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Chapter 33

UNITED STATES

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I INTRODUCTION

Regulation of the capital markets in the United States is principally conducted by federal government agencies, particularly the Securities and Exchange Commission (SEC).

The Securities Act of 1933 (the Securities Act) requires that all offers and sales of securities in the United States be made either pursuant to an effective registration statement or an eligible exemption from registration. In addition, any class of securities listed on a US exchange must be registered under the Securities Exchange Act of 1934 (the Exchange Act), and the relevant issuer is required to file annual and other reports with the SEC. Exchange Act registration and reporting also applies to unlisted equity securities held by a sufficiently large population of US record holders, requirements that can apply to companies organised and traded outside the United States. Companies with securities registered under the Exchange Act are also subject to the SEC's rules on ownership reporting and tender offers.

The perspective of the SEC statutes is that persons making investment decisions in regulated transactions should have complete and reliable information. The detailed disclosure requirements that apply to such transactions are found in the rules promulgated by the SEC under the securities laws.

In addition to the SEC, other federal and state regulators and self-regulatory organisations play important roles in the oversight of the securities activities of banks,

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insurers and broker-dealers, in particular. Finally, the Commodities Futures Trading Commission (CFTC) continues to adopt and propose important rules relevant to the securities industry and the capital markets.

Wide-ranging SEC rule changes have been adopted in recent years under the post-crisis Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) and the Jumpstart our Business Startups Act of 2012 (the JOBS Act). These two laws have furthered apparently competing objectives. The Dodd-Frank Act, generally, sought to increase investor protection through substantive market regulation. The JOBS Act, in contrast, was intended to ease burdens associated with capital raising in the United States with liberalised advertising rules and disclosure standards. Most of the required rule changes under these Acts have now been adopted, but there have been, and will be, further important implementation measures in 2015 and beyond. Not all of the rule changes (and related SEC staff interpretations) apply to non-US issuers.

This chapter summarises some of the more important rule changes and proposals over the past year, as well as some of the more important litigation, tax and other developments likely to be of interest to capital markets practitioners outside the United States.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

In 2015, notable SEC rule changes and guidance of relevance to transactional lawyers included the adoption of Regulation A+, a small public offering exemption with filing and disclosure requirements similar to Securities Act registration, and a no-action letter designed to make it easier to conduct five-business-day tender and exchange offers for non-convertible debt securities. There were also disclosure-focused SEC rule changes and proposals that, while not all applicable to non-US issuers, are all of potential interest to those interested in shareholder activism and other corporate governance developments. 2015 also saw important further developments in relation to the Volcker Rule. These are discussed in Section II.vi, *infra*.

Regulation A+

The SEC's Regulation A has provided a streamlined method to allow unregistered public offerings for many years, but its very limited scope has meant that the rules have seldom been used for mainstream capital raising activities since the adoption of Regulation D in the early 1980s. Regulation A+, which came into effect in June 2015, raises the amount that can be raised in Regulation A offerings from US$5 million to US$50 million over a 12-month period.[2] The new rules should result in increased use of Regulation A procedures by eligible issuers. The amendments create a two-tiered framework for Regulation A offerings. Issuers in Tier 1 may offer and sell up to US$20 million of securities over a

2 See Sidley Austin LLP, Securities Update: Regulation A+ Takes Effect on 19 June 2015: Making the Grade?, 11 June 2015 (www.sidley.com/~/media/update%20pdfs/2015/06/20150610%20securities%20update.pdf).

12-month period. Issuers in Tier 2 may offer and sell up to US$50 million of securities over a 12-month period. The key difference between the two tiers is that a Tier 2 offering will subject the issuer to ongoing annual and other reporting requirements. Regulation A+ also includes testing-the-waters provisions and simplified disclosure and financial statement requirements. No SEC filing fees are payable in connection with Regulation A offerings.

Unfortunately, the eased capital raising requirements made possible by Regulation A+ will only be available to US and Canadian issuers. Several commentators urged the SEC to open eligibility for the regulation to issuers wherever organised, but the agency stated that it wished to observe the amended rules in operation before deciding to extend the exemption generally.

Five-business-day tender and exchange offers

The SEC's requirements under the Exchange Act for tender and exchange offers (designed primarily for those in relation to equity securities) have long been viewed as impractical for offers of non-convertible debt securities, particularly the 20-business-day requirement mandated for such offers by Rule 14e-1 under the Exchange Act. Over the years, the staff has accommodated market participants through a series of no-action letters that allow somewhat easier requirements in relation to exchange offers for investment grade debt securities. Notwithstanding these accommodations, the perception that the staff's position was too limited continued.

In January 2015, the SEC staff issued a no-action letter expanding its historical positions, which are expressly superseded by the letter.[3] These include the extension of the staff's no-action position beyond cash tender offers to include exchange offers and of the simplified procedures to offers in relation to non-investment grade non-convertible debt securities, which were formerly ineligible for relief. The letter reflects extensive discussions and negotiations among a group of law firms, the Credit Roundtable and the SEC staff, and applies to both US and foreign private issuers.

Under the letter, issuers will be able to conduct tender or exchange offers over a five-business-day period if the following eligibility requirements are satisfied. The offer must be: (1) made for 'any and all' of a series of non-convertible debt securities; (2) made by the issuer of the target securities or its 100 per cent parent or subsidiary; (3) made solely for cash and/or qualified debt securities (essentially securities that are identical in all material respects to the target securities, except as to maturity date, interest rate and other market-specific characteristics) of the issuer (or cash only for ineligible exchange offer participants); and (4) open to all record and beneficial holders of the target debt securities.

