

International Securities and Capital Markets

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The following Article summarizes selected developments during 2016 in the regulation of international securities and capital markets in Brazil, Colombia, Finland, India, Japan, the United Kingdom, and the United States.

I. Developments in Brazil

A. THE BRAZILIAN PROGRAM OF ALIENATION OF ASSETS OF INSOLVENT COMPANIES

On August 30, 2016, the Brazilian Development Bank (Banco Nacional de Desenvolvimento Econômico e Social or BNDES) announced its Program to Promote the Revitalization of Productive Assets (*Programa de Incentivo à Revitalização de Ativos Produtivos*) (the “program”),¹ which aims to support the transfer of economically viable (i.e., productive) assets held by insolvent companies (i.e., companies in judicial or extrajudicial recovery, bankruptcy or, at the discretion of BNDES, in economic-financial crisis and at high risk of credit default).

The new program aims to promote the exploitation, utilization, and conservation of existing assets, and prevent their deterioration and the creation of environmental liabilities.² This program will have a budget allocation of BRL 5 billion and will run until August 31, 2017.³

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1. *BNDES aprova programa de apoio à reintegração de ativos ao sistema de produção [BNDES Approves a Program to Support the Reintegration of Assets into the Production System]*, BNDES .GOV.BR (Aug. 30, 2016), <http://www.bndes.gov.br/wps/portal/site/home/imprensa/noticias/conteudo/bndes-aprova-programa-apoio-reintegracao-ativos-sistema-producao/>. All the conditions mentioned therein are contained in this Program (the new BNDES Program).

2. *Id.*

3. *Id.*

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The alienation of viable assets of insolvent companies is a necessary step for companies that wish to acquire them to undertake economic activity and reinstate them into the production system.⁴ The goal is that the transfer of productive assets will stimulate economic activity, preserve jobs, and generate income.⁵ In addition, the program aspires to strengthen the adoption of best practices regarding governance and management in relation to the disposed assets⁶.

BNDES will provide direct support solely for purchasers in the form of loans (fixed income).⁷ There is the added possibility of the introduction of securities subscription mechanisms.⁸

The indirect support through the financial agents of BNDES may only occur if the company is under judicial or extrajudicial recovery or bankruptcy proceedings.⁹ Thus, the seller must be an insolvent company.¹⁰ Companies in economic-financial crisis and at high risk of credit default are not eligible.¹¹

The beneficiaries (i.e., purchasers) of the program will be companies and cooperatives with their headquarters and administration in Brazil fulfilling the following conditions: (1) the purchaser must have managerial capacity and be in an economic and financial situation compatible with the acquisition and intended exploitation of the asset as well as possessing the desired financing; (2) the asset must “be acquired for the purpose of undertaking an economic activity, even if different from that of the seller”; (3) the purchaser must have financial statements audited “by an independent audit firm registered with the Brazilian Securities and Exchange Commission” (*Comissão de Valores Mobiliários* or CVM); and, (4) the purchaser cannot be part of the same economic group as the seller, be a related party to the seller, or be identified as the seller’s agent.¹²

Among the assets intended to be financed are industrial units, commercial establishments, and equity participation representing the company’s control or part of the block control¹³. This financing may also be extended to “the acquisition of real estate, used machinery and equipment, and intellectual property rights. . .”¹⁴ The underlying asset is expected to “be in the implementation , operational, or disabled phase.”¹⁵

4. *Id.*

5. *Id.*

6. *Id.*

7. *BNDES aprova programa de apoio à reintegração de ativos ao sistema de produção, supra* note 1.

8. *Id.*

9. *Id.*

10. *See Id.*

11. *Id.*

12. *Id.*

13. *BNDES aprova programa de apoio à reintegração de ativos ao sistema de produção, supra* note 1.

14. *Id.*

15. *Id.*

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“Studies, projects, consultancies, and audits (in particular for the preparation of business plans, business restructuring, implementation of corporate governance practices and strategic planning)” as well as working capital associated with the acquisition and initial operation of the asset may also be financed, provided that these activities are linked to the goals of the program.¹⁶

The financial terms and conditions of the proposed financing are as follows:

- (1) interest rate: market cost benchmarks and/or financial cost equivalent to any already existing credit from BNDES by the seller of the asset, limited in this second hypothesis to the value of that credit;
- (2) maximum participation of BNDES: up to 100 percent of the eligible items;
- (3) basic spread: 1.5 percent per year;
- (4) spread of risk: according to the risk of the purchaser; and
- (5) total period: the length of a grace period and amortization must be compatible with the designed cash flow, limited to a ten-year term.¹⁷

It is anticipated that this program will be very attractive for those investors that would like to acquire productive assets from insolvent Brazilian companies in order to expand their activities in Brazil.¹⁸

II. Developments in Colombia

The Colombian Regulatory Protection Unit and Studies of Financial Regulation (*Unidad de Proyección Normativa y Estudios de Regulación Financiera* or URF) projected a normative agenda for 2016, establishing as a departure point the general public policies and principles of the National Development Plan (*Plan Nacional de Desarrollo*) of 2014–2018.¹⁹ The only goal was that the financial system be consolidated under the pillars of Solidity, Efficiency, and Social Inclusion.²⁰

A. MODIFICATION OF CONCENTRATION LIMITS

By the 766 Decree of 2016,²¹ a completely new set of measures were implemented with the goal of promoting market liquidity and wider

16. *Id.*

17. *Id.*

18. *See Id.*

19. *Agenda 2016—Unidad de Regulación Financiera (URF)*, UNIDAD DE PROYECCIÓN NORMATIVA Y ESTUDIOS DE REGULACIÓN FINANCIERA, available at http://www.urf.gov.co/urf/ShowProperty?jsessionid=OZlRuDJjThtbVApsJKl1WGjZxilkkCz5rPKv7LUsXQyq0Gsncvj!982714394?nodeId=%2FOCS%2FMIG_47416605.PDF%2F%2FidcPrimaryFile&revision=latestreleased.

