions are met. Qualifying companies must be privately-held and the written policy granting the RSUs must contain specific financial information to be distributed to all employees, directors and consultants that are allowed to participate in the plan. In addition, the RSUs are subject to certain holding and transferability restrictions.

The no-action letter provides some relief for private companies that are approaching the statutory 500 shareholder limit under Section 12(g). The no-action letter will allow private companies to issue RSUs as compensation to employees, directors and some consultants without triggering the reporting requirements of the 500 shareholder limit. The SEC had previously granted similar no-action relief to Facebook, Twitter and Zynga on an individual basis.

In addition, the JOBS Act (discussed above) will increase the threshold for the number of shareholders at which a private company is required to register its equity

securities with the SEC under the Exchange Act from 500 or more shareholders of record to either 2,000 shareholders of record or 500 shareholders of record who are not accredited investors. Equity securities held by persons who received them through an employee compensation plan in transactions not subject to registration under the Securities Act do not count towards the above thresholds. The JOBS Act also directs the SEC to issue a rule within 270 days after enactment exempting crowdfunding investors from the threshold calculation.

Updated Compliance and Disclosure Interpretations

On 13 February 2012, the staff of the SEC's Division of Corporation Finance issued a Compliance and Disclosure Interpretation addressing how to present advisory say-on-pay on proxy cards.

The comprehensive set of Compliance and Disclosure Interpretations as updated is available at: http://www.sec.gov/divisions/corpfin/cfguidance.shtml

Updated Financial Reporting Manual

On 13 April 2012, the staff of the SEC's Division of Corporation Finance updated its Financial Reporting Manual for issues related, among others, to scaled disclosure for smaller reporting companies, filing requirements for reverse acquisitions and the treatment of related businesses in significance testing.

The comprehensive Financial Reporting Manual as updated is available at: http://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.shtml.

NYSE Developments

NYSE Further Restricts Broker-Discretionary Voting under Rule 452

On 25 January 2012, the New York Stock Exchange and the NYSE Amex (collectively, the "NYSE") issued guidance further limiting the ability of brokers under Rule 452 to vote customer shares without client instructions with respect to certain types of corporate governance proposals.

- Rule 452 permits brokers to vote uninstructed customer shares in their discretion on "routine" or "Broker May Vote" matters, but prohibits so-called broker-discretionary voting with respect to "non-routine" or "Broker May Not Vote" matters.

Following a recent congressional and public policy trend against broker-discretionary voting, the NYSE determined that it will no longer permit broker-discretionary voting with respect to corporate governance proposals and, by way of example, classified the following as "Broker May Not Vote" matters:

- proposals to declassify the board of directors;
- proposals to implement majority voting in the election of directors;
- proposals to eliminate supermajority voting requirements;
- proposals regarding the use of written consents;
- proposals regarding the right to call special meetings; and
- proposals enacting certain types of anti-takeover provision overrides.

As a result of this guidance, brokers will no longer be able to vote uninstructed shares with respect to corporate governance proposals and such broker non-votes may not be counted for purposes of establishing a quorum for shareholder meetings where only such proposals are being considered. Thus, companies may find it more difficult to pass corporate governance proposals (or defeat similar shareholder proposals) in the future. Proposals that require a majority of the outstanding shares for approval will be particularly challenging as any broker non-votes will be considered votes against the proposal. The NYSE continues to consider the ratification of auditors a "Broker May Vote" matter, thus broker votes may be used to establish a quorum for a shareholder meeting where such a proposal is being heard.

These changes are effective immediately. Because Rule 452 governs when an NYSE-member may vote customer shares, these changes affect both NYSE listed and non-NYSE listed companies.

Our related client publication is available at: http://www.shearman.com/nyse-further-restricts-broker-discretionary-voting-under-rule-452-01-31-2012/.