An abbreviated offer will be subject to requirements that: (1) it must not be made in connection with a solicitation of consents to amend the indenture or other

3 Securities and Exchange Commission, Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities, 23 January 2015 (www.sec.gov/divisions/corpfin/cf-noaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf); see also, Sidley Austin LLP, Securities Update: SEC Guidance for Five Business Day Tender Offers and Exchange Offers for Debt Securities, 12 February 2015 (www.sidley.com/news/02-12-2015-securities-update).

instrument governing the debt securities; (2) it must not be made if a default or event of default exists under the indenture or any other indenture or material credit agreement to which the issuer is a party; (3) it must not be made at the time the issuer is the subject of bankruptcy or insolvency proceedings, or has commenced a solicitation of consents for a 'pre-packaged' bankruptcy proceeding or if the board of directors has authorised discussions with creditors for a consensual restructuring of the issuer's outstanding indebtedness; (4) it must not be financed with indebtedness that is senior in right of payment to the subject debt securities; (5) it must make provision for tenders to be made through a guaranteed delivery procedure; (6) it must make provision for withdrawal rights; (7) there can be no early settlement; and (8) it must not be made in conjunction with a range of specified material transactions, such as a change of control transaction or a competing offer.

Notice requirements include publication of a press release prior to 10am, Eastern time, on the first business day of the five-business-day offer period, the communication of related information and other offer details to beneficial holders and prospective investors, and the publication of a press release promptly after the consummation of the offer disclosing the results of the offer. SEC registrants are required to furnish the related communications to the SEC on Form 8-K. (In the case of a foreign private issuer, such a report would presumably be made on Form 6-K.)

Corporate governance rule changes and proposals

Most of the SEC's corporate governance requirements do not apply to foreign private issuers, which are generally obliged to follow and provide disclosure with respect to their home country standards. Nonetheless, US developments (including SEC rule changes) in the area have helped to inform the corporate governance debate in Europe and elsewhere.[4]

One topic of continued interest in the United States and the United Kingdom is executive compensation. Acting under the Dodd-Frank Act, the SEC adopted rules in August 2015 (the subject of a *Financial Times* editorial[5]) to require public companies to disclose the 'pay ratio' between its CEO's annual total compensation and the median annual total compensation of all other employees of the company.[6] The pay ratio rules

4 See, e.g., Sidley Austin LLP, Corporate Governance and Executive Compensation Update: The State of Corporate Governance for 2015, 13 January 2015 (www.sidley.com/~/media/Files/NewsInsights/News/2015/01/The%20State%20of%20Corporate%20Governance%20for%202015/Files/Read%20Update%20in%20PDF%20Format/FileAttachment/011315%20Corporate%20Governance%20Update).

5 Pozen, Robert, 'Executive pay is a touchy but misunderstood subject', *Financial Times*, 2 August 2015 (www.ft.com/intl/cms/s/0/c867cf7a-3546-11e5-bdbb-35e55cbae175.html#axzz3lATeJqEc); see also, 'Companies need to accept that remuneration is now a public issue', *Financial Times*, 7 August 2015 (www.ft.com/intl/cms/s/0/11acf6fc-3cf3-11e5-8613-07d16aad2152.html#axzz3lATeJqEc).

6 See Sidley Austin LLP, Corporate Governance Update: SEC Adopts CEO Pay Ratio Disclosure Rule Required by Dodd-Frank, 12 August 2015 (www.sidley.com/~/media/update-pdfs/2015/08/0807-corporate-governance-update.pdf).

do not apply to foreign private issuers. Covered domestic companies will be required to provide pay ratio disclosure for fiscal years beginning on or after 1 January 2017.

In July 2015, the SEC proposed rules for clawbacks of executive compensation. The proposed rules, which were directed by Congress in the Dodd-Frank Act, would compel the US securities exchanges to adopt listing standards requiring all companies with listed securities to adopt, disclose, and enforce clawback policies applicable to executive officers. As proposed by the SEC, the rules would call for the repayment of three years' incentive-based compensation in the event that a listed company is required to prepare an accounting restatement because of material non-compliance with any financial reporting requirement under SEC regulations. The clawback policy would apply to the listed company's chief executive, chief financial and accounting officers, any vice-presidents in charge of a principal business unit or function, and any other person making policy for the company. Former executive officers would be included. All covered officers would be subject to the clawback without regard to personal fault. Amounts recoverable would be the excess of incentive-based compensation paid on the basis of the erroneous financial statements over what would have been paid under the restated financial statements. The proposal would allow a foreign private issuer not to seek clawbacks of covered compensation if such recovery would violate the law of the issuer's home jurisdiction, but only if the law in question was in force before the publication of the final clawback rule in the Federal Register. Companies would be required to file their clawback policy as an exhibit to their annual report on Form 10-K or 20-F, as applicable. Failure to adopt, disclose, or enforce the required clawback policy would be grounds for delisting the company's securities. It remains to be seen whether the rules as finally adopted will extend to foreign private issuers or be restricted to US issuers.[7]

In April 2015, the SEC proposed rules requiring a domestic public company to disclose how its executive compensation relates to its financial performance.[8] Under the proposal, the company would be required to prepare and disclose a table showing the executive compensation paid to a company's named executive officers and the financial performance of the company and a 'peer group' selected by the company for the past five years. Using the information disclosed in the table, the company would have to describe, in narrative or graphic form, the relationship between the executive compensation actually paid and the company's cumulative total shareholder return (TSR) and the relationship between the company's TSR and the TSR of its peer group. Although the rule may not be adopted in its proposed form, the Dodd-Frank Act mandates a rule prescribing a TSR comparison. A number of companies are already making some form of the disclosures envisaged.

