SHEARMAN & STERLING LLP

Governance & Securities Law Focus

Latin America Edition July 2012

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

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US DEVELOPMENTS

SEC Developments

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Reform Act"), which was signed into law on July 21, 2010, 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 Issues Final Rules on Independence of Compensation Committees and their Advisers

On June 20, 2012, the SEC issued final rules directing the national securities exchanges in the US to adopt listing standards related to the independence of compensation committees and their selection of advisers. The final rules are very similar to the proposed rules issued in March 2011. The rules also finalize disclosure requirements relating to compensation adviser conflict of interest in Item 407 of Regulation S-K.

The SEC was required to formulate rules on these topics under the Reform Act, which prohibits US securities exchanges from listing any equity security of an issuer that is not in compliance with the exchange's compensation committee independence and adviser requirements.

Definition of "Compensation Committee." The final rules do not require a listed issuer to maintain a compensation or similar committee. References to "compensation committee" in the final rules generally refer to any board committee that oversees executive compensation, whether or not the committee also performs other functions (e.g., the corporate governance

and nominating committee). The listing requirements also generally apply to members of the board of directors who, in the absence of a board committee, oversee executive compensation matters.

Compensation Committee Independence Requirements. Final Rule 10C under the US Securities Exchange Act of 1934, as amended (the "Exchange Act") directs the national securities exchanges to require that each member of an issuer's compensation committee be an "independent" member of the issuer's board of directors under the applicable exchange's independence standards. The rules mirror the Reform Act's mandate that each exchange develop independence requirements.

The final rules do not specify additional independence factors to be considered, establish independence standards, provide any safe harbors or exceptions, mandate a specified look-back period or exempt any particular relationship between compensation committee members and issuers, leaving all of these topics to the exchanges. In its adopting release, the SEC noted that while it expects the exchanges to consider whether their audit committee independence standards should also apply to compensation committee members, there is no requirement to adopt those standards.

Foreign private issuers are exempt from the compensation committee independence requirements so long as they provide annual disclosures of the reasons why they do not have an independent compensation committee. Certain other issuers, including controlled companies, are similarly exempt.

Compensation Advisers. The final rules also require US exchanges to implement listing standards requiring that compensation committees have the authority to retain or obtain the advice of compensation advisers and to appoint, compensate and oversee the work of compensation advisers.

Independence Factors. Under the final rules compensation committees must consider certain independence factors before selecting a compensation adviser. The factors largely mirror those of the Reform Act, with the addition of the sixth factor below:

- whether the entity employing the compensation adviser provides other services to the issuer;
- the amount of fees received from the issuer by the entity employing the compensation adviser as a percentage of its total revenues;
- the policies and procedures of the entity employing the compensation adviser designed to prevent conflicts of interest;
- any business or personal relationship between the compensation adviser and a member of the compensation committee;
- whether the compensation adviser owns any stock in the issuer; and
- any business or personal relationship between the compensation adviser and the issuer's executive officer.

The independence assessment must be conducted on any compensation consultant, legal counsel or other adviser that provides advice to the committee, whether or not the adviser was retained by the committee. In-house legal counsel are not subject to the independence assessment.

No Adviser Independence Requirement. The final rules do not require that a compensation adviser actually be independent, but only that the compensation committee consider the factors listed above when deciding to hire or seek advice from a given adviser. Additionally, the final rules do not require compensation committees to retain a compensation consultant or legal or other adviser, or preclude such adviser from providing other services to the issuer.

Notably, there is no specific exemption in the final rules for foreign private issuers and therefore the compensation adviser independence rules are applicable to foreign private issuers unless the exchanges act to exempt them. Controlled companies, smaller reporting companies and certain securities futures products and standardized options are exempt from the compensation adviser independence rules.

Compensation Consultant Disclosure and Conflicts of Interest. The Reform Act dictates when an issuer must disclose whether the compensation committee has "retained or obtained" the advice of a compensation consultant, whether the work of the compensation consultant has raised any conflicts of

interest and, if so, the nature of the conflict and how the conflict is being addressed. Currently, Item 407 of Regulation S-K requires registrants to disclose "any role of the compensation consultants in determining or recommending the amount or form of executive and director compensation."

Given the similarities between the disclosures required under Item 407 and the Reform Act, the proposed rules would have combined them into a single disclosure requirement by expanding the disclosure triggers and eliminating the exclusions for disclosure when the consultant provides advice on broad-based plans or provides only non-customized benchmarking data.

The final rules eliminate the integration. The existing compensation consultant disclosures under Item 407 remain unchanged. A new subsection under Item 407 requires the Reform Act conflicts disclosure with respect to any consultant identified and disclosed under the existing Item 407 rules, whether the consultant is retained by management or the committee. An instruction to Item 407 provides that issuers should, at a minimum, consider the six independence factors in determining whether a conflict of interest exists. The final rules retain (1) the disclosure obligations with respect to consultants who advise on director compensation and (2) the exclusions for disclosure when the consultant provides advice on broad-based plans or provides only non-customized benchmarking data. There is no obligation to disclose the committee's process for selecting advisers.

