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ALERT MEMORANDUM

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GERMAN FEDERAL SUPREME COURT FACILITATES DELISTING AND DOWNLISTING

In its ruling dated October 8, 2013, the German Federal Supreme Court (*BGH*) significantly facilitated the downlisting and delisting of listed German stock corporations (II ZB 26/12).

I. Previous Jurisprudence Established Obstacles

Since 2002, the BGH has required for purposes of a delisting, (i) an approval from the shareholders' meeting and (ii) a compensatory offer by either the stock corporation itself or its majority shareholder to the outstanding minority shareholders to acquire their shares against adequate monetary consideration. Under this jurisprudence, minority shareholders were entitled to appraisal rights, and consequently could initiate judicial review of the adequacy of the compensation offered. As a result of these obstacles, listed companies tended to use a squeeze-out in order to indirectly achieve a delisting, which, however, requires a majority of at least 90%.

II. New Jurisprudence Facilitates Downlisting and Delisting

In a recent ruling, the BGH eliminated the abovementioned obstacles. In a case where the management board had initiated the downlisting of the company from the regulated market of the Berlin stock exchange to the open market of the Frankfurt stock exchange, the BGH established that the downlisting of a German stock corporation no longer requires an approval from the shareholders' meeting and a compensatory offer to minority shareholders. The reasoning behind the decision is that the law protects the corporate and financial participation by a shareholder and his or her organizational rights, but does not warrant the commercial trading aspect and the market liquidity associated with a listing in general, or with a listing in a specific market segment of a stock exchange. Although the case involved a downlisting, the same principles should also apply to full delistings, as the BGH did not differentiate in its reasoning between a downlisting and a full delisting.

The BGH rendered its new decision also on the basis of a recent ruling of the German Constitutional Court that had held that neither a shareholders' meeting nor a compensatory offer were required to protect the shareholders' rights under the German constitution in the event of a delisting or downlisting.

III. Remaining Limitations on Downlisting and Delisting

However, minority shareholders are still protected, to a certain extent, under the German Stock Exchange Act, which stipulates that shareholders must not be unduly disadvantaged by a delisting of their shares. In furtherance of this rule, the exchange regulations adopted by various German stock exchanges, including the Frankfurt stock exchange, provide that the effectiveness of the delisting from the regulated market be delayed for a period of up to six months unless the stock corporation or its majority shareholder offers to acquire the minority shareholders' shares against monetary compensation. The rationale for this provision is to provide for a period of time in which shareholders can divest their shares via the stock exchange. To the extent the time periods granted are in line with the applicable rules, the respective stock exchange cannot require the offer of monetary compensation, and the delisting will have to be implemented upon expiration of the six months' period in any event.

IV. Outlook

The decision establishes clear rules and paves the way for German stock corporations to delist, thereby saving the costs associated with providing ongoing disclosure. Moreover, the new jurisprudence may allow a majority shareholder whose shareholdings are just short of, *e.g.*, the squeeze-out threshold to convince outstanding minority shareholders to sell their shares by announcing a delisting. Potential adverse effects of an outright full delisting on the liquidity of the minority shareholders' shares may be mitigated by employing a two-step strategy: Such a strategy could include the implementation of a downlisting from a regulated market to an open market for an interim period as a first step, and an eventual full delisting from the open market as a second step. Delisting from an open market is less cumbersome and can be achieved in case of, *e.g.*, the Entry Standard of the Frankfurt stock exchange by giving six weeks' notice.

However, in order not to breach its duties, the management board still needs to carefully assess the consequences of a delisting for the stock corporation under the business judgment rule.

It should also be noted that pending appraisal proceedings with regard to delistings under the now obsolete jurisprudence of the BGH must be dismissed.

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If you have any questions in regard of the issues addressed herein, please do not hesitate to contact Klaus Riehmer (kriehmer@cgsh.com), Oliver Schröder (oschroeder@cgsh.com), Gerold Niggemann (gniggemann@cgsh.com) or Alexander Rahn (arahn@cgsh.com) in the firm's Frankfurt office or any of our partners and counsel listed under "Germany", "Lawyers in this Practice", under the "Practices" section of our website at http://www.clearygottlieb.com.

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