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International Securities and Capital Markets

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This article summarizes selected changes announced or implemented during 2012 in the regulation of international securities and capital markets in Australia, Brazil, Bulgaria, Canada, India, Israel, Sweden, and Turkey.[1]

I. Developments in Australia

A. Continuous Disclosure Guidance Note Rewrite

Continuous disclosure is an area of law that often vexes Australian listed company boards and general counsels. In October, the Australian Securities Exchange (ASX) issued one of the most significantly awaited corporate law reforms proposals in 2012 in relation to continuous disclosure.[2] Although a number of market participants were hoping for broad-ranging changes, it would have been optimistic to expect significant changes to the continuous disclosure regime in Australia at this stage. Instead, ASX's proposals seek to clarify the murkier aspects of the operation of the rules. The transparency and insight these revisions provide are welcome.

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1. For developments during 2011, see Thomas M. Britt III et al., *International Securities and Capital Markets*, 46 INT'L LAW. 265 (2012). For developments during 2010, see João Otávio Pinheiro Olivéro et al., *International Securities and Capital Markets*, 45 INT'L LAW. 253 (2011).

2. Media Release, Austl. Secs. Exch., Consultation on New Draft Guidance Note on Continuous Disclosure (Oct. 17, 2012), *available at* http://www.asxgroup.com.au/media/PDFs/New_Continuous_Disclosure_Guidance_Note_Media_Release(1).pdf.

B. "IMMEDIATELY"

Under ASX Listing Rule 3.1, market sensitive information must be disclosed to ASX *immediately* upon a listed company becoming aware of the information, unless it falls within the carve-outs from disclosure.[3] There have been various views expressed about the interpretation of the word "immediately," in particular, the Australian Securities and Investments Commission (ASIC) previously appeared to adopt a strict interpretation of the term.[4] The amendments proposed to the Listing Rules do not amend the use of the term "immediately." But to address concerns about the uncertainty of the term, a revised Guidance Note sets out ASX and ASIC's views about the timing for disclosure and factors that may affect that timing. The Guidance Note confirms that, consistent with judicial authority, the term "immediately" does not mean "instantaneously" but rather means "promptly and without delay."[5] In this context, ASX recognizes that the speed with which a notice can be given will vary depending on the circumstances and suggests relevant factors that will be taken into account by ASX in assessing whether a company has complied with its obligation to disclose information in a timely matter.[6]

C. EARNINGS GUIDANCE AND SURPRISES

Earning expectations are critical to price, and ASX has taken the view that a material change in a company's previously released financial forecasts or expectations must be disclosed. The current guidance provides that a variation in earnings is material if it is between 10 to 15 percent compared against earnings guidance or, if the entity has not issued earnings guidance, against consensus forecasts or the result of the prior corresponding period.[7] In late 2008, ASIC urged companies to take a conservative approach and disclose at the lower end of the threshold.[8]

ASX proposes to withdraw this guidance and suggests that a threshold of a 5-10 percent variation apply only in the case where a company has already given the market earnings guidance or a forecast.[9] This guidance reflects ASX's view that:

- it is the share price movement that is the material issue, and historical earnings variations are not material unless they result in a material move in the share price;

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3. ASX Listing Rule 3.1 provides that "once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must *immediately* tell ASX that information." AUSTL. SECS. EXCH., LISTING RULES, R. 3.1 (2012) (emphasis added).

4. *See* AUSTL. SECS. & INVS. COMM'N, REGULATORY GUIDE 73, CONTINUOUS DISCLOSURE OBLIGATIONS: INFRINGEMENT NOTICES (June 2012), *available at* http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg73-published-5-June-2012.pdf/$file/rg73-published-5-June-2012.pdf; *see also* AUSTL. SECS. EXCH., GUIDANCE NOTE 8, CONTINUOUS DISCLOSURE: LISTING RULES 3.1–3.1B § 3.5 nn.30 & 31, at 11 (Jan. 2013).

5. AUSTL. SECS. EXCH., *supra* note 4, §§ 3.1, 3.5, at 4, 11.

6. *Id.* § 3.3, at 9-10.

7. AUSTRL. SECS. EXCH., CONTINUOUS DISCLOSURE: LISTING RULE 3.1 para. 93, at 19 (2005).

8. Belinda Gibson, Comm'r, Australian Secs. & Invs. Comm'n, Speech at the Australasian Investor Relations Association's 2008 Annual Conference: Capital Markets Update 3 (Nov. 27, 2008), *available at* http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/2008-11-27_AIRA%20FINAL%20_for%20website__final.pdf/$file/2008-11-27_AIRA%20FINAL%20_for%20website__final.pdf.

9. AUSTL. SECS. EXCH., *supra* note 4, § 6.3, at 37.

- the market is more concerned about prospects rather than historical earnings.[10]

Meeting continuous disclosure requirements involves subjectivity and judgment. Matters that give rise to profit warnings are not easy, and companies often struggle to know when they have robust enough information on which to make a disclosure. This problem grows exponentially if a company is also required to manage analysts' forecasts. ASX does not believe that a listed company has any obligation, whether under the Listing Rules or otherwise, to correct analysts' forecasts to bring them in line with their own.[11] But a listed company covered by sell-side analysts should be monitoring forecasts of these analysts to understand the market's expectations for its earnings. This is important, as ASX regards a disclosure obligation as having arisen where the company has a reasonable degree of certainty of an expected material difference in its earnings from market expectations.