These disclosure rules apply to all issuers that are subject to the US proxy rules, including controlled companies and smaller reporting companies. Consequently, foreign private issuers that are not subject to the US proxy rules would not be subject to these disclosure requirements. As a matter of best practice, however, foreign private issuers may want to give due consideration to these requirements when drafting their disclosures.

The SEC final rules are available at: http://www.sec.gov/rules/final/2012/33-9330.pdf.

Our related client publication is available at: http://www.shearman.com/sec-issues-final-rules-on-independence-of-compensation-committees-06-26-2012/.

SEC Division of Corporation Finance Updates Policy on Confidential Submissions by Foreign Private Issuers

On May 30, 2012, the SEC's Division of Corporation Finance announced an update to its policy for review of confidential submissions of draft registration statements prior to public filing by foreign private issuers as a result of the recently enacted Jumpstart Our Business Startups Act ("JOBS Act").

- The Division policy was last revised in December 2011. The December 2011 revisions to the policy limited the availability of the confidential submission process to foreign governments registering their debt securities, foreign private issuers that are listed or concurrently listing their securities on a non-US exchange, foreign private issuers that are being privatized by a foreign government, and foreign private issuers that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.

Under the JOBS Act and the SEC policy update in May 2012, certain foreign private issuers may now elect to use the confidential submission process for "emerging growth companies", regardless of whether they qualify for confidential submission under the Division policy discussed above, if they qualify as emerging growth companies and comply with the applicable procedures. This includes, for example, a requirement that an emerging growth company that has confidentially submitted a draft registration statement publicly file the registration statement (together with all confidentially submitted drafts and amendments) at least 21 days prior to the commencement of its roadshow for the offering.

The most significant change in the May 2012 update to the Division policy is that foreign private issuers that avail themselves of the Division's confidential submission process now will be required, at the time they publicly file their registration statements, to also publicly file their previously submitted draft registration statements and resubmit all previously submitted response letters to staff comments as correspondence on the SEC's EDGAR system.

This new requirement will apply only to registration statements where the initial draft submission is made after May 30, 2012.

The Division's updated policy is available at: http://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm.

SEC Approves Stock and Market Volatility Rules

On May 31, 2012, the SEC approved two pilot proposals submitted by the national securities exchanges and the Financial Industry Regulatory Authority ("FINRA"), which are designed to address extraordinary volatility in individual securities and the broader US stock market. The proposals, which will be implemented by February 4, 2013, are approved for a one-year pilot period during which the exchanges, FINRA and the SEC will assess their operations and any necessary modifications.

The "Limit-Up/Limit Down" Initiative. The proposed "limit up/limit down" mechanism is aimed at preventing trades in individual exchange-listed securities from occurring outside a specified band. That band would be set at a percentage level above and below the average price of the security over the immediately preceding five-minute period, with the level for more liquid securities set at 5 percent and for other listed securities at 10 percent. Those percentages will be doubled during the opening and closing periods and broader price bands will apply to securities priced at $3 per share or less. In case of more fundamental price moves, the new rules impose a five-minute trading pause.

Updated Market-Wide Circuit Breakers. The revised market-wide circuit breaker rules update the existing rules by lowering the current percentage-decline threshold for triggering a market-wide trading halt and shortening the amount of time that trading is halted.

The related SEC press release is available at http://www.sec.gov/news/press/2012/2012-107.htm.

SEC Division of Corporation Finance Publishes Data on Foreign Companies

The SEC Division of Corporation Finance has published data on foreign companies, which present snapshots of 965 foreign companies registered and reporting with the SEC as of December 31, 2011. The summaries show

- a list of the companies in alphabetical order;
- a ranking of countries according to the number of companies registered and reporting from each country;
- a list of the companies by geographic location; and
- a market summary showing the number of companies from each country and specifying the US market each company is trading on.

The SEC data is available at: http://www.sec.gov/divisions/corpfin/internatl/companies.shtml.

SEC Issues Exemptive Order to Large Trader Reporting Requirements

On April 20, 2012, the SEC issued an order temporarily exempting registered broker-dealers from the Large Trader Identification requirements under Rule 13h-1. This temporary exemption was issued in anticipation of the rule's original effective date of April 30, 2012, providing covered broker-dealers with additional time to ensure compliance with the recordkeeping, reporting, and monitoring requirements under the rule. In addition, the SEC granted a permanent exemption for certain capital market transactions for the purposes of the large trader identification requirements.

- The new rules, adopted by the SEC in July 2011, are designed to assist the SEC to identify market participants that conduct a substantial amount of trading activity, as measured by volume or market value, in the US securities markets, collect information on their trading and analyze their trading activity.