20. *Id.*

21. Boletín No. 054, Ministerio de Hacienda y Crédito Público, MinHacienda anuncia medidas para promover liquidez y dinamizar el Mercado de valores (May 10, 2016), <http://www>

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dynamism in the Colombian stock market. These regulations provide new limits that broker dealers must follow at the time of performing repurchase operations, simultaneous operations, and temporary transfers of securities operations.²² The technical equity to perform these operations with the same third party remains at the current limit of 30 percent, leaving open the possibility of increasing discretionally the margin, as long as it can be justified and incorporated in the internal risk management policies.²³ In addition, the maximum exposure limits are set by this new regulation according to the “free-float” or the paid-in capital of each type of share instead of the “technical equity test” which was previously measured in the following way: (1) up to 6.5 percent according to each type of every share; and (2) up to 3 percent according to the same third party.²⁴

B. TEMPORARY REGISTRATION OF SECURITIES

Under the regulatory scheme governing insolvency proceedings in Colombia, a set of principles have been established to adopt innovative legal instruments that harmonize the legal environment with the economic reality of companies, especially those involved in a bankruptcy process. Following international experience, in particular practice in the United States, Colombia has been placing greater importance on the recognition of credit protection and the preservation of companies as a unit of economic exploitation and as a source of employment and prosperity. This is accomplished through the adoption of amendments that minimize the impact and adverse effects of a company’s potential insolvency. In view of the above, any aided bankruptcy process represents at some point a “race against time” because of the gradual loss of value of the company. In response to this need, the local regulation created a new financial legal instrument, which will allow the purchase of existing companies under the bankruptcy process subject to approval by a judge. As evidence of this purpose, the 1523 Decree of 2016²⁵ was enacted to provide an opportunity for companies that are using the aided bankruptcy process to create a secondary market where they can offer to the public their securities in a temporary manner (for a term of six months) through institutional mechanisms provided for by the stock exchanges.

.minhacienda.gov.co/HomeMinhacienda/ShowProperty;jsessionid=GY4MEG_cCTwU6u
kfVko4xz9kf34tFhW7VQo9QWx9Ue9YKtHRU1my!741545819?nodeId=%2FOCS%2FP_
MHCP_WCC-041068%2F%2FidcPrimaryFile&revision=latestreleased.

22. *Id.*

23. *Id.* at 1.

24. Decreto 766, mayo 6, 2016, (Colom.), <http://es.presidencia.gov.co/normativa/normativa/DECRETO%20766%20DEL%2006%20DE%20MAYO%20DE%202016.pdf>.

25. Decreto 1523, septiembre 29, 2016, Año CLII No. 50.011, DIARIO OFICIAL [D.O.] (Colom.), *available at* http://www.imprenta.gov.co/diariop/diario2.pdf?p_tipo=02&p_numero=1523&p_fecha=29/09/2016&p_consec=1360936.

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C. MUTUAL FUNDS FINANCIAL DISCLOSURE

The existing Colombian legal mutual funds regime, enacted by 1242 Decree of 2013,²⁶ consolidated the investment opportunity of this instrument in foreign collective schemes. This provision established changes in Colombian mutual funds by expanding the spectrum of the asset management portfolio and giving local investors direct access to foreign markets that they previously would not have been able to easily access.²⁷ With the aim of improving this regulation, the 034 External Resolution (Circular Externa, in Spanish) of 2016²⁸ was enacted to describe the conditions of the particular financial disclosures of the collective incoming schemes as an acceptable asset of local mutual funds. For this purpose, this new regulation establishes that this type of investment has to be disaggregated over the type of financial and technical features. On the bright side, these specific instructions provide clarity as to the content of the security investments as well as their potential risks. This also encourages financial consumer protection, which is reinforced by information obligations and disclosure requirements over the investment policy of the local mutual fund by revealing the particular assets of the collective incoming schemes.

III. Developments in Finalnd

A. MARKET GENERALLY

Over the past five years, the number of initial public offerings (IPOs) on the Nasdaq Helsinki markets (the main list Helsinki Stock Exchange, and multilateral trading facility First North Finland) has been growing steadily.²⁹ There were no listings in 2011, nine in 2014, twelve in 2015 and eight in 2016³⁰ on the Helsinki Stock Exchange and First North Finland markets, collectively. This year also saw an historical first half with two inaugural companies transferring from First North Finland to the Helsinki Stock Exchange, corroborating First North Finland's purpose to offer a "stepping stone" for companies that are willing to grow into the Helsinki Stock Exchange.³¹

26. Decreto 1242, junio 14, 2013, No. 48.821, DIARIO OFICIAL [D.O.] (Colom.), available at https://normativa.colpensiones.gov.co/colpens/docs/decreto_1242_2013.htm.

27. *Id.*

28. Superintendencia Financiera de Colombia (Colombian National Finance Authority), issued September 29, 2016 available at <https://www.superfinanciera.gov.co/jsp/loader.jsf?lServicio=Publicaciones&lTipo=publicaciones&lFuncion=loadContenidoPublicacion&id=10085860>.

29. *Why Has NASDAQ Helsinki Seen a Dramatic Increase in IPOs?*, NASDAQ (May 18, 2016), <http://business.nasdaq.com/marketinsite/2016/Why-Has-Nasdaq-Helsinki-Seen-a-Dramatic-Increase-in-IPOs.html>.

30. For the 2016 calendar year, as at November 1, 2016.

31. *Why Has NASDAQ Helsinki Seen a Dramatic Increase in IPOs?*, *supra* note 29.