ASX proposes to introduce the changes to the Listing Rules in the first quarter of 2013. The package of documents is the first time that ASX and ASIC have together expressed views about the operation of Australia's continuous disclosure laws.[12] It is a timely and welcome acknowledgment of the proposed approach of these regulators to the continuous disclosure framework.

II. Developments in Brazil

A. The Brazilian CRI Is Now More Attractive to Foreign Investors

The Brazilian Certificates of Real Estate Receivables (*Certificados de Recebíveis Imobiliários*) (CRI) are securities backed by real estate receivables and are very similar to mortgage pass-through securities issued in the United States. Only Brazilian real estate securitization companies are permitted to issue CRI, which were created in order to allow these companies to raise funds from investors on terms compatible with underlying real estate transactions. They are negotiable, fixed-income securities originated through receivables securitization contracts that identify the real estate receivables backing them.

Law No. 12431, of June 24, 2011, provides several tax benefits to debentures intended to attract infrastructure investments to the country and foster the development of the secondary securities market in Brazil.[13] Law 12431/2011 was recently amended by Law No. 12715, of September 17, 2012, which extended such tax benefits to the CRI.[14]

By force of Law 12431/2011, the applicable rate of the Brazilian withholding income tax (*Imposto de Renda na Fonte*) (IRF) on income generated by bonds and securities of public distribution that are issued by legal entities that are not classified as financial institutions and are regulated by the Brazilian Securities Exchange Commission (*Comissão de Valores Mobiliários*) (CVM) or the Brazilian Monetary Council (*Conselho Monetário Nacional*) (CMN), has been reduced to zero. To obtain this tax benefit, these bonds and

10. *Id.*
11. *Id.* § 6.4, at 38.
12. Austl. Secs. Exch., Review of ASX Guidance Note 8: Continuous Disclosure: Listing Rules 3.1–3.1B para. 4 (Oct. 17, 2012), *available at* http://www.asxgroup.com.au/media/GN_8_Consultation_Paper.pdf.
13. *See* Lei No. 12.431, de 24 de Junho de 2011, Diário Oficial da União [D.O.U.] de 27.6.2011 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/Lei/L12431.htm.
14. *See* Lei No. 12.715, de 17 de Setembro de 2012, Diário Oficial da União [D.O.U.] de 18.9.2011 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/l12715.htm.

securities will have to be acquired between January 1, 2011, and December 31, 2015, and the income must be paid to a beneficiary resident or domiciled abroad. This benefit is not applicable, however, if the foreign investor is domiciled in a favored taxation country or dependency.

The expression "favored taxation country or dependency" (*país ou dependência com tributação favorecida*) is used in the Brazilian tax legislation instead of tax haven or fiscal paradise (*paraíso fiscal*). It means any country or dependency of a country that either does not impose tax on income or is a low-tax country whose applicable income tax rate is equivalent to any percentage varying between 0 and 20 percent (maximum). The definition is contained in Article 14 of Law 9.430, of December 27, 1996, which introduced the transfer pricing regulations in Brazil.

Law 12715/2012 consolidates the rules that are applied to the debentures and the CRI. In order to benefit from the IRF zero rate, the CRI must pay a fixed interest rate based on an index-linked price or reference rate (*Taxa Referencial*) (TR), and the total or partial post-fixed interest rate is expressly prohibited. The CRI must also comply with the following cumulative requirements: (i) an average maturity term of more than four years as regulated by the CMN; (ii) a prohibition of the repurchasing of the CRI by the issuer or any related party, the assignor, or originator in the first two years after their issuance and early settlement by means of redemption or prepayment, except if otherwise regulated by the CMN; (iii) a lack of commitment on resale assumed by the buyer; (iv) a term of periodical income payment, if any, at intervals of at least 180 days; (v) evidence that the CRI has been registered in a system of registry duly authorized by the Central Bank of Brazil (*Banco Central do Brasil*) (Bacen) or the CVM in their respective areas of jurisdiction; and (vi) a simplified procedure to be determined by the CMN that evidences the purpose of allocating the proceeds in the future or in the reimbursement of costs, expenses, or debts related to investment projects, including those focused on research, development, and innovation. These costs, expenses, or debts must be incurred within twenty-four months, which are counted from the date of closing of the public distribution.

In the event that the funds raised are not invested in the project, the issuer of bonds or securities or the originator of the CRI will be subject to a fine of 20 percent of the total amount of the transaction. Despite the payment of the fine, the reduced income rate will still apply to the transaction.

With Law 12715/2012, the Brazilian Government extends to foreign investors the same tax treatment already given to Brazilian residents who invest in CRI. The new law also encourages the issuance of CRI-backed infrastructure projects and works involving the construction of warehouses or distribution centers to be leased to Brazilian companies.

III. Developments in Bulgaria

A. Capital Markets in Bulgaria – Legal Developments in 2012

1. *National Legal and Regulatory Developments; Transposing European Union (EU) Directives*

Several Bulgarian statutes were amended in response to the new pan-EU regulatory and supervisory architecture.[15] In particular, the purpose was to provide enhanced cooperation and coordination between Bulgaria's Financial Supervision Commission (FSC) and the European Securities and Markets Authority (ESMA).

Albeit with a delay, Bulgaria transposed in 2012 another important EU law, Directive 2010/73/EU relating to prospectuses.[16] Relevant amendments were made to the Public Offer of Securities Act.[17] Some of the required changes have interesting local dimensions. For example, individuals will no longer need to be registered with the FSC to be treated as "qualified investors" in the context of public and private placements; the registration requirement probably deterred the participation of affluent individuals in private placements. Other amendments fall beyond the scope of Directive 2010/73/EU, such as those focusing on minority shareholder protection in already public companies. These proposals include improvements to the regime of intra-corporate authorizations of large transactions, the rules on independent directors election, and, notably, the mandatory tender offer rules (*e.g.*, the trigger threshold will be lowered to acquisitions of one-third of the votes in a public company with no majority shareholder).