Extension of Compliance Date for Broker-Dealers. Rule 13h-1 requires registered broker-dealers to, among other things, maintain specified records of transactions that they effect, directly or indirectly, for large traders, and to report to the SEC, upon request, such records in electronic format. In addition, the broker-dealers are required to perform limited monitoring of their customers' accounts for activity that may trigger the large trader identification requirements of Rule 13h-1.

Through its order, the SEC is temporarily exempting registered broker-dealers from these requirements by extending the compliance date of April 30, 2012 to May 1, 2013. With respect to the recordkeeping and reporting requirements, the SEC is extending the

compliance date only to November 30, 2012 for clearing broker-dealers for a large trader where the large trader is either (i) a US-registered broker-dealer, or (ii) trades through a sponsored access arrangement.

It is the SEC's view that the extension of the compliance date will allow broker-dealers additional time to develop, test, and implement enhancements to their recordkeeping and reporting systems and where necessary request exemptive relief from the rule requirements.

Exemptions for Certain Securities Transactions. Whether a person is considered a "large trader" is in part determined by reference to the volume and value of "transactions" effected by such person. Rule 13h-1 exempts, however, certain types of transactions that are not effected with the intent that is commonly associated with the arm's length trading of securities in the secondary market and therefore are not transactions characterized by the exercise of investment discretion for purposes of the rule.

The SEC's order extends this exemption to certain additional transaction types involving securities offerings that should not count towards the activity levels required to determine whether a person is a large trader, namely (i) any transaction that is part of an offering of securities by or on behalf of an issuer, or by an underwriter on behalf of an issuer, or an agent for an issuer, whether or not such offering is subject to registration under the Securities Act of 1933, as amended (the "Securities Act"), regardless of whether such transaction is effected through the facilities of a national securities exchange and (ii) sales of securities by a selling shareholder in connection with an initial public offering or in a registered secondary offering if such selling shareholder is a current or former employee of the issuer and the securities being sold were acquired as part of the person's compensation as an employee of the issuer.

Rule 13h-1 represents an important change to the reporting obligations for large traders and for registered broker-dealers that facilitate secondary market trading. This temporary reprieve from the SEC should afford broker-dealers the time needed to focus resources toward enhancing their record keeping and reporting infrastructure necessary for compliance under this new regulatory regime. Equally important, the expansion of the list of exempted transactions better matches the list of reportable activities to the regulatory purposes underlying the rule. Nonetheless, the Rule continues to be an important new compliance requirement for both traders and broker-dealers.

The SEC order is available at: http://www.sec.gov/rules/exorders/2012/34-66839.pdf.

Our related client publication is available at: http://www.shearman.com/large-trader-reporting-rule-a-temporary-reprieve-for-broker-dealers-and-broadening-of-exemptions-for-capital-markets-transactions-06-20-2012/.

Update on SEC Conflict Mineral and Government Payments Rules

After considerable delay, the SEC announced on July 2, 2012 that it will consider final rules on conflict minerals and disclosure of government payments by resource extraction companies at an open meeting on August 22, 2012.

The proposed conflict mineral rules mandated by Section 1502 of the Reform Act require any issuer for which "conflict minerals" (i.e., certain minerals that are determined to be financing conflict in the Democratic Republic of Congo and adjoining countries) are necessary for the functionality or production of such issuer's products to disclose in the body of its annual report whether its conflict minerals originated in the Democratic Republic of Congo or an adjoining country. If so, that issuer would be required to furnish a separate report as an exhibit to the annual report that includes a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals. In addition, the proposed rules impose certain auditing, certification and publication requirements relating to such report.

The so-called "publish what you pay" rules mandated by Section 1504 of the Reform Act require any resource extraction issuer that is an SEC reporting company to disclose in its annual report any payments made to the US or non-US governments for the purpose of the commercial development of oil, natural gas or minerals. Under the proposed rules, information required relates to both the type and total amount of payments made for each project and to each government.

- A similar proposed EU law, introduced in October 2011, is also said to be nearing agreement. As it is for the SEC, the issue of disclosure on an individual project basis is one of the hotly debated items in the proposed EU rule.

The SEC meeting notice is available at: http://www.sec.gov/news/openmeetings/2012/ssamtg082212.htm.

Update on Publicity for Rule 144A Offerings and Certain Private Placements

On July 2, 2012, the SEC also announced that at the same open meeting on August 22, 2012, it will consider rules to eliminate the prohibition against general solicitation and general advertising in securities offerings conducted pursuant to Rule 144A and Rule 506 of Regulation D under the Securities Act, as mandated by Section 201(a) of the JOBS Act.

Update on SEC Proxy Rule

On April 25, 2012, SEC Chairman Mary Schapiro confirmed during a hearing before the Financial Services Committee of the US House of Representatives that the SEC had no immediate plans to revisit the "proxy access rule" due to a lack of capacity at the agency.

