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Bulletin No. 197

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Editor's Note

This is an additional issue of the Corporate Law Bulletin. The "Recent Corporate Law Decisions" section of the Bulletin will return in the February 2014 issue.

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 Banks' capital planning practices: Basel Committee report

On 23 January 2014, the Basel Committee issued a document on sound practices to foster overall improvement in banks' capital planning practices. An important lesson from the financial crisis concerned the need for banks to improve and strengthen their capital planning. Some of the observed weaknesses reflected processes that were not sufficiently comprehensive, appropriately forward-looking or adequately formalised. As a consequence, some banks underestimated the risks inherent in their business strategies and, in turn, misjudged their capital needs.

In the absence of comprehensive information, some banks continued to pay dividends and repurchase common shares when capital could have been retained to insulate them against potential future losses. Some banks also issued large amounts of capital instruments - such as hybrid debt - that ultimately proved ill-equipped to absorb realised losses. In sum, many banks did not scale their decisions about the level and composition of regulatory capital to the potential impact of changing economic conditions.

During and after the financial crisis, regulators in certain jurisdictions conducted ad hoc stress tests to assess the capital adequacy of banks in their jurisdictions. Because of the pressing need to determine whether banks were appropriately capitalised, those first rounds of official stress tests often did not include an assessment of the processes banks employ to project potential capital needs and to manage capital sources and uses on an ongoing basis. More recently, regulators have begun to codify their expectations for what constitutes sound capital planning. Those planning processes enable a bank's management to make informed judgments about the appropriate amount and composition of capital needed to support the bank's business strategies across a range of potential scenarios and outcomes.

The report is available on the Bank for International Settlements (BIS) website.

1.2 Global audit committee survey

On 15 January 2014, KPMG published its Global Audit Committee Survey. To help identify the key challenges and concerns facing audit committees, boards and their companies, KPMG's Audit Committee Institute surveyed 1,500 audit committee members in more than 34 countries around the world on a range of issues, including:

- the audit committee's workload and agenda;
- risk and information quality;
- CFO and the finance organisation;
- corporate performance; and

- internal audit.

The survey identifies broad international trends and provides detailed country data on audit committee challenges and concerns in different geographies.

The survey is available on the KPMG website.

1.3 Risk management guidelines related to anti-money laundering and terrorist financing issued by the Basel Committee

On 15 January 2014, the Basel Committee on Banking Supervision issued a set of guidelines to describe how banks should include the management of risks related to money laundering and financing of terrorism within their overall risk management framework.

Prudent management of these risks together with effective supervisory oversight is critical in protecting the safety and soundness of banks as well as the integrity of the financial system. Failure to manage these vulnerabilities exposes banks to serious reputational, operational, compliance and other risks.

The guidelines are consistent with the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation issued by the Financial Action Task Force (FATF) in 2012 and supplement their goals and objectives.

The guidelines are available on the BIS website.

1.4 Amendments to Basel III's leverage ratio

On 12 January 2014, the Basel Committee issued the full text of Basel III's leverage ratio framework and disclosure requirements following endorsement on 12 January 2014 by its governing body, the Group of Central Bank Governors and Heads of Supervision.

Implementation of the leverage ratio requirements has begun with bank-level reporting to national supervisors of the leverage ratio and its components and will proceed with public disclosure starting 1 January 2015. The final calibration of the leverage ratio, and any further adjustments to its definition, will be completed by 2017, with a view to migrating to a Pillar 1 (minimum capital requirement) treatment on 1 January 2018.

The Committee will closely monitor accounting standards and practices to address any differences in national accounting frameworks that are material to the definition and calculation of the leverage ratio.

The Basel III leverage ratio framework and disclosure requirements are available on the BIS website.

