SHEARMAN & STERLING LLP

Governance & Securities Law Focus

A QUARTERLY NEWSLETTER FOR CORPORATES AND FINANCIAL INSTITUTIONS

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

In This Issue

ASIAN DEVELOPMENTS

IPO Sponsors in the Firing Line of Hong Kong SFC

Consultation Paper on the Regulation of Sponsors

In May 2012, the 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.

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

- ***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 31 July 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 19 July 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 capitalisation 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 capitalisation 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, capitalisation issue or a subdivision of shares is required to satisfy the SGX that its daily weighted average price, adjusted for the capitalisation 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.

SEC Delays Court Action Seeking Audit Papers from Deloitte China

Shanghai-based Deloitte Touche Tohmatsu CPA Ltd. ("Deloitte China") is a public accounting firm registered with the Public Company Accounting Oversight Board ("PCAOB"). The SEC issued a subpoena in May 2011, requesting Deloitte China to produce records related to the possible accounting fraud at Longtop Financial Technologies Ltd., but Deloitte China has refused to submit the records, citing concerns that Chinese authorities could penalize the firm under China's state-secrecy laws. As a result, in September 2011, the SEC filed a subpoena enforcement action (*SEC v. Deloitte Touche Tohmatsu CPA Ltd.*) against Deloitte China for failing to produce the documents.

The SEC subsequently filed a motion on 18 July 2012, seeking to stay the action for six months. The SEC cited its ongoing negotiations with the China Securities Regulatory Commission ("CSRC"), which hold out the prospect of effectively mooting its dispute with Deloitte China, as the reason for the stay. The SEC already requested and received, in May 2012, one similar 60-day deadline extension due to ongoing negotiations with the CSRC.

The SEC has been investigating dozens of China-based companies listed in the United States for accounting irregularities. Those inquiries have stalled amid difficulties in obtaining documents from Chinese auditing firms. To solve this problem, the SEC has been negotiating with the CSRC on cross-border cooperation, including access to audit documents. In early July 2012, SEC Chairman Mary Schapiro visited China to meet with the Chairman of the CSRC and other Chinese government officials. During the meetings, the parties discussed the need to develop a mechanism by which the SEC can obtain audit papers and other documents from audit firms based in China. Similarly, under US laws, the PCAOB, over which the SEC has oversight authority, is required to regularly inspect auditors of companies that are registered with the SEC, such as Deloitte China, in order to assess their compliance with US laws and professional standards. However, the PCAOB is currently unable to conduct inspections of China-based auditing firms without the approval of Chinese authorities, and such auditing firms are therefore not currently being regularly inspected. While no agreements have been reached, the SEC and CSRC are continuing negotiations on these issues. If the SEC action against Deloitte China proceeds and is ultimately decided against the audit firm, it potentially could be barred from auditing US-listed companies in the future.

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 Issues Final Rules on Independence of Compensation Committees and their Advisers

On 20 June 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 last March on which we reported in our April 2011 update. 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 standardised 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-customised 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-customised 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 30 May 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 and we reported on it in our January 2012 Newsletter. 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 privatised 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 30 May 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 31 May 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 4 February 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 31 December 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 20 April 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 30 April 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.

- We reported on the large trader reporting requirements in our October 2011 Newsletter. 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 30 April 2012 to 1 May 2013. With respect to the recordkeeping and reporting requirements, the SEC is extending the compliance date only to 30 November 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 2 July 2012 that it will consider final rules on conflict minerals and disclosure of government payments by resource extraction companies at an open meeting on 22 August 2012.

- We reported on the SEC's proposed rules and subsequent developments in our previous Newsletters in 2011 and 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 2 July 2012, the SEC also announced that at the same open meeting on 22 August 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 25 April 2012, SEC Chairman Mary Schapiro confirmed during a hearing at the US House Financial Services panel 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, on which we reported in our October 2010 Newsletter, 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 analysed the economic impact of the rule.

Updated Financial Reporting Manual

On 11 July 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.

EU DEVELOPMENTS

Prospectus Directive Developments

In our April 2012 Newsletter, we reported on a draft delegated regulation amending the Prospectus Regulation with effect from 1 July 2012. This delegated regulation was published in the Official Journal last month.

The amendments to the Prospectus Regulation made by the delegated regulation cover the following areas:

- the mandatory format and content of key information to be included in the prospectus summary, which may not exceed the longer of seven percent of the length of the prospectus or 15 pages; and
- the new proportionate disclosure regime that will be available for prospectuses used
  - in connection with rights issues by issuers with shares traded on a regulated market or multilateral trading facility; and
  - by small and medium sized enterprises and by companies with reduced capitalisation, i.e., with an average market capitalisation of less than €100 million.

The European Commission's delegated regulation is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:150:0001:0065:EN:PDF.

A further draft delegated regulation was published by the European Commission on 4 June 2012 to make the following additional amendments to the Prospectus Regulation with effect from 1 July 2012:

- disclosure requirements relating to the consent of, and acceptance of responsibility by, an issuer for the use of its prospectus in a retail cascade offering of its securities by financial intermediaries; and
- clarification of the disclosure requirements in the Prospectus Regulation with respect to
  - indices composed by the issuer; and
  - independent accountants' or auditors' reports on profit forecasts and estimates.