- The proxy access rule was aimed at providing certain shareholders direct access to the proxy statements of public companies for the purpose of nominating and soliciting support for a limited number of director nominees. The proxy access rule was vacated in July 2011 by the US Court of Appeals for the District of Columbia Circuit, holding that the agency inadequately analyzed the economic impact of the rule.

Updated Financial Reporting Manual

On July 11, 2012, the SEC's Division of Corporation Finance published an updated version of its Financial Reporting Manual.

The manual has been revised to address issues related to:

- the age of interim financial statements included in Form 8-K;
- the use of pro forma information in the MD&A;
- the age of financial statements required in Form 8-K for smaller reporting companies; and
- periods required for financial statements filed by Canadian issuers on Form 40-F.

The updated manual is available at: http://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.shtml.

Foreign Investment Review

Shearman & Sterling LLP Writes US Chapter for International Trade & Investment Publication

Robert LaRussa and Lisa Raisner of Shearman & Sterling's Washington, DC-based International Trade & Investment practice wrote the United States chapter in Getting the Deal Through, Foreign Investment 2012, a publication that takes a broader look at mergers, national interest and national security in 26 jurisdictions worldwide.

The US chapter gives investors a road map to the intricacies of getting a deal through a national security review by the Committee on Foreign Investment in the United States ("CFIUS"). It looks specifically at the US law and regulations governing CFIUS, as well as some recent cases and the politics and policy surrounding these reviews.

The US chapter of the publication is available at: http://www.shearman.com/foreign-investment-review-mergers-national-interest--national-security-in-26-jurisdictions-worldwide-05-09-2012/.

Noteworthy US Securities Law Litigation

US Court of Appeals decision reinforces the importance of specific disclosure of trends and uncertainties: Panther Partners Inc. v. Ikanos Communications. In May 2012, a US federal appeals court reversed a district court's decision granting Ikanos Communications' motion to dismiss and ruled that investors had plausibly alleged that Ikanos omitted material information from its registration statement for its secondary offering in violation of Sections 11 and 12(a)(2) of the Securities Act. In their complaint, the plaintiffs alleged that, prior to the secondary offering, Ikanos knew about defects in the company's semiconductor chips but failed to disclose the defects. The plaintiffs asserted that Ikanos had a duty to disclose the existence of the chip defects pursuant to Item 303(a) of Regulation S-K, which requires a company to disclose any known trend or uncertainty that the company

reasonably expects to have a material unfavorable impact on its revenue.

The district court ruled that the plaintiffs failed to state a claim because they did not allege specific facts demonstrating that Ikanos knew, prior to filing the registration statement, the magnitude of the problem with its chips. The appellate court disagreed and held that the plaintiffs plausibly alleged that the defect issue, and its potential impact on Ikanos' business, constituted a known trend or uncertainty that Ikanos reasonably expected would have a material unfavorable impact on revenue. In support, the appellate court cited allegations that, before the secondary offering, Ikanos was receiving an increasing number of complaints from its two largest customers, which accounted for 72 percent of Ikanos's revenues, and that it might have to accept returns of all chips it had sold to those two customers. Based on these and other facts, the appellate court ruled that Ikanos' generic cautionary language that it sold complex products that often had defects or bugs was incomplete and did not fulfill Ikanos' duty to inform the investing public of a known uncertainty that could materially impact revenues.

This case reinforces that, prior to a public offering, issuers and underwriters must evaluate carefully whether they are aware of any trends or uncertainties that could materially affect the issuer's business, and if they do, they need to disclose them. Non-specific cautionary language in the offering documents is unlikely to insulate them from liability.

US Federal Court decision in securities class action provides important guidance for disclosure of potential SEC enforcement action and conflicts of interest: Richman v. Goldman Sachs. In June 2012, a federal court in New York granted in part and denied in part Goldman Sachs' motion to dismiss a securities fraud class action, pursuant to Section 10(b) of the Exchange Act, related to Goldman Sachs' role in certain synthetic collateralized debt obligations ("CDO"). The court held that Goldman Sachs' nondisclosure of a Wells notice from the SEC related to the CDOs was not materially misleading, but that the plaintiffs had sufficiently alleged that Goldman Sachs' statements about its procedures for addressing conflicts of interest were materially misleading in light of its purportedly conflicted role in certain synthetic CDOs. A Wells notice is a letter from the SEC indicating that the SEC staff has determined that it may bring a civil enforcement action against a person or firm, providing such person or firm with the opportunity to provide information as to why the enforcement action should not be brought.