The FSC further adopted or drafted statutory instruments relating to investor compensation schemes and remuneration policies for public companies.

2. *Major Self-Regulatory Developments*

The Rules and Regulations of the Bulgarian Stock Exchange (BSE) were amended,[18] above all concerning the redefinition of BSE's market segments, which now include:

- "Premium" equities segment: among other criteria, the new blue chips are required to have a history of at least one year on the "Standard" segment, a 25 percent free float, and comply with disclosure and reporting obligations;
- The "Standard" segment, which is for non-Premium equity issuers and closed-end investment companies;
- Segments for regulated securitization companies, bonds issuers, open-end investment schemes, and other "Main Market" segments; and
- An "Alternative Market" for low liquidity issues.

15. *See* Financial Supervision Commission Act, State Gazette 21/13.03.2012 (2012) (also amending all other national statues transposing EU directives falling within the purview of ESMA).

16. Directive 2010/73, of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading and 2004/109/EC on the Harmonization of Transparency Requirements in relation to Information about Issuers whose Securities are Admitted to Trading on a Regulated Market, 2010 O.J. (L 327).

17. *See* Public Offering of Securities (Amendments) Act, State Gazette 103/28.12.2012 (2012).

18. Changes concern mostly Parts III and IV. For the Rules and Regulations, *see Rules and Regulations of BSE-Sofia*, Bulg. Stock Exch., http://www.bse-sofia.bg/?page=RulesOfBSE-Sofia (last updated Jan. 2013).

The Bulgarian Code for Corporate Governance (Code), recommended to public companies for nationwide adherence, was updated in February 2012.[19] The Code continues to be a concise collection of globally recognized, yet too broadly worded, principles — a feature probably making its application less efficient. Some important topics, such as board committees or independent directors, continue to be only touched upon. The majority shareholder's power (very topical for Bulgaria), among other topics, is not addressed at all. The Code's new express recommendation that public companies' corporate websites should have an English language version is certainly positive.

IV. Developments in Canada

A. National Securities Regulator

At the end of 2011, the Supreme Court of Canada struck down a proposal by the federal government to unilaterally impose a national Canadian securities regulator as unconstitutional.[20] As a result, securities regulation in Canada continues to be governed by thirteen provincial and territorial regulators. In late 2012, the provinces of Alberta, British Columbia, and Ontario led a renewed effort to create a national securities regulator on a consensual basis.[21] While the federal government remains supportive of the initiative, it remains to be seen whether it will be possible to create a framework that all jurisdictions are prepared to accept.

B. Targeted Review of Emerging Market Issuers

Following several high-profile allegations of non-compliance and fraud against foreign-based companies listed on North American exchanges, the Ontario Securities Commission (OSC) has indicated that it intends to scrutinize more closely the actions of emerging market issuers[22] and key gatekeepers[23] who help such companies access Canadian capital markets.

In November 2012, the OSC released guidelines for issuers operating in emerging markets based on findings of a targeted review of disclosure and corporate governance prac-

19. Nat'l Corporate Governance Comm'n, Bulgarian National Code for Corporate Governance (Feb. 2012), *available at* http://download.bse-sofia.bg/Corporate_governance/CGCode_EN-2012.pdf.

20. *In re* Securities Act, [2011] 3 S.C.R. 837 (Can.).

21. Karen Howlett, *Ontario, B.C., Alberta Revive Talks on National Securities Regulator*, The Globe & Mail (Nov. 20 2012, 8:39 AM), http://www.theglobeandmail.com/news/politics/ontario-bc-alberta-revive-talks-on-national-securities-regulator/article5461626/.

22. An emerging market issuer is an issuer: (i) whose mind and management are largely outside of Canada and (ii) whose principal active operations are outside of Canada, in regions such as Asia, Africa, South America, and Eastern Europe. *See* Ontario Secs. Comm'n, OSC Staff Notice 51-719, Emerging Market Issuer Review (Mar. 20, 2012) [hereinafter EMIR Review], *available at* http://osc.gov.on.ca/en/SecuritiesLaw_sn_20120320_51-719_emerging-markets.htm.

23. *Id.* The OSC considers key market gatekeepers to include auditors, corporate officers and directors, and underwriters. *Ontario Securities Commission to Target "Gatekeepers" of Emerging Market Issuers Listed on Canadian Exchanges*, Goodmans LLP (Oct. 31, 2012), http://www.goodmans.ca/Doc/Ontario_Securities_Commission_to_Target__Gatekeepers__of_Emerging_Market_Issuers_Listed_on_Canadian_Exchanges.

tices of such issuers conducted by the OSC in 2011.[24] The guidelines, which focus on eight "risk areas," inform the manner in which the OSC will interpret disclosure requirements and how gatekeepers should discharge their responsibilities, but they do not change the legal requirements applicable to affected issuers. Further guidance addressing risks associated with listing emerging market issuers on Canadian exchanges is expected from the Toronto Stock Exchange and the TSX Venture Exchange (TSXV).