1.5 IOSCO proposes assessment methodologies for identifying non-bank non-insurer global systemically important financial institutions

On 8 January 2014, the Financial Stability Board (FSB) and the International Organization of Securities Commissions (IOSCO) published for public consultation *Assessment Methodologies for Identifying Non-bank Non-insurer Global Systemically Important Financial Institutions (NBNI G-SIFIs).*

Systemically important financial institutions (SIFIs) are institutions whose distress or disorderly failure, because of their size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity. At the Seoul Summit in 2010, the G20 Leaders endorsed the FSB framework for reducing the systemic and moral hazard risks posed by SIFIs.

The implementation of the FSB SIFI framework requires, as a first step, the assessment of the systemic importance of financial institutions at a global level (or G-SIFIs). The framework recognises that SIFIs vary in their structures and activities and that systemic importance and impact upon distress or failure can vary significantly across sectors. It requires that the FSB and national authorities, in consultation with the standard-setting bodies and drawing on relevant indicators, determine which institutions will be designated as G-SIFIs. The assessment methodologies to identify G-SIFIs need to reflect the nature and degree of risks they pose to the global financial system. To date, assessment methodologies have been developed for global systemically important banks (G-SIBs) and insurers (G-SIIs).

The assessment methodologies for identifying NBNI G-SIFIs published on 8 January 2014 for public consultation complement the methodologies that currently cover banks and insurers. While the consultative document proposes specific methodologies for the identification of NBNI G-SIFIs, it neither designates any specific entities as systemically important nor proposes any policy measures that would apply to NBNI G-SIFIs. In the report *Progress and Next Steps Towards Ending "Too-Big-To-Fail"* published in September 2013, the FSB explained that policy measures will be developed once the methodologies are finalised.

The consultative document is available on the IOSCO website.

1.6 APRA annual superannuation statistics to 30 June 2013

On 8 January 2014, the Australian Prudential Regulation Authority (APRA) released its Annual Superannuation Bulletin for the financial year to 30 June 2013. Total superannuation assets increased during the year by $219.8 billion, or 15.7%, to $1.62 trillion. During this period, industry funds' assets increased by 21.5%. Small funds' assets, which include self-managed superannuation funds (SMSFs), single-member approved deposit funds and small APRA funds, increased by 15.5%, public sector funds' assets by 15.4%, retail funds' assets by 13.9% and corporate funds' assets by 9.1%.

Over the year, the industry-wide rate of return (ROR) for large funds (more than four members) was 13.7%. Over the ten years from 30 June 2004 to 30 June 2013, the average industry-wide ROR for large funds was 6.0% per annum. Over the year, contributions to all superannuation entities totalled $115.3 billion, with employers contributing $77.5 billion and members contributing $36.5 billion. Contributions to large funds totalled $87.6 billion, of which industry funds received 32.6% ($28.6 billion), public sector funds 32.3% ($28.3 billion), retail funds 31.5% ($27.6 billion) and corporate funds 3.6% ($3.1 billion).

The bulletin also includes a feature on registrable superannuation entity (RSE) licensees. The feature examines changes in the size of RSE licensee business operations, and the structure and composition of RSE licensee boards over the eight years from 2006. Over that period, the size and complexity of RSE licensee business operations increased, as did the average number of directors on RSE licensee boards and the proportion of those directors who were women. There were fewer directors who sat on more than one RSE licensee board in 2013 than in 2006.

The Annual Superannuation Bulletin is available on the APRA website.

1.7 APRA framework for domestic systemically important banks in Australia

On 23 December 2013, the Australian Prudential Regulation Authority (APRA) released an information paper on its framework for dealing with domestic systemically important banks (D-SIBs) in Australia.

In October 2012, the Basel Committee on Banking Supervision finalised its D-SIB framework, which involves a set of principles on the methodology to identify D-SIBs and on the higher loss absorbency (HLA) capital requirement for banks identified as D-SIBs. The Basel Committee's framework responds to the view of the G20 Leaders, including Australia, that no financial firm should be "too-big-to-fail" and that taxpayers should not bear the cost of resolution. The framework also emphasises that other policy tools, such as more intensive supervision, can play an important role in dealing with D-SIBs.

