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Financial Services Action Plan - Update

London
March 21, 2007

During the last year, the European securities market witnessed a number of significant developments in relation to the implementation of the European Commission's Financial Services Action Plan (the "FSAP"), adopted in 1999 with the purpose of promoting the integration of European financial services and capital markets. This newsletter provides a description of these recent developments, focusing on the following:

- Issuers with a complex financial history under Directive 2003/71/EC (the "Prospectus Directive").
- The treatment of employee stock options and free stock awards under the Prospectus Directive.
- The equivalence of certain GAAP to IFRS under the Prospectus Directive and Directive 2004/109/EC (the "Transparency Directive").
- The implementation of the Transparency Directive, with a particular focus on the United Kingdom.
- The adoption of Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts (the "Statutory Audit Directive").

1. Issuers with a complex financial history under the Prospectus Directive

Because the historical financial information requirements of Regulation (EC) No. 809/2004 (the "Prospectus Regulation") apply only to "issuers", a question had arisen as to whether competent authorities in the European Economic Area ("EEA") could require issuers who have been the subject of a merger or spin-off transaction or other kind of business combination or who have engaged in significant acquisitions or disposals[1] (the

[1] The significance of the acquisitions or disposals should, as a starting point, be measured on the basis of significance tests comparing the entity or business acquired or disposed of with the issuer. The comparators for the significance tests recommended by the Committee of European Securities Regulators in the context of measuring a "significant gross change", referred to here by

types of issuers referred to in broad terms by the European Commission and the Committee of European Securities Regulators ("CESR") as those with a "complex financial history") to include historical financial information about entities other than the issuer in their prospectus.[2]

Prior to the implementation of the Prospectus Directive, EEA competent authorities generally had a significant degree of discretion in determining the appropriate historical financial information requirements for an issuer with a complex financial history, and the approaches they adopted differed from state to state. To address this potential lacuna, following consultations on the matter and advice from CESR, the European Commission proposed amendments to the Prospectus Regulation in August 2006 to specifically allow competent authorities to request additional financial information of certain issuers with a complex financial history. The final regulation amending the Prospectus Regulation, Regulation 211/2007, was adopted on February 28, 2007 and came into force on March 1, 2007.

Interestingly, the principal amendments are only applicable to issuers of shares and certain convertible bonds. In addition, in contrast to the approach initially considered by CESR, but consistent with its final technical advice, these amendments do not seek to identify and regulate an exhaustive list of transactions constituting complex financial histories. Rather, if an issuer has a complex financial history or has entered into a binding agreement to undertake a transaction which, on completion, is likely to give rise to a "significant gross change"[3], the amendments would require the relevant competent authority to request the inclusion of such additional financial information as is necessary to ensure that the prospectus complies with the standards relating to completeness and accuracy of disclosure set out in Article 5.1 of the Prospectus Directive, while conferring upon the regulator broad discretion as to the content of the additional financial

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analogy, include net income, turnover and total assets. Generally, a transaction would be considered to be significant if the transaction reached a threshold of 25% on the basis of these comparators. However, since the definition of a complex financial history is not specifically built around the concept of a "significant gross change" or the related significance tests specifically, even if the 25% threshold is not crossed, an issuer still needs to be mindful of its obligations under Article 5.1 of the Prospectus Directive, which requires a prospectus to include all material information. Reference to Article 5.1 has been specifically built into the concept of a "complex financial history" for the purposes of the amended Prospectus Regulation. Issuers should note that regulators could use the definition of "complex financial history" to impose much more onerous requirements than a simple application of the significant gross change tests.

2 The question arose notwithstanding Article 5.1 of the Prospectus Directive, which requires a prospectus to include all material information, because of Article 3 of the Prospectus Regulation. Article 3 states that a competent authority shall not request that a prospectus contains information that is not set out in Annexes I-XVII of the Prospectus Regulation, which set out the prescriptive disclosure requirements for prospectuses.