C. Proposed Liberalization of Public Offering Marketing Rules

Proposed amendments to public offering marketing rules intended to increase the scope of permissible marketing activities for prospectus offerings in Canada could soon bring meaningful changes to Canadian capital markets.[25]

Current rules governing prospectus offerings prohibit any marketing efforts until a receipt has been issued for a preliminary prospectus and restrict disclosure about an offering to the prospectus itself. Accordingly, issuers considering an initial public offering cannot gauge potential interest in an offering (such as "pilot fishing" activities that are permissible in some jurisdictions) without incurring the cost and time associated with preparing and filing a preliminary prospectus.

The proposed rules allow an issuer to "test the waters" by allowing an investment dealer to have preliminary contact with certain classes of institutional investors. Subject to conditions, the use of term sheets to market an offering would also be permitted.

In addition, the proposed rules outline requirements applicable to road shows and expand the range of pre-marketing activities that can be undertaken in connection with "bought deals"[26] by allowing the distribution of a term sheet to certain institutional investors during the "pre-marketing" period after announcement of the offering but prior to filing a preliminary prospectus. The circumstances in which "upsizing" of a bought deal offering would be permitted are also specified.

D. Proposed Governance and Disclosure Requirements for Venture Issuers

A new governance and disclosure regime has been proposed for issuers with securities listed on Canadian junior exchanges, such as the TSXV.[27] The new regime would intro-

24. Ontario Secs. Comm'n, OSC Staff Notice 51-720, Issuer Guide for Companies in Emerging Markets (Nov. 9, 2012), *available at* http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20121109_51-720_issuer-guide.pdf; *OSC Releases Guidelines for Companies Operating in Emerging Markets*, Goodmans LLP (Nov. 13, 2012), http://www.goodmans.ca/Doc/OSC_Releases_Guidelines_for_Companies_Operating_in_Emerging_Markets.

25. Ontario Secs. Comm'n, Notice and Request for Comment: Proposed Amendments to National Instrument 41-101 General Prospectus Requirements and Companion Policy 41-101CP to National Instrument 41-101, (2011) 34 OSCB 11829 (Nov. 25, 2011), *available at* http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20111125_41-101_rfc-pro-amd-pre-marketing.htm.

26. A bought deal is a form of public offering, frequently used in Canada, in which the underwriters make a firm commitment to purchase the offered securities in advance of a preliminary prospectus being filed.

27. Ontario Secs. Comm'n, *Proposed National Instrument 51-103 Ongoing Governance and Disclosure Requirements for Venture Issuers and Related Amendments*, (2012) 35 OSCB (Supp-4) (Sep. 13, 2012) [hereinafter *Proposed National Instrument 51-103*], *available at* http://www.osc.gov.on.ca/en/SecuritiesLaw_ni_20120913_51-103_rfc-venture-issuers.htm.

duce streamlined disclosure requirements intended to balance the ability of venture issuers to manage such obligations with the needs and expectations of investors. The proposed amendments would reduce disclosure redundancies, place more emphasis on the type of disclosure most valuable to investors in smaller issuers, and enhance governance standards.[28]

Key features of the proposed regime include: (i) replacing interim MD&A requirements with an obligation to file an interim report containing quarterly highlights; (ii) introducing substantive corporate governance requirements, such as an obligation to develop policies and procedures addressing conflicts of interest, related party transactions, and insider trading; (iii) changes to long and short-form prospectus rules intended to simplify, among other things, disclosure of audited financial statements; and (iv) simplified executive compensation disclosure.[29]

V. Developments in India

The following is a summary of some of the major legal and regulatory developments in India during 2012 in the area of international securities and capital markets law.

A. Securities and Exchange Board of India (Alternative Investment Funds) Regulations

In May 2012, the Indian securities market regulator, the Securities and Exchange Board of India (SEBI) released, or notified, regulations on alternative investment funds (AIFs).[30] SEBI has made registration mandatory for all privately pooled investment vehicles set up in India that raise and pool funds from investors for making investments according to a defined investment policy.

Before the AIF Regulations were notified, the Indian regulatory regime for pooling money was a bit unclear. Under the former Venture Capital Funds (VCF) Regulations (now repealed by AIF Regulations), SEBI regulated the pooling of money for investments in unlisted and early stage companies and disallowed such registered VCFs from investing in mature or listed companies. Also registration as VCF was optional. For those seeking registration, there were investment restrictions and also some benefits from a lock-in requirement, certain exemptions under takeover law, and tax pass-through benefits. This created a regulatory environment where anyone wishing to pool and invest, mainly outside the unlisted and early stage companies, would be forced to remain unregistered. Those eligible would have to decide whether or not to register, keeping in view the regulatory burdens and benefits arising out of the registration vis-à-vis absence of both by remaining unregistered. The new AIF Regulations eliminate these registration options such that registration for all privately pooled vehicles is now mandatory. A pool can be created for any kind of investment, whether venture capital, private equity, hedge fund, real estate fund, debt fund, or any other sectors or combinations possible.

28. *Id.*; *Proposed Governance and Disclosure Requirements for Venture Issuers*, GOODMANS LLP (Aug. 31, 2012), http://www.goodmans.ca/Doc/Proposed_Governance_and_Disclosure_Requirements_for_Venture_Issuers.

29. *Proposed National Instrument 51-103*, *supra* note 27.

30. Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012, (May 21, 2012), *available at* http://www.sebi.gov.in/cms/sebi_data/attachdocs/1337601524196.pdf.

B. QFI Regime

"With an objective to boost the domestic markets with increased foreign inflows, the Government of India, vi[a] its press release dated January 1, 2012, has conveyed its decision to open up the Indian equity market to a wide range of foreign investors, termed as Qualified Foreign Investors (QFIs)."[31] SEBI and Reverse Bank of India (RBI) operationalized the QFI regime for investments in Indian equity markets via circulars issued in January 2012.[32] Prior to that, QFIs were permitted to invest only in Indian mutual fund schemes and were not entitled to invest directly in the Indian equity market.