7 See Sidley Austin LLP, Corporate Governance and Executive Compensation Update: SEC Proposes Compensation Clawback Rules, 7 July 2015 (www.sidley.com/~/media/update-pdfs/2015/07/0706-client-update-on-sec-proposed-clawback-rules-july-2015.pdf).

8 See Sidley Austin LLP, Corporate Governance Update: SEC Proposes Rules Requiring Pay Versus Performance Disclosure, 1 May 2015 (www.sidley.com/news/2015-05-01-corporate-governance-update).

Another SEC rule proposal under the Dodd-Frank Act was published for comment in February 2015.[9] This would require a domestic public company to disclose whether its employees (including officers) and directors are permitted to hedge the company's equity securities. The proposed rules are intended to ensure shareholders are informed as to whether employees or directors are allowed to engage in transactions to mitigate or avoid the risks associated with long-term ownership of a company's stock and thereby eliminate the incentive alignment associated with equity ownership. Notably, the proposal would not require companies to prohibit such hedging.

ii Developments affecting derivatives, securitisations and other structured products

2015 also saw the introduction of important rule proposals, changes and regulatory guidance relating to securitisation transactions, derivatives and, to a lesser extent, structured products. These included final rules adopted by the SEC in relation to due diligence reports and risk retention in securitisation transactions, as well as rules proposed by the CFTC to determine the cross-border application of its margin requirements for uncleared swaps.

Dodd-Frank final ABS risk retention rules

Final rules under the Dodd-Frank Act requiring sponsors of asset-backed securities (ABS), or their majority-owned affiliates, to retain not less than 5 per cent of the credit risk on the securitised assets on an unhedged basis, subject to various exemptions, were adopted by the SEC in October 2014.[10] Generally, the risk retention requirements aim to remedy the general erosion of lending standards purportedly resulting from the 'originate to distribute' business model by requiring sponsors to align their economic interest with those of investors through retention of 'skin in the game'.

These final rules apply to ABS whether such securities are publicly offered, privately placed or otherwise exempt from registration under the Securities Act, including offerings under Rule 144A. The compliance date for securitisation transactions is 24 December 2015 for ABS backed by residential mortgages and 24 December 2016 for all other asset classes. Transactions closing prior to the applicable compliance date need not conform to the final rules except in limited circumstances.

The final rules permit a sponsor's majority-owned affiliates (wholly-owned in the case of revolving pool securitisations) to share in holding the retained interest with the sponsor. In addition, a sponsor may share its risk retention requirement with one or more originators that meet certain conditions.

9 Securities and Exchange Commission, Proposed Rule: Disclosure of Hedging by Employees, Officers and Directors, Release No. 33-9723; 34-74232, 9 February 2015 (www.sec.gov/rules/proposed/2015/33-9723.pdf).

10 See Sidley Austin LLP, Sidley Update: Agencies Adopt Final Dodd-Frank Risk Retention Rules for Asset-Backed Securities, 25 November 2014 (www.sidley.com/~/media/Files/News/2014/11/Agencies%20Adopt%20Final%20DoddFrank%20Risk%20Retention%20Ru__/Files/View%20Update%20in%20PDF%20Format/FileAttachment/112514SidleyUpdate).

The final rules allow a sponsor to satisfy the base risk retention requirement by retaining an eligible vertical interest, eligible horizontal residual interest or any combination thereof, as long as the percentage amount of the combined vertical and horizontal interests is no less than 5 per cent. The percentage amount of an eligible vertical interest is the percentage of each class of 'ABS interests' that is issued in the securitisation transaction and held by the sponsor. The percentage amount of an eligible horizontal residual interest equals the fair value (determined in accordance with US GAAP) of the eligible horizontal residual interest expressed as a percentage of the fair value of all of the ABS interests issued. An eligible horizontal residual interest need not be represented by a single class of ABS interests, but may consist of multiple adjacent classes or by the maintenance of a funded horizontal cash reserve account. In addition, a sponsor may hold an eligible vertical interest as a single vertical security. The final rules also impose detailed disclosure obligations and require sponsor certifications with respect to fair value determinations of eligible horizontal residual interests and certain other material items.

The rules generally permit interest rate and currency hedging and certain limited index-based hedging activities. Separate sunsets on the hedging and transfer restrictions for sponsors of residential mortgage-backed securities (RMBS) and non-RMBS transactions apply.

The final rules also specify various exemptions to the standard risk retention requirements depending on the particular asset class or other criteria. For example, sponsors of RMBS transactions for which the collateral consists entirely of 'qualified residential mortgages' and certain other qualifying assets will not be obligated to satisfy the requirements. Qualified residential mortgages for purposes of risk retention are 'qualified mortgages' that satisfy the US Consumer Financial Protection Bureau's ability-to-repay rules. The final rules also contain a safe harbour from risk retention for foreign-based securitisation transactions that satisfy certain conditions, including that:

a the securitisation transaction is not, and is not required to be, registered under the Securities Act;

b the initial investors that are US persons constitute no more than 10 per cent of the dollar value (or foreign currency equivalent) of all classes of ABS interests;

c neither the sponsor nor the issuer is formed under United States federal or state law or is the unincorporated US branch or office of an entity not formed thereunder; and

d no more than 25 per cent of the assets collateralising the ABS sold in the securitisation transaction were acquired by the sponsor from a consolidated affiliate of the sponsor or issuing entity that is a US-located entity described in (c) above.