In granting the motion to dismiss regarding the alleged nondisclosure of the Wells notice, the court relied primarily on two facts. First, the court stated that, under SEC rules, a company that receives a Wells notice has an opportunity to make a Wells submission to try to persuade the SEC not to take any action, and therefore, the receipt of a Wells notice does not necessarily indicate that charges will be filed against the company. Second, the court noted that Goldman Sachs had already disclosed that the SEC was conducting an investigation into Goldman Sachs' involvement with synthetic CDOs. Based on these two facts, the court ruled that Goldman Sachs' receipt of a Wells notice did not make its prior disclosures about the SEC investigation inaccurate or incomplete because its receipt of the Wells notice merely indicated that the government investigation was still proceeding. The court also ruled that Goldman Sachs did not have a duty to disclose the receipt of the Wells notice under any SEC regulations or FINRA rules.

In denying the motion to dismiss with regard to the alleged conflicts of interest, the court noted that Goldman Sachs affirmatively represented in certain marketing materials that it held a long position in the equity tranches of certain synthetic CDOs, but failed to disclose that it also had a larger short position in the synthetic CDOs. In light of these alleged material omissions, the court ruled that the plaintiffs had adequately alleged that Goldman Sachs' disclosures in its SEC filings that it had extensive procedures and controls designed to address conflicts of interest were materially misleading.

Many listed companies that receive SEC subpoenas wrestle with the question as to when to disclose the SEC investigation. Although the court's ruling here was somewhat fact-specific, it should provide useful guidance for companies that find themselves receiving a Wells notice, or an SEC investigation more generally. The case also serves as a cautionary tale that general statements about a company's business practices are capable of constituting an actionable misrepresentation if a shareholder later plausibly alleges that the

statements were inconsistent with the company's actual business practices at the time.

Recent SEC/DOJ Enforcement Matters

Conviction in insider trading case: United States v. Gupta. In June 2012, a jury in a federal court in New York convicted Rajat Gupta, the retired head of the consulting firm McKinsey & Company and former Goldman Sachs board member, of securities fraud and conspiracy to commit securities fraud for leaking material nonpublic information to a hedge fund manager. Mr. Gupta is scheduled to be sentenced in October 2012 and faces a maximum sentence of 25 years in prison.

The case is part of an aggressive crackdown on insider trading by the US Attorney's office in Manhattan. Since 2009, sixty individuals have pleaded guilty or been found guilty by juries of insider trading.

US Commodity Futures Trading Commission ("CFTC"), US Department of Justice ("DoJ") and UK Financial Services Authority ("FSA") enter into settlement agreement with Barclays in LIBOR and EURIBOR investigation. In June 2012, Barclays entered into settlement agreements with the CFTC, the DOJ, and the FSA in which it acknowledged that, as a member of the panel of banks whose rates determined the daily calculation of LIBOR (the London Interbank Offered Rate) and EURIBOR (the European Interbank Offered Rate), it had improperly manipulated LIBOR and EURIBOR rates. Barclays admitted that certain of its derivative traders, working with other Barclays employees responsible for submitting the bank's rates for LIBOR and EURIBOR purposes, had manipulated the published rates in order to help the traders' investments. Barclays also acknowledged that, during the financial crisis in 2007 and 2008, Barclays' senior management instructed Barclays' LIBOR rate submitters to lower Barclays' rate submissions, in violation of the rules governing rate submissions, so that Barclays' rates would be closer to the rates submitted by other banks.

As part of the settlement, Barclays agreed to pay US$450 million in penalties and to take certain remedial actions, including implementing firewalls to prevent improper communications between traders and rate submitters, enhancing auditing and monitoring procedures, and making regular reports to the regulators regarding its compliance efforts.

Numerous regulators around the world are currently investigating alleged manipulation of LIBOR, TIBOR, and EURIBOR rates. Barclays is the first financial institution to enter into a settlement agreement with the regulators and agree to pay a significant penalty.

INTERNATIONAL DEVELOPMENTS

The Eurozone. What Do You Really Need to Know?

The euro and the European Economic and Monetary Union are facing an increasingly challenging period in their evolution. The dynamic situation, influenced by economics and politics, is evolving and will continue to evolve over the coming months and years.

As a firm, we have been monitoring the situation closely and advising our clients on contingency planning. Given the continuing uncertainty, we think now would be a prudent moment for our clients to take stock, ensure they are apprised of the relevant facts and, if they have not already done so, undertake analysis of their organization to ensure that they have implemented an appropriate approach to contingency planning.

To assist with such analysis, we have prepared a briefing note that outlines the current status of the Eurozone predicament, details some of the legal risk issues that may be considered as part of any contingency planning and summarizes some ways in which institutions have been seeking to insulate themselves from any potential fallout.

Our briefing note is available at: http://www.shearman.com/the-eurozone-what-do-you-really-need-to-know-07-05-2012/.

IPO Sponsors in the Firing Line of Hong Kong SFC

Consultation Paper on the Regulation of Sponsors

In May 2012, the Hong Kong Securities and Futures Commission ("SFC") launched a public consultation on proposals to enhance the regulatory regime of listing sponsors. The SFC has recently shown it will get tougher on poor performing sponsors with the revocation of Mega Capital's license to advise on corporate finance transactions in April 2012 and the imposition of an HK$42 million fine, for failing to discharge its sponsor's

duties in relation to the listing of Hontex International Holdings Company Limited on The Stock Exchange of Hong Kong Limited ("HKEx"). The following highlights key proposals of the SFC with the benefit of our views and relevant considerations.

