

Update for Latin American Issuers on the European Transparency Directive

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Any Latin American issuer with securities admitted to trading on a regulated market in the European Union should consider the implications of the European Transparency Directive. Regulated markets include the main trading platforms of the London Stock Exchange and the Luxembourg Stock Exchange. They do not include “exchange-regulated” markets, such as Latibex in Madrid, the EuroMTF platform of the Luxembourg Stock Exchange or the Professional Securities Market platform of the London Stock Exchange.

Until recently, many Latin American issuers routinely listed their debt securities on the Luxembourg Stock Exchange. For new issues today, issuers and their bankers generally avoid the regulated markets, because of the potential implications under various European directives, and rely on one of the exchange-regulated markets instead. In our experience, few Latin American issuers have listed their equity on regulated markets.

Many Latin American issuers, however, still have older debt securities admitted to trading on the Luxembourg Stock Exchange. These issuers should be aware that the Transparency Directive will impose new periodic reporting requirements on issuers of securities that trade on regulated markets, and that there is still some uncertainty about its requirements.

The general rule under the Transparency Directive is that an issuer with debt securities admitted to trading on regulated markets must publish (a) an annual report containing IFRS financial statements within four months after the end of its fiscal year and (b) a half-year report containing unaudited IFRS financial statements within two months after the end of its first half. Each of these reports must also contain certain other mandated information. An issuer is exempt from these reporting provisions if its only securities admitted to trading on a regulated market are debt securities with minimum denominations of €50,000 or more. Each member state is free, however, to impose more onerous requirements.

One continuing uncertainty is when implementing regulations will become effective. January 20, 2007 is the deadline for European states to implement the Directive. Many states will miss that deadline, but implementing regulations can be expected to come into force during the course of 2007. The actual effectiveness in a given jurisdiction will depend on its own implementing regulations. The United Kingdom is expected to implement on time, but will make the Transparency Directive reporting requirements applicable for fiscal years starting *after* January 20, 2007. Luxembourg is not expected to implement on time, and its proposed approach to effective dates has not been publicly disclosed.

The other uncertainty is over what accounting principles may be used by an issuer that, like the vast majority of Latin American issuers, does not report in IFRS. The Transparency Directive allows a non-European issuer to prepare financial statements in accordance with other accounting principles that are considered to be “equivalent” to IFRS, but there is still no final determination about what constitutes “equivalent” GAAP. The European Commission began a process to decide whether U.S., Canadian or Japanese GAAP are equivalent, but that decision has been postponed to 2009, which corresponds to the timetable the U.S. Securities and Exchange Commission is using to consider whether to eliminate the U.S. GAAP reconciliation requirement for IFRS financial statements.

In the meantime, the European Commission decided in December 2006 on an interim regime that will apply for fiscal years beginning before the beginning of 2009. The Commission decision permits (a) financial statements that explicitly confirm that they comply with IFRS, (b) financial statements prepared in accordance with U.S, Canadian or Japanese GAAP and (c) financial statements prepared under any other body of GAAP, as long as the relevant national accounting authority has made a public commitment to converge with IFRS and has established a work program that demonstrates the intention to progress towards convergence before the end of 2008, and the issuer provides evidence to that effect to the appropriate European regulator.

Most Latin American issuers report only under their home-country GAAP, so whether they can comply with this interim regime will depend on the status of their national accounting authority’s convergence program. Those Latin American issuers that are reporting companies under U.S. law also prepare an annual reconciliation to U.S. GAAP, but U.S. GAAP reconciliation will not be sufficient. The handful of Latin American issuers that also prepare full U.S. GAAP financial statements will be able to use those financial statements to meet most of the European Commission requirements, if they can prepare them semiannually as well as annually and meet the deadlines.

In any event, it remains unclear whether, after 2008, a Latin American issuer will be able to report using any of home-country GAAP, home-country GAAP with a U.S. GAAP reconciliation or full U.S. GAAP.

In light of these uncertain requirements, an issuer should review its existing listings and consider whether (and if so, when) to move them from regulated to unregulated markets if there are no contractual or investor relations impediments to doing so. Each of the London Stock Exchange and the Luxembourg Stock Exchange has an alternative trading platform that is outside the scope of the Transparency Directive—the Professional Securities Market in London and the EuroMTF in Luxembourg. The procedures for transferring debt securities from the regulated market to these alternative markets are simple and straightforward. A number of non-EU issuers have already transferred their debt securities to the alternative markets to avoid the Transparency Directive and other European directives that apply only to the regulated markets.

A Latin American issuer may also want to consider whether it has a long-term interest in access to the regulated European markets, and if so what action it can take, for example with national accounting regulators, to ensure that its local GAAP will be acceptable in the European Union both before and after 2009.

Please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Latin America in the “Our Practice” section of our website (<http://www.clearygottlieb.com>) if you have any questions.

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