This draft delegated regulation, pending its publication in the Official Journal, is available at: http://register.consilium.europa.eu/pdf/en/12/st10/st10789.en12.pdf.

Last month, the European Securities and Markets Authority ("ESMA") updated its "Prospectus: Questions and Answers" publication which provides non-binding guidance in response to a series of common questions on the operation of the Prospectus Directive and Regulation. The update concerned certain disclosure in respect of taxes on income from securities withheld at source and applications for admission to trading on a regulated market of an "up to" specified figure of Global Depositary Receipts. A further update was issued on 2 July 2012 to give guidance on the formatting requirements of the prospectus summary following the changes to the Prospectus Regulation mentioned above.

This latest, 15th updated edition, of ESMA's Prospectuses: Questions and Answers is available at: http://www.esma.europa.eu/content/Questions-and-Answers-Prospectuses-15th-updated-version.

Lastly, on 20 June 2012, ESMA issued a consultation on draft technical advice to the European Commission on amendments to the Prospectus Regulation, which would clarify the disclosure requirements under the Regulation for convertible and exchangeable securities. Comments on the draft advice are requested by 20 August 2012.

ESMA's consultation paper is available at: http://www.esma.europa.eu/content/ESMA%E2%80%99s-technical-advice-possible-delegated-acts-concerning-Prospectus-Directive-amended-Di-2.

Update on Short Selling Regulation

On 20 April 2012, ESMA published final technical advice on possible delegated acts with respect to the EU Regulation on Short Selling and certain aspects of Credit Default Swaps (the "Short Selling Regulation").

- The Short Selling Regulation will, amongst other things, increase transparency on short positions held by investors in certain securities and empower Member States to intervene where there are adverse developments constituting a serious threat to financial stability or to market confidence. The Short Selling Regulation will apply from 1 November 2012.

The final advice of ESMA includes, amongst other things, the following changes to the draft advice it published earlier this year and on which we reported in our April 2012 update:

- the exemptions from the definition of a short sale have been extended to exclude the selling of financial instruments by someone who has exercised an option or a similar claim on them, provided the securities will be delivered so that settlement can be effected when it is due;
- amendments to the determination and calculation of long and short positions in sovereign debt, including the notification thresholds;

- amendments to the method of calculating positions when different entities in a group have long or short positions or for fund management activities related to separate funds; and
- amendments to the advice on cases in which a sovereign CDS transaction is considered to be hedging against a default risk.

The ESMA final advice is available at: http://www.esma.europa.eu/content/ESMAs-Technical-Advice-possible-delegated-acts-short-selling-and-certain-aspects-CDS.

In this context, on 29 June 2012, the European Commission announced the adoption of an implementing regulation and adopted a delegated regulation, both in relation to the Short Selling Regulation, which reflect the draft technical standards published by ESMA.

- The implementing regulation, which sets out technical standards regarding the means for public disclosure of net positions in shares and the format of the information to be provided to ESMA, will enter into force the day following its publication in the Official Journal and will apply from 1 November 2012.
- The delegated regulation, which sets out details of the information on short positions that must be notified to competent authorities and disclosed to the public, will apply from 1 November 2012, but is subject to a maximum two-month objection period by the European Parliament and the EU Council.

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

The implementing regulation in draft form is available at: http://ec.europa.eu/internal_market/securities/docs/short_selling/20120629-technical-standards_en.pdf.

The delegated regulation is available at: http://ec.europa.eu/internal_market/securities/docs/short_selling/20120629-regulatory_en.pdf.

Inside Information: an ECJ Decision

On 28 June 2012, the European Court of Justice ("ECJ") issued its decision in the case of Markus Geltl v. Daimler AG. This was in response to two questions referred to it by the German Federal Court of Justice in connection with proceedings brought by certain investors in Daimler AG who alleged that Daimler had failed to comply with its obligation under the EU market abuse rules to inform the market of the forthcoming replacement of its chairman and that they had suffered loss as a consequence.

The two questions concerned:

- Whether, in a developing situation (or "protracted process"), there may be regarded as "precise information" for the purposes of the market abuse rules not only the future event or outcome, but also the intermediate steps of the developing situation or process which are connected with bringing about the future event or outcome. The ECJ answered "yes" to this question.
- Whether the expression "may reasonably be expected" (which is used in the definition of "inside information" in article 1 of the Market Abuse Directive 2003/124/EC to say that information is "precise" if it indicates circumstances that exist or "may reasonably be expected to come into existence" or an event which has occurred "or may reasonably be expected to do so") requires or implies that the probability is predominant or high; or whether it depends on the extent of the effects of the circumstances or event on the issuer, so that where the prices of its securities would be highly likely to be affected by the occurrence, it is sufficient if the occurrence of the future circumstance or event is uncertain but not improbable.
- In answer to this second question, the ECJ held that "may reasonably be expected"
  - does not catch circumstances or events which would be implausible;
  - rather, it must appear, on the basis of an overall assessment of the factors existing at the relevant time, that there is a "realistic prospect" that the circumstance or event will come into existence or occur; and
  - does not mean that the magnitude of the effect of the circumstances or event on the prices of the issuer's securities must be taken into consideration.

This latter point was significant since at an earlier stage in the proceedings before the ECJ, the Advocate-General had given an opinion saying that where the potential of the circumstances or event for affecting the prices of the issuer's securities is significant, it is sufficient that the occurrence of the future circumstances or event, albeit uncertain, is not impossible or improbable.