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Bond offerings generally also continue to grow primarily because of supranational or governmental investor. The European Central Bank is encouraging borrowing through its bond buying program, and the Finnish state-owned financing company Finnvera has a mandate to invest in bonds.³²

B. NOTEWORTHY CAPITAL MARKETS MATTERS

Nasdaq Nordic, the parent company of the various Nasdaq exchanges in the Nordic region, including Helsinki, was the second most active Nasdaq market in 2015, only behind the Nasdaq Stock Market located in New York.³³ The largest Finnish IPO in 2015 in terms of gross proceeds went to Asiakastieto Group Plc after its sole shareholder sold 76.7 percent of the company's then outstanding shares at EUR 14.75 per share for approximately EUR 170 million, providing the company with a market capitalization of approximately EUR 223 million.³⁴

The second largest IPO was enjoyed by Pihlajalinna Plc from newly issued shares representing approximately 43 percent of the then outstanding shares, which earned, together with the selling shareholders' shares priced at EUR 10.50 per share, approximately EUR 80.1 million with a company market capitalization of approximately EUR 201 million.³⁵

Lastly, another notable IPO was that of Consti Group Plc where shareholders sold approximately 51.2 percent of the then outstanding shares of the company at EUR 9.50 per share for a market capitalization of approximately EUR 72.3 million, proving to be a very successful IPO-exit for majority shareholder Intera Fund I Ky.³⁶

Other notable IPOs on the Helsinki Stock Exchange included the two listings that transferred from First North Finland. After three years on First North Finland, Taaleri Plc enjoyed a market capitalization of approximately EUR 250 million right after its IPO.³⁷ While not experiencing the same capitalization, Siili Solutions Plc quadrupled its value after four years on First North Finland.³⁸

32. *Why Has NASDAQ Helsinki Seen a Dramatic Increase in IPOs?*, *supra* note 29.

33. *FIND SOURCE*

34. Press Release, Asiakastieto Group Oyj: Asiakastieto's Share Sale Concluded Successfully-Final Sale Price Set at EUR 14.75 per Share, Asiakastieto (Mar. 26, 2015), <http://investors.asiakastieto.fi/releases/single-release/?var=http%3A%2F%2Fews.huginonline.com%2FA%2F167529%2FPR%2F201503%2F1906530.xml&date=2015032>.

35. Press Release, Pihlajalinna Plc Stock Exchange Release, NASDAQ (June 3, 2015), <http://globenewswire.com/news-release/2015/06/03/741728/0/en/Pihlajalinna-Oyj-The-final-subscription-price-in-Pihlajalinna-s-initial-public-offering-has-been-set-at-EUR-10-50-per-share-and-Pihlajalinna-will-issue-5-714-286-new-shares-in-the-.html>.

36. Press Release, Consti Group Plc: Consti's Share Sale Concluded Successfully-the Final Sale Price set at EUR 9.50 per Share, Consti (Dec. 10, 2015), <http://investor.consti.fi/releases/pr-story?ResultPageURL%3Ahttp://ews.huginonline.com/C/171618/PR/201512/1972737.xml>.

37. *Nordic Surveillance Annual Report 2016*, NASDAQ (Jan. 2017), http://www.nasdaqomx.com/digitalAssets/104/104532_nordic-surveillance-annual-report-2016.pdf.

38. *Id.*

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Public tender offers in 2015 were also sizeable by Finnish standards. In April 2015, Nokia announced the acquisition of French-American Alcatel-Lucent in a EUR 15.6 billion exchange offer.³⁹ The transaction was the largest M&A deal in the history of Finland.⁴⁰ Nokia became a nearly 80 percent shareholder in Alcatel-Lucent when the public exchange offer closed in January 2016, and, as of late 2016, had likely just completed its public buy-out offer and squeeze-out in France for the remaining shares after exceeding the 95 percent ownership threshold earlier this year.⁴¹

The development of the EUR 3.9 billion Konecranes and Terex “merger of equals” announced in August 2015 attracted notice in early 2016 after two back-to-back, unsolicited cash offers from Chinese state-run Zoomlion at almost double the value of Konecranes’ offer.⁴² After Zoomlion’s offer fell through, the deal was restructured into a sale of Terex’s material handling and port solutions (MHPS) business for EUR 1.126 billion, which accounted for roughly 20 percent of Terex’s total turnover.⁴³ While not yet completed,⁴⁴ the significant ongoing obstacle to the MHPS acquisition is the European Union’s (EU) competition authorities’ clearance condition that Konecranes divest its Stahl subsidiary located in Germany to a yet-to-be-approved buyer.⁴⁵

C. LEGISLATION

As part of the European Union, Finland has been subject to the same EU regulations and directives as other Member States, such as the July 3, 2016 European Securities and Markets Authority Market Abuse Regulation and Directive on Criminal Sanctions for Market Abuse (commonly referred to as MAD II) which criminalizes insider dealing and market manipulation, imposes maximum criminal penalties for the most serious market abuse offenses, and extends the scope of EU market abuse regulation to multilateral trading facilities.⁴⁶

Apart from EU-related regulatory changes, there have been few regulations solely impacting Finland. The Finnish Securities Market Association is a cooperative organ established by Nasdaq Helsinki and the Finland Chamber of Commerce that publishes self-regulating guidelines

39. Juha Koponen & Matias Keso, *The 2015 & 2016 Finnish Public Takeover Scene: How Major 2015 Deals Resolved and 2016 So Far*, INTERNATIONAL M&A AND JOINT VENTURES COMMITTEE NEWSLETTER (ABA Section of Int’l Law), Oct. 14, 2016, at 3.

40. *Nokia’s Alcatel-Lucent Merger Largest Corporate Acquisition in Finnish History*, YLE (Apr. 15, 2015), http://yle.fi/uutiset/osasto/news/nokias_alcatel-lucent_merger_largest_corporate_acquisition_in_finnish_history/7931413.

41. Koponen & Keso, *supra* note 39.

42. *Id.* at 4.

43. *Id.*

44. As at November 1, 2016.

45. *Id.*

46. *Market Abuse Regulation-MAR*, FINANSSIVALVONTA (Jan. 19, 2017), http://www.finanssivalvonta.fi/en/Regulation/International_Projects/mar/Pages/Default.aspx.

which complement Finnish regulations.⁴⁷ The Association restructured the Finnish Corporate Governance Code (the Code) effective as of January 1, 2016.⁴⁸ The revised Code improves the transparency of corporate governance practices and principles of listed companies and advances more uniform corporate governance reporting in line with the European Commission's 2014 recommendation on the quality of corporate governance reporting.⁴⁹

D. FINAL THOUGHTS

The upward trend in IPO activity has seen the Helsinki Stock Exchange reinvigorated as a listing platform. In addition, government and other interested parties have set up a number of working groups, such as the Finnish Foundation for Share Promotion, to propose various reforms in the tax, general securities markets and listing regimes to increase the attractiveness of the listing platforms.⁵⁰ While so far very little has been done with regard to implementing regulations, the continued, albeit cautious, general economic resurgence of Finland and the lack of availability of other suitable investment alternatives should further benefit the Finnish capital markets' appeal.

