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International Securities and Capital Markets*

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The following article summarizes selected changes announced or implemented this year in the regulation of international securities and capital markets in Brazil, Colombia, EU, Germany, India, Malaysia, New Zealand, and the United States.

I. Developments in Brazil

A. BRAZILIAN CAPITAL MARKETS*

Activity in the Brazilian capital markets in 2010 was characterized by a recommencement, after the subprime and subsequent crisis post-2008, of follow-on offerings by some real estate companies in the first semester, a retake of new equity offerings, mainly in the oil & gas and infrastructure industries, and the beginning of a potential new trend, *viz.*

* João Otávio Pinheiro Olivério, Campos Mello Advogados, in cooperation with DLA Piper and Paulo Satoshi Nakamura (São Paulo, Brazil), contributed Part A of Brazil's developments, and Walter Douglas Stuber and Adriana Maria Gödel Stuber, Walter Stuber Consultoria Jurídica (São Paulo), contributed Part B. Carlos Fradique-Mendez and Adriana Carolina Ospina Jiménez, Brigard & Urrutia (Bogotá, Colombia), contributed Colombia's developments. Dr. Manfred Ketzer, Hausmaninger Kletter Rechtsanwälte GmbH, (Vienna, Austria), contributed EU's developments. Dr. Hartmut Krause, Allen & Overy LLP (Frankfurt, Germany), contributed Germany's developments. Ajit Sharma, Trilegal (Mumbai, India), contributed India's developments. Dr. Md Anowar Zahid, Universiti Kebangsaan Malaysia (National University of Malaysia), (Bangi Selangor, Malaysia), contributed Malaysia's developments. David Quigg, John Horner, and Asha Stewart, Quigg Partners (Wellington, New Zealand), contributed New Zealand's developments. Justin Schluth, Widener University School of Law, (Glassboro, New Jersey), contributed Part A of United States' developments, and Walter G. Van Dorn, Jr., and Jeffrey Krilla, SNR Denton US LLP (New York and Washington D.C., respectively, United States), contributed Part B.
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foreign companies raising funds in the local market. As milestones, the volume of securities instruments related to the real estate industry, such as public offerings issued by the Real Estate Investment Funds and the Funds for Securitized Receivables (so-called *CRI*) reached its historical peak in 2010, and the influence of Petrobras' significant stock market offering somehow halted other offerings that were in the pipeline.

Compared to other years, in which the Brazilian Securities and Exchange Commission (CVM) sponsored many discussions about and amendments to capital markets regulation, the Commission in 2010 focused on making its supervision more effective, in particular by punishing infringements of law with hard penalties. Important transactions were scrutinized by CVM, and administrative proceedings regarding these transactions were concluded with violators entering into settlements to dismiss the respective cases. Examples include: (i) insider trading operations (Suzano acquisition of Ripasa, joint acquisition by Petrobras, Braskem and Ultrapar of Ipiranga and Perdigão acquisition of Sadia), (ii) failure to disclose material information (LAEP and Petrobras), and (iii) concerns about manager due diligence over the derivative-currency losses that occurred in some companies during the 2008 turmoil (Aracruz and Sadia). Against this backdrop, the major developments and events in the Brazilian capital markets in 2010 (exclusive of the rule changes applicable to securities analysts, discussed in Part I(B) below) are as follows:

1. *Petrobras Follow-on Offering*

In September 2010, the Brazilian stock market witnessed the biggest equity offering in the world's history: a R$120 billion transaction by Petrobras. The oil company undertook this offering in order to fund its expansion plans. This large offering may have contributed to keeping the number of other equity offerings relatively low during the year, but, now that this deal is concluded, it points to an increase in 2011.

Some questions regarding conflict of interests and the offering's quiet period arose. A few days after the offering was completed, the equity research departments of some bookrunners distributed a report criticizing the transaction economics, but because they had to comply with the quiet period rules, such report was not released during the book-building process. This troublesome situation negatively affected Petrobras' stock price.

2. *Amendments to Corporate Governance Self-regulatory Rules Issued by Bovespa*

Considering the new concerns raised by the São Paulo-based securities exchange BM&F Bovespa to improve the rules for "Novo Mercado," "Nível 1," and "Nível 2" listing segments that comprise self-regulatory best practices of corporate governance that has been carried out by 160 companies so far,[1] additional concepts were discussed by all the participants, with final changes agreed in September. The most important resolution determined that the roles of Chairman of the Board of Directors and Chief Executive Officer cannot be performed by the same person. However, some controversial subjects were not approved, such as: (i) increasing the percentage of Independent Directors participating in the Board from twenty percent to thirty percent (Novo Mercado and Nível 2),

1. *Confira o resultado da proposta de alteração dos regulamentos do Novo Mercado* [Proposed amendment to new market regulations], *Níveis 1 e 2*, BM&F BOVESPA, http://www.bmfbovespa.com.br/empresas/pages/100909NotA.asp?WT.ac=PT_FullBanner-Audiencia_Restrita-2 (last visited Jan. 9, 2011).

(ii) establishing a permanent Audit Committee with one Independent Director (all three segments), and (iii) a mandatory takeover with a threshold of thirty percent in total equity capital, similar to the EU Takeover Directive disposition (Novo Mercado).

3. *BDR Improvements*

After October, certificates backed by shares of blue chip foreign companies are eligible to be traded on BM&F Bovespa, using the non-sponsored Brazilian Depositary Receipt (BDR) program, a specific segment that does not require any direct participation by the relevant foreign company to have its shares traded in Brazil. Some companies included are Apple, Google, Goldman Sachs, Walmart, and Exxon Mobil.

Moreover, it is important to stress that, after January 2010, amendments to the rules of the BDR program, introduced by CVM through Normative Ruling 480, are in full effect. Because BDRs may be backed only by shares issued by foreign companies, and in order to prevent their use by corporations with their main operations in Brazil (which, depending on the corporate structure defined by their shareholders, may not comply with all of the corporate governance rules provided for in Brazilian law), new candidates wishing to participate in this program have to face additional criteria to be registered, *viz.* maintaining a head office outside Brazil and having less than fifty percent of their assets located in Brazil.

4. *Currency control and Tax on Financial Operations (IOF)*

In an attempt by the government to prevent the Brazilian currency from being overvalued relative to the U.S. Dollar, IOF rates were increased from two percent to six percent in respect of transactions by foreign investors in the Brazilian fixed-income market. These changes were effective in October.

B. Securities Analysts in Brazil must obey new rules*

By means of CVM Instruction No. 483 of July 6, 2010, the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários*–CVM) issued new rules applied to the securities analysts,[2] which are valid as of October 1, 2010. The main objectives of these rules are: (a) to modernize and improve the rules of conduct to which analysts are subject, (b) to recognize the responsibilities of the institutions that employ securities analysts, and (c) to strengthen the structure of self-regulation applicable to them. Individuals or legal entities that carry out risk classification activities are not subject to these rules.

A securities analyst is the individual who professionally prepares analysis reports for publication, disclosure or distribution to others, even though restricted to clients. The term "analysis report" means any text, monitoring reports, studies or analyses on specific securities or issuers of certain securities or influence that might assist investors in making investment decisions. Public exhibitions, presentations, meetings, conference calls, and other non-written events, whose content is typical of the analysis report, are also included in the same definition.

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* By Walter Douglas Stuber and Adriana Maria Gödel Stuber.

2. *See* Brazilian Official Gazette of the Union (*Diário Oficial da União* - DOU), July 12, 2010, available at http://www.cvm.gov.br/asp/cvmwww/atos/Atos/inst/inst483.doc.

It is forbidden for a securities analyst: (i) to issue analysis reports in order to obtain improper advantage for himself/herself or for others, (ii) to omit information on conflict of interest, (iii) to negotiate directly or indirectly, in his/her own name or in the name of others, securities that are the object of analysis reports or derivatives backed by such securities for a period thirty days before and five days after the disclosure of the analysis report on such security or its issuer, and (iv) to deal directly or indirectly, on behalf of himself/herself or others, securities that are the object of analysis reports or derivatives backed by these securities that conflict with the recommendations or conclusions expressed in the reports for up to six months from the disclosure of such report, or until the release of a new report on the same issuer or security. The restrictions mentioned in items (iii) and (iv) herein do not apply to trading with shares of investment funds, unless the analyst can influence directly or indirectly the administration or management of the fund, or the investment fund concentrates its investments in industries or businesses covered by the reports produced by the analyst.

The distribution system institutions and securities analyst companies that hire securities analysts must:

(i) supervise the financial activities of the professional analysts related to them to ensure compliance with these regulations;

(ii) develop and implement rules, procedures and adequate internal controls to (a) ensure that the analysts will perform their functions independently, (b) prevent their commercial interests or those of their clients from influencing the analysts' work related to them, (c) identify, manage and eliminate conflicts of interest that may affect the impartiality of the analysts, and (d) ensure that the requirements for the analysis reports are met in all the reports published, disseminated, or distributed;

(iii) ensure that the professionals they bound comply with the set of rules provided for in item (ii) herein;

(iv) disclose such set of rules and any updates thereto in their webpage;

(v) immediately inform CVM and/or the accrediting entity about any acts committed by the analysts that may be deemed to be an evidence of violation of the CVM rules or non-compliance of the norms of the code of professional conduct; and

(vi) physically segregate the location where the team of analysts carries out its activities from the location of the other activities performed by the company.

The organizational structure of these companies should not allow an individual whose duties are potentially incompatible with the fairness opinion issued by the analyst to supervise him/her or otherwise have interference on the content of the analysis reports or on the remuneration of the analyst. The compensation of analysts should be structured so as to preserve their impartiality. The analysis team should be formed by at least thirty percent of accredited analysts until December 31, 2010, fifty percent of accredited analysts until December 31, 2011, and seventy percent of accredited analysts until December 31, 2012.

II. Developments in Colombia*

Recent regulatory changes in the Colombian capital markets reflect Colombia's newfound economic prominence and increased level of financial sophistication.

Two important regulatory changes were introduced in 2010: (i) Decree 2555 of 2010[3] that unified certain decrees and regulations in the area of finance, securities, and reinsurance, and that now includes regulations on the offering of cross-border financial and securities services in Colombia (formerly embodied in the Decree 2558 of 2007),[4] and (ii) the "Multifund Scheme" Decree 2955 of 2010[5] that changed certain regulatory requirements (including investment limits) for Colombian pension funds for purposes of alternative investments in private equity funds and certain entities incorporated abroad.

The Colombian Government issued regulations authorizing the creation of the Securities Trading System for Foreign Securities, which allows foreign issuers' securities to be listed and traded on qualifying Colombian systems without prior registration with the National Registry of Securities and Issuers and without approval of the Superintendence of Finance (the "Superintendence").[6] In addition, following the successful registration of Pacific Rubiales on the Colombian Stock Exchange, the government has issued regulations to facilitate the dual listing process for foreign issuers in Columbia.[7]

Given the significant increase in the number of the foreign financial institutions looking to render cross-border financial and securities-related services to Colombian investors, the marketing rules with respect to the offering of such services are of great interest to the international financial community. Pursuant to Decree 2555 of 2010, any foreign financial institution providing financial, reinsurance, or securities-related services, and seeking to market its products or services in Colombia is required either to establish a representative office in Colombia or to enter into a referral agreement with a Colombian broker-dealer or a financial corporation.

Representative offices act as a liaison between the home offices of foreign financial institutions and their clients in Colombia and are permitted to (i) deliver and receive client

* By Carlos Fradique-Mendez and Adriana Carolina Ospina Jiménez; edited by Robert Samir Kuster.

3. "Decreto por el cual se recogen y reexpiden las normas en materia del sector financiero, asegurador y del mercado de valores y se dictan otras disposiciones," Decreto No. 2555, de 15 de julio de 2010, Diário Oficial da União [D.O.U.] de 47.771.2010. (Braz.), *available at* http://www.avancejuridico.com/actualidad/documentosoficiales/47771.html.

4. "Por el cual se expide el régimen de las oficinas de representación de instituciones financieras, reaseguradoras y del mercado de valores del exterior y se dictan otras disposiciones," Decreto No. 2558, de 6 de julio de 2007, Diário Oficial da União [D.O.U.] de 46.681.2007. (Braz.), *available at* http://www.avancejuridico.com/actualidad/documentosoficiales/46681.html.

5. "Por el cual se modifica el Decreto 2555 de 2010, se establece el régimen de inversión de los recursos de los Fondos de Pensiones Obligatorias y se reglamentan parcialmente la Ley 100 de 1993, modificada por la ley 1328 de 2009, la ley 549 de 1999, la ley 550 de 1999 y el decreto ley 1283 de 1994," Decreto No. 2555, de 6 de agosto de 2010, Diário Oficial da União [D.O.U.] de 47.793.2010. (Braz.), *available at* http://www.avancejuridico.com/actualidad/documentosoficiales/47793.html.

6. "Por el cual se reglamenta el listado de valores extranjeros en los Sistemas de Cotiza-ción de Valores Extranjeros y se dictan otras disposiciones," Decreto No. 3886, de 8 de octubre de 2009, Diário Oficial da União [D.O.U.] de 47.496.2009. (Braz.), *available at* http://www.avancejuridico.com/actualidad/documentosoficiales/47496.html.

7. "Por el cual se modifican los artículos 5.2.6.1.2 y 6.11.1.1.2 del Decreto 2555 de 2010," Decreto No. 2826, de 5 de agosto de 2010, Diário Oficial da União [D.O.U.] de 47.792.2010. (Braz.), *available at* http://www.avancejuridico.com/actualidad/documentosoficiales/47792.html.

documents required in connection with the provision of services, (ii) advise clients on the risk characteristics of certain types of transactions, and (iii) provide information on fees, expenses, and tax implications regarding the provision of services. Representative offices are barred from carrying out, directly or indirectly, any on-shore financial or securities-related activity that requires the authorization of the Superintendence, and are barred from raising funds (either in Colombian Pesos or in any foreign currency), regardless of whether such funds are raised through acceptance of deposits, issuance of securities, or in any other manner. The Superintendence must authorize the establishment of a representative office, and its operations are subject to the Superintendence's supervision.

Another method to establish a presence in the Colombian market is through execution of a referral agreement between the foreign entity and a local broker-dealer or financial corporation. In general, all the rules regarding representative offices also apply to referral agreements. Referral agreements set forth the terms and conditions under which a local broker-dealer or financial corporation promotes the foreign entity's securities-related products and services in Colombia. As with the establishment of a representative office, referral agreements must be approved by the Superintendence. However, the Superintendence's approval process for referral agreements generally is less time-consuming than the establishment of a representative office.

The applicable regulations establish safe harbor exceptions to these requirements for foreign financial entities wishing to promote their services in Colombia. For instance, multilateral agencies and foreign governmental entities arranging government-to-government financings are exempted from the representative office or referral agreement requirements. The same applies, subject to specific considerations, in the case of reverse solicitation and existing clients.

III. Developments in the European Union*

The European Union (EU) reacted to the challenges of the financial markets in 2010 by publishing a number of rules and proposals and by initiating reviews of existing directives and regulations.

A. New EU rules on Credit Rating Agencies

Credit Rating Agencies (CRAs) registered in the EU[8] shall be regulated by the newly established European Securities and Markets Authority (ESMA), which shall be entitled to perform on-site inspections, launch investigations, and request information. Issuers of structured finance instruments such as credit institutions, banks, and investment firms will have to provide all other interested CRAs with access to the information they give to their

* By Dr. Manfred Ketzer. http://ec.europa.eu/internal_market/securities/docs/agencies/list_en.pdf.

8. *See List of Credit Rating Agencies Registered in Accordance with Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on Credit Rating Agencies (CRA Regulation)*, European Comm'n, http://ec.europa.eu/internal_market/securities/docs/agencies/list_en.pdf (last visited Jan. 12, 2011).

own CRA, in order to enable them to issue unsolicited ratings.[9] The Commission will decide in the coming year whether further measures shall be taken to regulate CRAs.

B. Review of the Transparency Directive 2004/109/EC

In its report on the operation of the Transparency Directive 2004/109/EC,[10] the European Commission identified several issues to improve the impact of the Directive. These include: adapting transparency rules to smaller listed companies to increase the attractiveness of being listed on a regulated market, such as more flexible deadlines for the disclosure of financial reports, alleviating the obligation to publish quarterly financial information, harmonizing the content of reports, and facilitating cross-border visibility of such companies to potential investors/intermediaries. The report also found insufficient disclosure of stock-lending practices that increase the risk of "empty voting" as well as a lack of disclosure of cash-settled derivatives that lead to "hidden ownership." The report points out that existing rules in some Member States require large investors not only to disclose their intentions as regards their holdings but also how they financed the acquisition.

C. Proposal for a Regulation on Short Selling and certain aspects of Credit Default Swaps

The European Commission published this proposal (the "Proposal") on September 15, 2010.[11] The Regulation shall enter into force on July 1, 2012.[12] On short selling, it provides for a flagging of short sale orders as well as disclosure obligations of significant net short positions in shares.[13] Reaching or falling below the threshold of 0.2% (and each 0.1% above that) of the value of the issued share capital of the company concerned triggers a notification obligation to the relevant competent authority.[14] If the net short position reaches or falls below 0.5% (and each 0.1% above that), the person shall disclose to the public details of the position.[15] Rules on notification thresholds of significant net short positions in sovereign debt (not in shares) and credit default swaps (CDS) shall be set by the European Commission on a later date.[16] Articles 5, 7, and 8 also apply to natural and legal persons residing or established outside the European Union.[17] To enter

9. Press Release, European Comm'n, Commission Proposes Improved EU Supervision of Credit Rating Agencies and Launches Debate on Corporate Governance in Finance Institutions (June 2, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/656.

10. *Operation of Directive 2004/109/EC on the Harmonisation of Transparency Requirements in Relation to Information About Issuers Whose Securities are Admitted to Trading on the Regulated Market*, at 3(10), COM (2010) 243 final (May 27, 2010), *available at* http://ec.europa.eu/internal_market/securities/docs/transparency/directive/com-2010-243_en.pdf.

11. *Regulation of the European Parliament and of the Council on Short Selling and Certain Aspects of Credit Default Swaps*, COM (2010) 482 final (Sept. 15, 2010), *available at* http://ec.europa.eu/internal_market/securities/docs/short_selling/20100915_proposal_en.pdf.

12. *Id.* art. 42.

13. *Id.* arts. 14-15.

14. *Id.* art. 5.

15. *Id.* art. 7.

16. *Id.* art. 8.

17. *Id.* art. 10.

a short sale, an investor must have borrowed the instruments concerned, entered into an agreement to borrow them, or have an arrangement with a third party to locate and reserve them for lending so that they are delivered by the settlement date (at the latest four days after the transaction).[18] This bans naked short selling.

In times of "adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State or one or more other Member States" and if "the measure is necessary to address the threat," a national competent authority of a Member State may prohibit or impose conditions on short sales and other transactions, including with CDS.[19] The newly established ESMA shall coordinate such measures and is entitled to intervene.[20]

IV. Developments in Germany*

A. Short Sales

Germany enacted new legislation on certain short sales and derivatives.[21]

Now, uncovered short sales are prohibited if they are (i) shares of German companies that are admitted to trading on a regulated market in Germany, (ii) shares of foreign companies that are exclusively admitted to trading on a regulated market in Germany, and (iii) sovereign bonds of Euro-zone countries (including their regional governments and local political subdivisions) that are traded on a regulated market in Germany.[22]

These prohibitions do not apply to intra-day short positions. Market makers, comparable liquidity providers and lead brokers, as well as transactions entered into to fulfil fixed price client transactions, are exempt from the prohibition.[23]

Certain net short positions[24] in shares that are traded on a regulated market in Germany must be reported and disclosed. Exemptions apply in favor of market makers, comparable liquidity providers, and lead brokers.[25]

It is prohibited for protection buyers to enter into, or accede to, credit derivatives referencing debt of Euro-zone countries (including their regional governments and local political subdivisions) unless the credit derivative serves hedging purposes. Exemptions from such prohibition apply in favor of market makers and comparable liquidity providers.

Following consultation with the German Federal Bank, the German Federal Financial Supervisory Authority (BaFin) is authorized to impose on a temporary basis further restrictions on financial instruments if necessary. In particular, BaFin may temporarily pro-

18. *Id.* art. 12.

19. *Id.* arts. 16-25.

20. *Id.* arts. 22-25.

* By Dr. Hartmut Krause.

21. "*Gesetz zur Vorbeugung gegen missbräuchliche Wertpapier- und Derivategeschäfte*" of July 21, 2010; Bundesgesetzblatt 2010 part I p. 245 (July 26, 2010).

22. Wertpapierhandelsgesetz [Securities Trading Act], Sept. 9, 1998, BUNESGESETZBLATT [BGBL I] at 2708, § 30 h(1a), last amended by Gesetz [G], Nov. 19, 2010, BGBL. I at 1612 (Ger.), *available at* http://www.BaFin.de/cln_171/nn_720786/SharedDocs/Aufsichtsrecht/EN/Gesetze/wphg__101119__en.html#Start.

23. *Id.* § 30h (2).

24. In case of 0.2% notification to BaFin; in case of 0.5% notification in Electronic Federal Gazette.

25. Wertpapierhandelsgesetz, BGBL I, § 30i.

hibit (i) transactions in equity derivatives or Euro-zone sovereign bond derivatives if the underlying securities are admitted to trading or traded on a regulated market in Germany and if such derivatives synthetically replicate short sales of such securities, unless such derivatives are entered into for hedging purposes;[26] and (ii) the execution of, or the accession to, currency derivatives referencing the Euro if the market value of such derivatives can be expected to rise in case of an exchange rate decline of the Euro, unless such derivatives are entered into for hedging purposes.[27]

B. Disclosure of Equity Derivatives

On September 22, 2010, the German Federal Government submitted to the German Parliament the draft bill "Act for the Strengthening of Investor Protection and the Improvement of Capital Market Efficiency."[28]

At present, disclosure is limited to financial instruments[29] granting their holders the right to unilaterally acquire, under a legally binding agreement, issued voting shares.[30] Under the proposed new disclosure rules, return claims under securities loans and repurchase claims under repo transactions will become disclosable.[31]

The Act also will introduce disclosure of instruments "making it possible" for their holder to acquire shares.[32] Therefore, disclosure will extend to (i) cash-settled instruments if the counterparty can hedge its risks under the instruments by holding the relevant shares,[33] and (ii) instruments providing for physical settlement even if they do not confer the right to unilaterally acquire shares.[34] The latter include physical call options subject to a condition beyond the control of the holder of the instrument, or physical put options.

Disclosure is required if the underlying reaches, exceeds, or falls below any of the following thresholds: five percent, ten percent, fifteen percent, twenty percent, twenty-five percent, thirty percent, fifty percent, or seventy-five percent of the share capital. The percentage shall be determined based on the number of voting shares that the counterparty would have to hold at the time of the acquisition of the instrument to fully hedge its position. The hypothetical voting rights under such instruments shall be aggregated with the voting rights that are disclosable under current legislation.[35]

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26. *Id.* § 4a (1)(1a).

27. *Id.* § 4a (1)(1b).

28. "*Gesetz zur Stärkung des Anlegerschutzes und Verbesserung der Funktionsfähigkeit des Kapitalmarkts*", BT-Drucks.

29. Wertpapierhandelsgesetz, BGBL I, § 2 (2b).

30. *Id.* § 25.

31. According to the materials; *see* BT-Drucks, *supra* note 28.

32. Draft Section 25a WpHG.

33. Draft section 25a (1) sentence 2 no. 1 WpHG.

34. Draft section 25a (1) sentence 2 no. 2 WpHG.

35. Wertpapierhandelsgesetz, BGBL I, § 25a (1).

V. Developments in India*

The Securities and Exchange Board of India (the SEBI) announced several reforms in 2010, including the following:

A. First issue of Indian Depository Receipts (IDRs)

Standard Chartered PLC became the first company to raise approximately US$530 million in May 2010 by issuing IDRs in India. IDRs are instruments denoted in Indian Rupees created by Indian depositories that are held by overseas custodians against underlying equity shares of an issuing foreign company. It allows foreign companies to raise capital in India and Indian investors to own shares in foreign companies that are unlisted in India.

B. Creation of the Anchor Investor Category

In June 2009, a SEBI circular created the category of anchor investors, equivalent to a cornerstone investor, and governed their participation in IPOs. Later, the anchor investor rules were codified in new regulations.

A portion of Indian IPO's (usually fifty percent) is typically reserved for subscription by qualified institutional buyers (QIBs). Now, up to thirty percent of the portion reserved for QIBs can be allocated to anchor investors through a bidding process subject to a thirty-day lock-in. The regulations define anchor investors to include large investors such as mutual funds and banks as QIBs with a minimum application/bid value of Rs. 100 million (approximately US$2 million). According to the regulations, anchor investors are allowed to bid for shares one day before the issue opens to the public, and bidding must be completed on the same day. The price and the number of shares allotted to anchor investment also must be disclosed to the public before the issue opens the next day. The allocation to anchor investors is made on a discretionary basis by the issuer.

The introduction of anchor investors is expected to reduce pre-IPO private placements and give confidence to retail investors to bid for securities in the public issue. Since the SEBI introduced the regulations allowing anchor investors, several Indian companies already have gone public with anchor investor backing.

C. Minimum Public Shareholding Norms

The Ministry of Finance in June 2010 made it mandatory for all listed companies to maintain a minimum public shareholding of twenty-five percent of their paid-up capital within a period of three years from the date of the notification. Public sector companies (owned by the government) are required to maintain a minimum public shareholding of ten percent. Unlisted companies intending to list also are required to offer at least twenty-five percent at the time of listing except (i) when the post-issue capital of the issuer, calculated at offer price, is over Rs. 40,000,000 (Rs. four crores, or approximately US$ 900 million); and (ii) when public sector companies are involved that are required to offer at least ten percent at the time of listing. These norms are expected to benefit small

* By Ajit Sharma.

investors by increasing liquidity in the Indian markets and enhancing corporate governance.

Prohibition on Protected Cell Companies (PCCs) and Segregated Portfolio Companies (SPCs) from being registered as Foreign Institutional Investors (FIIs).

In April 2010, SEBI made it mandatory for all FII applicants to declare that they are not structured as PCCs and SPCs. FIIs must register with SEBI prior to making any investments in Indian securities. Through the April 2010 circular, SEBI has prohibited entities structured as PCCs and SPCs from being registered as FIIs. Further, in case an FII applicant is structured as a multi-class vehicle, SEBI requires it to declare that each class of shares is broad-based (defined to mean at least twenty investors with no investor holding over forty-nine percent). This move is expected to ensure that FIIs remain broad-based and do not represent the interests of certain investors only.

VI. Developments in Malaysia*

Effective from April 1, 2010, Malaysia has introduced the Securities Commission (Amendment) Act 2010,[36] an amendment to the Securities Commission Act 1993.[37] In order to enhance the investor confidence in the quality and reliability of audited financial statements, this amendment requires the Securities Commission (SC) to appoint an Audit Oversight Board (AOB) consisting of an executive chairperson and six non-executive members.[38] The AOB members shall possess knowledge and experience in finance, business, or in any other relevant field.[39] They must also be people of integrity and repute, who understand the responsibilities for and nature of financial disclosures by public interest entities, such as public listed companies, licensed financial institutions including insurance companies and banks, both traditional and Islamic.[40]

The AOB is responsible for registering qualified auditors of public interest entities defined above.[41] "Qualified auditors" include, among others, those competent auditors who are approved by the Minister of Finance under Section 8 of the Companies Act 1965[42] and those who have not been convicted of any offense involving fraud or other dishonesty, or of any offense of harming the investors financially under any written law due to their dishonesty, incompetence or malpractice, or the conduct of discharged or undischarged bankrupts.[43] Unless registered with the AOB, no one is allowed to practice the profession of auditor. A breach of this provision is punishable with a fine not exceeding one million ringgit (approximately US$3.3 million) or imprisonment for a period not exceeding five years or both.[44]

* By Dr. Md Anowar Zahid.
36. Securities Commission (Amendment) Act 2010, Act A1369 (Malay.).
37. *Id.* Act 498.
38. *Id.* act A1369, §§ 31B, 31C.
39. *Id.* § 31C(3)(a).
40. *Id.* § 31C(b)-(c).
41. *Id.* § 31E(1)(b).
42. Companies Act, 1965, Act 125 (Malay.).
43. *Securities Commission (Amendment) Act 2010*, act A1369, § 31P.
44. *Id.* § 31N.

The AOB is empowered to prescribe auditing and ethical standards for auditors.[45] It may also direct the Malaysian Institute of Accountants to establish or adopt such standards.[46] The AOB shall monitor their compliance.[47] To this end, the AOB shall conduct inspection programs including the assessment of audit reports prepared by auditors for public interest entities.[48] If the inspection report shows that there has been a violation of any provision of this law, or condition imposed by the AOB, or notice or guideline imposed or issued by the SC, the AOB shall inquire into the matter.[49] Findings against an auditor may result in the following actions: (i) directing to comply with relevant provisions, conditions, or guidelines; (ii) reprimanding; (iii) requiring steps to remedy the breach; (iv) requiring relevant professional education; (v) assigning a reviewer to oversee an audit undertaken by the concerned auditor; (vi) prohibiting the auditor from taking any public interest entity as a client; (vii) prohibiting him/her from auditing financial statements of any public interest entity; and (viii) imposing a penalty not exceeding five hundred thousand ringgits (approximately US $170,000).[50] A person aggrieved by the AOB's decision may appeal to the SC within thirty days from the date on which he/she has been notified of the decision.[51] The SC may affirm, set aside, or substitute the AOB's decision.[52]

For the purpose of paying the expenditure of the AOB, this law requires the SC to establish and administer the "Audit Oversight Board Fund."[53] After defraying expenditures, the SC shall invest the remainder of the fund,[54] adding investment income to monies received from the Fund's other sources, including personal contributions required by the Minister of Finance, auditors' registration fees, and other charges or fines payable under this law.[55]

VII. Developments in New Zealand*

As in 2009, New Zealand's securities law and capital markets landscape experienced only incremental change in 2010.

On April 28, 2010, the Minister of Commerce announced a new "super-regulator" for financial markets, to be known as the Financial Markets Authority (FMA).[56] The FMA will consolidate the functions currently distributed across the Securities Commission, the

45. *Id.* § 31U.
46. *Id.*
47. *Id.* § 31E, 31U.
48. *Id.* § 31V.
49. *Id.* § 31W.
50. *Id.* § 31Z.
51. *Id.* § 31ZB.
52. *Id.*
53. *Id.* § 31H.
54. *Id.* § 31K.
55. *Id.* § 31H.

* By David Quigg, John Horner and Asha Stewart.

56. Press Release, Hon. Simon Power, Minister of Commerce, Gov't Announces "Super-Regulator" for Financial Markets (Apr. 28, 2010), *available at* http://www.beehive.govt.nz./release/government-announces-%E2%80%98super-regulator039-financial-markets.

Ministry of Economic Development (including the Government Actuary), and NZX. The FMA is to be operational by the first half of 2011.[57]

Formation of the FMA is in part a response to the collapse of numerous finance companies over the last few years. This run of failures has included the receivership of South Canterbury Finance, which was New Zealand's largest locally-owned finance company, in August 2010.[58] The Securities Commission has been busy with these failures, investigating various companies and their directors, and has laid criminal charges and issued civil proceedings in some cases.[59]

Other than the creation of the FMA, 2010 has been a year of "behind the scenes" work as the key regulators have moved towards the practical implementation of several key pieces of legislation. In particular:

a. The Government is moving ahead with the full implementation of the Financial Advisers Act 2008. This Act, which is intended to be fully in force by the end of 2010,[60] places minimum competence standards on financial advisers,[61] as well as improving the quality and relevance of the disclosure that financial advisers are required to give to clients.[62]
b. The key operative provisions of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 came into force on December 1, 2010. Pursuant to this legislation, and subject to some exceptions, financial service providers who are ordinarily residents in New Zealand, or have a place of business in New Zealand, must be registered on the Financial Service Providers Register.[63] The definition of "Financial Service Provider" is broad and includes:[64]
   (1) Financial advisers and brokers;
   (2) Those who keep, administer, or manage money, securities, or investment portfolios on behalf of others;
   (3) Those who provide credit under a credit contract; and issuing and managing means of payment;
   (4) Those who participate in an offer of securities to the public, either as an issuer or promoter;
   (5) Those who enter into derivative transactions or trade in money market instruments and futures contracts on behalf of other persons; or
   (6) Those who act as an insurer.

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57. Press Release, Hon. Simon Power, Minister of Commerce, Minister Welcomes Appointment of CEO for Super Regulator (Oct. 20, 2010), *available at* http://www.beehive.govt.nz./release/minister-welcomes-appointment-ceo-super-regulator.

58. Adam Bennett, *Gov't Pays $1.7bn to Sth Canterbury Finance*, N.Z. HERALD, Aug. 31, 2010, http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10670109.

59. *See generally News Releases*, SECURITIES COMM'N (N.Z.), http://www.seccom.govt.nz/new/releases/2010/ (last visited Jan. 24, 2011).

60. Press Release, Hon. Simon Power, Minister of Commerce, Gov't Addressing Concerns Over Financial Advisers (Nov. 9, 2009), *available at* http://www.beehive.govt.nz/release/govt+addressing+concerns+over+financial+advisers.

61. Financial Advisers Act 2008 §§ 33, 37, 46, 2008 S.N.Z, No. 91, http://www.legislation.govt.nz/act/public/2008/0091/latest/096be8ed80677368.pdf.

62. Part 2 of the Financial Advisers Act.

63. Financial Service Providers (Registration and Dispute Resolution) Act 2008 § 11, 2008, *available at* http://www.legislation.govt.nz/act/public/2008/0097/latest/096be8ed805e22ce.pdf.

64. *Id.* § 5.

In order to register, a financial service provider must also belong to a dispute resolution scheme, unless the provider provides financial services only to wholesale clients, or unless it is considered to be a financial service provider only because it is an issuer or promoter participating in one or more offers of securities to the public, and doing so is not its only business.[65]

c. The Anti-Money Laundering and Countering Terrorist Financing Act 2009 was enacted in October 2009.[66] This Act aims to bring New Zealand into line with international standards in this area.[67] Regulations that will set out the detailed requirements of the legislation are currently being developed. A consultation paper was released on August 9, 2010, with submissions closing on September 6, 2010.[68] Additional obligations under this Act for financial sector participants are likely.

VIII. Developments in the United States

A. Investor Protection a Major Focus of the Dodd-Frank Act*

The Investor Protections and Improvements to the Regulation of Securities Act (IPIRSA) was signed into law on July 21, 2010. It is part of the much larger Dodd–Frank Wall Street Reform and Consumer Protection Act (the "Dodd–Frank Act"). IPIRSA seeks to enhance investor protection through several reforms to existing securities laws, including the creation of two new entities within the Securities Exchange Commission (SEC), and a reformed award program for whistleblowers to incentivize disclosure of companies violating securities laws.

1. *New Committees Created in the SEC to Bolster Investor Protection*

IPIRSA creates two new entities within the SEC: The Office of the Investor Advocate and The Investor Advisory Committee. These entities are designed to combat the "regulatory capture" that is perceived to exist in the industry. Regulatory capture is the phenomenon that occurs when a governmental agency that is supposed to regulate an industry begins to advocate for that industry due to their close working relationship, often with a harmful effect upon the people that agency is supposed to protect—for the SEC, common investors.[69]

The Investor Advisory Committee (IAC) is an entity added by IPIRSA under the Securities Exchange Act of 1934.[70] The IAC has a broad mandate and functions primarily to advise the SEC on matters of concern within the different securities markets.[71] The IAC

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65. *Id.* § 48.

66. Anti-Money Laundering and Countering Terrorist Financing Act 2009, *available at* http://www.legislation.govt.nz/act/public/2009/0035/latest/096be8ed805bc1f5.pdf.

67. Press Release, Hon. Simon Power, Minister of Commerce, Parliament Passes Law on Money Laundering (Oct. 15, 2009), *available at http://www.beehive.govt.nz/release/parliament¶asses+lawōney+laundering.*

68. *AML/CFT Regulations Consultation Document*, Ministry of Justice (N.Z.), Aug. 9, 2010, http://www.justice.govt.nz/publications/global-publications/a/aml-cft-regulations-consultation-document/aml-cft-regulations-consultation-document.

* By Justin Schluth.

69. Aguirre v. SEC, 551 F. Supp. 2d 33, 56 (D.D.C. 2008).

70. Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* § 39 (2011).

71. *Id.* § 78a *et seq.* § 39 (a).

is also supposed to amass and produce a report that contains a summary of individual investor views on regulatory issues that are not related to the enforcement of the SEC provisions. The report will focus mainly on the current regulatory concerns stemming from new rules and regulations. The IAC has a board of anywhere from ten to twenty members, including a representative for senior citizen investors, a representative for state securities regulation, and other members appointed at the discretion of the SEC to represent investors and institutional investors.[72]

The Office of the Investor Advocate (OIA) is the second entity created under the Securities Exchange Act of 1934.[73] The OIA is appointed by and reports to the Chairman of the SEC, and is to act as a liaison between individual investors and the SEC.[74] The OIA's primary purpose is to help investors resolve the issues that arise between them and the SEC, including informal resolutions to problems.[75] The OIA is also designed to alert the SEC Chairman of concerns that individual investors have. That duty includes suggesting and commenting upon regulatory changes that would benefit the individual investor. The final major duty of the OIA is to analyze and report to the Chairman how proposed rules and regulations affect individual investors and offer suggestions to the SEC that would address investor concerns in the most effective way. This entity, though part of the SEC, is supposed to be independent and focus on the needs of private investors by giving those investors a larger voice within the SEC.

2. *Expanded Whistleblower Bounty Program*

One of the most interesting additions implemented by IPIRSA is the ability for the SEC to reward whistleblowers for successful enforcement actions. The whistleblower bounty program is instituted under the Securities Exchange Act of 1934.[76] Under IPIRSA, if a whistleblower provides the SEC with original information that leads to a successful enforcement action with a sanction of greater than $1 million, the SEC may award the whistleblower up to thirty percent of sanctions imposed,[77] and must award at least ten percent of the total sanction imposed if all IPIRSA's requirements are met.[78] Although the bounty program is not new, the SEC rarely used this power in the past.[79] The awards that are given to whistleblowers under this section are paid out of a fund created in this portion of IPIRSA.[80]

72. *Id.* § 78a *et seq.* § 39 (b).

73. *Id.* § 78d (g).

74. *Id.* § 78d (g)(2).

75. *Id.* § 78d (g)(4).

76. *Id.* § 78a *et seq.* § 21F.

77. *Id.* § 78a *et seq.* § 21F (a)(1), (a)(3)-(4).

78. *Id.* § 78a et seq. § 21F (b).

79. *Id.* § 78u-1(e).

80. *Id.* § 78a et seq. § 21F (g).

B. New SEC Rules under Dodd-Frank on "Conflict Minerals" and "Extractive Industries"*

The Wall Street Reform and Consumer Protection Act (the "Act")[81] was enacted into law on July 21, 2010, and will have far-reaching effects on the regulation and supervision of the U.S. financial system. The Act includes various changes that will affect public companies and companies hoping to access the U.S. securities markets.

Among other things, companies with overseas operations, particularly in the extractives industry, will face new SEC disclosure requirements under the Act. In an effort to expand transparency and try to "name and shame" multinational companies whose activities could be seen as linked to conflict minerals or to corrupt governments abroad, Title 15 of the Act includes provisions which will require such companies to provide increased SEC disclosure.

The Act requires the SEC to promulgate rules that will require additional disclosures from certain companies, most likely in the annual reports that public companies with securities registered under the Securities Exchange Act of 1934 file with the SEC.[82] (Generally, Form 10-K is required for domestic companies, and Form 20-F is required for non-U.S. companies that meet the definition of a "foreign private issuer.")

Section 1502 of the Act[83] directs the SEC to require certain disclosure from any public companies whose products contain so-called conflict minerals or for whose products conflict minerals are necessary to operate. Under the Act, and as will be detailed in the new rules, "conflict minerals" consist of the following or their derivatives: cassiterite (the major ore used in making tin), columbite-tantalite (or "coltan," also know as iron manganese, used in the manufacture of condensers, micro-electronic technology—chips and processors, cell phones, nuclear reactors and highly heat-tolerant varieties of steel), wolframite (the principal ore in tungsten which is used in many electrical items), and gold. Under the rules, these companies will need to disclose annually whether they are sourcing these minerals from the Democratic Republic of Congo (the "DRC") or adjoining countries: Angola, the Republic of Congo (Brazzaville), the Central African Republic, the Sudan, Uganda, Rwanda, Burundi, Tanzania, and Zambia. Where such minerals are being sourced from these countries, companies must report to the SEC on the measures that the company has taken to exercise due diligence on the source and chain of custody of the minerals. This report must include an independent private sector audit conducted in accordance with standards established by the U.S. Comptroller General.

Similarly, section 1504 of the Act[84] directs the SEC to require any company that is required to file an annual report with the SEC and that engages in the commercial development of oil, natural gas, or minerals to include in such annual report information relating to any payment that the company, any subsidiary, or any entity under the control of the company has made to a foreign government or the U.S. government for the purpose of the commercial development of oil, natural gas, or minerals. The Act also specifies that

* By Walter G. Van Dorn, Jr. and Jeffrey R. Krilla.

81. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

82. *See* Securities and Exchange Act of 1934, 15 U.S.C. § 78m(a)(2).

83. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502.

84. *Id.* § 1504.

the information required to be disclosed in the annual report must be provided in "interactive data format" and must include electronic "tags" that identify certain aspects of the payments.

Under the Act, SEC rules enforcing these mandates are due by April 17, 2011, with reporting obligations to arise in each company's first full fiscal year commencing after the rules are issued.[85] Thus, for calendar-year companies, the new disclosure obligations would pertain to activities in 2012, and such companies would need to file 2012 annual reports containing the newly-required disclosures in early 2013.

85. *Id.* §§ 1502, 1504.