Significantly, the regulations do not recognise satisfaction of risk retention under other regimes, including the EU Capital Requirements Regulation, as sufficient to satisfy the final rules.

New SEC rules requiring disclosure of certain ABS due diligence reports

In August 2014, the SEC implemented final rules under the Dodd-Frank Act that expand disclosure requirements concerning due diligence services conducted by third parties engaged by the issuer or underwriter of rated ABS, whether publicly registered under the Securities Act or exempt from registration. The rules are intended to improve the quality of credit ratings by providing more comprehensive and accurate information, to reduce information asymmetries between investors and transaction participants and to increase transparency regarding the due diligence process. The effective date for the final rules was 15 June 2015.[11]

Under new Rule 15Ga-2, an issuer or underwriter of an ABS that will be rated by a nationally recognised statistical rating organisation (NRSRO) must furnish to the SEC on Form ABS-15G, at least five business days prior to the first sale in the offering, the findings and conclusions of any third-party due diligence report obtained by the issuer or underwriter.

Rule 17g-10 defines a third-party due diligence report as any report containing findings and conclusions of any due diligence services, including a review of the assets underlying an ABS for the purpose of making findings with respect to the accuracy of the information about the assets provided by the securitiser or originator of the assets, whether the origination of the assets conformed to underwriting criteria, compliance with applicable laws or any other characteristic that would be material to the payment on the ABS. The adopting release to the final rules clarifies that the definition of due diligence services is intended to cover reviews of assets by diligence providers that are commonly understood in the securitisation markets to be third-party due diligence services.

For registered ABS transactions, if the required disclosures under Rule 15Ga-2 have been made in the related prospectus, the issuer or underwriter may satisfy its disclosure obligation by referring to that section of the prospectus in the Form ABS-15G. Unrated ABS and unregistered offshore offerings having an issuer that is not a US person and for which the security will be offered and sold only in transactions that occur outside the United States generally are not subject to the final rules.

Rule 17g-10 requires providers of third-party due diligence services to an NRSRO, issuer or underwriter to deliver a written certification on new Form ABS Due Diligence-15E to any NRSRO that produces a credit rating to which the services relate and to the issuer or the underwriter responsible for maintaining the transaction website under Rule 17g-5. The NRSRO must disclose any certification on Form ABS Due Diligence-15E received from a third-party due diligence provider in a report accompanying each rating action to which the certification relates and to what extent it used due diligence services of a third party in taking the rating action.

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11 See Sidley Austin LLP, Global Finance Update: SEC Releases Final Rules on Third-Party Diligences Reports for Asset-Backed Securities, 27 October 2014 (www.sidley.com/~/media/Files/News/2014/10/SEC%20Releases%20Final%20Rules%20On%20ThirdParty%20Diligence__/Files/Read%20Update%20in%20PDF%20Format/FileAttachment/20141027%20Global%20Finance%20Update); Sidley Austin LLP, Global Finance Update: SEC Issues Final Rules for Asset-Backed Securities with Respect to Certain Third-Party Due Diligence Services Provided in Rated Transactions, 28 August 2014 (www.sidley.com/en/news/08-28-2014-global-finance-update).

CFTC rule proposal for cross-border application of margin requirements for uncleared swaps

In June 2015, the CFTC proposed rules that will determine the cross-border application of its margin requirements for uncleared swaps.[12] The proposal reflects a significant re-evaluation of the agency's 2013 cross-border interpretation, which had been the subject of much comment and criticism. Importantly, the proposal has narrowed the definitions of US person and guarantee for purposes of applying its margin requirements for uncleared swaps, has indicated a willingness to alter the means by which it takes cross-border regulatory action related to swaps (rule-making versus interpretive guidance), and has signalled a greater interest in collaborating and finding common ground with regulators in other countries, perhaps evidencing a desire on the CFTC's part to exercise a regulatory oversight role not unlike that exercised by bank regulators in relation to consolidated supervision.

The CFTC's proposal should be read together with the rules proposed separately in 2014 by the various bank regulators and by the CFTC which would establish the requirements for initial and variation margin that CFTC-registered swap dealers and major swap participants must post to and collect from their counterparties.[13] The 2014 proposals mirror to a significant degree the final international standards on margin requirements for non-centrally cleared derivatives issued in September 2013 by the Basel Committee on Banking Supervision and the Board of the International Organization of Securities Commissions.

SEC guidance in relation to structured notes

For several years, the SEC staff has expressed concerns related to the complexity of structured note products and the adequacy of related disclosures. This continues to be a topic of concern. In August 2015, the Office of Compliance Inspections and Examinations published a risk alert regarding broker-dealer controls in relation to the retail sale of structured products.[14]

iii Cases and dispute settlement

The global financial crisis has generated more litigation and regulatory enforcement action than any other crisis. At the cost of billions of dollars, US and other banks with US operations continue to defend and settle multiple claims by private and

12 See Sidley Austin LLP, Derivatives Update: CFTC Proposes Rules for Cross-Border Application of Margin Requirements for Uncleared Swaps, 4 August 2015 (www.sidley.com/~/media/20150804-derivatives-update.pdf).

13 See Sidley Austin LLP, Derivatives Update: Margin Requirements for Uncleared Swaps Continue to Take Form: Prudential Regulators and CFTC Re-Propose Similar Rules, 12 November 2014 (www.sidley.com/news/11-12-14-derivatives-update).