QFIs include individuals, groups, or associations who are residents in a country that is a member of Financial Action Task Force (FATF) or a country that is a member of a group which is a member of FATF *and* a resident in a country that is a signatory to the International Organization of Securities Commisions' (IOSCO) MMOU (Appendix A Signatories) or a signatory of a bilateral Memorandum of Understanding (MOU) with SEBI. QFIs do not include foreign institutional investors (FIIs), sub accounts, or foreign venture capital investors.[33]

Prior to the opening of the QFI regime, only FIIs and their sub-accounts registered under the SEBI FII Regulations and Non-Resident Indians (NRIs) were permitted to directly invest or deal in shares listed and traded on Indian stock exchanges under the portfolio investment scheme (PIS) route. Now with the opening of the QFI regime, QFIs have been granted a general permission to make portfolio investments under the PIS route similar to FIIs, their sub-accounts, and NRIs.

C. New Consent Mechanism

Consent orders were first introduced in 2007 by SEBI to settle cases of securities violations.[34] Consent orders are passed where prima facie violations are detected, and the alleged violator agrees to pay a fine (or disgorgement amount) or stay off the market, usually without admitting or denying guilt. The consent mechanism in India was recently revised by SEBI in May 2012,[35] and the changes can be divided into four parts.

First, certain serious violations can no longer be consented. This was a result of many people disagreeing with the fundamental principle that one should be allowed to settle any violation of a serious kind. Second, repeat offenders will not be able to use the consent

31. Tejesh Chitlangi, *QFI Regime: Pros, Cons & the Way Formward*, MONEYCONTROL (Jan. 9, 2012, 11:14 AM), http://thefirm.moneycontrol.com/story_page.php?autono=647258.

32. Secs. & Exch. Bd. of India, Investment by Qualified Foreign Investors (QFIs) in Indian Equity Shares, CIR/IMD/FII&C/3/2012 (2012), *available at* http://www.sebi.gov.in/cms/sebi_data/attachdocs/1326453304731.pdf; Reserve Bank India, (I) Scheme for Investment by Qualified Investors in Equity Shares (II) Scheme for Investment by Qualified Foreign Investors in Rupee Denominated Units of Domestic Mutual Funds – Revision, RBI/2011-12/347 (2012), *available at* http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=6937.

33. *Frequently Asked Questions: QFI Eligibility Conditions*, SEBI, http://www.sebi.gov.in/cms/sebi_data/attachdocs/1345199799106.pdf (last visited Jan. 27, 2013).

34. *See* SEBI, Guidelines for (i) Consent Orders and (ii) For Considering Requests for Composition of Offences, Cir. No. EFD/ED/Cir-1/2007 (Apr. 20, 2007), *available at* http://www.sebi.gov.in/cms/sebi_data/attachdocs/1291879532674.pdf.

35. *See* SEBI, Amendment to the Consent Circular Dated 20th April 2007, CIR/EFD/1/2012 (May 25, 2012), *available at* http://www.sebi.gov.in/cms/sebi_data/attachdocs/1337946507938.pdf.

mechanism. There is a cooling-off period for both serious and all violations, so the mechanism is not misused. Third, interim orders can be adopted despite the consent process being initiated. This new explicit power enables SEBI to protect the market with an interim order even though it suspends adoption of a final order. Fourth, higher levels of disclosures are imposed on SEBI while passing consent orders. Before, some of the SEBI orders were not transparent about the facts and allegations involved. Now, SEBI will have to spell out the alleged misconduct, legal provisions alleged to have been violated, facts and circumstances of the case, and the consent terms.

VI. Developments in Israel

The Israeli authorities recently took significant steps to strengthen corporate governance and enhance the competitiveness of the market in Israel. Some of the main regulatory changes and proposals are described below.

A. Administrative Enforcement

In January 2011, the Israeli Parliament (the Knesset) enacted the Efficiency of Enforcement Procedures in the Securities Authority Act (Legislation Amendments), 2011 (the Law).[36] One of the main purposes of the Law is to better utilize enforcement by the Israel Securities Authority (ISA) for sanctions on violators of the laws regulating the Israeli capital market. In addition, the Law imposes on the chief executive officer a supervision authority of a company's or partnership's activities to take reasonable actions to prevent breaches by the company, partnership, or any of its employees.[37]

Pursuant to the Law, the ISA established a procedure for administrative enforcement through a special Administrative Enforcement Committee (Committee), which investigates breaches of capital market laws and, if required, takes enforcement action.[38] The main administrative enforcement means available to the Committee are monetary sanctions on individuals and companies (the ISA can also impose monetary sanctions in an accelerated procedure without the requirement of action by the Committee), which can be as high as NIS 1,000,000 (approximately US $250,000) for an individual and NIS 5,000,000 (approximately US $1,250,000) for companies, payment to victims of the violation, prohibition on the violator to act as a senior office holder for one year in one of the entities detailed in the Law.[39]

36. Efficiency of Enforcement Procedures in the Securities Authority Act (Legislation Amendments), 5771-2011, *available at* http://www.knesset.gov.il/privatelaw/data/18/3/489_3_1.rtf (Isr.).
37. The Securities Law, 5728-1968, SH No. 2274 p. 206, § 52LLL (Isr.).
38. *See id.* § 52FF.
39. *Id.* §§ 52AAA, 52DDD.