The information paper provides details on the methodology APRA has used to identify D-SIBs in Australia and how the HLA capital requirement will apply.

APRA's assessment methodology has regard to the Basel Committee's four key indicators of systemic importance: size, interconnectedness, substitutability and complexity. Based on its assessment of these indicators, APRA has determined that the following authorised deposit-taking institutions are D-SIBs:

- Australia and New Zealand Banking Corporation;
- Commonwealth Bank of Australia;
- National Australia Bank; and
- Westpac Banking Corporation.

The HLA capital requirement for D-SIBs is intended to reduce the probability of failure compared to non-systemic institutions, reflecting the greater impact a D-SIB failure is expected to have on the domestic financial system and economy. Based on a range of considerations, APRA has determined that a 1% HLA requirement will apply to the four D-SIBs. This must be met by Common Equity Tier 1 capital and will be implemented as an extension of the capital conservation buffer as defined in Prudential Standard APS 110 Capital Adequacy.

The D-SIB framework will come into effect from 1 January 2016.

The four D-SIBs in Australia currently hold significant management capital buffers above the minimum requirements set by APRA; they also have strong capital generation capacity through earnings retention. The D-SIBs already hold sufficient Common Equity Tier 1 capital to meet the capital conservation buffer in full from 1 January 2016 and are expected to have sufficient Common Equity Tier 1 to meet the 1% D-SIB extension to that buffer from that date. APRA therefore does not believe that phase-in arrangements for the HLA requirement, beyond the two-year lead time, are necessary.

At 1 January 2016, the management capital buffers of the D-SIBs may be lower than current levels if they are used to absorb some part of the HLA capital requirement. APRA considers it reasonable if D-SIBs choose to operate with relatively lower management capital buffers from that date given the nature and size of the extended capital conservation buffer.

APRA emphasises that the designation of a bank as a D-SIB does not make it immune from failure. Rather, the designation is intended to ensure that banks perceived to be "too-big-to-fail" are subject to more intense supervisory oversight and have greater capacity to absorb losses, to increase their resilience to failure.

The information paper is available on the APRA website.

1.8 SEC staff report on public company disclosure

On 20 December 2013, the US Securities and Exchange Commission (SEC) issued a staff report to Congress on its disclosure rules for US public companies, as part of agency's ongoing efforts to modernise and simplify disclosure requirements and reduce compliance costs for emerging growth companies.

The report, mandated by Congress in the 2012 *Jumpstart Our Business Startups Act* (the JOBS Act), offers an overview of the SEC's Regulation S-K that governs public company disclosure, as well as the staff's preliminary conclusions and recommendations.

The report is available on the SEC website.

1.9 Final paper on longevity risk transfer markets issued by the Joint Forum

On 20 December 2013, the Joint Forum released its final report Longevity risk transfer markets: market structure, growth drivers and impediments, and potential risks.

Ageing populations pose serious social policy and regulatory/supervisory challenges in many countries. Longevity risk—the risk of paying out on pensions and annuities for longer than anticipated—is significant when measured from a financial perspective. For example, certain estimates of the total global amount of annuity- and pension-related longevity risk exposure range from US$15 trillion to US$25 trillion. At the same time, pension funds are increasingly looking to transfer this risk. The

Joint Forum is therefore publishing this report on longevity risk transfer markets that makes a set of recommendations to policymakers and supervisors.

The report is available on the [BIS website](#).

1.10 IOSCO report on regulation of retail structured products

On 20 December 2013, the International Organization of Securities Commissions (IOSCO) published the final report *Regulation of Retail Structured Products*, which provides a toolkit outlining regulatory options that securities regulators may find useful to regulate retail structured products.

The Toolkit has been developed with the goal of enhancing investor protection by providing securities regulators with possible approaches to address certain concerns with retail structured products. The proposed tools are intended to allow for a wide range of application and adaptation in different jurisdictions, and regulators may choose to implement some, all or none of them in their jurisdiction.