3 Note that "significant gross change" is measured directly by reference to the significance tests referred to in note 1.

information required in any particular case. In broad terms, the type of additional financial information that a competent authority would request in the context of a significant acquisition is likely to be, in addition to pro forma financial information for the acquisition for the last financial year and any subsequent interim period, historical financial information for the acquired entity for a period of up to three years, depending on the timing and size of the acquisition, the type of other information proposed to be included in the prospectus and the practicability of providing such information. One should also expect a degree of flexibility with regard to the accounting principles that such additional financial statements would need to be prepared under. It is intended that these amendments will ultimately be accompanied by additional guidance from, and co-operation within, CESR, in order to ensure that the passporting procedure remains effective even in the absence of a unified pan-European approach to complex financial histories.

Even though the amendments will apply only to issuers of shares and certain convertible bonds, issuers must be mindful of their general obligations to disclose all material information in a prospectus under Article 5.1. Accordingly, issuers may well see competent authorities using the complex financial history regime as a starting reference point, by analogy, to test issuers' compliance with Article 5 in the context of significant transactions outside the scope of the amendment (for instance in connection with the admission to trading of debt securities). This could well be the case notwithstanding the ambiguity in Article 3 of the Prospectus Regulation.[4]

2. The treatment of employee stock options and free stock awards under the Prospectus Directive

On July 18, 2006, CESR published a "Q and A" statement[5], that provides greater clarity on the treatment of stock options and free stock awards under the Prospectus Directive and which may provide relief to companies considering delisting from EEA-exchanges or that do not have a listing at all in the EEA, but who have significant numbers of employees there.[6] Although the CESR statement is not binding on the European Commission or the European Court of Justice, it provides guidance to market

[4] See note 2.

[5] Ref. CESR/06-296d

[6] The Prospectus Directive provides for an exemption from the obligation to publish a prospectus for securities offered, allotted or to be allotted to existing or former directors or employees by their employer, provided that a document is made available with information on the number and nature of the securities and the reasons for and details of the offer (the "Listed Companies Employee Exemption"). However, according to the latest interpretation of the Listed Companies Employee Exemption, which we believe has the blessing of the European Commission, it requires the company whose securities are being offered to have securities of any class (which need not be the securities so offered or allotted) admitted to trading on a regulated market in the EEA. This brings with it, among other things, ongoing financial reporting obligations (potentially in accordance with International Financial Reporting Standards) and an obligation to report price sensitive information to the market as soon as possible.

participants as to the way the various CESR Member State regulators will apply the provisions of their legislation implementing the Prospectus Directive.

With respect to employee stock options, the general conclusion of CESR Member State regulators was that non-transferable options granted to employees do not fall within the scope of the Prospectus Directive because that Directive only applies to transferable securities. The CESR statement also generally concludes that the exercise of non-transferable options is not a public offer since it is just the execution of a previous offer.

However, the German, Italian and Polish regulators dissented from this general view. The German regulator, the German Federal Financial Supervisory Authority (the "BaFin"), considers it possible to structure non-transferable share option grants so that they do not fall within the Prospectus Directive as implemented in Germany, but expressed the view that the exercise of such options and the delivery of the securities granted thereunder may constitute a public offer.[7] According to the CESR statement, the regulators in Italy and Poland expressed the view that the issuance of non-transferable options and their exercise should be assessed as a single financial transaction requiring either a prospectus or an exemption. It appears, but it is not clear, that the view of those regulators is that if an exemption is not available, a prospectus is required to be published prior to the issuance of the options.

With respect to outstanding or future stock option grants to employees in Germany, Italy[8] and/or Poland, companies should therefore consider whether the following exemptions under the Prospectus Directive may be available (though for future grants, we recommend consulting with counsel in those jurisdictions regarding the status of those exemptions at that time):

- the exemption for offers to less than 100 persons (the "100-person exemption"); and
- the exemption for small offers in terms of consideration (it should be noted that the aggregation rules, which can be peculiar to each jurisdiction, may be problematic).