In September 2012, the Committee ruled in its first case concerning stock price manipulation by means of artificial transaction[40] and imposed on the defendant a monetary sanction of NIS 50,000 (approximately US $12,500).[41]

B. Committee on Increasing Competition in the Economy

The Israeli Government appointed a special committee (Special Committee) in 2010 to examine the Israeli concentrated corporate structure and its effect on the level of competition, market efficiency, and financial stability. The Special Committee's final proposals were adopted in April 2012,[42] and a bill was submitted to the Knesset in July 2012.[43] Enacting the Special Committee recommendations would have a material impact on the Israeli market and economy and call for a change in core corporate concepts.

According to the Special Committee, the Israeli economy is characterized by a small number of control groups, which control major business areas, may have negative effects on competition, distribution of sources and financing, excessive leverage and risk, conflicts of interests, and systemic risk in the Israeli market. The Special Committee also addressed the pyramid structure used by controlling business groups. This pyramid structure typically involves a public company with a controlling shareholder holding 50 percent or less of the company's capital (often through intermediate companies) and whose voting rights in the company exceed its holdings in capital (a Gap Company).

The Special Committee's recommendations include several recommendations to limit such negative effects.[44] These recommendations include: separating equity holdings in significant non-financial corporate businesses[45] and in significant financial[46] activities; prohibiting the establishment of new pyramid structures of more than two or three layers (if it is a current pyramid structure); prohibiting the same directors from serving both in a significant non-financial corporation and in a significant financial corporation; strengthening corporate governance and powers of minority shareholders in Gap Companies,

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40. Press Release, Isr. Sec. Auth., In the First Decision of the Administrative Enforcement Committee Portfolio Securities Exchange Manipulation Using Artificial Deal (Nov. 14, 2012), http://www.isa.gov.il/Default.aspx?Site=MAIN&ID=8,175,5166; Chairman of Israel Securities Authority v. Dahan [2012] (Isr.), *available at* http://www.isa.gov.il/Download/IsaFile_7193.pdf.

41. In determining the amount of the fine, the Committee took into account, among other, the primacy of the discussion concerning a manipulation violation in an administrative discussion and the policy of the ISA chairperson of moderating sanctions in the first year of enforcement. Press Release, Isr. Sec. Auth., *supra* note 40.

42. Comm'n to Increase Competitiveness, Final Report of the Commission to Increase Competitiveness (Mar. 2012), *available at* http://mof.gov.il/Pages/CompetitivenessCommittee.aspx.

43. Nadav Shemer, *Knesset Approves First Reading of Economic-Concentration Bill*, Jerusalem Post (July 18, 2012), http://www.jpost.com/Business/BusinessNews/Article.aspx?id=277878.

44. In determining the amount of the fine, the Committee took into account, among other, the primacy of the discussion concerning a manipulation violation in an administrative discussion and the policy of the ISA chairperson of moderating sanctions in the first year of enforcement. Press Release, Isr. Sec. Auth., *supra* note 40.

45. A significant non-financial corporate businesses is a corporation that is not a financial entity and: (i) generates sales in Israel exceeding NIS 6 billion or (ii) its balance sheet debt and debentures issued in Israel in the past calendar year for which financial statements were prepared exceeds NIS 6 billion. *See* Comm'n to Increase Competitiveness, *supra* note 42, at 7.

46. Financial corporations that manage assets exceeding NIS 40 billion are considered to engage in significant financial activities. *Id.* at 8.

strengthening directors' independence; requiring a competitive process (such as a tender) before approving certain interested party transactions; encouraging private enforcement by shareholders; and encouraging institutional investor activism, including enabling institutional investors to coordinate their positions before shareholder meetings and requiring institutional investors to take into account the quality of corporate governance when making investment decisions.

C. Corporate Governance

In November 2012, the Israeli Legislature adopted an amendment to the Companies Law, 1999 (Companies Law) concerning the terms of engagement and employment of officers in publicly-traded companies and debentures companies (Amendment No. 20).[47] The main purpose of this amendment is to provide procedures for companies to determine appropriate compensation for their officers. Amendment No. 20 is a supplementary layer to the amendments of the Companies Law adopted during 2011, which dealt with strengthening and improving the efficiency of corporate governance by emphasizing principles of the independence of directors and the Audit Committee, strengthening the status of institutional investors and minority shareholders in public companies, etc. in publicly-traded companies and debenture companies.

Amendment No. 20 obligates companies with publicly traded equity and with publicly traded debentures to form a compensation committee of the board of directors,[48] of which the majority of its members should be external directors. Pursuant to Amendment No. 20, such companies will be required to adopt a compensation policy concerning the terms of employment of officers.

VII. Developments in Sweden

A. Recent Significant Developments in Sweden in the Area of International Securities and Capital Markets During 2012

1. *High frequency Trading — New Guidelines*

High-frequency trading became the subject of intense public focus and debate in Sweden during the fall of 2011.

The European Securities and Markets Authority (ESMA) adopted guidelines concerning high frequency and algorithm trading on February 24, 2012,[49] which came into effect in Sweden on May 1, 2012.[50] The requirements concern the trading systems of trading

47. Amendment to the Companies Law (No. 20), 5772-2012 (Isr.), *available at* http://www.justice.gov.il/NR/rdonlyres/87E79A0A-2224-4944-B26F-191E7D7E5F62/38579/2385.pdf.

48. Companies Law, 5759-1999, SH No. 2385 p. 6, § 118 (Isr.).

49. Eur. Secs. & Mkts. Auth., *Systems and Controls in an Automated Trading Environment for Trading Platforms, Investment Firms and Competent Authorities* 5 (Feb. 24, 2012) [hereinafter *Systems and Controls*], *available at* http://www.esma.europa.eu/system/files/esma_2012_122_en.pdf.