Securities regulators may find the Toolkit useful because of the growing popularity of complex financial tools among retail investors. These products combine derivatives with other financial instruments. Retail investors might lose money through not understanding the products' complexity. Several events, including the 2008 default on products relating to the Lehman Brothers failure, exposed the problems retail investors can face with structured products. These events raised concern among IOSCO members about investors understanding of the products, design, disclosure, suitability, mis-selling and post-sale product controls.

The Toolkit has five sections with 15 regulatory tools that are organised along the value chain of the retail structured product market, from issuance to distribution to investment.

They cover:

- a potential regulatory approach to retail structured products;
- potential regulation of the product design and issuance;
- potential regulation of product disclosure and marketing;
- potential regulation of the product distribution; and
- potential regulation of post-sales practices (once investors have the products).

The report is available on the [IOSCO website](#).

1.11 APRA releases final Basel III liquidity reforms

On 20 December 2013, the Australian Prudential Regulation Authority (APRA) released its final position on implementation of the main elements of the Basel III liquidity reforms for authorised deposit-taking institutions (ADIs) in Australia.

This position is provided in a response-to-submissions paper, which sets out the main issues raised in submissions on APRA's discussion paper released in May 2013. Accompanying the response paper is Prudential Standard APS 210 Liquidity and Prudential Practice Guide APG 210 Liquidity, which came into force on 1 January 2014.

The Basel III liquidity reforms involve two new quantitative measures—a 30-day liquidity coverage ratio (LCR) to address an acute stress scenario and a Net Stable Funding Ratio (NSFR) to encourage longer-term funding resilience. These requirements will apply to the larger, more complex ADIs.

The LCR will become effective from 1 January 2015. The Basel Committee on Banking Supervision (the Basel Committee) has yet to finalise the rules text for the NSFR; once it has done so, APRA will consult on the implementation of this measure in Australia. The NSFR will become effective from 1 January 2018.

APRA has previously noted that the Basel III quantitative measures will not apply to smaller ADIs that are currently subject to the simple liquidity ratio requirement, the minimum liquidity holdings (MLH) regime.

Enhanced qualitative requirements for liquidity risk management, reflecting the Basel Committee's *Principles for Sound Liquidity Risk Management and Supervision (2008)*, will apply to all ADIs. These include requirements for enhanced Board oversight of an ADI's liquidity risk management framework, articulation of the Board's tolerance for liquidity risk, quantification and allocation of liquidity costs and benefits, and other matters.

Further information is available on the APRA website.

1.12 CFTC approves comparability determinations for six jurisdictions with substituted compliance purposes

On 20 December 2013, the US Commodity Futures Trading Commission (CFTC) approved a series of broad comparability determinations that would permit substituted compliance with non-US regulatory regimes as compared to certain swaps provisions of Title VII of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the Dodd-Frank Act) and the CFTC's regulations.

Substituted compliance describes the circumstances where the CFTC's general policy would be to permit non-US swap dealers or non-US market swap participants whose swaps activities might bring them within the scope of certain CFTC regulations to use compliance with regulations in their home jurisdiction as a substitute for compliance with the relevant CFTC regulations. This approach builds on the CFTC's long-standing policy of recognising comparable regulatory regimes based on international coordination and comity principles with respect to cross-border activities involving futures and options.

This approval by the CFTC reflects a collaborative effort with authorities and market participants from each of the six jurisdictions that has registered swap dealers. Working with authorities in Australia, Canada, the European Union (EU), Hong Kong, Japan, and Switzerland, the CFTC was able to issue comparability determinations for a broad range of entity-level requirements. In two jurisdictions, the EU and Japan, the CFTC also approved substituted compliance for a number of key transaction-level requirements.

Further information is available on the CFTC website.

1.13 Revisions to the Basel securitisation framework

On 19 December 2013, the Basel Committee on Banking Supervision issued a second consultative document on revisions to the Basel securitisation framework. The paper comprises a detailed set of proposals, including draft standards text, for a comprehensive revision of the treatment of securitisation within the risk-based capital framework. This initiative forms part of the Committee's broader agenda to reform regulatory standards for banks in response to lessons learned from the global financial crisis.