PCAOB Developments

PCAOB Extends Comment Period on Concept Release on Auditor Independence and Mandatory Audit Firm Rotation

In our October 2011 Newsletter, we reported that the Public Company Accounting Oversight Board ("PCAOB") issued a concept release on auditor independence and mandatory audit firm rotation. On 7 March 2012, the PCAOB announced that is was extending the comment period on its concept release to 22 April 2012. PCAOB had held a public forum on 21-22 March 2012 on ways to enhance auditor independence, objectivity and professional skepticism, including through consideration of audit firm term limits. The PCAOB stated that in light of the public forum, it was reopening the comment period on the concept release to allow interested parties to weigh in, taking into consideration the discussions at the public forum. It is reported that so far the PCAOB has received more than 600 letters, most in opposition to its proposals.

Noteworthy US Securities Law Litigation

US Court of Appeals interprets the "domestic transaction" prong of Morrison: Absolute Activist Value Master Fund Limited v. Ficeto. Lower federal courts in the United States continue to explore the boundaries of the US Supreme Court's landmark decision in *Morrison v. National Australia Bank*. In *Morrison*, the court adopted the "transactional test" and held that Section 10(b) and Rule 10b-5 do not apply extraterritorially, but apply only to (i) transactions in securities listed on domestic exchanges and (ii) domestic transactions in other securities.

In *Absolute Activist Value Master Fund Limited v. Ficeta*, the United States Court of Appeals for the Second Circuit considered whether foreign funds' purchases of securities directly from US companies in private offerings known as private investment in public equity ("PIPE") transactions are "domestic transactions in other securities" under *Morrison*. The funds alleged that certain employees of their investment manager engaged in a "pump and dump" scheme in which the employees used transactions between and among the funds to generate commissions and to inflate the share price of thinly capitalised companies. After the share price was inflated, the defendants sold their shares of the companies at a profit. The funds meanwhile allegedly lost nearly US$200 million. The district court dismissed the funds' Section 10(b) claims and the funds appealed.

The Second Circuit for the first time examined the second prong of the *Morrison* test and held that, to allege a domestic transaction in securities not listed on a domestic exchange, a plaintiff must allege plausible facts that (i) irrevocable liability was incurred by the parties within the United States or (ii) title to the security was transferred within the United States. In explaining the irrevocable liability portion of its holding, the court stated that a transaction (i.e., a purchase or sale of a security) occurs when the parties enter into a binding contract. By similar logic, the point at which the parties are irrevocably bound can be used to determine the location of a transaction. Based on this reasoning, the court held that one way a plaintiff can plead that a transaction was domestic is by alleging plausible facts that a purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security. In explaining the transfer of title portion of its holding, the court stated that a sale is ordinarily defined as the transfer of property or title for a price. Based on this definition, the court held that a second way a plaintiff can plead a domestic transaction is by alleging sufficient facts that the title to the security was transferred within the United States. In reaching its decision, the court rejected other potential tests proposed by the parties for determining whether the transaction is domestic, including the location of (i) the broker-dealer, (ii) the issuer of the security, (iii) the buyer and seller or (iv) the fraudulent conduct. The court ruled that the plaintiffs had not adequately alleged sufficient facts to satisfy the second prong of *Morrison*, but directed the district court to permit the plaintiffs to amend their complaint in order to plead additional facts to support their claim that the transaction took place in the United States.

Our related client publication is available at: http://www.shearman.com/foreign-issuers---two-noteworthy-items-03-14-2012/.

Recent SEC/DOJ Enforcement Matters

US Court of Appeals stays decision to reject consent judgement for lack of admission of factual allegations: Citigroup. As noted in our January 2012 Newsletter, a federal judge in New York

rejected a proposed US$285 million consent judgement between the SEC and Citigroup related to the sale of mortgage-backed securities, in part because Citigroup entered into the agreement without admitting or denying the underlying allegations. In March 2012, the US Court of Appeals for the Second Circuit granted the SEC's and Citigroup's motion to stay the district court's decision while the Second Circuit considers the merits of the appeal. The Second Circuit ruled that a stay was appropriate, in part, because the parties made a strong showing that they will likely succeed in overturning the district court's rejection of their settlement. In reaching this conclusion, the court said that the district court did not appear to give proper deference to the SEC's judgement on a wholly discretionary matter of policy. The court explained that numerous factors affect a litigant's decision whether to compromise a case or litigate it to the end, including the value of the proposed compromise, the perceived likelihood of obtaining a better settlement, the prospects of coming out better or worse after a full trial and the resources that would need to be expended on the case. The court said it had no basis to doubt that the SEC's decision weighed those factors, and that the court's authority to second-guess an agency's discretionary decision to settle a case is at best minimal.

