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## Update – New Rules Opening the Bond Market to Italian Non-Listed Companies Approved in Final Form: A Move in the Right Direction

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**On August 7, 2012, Italy enacted Law No. 134 (the “Final Law”), which converted into law and approved (introducing certain notable changes) the final version of the new rules originally set out in Law Decree No. 83 dated June 22, 2012 (the “Initial Decree”), eliminating restrictions and decreasing the tax cost of the issuance of bonds by non-listed companies. The Final Law entered into force on August 12, 2012.**

In the process of conversion of the Initial Decree, the Italian Parliament introduced a few discrete yet important changes, which further increase flexibility and create a more favorable regulatory environment for the issuance of bonds by non-listed companies. This client memo will focus only on the key amendments introduced on this subject matter by the Final Law as compared to the Initial Decree and updates, and should be read in conjunction with, our previous client memo “New Rules Open Bond Markets to Italian Non-Listed Companies – Open Season for High-Yield Offerings?”, dated June 28, 2012.<sup>1</sup>

### Key Amendments to the Initial Decree

#### Elimination of Requirements for Issuance of Bonds by Non-listed Companies

Pursuant to the Final Law, the issuance of bonds by non-listed companies will no longer require the appointment of a Sponsor, or that the most recent financial statements of the issuer be audited. Similarly, the bonds no longer need to be placed solely to, and circulate exclusively among, “qualified investors” that are not, either directly or indirectly,

<sup>1</sup> See our Client Publication entitled [New Rules Open Bond Markets to Italian Non-Listed Companies](#).

shareholders of the issuer (however, in order to benefit from the new tax regime on deductibility of interest payments, the bonds will continue to have to be subscribed only by non-shareholder qualified investors<sup>2</sup>).

As a result, non-listed companies will enjoy higher flexibility in connection with the issuance of bonds. This change represents a fundamental improvement, which also solves certain practical issues relating to the appointment of a Sponsor (including, in particular, with respect to the Sponsor's obligation to hold a portion of the issued bonds until maturity).<sup>3</sup>

The foregoing requirements, however, will continue to apply to the issuance of commercial paper (*cambiali finanziarie*) by non-listed issuers.<sup>4</sup>

#### Clarification on the Scope of Application – Revised Definition of “Non-listed Company”

The Final Law amended the Initial Decree to clarify that the new beneficial tax regime on deductibility of interest payments applies to all companies (other than banks or micro-sized companies) that are not issuers of “equity financial instruments” (*strumenti finanziari rappresentativi del capitale*) listed on a regulated market or a multilateral trading facility. This change was key to solving an interpretive issue raised by the prior definition of “non-listed company” contained in the Initial Decree, which could be read to imply that the new more favorable regime on deductibility was not available to companies having any security (debt or equity) listed on a regulated market or a multilateral trading facility.

#### Key Change to Subordinated and/or Participating Bonds

The Final Law decreased from 60 months to 36 months the minimum maturity of subordinated and/or participating bonds that can be issued by non-listed companies (which, for purposes of these rules, are defined as companies – other than banks or micro-sized companies – that are not issuers of financial instruments (debt or equity) listed on a regulated market or a multilateral trading facility).

All of the other rules regarding subordinated and/or participating bonds set forth in the Initial Decree were confirmed without variations.

<sup>2</sup> The relevant provision on deductibility of interest payments refers only to “subscription” of bonds and does not expressly seem to require also that subsequent circulation be limited to “qualified investors” that are not shareholders of the issuer. However, a prudent interpretive approach may need to be adopted, given the rationale and scope of the restriction, which is intended to prevent abusive tax elusive conduct by shareholders. It is, therefore, to be seen how this provision will be interpreted by Italian tax authorities, in particular whether a literal interpretation of the rule will prevail as opposed to a more substantive and systemic interpretation of the same.

<sup>3</sup> Article 32 as amended by the Final Law still contains a general paragraph referring to the obligation of the Sponsor to hold a portion of the issued instruments until maturity. It is probably a drafting mistake given that the Sponsor requirement is no longer applicable to the issuance of bonds by non-listed companies and this very same requirement is already expressly provided for only with respect to the issuance of commercial paper (“*cambiali finanziarie*”) by non-listed companies.

<sup>4</sup> “*Cambiali finanziarie*” represent short-term indebtedness having a maturity of at least one month and not exceeding 36 months.

## Elimination of the Notification Requirement to Tax Authorities

The Final Law eliminated the obligation to notify within 30 days of the date of issue the competent Italian tax authority (*Agenzia delle Entrate*) if the bonds are not listed on a regulated market. Such notification will no longer be necessary.

## Conclusion

The elimination of the general requirements for the issuance of bonds by non-listed companies set forth in the original version of the new rules contained in the Initial Decree and the clarification on the scope of its application significantly simplify and improve the process for issuance of bonds by non-listed companies, solving a few of the issues identified in connection with the first version of the rules set out in the Initial Decree.

There are still a few practical issues that will need to be addressed, in particular with respect to the certification mechanics of the “non-shareholder qualified investor” status, in order to benefit from the new tax regime on deductibility of interest payments. However, overall, the amendments inserted in the Final Law appear to confirm the determination of the Legislature to make the issuance of bonds a concrete alternative resource of corporate financing for Italian non-listed companies.

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

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