The ECJ clearly rejected this approach, and this has generally been welcomed since the contrary approach could have forced issuers into having to announce details of future circumstances or events that may be unlikely to occur but which, if they did, would have a significant effect on the prices of the issuer's securities.

The ECJ's decision is available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=124466&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2163855.

Opinion on Proposed Financial Transaction Tax

At the plenary session on 23 May 2012, the European Parliament adopted its opinion on the European Commission's proposal for a directive on a common system of financial transaction tax ("FTT") in the EU.

In summary, the European Parliament's opinion:

- states that the tax rates proposed by the European Commission, namely 0.1 percent for shares and bonds and 0.01 percent for derivatives, are suitable and that pension funds should be the only sector exempted from the tax;
- incorporates an 'issuance principle' into the proposal, which, if passed into legislation, will ensure that financial institutions located outside the EU will also be obliged to pay the FTT if they trade securities which were originally issued within the EU;
- approves the European Commission's 'residence principle', meaning that shares which are issued outside the EU but are subsequently traded by at least one institution which is established within the EU would be caught by the directive;
- links payment of the FTT to the acquisition of legal ownership rights. As a result, if the buyer of a security does not pay the FTT, the buyer will not be legally certain of owning such security; and
- maintains the European Commission's proposed timetable with a deadline of 31 December 2013 for Member States to adopt implementing laws and 31 December 2014 for entry into force of these laws.

The European Parliament's press release is available at: http://www.europarl.europa.eu/pdfs/news/expert/infopress/20120523IPR45627/20120523IPR45627_en.pdf.

The text of the European Parliament's opinion is available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20120523+SIT+DOC+WORD+V0//EN&language=EN.

Update on Market Abuse Regulation

On 21 June 2012, the Presidency of the EU Council issued a progress report on the proposed Market Abuse Regulation ("MAR").

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

According to the progress report, the Presidency considers the outstanding key issues to be the definition and time of publication of inside information, the defences to insider dealing, accepted market practices, the powers of competent authorities, administrative sanctions and the publication of sanctions.

The progress report is available at: http://register.consilium.europa.eu/pdf/en/12/st11/st11535.en12.pdf.

On 11 June 2012, the Presidency also issued a compromise proposal text of MAR, highlighting the changes to the previous version, published on 3 May 2012.

The compromise proposal text is available at: http://register.consilium.europa.eu/pdf/en/12/st11/st11183.en12.pdf.

Equivalence of Third Country National GAAP

On 13 April 2012, the European Commission published the following delegated regulations and implementing decision in the Official Journal, taking effect from 1 January 2012. The delegated regulations are in the same form as published in December 2011:

- a delegated regulation ((EU) No 311/2012) amending the Prospectus Regulation and dealing with the expiry, on 31 December 2011, of the transitional period for which the European Commission granted equivalence to Canada, South Korea, China and India in respect of their national GAAPs, allowing these GAAPs to be treated as equivalent to IFRS as adopted by the EU. From 1 January 2012, the European Commission has granted permanent equivalence to, and therefore third country issuers may present their historical financial information in accordance with, the GAAPs of Canada, South Korea and China. The transitional equivalence status of India has been extended until 31 December 2014, to allow India to complete the process of adopting IFRS.
- a delegated regulation ((EU) No 310/2012) amending earlier Regulation (EC) No 1569/2007, which established a mechanism for determining the equivalence of accounting standards applied by third country issuers of securities pursuant to the Prospectus Directive and the Transparency Directive. The delegated regulation extends the period for accepting third country accounting standards until 31 December 2014, to cater for countries that are still working to adopt IFRS in their national systems and receive an equivalence status.
- an implementing decision dated 11 April 2012, permitting the use by third countries' issuers of Chinese, Canadian and South Korean GAAP in the preparation of their consolidated financial statements and extending the transitional equivalence status of Indian GAAP in this regard until 31 December 2014.

The European Commission's delegated regulation No 311/2012 is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:103:0013:0014:EN:PDF.

The European Commission's delegated regulation No 310/2012 is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:103:0011:0012:EN:PDF.

The European Commission's implementing decision is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:103:0049:0050:EN:PDF.

Amendment to Credit Rating Agencies Regulation

On 25 May 2012, the EU Council published its general approach setting forth its view on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on Credit Rating Agencies ("CRA III"). The approach included amendments to the proposed Regulation that were announced by the EU Council on 21 May 2012 and that will now be considered by the European Parliament.

The aim of CRA III is to amend Regulation (EC) No 1060/2009 to reduce investors' over-reliance on external credit ratings, mitigate the risk of conflict of interest in credit rating activities and increase transparency and competition in the sector.

The European Council's approach is available at: http://register.consilium.europa.eu/pdf/en/12/st10/st10452.en12.pdf.

Update on the European Market Infrastructure Regulation

On 15 June 2012, the EU Council published a revised text of the European Market Infrastructure Regulation ("EMIR"), reconciling the texts adopted by the European Parliament on 29 March 2012 and the EU Council on 11 April 2012.

- We have reported on EMIR on various occasions in our previous Newsletters.

At its meeting on 4 July 2012, the European Council adopted EMIR. The Council has accepted the amendments voted for by the European Parliament. EMIR will apply from the end of 2012 and still needs to be published in the Official Journal of the European Union.