Because the SEC and Citigroup are united in seeking to overturn the district court's order, the Second Circuit appointed counsel to argue in support of the district court's position so that the appeals court would have the benefit of briefing and argument from both sides of the issue when it decides the merits of the appeal. The Second Circuit's March decision granting the motion to stay, by contrast, was handed down without the benefit of a brief in support of the district court's position. The Second Circuit declined to hear the merits of the appeal on an expedited basis and referred the matter to its regular calendar.

Recently, federal district courts have issued orders, similar to the one issued in the Citigroup case, that rejected an SEC settlement because the defendant did not admit or deny the allegations. Although the Second Circuit's decision did not decide the merits of the appeal, its detailed opinion, in which it explained that the SEC and Citigroup had made a substantial showing that it will likely succeed on the merits, may cause other federal courts to pause before rejecting SEC settlements that include such language.

DOJ enters into deferred prosecution agreement in FCPA enforcement action: Marubeni Corporation. In January 2012, Marubeni Corporation, a Japanese trading company, entered into a deferred prosecution agreement with the DOJ and agreed to pay a US$54.6 million criminal penalty to resolve charges related to violations of the Foreign Corrupt Practices Act ("FCPA"). The DOJ alleged that Marubeni was hired as an agent by a joint venture to pay bribes to Nigerian government officials in order to obtain engineering, procurement and construction contracts to build liquefied natural gas facilities on Bonny Island, Nigeria.

Under the terms of the deferred prosecution agreement, the DOJ agreed to defer prosecution of Marubeni for two years. Marubeni agreed to hire a corporate compliance consultant for a term of two years to review the design and implementation of its compliance programme, to enhance its compliance programme to ensure that it satisfies certain standards and to cooperate with the department in ongoing investigations.

This case demonstrates yet again the expansive reach of the DOJ's FCPA enforcement programme. Marubeni is a Japanese corporation that was charged with aiding and abetting a US corporation's willful and corrupt acts outside of the US. Even if all of the activity occurs outside the US, the DOJ will still charge the non-US company with aiding and abetting the US co-conspirator.

ASIAN DEVELOPMENTS

HKSE Continues to Promote Listings of Overseas Companies

The Stock Exchange of Hong Kong Limited (the "HK Stock Exchange") is continuing its efforts to attract listings of overseas companies. Besides the four recognised jurisdictions for incorporation of a listed company, namely Hong Kong, Mainland China, Bermuda and the Cayman Islands (the "Recognised Jurisdictions"), the HK Stock Exchange has considered and accepted in principle 19 other overseas jurisdictions. The HK Stock Exchange has also taken steps to promote secondary listings in Hong Kong and it is expected that a consultation paper on proposed amendments to the rules for secondary listed issuers will be issued in 2012.

Listings of Overseas Companies

In 2011, Hong Kong ranked first globally for the third year in terms of total equity fund raised by initial public offerings. As at the end of 2011, there were in total 1,326 companies listed on the Main Board of the HK Stock Exchange, 1127 of them are non-Hong Kong companies and around 70 of them have shares listed on one or more overseas stock exchanges.

There were also a number of international listings in 2011 where the issuers are incorporated outside the Recognised Jurisdictions, e.g., Glencore International plc incorporated in Jersey, PRADA SpA from Italy and Samsonite International SA incorporated in Luxembourg.