IV. Developments in India

A. FOREIGN PORTFOLIO INVESTMENT (FPI) IN GOVERNMENT SECURITIES

In order to increase the fund flow from foreign investors in India's capital markets, the Securities and Exchange Board of India (SEBI) has recently increased the limit of Foreign Portfolio Investors (FPIs) in government securities.⁵¹

SEBI, through its circular dated October 3, 2016, has decided to increase the limits of investment by FPIs in government securities (debt). These limits have been increased from Rs. 135400 crores⁵² from October 1, 2016, to Rs. 148,000 crores and will be further increased to Rs. 152,000 crores effective January 2, 2017.⁵³ Investment limits for FPIs in long-term central

47. *Id.*

48. *COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS* (Andreas M. Fleckner & Klaus J. Hopt eds., Cambridge University Press, 2013).

49. Antti Turunen, *The Finnish Corporate Governance Code*, SEC. MKT. ASS'N (last visited Apr. 17, 2017), <http://cgfinland.fi/en/recommendations/the-finnish-corporate-governance-code/>.

50. *Foundation*, FINNISH FOUND. FOR SHARE PROMOTION (last visited Apr. 17, 2017), <http://www.porssisaatio.fi/en/porssisaatio/>.

51. *SEBI Hikes FPI Investment Limit for Govt Debt*, THE TIMES OF INDIA (Mar. 29, 2016), <http://timesofindia.indiatimes.com/business/india-business/Sebi-hikes-FPI-investment-limit-for-govt-debt/articleshow/51602566.cms>.

52. SEBI Circular IMD/FPIC/CIR/P/2016/107 (Oct. 3, 2016), *available at* http://www.sebi.gov.in/cms/sebi_data/attachdocs/1475498739311.pdf. One Crore is equal to ten million.

53. *Id.*

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government securities like sovereign wealth funds (SWFs), multilateral agencies, endowment funds, insurance funds, pension funds and foreign central banks have been increased from Rs. 44,100 crores to Rs. 62,000 crores, and will be further increased to Rs. 68,000 crores effective January 2, 2017.⁵⁴ Similarly, investment limits on state development loans by FPIs have been increased from Rs. 7,000 crores to Rs. 17,500 crores, and will be further increased to Rs. 21,000 crores as of January 2, 2017.⁵⁵

B. FOREIGN DIRECT INVESTMENT POLICY IN 2016 (FDI POLICY)

FDI investment in India usually occurs through the Automatic Route or the Government Route. The Department of Industrial Policy and Promotion (DIPP) of the Government of India, has notably liberalized FDI in the insurance sector by making the entire 49 percent limit through the Automatic Route.⁵⁶ Investment in the pharmaceutical sector has been revised to 100 percent via the Automatic Route under the greenfield category, and 74 percent of FDI is allowed under the Automatic Route for brownfield projects.⁵⁷ In addition, 100 percent of investment in the airport sector has been allowed through the Automatic Route for both new and existing projects.⁵⁸

C. WILFUL DEFAULTERS

In May 2016, the definition of wilful defaulter was inserted by SEBI in SEBI (Issue of Capital and Disclosure Requirements) Regulation, 2009 (the ICDR Regulations).⁵⁹ “Wilful Defaulter” means “an issuer categorized as a wilful defaulter by any bank or financial institution or consortium thereof, in accordance with the guidelines on wilful defaulter issued by Reserve Bank of India and includes an issuer whose director or promoter is categorized as such.”⁶⁰ Additionally, the watchdog has barred any issuer from publicly issuing equity shares or convertible debt instruments if it is a Wilful Defaulter, as defined above.⁶¹ In the case of a rights issue of specified securities, a disclosure in the prescribed format shall be made with respect to Wilful Defaulters.⁶² An entire new section (Part G) has been inserted for

54. See *SEBI Hikes FPI Investment Limit for Govt Debt*, *supra* note 51; see also *SEBI Circular IMD/FPIC/CIR/P/2016/107*, *supra* note 52.

55. *Id.*

56. See *SEBI Circular IMD/FPIC/CIR/P/2016/107*, *supra* note 51.

57. Express Web Desk, *100% FDI: Govt Bites Reform Bullet, Open Up Defense, Civil Aviation and Pharma*, INDIAN EXPRESS (June 20, 2016), <http://indianexpress.com/article/business/economy/govt-bites-fdi-bullet-opens-up-defence-civil-aviation-and-pharma/>.

58. *Id.*

59. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2016, Gazette of India, section III(4) (May 25, 2016) http://www.sebi.gov.in/cms/sebi_data/attachdocs/1464245320010.pdf.

60. *Id.*

61. *Id.*

62. *Id.*

detailed disclosures pertaining to Wilful Defaulters with specific disclosures and suitable cross-referencing to be made on the cover page.⁶³ In line with the above measures from SEBI to streamline disclosures, the Reserve Bank of India (RBI) is now requiring lending institutions to publish photographs of those borrowers who have been declared as Wilful Defaulters following the Master Circular on Wilful Defaulters⁶⁴ dated July 1, 2015 of RBI.⁶⁵ The publication of photographs of Wilful Defaulters includes “proprietors, partners, directors, [or] guarantors of borrower firms” or companies, but excludes non-executive directors.⁶⁶ In order to justify the process, the RBI has asked lending institutions to develop policies setting out the measures in connection with boards of directors for the decision leading to the publishing of photographs of such Wilful Defaulters.⁶⁷

There has also been an amendment in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the Takeover Code)⁶⁸ with the addition of the definition of Wilful Defaulters.⁶⁹ The definition runs parallel with the definition under the ICDR Regulations with the further addition of the words “or partners” under the inclusive category of Wilful Defaulters.⁷⁰ The Takeover Code has prohibited Wilful Defaulters from public announcements with respect to the acquisition of shares in an open offer.⁷¹ But, a Wilful Defaulter will not be prohibited from making a competing offer in accordance with Regulation 20 of the Takeover Code upon any company making such an open offer.⁷²

D. FORMULATING DIVIDEND DECLARATION MANDATE THROUGH LISTING OBLIGATIONS

Section 24 of the Companies Act, 2013 authorizes SEBI to regulate provisions of default in payments of dividends.⁷³ In order to aid investors, SEBI, through its SEBI (Listing Obligations and Disclosure Requirements)

63. *Id.*

64. Res. Bank of India Master Circular on Wilful Defaulter (July 1, 2015), DBR.CID.BC.No.22/20.16.003/2015-16, <http://seair.co.in/rbi-notifications/publishing-of-photographs-of-wilful-defaulters-247974.aspx>.