14 Securities and Exchange Commission, Office of Compliance Inspections and Examinations, National Exam Program Risk Alert: Broker-Dealer Controls Regarding Retail Sales of Structure Securities Products, Vol. IV, Issue 7, 24 August 2015 (https://www.sec.gov/about/offices/ocie/risk-alert-bd-controls-structured-securities-products.pdf).

governmental claimants in relation to misselling, foreign currency, interest rate and other market manipulation, as well as the alleged abuse of Foreign Corrupt Practices Act, Office of Foreign Assets Control and other sanctions issues. Although not all such cases raise issues of significance to capital markets lawyers, there have been important federal court decisions in relation to conflict minerals, disclosure, sovereign immunity and other matters.

Conflict Minerals case

The US Court of Appeals for the DC Circuit recently confirmed its 2014 decision to strike down a key part of the SEC's 'conflict minerals' rule under the Dodd-Frank Act. The 'conflict minerals' statute[15] and the SEC rule implementing it[16] require all Exchange Act reporting companies whose products contain tin, tantalum, tungsten or gold to conduct due diligence to attempt to determine whether those minerals may have originated from the Democratic Republic of the Congo (DRC) or adjoining countries and, if so, whether proceeds from those minerals may have 'directly or indirectly finance[d] or benefit[ed] armed groups' committing human rights abuses.[17] Unless a company can conclude that it has no 'reason to believe' the minerals 'may have originated' from the DRC region, or can confirm that the minerals did not 'directly or indirectly finance or benefit armed groups', the rules require the company to state on its website and in public reports filed with the SEC that the products have not been found to be 'DRC conflict-free'.[18]

The National Association of Manufacturers, the Chamber of Commerce, and Business Roundtable filed suit, raising a number of arguments under the Administrative Procedures Act, and also contending that the compelled statement that products had not been found to be 'DRC conflict-free' violated the First Amendment. In 2014, a panel of the DC Circuit denied the Administrative Procedures Act challenges, but agreed that the compelled statement violated the First Amendment, because it 'requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups', a message with which issuers may strongly disagree. Following the decision, the SEC staff announced that it 'expects companies to file any reports required',[19] disclosing the factual information required by the rule, including a 'description of the due diligence that the company undertook'.[20] However, statements whether products are 'DRC conflict-free' would not be required.[21]

15 15 U.S.C. § 78m(p).

16 77 Fed. Reg. 56,274 (12 September 2012).

17 15 U.S.C. § 78m(p)(1)(A)(ii); 77 Fed. Reg. at 56,364.

18 15 U.S.C. § 78m(p)(1)(A)(ii); 77 Fed. Reg. at 56,363.

19 Keith F Higgins, Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule, 29 April 2014 (www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994#.VJhGUs8BAA).

20 Id.

21 Id.; see also, Higgins, Keith F, Securities and Exchange Commission, Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule, 29 April 2014 (www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994).

Omnicare case

US courts deal frequently with issues regarding the kinds of statements (or failures to make disclosure) that can be the subject of private lawsuits and regulatory enforcement actions, and disclosure counsel must be versed in these varying requirements, but the US Supreme Court only rarely addresses these questions. In one 2015 case, however, the Court offered guidance on a question that arises frequently for both registered and unregistered offerors: can statements of opinion, rather than statements of fact, lead to liability under the federal securities laws? The Court, in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*,[22] gave a qualified answer to that question: an opinion cannot be a false statement unless the speaker does not actually believe it (and unless it is also objectively factually incorrect). But a statement of opinion can give rise to liability for an omission when a statement falsely implies that the speaker had a reasonable factual basis for the opinion, or when the statement implies the existence of some fact that is not true.

Omnicare arose from a pharmacy-services company's regulatory problems due to alleged illegal kickbacks. The company said in the registration statement for a stock offering that it believed its business practices were 'in compliance with applicable federal and state laws' and 'legally and economically valid'.[23] As the Court noted, 'a statement of fact ('the coffee is hot') expresses certainty about a thing, whereas a statement of opinion ('I think the coffee is hot') does not,' but 'every such statement explicitly affirms one fact: that the speaker actually holds the stated belief' and thus there could be liability for misrepresenting an opinion only where the speaker did not actually believe the opinion.[24]

The Court noted that, in some cases, simply adding 'I believe' to the statement would make it an opinion.[25] Because the plaintiffs in *Omnicare* 'do not contest that *Omnicare*'s opinion was honestly held,' the Court did not discuss further what evidence would be sufficient to show that a company did not believe its own statements, but it did emphasise the prohibition on false and misleading statements.[26]

The *Omnicare* Court also commented that a statement of opinion may be materially misleading if it implied a factual basis for the opinion that did not exist. The Court warned that 'a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about […] the speaker's basis for holding that view.'[27] The Court did not address in practice how its standard would apply to actions against underwriters, accountants or other third parties rather than issuers, although the same statutory analysis would apply.

22 135 S. Ct. 1318 (2015).

23 *Omnicare*, 135 S. Ct. at 1323.

24 Id. at 1325-26.

25 Id. at 1326.

26 Id. at 1327.

27 Id. at 1328.

In re Madoff Securities

The widespread perception that US courts will give extraterritorial effect to US securities laws is perhaps sometimes overstated. On 6 July 2014, the US District Court for the Southern District of New York issued a decision in *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC* (*In re Madoff Securities*),[28] in which Judge Rakoff held that Section 550(a) of the Bankruptcy Code and the complementary provision in the Securities Investor Protection Act of 1970 (SIPA) did not apply extraterritorially, blocking the trustee's efforts to recover allegedly fraudulent transfers that were received abroad by foreign transferees.