Relative to the first consultation, the major changes in this consultative document apply to the hierarchy of approaches, and the calibration of capital requirements.

For the hierarchy, the Committee has proposed a framework akin to that used for credit risk:

- where banks have the capacity and supervisory approval to do so, they may use an internal ratings-based approach to determine the capital requirement based on the risk of the underlying pool of exposures, including expected losses. The internal ratings-based approach is risk-sensitive, yet relatively easy to use and supervise;
- if this internal ratings-based approach cannot be used for a particular securitisation exposure, an external ratings-based approach may be used (assuming that the use of ratings is permitted within the relevant jurisdiction). Unlike the existing securitisation approach, however, capital requirements need not be based on external ratings if they are available; furthermore, some jurisdictions may not wish to use this approach at all; and
- finally, if neither of these approaches can be used, a standardised approach would be applied. This is based on the underlying capital requirement that would apply under the standardised approach for credit risk, and other risk drivers.

In reviewing the calibration of the approaches, the Committee has revised some of the modelling assumptions behind the original calibration proposed in the first consultative document. These changes result in greater consistency with the underlying credit risk framework. They would lead to meaningful reductions in capital requirements vis-à-vis the initial proposals, yet would remain more stringent than under the existing framework. The Committee also proposes to set a 15% risk-weight floor for all approaches, instead of the 20% floor originally proposed.

The consultative document is available on the BIS website.

1.14 FRC encourages better comply or explain disclosure and improved investor transparency

On 19 December 2013, the UK Financial Reporting Council (FRC) released an annual review of the Corporate Governance and Stewardship Codes, which sets out findings on the key updates introduced by the FRC in October 2012. One year on, early indications are that companies are responding in a positive manner to the changes. While most companies are only required to report formally in 2014 on how they have applied the 2012 version of the Corporate Governance Code, many are already disclosing their boardroom diversity policies and there has been an increase in the level of audit tendering activity. There has been an uptake in signatories to the Stewardship Code with signs of better engagement with large companies by investment managers.

The report shows that early adoption of new reporting recommendations on the activities of the audit committee and confirmation that reports and accounts are fair, balanced and understandable has been less widespread. Anecdotal evidence suggests that many companies are, however, reviewing their processes for making these disclosures in preparation for doing so in the next report.

(a) Corporate Governance Code, other key findings:

- there are high levels of compliance with the new recommendations added to the UK Corporate Governance Code in 2010, including the almost universal adoption of annual director elections among FTSE 350 companies;
- there have been many good examples of reporting by mid and small-cap companies, but in general their reporting is less informative than that produced by larger companies; and
- companies should focus on board succession planning which is often highlighted as requiring attention during external effectiveness reviews. The FRC will undertake a project in 2014 to identify good practice to assist companies in meeting the Code principles on succession planning.

(b) Stewardship Code, other key findings:

- the Stewardship Code now has nearly 300 signatories, of whom approximately two-thirds are asset managers. Among them, current signatories own or manage a significant proportion of UK listed equities and have the potential to become the critical mass of investors needed to oversee and engage with companies with the aim of achieving a sustainable return to savers;
- there are signs of growing demand from owners for their investment managers to apply a stewardship approach—more mandates and Requests for Proposals now refer to stewardship and owners are reportedly more demanding with the quality of information they receive from their managers—but there remain many real and perceived barriers to effective stewardship; and
- the quality of reporting by Stewardship Code signatories remains variable. Nearly half of the signatories to the Code have not yet updated their public statements over a year after a revised edition of the Code took effect in October 2012. The FRC is considering mechanisms for ensuring that statements are complete and up to date and possible sanctions if they are not.