Listing Applicants Incorporated Outside the Recognised Jurisdictions

Listing applicants incorporated outside the Recognised Jurisdictions are assessed on a case-by-case basis and will have to satisfy the HK Stock Exchange that they are subject to appropriate standards of shareholder protection at least equivalent to those in Hong Kong. To give a clear signal that the Hong Kong listing regime is open to companies incorporated outside the Recognised Jurisdictions, the HK Stock Exchange and the Securities and Futures Commission (the "SFC") published a Joint Policy Statement Regarding the Listing of Overseas Companies (the "JPS") in March 2007. The JPS provides a roadmap on key shareholder protection matters which the HK Stock Exchange would expect overseas listing applicants to address. It also sets out other factors affecting eligibility such as whether adequate cooperation and information gathering arrangements exist between the Hong Kong securities regulator and the corresponding regulator in the listing applicant's place of incorporation.

In September 2009, the HK Stock Exchange streamlined the vetting procedures and introduced the following measures to reduce the burden of overseas listing applicants:

- where the HK Stock Exchange has accepted shareholder protection arrangements adopted by an issuer, the HK Stock Exchange will accept subsequent issuers from the same jurisdiction adopting similar arrangements and the subsequent issuers would not need to complete a detailed line-by-line comparison of the shareholder protection matters specified in the JPS;
- cross-benchmarking is allowed so that a potential issuer may demonstrate the acceptability of a new jurisdiction by showing that the shareholder protection standards of the jurisdiction are comparable to the standards of any one of the accepted jurisdictions, instead of benchmarking directly to Hong Kong's standards;
- when comparing shareholder protection standards, the HK Stock Exchange would not require textual equivalence and would adopt a purposive interpretation; and
- where amendment to constitutional documents is not permitted under law or may be too burdensome, an issuer may demonstrate "equivalence" through alternative means, e.g., compliance with the rules of the local exchange on which it is listed would result in the same protection for investors.

Following the issue of the JPS, the number of overseas jurisdictions which the HK Stock Exchange has considered and accepted in principle has increased to 19:

Year	Acceptable overseas jurisdiction	No. of jurisdictions
2006 and before	Canada – Ontario	
	United Kingdom	
	Australia	
	Canada – British Columbia	4
2009	British Virgin Islands	
	Cyprus	
	Germany	
	Jersey	
	Luxembourg	
	Singapore	6
2010	Brazil	
	Isle of Man	
	Japan	
	United States of America – State of California	4
2011	Canada – Alberta	
	France	
	Guernsey	
	Italy	4
2012 (up to end of March)	United States of America – State of Delaware	1
	TOTAL:	19

Proposed Further Streamlining of the Vetting Process

As stated in the Listing Committee Report 2011 published in March 2012, the HK Stock Exchange is working with the SFC on further streamlining of the JPS and there have been proposals to revise the JPS by reducing its focus on comparability with Hong Kong company law and placing more attention on compliance with the general principles underlying the Hong Kong Listing Rules.

We welcome the initiative and agree that the vetting criteria and process could be further streamlined to encourage listings of overseas companies. For example:

- for listing applicants with dual or multiple listings, more reliance could be placed on shareholder protection standards under the rules of the relevant overseas stock exchange(s); and
- the requirement under the JPS for a listing applicant to demonstrate a reasonable nexus between its place of incorporation and its business operations should be removed or modified. Many listed companies incorporated in Bermuda or the Cayman Islands do not have business operations in their place of incorporation and the requirement for a reasonable nexus seems to be unduly burdensome and in fact irrelevant in many cases.

Secondary Listings in Hong Kong

There are in total nine secondary listed issuers with shares or depositary receipts listed on the HK Stock Exchange. Traditionally, the HK Stock Exchange has not differentiated significantly between primary and secondary listings and secondary listed issuers are required to comply with substantially the same rules as issuers with a primary listing on the HK Stock Exchange.