7 Although the CESR statement does not state under what circumstances, in the view of the BaFin, the exercise of the options and the delivery of the securities thereunder would not constitute a public offer, the BaFin has clarified in recent informal conversations with our Firm that a prospectus would not be required if: (i) the options are not transferable; (ii) the options become exercisable only after a certain time of at least one year; (iii) during that time the employees are provided with or have access to comprehensible information similar to that usually contained in a prospectus (for example, annual financial statements and other price sensitive information that might be found in SEC filings or otherwise filed abroad); and (iv) the exercise of the options is not mandatory or automatic. The BaFin advised that there is no strict minimum time period, but it depends whether, at the relevant time, the employees are in possession of sufficient up to date information similar to that usually contained in a prospectus.

8 Under Italian securities laws, the exercise of the existing options should not qualify as a solicitation to the public and, therefore, should not be subject to the Italian applicable solicitation rules and regulations, including any prospectus requirement.

The Prospectus Directive is capable of being implemented in each EEA Member State so that the 100-person exemption is rendered unavailable if the offer, albeit made to fewer than 100 persons in that EEA Member State, is made to 100 or more persons in any other EEA Member State. A company may have 100 or more employees to whom offers of securities are made in at least one EEA Member State, for example, the United Kingdom, and employees in other EEA Member States, for example, Germany, Italy and Poland, who hold non-transferable options, the exercise of which could conceivably constitute an offer to the public in those jurisdictions that could require the publication of a prospectus.[9] So the view of the regulators in Germany, Italy and Poland on the application of the 100-person exemption there in these circumstances would be key in determining whether a company needs to rely on the Listed Companies Employee Exemption. We understand the application of the 100-person exemption in Germany, Italy and Poland is as follows:

- In discussions our Firm has had with the BaFin, the BaFin has expressed the view that a prospectus is not required in Germany if the options are offered to fewer than 100 persons in Germany irrespective of whether the offer is made to 100 or more persons in any other EEA Member State, provided, however, that none of the offers in other EEA Member States constitutes a public offer or requires the publication of a prospectus under the Prospectus Directive as applied in the relevant EEA Member State.[10, 11] In addition, under German law, employees holding only restricted stock awards or stock pursuant to letters of intent should not count towards the calculations for the 100-person exemption.

- In discussions our Firm has had with the Italian regulator, the Italian regulator has indicated that the 100-person exemption should be applied in relation to Italy only, irrespective of the number of offerees in other jurisdictions.

- Similarly, we have been advised by Polish counsel that the 100-person exemption should be applied in relation to Poland only, irrespective of the number of offerees in other jurisdictions.

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9 Please see note 8 with respect to Italy.

10 We understand that the United Kingdom's regulator, the Financial Services Authority, shares the view expressed in the CESR Statement that the grant to, or exercise of non-transferable stock options by, employees there should not constitute a public offer within the meaning of the Prospectus Directive as implemented in the United Kingdom.

11 We understand that in recent discussions that the FSA has had with the European Commission, the FSA and the Commission have agreed that the 100-person exemption should be available in the United Kingdom irrespective of the number of offerees in any other European member state.

Accordingly, in the circumstances outlined above, the 100-person exemption should be available in each of Germany, Italy and Poland, based on the current views of the regulators there.

The CESR statement also confirms that giving employees free stock awards should not require the publication of a prospectus – where the employee does not have any choice whether to exercise, there is no offer under the Prospectus Directive. If the employee does have a choice, it would appear that as long as that choice is between taking the stock and not taking the stock, and no other alternative (for example, cash) is available, a prospectus should not be required, as it would be an offer for zero consideration benefiting from the exemption for offers with low consideration.

3. The equivalence of Canadian GAAP, Japanese GAAP and U.S. GAAP to IFRS under the Prospectus Directive and the Transparency Directive

On December 4, 2006, the European Commission adopted Regulation No. 1787/2006 with respect to the Prospectus Directive (the "Equivalence Regulation")[12] and Decision No. 2006/891/EC with respect to the Transparency Directive (the "Equivalence Decision")[13]. These measures extend any decision with respect to the equivalence of certain non-IFRS GAAP to IFRS under both the Prospectus Directive and the Transparency Directive until January 1, 2009.