Highlights of the SFC's Proposals

The SFC proposes to enhance the regulatory regime by consolidating and tightening obligations on sponsors in the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (the "Code of Conduct") and making it explicit that sponsors will have statutory liability under the Companies Ordinance for untrue statements in a prospectus:

- ***Sponsors' prospectus liability***. The SFC proposes to explicitly identify sponsors as being liable under section 40 (civil liability for misstatements in prospectus) and section 40A (criminal liability for misstatements in prospectus) of the Companies Ordinance for untrue statements in a prospectus.
- ***Publication of first draft prospectus***. The first draft of the prospectus submitted to the HKEx and the SFC (commonly known as "A1 proof") is to be published on the HKEx's website. The SFC is eager to see sponsors produce a significantly more developed and "diligenced" prospectus early on, lessening the sponsors' perceived over-reliance on the regulatory commenting process.
- ***Only one sponsor on each engagement***. The SFC considered that the appointment of multiple sponsors might be a factor contributing to unsatisfactory standards and it is proposed that either (i) a sole independent sponsor should be appointed, or (ii) alternatively, there should be a limit on the number of sponsors, each of whom should be independent of the listing applicant.
- ***Work required before listing application***. A key theme of the SFC's proposals is that a sponsor should not submit a listing application to the regulators unless it is satisfied that the listing applicant is ready to be listed. Under the proposed rules, a sponsor should not submit a listing application unless it has completed all reasonable due diligence save for any matters that by their nature can only be dealt with at a later stage. In addition, before submitting a listing application a sponsor should have come to a reasonable opinion that:
  - the information in the draft listing document is substantially complete;
  - the applicant has complied with all applicable listing conditions (except to the extent that waivers have been applied for);
  - the applicant has established adequate systems and procedures to ensure compliance with the Listing Rules and other applicable legal and regulatory requirements; and
  - the directors have the necessary experience, qualifications and competence.
- ***Reliance on experts***. Under the proposed rules, a sponsor should be in a position to demonstrate that it is reasonable for it to rely on the expert sections of the listing document. The Code of Conduct will specify typical tasks a sponsor should perform in order to demonstrate reasonable reliance.
- ***Reliance on non-expert third parties***. There are indications that sponsors have increasingly sought to delegate due diligence work and responsibilities to others, in particular legal counsel. Sponsors are ultimately responsible for due diligence and the proposed rules would require that a sponsor, after reasonable due diligence, should have reasonable grounds to believe and does believe that the information in the non-expert sections is true, accurate and complete in all material respects and that there are no material omissions.
- ***Records***. A sponsor's record should be sufficient to demonstrate that the sponsor has complied with all applicable legal and regulatory requirements, and such records are to be kept for at least seven years in Hong Kong.
- ***Resources, systems and procedures***. Sufficient staff with requisite knowledge and skills should be devoted to a listing assignment and it is important for senior management of a sponsor to monitor and guide the due diligence process.
- ***Information to regulators***. A sponsor should reasonably satisfy itself that all information

provided to the regulators is accurate, complete and not misleading and should disclose to the HKEx in a timely manner any material information relating to the applicant concerning non-compliance with the Listing Rules or other legal or regulatory requirements.

Our Views

The SFC's proposals have attracted heated debate in the market. While we welcome the SFC's efforts in enhancing the regulatory regime for sponsors, we have concerns over some of the consultation proposals:

- ***Sponsors' prospectus liability***. There are existing provisions in the Securities and Futures Ordinance which impose civil and criminal liability on any person who (i) makes any fraudulent or reckless misrepresentation for the purpose of inducing another person to acquire securities, or (ii) discloses, circulates or is concerned in the disclosure or circulation of false or misleading information inducing transactions. Moreover, the SFC seems to have sufficient powers to reprimand sponsors without relying on statutory provisions. The recent Hontex case is a case in point where Mega Capital was subject to a significant fine and revocation of its license. The fact that a sponsor may risk losing its license should be a sufficient deterrent to ensure adequate due diligence is carried out.

- ***Early disclosure of the A1 proof may raise concerns with potential listing applicants***. The intervening period from the filing of listing application to the expected listing date can be significant and the local and global market conditions may add further delay to the process. Any premature disclosure of financial and other sensitive information such as average selling price and key supplier/customer information will likely raise grave concerns with potential applicants.