To reduce its compliance burden, a secondary listed issuer would usually apply for a number of waivers from the HK Stock Exchange and the SFC, such as waivers from the continuing obligations under Chapter 13 of the Listing Rules, waivers from the notifiable and connected transaction requirements and a ruling by the SFC that the company will not be subject to the Hong Kong Takeovers Code. Over time, the waivers and guidance on secondary listings have grown in number and complexity and some market practitioners have commented that it is unclear what a "secondary listing" actually means, what requirements apply and what waivers will be granted.

Proposed Amendments to the Rules for Secondary Listed Issuers

We support the proposal that there should be a clear set of rules applicable to secondary listings in Hong Kong. In particular, for market practitioners, it would be helpful if the HK Stock Exchange could (i) amend the Listing Rules to reflect common waivers granted to secondary listed issuers; and (ii) provide guidance on other waivers which may be granted on a case-by-case basis.

In 2011, the SFC and the HK Stock Exchange conducted soft consultations with the market on proposals to review the rules for secondary listings. According to the Listing Committee Report 2011, the HK Stock Exchange is working closely with the SFC to publish a consultation paper in 2012 and the proposed amendments would aim to provide certainty, reduce unnecessary regulatory burden and, at the same time, preserve Hong Kong's reputation for high standards of regulation, investor protection and corporate governance.

DEVELOPMENTS SPECIFIC TO FINANCIAL INSTITUTIONS

EU Developments

Draft Reports on MiFID II

On 16 March 2012, the European Parliament's Committee on Economic and Monetary Affairs ("ECON") published two draft reports, one on the proposed amendments to the Markets in Financial Instruments Directive 2004/39/EC ("MiFID") and one on the proposed new Markets in Financial Instruments Regulation ("MiFIR"), (together "MiFID II").

- MiFID introduced a new regulatory regime for securities markets in the EU, including regulated markets, multilateral trading facilities and systematic internalisers and imposed a set of transparency requirements that applies to all these entities.

The draft reports propose amendments to the European Commission's original proposals for MiFID II, including the following:

- the prohibition of 'direct electronic access';
- a minimum order validity period of at least 500 milliseconds for all trading venues;
- the extension of non-discretionary position limits to all trading venues on which commodity derivative contracts are traded in addition to "alternative arrangements";
- limiting the number of executive and non-executive directorships which one person may hold to one and two, respectively; and
- the possibility of economic inducements under certain circumstances.

Each draft report includes a brief explanatory statement which details the reasoning behind the proposals. It is anticipated that ECON will vote on these draft reports during the course of July 2012.

The MiFIR report is available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-485.888%2b01%2bDOC%2bPDF%2bV0%2f%2fEN.

The MiFID report is available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-485.882%2b01%2bDOC%2bPDF%2bV0%2f%2fEN.

ESMA Advice on MiFID Suitability and Compliance

ESMA has published the responses it received to its December 2011 consultation on the MiFID suitability and compliance function requirements. We reported on ESMA's consultation in our January 2012 Newsletter.

In particular, ESMA has received comments from its Securities and Markets Stakeholder Group ("SMSG"). The SMSG comments on the suitability requirements contain the following points of interest:

- The group is of the view that a consistent level of investor protection will only be achieved if the guidelines are extended to all retail investment products.
- In terms of assessing suitability, questionnaires should not be excessively relied upon nor used by investment firms to reverse the burden of proof. Live discussion and interaction between firm and client is the best method for understanding client needs. The group also suggests that the guidelines place too much emphasis on relevant risks.
- The guidelines should emphasise that investment firms should consider whether, depending on the circumstances, non-tradable products, and particularly basic deposit products, can satisfy the suitability requirement.

The SMSG comments on the compliance function advice focus on the need for ESMA to follow the proportionality principle and calls on ESMA to give more flexibility to small and medium-sized investment firms.

The consultation paper, SMSG advice, and the other responses on the suitability requirements are available at:

http://www.esma.europa.eu/consultation/Consultation-paper-guidelines-certain-aspects-MiFID-suitability-requirements.

The consultation paper, SMSG advice and the other responses on the compliance function requirements are available at: http://esma.europa.eu/consultation/Guidelines-certain-aspects-MiFID-compliance-function-requirements.