The text of the adopted EMIR is available at: http://register.consilium.europa.eu/pdf/en/12/pe00/pe00008.en12.pdf.

ESMA Level II Consultation on EMIR Technical Standards

On 25 June 2012, ESMA published a consultation paper on the draft regulatory and implementing technical standards it is required to prepare for EMIR. ESMA held an open hearing on the consultation on 12 July 2012, and the consultation will close on 5 August 2012.

Under EMIR, ESMA is required to draft these standards, covering implementing measures for the application of the clearing obligation for risk mitigation techniques, exemptions for non-financial counterparties and intra-group transactions, requirements for CCPs and reporting and disclosure obligations for trade repositories.

The ESMA consultation paper and further information are available at: http://www.esma.europa.eu/consultation/Consultation-Draft-Technical-Standards-Regulation-OTC-Derivatives-CCPs-and-Trade-Repo-0.

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 organisation 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 summarises 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/.

UK DEVELOPMENTS

Executive Pay Reform

On 20 June 2012, the UK Government announced the details of its final proposals on directors' remuneration.

The key proposals include:

- a binding vote on future remuneration policy at least every three years. Shareholder approval will be required if the directors wish to change the policy;
- the future remuneration policy will have to include details of a company's approach to exit payments and therefore this will be subject to the binding vote. The report will not be required to be circulated to shareholders as part of the directors' remuneration report where no changes in a previously approved policy are proposed, but a link to the existing policy on the company's website will have to be given;
- when a director leaves, the company will be required to announce, as soon as reasonably practicable, on its website the amount that the director received;
- an annual advisory vote on the implementation of the remuneration policy, including actual sums paid in the previous year;
- the implementation report must include disclosure of a single total figure of remuneration, including fixed and variable elements as well as pension provision, for each director;
- both binding and advisory votes will require an ordinary resolution;
    - the UK Government had raised for consultation the possibility of the future remuneration policy vote requiring more than just a simple majority of votes. We reported on this consultation in our April 2012 Newsletter; and
- if the binding vote on the future remuneration policy fails, the company must continue with its existing policy until a revised policy is agreed. If the advisory vote on the implementation report fails, the company must put its overall pay policy back to its shareholders for re-approval in a binding vote at its next annual general meeting.

On 28 June 2012, the UK Government introduced amendments to the Enterprise and Regulatory Reform Bill to give effect to the above proposals by way of amendment to the existing directors' remuneration reporting requirements of the Companies Act 2006. On 27 June 2012, the Department for Business Innovation & Skills ("BIS") launched a consultation on draft regulations to amend the existing requirements with respect to directors' remuneration reports, in line with the above proposals.

The Financial Reporting Council (the "FRC") has also announced that, once the legislative proposals have been finalised, it will consult on changes to the UK Corporate Governance Code to address issues relating to remuneration, including requiring companies to publish a statement where a substantial minority have voted against the binding or advisory vote.

The FRC's announcement is available at: http://corporate.practicallaw.com/9-519-9675.

The UK Government's proposals are available at: http://www.bis.gov.uk/assets/biscore/business-law/docs/d/12-900-directors-pay-guide-to-reforms.pdf.

The BIS consultation on the draft regulations with respect to directors' remuneration reports is available at: http://www.bis.gov.uk/assets/biscore/business-law/docs/d/12-888-directors-pay-consultation-remuneration-reporting.pdf.

UK Corporate Governance and Stewardship Code Reviews

On 20 April 2012, the FRC announced a consultation on proposed revisions to the UK Corporate Governance Code and its accompanying Guidance on Audit Committees to give effect to its Effective Company Stewardship proposals. The FRC also announced consultations on updates to the Stewardship Code and published a consultation paper on proposed revisions to International Standards on Auditing (UK and Ireland) to give effect to its Effective Company Stewardship proposals.

The UK Corporate Governance Code sets out good practice for UK listed companies on issues such as board composition and effectiveness, risk management, audit committees and relations with shareholders. The Stewardship Code, first published in 2010, sets out good practice for institutional investors on monitoring and engaging with investee companies and reporting to clients and beneficiaries.

The proposed changes to the UK Corporate Governance Code include:

- requesting FTSE 350 companies to put the external audit contract out to tender at least every ten years;
- asking boards to explain why they believe their annual reports are fair and balanced and provide the information necessary to enable users to assess the company's performance, business model and strategy;
- encouraging more meaningful reporting by audit committees; and
- providing more guidance on explanations that should be provided to shareholders when a company chooses not to follow the Code, including whether any deviations from the Code are intended to be limited in time.

The revised Code will also embody the provisions previously announced requiring boards to report on their gender diversity policies.

The proposed changes to the audit committee guidance are mainly directed at:

- extending the remit of the audit committee to include consideration of the whole annual report, including the narrative report, with a view to determining whether it provides the information necessary for users to assess the company's performance, business model and strategy and whether the annual report, viewed as a whole, is fair and balanced;
- requiring the audit committee to report to the board on this issue, and for the board subsequently to publish this assessment in the annual report; and
- requiring the audit committee also to report to the board, and in its own report in the annual report, the issues considered in relation to the financial statements, including how these issues were addressed and its assessment of the effectiveness of the external audit and the approach taken to the appointment or reappointment of the external auditor, including the steps taken in deciding whether to recommend that the audit be put out to tender.