65. Res. Bank of India Circular on Wilful Defaulter RBI/2016-17/71 DBR. CID. BC. No. 17/20.16.003/2016-17 (Sep. 29, 2016), <http://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI71FD8F900408E14A9DA81E1D4C2BA72526.pdf>.

66. *Id.*

67. ET Bureau, *RBI Asks Banks to Publish Photographs of only Wilful Defaulters*, ECON. TIMES OF INDIA (Sept. 30, 2016), <http://economictimes.indiatimes.com/markets/stocks/news/rbi-asks-banks-to-publish-photographs-of-only-wilful-defaulters/articleshow/54600294.cms>.

68. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers)(Second Amendment) Regulations, 2016, Gazette of India, Section III(4) (May 25, 2016), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1464245549280.pdf.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2.

73. *Id.*

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Regulations, 2015 (the Listing Obligations) has asked the top 500 listed companies⁷⁴ to create a dividend distribution policy and make disclosure in their annual reports and websites regarding such policy.⁷⁵ In addition to Regulation 29 (dividend declaration prior to intimation to stock exchanges), Regulation 42 (3) (time stipulation for declaration of dividend) and Regulation 43 (disclosure and forfeiture norms for dividend) of the Listing Obligations are amended with the insertion of Regulation 43A to formulate the dividend distribution policy within the five parameters mentioned in the Circular.⁷⁶ An additional disclosure is required to be made in the annual report and website only by those entities which propose to declare dividends in addition to or in alteration of the set parameters.⁷⁷

V. Developments in Japan

A. STATUS OF STEWARDSHIP CODE AND CORPORATE GOVERNANCE CODE

Following the adoption of Japan's Stewardship Code (the Stewardship Code)⁷⁸ in 2014 and the Corporate Governance Code (the CG Code)⁷⁹ in 2015, stewardship and corporate governance practices in Japan have been making steady progress. As of September 2, 2016, a total of 213 institutional investors signed up for the Stewardship Code, and after the first anniversary of the adoption of the CG Code, 2262 companies listed on the First and Second Sections of the Tokyo Stock Exchange (TSE) have reported on their compliance with the CG Code as of July 14, 2016, of which 474 companies (representing 21.0 percent) comply with all 73 principles of the CG Code, and 1,437 companies (representing 63.5 percent of the remaining 1,788

74. Companies whose stocks are listed on a recognised stock exchange in India.

75. Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (2nd Amendment) Regulations, 2016, Gazette of India, section III(4) (Jul. 8, 2016).

76. *Section 24 of Companies Act, 2013—Power of Securities and Exchange Board to Regulate Issue and Transfer of Securities, etc.*, CORP. LAW REP. (Apr. 15, 2017), http://corporatelawreporter.com/companies_act/section-24-of-companies-act-2013-power-of-securities-and-exchange-board-to-regulate-issue-and-transfer-of-securities-etc/.

77. *See id.*; *see also SEBI Inserted New Listing Regulation 43A in LODR Mandating Formulation of Dividend Distribution Policy*, HARESH JANI & ASSOC. (Jul. 15, 2016), <http://www.hja.legal/legal-updates/sebi/sebi-inserted-new-listing-regulation-43a-in-lodr-mandating-formulation-of-dividend-distribution-policy/>.

78. *See Principles for Responsible Institutional Investors—Japan's Stewardship Code—To Promote Sustainable Growth of Companies Through Investment and Dialogue*, THE COUNCIL OF EXPERTS CONCERNING THE JAPANESE VERSION OF THE STEWARDSHIP CODE (Feb. 26, 2014), available at <http://www.fsa.go.jp/en/refer/councils/stewardship/20140407/01.pdf>.

79. *See Japan's Corporate Governance Code, Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid-to Long-Term*, TOKYO STOCK ECH. (June 1, 2015), available at <http://www.jpix.co.jp/english/equities/listing/cg/tvdivq000008jdy-att/20150513.pdf>.

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companies) comply with 90 percent or more of the principles of the Code.⁸⁰ Notably, 2,258 companies (representing 99.59 percent) have complied with Principle 5.1, requiring Policy for Constructive Dialogues with Shareholders, and engaging shareholders has now become common practice in Japan.⁸¹

To monitor the progress and to discuss necessary measures to promote governance practices, the Financial Services Agency of Japan (FSA) and the TSE announced in August 2015, the establishment of the Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code,⁸² which was formed in September 2015, and issued in February 2016 an opinion statement reflecting issues and good practices discussed at its meetings entitled "Corporate Boards Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term" to help facilitate the implementation of good governance and to enable constructive dialogue with the shareholder.⁸³ The Council moved on to discuss the issues and practice concerning shareholder engagement in 2016.⁸⁴

B. GOVERNANCE CODE FOR AUDIT FIRMS

In April 2015, an accounting scandal involving Toshiba Corporation (Toshiba), a leading Japanese company, surfaced in Japan, which gave rise to the renewed question about the integrity of financial reporting by Japanese listed companies and the effectiveness of the auditing process by external auditors in Japan. A committee of external lawyers and accountants was formed in May 2015 to conduct the investigation and they issued a detailed investigation report in July 2015,⁸⁵ following which, Toshiba filed restated financial statements. Due to the accounting misconduct by the management and the deficient internal control, TSE designated Toshiba stock as a security on alert and imposed a monetary penalty of JPY 91.2 million for violating the listing agreement in September 2015.⁸⁶ The FSA also imposed

80. *How Listed Companies Have Addressed Japan's Corporate Governance Code*, TOKYO STOCK EXCH. (Sept. 13, 2016), available at <http://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jdy-att/b5b4pj000001akx0.pdf>.