  For listing applicants which are already listed on an overseas stock exchange, posting the A1 proof on the HKEx's website is likely to trigger a corresponding disclosure requirement under the rules of the overseas stock exchange. This can be unduly onerous to the applicants. Moreover, in order to avoid releasing any stub period figures required to be included in the A1 proof on the overseas stock exchange, a potential overseas listed applicant will be left with limited windows of opportunity to file its listing application to coincide with the release of its interim/quarterly results on the overseas stock exchange. Given the increasing number of companies seeking a dual primary or secondary listing in Hong Kong, it is important for the SFC to consider the regulatory implications for overseas listed applicants before introducing the new requirement.

- ***Multiples sponsors are unlikely to be a cause of fragmentation of work and gaps***. Hong Kong has become a listing hub for international companies operating in different industry sectors and we believe there are cases where an issuer could benefit from the expertise of more than one sponsor. We do not agree that multiple sponsors would necessarily increase the risk of fragmentation of work and gaps. Although the "lead" sponsor may act as the overall coordinator, due diligence is usually conducted as a joint exercise with representatives from each sponsor participating with the same vigor and intensity. As long as the identity of the "lead" sponsor and the responsibilities of the respective sponsors have been agreed at the outset, the risk of the dispersal of effective responsibility should not be significant.

- ***Undesirable consequences if each sponsor is required to be independent***. We are concerned that the proposed change may lead to unintended counter-effects. The Listing Rules set out a long list of factors to be taken into account in assessing independence of sponsors. In particular, a sponsor will not be considered independent if any member of the sponsor group has a current business relationship with the applicant or any of its related parties which might reasonably give rise to a perception that the sponsor's independence would be affected.

  A sponsor, which is a member of a global financial institution, could be easily caught by the "independence" test if any member of the sponsor group provides pre-IPO loans or other banking facilities to the listing applicant or its related parties. If only independent entities are allowed to act as sponsors, the new requirement may effectively rule out a number of big investment banks from acting

as sponsors. While it is the intention of the SFC to better safeguard the interest of public investors with the proposed rule changes, a number of investment banks may choose to act as underwriters only so that they may continue their banking relationship with the listing applicant and avoid the increased responsibilities attached to sponsors.

Next Steps

In view of the impact of the changes and in response to market requests, the SFC has extended the consultation period to July 31, 2012. It is expected that a number of the proposals, the potential criminal liability in particular, will be met with fierce resistance from investment banks and non-bank sponsors.

We await with interest the consultation conclusions to be issued. There has already been media speculation suggesting that if the changes were implemented, possible penalties for sponsors in Hong Kong would be much more severe than those in London and New York. We hope that the SFC strikes an appropriate balance between safeguarding interests of public investors and ensuring Hong Kong maintains its competitiveness as an international finance centre, especially with the increase in overseas companies wishing to list in Hong Kong.

The Consultation Paper is available at: https://www.sfc.hk/sfcConsultation/EN/sfcConsultFileServlet?name=sponsorrglt&type=1&docno=1.

Singapore Exchange Amends Mainboard Admission Criteria

On July 19, 2012, Singapore Exchange Ltd. (the "SGX") announced higher Mainboard admission criteria in a bid to improve its global profile and attract higher quality and larger listings. The new criteria take into account feedback and suggestions the SGX received as a result of the public consultation concluded in February 2010.

In the accompanying news release, the SGX said it believes the new admission criteria will enable retail investors to reap significant benefits in terms of having wider access to new IPOs, while at the same time, investors can be better assured that companies listed on the SGX are of good standing and quality.

Highlights of the New Mainboard Admission Criteria

Under the new rules, a company intending to list on the SGX's Mainboard must meet one of the following quantitative requirements:

- the company must have a market capitalization at IPO of not less than S$150 million if it is profitable in the latest financial year and has an operating track record of at least three years;
- the company must have a market capitalization at IPO of not less than S$300 million if it only has operating revenue in the latest financial year; or
- the company must have a minimum consolidated pre-tax profit of at least S$30 million for the latest financial year and have an operating track record of at least three years.

In addition, the IPO shares issued must be at least S$0.50 each.

Other Amendments

The SGX also announced the following ancillary rule amendments that relate to the new Mainboard admission criteria:

- for a company listed on the SGX's junior board (a "Catalist Company") to qualify for a transfer to the Mainboard, it is required to satisfy any one of the new Mainboard admission criteria;
- an issuer that intends to make a bonus issue, capitalization issue or a subdivision of shares is required to satisfy the SGX that its daily weighted average price, adjusted for the capitalization issue or subdivision of shares, will not be less than S$0.50;
- the incoming business and the enlarged group that are engaged in a reverse takeover must meet the new Mainboard admission criteria and the issuer is required to appoint a competent and independent valuer to value the incoming business; and
- the target business that is to be acquired in a very substantial acquisition has to be profitable and have a healthy financial position. The issuer is required to appoint a competent and independent valuer to value the target business and the very substantial acquisition is subject to the discretion of the SGX to approve or decline the offer as it deems appropriate.

The amendments will be effective on August 10, 2012.

The new criteria for Mainboard applicants and for a Catalist Company seeking to transfer to the Mainboard are available at: www.sgx.com/transformingthemarket.