At issue in *Madoff* was the recoverability of funds that were transferred from Bernard L. Madoff Investment Securities LLC (Madoff Securities) in New York to certain foreign feeder funds, which were in turn transferred to the funds' foreign customers, asset managers, and other persons and entities. The trustee sought to avoid and recover those transfers for the benefit of Bernard Madoff's defrauded investors. In response to the transferees' motions to dismiss, the trustee argued that the proper focus of the court's jurisdictional inquiry was the domestic nature of the SIPC-member US broker-dealer that was the subject of the SIPC liquidation; here, Madoff Securities.

In rejecting the trustee's arguments, the *Madoff* court applied the presumption that US statutes have no extraterritorial application absent a 'clearly expressed' intent by Congress to give a statute extraterritorial effect.[29] Judge Rakoff determined that it was the transfer itself, not the transferor, that was the proper focus of the court's inquiry. 'Although the chain of transfers originated with Madoff Securities in New York,' the court found that fact alone was 'insufficient to make the recovery of these otherwise thoroughly foreign subsequent transfers into a domestic application of section 550(a).'[30] The *Madoff* court concluded that the application of the Bankruptcy Code's recovery provisions to the challenged transfers would constitute an extraterritorial application of the statute, Congress did not intend such an application, and that even if the relevant provisions could be applied extraterritorially, such an application would be precluded by considerations of international comity.

The decision in *Madoff* has not yet been subject to appeal, but two subsequent opinions of the US Court of Appeals for the Second Circuit likewise rejected the extraterritorial application of US securities laws consistent with the analysis set forth by the District Court in *Madoff*.[31]

28 513 B.R. 222 (S.D.N.Y. 2014) (*Madoff*).

29 *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

30 *Madoff*, 513 B.R. at 228.

31 See *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014) (holding that security-based swaps (SBS) referencing stocks traded exclusively in foreign jurisdictions could not be the basis of liability under Section 10(b) of the Exchange Act for statements made in foreign jurisdictions by foreign individuals, despite the fact that the SBS trades themselves took place in the US); *Liu v. Siemens AG*, 763 F.3d 172 (2d Cir. 2014) (holding that that the whistle-blower anti-retaliation provision in the Dodd-Frank Act

Developments in the Argentinian bond litigation

The ongoing dispute in the New York federal courts regarding the repayment of certain of Argentina's defaulted bonds continues to place significant constraints on Argentina's access to the international capital markets. Two recent decisions by the US District Court for the Southern District of New York, favouring the so-called 'holdout' bondholders who have been locked in litigation with the Republic since 2002, illustrate the far-reaching consequences to Argentina of the *pari passu* provision, forum selection clause, and waiver of sovereign immunity in the operative bond agreement.

The bond dispute arose in 2001 when, amid a severe financial crisis, the Republic of Argentina defaulted on more than US$80 billion of sovereign debt issued under a 1994 Fiscal Agency Agreement (the FAA bonds). Argentina restructured more than 91 per cent of its bond debt in 2005 and 2010, issuing replacement 'exchange bonds' to the settling bondholders at a rate of 25 to 29 cents on the dollar.[32] The exchange bonds are composed of various series, including dollar-denominated bonds governed by New York law, dollar-denominated bonds governed by Argentine law, euro-denominated bonds governed by English law, and peso-denominated bonds governed by Argentine law.

Certain distressed sovereign debt investors, however, rejected the terms offered by Argentina to restructure their FAA bonds. These 'holdout' bondholders, led by NML Capital, filed suit in the US District Court for the Southern District of New York in 2002, pursuant to a forum selection clause and waiver of sovereign immunity by Argentina in the FAA. The holdouts sought enforcement from the District Court of the *pari passu* provision in the FAA, which provided that the FAA bonds 'shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness'. Because the FAA bonds were in default and due in full, the holdouts argued that the settling bondholders could not receive any payments of principal or interest on account of their exchange bonds unless the holdouts were paid in full. Judge Griesa concurred and on 23 February 2012 issued an injunction preventing Argentina from making any payments on the exchange bonds absent full payment to the holdouts on account of the FAA bonds. Following an appeal and remand, the injunction was modified on 21 November 2012. The modified injunction was affirmed on appeal to the US Court of Appeals for the Second Circuit but was stayed pending appeal to the US Supreme Court. On 16 June 2014, the US Supreme Court denied Argentina's petition for certiorari, which allows the injunction to stand.

The holdouts have been awarded numerous final judgments against Argentina on account of their FAA bonds, totalling approximately US$2.4 billion in principal and interest. However, Argentina has made no payments on the holdout FAA bonds. The holdouts have continued to aggressively litigate their claims in the New York courts and have obtained orders from the District Court barring Argentina's attempts to repay the dollar-denominated exchange bonds governed by New York law, dollar-denominated

did not apply to a non-US citizen overseas employee of a foreign employer solely by virtue of the fact that the employer had listed securities on a US exchange).

32 *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 252 (2d Cir. 2012).

exchange bonds governed by Argentine law,[33] and euro-denominated exchange bonds governed by English law,[34] all of which the District Court has determined are subject to the *pari passu* clause in the FAA. The practical and cumulative effect of these orders has been to block Argentina from repaying any of the exchange bonds other than the peso-denominated exchange bonds governed by Argentine law and to preclude Argentina from selling new bonds in the international capital markets.

More recently, on 16 July 2015, the District Court authorised the holdout bondholders to amend their complaints against Argentina to seek declaratory judgments that certain additional Argentine law-governed non-exchange bonds are also subject to the *pari passu* clause in the FAA, on the grounds that they too are dollar-denominated.[35] This litigation puts at issue yet another one of Argentina's debt issuances.