81. *Id.*

82. See *Establishment of "Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code,"* FIN. SERV. AGENCY (Aug. 7, 2015), <http://www.fsa.go.jp/en/news/2015/20150807-1.html>.

83. The Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code, *Corporate Boards Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid-to Long-Term, Opinion Statement 2*, FIN. SERV. AGENCY (Feb. 18, 2016), http://www.fsa.go.jp/en/refer/councils/follow-up/statements_2.pdf.

84. *Id.*

85. *Investigation Report*, INDEP. INVESTIGATION COMM. FOR TOSHIBA CORP. (July 20, 2015), http://www.toshiba.co.jp/about/ir/en/news/20151208_2.pdf.

86. *Designation of Security on Alert and Imposition of Listing Agreement Violation Penalty-Toshiba Corporation*, JAPAN EXCH. GRP. (Sept. 15, 2015), <http://www.jpx.co.jp/english/news/1021/20150915-11.html>.

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an administrative penalty charge of JPY 7.3 billion on Toshiba for making false financial statements in securities reports in December 2015.⁸⁷

In the face of this accounting scandal, the Advisory Council on the Systems of Accounting and Auditing (the Advisory Council) in October 2015⁸⁸ was formed by the FSA to discuss proposals to address accounting and auditing issues. The Advisory Council published in March 2016 recommendations on wide-range actions to ensure confidence in audit systems, categorized under five objectives: “(1) reinforcing the management of audit firms; (2) enhancing the provision of information on audits to shareholders and other stakeholders; (3) strengthening the ability to detect corporate fraud; (4) assessing the audit quality from viewpoints of third parties; [and], (5) improving the environment for high quality audits.”⁸⁹ The Advisory Council’s recommendations focus primarily on facilitating good practice, rather than proposing new or stricter regulation or auditing standards, and urge audit firms, companies, and regulators to discharge their respective responsibilities for promoting better audit quality and environments that ensure higher standards in audits.⁹⁰

One of the priorities of such recommendations is the Audit Firm Governance Code, the FSA established the Council of Experts on Audit Firm Governance Code in July 2016,⁹¹ with the goal of adopting the Code in December 2016. This would make Japan the third country to have a governance code for audit firms, following the United Kingdom and Netherlands. It is expected that the Audit Firm Governance Code will be principle-based and will call on the leadership of audit firms to ensure exercise of professional skepticism in the auditing, quality control system and supervision, education and training, and evaluation of the firm’s activities.⁹²

C. PRINCIPLES FOR INVESTIGATING CORPORATE SCANDALS

Japan Exchange Regulation, the self-regulatory organization (SRO) of Japan Exchange Group, Inc. (a holding company incorporated upon the merger of TSE and the Osaka Securities Exchange in January 2013) issued in February 2016 principles for investigating corporate scandals involving

87. *Toshiba Fined Record ¥7.3 Billion Over Accounting Scandal*, JAPAN TIMES (Dec. 25, 2015), <http://www.japantimes.co.jp/news/2015/12/25/business/corporate-business/toshiba-fined-record-¥7-3-billion-over-accounting-scandal/#.WPVXoBiZOuM>.

88. *Ensuring Confidence in Audit, Recommendations from the “Advisory Council on the Systems of Accounting and Auditing,”* FIN. SERV. AGENCY (Mar. 8, 2016), <http://www.fsa.go.jp/en/news/2016/20160308-1/01.pdf>.

89. *Id.*

90. *Id.*

91. *See Principles for Effective Management of Audit Firms, the Audit Firm Governance Code*, FIN. SERV. AGENCY, <http://www.fsa.go.jp/news/28/sonota/20161215-1/02.pdf>.

92. *See id.*

listed companies (the Principles).⁹³ The Principles consist of four fundamentals that should be followed when investigating and disclosing the investigation result, but are not intended to have a binding effect.⁹⁴ As they reflect essential elements of internal investigation, they are expected to be followed by committees of listed companies to ensure the objectivity, independence and expert knowledge required for investigation.⁹⁵ TSE will consider whether the Principles are properly followed when deciding on the sanction for a listed company.⁹⁶

VI. Developments in the United Kingdom

A. DEVELOPMENTS AFFECTING EQUITY OFFERINGS

1. Listing Rules

In 2016, the Financial Conduct Authority (FCA) has made a number of significant changes to the U.K. Listing Rules. Most of the changes relate to the implementation of the Market Abuse Regulation (MAR) across the European Union (EU) on July 3, 2016.⁹⁷ Following market comment periods, the Model Code was withdrawn in its entirety and changes were made to related provisions within the Listing Rules. In addition, references to the Disclosure and Transparency Rules were replaced with references to MAR, reflecting changes made to disclosure obligations for listed companies.⁹⁸ Furthermore, the restrictions on companies buying their own shares and the selling and transfer of treasury shares during restricted periods were also removed.⁹⁹

The 80 percent control provision in relation to the cancellation of shares following a takeover offer was also removed from the Listing Rules.¹⁰⁰ In order to seek a cancellation of a listing of shares, a controlling shareholder no longer needs to obtain acceptances from 80 percent of the shareholders

93. See *Principles for Responsive Measures by Listed Companies to Corporate Scandals*, Japan Exch. Regulation (Feb. 24, 2016). In July 2010, the Japan Federation of Bar Associations issued the guidelines for investigation of crimes, illegal conducts or other misconduct or improper acts subject to social criticism or censor (collectively, “scandals”), the “Guidelines for Third Party Committee in Corporate and Other Scandals,” subsequently revised as of December 17, 2010. *Third Party Committee Guidelines for Corporate Misconduct*, THE JAPAN FED’N BAR ASSOC. (July 15, 2010), https://translate.google.com/translate?hl=en&sl=ja&u=https://www.nichibenren.or.jp/library/ja/opinion/report/data/100715_2.pdf&prev=search. These Guidelines are intended to be prepared as a guide, but not requirement, providing for what is then considered to be best practices.

