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Recent Developments in International Securities Law

Dear Committee Members,

This is the latest issue of the International Securities & Capital Markets Newsletter, published by the International Securities & Capital Markets Committee of the American Bar Association's Section of International Law. We hope you find it interesting and useful. We generally publish this newsletter on a quarterly basis and welcome submissions regarding jurisdictions not already covered. This newsletter covers developments in the first quarter of 2010.

A special note of thanks to our contributors, who have each prepared interesting and informative pieces. If you would like to contribute, and we very much encourage you to do so, or if you have a question or suggestion, please contact me using my details at the end of the newsletter.

Regards,

Dorothee Fischer-Appelt

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NEW RULES FOR REGISTRY OF ISSUERS OF SECURITIES ADMITTED FOR TRADING IN THE BRAZILIAN REGULATED MARKETS

On December 7, 2009, the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários – CVM*) released to the public CVM Instruction No. 480, of the same date, which establishes rules for registry of issuers of securities admitted for trading in the local regulated markets[1]. These rules are in full force and effect as of January 1, 2010. The main provisions are outlined below.

The trading of securities in regulated markets in Brazil depends on the prior registry of the issuer with CVM. The registry application can be submitted regardless of the public offer registry for distribution of securities. With very few exceptions, the issuer must be organized in the form of a corporation (*sociedade anônima*)[2]. CVM Instruction 480 does not apply to investment funds, investment clubs and companies beneficiary of tax incentive resources.

Under the new rules there are two different categories of registry: (i) category A, which authorizes the trading of any types of securities; and (ii) category B, which excludes shares and share certificates of deposit as well as securities which attribute to the holder the right to acquire shares and share certificates of deposit as a result of the conversion or the exercise of inherent rights, provided that these securities are issued by the same issuer or by a company belonging to its economic group.

[1] Pursuant to CVM Instruction No. 461, of October 23, 2007, the Brazilian regulated markets comprise organized markets of securities, meaning the physical space or electronic system designed for the negotiation or registration of operations with securities by a certain number of people authorized to trade, whether they are acting on their own account or on behalf of a third party. Organized markets of securities are the Stock Exchanges, Commodities and Futures markets and the organized over-the counter (OTC) markets. These markets shall be administrated by managing entities authorized by CVM.

[2] The issuers which issue exclusively commercial paper (*notas comerciais*) and bank credit bills (*cédulas de crédito bancário* – CCB), for public distribution or negotiation, can be organized in the form of corporation (*sociedade anônima*) or limited liability company (*sociedade limitada*). The issuers which issue exclusively agribusiness commercial paper (*notas comerciais do agronegócio* – NCA), for public distribution or negotiation, can be organized in the form of agricultural cooperative. The corporate form of a foreign issuer, however, will be determined by the organization laws of the country (jurisdiction) of origin of such issuer.

The cases of waiver of registry are very restricted and limited to the following situations: (a) foreign issuers of securities evidenced by Brazilian Depositary Receipt programs – BDRs Level I[3], sponsored or not; (b) issuers of additional construction potential certificates; (c) issuers of investment certificates related to the Brazilian cinematographic audiovisual area; (d) small size companies; and (e) micro-companies.

According to the new rules, an issuer is not deemed to be foreigner, if either it is headquartered in the Brazilian territory, or whose assets located in Brazil correspond to 50% or more of those mentioned in its individual, segregated or consolidated financial statements, prevailing the one that best represents the economic substance of the business for the purpose of this classification. Therefore, a foreign issuer should have its head office located abroad or must have at least 50% of its registered assets based outside Brazil[4].

The foreign issuers that sponsor BDR programs Levels II and III[5] must be registered in category A.

With respect to the procedure to submit the registry application, the issuer shall forward it to CVM at the Companies Relations Supervise Department (*Superintendência de Relações com Empresas* – SEP), together with the relevant documentation, such as its by-laws, corporate resolution approvals, shareholders agreements or similar instruments, the periodical information documents indicated below, financial statements specially prepared for registration´s purpose, information disclosure policy, securities trading policy (if any), proof of the empowered administrators, statements regarding the securities issuer hold by its administrators, etc. SEP must examine the application within a term of 20 business days, and if no additional request of information or documents is made or no reply is given by SEP within such period, the application will be deemed to be automatically approved. This term can only be suspended one time by SEP, if SEP asks for additional information or documents. The issuer will have to satisfy such request within 40 business days, which term may be extended once for 20 business days upon prior and justified petition by the issuer to SEP. SEP will then have a 10 business day-period to review the new information or documents submitted by the issuer and decide whether the demand has been satisfied or not. The new demand will have to be satisfied within 10 business days and SEP will have another 10 business days to approve or deny the application. If the issuer does not comply with the above-mentioned terms, the application will be deemed to be automatically denied. Likewise, should SEP be silent, the application will be considered automatically approved. Last but not least, SEP can only suspend the analysis once at the request of the issuer for a period of up to 60 business days.