Both the Prospectus Directive, and the related EEA implementing legislation (for prospectuses) and the Transparency Directive (for ongoing financial reporting) have a general requirement for the relevant financial statements to be prepared in accordance with either IFRS or, for non-EEA issuers, GAAP that has been determined to be "equivalent" to IFRS. Following the recent expiry of certain transitional provisions in the Prospectus Directive (January 1, 2007) and pending the implementation of the Transparency Directive (for which the deadline was January 20, 2007), there has been much discussion and consultation by European authorities as to what GAAPs should be considered to be equivalent to IFRS. The last advice to the European Commission that CESR published on the matter was that US GAAP, Canadian GAAP and Japanese GAAP should be considered to be equivalent subject to the inclusion of additional remedial disclosures. The detail of the proposed advice led many to conclude that it was tantamount to forcing a full restatement of the relevant non-IFRS GAAP to IFRS. The unpalatability of such a result has perhaps been the driver for an alternative approach, which has been effected through the Equivalence Regulation and the Equivalence Decision.

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12 The Equivalence Regulation is available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_337/l_33720061205en00170020.pdf.

13 The Equivalence Decision is available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_343/l_34320061208en00960098.pdf.

Collectively, the Equivalence Regulation and the Equivalence Decision exempt non-EEA issuers from having to restate to IFRS historical financial statements in prospectuses filed with a competent authority before January 1, 2009 and historical financial statements for financial years starting prior to January 1, 2009 in periodic reports, if one of the following conditions is met:

a) the notes to the financial statements that form part of the historical financial information contain an explicit and unreserved statement that they comply with IFRS;

b) the historical financial information is prepared in accordance with Canadian, Japanese or U.S. GAAP;

c) the historical financial information is prepared in accordance with a non-IFRS GAAP (other than Canada, Japan or the United States) and the issuer provides evidence to the competent authority that the non-EEA authority responsible for the relevant GAAP has both (i) made a public commitment to converge its national GAAP with IFRS; and (ii) established a work programme which demonstrates the intention to progress towards convergence before December 31, 2008.

As expressly stated in the Equivalence Regulation and the Equivalence Decision, the intention of the European Commission during that two-year period is to engage and maintain a regular dialogue with non-EEA authorities (in particular the U.S. Securities and Exchange Commission) and to closely monitor (and inform the European Securities Committee ("ESC") and the European Parliament about) progress in the convergence of non-IFRS GAAPs and IFRS, as well as progress on the elimination of reconciliation requirements that apply to Community issuers in non-EEA countries. We note, however, that certain Member States[14] and the European Parliament[15] have expressed concern about the possibility that the SEC would continue to require reconciliation of U.S.-listed EEA issuers' financial statements to U.S. GAAP in U.S. filings after 2008. The European Parliament has made it clear that in its view "in the absence of agreement on equivalence between the IFRS and the United States GAAPs on 1 January 2009 (…) American businesses established in Europe should use the IFRS standards in full". The European Parliament also calls on the Union's other competent authorities to "state their position along these lines". Taking into account these concerns, the Equivalence Regulation and the Equivalence Decision expressly provide that "at the end of the additional transitional period, the decision of the Commission will have to be such that community and non-E.U. issuers should be on equal footing".

14 See, for example, the draft summary record of the meeting of the Accounting Regulatory Committee held on July 7, 2006, available at http://ec.europa.eu/internal_market/accounting/docs/arc/2006-07-07-summary-record_en.pdf.

15 European Parliament resolution dated October 24, 2006, available at http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2006-0436&language=EN.

4. The implementation of the Transparency Directive

On May 24, 2006, the European Commission published a draft directive[16] laying down detailed rules for the implementation of the Transparency Directive (the "Draft Directive"). This draft Directive was approved by a resolution of the European Parliament in October 2006.[17] In particular, the Draft Directive provides the following rules:

- The minimum content of half-yearly non-consolidated financial statements.
- The minimum disclosure requirements for major related party transactions.
- Notification of major holdings by natural persons or legal entities.
- Minimum standards for the dissemination of regulated information.
- Equivalence of the requirements set forth by non-EEA countries to those set out in various provisions of the Transparency Directive, including the minimum information that annual consolidated accounts of non-EEA issuers should contain for such accounts to be considered equivalent pursuant to Article 23(1) of the Transparency Directive.