Investors and analysts are now looking ahead to the October 2015 elections in Argentina, which many view as Argentina's best opportunity to reach a settlement with the holdouts and resolve this dispute.

iv Relevant tax and insolvency law

Foreign Account Tax Compliance Act (FATCA)

FATCA, which was enacted by Congress in 2010 to combat tax avoidance by US taxpayers using foreign accounts and established a global approach to combating offshore tax evasion, continues to be the US tax law development of greatest interest to international capital markets lawyers. In the years following FATCA's enactment, the US Internal Revenue Service (IRS) attempted to achieve a practical implementation of FATCA, but was forced to repeatedly revise its guidance and to postpone FATCA's implementation. The IRS finally found a workable framework for implementing FATCA with final and temporary regulations that were released in early 2014, and FATCA withholding and reporting officially came into effect on 1 July 2014. Although there are several areas within FATCA that still need to be addressed in future IRS guidance, the final and temporary regulations released in 2014 remain in effect. FATCA withholding currently applies to payments of interest, but will not apply with respect to gross proceeds from the disposition of property that could give rise to US source interest or dividends until 1 January 2017. It is of particular relevance to US issuers making payments outside the

33 Opinion, *NML Capital, Ltd. v. Republic of Argentina*, No. 08-06978 (S.D.N.Y. 12 March 2015) (concluding that the dollar-denominated Argentine law-governed exchange bonds constitute 'external indebtedness' of Argentina subject to the *pari passu* clause, by virtue of the fact that they were denominated in US dollars and were 'offered in many countries, not exclusively in Argentina').

34 Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 08-06978 (S.D.N.Y. 6 August 2014) (stating that Argentina's attempted repayment of the euro-denominated exchange bonds violated the 2012 injunction and requiring The Bank of New York Mellon to retain the funds it received from Argentina for the repayment of such bonds in its account pending further court order), appeal denied, *NML Capital, Ltd. v. Euro Bondholders*, No. 14-2922 (2d Cir. 22 October 2014).

35 Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 08-06978 (S.D.N.Y. 16 July 2015).

United States, but does not apply to most debt and equity securities issued by non-US banks to US investors.

The United States has entered into intergovernmental agreements with 72 countries, and reached agreements in substance with 40 countries, to facilitate the implementation of FATCA. Under a 'model 1' intergovernmental agreement, a foreign financial institution would not be required to report information under FATCA to the IRS but would instead report to the tax authorities in its own country. Under a 'model 2' intergovernmental agreement, a foreign financial institution would be required to report to the IRS and obtain consent from its account holders to such reporting. A foreign financial institution that complies with the requirements of an intergovernmental agreement is generally not subject to FATCA withholding.

v Role of exchanges, central counterparties and rating agencies

Acting pursuant to rulemaking mandated in the Dodd-Frank Act, the SEC adopted new rules in 2014 governing nationally recognised statistical ratings agencies or NRSROs. Most important, new Exchange Act rules require the establishment, maintenance, enforcement and documentation of effective internal control structures by NRSROs. The required controls should provide for the appropriate review of new or amended ratings methods, regular internal audits of ratings methods, measures to evaluated the performance of credit ratings. An annual report on an NRSRO's internal controls, including an attestation of its chief executive, will be required for any fiscal year ending on or after 1 January 2015. New Exchange Act Rule 17g-5 seeks to prevent conflicts of interest for NRSROs by forbidding the participation of sales and marketing staffs and any personnel influenced by sales and marketing considerations in the ratings process, including the design or approval of ratings procedures or methods. Credit analysts will be subject to a look-back review to determine whether the prospect of future employment with an issuer or underwriter may have influenced an analyst's ratings under Rule 17g-8. Any rating found to have been so influenced must be revised in accordance with standards promulgated by the SEC.

vi Other strategic considerations

Volcker Rule

The Volcker Rule under the Dodd-Frank Act prohibits covered financial institutions from engaging in 'proprietary trading' and from acquiring or retaining ownership interests in, or sponsoring, hedge funds, private equity funds and certain other private funds (subject to certain exceptions). On 21 July 2015, with an important exception relating to 'legacy covered funds', compliance with the rule became mandatory. The Federal Reserve and other US agencies have published their interpretation regarding the scope of an exception for certain covered fund investment activities of foreign banking organisations.

An order published in December 2014 (the Extension Order) extended the conformance period under the Volcker Rule until 21 July 2016 (and announced an intention to extend the conformance period a further year to 21 July 2017) for purposes of permitting banking entities additional time to conform investments in, and relationships with, 'covered funds' and certain foreign funds (legacy covered funds).[36] The Extension Order applies to banking entities only with respect to investments in, and relationships with, legacy covered funds that were in place prior to 31 December 2013. The Extension Order provides conformance period relief to banking entities with respect not only to such 'legacy' covered funds (as defined under the Volcker Rule) but also to a second category of legacy funds, which the order describes as 'foreign funds that may be subject to the provisions of [the Volcker Rule]'. Although the Extension Order did not elaborate on the second category, the category would seem to be designed for foreign funds that are not covered funds, particularly those that may be considered banking entities themselves (and thus subject directly to the Volcker Rule).

In February 2015, the Federal Reserve and other responsible US agencies clarified via an FAQ (the New FAQ) the circumstances under which a foreign banking entity may continue to hold, or may make, investments in 'third-party covered funds'.[37] The guidance limits the need for managers to restructure their third-party covered funds to accommodate many existing – and future – investments by foreign banking entities.