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[3] The main characteristics of Level I BDRs are: (a) trading is limited exclusively to the non-organized OTC market and only between the persons referred to below in item (d); (b) exception from the need to provide information about the issuing company other than that required by law it its country of origin (in the Portuguese language); (c) exemption from the need to register the company with CVM; and (d) exclusive acquisition by financial institutions and other institutions authorized to function by the Central Bank of Brazil (*Banco Central do Brasil* – Bacen), by employees of the sponsoring company or its subsidiary, by insurance brokerage firms and savings capitalization corporations, by corporate entities with a net worth of more than R$ 5 million, and by securities portfolios worth more than R$ 500 thousand, carefully administrated by an administrator authorized by the CVM and by employees of the sponsoring company or its subsidiary.

[4] The condition of foreigner or Brazilian will be verified at the time of the registry application of: (i) the issuer with CVM; (ii) the public offer distribution of BDRs; and (iii) the BDR program.

[5] The main characteristics of a Level II BDRs are: (a) admission to trading on Sock Exchanges, OTC markets or electronic trading systems; and (b) registration of the company with the CVM. The Level III BDRs presents the following characteristics: (a) public distribution on the market; (b) admission to trading on the Stock Exchange, the organized OTC market or on the electronic trading system; and (c) registration of the company with CVM.

One of the obligations of the issuer is to send to CVM periodical and eventual information, as per the content, form and terms set forth by CVM Instruction 480/2009. The same information must also be simultaneously sent to the entities that administrate the regulated markets in which the securities of the issuer are admitted for trading. For a period of three years counted as of the date of the respective disclosure, the information must be kept at the disposal of the investors at the issuer´s head office and, in the case of an issuer registered in category A, at its webpage.

The periodical information which is required from the issuer comprises, among others:

(i) a registry form (*formulation cadastral*) containing all the issuer´s data. The registry form must be updated within 7 business days after the date of any material change and reconfirmed annually on May of each year;

(ii) a reference form (*formulário de referência*) identifying the independent auditors and describing selected financial information; risk factors; market risks; historic data about the issuer; the company´s activities; the economic group; relevant assets; comments of the directors; forecasts; general shareholders´ meeting and administration (corporate governance); directors´ compensation; human resources; controlling shareholders; transactions with related parties; capital stock structure; different types of securities; repurchase and treasury securities plans; securities negotiation policy; information disclosure policy; and any extraordinary business. The reference form must be updated annually within 5 months as from the closing date of the relevant fiscal year or within 7 business days as of certain facts[6], and delivered at the time of the registry application of any public distribution of securities;

(iii) the financial statements, accompanied by the management report; auditor´s opinion; audit committee´s opinion or equivalent body (if any); capital budget proposal prepared by the management (if any); and statement of the directors about the auditor´s opinion and the financial statements. The financial statements must be presented within 3 months, in the case of Brazilian issuers, or 4 months, in the case of foreign issuers, counted as from the closing of the fiscal year;

(iv) the standard financial statements form (*formulário de demonstrações financeiras padronizadas* – DFP) will be delivered in the same terms mentioned in item (iii) above or together with the financial statements, whichever occurs first; and

[6] These facts, in the case of a category A issuer, include: (i) change of manager or of a member of the audit committee of the issuer; (ii) any amendment of the capital stock; (iii) issue of new securities, even if subscribed privately; (iv) change in the rights and advantages attributed to the issued securities; (v) change of the direct or indirect controlling shareholders or variations in their shareholding positions equal or exceeding 5% of the same kind or class of shares of the issuer; (vi) whenever any individual or legal entity or group of persons representing the same interest reaches the 5% threshold, provided that the issuer is aware of such change; (vii) any variation in the shareholding position of any of the persons mentioned in (vi) above exceeding 5% of the same kind or class of shares of the issuer, provided that the issuer is aware of such variation; (viii) merger, incorporation of shares, consolidation or spin off involving the issuer; (ix) alterations in the forecasts or estimates or divulgation of new forecasts or estimates; (x) signing, amendment or termination of shareholders agreement filed at the issuer´s headquarter or in which the controlling shareholder is a party regarding the exercise of voting rights or power of control of the issuer; and (xi) decree of bankruptcy, judicial recovery plan, liquidation or judicial ratification of an extrajudicial recovery plan. In the case of a category B issuer, the facts to be reported are limited to those mentioned in items (i), (iii), (v), (viii), (ix) and (x).