The deadline for implementation of the Transparency Directive by all Member States was January 20, 2007. The current status of implementation of the Transparency Directive varies among Member States; some countries (such as the U.K., Germany and France) have transposed the Transparency Directive into national legislation on time by January 20, 2007, whereas others (such as Italy) have not met the deadline.

The implementation of the Transparency Directive in the UK

On December 22, 2006, the FSA published the Transparency Obligations Directive (Disclosure and Transparency Rules) Instrument 2006 (FSA 2006/70) containing final rules implementing the Transparency Directive[18]. Key features of UK implementation include the following:

- The periodic financial reporting requirements of the Transparency Directive will be applicable to financial years starting on or after January 20, 2007. In practice, this means that: (i) if the issuer has an accounting year starting on January 1,

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16 The draft directive may be found at http://ec.europa.eu/internal_market/index_en.htm.

17 The Resolution may be found at http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2006-0435&language=EN

18 Available at www.fsa.gov.uk

2007, the first Transparency Directive compliant half-year report will be for the first six months of 2008 and will need to be published by the end of August 2008 and the first Transparency Directive compliant annual report will be for full-year 2008 and will need to be published by the end of April 2009; (ii) if the issuer's accounting year starts, for example, on April 1, 2007, the first Transparency Directive compliant half-year report will be for the six months ending September 30, 2007 and will need to be published by the end of November 2007 and the first Transparency Directive compliant annual report will be for the year ended April 1, 2008 and will need to be published by the end of July 2008.

- Issuers with only convertible debt and/or depository receipts admitted to trading on a regulated market will not be required to publish half-yearly reports (in contrast to those with listed debt or shares) or interim management statements ("IMS") (in contrast to those with listed shares) and holders of securities of such issuers will not be subject to the shareholding reporting requirements (in contrast to holders of securities of issuers with listed shares).

- In light of a concern that the draft UK rules implementing the Transparency Directive, combined with the required management certification of periodic reports, would extend the responsibility of the certifying management, the final rules confirm that the issuer will bear exclusive responsibility for compiling the annual and half-yearly reports. This is somewhat at odds with the text of the required certification, but is nevertheless a helpful clarification. The final rules also clarify that the determination of 'responsible persons' will lie with issuers, who, therefore, may frame 'responsible persons' such that any certification by any particular director or officer is done on behalf of the whole board or on behalf of the issuer.

- For half-yearly reports, the Transparency Directive requirement for the persons responsible within the issuer to certify, *inter alia*, that, to the best of their knowledge, the financial statements prepared in accordance with the applicable set of accounting standards give a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer and the undertakings included in the consolidation taken as a whole, will be capable of being satisfied by a statement that the condensed set of financial statements have been prepared in accordance with IAS 34 or other applicable standard relating to interim reporting. The background for this is that the term "true and fair view" has a particular meaning in the United Kingdom, and the standard underlying that meaning may well not be satisfied with a set of typical, condensed half-yearly financial statements.

- UK issuers with shares traded on regulated markets will be required to comply with a set of rules super-equivalent to the Transparency Directive that will maintain the basic requirements of the predecessor (Companies Act) major shareholding disclosure regime. Non-EEA issuers and their shareholders whose shares are traded on regulated markets for which the UK is their home member state will be required to comply with the Transparency Directive minimum requirements, although they may be exempt from these requirements if their domestic regime has been deemed equivalent.

5. The adoption of the Statutory Audit Directive

The Statutory Audit Directive, published in the E.U. Official Journal on June 9, 2006, and to be implemented by Member States by June 29, 2008, introduces additional rules on the audit of company accounts, aimed at reinforcing the reliability of company financial statements by establishing minimum requirements for statutory audit of annual accounts and consolidated accounts. The Statutory Audit Directive's main provisions include the following:

Transparency report

- Audit firms that carry out statutory audit of "public interest entities" (which includes, but – importantly – is not limited to, all entities with securities admitted to trading on a E.U. regulated market) must provide a detailed public report (a "transparency report") including, *inter alia,* a description of the audit firm and the network to which it belongs (if it belongs to a network), an indication of when the last quality assurance review took place, a statement on the policy followed by the audit firm concerning continuing education of statutory auditors and a fee breakdown.