The changes to the auditing standards are concerned with:

- enhancing auditor communications by requiring the auditor to communicate to the audit committee information that the auditor believes the committee will need to understand the significant professional judgments made in the audit; and
- extending auditor reporting by requiring the auditor to report, by exception, if the board's statement of

why the annual report is fair and balanced is inconsistent with the knowledge acquired by the auditor in the course of performing the audit, or if the matters disclosed in the report from the audit committee do not appropriately address matters communicated by the auditor to the committee.

The FRC's consultation document on the proposed revisions to the UK Corporate Governance Code and Guidance to Audit Committees is available at: http://www.frc.org.uk/getattachment/4794e206-50a7-45d1-815c-7393046fef33/Consultation-Dicument-revisions-to-teh-UK-Corporat.aspx.

The appendices to the above consultation, which include details of the proposed changes to the Code and Guidance, are available at: http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Consultation-Dicument-revisions-to-teh-UK-Corporat/Appendices-to-Consultation-Document.aspx.

The FRC's consultation on revisions to the International Standards on Auditing (UK and Ireland) is available at: http://www.frc.org.uk/getattachment/5adf6178-bdbf-4ee1-abf3-d12e9fd0a63d/Consultation-paper-ECS-proposed-additions-to-ISAs.aspx.

The proposed changes to the Stewardship Code include:

- clarifying what is meant by stewardship, and the respective responsibilities of asset owners and asset managers; and
- asking investors to disclose their policy on stock lending, and whether they recall lent stock for voting purposes.

The FRC's Stewardship Code consultation and the proposed revisions to that Code are available at: http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Consultation-Document-Revisions-to-the-UK-Stewards.aspx.

Subject to the outcome of the consultations, all the proposed changes will apply to financial years beginning on or after 1 October 2012.

UK Proposes Mandatory Carbon Reporting for Quoted Companies

On 20 June 2012, UK Deputy Prime Minister Nick Clegg announced that the UK Government plans to introduce regulations from April 2013 requiring all UK companies whose shares are officially listed on the Main Market of the London Stock Exchange and certain other exchanges to report on their greenhouse gas ("GHG") emissions. Deputy Prime Minister Clegg's announcement followed a period of consultation by the Department for Environment, Food and Rural Affairs ("Defra"), which is the agency charged with administering the regulations. On 25 July 2012, Defra published for consultation The Greenhouse Gas Emissions (Directors' Reports) Regulations 2013. The regulations have been issued pursuant to section 416(4) of the Companies Act 2006. It is intended that the final regulations will take effect for reporting years ending after 6 April 2013 or 1 October 2013. They will be reviewed in 2015 in order to decide whether to extend the approach to all large companies from 2016.

Our related client publication is available at: http://www.shearman.com/uk-proposes-mandatory-carbon-reporting-for-quoted-companies-07-06-2012/.

FSA Letter on "Cleansing Announcements"

On 12 April 2012, a committee of the City of London Law Society (the "CLLS") published a letter from the FSA responding to a concern that it had raised about an earlier statement made by the Financial Services Authority (the "FSA") concerning cleansing announcements. The FSA had stated that once a party had been "wall crossed" and made privy to inside information, it would only be released from the restrictions on trading that would thereby arise when the relevant information was made public or "in cases where a transaction does not proceed, when an announcement is made to the market stating that a transaction was contemplated, but did not proceed" (a "cleansing announcement").

The CLLS had expressed concern that in all cases issuers would have to make a cleansing statement when information is provided about a possible transaction. Although it agreed that a recipient of inside information will be unable to trade for as long as it remains inside information, the CLLS did not believe that it would always be the case that the fact that a capital raising is not going ahead would remain inside information.

The FSA confirmed in its letter of response that:

- it agrees that, in some circumstances, the fact that a previously proposed capital raising is no longer proceeding will not necessarily constitute inside information; and

- in situations where information is no longer inside information, a cleansing announcement will not be necessary. The FSA, however, expects advisers to consider carefully whether that is in fact the case.

The FSA's response is available at: http://www.citysolicitors.org.uk/FileServer.aspx?oID=1167&lID=0.

The Sharman Inquiry's Final Report

On 13 June 2012, the Sharman Inquiry, set up by the FRC to consider the lessons to be learnt following the financial crisis for companies and auditors in addressing going concern and liquidity risks, published its final report and recommendations.

The Panel's principal recommendations are that:

- the primary purpose of the going concern assessment and reporting should be to reinforce responsible behaviour in the management of going concern risks; and
- going concern considerations made by directors and reviewed by auditors should cover both solvency and liquidity and these should be considered over the business cycle, taking an appropriately prudent view of future prospects.

The Panel recommends that the FRC should:

- seek to clarify and harmonise differing definitions of going concern and related risks in accounting, auditing and governance requirements, working with the international bodies;
- review its Going Concern and Liquidity Risks Guidance for Directors (2009) to ensure that the going concern assessment
  - is integrated with business planning and risk management;
  - focuses as appropriate on both solvency and liquidity risks (including risks to the entity's business model or capital adequacy) that could threaten the entity's survival through the cycle; and
  - includes stress tests of liquidity and solvency;
- integrate going concern reporting with its Effective Company Stewardship proposals, to present a fuller picture of the principal risks the entity is facing in pursuit of its business model and strategy rather than just highlighting going concern risks when there are significant doubts about the entity's survival;
- enhance the role of the auditor by seeking an explicit statement in the auditor's report about whether the auditor has anything to add to, or emphasise in relation to, the narrative disclosures made by the directors about the robustness of the process of assessing going concern and its outcome; and
- take a more systematic approach to learning lessons when significant companies fail or suffer significant financial or economic distress but nonetheless survive.