The Volcker Rule includes an exception to its covered fund prohibitions that permits a foreign banking entity to acquire or retain an ownership interest in, or to sponsor, a covered fund 'solely outside of the United States' (the SOTUS Exemption). One of the four criteria of the SOTUS Exemption is that no ownership interest in the covered fund may be offered for sale or sold to a resident of the United States (the Marketing Restriction). Before the New FAQ, it was unclear whether the Marketing Restriction limited the marketing and sales activities only of the foreign banking entity seeking to take advantage of the SOTUS Exemption or, alternatively, applied more generally. In other words, it was unclear whether a foreign banking entity could invest in a covered fund offered and sold in the United States even if the covered fund was not sponsored, organised, offered or advised by the foreign banking entity (e.g., a third-party sponsored Cayman Islands-domiciled 'feeder fund' marketed to both US tax-exempt investors and non-US investors). The New FAQ confirms that the SOTUS Exemption imposes the Marketing Restriction only on the activities of the foreign banking entity seeking to rely on the SOTUS Exemption and not on the activities of unaffiliated third parties. In particular, the New FAQ states that a foreign banking entity may invest in a covered fund in reliance on the SOTUS Exemption even if the covered fund is sold to

36 Federal Reserve Board, Order Approving Extension of Conformance Period Under Section 13 of the Bank Holding Company Act, 18 December 2014 (www.federalreserve.gov/newsevents/press/bcreg/bcreg20141218a1.pdf); see also, Sidley Austin LLP, Banking and Financial Services Update: Volcker Rule: Conformance Period Extended for Certain Legacy Covered Funds, 24 December 2014 (www.sidley.com/news/12-24-14-banking-and-financial-services-update).

37 See Federal Reserve Board, Frequently Asked Questions: Volcker Rule – SOTUS Covered Fund Exemption: Marking Restriction, 27 February 2015 (www.federalreserve.gov/bankinforeg/volcker-rule/faq.htm); see also, Sidley Austin LLP, Banking and Financial Services Update: Volcker Rule: Clarification of Covered Fund 'SOTUS' Exemption, 3 March 2015 (www.sidley.com/news/03-03-2015-banking-and-financial-services-update).

US residents so long as neither the foreign banking entity nor any of its affiliates acts as sponsor of – or serves, directly or indirectly, as the investment manager, investment adviser, commodity pool operator or commodity trading adviser to – the covered fund (a third-party covered fund) and the foreign banking entity otherwise complies with the provisions of the SOTUS Exemption.

III OUTLOOK AND CONCLUSIONS

The past 12 months has in many respects been a continuation of the post-financial crisis regulatory reform era, with perhaps some evidence of a desire by the SEC, the CFTC and others, where possible, to ease the regulatory burdens on capital raising that have become noteworthy as a result of the Dodd-Frank Act in particular. It is interesting to compare the increased flexibility evidenced by Regulation A+ and the no-action letter relating to tender and exchange offers with the Dodd-Frank mandated changes, such as the risk-retention rules and disclosure of due diligence reports applicable to securitisation transactions and, of course, Volcker. In other areas, such as the corporate governance arena and the structured note market, the staff continues to evidence obvious concern about industry trends and market practice, and remains willing to assert (not always successfully) its jurisdiction through the courts and otherwise. There is continued attempted harmonisation of the requirements of the CFTC, Federal Reserve and other domestic and international regulators, and ongoing active enforcement of FCPA, OFAC and other US laws and requirements. However, notwithstanding the associated regulatory burdens, the United States continues to be a key market for prospective issuers of debt and equity securities, not least because of its continued market stability and depth relative to other markets.

Appendix 1

ABOUT THE AUTHORS

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Mark Walsh is a partner in the London office of Sidley Austin LLP where he co-heads the capital markets group and leads the US and New York law capital markets team. Mark's practice includes the representation of issuers and investment banks on all categories of debt, equity and equity-linked capital markets transactions, including IPOs, ADRs/GDRs, ordinary and preference share offerings, regulatory capital offerings for European banks and other securities offerings. These include SEC registered and Rule 144A offerings in the US markets, as well as Prospectus Directive-compliant and Regulation S offerings and listings in the UK, Ireland, Luxembourg and other EU markets. He also works on M&A and other corporate and partnership transactions, corporate governance and compliance (particularly for financial institutions), as well as advice on capital markets products subject to dispute or restructuring. He has worked with sovereign and quasi-sovereign issuers, as well as with companies from a broad range of industries. Mark joined the firm in 1986 and practised in the New York and Hong Kong offices before moving to London. He is qualified to practise New York, English and Hong Kong law, and is a non-practising member of the Irish bar.

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Michael Hyatte is a partner in the Washington, DC office of Sidley Austin LLP. Michael joined the firm in 2001 after nearly 20 years with the SEC's Division of Corporation Finance, including more than 10 years in its Office of Chief Counsel and five years in its Office of International Corporate Finance. At the SEC, his duties included interpreting regulatory and disclosure rules in advice to the Commission, the Division staff, and the public. The written record of his work for the SEC includes more than 500 no-action letters, the Trust Indenture Reform Act of 1990, Exchange Act rule 12h-5, and provisions of the Commodity Futures Modernization Act of 2000. Reflecting his wide range of experience, Michael regularly counsels on the Securities Act of 1933, Securities Exchange Act of 1934, Trust Indenture Act of 1939 and Sarbanes-Oxley Act. Michael is a graduate of the University of Chicago and the Indiana University School of Law and is admitted to practise in Illinois and the District of Columbia.

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