CRD IV Compromise Proposals

As part of the reforms to the Capital Requirements Directive ("CRD"), known as CRD IV, the EU Council has published two documents, a compromise proposal for the CRD IV Directive and a compromise proposal for the proposed Capital Requirements Regulation ("CRR").

The proposed CRD IV Directive and CRR will recast and replace the directives that currently comprise the CRD and, among other things, will implement the Basel III reforms in the EU, including amendments to the definition of capital and counterparty credit risk and the introduction of a leverage ratio and liquidity requirements.

Both of the compromise proposals are dated 1 March 2012, and the cover note for the CRR compromise proposal states that the documents were prepared following discussions at Council working party meetings in January and February 2012.

The proposal for CRD IV is available at: http://register.consilium.europa.eu/pdf/en/12/st07/st07044.en12.pdf.

The proposal for the CRR is available at: http://register.consilium.europa.eu/pdf/en/12/st07/st07042.en12.pdf.

UK Developments

Market Response to Vickers Report

On 15 March 2012, the British Bankers' Association ("BBA") published its submission to the UK Government's response to the Independent Commission on Banking's ("ICB") final report (the "Vickers Report") and recommendations on reforms to improve stability and competition in UK banking.

- We reported on the UK Government response that was published in December 2011 by HM Treasury and Department for Business, Innovation and Skills in our January 2012 Newsletter.

The BBA reiterates its support in principle for the broad financial stability objectives set out by the ICB, but agrees with the UK Government that there remain many detailed and complex aspects which require further consideration.

The BBA's general comments include:

- There should be a clearer image of what is intended to be achieved from the introduction of the ring-fence model and how this fits within the policy objectives for recovery and resolution plans.
- Ancillary services that are relevant to an appropriate service provision from within the ring-fence may also be relevant to the non-ring-fence and may be critical to a bank's ability to provide an appropriate mix of services to customers within a normal banking relationship. The BBA recommends that a principle is established that emphasises the maintenance of a single banking relationship.
- Banks are currently subject to significant reforms to the capital and liquidity regimes, the regulatory framework and initiatives on recovery and resolution. It is vital that HM Treasury and the UK regulatory authorities coordinate in taking forward these initiatives.

The submission includes two schedules. The first schedule sets out the BBA's views on each of the issues relating to ring-fencing identified in the UK Government's response to the ICB. The second schedule sets out issues concerning the ICB's recommendations in respect of increasing banks' loss-absorbing capacity, based on the six areas outlined in the UK Government's paper.

The paper is available at: http://www.bba.org.uk/download/7532.

Our related client publication is available at: http://www.shearman.com/the-vickers-report-and-the-uk-governments-response-what-the-recommendations-mean-for-the-future-of-banking-in-the-uk-03-06-2012/.

UK Supreme Court Judgement in Lehman Brothers

The UK Supreme Court handed down its judgement in *In the matter of Lehman Brothers International (Europe) (In Administration)* on 29 February 2012.

The case concerns fundamental issues concerning the protections given by financial institutions to their clients

relating to the scope of the statutory trust over client money under the FSA's Clients' Assets sourcebook (CASS). The Supreme Court dismissed the appeal on each of the three issues, upholding the decision of the Court of Appeals, and held as follows:

- A statutory trust arises on receipt of client money (unanimous).
- The primary pooling arrangements were held to apply to client money in house accounts (with Lords Hope and Walker dissenting in part on this point).
- Participation in the client money pool was held not to depend on the segregation of client money (with Lords Hope and Walker dissenting).

The court's decision was by a three-to-two majority. The majority's focus was on giving effect to the natural meaning of the language contained in CASS, together with the purpose behind it of giving a high level of protection to clients' money. The case is of great interest not only for the Lehman creditors but also for those with interests in the MF Global administration, and more generally for customers who are concerned about assets that they place with financial institutions.