The Panel also decided that a special going concern disclosure regime should not be required for banks.

The Sharman Inquiry's final report is available at: http://www.frc.org.uk/getattachment/591a5e2a-35d7-4470-a46c-30c0d8ca2a14/Sharman-Inquiry-Final-Report.aspx.

FRC Update – Country and Currency Risks in Interim Reports

On 15 June 2012, the FRC published a further update for directors of UK listed companies to assist them in responding to the continuing economic uncertainties facing a number of countries when preparing interim financial reports. The guidance follows on from guidance issued by the FRC in January 2012 in advance of the main annual reporting season and has been updated to reflect the FRC's views on developments since that earlier guidance.

- We reported on the FRC's January 2012 guidance in our April 2012 Newsletter.

The update draws attention to a number of significant issues that need to be considered by directors, including:

- the company's exposure to country risk, direct or to the extent practical indirect, through financial instruments, through foreign operations, and through exposure to trading counterparties (customers and suppliers);
- the impact of austerity measures being adopted in countries on, among others, the company's

forecasts, impairment testing and going concern considerations;

- possible consequences of currency events that are not factored into forecasts but may affect reported exposures and the sensitivity testing of impairment or going concern considerations; and
- post balance sheet date events that require enhanced disclosures to inform adequately investors and other users.

The FRC's update is available at: http://www.frc.org.uk/getattachment/2d569e5e-71f8-4215-947a-c47836fc18b2/An-update-for-directors-of-listed-companies-country-and-currency-risk-interim-reports.aspx.

Changes to Prospectus Directive and Rules

The amendments made by the Amending Prospectus Directive (2010/73/EU) and to the Prospectus Regulation (809/2004/EC) discussed above have been implemented in the UK as from 1 July 2012 by:

- the Prospectus Regulations 2012, which amend the Financial Services and Markets Act 2000;
  - two of the Amending Prospectus Directive's changes, which increased two thresholds for exemption from the need to produce a prospectus, had already been implemented in the UK on 31 July 2011;
- the FSA's Prospectus Amending Directive Instrument 2012, which amends parts of the FSA Handbook (largely the Prospectus Rules); and
- the FSA's Prospectus Regulation (Amendment) Instrument 2012, which has amended the Prospectus Rules to reflect the amendments made to the Prospectus Regulation (809/2004/EC).

As and when the outstanding European Commission Delegated Regulation referred to above under "EU Developments" enters into force and the further amendments which it makes to the Prospectus Regulation (809/2004/EC) become effective, the FSA will make further corresponding amendments to the Prospectus Rules.

The Prospectus Regulations 2012 is available at: http://www.legislation.gov.uk/uksi/2012/1538/pdfs/uksi_20121538_en.pdf.

The FSA's Prospectus Amending Directive Instrument 2012 is available at: http://media.fsahandbook.info/Legislation/2012/2012_29.pdf.

The FSA's Prospectus Regulation (Amendment) Instrument 2012 is available at: http://media.fsahandbook.info/Legislation/2012/2012_34.pdf.

Further Listing Rules Changes

While the FSA prepares a response to its consultation on proposed changes to the Listing Rules, which closed in April 2012 (and on which we reported in our April 2012 Newsletter) and was largely concerned with premium listings, the FSA announced in its quarterly consultation on 6 June 2012 two minor set of changes to the Listing Rules:

- *Extension of exemption from cancellation of listing requirements*. The FSA proposes extending the exemption enjoyed by premium listings from complying with the usual cancellation of listing requirements, e.g., market announcements and 20 business days delay, in cases of schemes of arrangement or insolvency proceedings involving the issuer, to equity shares with a standard listing, to certain overseas issuers and on a wider range of insolvency or reconstruction measures; and
- *Annual notification requirements for sponsors*. The FSA proposes amending the timing and format of the annual notification requirements that apply to sponsors of issuers with a premium listing.

The FSA's quarterly consultation paper (CP 12/11, No. 33) is available at: http://www.fsa.gov.uk/static/pubs/cp/cp12-11.pdf.

Deferred Prosecution Agreements in the UK

On 17 May 2012, the Ministry of Justice ("MoJ") published a consultation paper on deferred prosecution agreements ("DPAs"), a proposed new enforcement tool to tackle economic crime committed by commercial organisations. While DPAs have long been used by prosecutors in the US, this is a further step by the UK Government to tackle white collar crime. The MoJ has invited interested parties to comment on its proposals to help determine whether they are sensible, proportionate and likely to make a genuine difference. The deadline for responding to the consultation is 9 August 2012.

A DPA is an agreement between a prosecutor and a commercial organisation, under which the prosecutor will lay, but not immediately proceed with, criminal charges against the organisation. The prosecution will only proceed if the commercial organisation fails to meet certain agreed terms and conditions as stated in the DPA. The agreed terms and conditions are likely to include financial penalties, reparation to victims, confiscation of the profits of wrongdoing and measures to prevent future offending. While the consultation paper refers to "commercial organisations", the MoJ states that "many of the difficulties [referred to in the consultation paper] apply with equal force to large partnerships or trusts". It appears that the proposals in the consultation paper will not enable the SFO to enter into DPAs with individuals who are investigated for economic crimes.

Currently, prosecutors in the UK can either bring a formal prosecution against a commercial organisation for committing a criminal offence or pursue a civil recovery order. Both of these options can be expensive, involve lengthy investigations and in many instances are regarded as ineffective. The MoJ states that the purpose of DPAs is to give prosecutors the "flexibility to secure appropriate penalties for wrongdoing, at the same time as achieving better outcomes for victims" without the costs, uncertainty and risks involved in formal criminal prosecutions. The MoJ also hopes that DPAs will encourage organisations to self-report economic crime, with the incentive for doing so being to defer, and possibly avoid, criminal prosecution. However, self reporting by itself cannot guarantee a decision will be made not to prosecute. David Green QC, Director of the Serious Fraud Office, has suggested in a recent speech that the SFO's policy in relation to DPAs will be to reserve them for admissions by corporates that are "realistic and factual".

The consultation paper is available at: https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements.

ICSA Voting Guidance

On 16 April 2012, the Institute of Chartered Secretaries and Administrators Registrars Group (the "ICSA Registrars Group") published a guidance note on the practical issues surrounding the voting process at general meetings of quoted companies. The guidance note has been prompted by an increasing awareness of a number of misconceptions in the market regarding how the end to end process of voting at general meetings should be managed.

Areas covered by the guidance note include:

- the meeting notice;
- the proxy deadline and record date;
- the voting period; and
- what should happen after the proxy deadline has passed.

The guidance note is available at: http://www.icsa.org.uk/assets/files/pdfs/guidance/Guidance%20notes%202012/ICSA%20Registrars%20Group%20Best%20Practice%20Note%20-%20Practical%20issues%20around%20voting%20at%20general%20meetings%20-%20April%202012.pdf.

GC100 Listing Rules Guidelines

The Listing Rules Working Group of the GC 100, a grouping of general counsel and company secretaries of FTSE 100 companies, updated its guidance on compliance with the Listing Rules and Disclosure and Transparency Rules ("DTRs") and published the revised guidance in conjunction with Practical Law Company on 24 May 2012.

The guidance is produced in three parts:

- Part I of the guidance focuses on the procedures, systems and controls required to be established to ensure compliance generally with the Listing Rules and the disclosure of inside information under the DTRs.
- Part II of the guidance focuses on procedures to ensure compliance with the DTR requirement to maintain lists of persons privy to inside information (insider lists).
- Part III of the guidance is concerned with the procedures required to comply with:
  - the Listing Rules' requirements for directors and senior managers' securities dealings to be conducted in accordance with the "Model Code"; and
  - the DTR requirements for disclosure of securities dealings by directors and senior managers.

Part I of the guidance is available at: http://www.practicallaw.com/9-519-0929.

Part II of the guidance is available at: http://www.practicallaw.com/4-518-7156.

Part III of the guidance is available at: http://www.practicallaw.com/9-518-6569.

DEVELOPMENTS SPECIFIC TO FINANCIAL INSTITUTIONS

EU Developments

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 analysing 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 standardised 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.

Update on MiFID Reform

The EU Council published compromise proposals for the reform of the Markets in Financial Instruments Directive ("MiFID") on the proposed Directive ("MiFID II") and Regulation ("MiFIR"). The new proposals have been prepared as a result of discussions in meetings of the Working Group on Financial Services.

- The proposals to reform MiFID were originally published in October 2011 and we reported on them in our January 2012 Newsletter.

The compromise MiFID II proposal is available at: http://register.consilium.europa.eu/pdf/en/12/st11/st11645.en12.pdf.

The compromise MiFIR proposal is available at: http://register.consilium.europa.eu/pdf/en/12/st11/st11646.en12.pdf.

The European Parliament is currently scheduled to consider MiFID II at its plenary session from 10 to 13 September 2012. The timing of the introduction of the new legislation, however, has not been finalised, and it is unlikely to be implemented before 2015.

Update on Capital Requirements Directive

As part of its proposed reforms to the Capital Requirements Directive, the EU Council published the consolidated texts of its general approach for the amendments referred to as "CRD IV" in May 2012.

- We originally reported on the CRD IV compromise proposals in our April 2012 Newsletter.

CRD IV will replace the current Capital Requirements Directives (2006/48 and 2006/49) with a new Capital Requirements Directive and a new Capital Requirements Regulation.

- The new Directive will govern access to deposit-taking activities and the prudential supervision of credit institutions and investment firms. The general approach document relating to the new Directive is available at: http://register.consilium.europa.eu/pdf/en/12/st10/st10100.en12.pdf.
- The new Regulation will provide prudential requirements for credit institutions and investment firms. The general approach document relating to the new Regulation is available at: http://register.consilium.europa.eu/pdf/en/12/st10/st10099.en12.pdf.

EU Banking Union Proposals and UK Response

The European Commission has updated its memorandum on a proposed EU banking union that was originally published on 6 June 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 10 July 2012, the European Commission published a press release, which includes remarks made by Olli Rehn, Commission Vice-President, at the Eurogroup meeting held on 10 July 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.

In a speech at the Mansion House on 14 June 2012, the UK Chancellor stated that while the UK Government supports the concept of an EU banking union, the UK will not take part in the banking union once it is adopted.

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.

The Chancellor's speech is available at: http://www.hm-treasury.gov.uk/press_47_12.htm.

UK Developments

UK Financial Services Bill Report Published

A Report on the Financial Services Bill 2012-13 (the "FS Bill") was published in May 2012 by the House of Lords Regulatory Reform Committee, along with a memorandum from HM Treasury on the delegated legislative powers contained within the FS Bill.

The Report discusses the use of delegated powers in the current draft of the FS Bill. While the Committee considers that most of the delegated powers are well founded in precedent, it considers that the powers given to HM Treasury in clause 91 of the FS Bill should be limited, to protect consumer rights and duties. In its current form, clause 91 relates to the proposed transfer of consumer credit regulation from the Office of Fair Trading to the Financial Conduct Authority (the replacement of the current FSA) and gives HM Treasury broad powers to bring about that transfer.

The Report is available at: http://www.publications.parliament.uk/pa/ld201213/ldselect/lddelreg/21/21.pdf.

The HM Treasury Memorandum is available at: http://www.parliament.uk/documents/DPRR/2012-13/Financial%20Services%20Bill/Financial-Services-Bill-Delegeated-Powers-Memo-24-05-12.pdf.

SHEARMAN & STERLING LLP

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.

If you wish to receive more information on the topics covered in this publication, you may contact your usual Shearman & Sterling representative or any of the following:

ASIA

Alan Seem
Shanghai/Beijing
+86.21.6136 5018/+86.10.5922.8002
aseem@shearman.com

Matthew Bersani
Hong Kong
+852.2978.8096
mbersani@shearman.com

Peter Chen
Hong Kong
+852.2978.8012
peter.chen@shearman.com

Colin Law
Hong Kong
+852.2978.8090
colin.law@shearman.com

Vanessa Poon
Hong Kong
+852.2978.8057
vanessa.poon@shearman.com

Jayesh Wadhwani
Hong Kong
+852.2978.8086
jayesh.wadhwani@shearman.com

Andrew Schleider
Singapore
+65.6230.3882
aschleider@shearman.com

Masahisa Ikeda
Tokyo
+813.5251.0232
masahisa.ikeda@shearman.com

EUROPE

Pamela M. Gibson
London
+44.20.7655.5006
pgibson@shearman.com

Apostolos Gkoutzinis
London
+44.20.7655.5532
apostolos.gkoutzinis@shearman.com

Richard Kelly
London
+44.20.7655.5788
richard.kelly@shearman.com

Laurence Levy
London
+44.20.7655.5717
laurence.levy@shearman.com

Jacques B. McChesney
London
+44.20.7655.5791
jacques.mcchesney@shearman.com

Monica McConville
London
+44.20.7655.5904
monica.mcconville@shearman.com

Richard J.B. Price
London
+44.20.7655.5097
rprice@shearman.com

Barnabas W.B. Reynolds
London
+44.20.7655.5528
barney.reynolds@shearman.com

David Dixter
London
+44.20.7655.5633
david.dixter@shearman.com

Babett S. Carrier
London
+44.20.7655.5945
bcarrier@shearman.com

Paul Haut
London
+44.20.7655.5103
paul.haut@shearman.com

Simon Jerrum
London
+44.20.7655.5727
simon.jerrum@shearman.com

Michael Scargill
London
+44.20.7655.5161
michael.scargill@shearman.com

Marc O. Plepelits
Frankfurt
+49.69.9711.1299
mplepelits@shearman.com

Tobia Croff
Milan
+39.02.0064.1509
tobia.croff@shearman.com

Fabio Fauceglia
Milan
+39.02.0064.1508
fabio.fauceglia@shearman.com

Michael S. Bosco
Rome
+39.06.697.679.200
michael.bosco@shearman.com

Domenico Fanuele
Rome
+39.06.697.679.210
dfanuele@shearman.com

Guillaume Isautier
Paris
+33.1.53.89.70.00
gisautier@shearman.com

Hervé Letréguilly
Paris
+33.1.53.89.71.30
hletreguilly@shearman.com

John J. Madden
Paris
+33.1.53.89.71.80
jmadden@shearman.com

Cyrille Niedzielski
Paris
+33.1.53.89.89.30
cniedzielski@shearman.com

Bertrand Sénéchal
Paris
+33.1.53.89.70.95
bsenechal@shearman.com

Sami L. Toutounji
Paris
+33.1.53.89.70.62
stoutounji@shearman.com

AMERICAS

Abigail Arms
Washington, DC
+1.202.508.8025
aarms@shearman.com

Jerome S. Fortinsky
New York
+1.212.848.4900
jfortinsky@shearman.com

Doreen E. Lilienfeld
New York
+1.212.848.7171
dlilienfeld@shearman.com

Manuel Orillac
New York
+1.212.848.8026
morillac@shearman.com

Antonia E. Stolper
New York
+1.212.848.5009
astolper@shearman.com

Robert C. Treuhold
New York
+1.212.848.7895
rtreuhold@shearman.com

Jeffrey Resetarits
New York
+1.212.848.7116
jeffrey.resetarits@shearman.com

Jennifer Stadler
New York
+1.212.848.5241
jennifer.stadler@shearman.com