50. *Nya EU-regler för automatiserad handel från 1 maj* [*New EU Rules for Automated Trading from May 1*], Finansinspektionen [Financial Supervisory Inspectorate] (Feb. 4, 2012) [hereinafter *New EU Rules for Automated Trading from May 1*]. The Guidelines (Systems and Controls in an Automated Trading Environment for Trading Platforms, investment firms and competent authorities) are also available on this page.

venues and investment firms as well as the use of trading algorithms.[51] They also address trading surveillance and the prerequisites to apply for offering customers the ability to trade directly in the trading systems.[52]

The Swedish Financial Supervisory Authority (SFSA) informed the market that it assumes trading platforms and investment firms will adapt their respective activities to the guidelines as soon as possible after they entered into force on May 1, 2012, and that the SFSA, after May 1, 2012, intends to apply the guidelines in its supervision.[53] This means that several changes in the organization of the entities, subject to the guidelines, are required. Some market players objected and argued that the industry needs a realistic transitional period to implement the guidelines, but the SFSA did not change its position.

2. *Amendments in Prospectus Legislation*

The Prospectus Directive[54] and accompanying Commission's Regulation on Prospectuses[55] establish a harmonized format for prospectuses in Europe. The directive gives companies that receive approval for a prospectus prepared for admitting securities to trading on the market within one state of the European Economic Area (EEA), the right to use the same prospectus in any number of other European markets without having to reapply for approval from the local regulator. The Prospectus Directive was amended through Directive 2010/73/EC, which entered into force on July 1, 2012.[56] In order to implement the changes outlined in Directive 2010/73/EC, the Swedish Financial Instruments Trading Act[57] was amended correspondingly.[58] The main changes concern, inter alia, the following areas:

- The prospectus requirement occurs when an offer is addressed to 150 persons or more; the previous limit was 100 persons.[59]
- The threshold for the prospectus requirement when securities are offered to the public was increased from €1 million to €2.5 million.[60]
- The exemption from the prospectus requirement for offers to employees was expanded. This expansion means that no prospectus is required for offers to employ-

51. *Systems and Controls*, *supra* note 49, at 8-11.

52. *Id.* at 9-13.

53. For the SFA's announcement, see *New EU Rules for Automated Trading from May 1*, *supra* note 50.

54. *See* Directive 2003/71, of the European Parliament and of the Council of 4 November 2003 on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC, 2003 O.J. (L 365/64).

55. *See* Commission Regulation 809/2004, Implementing Directive 2003/71/EC of the European Parliament and of the Council as Regards Information Contained in Prospectuses as well as the Format, Incorporation by Reference and Publication of such Prospectuses and Dissemination of Advertisements, 2004 O.J. (L 149) (EC).

56. *See* Directive 2010/73, of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency, 2010 O.J. (L 327) (EC).

57. *See* LAG OM HANDEL MED FINANSIELLA INSTRUMENT [SWEDISH FINANCIAL INSTRUMENTS TRADING ACT] (Svensk författningssamling [SFS] 1991:980) (Swed.).

58. The Swedish Financial Instruments Trading Act was amended through The Act (SFS 2012:378) regarding amendments to the Swedish Financial Instruments Trading Act and the amendments were incorporated in the Swedish Financial Instruments Trading Act SFS 1991;980.

59. *Id.* 2 ch. 1, 4 §§, item 1, *e contrario*,

60. *Id.* 2 ch, 4 §.

ees of the firms registered in the EEA and, in certain cases, for the firms registered outside of the EEA.[61]

- Reduced information requirements shall apply for companies with reduced market value in connection with preferential rights issues as well as for small and mid-sized companies.[62]
- The "qualified investor" definition[63] was changed in order to include legal or natural persons who are deemed to be a "professional client" or "eligible counterparty," as defined by the Swedish Securities Market Act.[64]
- The deadline for withdrawal of a supplement to a prospectus, which is needed to be drafted in certain situations, was reduced from five to two days in accordance with the harmonized EU rules.[65]
- Prospectus summary requirements entail drafting a standardized table format prospectus summary in order to improve comparability between different prospectuses.[66]

In connection with the changes described above, the SFSA's prospectus guidelines were amended. The guidelines are used as additional guidance in connection with drafting the prospectus application to SFSA.[67]

3. *Short Selling — New Regulation*

The regulation regarding short selling and certain aspects of credit default swaps entered into force in Sweden on November 1, 2012.[68] The regulation harmonizes the rules concerning short selling in the European Union and addresses shares and state securities. The short selling rules require investors to, inter alia, publicly disclose significant net short positions in certain cases.[69] Such disclosures are to be made to the SFSA.[70]

VIII. Developments in Turkey

The modern securities market in Turkey was created in the 1980s as part of the country's general efforts to liberalize its economy. Now in its third decade, Turkish capital