(v) the quarterly information form (*formulário de informações trimestrais* – ITR), accompanied by an auditor´s special review report, to be delivered within one month as from the closing of each three-month period.

There are specific rules for the securitization companies. In addition to the DFP, ITR and other periodical information which is required from all issuers, securitization companies must also submit: (a) a report about the acquisition, retro-assignment, payment and default of credits linked to the issue of receivables certificates; and (b) independent financial statements regarding each of the segregated assets by issue of receivables certificates or debentures under fiduciary regime.

The new rules contemplate the "great exposure to the market issuer" (*emissor com grande exposição ao mercado*), which must comply with the following cumulative requirements: (a) it must have shares traded in the stock exchange for at least three years; (b) it shall have complied timely with its periodical obligations for the last 12 months; and (c) the market value of its shares in circulation[7] shall be equal or above R$ 5 billion, pursuant to the closing quotation of the last business day of the three-month period before the date of the securities public offer distribution application request. This special issuer will have the benefit of a fast track registration status, when submitting their public offer distribution of securities registry application.

The rules now announced are being discussed since December 26, 2008 and represent an effective improvement in the Brazilian capital markets regulations. According to the model adopted by CVM Instruction 480/2009, the relevant information regarding the issuer is evidenced by one sole document, the Reference Form, which must be updated regularly. When the issuer decides to do a public offer distribution of securities, the issuer can prepare only a supplementary document containing basically the information about the offered securities and the characteristics and conditions of the offer. The set formed by these two documents (the Reference Form and the supplementary document) will furnish to the investors all the information of a conventional prospectus. CVM believes that this model is desirable and compatible with the reality of the Brazilian market because it creates a reliable and permanent source of quantitative and qualitative information about the issuer, as well as it facilitates the analysis of such information by CVM and the investors.

[7] For the purposes of CVM Instruction 480/2009, the expression "securities in circulation" or "shares in circulation" means all the securities or shares of the issuer, other than those hold by the controlling shareholder(s), the persons linked to the controlling shareholder(s), the administrators of the issuer and those securities or shares kept in treasury. "Linked person" (*pessoa vinculada*) means any individual or legal entity, fund or universality of rights acting for and representing the same interest of the individual or legal entity to whom/which such person is linked.

United States

CHANGES TO TEFRA AND NEW US REPORTING AND WITHHOLDING RULES FOR NON-US SECURITIZATION VEHICLES

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March saw the enactment of the Hiring Incentives to Restore Employment Act of 2010 (the **HIRE Act of 2010**, or the **Act**) in the US. The Act includes provisions intended to tighten the enforcement of US tax laws, including new reporting and withholding rules for foreign (i.e. non-US) financial institutions and other entities. The entities caught by the rules will include certain foreign securitization vehicles which receive relevant US source payments.

This Note provides an overview of certain key points to note from a securitization perspective in respect of the rules.

The Act also includes provisions related to the repeal of TEFRA C and D for bonds issued by US and non-US issuers. In this regard, helpfully the Act includes certain accommodations which are expected to support continued issuance of bearer bonds through dematerialised book-entry systems and other systems designated by the Treasury.

Background

The Act provides for a withholding tax of 30 per cent. on US source payments, including the gross proceeds of sale of certain assets which produce US source dividends or interest, made to foreign financial institutions (a definition which should include a range of securitization vehicles). The new withholding tax does not apply if the relevant institution (i) enters into an agreement with the US Internal Revenue Service to report information in respect of its "financial accounts" (a term which includes debt and equity securities issued by the relevant institution) held by US persons or foreign entities which themselves have a substantial US owner or (ii) complies with prescribed procedures to ensure that the financial institution does not maintain any accounts held by such persons or entities. The Act also requires a foreign financial institution either to withhold a tax equal to 30 per cent. of any payment made to an account holder who does not provide the information or to make an election for amounts to be withheld from the payments made to the financial institution.

In addition, the Act imposes a withholding tax of 30 per cent. on payments made to non-US entities which are not financial institutions. While such an entity is not required to enter into an agreement to avoid the withholding tax, it is required to satisfy reporting obligations (i.e. to provide a certification that the beneficial owner with respect to the payment does not have any substantial US owners or to provide information on any substantial US owners).

A "substantial US owner" for these purposes is generally one which owns 10% or more of the vote or value of an entity. In the case of an entity which is primarily engaged in the business of investing (directly or through options, futures, etc.) in securities, partnership interests, or commodities, however, any US owner is regarded as "substantial".

Differences in final rules

The final rules are largely in the same form as previous proposals published in December 2009 (as part of the Tax Extenders Act of 2009, and as carried over from the Foreign Account Tax Compliance Act of 2009). Two changes in the final rules are worth noting.

First, the Act provides the Secretary of the Treasury the regulatory authority to interpret the term "financial account". It is expected that the Secretary of the Treasury will use this authority to exclude certain types of financial interests from the definition of financial account. Debt issued by securitization vehicles may be excluded under the relevant provision, which would provide helpful relief. It appears that institutions and entities that do not maintain relevant financial accounts with a US person are not intended to be required to comply with the withholding and reporting requirements contemplated by the rules. Any Treasury Regulations interpreting the new rules are unlikely to be available for at least a few months.

Second, the scope of the grandfathering provisions under the rules has been expanded. Under the Act no withholding applies in respect of any obligation outstanding on a date two years after the date of enactment of the Act, or in respect of "the gross proceeds of any disposition of such an obligation". The latter exclusion was a last-minute addition to the Act.

Implications for securitizations

The rules may operate in certain circumstances to reduce the amounts received by a relevant securitization vehicle and/or may give rise to potential tax liabilities in the context of deals involving US source payments. Relevant US source payment types under the Act include payments of interest, dividends, rents and gross proceeds from the sale of any equity or debt securities of US issuers. On this basis, a number of transactions may involve relevant US cashflow sources, although in a securitization context it appears that relevant deals are likely to be those involving US originated underlying assets.

In the context of deals involving US source payments made via a series of financial intermediaries which are foreign financial institutions (as may be the case with payments made under a bond issued by a US issuer), each of the relevant institutions in the chain will be required to comply with the Act to avoid the imposition of the withholding tax. Because the final recipient of a payment cannot control the compliance of financial intermediaries, the rules introduce a significant tax risk. In a securitization context, this risk would be relevant when the underlying assets include securities issued by a US issuer.

The reporting requirements imposed by the Act also present specific challenges for securitization vehicles. In general, holding arrangements in respect of asset-backed securities are not transparent and securitization vehicles (acting through appropriate transaction parties) will not be able to comply with the Act without assistance from the clearing systems and others. In addition, as "brain dead" entities, securitization vehicles are unable to manage additional administrative tasks to the extent such tasks are not contemplated (and delegated) by the transaction documents. The corporate servicing arrangements usually provide for the service provider to assist the securitization vehicle with activities related to the vehicle's tax related filings and obligations, but this may not completely address the point. Because compliance with the Act will require significant further ongoing work, to the extent the Act may be relevant in the context of a deal, it may be appropriate to include corresponding provisions in the transaction documents.

Lastly, the ability of a securitization vehicle to comply with the reporting requirements will depend on the cooperation of the noteholders (who in the absence of specific relief in regulations will generally be regarded as account holders). Not all investors will be interested in providing the vehicle with the relevant information and corresponding certifications. In addition, the rules may give rise to liability concerns for investors, given that the required US tax certifications may carry penalties of perjury. In the context of most securitization vehicles it may not be possible to cause the withholding tax triggered by non-compliant noteholders to be targeted to affect only their economic returns.

Timing

The Act provides that the reporting and withholding rules will take effect after 31 December 2012. In addition, as noted above, the Act provides that there will be no withholding under the rules in respect of any obligation outstanding on a date two years after the date of enactment or from the gross proceeds of any disposition of such an obligation.

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BRAZIL

New Rules for Registry of Issuers of Securities Admitted for Trading in the Brazilian Regulated Markets. .....

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UNITED STATES

Changes to TEFRA and New US reporting and withholding rules for non-US securitization vehicles.....

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This committee focuses on national and international laws and regulations dealing with issuance of securities and regulation of capital markets activities. Issues include: laws relating to on-line information about issuers; securities issues relating to privatizations, including offering techniques, relationship between economic policy and legal structures for privatizations and the role of legal and financial advisors; regulatory matters concerning derivatives and hybrid securities; new requirements for foreign issuers in the U.S. related to the Sarbanes-Oxley Act; and SEC and other accounting standards for foreign issuers and cross-border private placements.

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