94. *Id.*

95. *Id.*

96. *Id.*

97. Council Regulation 596/2014, 2014 O.J. (L 173/1), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596>.

98. See *id.*

99. See *id.*

100. See Listing Rules, 5.2.5.R, FCA, available at <https://www.handbook.fca.org.uk/handbook/LR.pdf>.

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before a takeover offer can proceed.¹⁰¹ Instead, acceptances may be obtained from independent shareholders who represent a majority of voting rights held by such shareholders before an application for the delisting of the shares can be submitted.¹⁰²

2. *AIM Rules*

MAR also resulted in several changes to the AIM Rules. AIM Rule 17 which requires that directors' dealings are notified without delay, was removed since MAR now provides an appropriate level of transparency.¹⁰³ AIM Rule 21, which deals with close periods and restrictions on trading in an AIM-listed company's shares was replaced with the requirement for AIM-listed companies to have a share dealing policy in place which complies with a set of minimum requirements, including: establishing appropriate close periods; following procedures for obtaining clearance to deal; and, notifying the public regarding certain transactions.¹⁰⁴

Article 17 of MAR requires that all "inside information" which directly concerns an issuer is announced to the market as soon as possible to minimize the risk of insider dealing.¹⁰⁵ Despite potential conflict with the similar, but slightly different AIM Rule 11, which requires that price-sensitive information be disclosed without delay, AIM Rule 11 was retained following the implementation of MAR.¹⁰⁶ This is because the MAR requirements potentially relate to a wider concept of inside information and the two rules are aimed at slightly different objectives. AIM-listed companies are therefore required to comply with both provisions, and the automatic AIM regulation team have made it clear that compliance with Article 17 of MAR will not mean compliance with AIM Rule 11.¹⁰⁷

3. *AIM: Electronic Settlement System for Regulation S, Category 3 Securities*

Since the implementation of the Central Securities Depository Regulation on September 1, 2015, Regulation S, Category 3 shares (as defined in Regulation S)¹⁰⁸ trading on the London Stock Exchange (LSE) are now required to settle electronically. Previously, they were settled in certificated form and settlement often required ten days to two weeks. With electronic settlement, settlement efficiency has vastly improved, which in turn has

101. *Id.*

102. *Id.*

103. Council Regulation 596/2014, *supra* note 97; AIM Rules for Companies, Rule 17, LONDON STOCK EXCH. (July 2016), <http://www.londonstockexchange.com/companies-and-advisors/aim/advisors/aim-notices/aimrulesforcompaniesjan16.pdf>.

104. AIM Rules for Companies, *supra* note 103 at, Rule 21.

105. *Id.* at Rule 17.

106. *See id.* at Rule 11.

107. *Id.*; *see also* Council Regulation 596/2014, *supra* note 97, at art. 17.

108. Offers or Sales of Securities by the Issuer, a Distributor, Any of their Respective Affiliates, or Any Person Acting on Behalf of Any of the Foregoing; Conditions Relating to specific Securities, 17 C.F.R. § 230.903 (2015).

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increased the liquidity and trading volumes of Regulation S, Category 3 shares. Due to the existence of the electronic settlement system for such securities, it is anticipated that the pipeline of companies looking to be admitted to AIM will continue to grow.

B. DEVELOPMENTS AFFECTING DEBT OFFERINGS

Yields on bonds remain at near-record lows, reflecting a continued low interest rate environment, and the ongoing impact of European Central Bank and United States Federal Reserve quantitative easing measures. The shift to a more U.S.-style market, whereby borrowers regularly utilize non-bank sources of liquidity, is likely to be a permanent feature of the U.K. debt and capital markets in coming years.

1. High-Yield Bonds

The high-yield European bond market continued on its downward trajectory in 2016 as financial markets faced a host of risks including declining oil prices, uncertainty in the world economy, negative interest rates, central banks' quantitative easing policies and Brexit.¹⁰⁹

The result of this uncertainty has caused the growing shift away from covenant-lite structures, as investors started to regain more negotiation power¹¹⁰ and portability clauses became even more liberal. This was seen in Mydentist's £425m high-yield bond issued on August 5, 2016 (only a few weeks after the Brexit vote) which contained a new type of portability clause which was particularly aggressive towards investors' interests because Mydentist would not have to buy back the bonds even if a new owner saddled the company with more debt.¹¹¹ Investors nevertheless accepted the clause, suggesting that there may be further changes ahead for covenant-lite bonds.

2. Crowdfunding

Crowdfunding has become a popular means to raise capital in the United Kingdom. In 2013, an estimated £500 million was invested on regulated crowdfunding platforms.¹¹² This grew to an estimated £2.7 billion in 2015.¹¹³ The FCA is currently undertaking a full post-implementation review of its rules on crowdfunding.

109. *AIM Notice 41*, LONDON STOCK EXCH. (Aug. 7, 2015), <http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/aim-notices/aimnotice41.pdf>.

110. See Jackson, Gavin, *Issuers on the Front Foot in Europe's Loan Market* FIN. TIMES (Sept. 6, 2016), <http://www.ft.com/cms/s/0/7ae6fc04-6a1e-11e6-ae5b-a7cc5dd5a28c.html>.

111. See Robert Smith, *Covenant Review Warns on Mydentist Bond's "New and Aggressive" Clause*, REUTERS (July 22, 2016), <http://uk.reuters.com/article/sterling-highyield-idUKL8N1A814E>.

112. *Global Transactions Forecast: The Impact of Macro Trends on Future M&A and IPO Activity*, BAKER & MCKENZIE (last visited Apr. 17, 2017), <http://www.bakermckenzie.com/-/media/files/insight/publications/2016/03/globaltransactionsforecastfinal.pdf?la=en>.

113. *Id.*

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3. *Loan-Based Crowdfunding*

Also known as peer-to-peer (P2P) lending, loan-based crowdfunding is a rapidly growing market. Such lending as a percentage of new bank loans to small businesses rose from 1 percent in 2012 to 12 percent in 2014.¹¹⁴ In January 2016, the government announced that interest on P2P loans could be paid without deducting income tax,¹¹⁵ while in April 2016, it became possible to hold P2P loans in Innovative Finance ISA wrappers.¹¹⁶ With these new policies, it appears that loan-based crowdfunding will continue to grow in popularity as a source of funding for small businesses.