Our related client publication is available at: http://www.shearman.com/pivotal-uk-supreme-court-ruling-on-the-protection-of-client-monies-03-02-2012/.

FSA Final Notice to HBOS

On 9 March 2011, the FSA published its Final Notice to Bank of Scotland PLC ("Bank of Scotland"), a subsidiary of the HBOS Banking Group (the "HBOS Group"). The FSA found that Bank of Scotland's Corporate Banking Division (the "Corporate Division") was guilty of serious misconduct during the period of January 2006 to December 2008 for failing to comply with Principle 3 of the FSA's Principles for Businesses ("Principle 3"). Principle 3 requires regulated firms to take reasonable care to organise and control their affairs responsibly and effectively, with adequate risk management systems. In the FSA's opinion, such misconduct contributed to the circumstances which led to the UK Government having to inject taxpayer funding into the HBOS Group.

The FSA considered that the Corporate Division's aggressive growth strategy, which had focused primarily on high-risk, sub-investment grade lending, was the prime cause of its failings. The FSA specifically censured the Corporate Division's propensity to increase the size, complexity and risk profile of the transactions it undertook notwithstanding the worsening economic conditions during 2007 and the fact that its lending competitors were simultaneously reducing their exposure to such positions. Furthermore, Bank of Scotland's internal framework for managing credit risk was deficient and failed to provide robust oversight of the Corporate Division's strategy. The FSA considered that the Corporate Division's internal culture was focused on revenue rather than examining the level of risk involved in transactions.

The FSA noted that the severity of the shortcomings in Bank of Scotland's internal risk management systems would ordinarily warrant a very substantial financial penalty. However, given the fact that taxpayer funds had already been called upon to support the HBOS Group, the FSA stated in its press release accompanying the Final Notice that "levying a penalty on the enlarged Group means the taxpayer would effectively pay twice for the same actions committed by the firm", and therefore "the FSA has not levied a fine against Bank of Scotland but has issued a public censure to ensure details of the firm's misconduct can be viewed by all and act as a lesson in risk management failings." The FSA's Chairman, Lord Turner, has subsequently indicated that if a fine had been levied it may have been up to £100 million which would have been the FSA's largest fine to date.

The FSA has confirmed that it will produce a "public interest report" into the causes of the failure of the HBOS Group. However, in order to avoid prejudicing the outcome of other enforcement proceedings in connection with the failure of the HBOS Group, the work to produce such a report is suspended pending the conclusion of those ongoing actions.

The FSA's Final Notice is available at: http://www.fsa.gov.uk/static/pubs/final/bankofscotlandplc.pdf.

The FSA's Press Release is available at: http://www.fsa.gov.uk/library/communication/pr/2012/024.shtml.

US Developments

The Comment Period Closes: What's Next for the Volcker Rule

The financial services industry is closely watching the progress of the federal financial regulatory agencies (the "Agencies") in adopting rules to implement the Volcker Rule, Section 619 of the Reform Act. The Agencies have issued a proposed rule (the "Proposal"), the comment period for which ended on 13 February 2012. The Agencies will review and analyse the comments, before adopting a final rule that provides guidance on how a banking entity may now conduct market-making and fund activities. In the interim, the Agencies will continue to be subject to pressure from both supporters and critics of the Volcker Rule, by individual members of the US Congress, public advocacy groups and the financial services industry. Many constituents are urging the Agencies to provide relief while others are calling on them not to weaken the rule, positions that are diametrically opposite and thus, in many cases, simply irreconcilable. Most comments submitted by industry participants are critical of the Proposal. While it is unusual for one government entity to criticise another's proposed rule in a public comment letter, rather than doing so through informal channels, this rulemaking has attracted numerous letters from foreign governments, central banks and regulatory agencies from around the world.

Pending issuance of a final rule, we reviewed a representative sampling of issues that the Agencies must address and handicapped the chances that portions of the Proposal may change. Our client publication is available at: http://www.shearman.com/Publications/detail.aspx?publication=5d93e01a-3fbc-4fa7-b128-34c9453fee2b.

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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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