New Policy Restricts Public Access to Chinese Corporate Information

It has been reported by several media sources that the State Administration of Industry and Commerce ("SAIC") has implemented a new policy, which prevents third parties from accessing a Chinese company's corporate records on file with the agency without express consent of the company involved. There has, however, been no official announcement or acknowledgement of such policy change from SAIC.

Companies incorporated in China are required to file key corporate documents, including basic information such as corporate registration information, penalty records as well as audited financial reports and annual inspection forms, with the local Administrations of Industry and Commerce ("AICs").

According to a report by International Financial Law Review, the new policy was introduced by local AICs in Shandong and Tianjin as well as parts of Shanghai earlier this year, and was rolled out in Beijing in May this year. The new policy may have been prompted by repeated challenges from short-selling research firms relating to alleged discrepancies between financial and accounting information filed by China-based US-listed companies with AICs and such companies' financial reports filed with the SEC. However, there is also speculation that the move was likely to be a reaction to a recent probe into the commercial information provider Dun & Bradstreet amid allegations it violated China's consumer privacy laws.

The new rules could have a significant impact on M&A and private equity transactions in China. The AIC filings are often an anonymous first step in due diligence for investors seeking corporate information about a company in China. If the new rules are confirmed and implemented across China, it will mean that investors will be required to obtain prior consent from target companies in order to be able to review their AIC files, which could discourage investors that may not yet be ready for a dialogue with the target company and hinder the early stage due diligence process. It would also mean that other market participants, such as research analysts, might be hindered in their ability to create a basic corporate profile of a company without that company's consent and thereby result in less transparency of Chinese companies.

DEVELOPMENTS SPECIFIC TO FINANCIAL INSTITUTIONS

Basel III Update: Basel Committee Report on Global Implementation

The Basel Committee on Banking Supervision ("Basel Committee") published its report on the implementation of its banking standards ("Basel III") for consideration by the G20 leaders at their June summit in Mexico.

The implementation review process includes the following three levels of review:

- Level 1: Aim is to ensure the timely adoption of Basel III into domestic legislation in the Basel Committee member countries within the agreed international timeframe. This, however, does not include review of the content or substance of the domestic legislation by the Basel Committee.
  - The Level 1 progress reports are and will continue to be published twice yearly.
- Level 2: This will ensure regulatory consistency of domestic regulations with the requirements of Basel III. Any delays or failures to adopt domestic regulations which are identified by the Level 1 review will be fed into the Level 2 assessment. A four-grade scale will apply: compliant, largely compliant, materially non-compliant and non-compliant, and all Basel Committee member countries will be assessed.
  - The first reviews commenced in February 2012 with the European Union, Japan and the United States, and are expected to be published in September 2012.
- Level 3: This will ensure the consistency of outcomes, by analyzing risk-weighted assets in the banking book and trading book across banks and across jurisdictions. It extends the findings of Levels 1 and 2, both of which focus on national rules and regulations, to supervisory implementation at the EU level. While the Basel Committee has indicated that this work is exploratory, it could eventually lead to policy recommendations to deal with potential inconsistencies.

- The two Level 3 assessments of risk-weighted assets in the banking book and the trading book will deliver initial findings to the Basel Committee by the end of 2012.

The full report is available at: http://www.bis.org/publ/bcbs220.pdf.

Basel III Update: Final Rules on Composition of Capital Disclosure Requirements for Banks

The Basel Committee has published the Final Rules on a new framework, which is designed to ensure that banks disclose the components of their capital bases in standardized formats across all of the jurisdictions that they operate in.

The Basel Committee identified in the Rules that during the financial crisis, market participants and supervisors had difficulty making detailed assessments of banks' capital positions and comparisons across jurisdictions. As such, the new Rules are designed to improve the quality of Pillar 3 disclosures regarding the capital that banks use to meet their regulatory requirements.

The full report is available at: http://www.bis.org/publ/bcbs221.pdf.

EU Banking Union Proposals

The European Commission has updated its memorandum on a proposed EU banking union that was originally published on June 6, 2012.

In the memorandum, the European Commission states that it is considering bringing forward proposals for implementing the banking union as early as autumn 2012. These proposals would cover the introduction of more integrated and direct banking supervision at EU level, a single EU deposit guarantee scheme and a single EU resolution fund.

On July 10, 2012, the European Commission published a press release, which includes remarks made by Olli Rehn, Commission Vice-President, at the Eurogroup meeting held on July 10, 2012, stating that the European Commission plans to publish its legislative proposal for the creation of a single supervisory mechanism for banks in the euro area in early September 2012, which would allow the Council to consider the proposal by the end of 2012.

The Memorandum is available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/478&format=HTML&aged=0&language=EN&guiLanguage=en.

The 10 July 2012 press release is available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/542&format=HTML&aged=0&language=EN&guiLanguage=en.

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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