4. *Investment-Based Crowdfunding*

Investment-based crowdfunding gives consumers the opportunity to invest, through buying shares or debentures in new or small businesses. From November 2016, debt securities issued by companies on investment-based crowdfunding platforms can be held in an Innovative Finance ISA.¹¹⁷ But, the situation with respect to equity securities is still being considered.

VII. Developments in the United States

A. SEC ADOPTED PAYMENT DISCLOSURE RULES FOR COMPANIES ENGAGED IN RESOURCE EXTRACTION

In 2016, the United States Securities and Exchange Commission (SEC) had adopted new rules which would have required “resource extraction issuers” to disclose annually payments that they (or subsidiaries or entities under their control) made to a foreign government or the U.S. federal government for the commercial development of oil, natural gas, or minerals.¹¹⁸ New Rule 13q-1 and corresponding amendments to Form SD implemented Section 13(q) of the U.S. Securities Exchange Act of 1934 (the

114. Michael Gorrie, *FCA's Crowdfunding Call for Input: Should Crowdfunding be Regulated Differently from More Traditional Forms of Financing?* ALLEN & OVERY (Oct. 26, 2016), <http://www.aoinvestigationsinsight.com/crowdfunding-fca-call-input/>.

115. *Revenue and Customs Brief 2 (2016): Deduction of Income Tax at Source from Payments of Peer-to-Peer Interest*, HM REVENUE & CUSTOMS (Jan. 8, 2016), <https://www.gov.uk/government/publications/revenue-and-customs-brief-2-2016-deduction-of-income-tax-at-source-from-payments-of-peer-to-peer-interest/revenue-and-customs-brief-2-2016-deduction-of-income-tax-at-source-from-payments-of-peer-to-peer-interest#p2p-loans>.

116. *Call for Input to the Post-Implementation Review of the FCA's Crowdfunding Rules*, FIN. CONDUCT AUTH., 20 (July 2016), <https://www.fca.org.uk/publication/call-for-input/call-input-crowdfunding-rules.pdf>.

117. *Income Tax: Crowdfunding and Individual Savings Accounts*, HM REVENUE & CUSTOMS (Aug. 9, 2016), <https://www.gov.uk/government/publications/income-tax-crowdfunding-and-individual-savings-accounts/income-tax-crowdfunding-and-individual-savings-accounts>.

118. Press Release, Sec. Exch. Comm., SEC Adopts Rules for Resource Extraction Issuers under Dodd-Frank Act (June 27, 2016), *available at* <https://www.sec.gov/news/pressrelease/2016-132.html>.

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Exchange Act),¹¹⁹ added by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. But, Congress through use of the Congressional Review Act, which authorizes Congress to review and cancel regulations within 60 days after an agency submits a rule for congressional review, passed House Joint Resolution 41, which canceled the resource extraction disclosures.¹²⁰ President Trump subsequently signed the legislation, precluding the SEC from enforcing or reissuing the rules.¹²¹

B. COMPANIES COVERED BY RULES

The new rules would have applied to all U.S. and non-U.S. companies that (1) are required to file annual reports with the SEC pursuant to Section 13 or 15(d) of the Exchange Act on Forms 10-K, 20-F or 40-F; and (2) engage in the commercial development of oil, natural gas or minerals.¹²²

C. SCOPE OF THE RULES

The disclosure obligations would have applied to any payment that:

- a company made to the U.S. federal government or a foreign government (including a foreign national government or a foreign subnational government or a company that is at least majority-owned by a foreign government);
- is in cash or in kind;
- furthered the commercial development of oil, natural gas, or minerals;
- was not *de minimis* (a single payment or a series of related payments that equals or exceeds US\$100,000 during the most recent fiscal year); and
- was one of the following types of payments for the commercial development of oil, natural gas, or minerals:
 - taxes levied on corporate profits, corporate income and production, but not taxes levied on consumption, such as value added taxes, personal income taxes or sales taxes;
 - royalties;
 - fees (including license fees, rental fees, entry fees and concession fees);
 - production entitlements;
 - bonuses (including discovery and production bonuses);
 - “community and social responsibility” payments required by law or contract;

119. SEC Disclosure of Payments by Resource Extraction Issuers, 17 C.F.R. § 240, 249b (2016).

120. *Id.*

121. *Id.*

122. Roger Yu, *Trump Signs Legislation to Scrap Dodd-Frank Rule on Oil Extraction*, USA TODAY (Feb. 14, 2017), <https://www.usatoday.com/story/money/2017/02/14/trump-scraps-dodd-frank-rule-resource-extraction-disclosure/97912600/>.

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- dividends that are paid to a government in lieu of production entitlements or royalties, but not dividends paid to a government as a shareholder of the issuer as long as dividends are paid to the government on the same terms as to other shareholders; and
- payments for infrastructure improvements.¹²³

D. REQUIRED DISCLOSURE

Covered companies would have been required to disclose payment information annually in new Exhibit 2.01 to Form SD.¹²⁴

E. EXEMPTIONS

The rules included exemptions for payments by recently acquired companies and for payments related to exploratory activities.¹²⁵ The SEC also determined that the disclosure requirements of the Canadian and European Union resource extraction disclosure laws (the Extractive Sector Transparency Measures Act, or ESTMA, the EU Accounting Directive¹²⁶ and the EU Transparency Directive,¹²⁷ as well as the Extractive Industries Transparency Initiative, in which the United States is a “candidate country” (U.S. EITI)), are “substantially similar” to Rule 13q-1 and provided an additional exemption allowing resource extraction companies to satisfy the new SEC obligations by relying on public filings previously made pursuant to these regulations without having to prepare a separate report for the SEC.¹²⁸

123. 17 C.F.R. § 240, 249b.

124. *Id.*

125. *Id.* at 25.

126. Council Directive 2013/34, 2013 O.J. (L182) (EU).

127. Council Directive 2013/50, 2013 O.J. (L294) (EU).

128. 17 C.F.R. § 240, 249b.

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