Oversight and registration of auditors

- Member states must designate competent authorities responsible for approval, registration, quality assurance, inspection and discipline and must cooperate with each other. Member States must also organize effective systems of investigations and sanctions, whether civil, administrative or criminal.

- Statutory auditors and audit firms must be approved in the Member State where the statutory audit is carried out, to ensure they meet certain educational qualifications. Statutory auditors and audit firms so approved must be identifiable in an electronic public register and the registration information must be kept updated. For audit firms, the register must show the size of the firm and the owners and members of the management of the audit firm.

- Auditors and/or audit firms from non-EEA countries that issue audit reports in relation to issuers incorporated outside the Community whose securities are traded on a regulated market of a Member State must be registered in that Member State and be subject to that Member State's systems of oversight, quality assurance and investigations and sanctions. Derogations from registration, oversight, quality assurance and investigations and sanctions may be allowed only if auditors and/or audit firms from non-EEA countries are subject to equivalent systems of public oversight, quality assurance, investigations and sanctions to those in Member States.[19] Many commentators believe these registration requirements are going to add a significant burden to audit firms, and perhaps, consequently, add significant cost to issuers.

- Auditors and/or audit firms from non-EEA countries may only be approved as statutory auditors if they meet quality criteria equivalent to that applied to Auditors and/or audit firms from Member States.

Audit committees

- Public interest entities must set up an independent audit committee or, if permitted by the Member State in which the audit is carried out, a body performing equivalent functions to an audit committee[20]. The audit committee or equivalent body is responsible, *inter alia*, for monitoring the financial reporting process and the statutory audit and reporting any undue influence of the management on the financial reporting of the audited entity.

Independence, appointment and dismissal

- Statutory auditors and audit firms must be independent from the audited entity and subject to a system of quality assurance, independent from the reviewed statutory auditors and audit firms and subject to public oversight. Statutory audits must be carried out in accordance with international standards on auditing adopted by the Commission[21].

- The statutory auditor or audit firm must be appointed by the shareholders or members of the audited entity unless the Member State in which the audit is carried out has adopted an alternative system which ensures that statutory auditors and audit firms are independent from those who prepare the financial statements of the audited entity. Statutory auditors and audit firms may only be dismissed if there is a significant reason why the statutory audit cannot finalize

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19 EEA competent authorities will have the authority to waive the requirements applicable to a non-EEA accounting firm upon determination by the European Commission that the non-EEA audit firm is subject to "equivalent" requirements in its home country, and the relevant competent authorities have entered into a cooperation agreement that ensures reciprocal treatment. The question of equivalency for purposes of the need for registration of EEA and U.S. auditors in, respectively, the U.S. and the EEA (*i.e.*, under which circumstances EEA and U.S. auditors can avoid a second (or dual) registration in respectively the United States and the EEA) is the subject of discussion among competent regulatory authorities.

20 In some circumstances Member States may go as far as exempting public-interest entities from having an audit committee (the conditions are set out in Article 41(6) Statutory Audit Directive).

21 Member States may, however, apply national auditing standards as long as the European Commission has not adopted an international auditing standard.

the audit. The reasons for dismissal and resignation must be disclosed to the responsible oversight authorities.

- Audited companies must disclose total fees paid to the statutory auditor or audit firm for the statutory audit, other assurance services, tax advisory services and for other non-audit services.

- Key audit partners responsible for carrying out a statutory audit must rotate within a maximum period of 7 years.

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Questions regarding the matters discussed in this newsletter, and the general implications of the Financial Services Action Plan, may be directed to your regular contacts at the Firm.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

PARIS
12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

MOSCOW
Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

COLOGNE
Theodor-Heuss-Ring 9
50668 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

ROME
Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

MILAN
Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

HONG KONG
Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

BEIJING
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax