

Forum for | **US Securities Lawyers** | in London

Annual Report 2009

## Introduction

The Forum for US Securities Lawyers in London (the “Forum”) is a trade association representing US-qualified lawyers and participants in the London capital markets. Membership is over 1,000 people and includes US-qualified lawyers practicing at over 45 law firms and 30 financial institutions in the London capital markets, as well as market participants including securities exchanges, settlement systems and registrars. Founded in 2006, the Forum is an independent, self-funded organization dedicated to addressing issues of the application of and compliance with US securities laws in London and international capital markets.

In 2008, the Forum completed several projects including submitting comment letters to the SEC in relation to: (1) its proposed amendments to Rule 12g3-2(b) (April 2008) under the US Securities Exchange Act of 1934 as amended (the “Exchange Act”); (2) its proposed amendments to the rules on Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings (the “Cross-Border Tender Offer Rules”) (June 2008); and (3) its proposals on exemptions for foreign broker-dealers (September 2008). The Forum also launched a website which contains legal updates and copies of our comment letters and other projects at [The Forum for US Securities Lawyers in London](#).

In 2009, the Forum’s projects focused on the effects of existing and proposed SEC rules, as well as proposed US federal legislation affecting the London capital markets. In March 2009, as part of its “SEC Speaker Series” the Forum hosted a conversation with Associate Director of the Division of Corporation Finance Mauri Osheroff on the SEC’s amendments to the Cross-Border Tender Offer Rules. Throughout the year the Forum held meetings to discuss issuer reliance on the Section 3(c)(7) exemption of the Investment Company Act of 1940, as amended (the “Investment Company Act”). In December 2009, the Forum hosted a seminar on the latest regulatory developments in dark pools. In addition, the Forum published a note elaborating upon recently proposed US federal legislation that would repeal the existing TEFRA D Eurobond exemption. The Forum was also nominated for the Law Firm Innovation Award by the British Legal Awards in October 2009.

## **SEC Speaker Series – A Conversation with SEC Associate Director Mauri Osheroff**

In March 2009 the Forum held a discussion with the SEC’s Associate Director for Regulatory Policy in the Division of Corporation Finance, Mauri Osheroff. The focus of the event was on the SEC’s amendments to the Cross-Border Tender Offer Rules and the effect on the London capital markets. Ms. Osheroff was instrumental in drafting the rules and the event provided an opportunity for her to have a dialogue with representatives from the London capital markets on the impact of the rules on the market. This event proved beneficial to all participants, as Ms. Osheroff provided very helpful clarification and insight in response to attendees’ various queries on the Cross-Border Tender Offer Rules. Given the success of the event, for 2010 the Forum plans a series of discussions with various SEC officials and other speakers of interest.

## Forum Meetings – Section 3(c)(7) Exemption / Investment Company Act of 1940

The Forum held several meetings with Forum members to discuss issues relating to offerings by companies that fell within an exemption of the Investment Company Act provided by Section 3(c)(7) of the Investment Company Act (the “3(c)(7) exemption”). These meetings included discussions of the memorandum issued by five law firms’ New York offices proposing certain procedures to be applied to equity offerings made by non-US companies that rely on the 3(c)(7) exemption in order to privately place equity securities in the United States. The discussions focused on the impact of the application of the procedures on these types of offerings. Through these series of meetings, the Forum initiated an ongoing project to conduct a dialogue on the application of the proposed procedures in the London capital markets. Meetings included representatives from various law firms and other market participants including SIFMA’s European Primary Markets Division (EPMD).

## Forum Seminar – Shining a Light Into “Dark Pools”

In light of recent SEC proposals to ban flash trading and increase regulation of dark pools, on 17 December 2009 the Forum hosted James Baugh, Head of Client Management at Baikal, the London Stock Exchange Group’s pan-European MTF dark pool and liquidity aggregation service. Mr. Baugh presented to the Forum along with Jonathan Melrose and Daniel Winterfeldt of Simmons & Simmons, and Katherine Mulhern of Lovells. The discussion focussed on the fundamentals, mechanics and regulations of dark pools in the United States, the United Kingdom and the European Union.