61. *Id.* 2 ch. 5 §.
62. *Id.* 2 ch. 11 §.
63. *Id.* 1 ch. 1 §.
64. *Id.* 8 ch. 16-17, 19 §§ LAG OM VÄRDEPAPPERSMARKNADEN [SECURITIES MARKET ACT] (Svensk författningssamling [SFS] 2007:528) (Swed.).
65. *Id.* 2 ch. 34 § LAG OM HANDEL MED FINANSIELLA INSTRUMENT (SFS 1991:980) (Swed.). An example of such a situation would be if new circumstances or factual errors which can influence an assessment of the transferable securities included in a prospectus occurs or is noticed after the prospectus has been approved but before the application period pursuant to the offer of transferable securities to the public has expired.
66. *Id.* 2 ch. § 14.
67. For the SFSA's Prospectus Guidelines, *see Granskning av prospect* [*Examination of Prospectuses*], FINANSINSPEKTIONEN [FINANCIAL SUPERVISORY INSPECTORATE], http://www.fi.se/Tillstand/Prospekt/Listan/Ny-uppdaterad-version-av-FIs-vagledning-for-prospekt/ (last visited Jan. 29, 2013). These guidelines are valid beginning November 5, 2012. *See id.*
68. Commission Regulation, 236/2012 of the European Parliament and of the Council of 14 March 2012 on Short Selling and Certain Aspects of Credit Default Swaps, 2012 O.J. (L 86).
69. *Id.* art. 5.
70. *Id.* art. 9.

markets are still largely untapped, mostly due to historical macroeconomic and systemic problems, such as the high inflationary environment throughout the 1990s and a lack of awareness the part of issuers and investors as to what capital markets can offer them. Most Turkish companies still prefer instruments other than securities, such as bank loans, to raise capital. The country's corporate bond market is virtually untapped,[71] and the number of publicly traded companies is quite low.[72]

With that said, for several years, the Turkish Government, the Istanbul Stock Exchange (ISE), and other market participants have been undertaking various projects in order to increase awareness of capital markets instruments. The Capital Markets Board of Turkey (CMB), the primary regulator and supervisor of Turkish capital markets, has, for its part, taken significant steps toward enhancing the regulatory regime in the country. The overarching goal of the CMB is to modernize Turkey's securities laws by better aligning them with EU regulations and international market practices. To that end, the CMB has recently released some significant communiqués:

- Corporate Governance: whereas listed companies were previously subject to a "comply or disclose" model, many extensive provisions are now being applied to most listed companies, such as the oversight of transactions with directors and officers, independence requirements for directors, and the functioning of board committees.[73]
- Interest on Debt Securities: interest must now start accruing on the date the securities are credited to the accounts of holders. Previously, it would start accruing on the last day of the order period.[74]
- Protection of Investors' Interests: issuers are now obliged to take necessary precautions to protect the interests of investors between the date investors place their orders and the initial interest accrual date and disclose such precautions in the prospectus.[75]
- Trading in Foreign Derivatives: intermediary institutions authorized to trade in derivative products are now permitted to trade in foreign derivatives too, provided that such securities are not linked to or backed by ISE indices or securities listed on the ISE.[76]
- Issuer Status for Factoring Companies: factoring companies have been granted issuer status and are now authorized to issue securities secured by their factoring receivables.[77]

71. Government bonds constitute around 99 percent of the total bond market. Kerem Turunç, *Exciting Times for Capital Markets in Turkey*, INT'L FIN. L. REV. (July 1, 2012), http://www.iflr.com/Article/3061362/Exciting-times-for-capital-markets-in-Turkey.html.

72. Approximately 12 percent of the top 1000 Turkish companies are listed. *Id.*

73. Amendments to the "Communiqué on Determination and Application of the Corporate Governance Principals, Serial: IV No: 56" were made on February 11, June 26, and September 13, 2012.

74. Amendments to the "Communiqué on Principles of Registration and Sale of Debt Securities, Serial: II No:27" were made on March 8, 2011.

75. Turunç, *supra* note 71.

76. Amendments to the "Communiqué on Brokerage Operations and Principles Regarding Intermediary Institutions, Serial: V No: 46" were made on May 6, 2011. *Id.* at 51.

77. Amendments to the "Communiqué on Principles Regarding Asset Guaranteed Securities, Serial: III No: 38" were made on July 20, 2011. *Id.*

A. New Capital Markets Law

The most exciting news of the year was the enactment by the Turkish Parliament of a new capital markets law.[78] The new law brought about some significant changes such as the following:

- The adoption of a prospectus review process, similar to the one used in the European Union.
- Enabling issuers to use a base prospectus, which, once approved, will remain effective for twelve months instead of having to go through a full review process for each issuance.
- Subject to CMB approval, permitting issuers to issue securities at a discount to the face value of the security, if the book or market value of such securities is below their face value.
- Permitting investors to cancel their orders within two business days after an amendment to the prospectus.
- Expanding the disclosure requirements of issuers as well as responsibility and liability for inaccurate or misleading information and omissions in disclosure documents.
- Modeling the definitions of insider trading and market manipulation after the relevant EU Directives, adopting extensive penalty provisions for violators and severe obligations for market participants.
- Creating an investor compensation fund modeled after EU examples.
- Empowering the CMB to make rules regarding certain major events such as mergers, sale of all or a significant portion of assets, and delisting, and also allowing the CMB to impose monetary penalties for transactions conducted in violation of such rules.
- Permitting shareholders who vote against such transactions to force a mandatory redemption of their shares by the company.
- Implementing squeeze-out rights and put options in relation to tender offers.
- Enabling companies to determine dividends based on the guidelines adopted by their general assemblies, instead of the CMB setting minimums for dividend distributions, as is the case now.

The Turkish economy is more stable and dynamic than it has been for decades and is expected to perform generally well over the foreseeable future. A growing economy, a large and mostly young consumer base, and continuous efforts to enhance the regulatory infrastructure and increase diversification of products signal exciting times for Turkish capital markets.

78. Capital Markets Law, Law No. 6362, Resmi Gazete [R.G.] 28513, 30 Dec. 2012, enacted 6 December, 2012.