Dark pools refer to private trading systems where participants can transact their trades without displaying quotations to the public. While the SEC acknowledges the utility of dark pools for block trades among institutional investors, it is concerned that the increasing number of dark pools will hinder price discovery in the public markets, draw interest away from the public markets and reduce the quality of public quotations, and therefore encourage the development of a two-tiered market. Due to these concerns, on 13 November 2009, the SEC proposed three rule changes:

- Amending the definition of a “bid” and “offer” for purposes of Rule 602 of Regulation NMS under the Exchange Act, so as to apply explicitly to actionable IOIs (“indications of interest”);
- Reducing the average daily trading volume threshold in Rule 301(b)(3) of Regulation ATS under the Exchange Act from 5% to 0.25%.
- Requiring real-time disclosure of ATS (“alternative trading systems”) trades in that the identity of the ATs must be revealed in the reports of their executed trades.

All three rule changes would include a block trade exception that would exclude transactions with a \$200,000 market value as long as there is a reasonable belief that the information is communicated to a contra-side trader with an interest in at least a \$200,000 market value transaction.

## **US Securities Update – Proposed Repeal of the “TEFRA D” Bearer Bond Exception**

On 1 December 2009, the Forum published an update on the Foreign Act Tax Compliance Act of 2009 (the “Bill”), which is comprised of numerous proposals designed to combat US tax evasion. The focus of the note was the proposed repeal of the “TEFRA D” bearer bond exemption given its potential impact on the Eurobond market. Currently, the TEFRA D exemption is frequently used in the context of Eurobond issuance in global bearer form, and can be relied upon by an issuer that ensures that “reasonable arrangements” are in place to prevent bearer debt securities from being sold to non-qualifying US persons in connection with the offering. The Bill would repeal this exemption and consequently subject US and non-US issuers to certain sanctions if the debt security is not in registered form, including:

- for a US issuer, the application of a US withholding tax on interest payments (disqualification of portfolio interest exemption) and a denial of a US tax deduction on interest paid and the imposition of a US excise tax.
- for a non-US issuer, including those who have issued bearer debt securities solely to non-US persons, the imposition of a US excise tax.

While the Bill appears to be clear in imposing limitations on US issuers, it is not entirely clear that Congress intended to impose the significant US excise tax on non-US issuers that have no connection with the United States.

For further information, please see the following:

[Text of US bill](#)

[Technical explanation of bill](#)

## **British Legal Awards 2009 – Nominated for Law Firm Innovation Award**

The British Legal Awards, hosted by Legal Week, celebrate the collective achievements of the British and international legal profession. In October 2009, alongside nominations for submissions from Allen & Overy, Clifford Chance and Berwin Leighton Paisner, among others, the Forum was shortlisted for the Law Firm Innovation Award for the British Legal Awards 2009, which recognised the Forum as an innovative, collaborative platform for dealing with the application of and compliance with US securities issues in the London capital markets. As one lawyer from a major investment bank in London commented: “Before the Forum... US legal know-how on many important issues affecting non-US clients was very scattered. US securities law has always been a complicated black box area where potential issues lie dormant. The Forum’s hard work has begun to bring these issues to the forefront so that they may be discussed and addressed in a meaningful and coherent way.”

## Conclusion and looking forward

2009 was an interesting, and in some senses, a transformative year for US capital markets practitioners outside the United States. The changes in terms of the regulatory framework and market practice look set to continue in 2010. In response to this, the Forum will continue to sponsor projects that provide Forum members with an opportunity to discuss and comment on recent developments in US securities law affecting London and the international capital markets. The Forum will continue certain projects, including the Speaker Series and the Investment Company Act sub-group. In addition, the Forum will look to launch new projects responsive to changing market conditions.

For further information on the Forum please visit [The Forum for US Securities Lawyers in London](#) or contact:

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