There are some encouraging signs that more engagement on a wider range of issues is taking place between large companies and their major shareholders. However, this is not the case across the listed sector as a whole and there are real concerns of an emerging "engagement deficit" affecting mid-market companies. The FRC believes that a lack of direct contact with shareholders feeds the perception on the part of many companies that proxy advisors wield undue influence over voting outcomes. It is important for companies to have a better understanding of how proxy advisors carry out their research and what they can expect in terms of communication. The FRC supports the direction of recent industry initiatives and is calling for greater oversight.

The annual review of the codes is available on the FRC website.

1.15 SEC proposes rules to increase access to capital for smaller companies

On 18 December 2013, the US Securities and Exchange Commission (SEC) voted to propose rules intended to increase access to capital for smaller companies.

The SEC's proposal would build upon Regulation A, which is an existing exemption from registration for small offerings of securities up to US$5 million within a 12-month period. The updated exemption would enable companies to offer and sell up to US$50 million of securities within a 12-month period.

The rules are mandated by Title IV of the *Jumpstart Our Business Startup Act* (the JOBS Act).

The proposed rules are available on the SEC website.

1.16 SEC announces enforcement results for FY 2013

On 17 December 2013, the US Securities and Exchange Commission (SEC) announced that the agency's enforcement actions in fiscal year 2013 resulted in a record US$3.4 billion in monetary sanctions ordered against wrongdoers.

The SEC filed 686 enforcement actions in the fiscal year that ended in September 2013. The US$3.4 billion in disgorgement and penalties resulting from those actions is 10% higher than FY 2012 and 22% higher than FY 2011, when the SEC filed the most actions in agency history.

(a) Market structure and exchanges

The SEC brought several significant actions against stock exchanges and other market participants on issues relating to market structure and fair market access. The SEC obtained its largest-ever penalty against an exchange when NASDAQ agreed to pay a US$10 million penalty for its poor systems and decision-making during the Facebook IPO. FY 2013 also included the SEC's first penalty against an exchange for breaches relating to regulatory oversight when the agency charged the Chicago Board Options Exchange (CBOE) and an affiliate for various systemic breakdowns.

(b) Gatekeepers

The SEC is focused on holding accountable accountants, attorneys and others who have special duties to ensure that the interests of investors are safeguarded. Among actions against auditors, the SEC charged the Chinese affiliates of major accounting firms for refusing to produce documents related to China-based companies being investigated. Further, the SEC charged trustees and directors for failing to uphold their responsibilities under the securities laws.

(c) Insider trading

Continuing its pursuit of those who unlawfully trade on material, nonpublic information, the SEC filed multiple actions alleging wrongdoing at SAC Capital Advisors and its affiliates, including an action against Steven Cohen for failing to supervise two senior employees and prevent them from insider trading under his watch.

(d) Municipal securities

The SEC increased its attention to securities-related breaches by municipalities and other participants in the market for securities of cities and other governmental issuers.

(e) Financial crisis enforcement actions

With several more enforcement cases in FY 2013 against individuals and entities whose actions contributed to the financial crisis, the SEC has now filed enforcement actions against 169 individuals and entities arising from the financial crisis, resulting in more than US$3 billion in disgorgement, penalties and other monetary relief for the benefit of harmed investors. The individuals charged include 70 CEOs, CFOs or other senior executives.

(f) New admissions policy

The SEC changed its longstanding settlement policy and now requires admissions of misconduct in a discrete category of cases where heightened accountability and acceptance of responsibility by a defendant are appropriate and in the public interest. The first settlements under the new policy came in actions against Philip A Falcone and his firm Harbinger Capital Partners, and JPMorgan Chase & Co.

(g) Going to trial

The SEC continued to deploy litigation resources to maximise the deterrent impact of enforcement actions. One successful example in FY 2013 is the favourable verdict obtained at trial against former Goldman Sachs vice president Fabrice Tourre, who was found liable for his role in marketing a CDO. The SEC also obtained a favourable decision after a lengthy trial against optionsXpress and two individuals for engaging in sham transactions to give the illusion of compliance with Reg SHO.

(h) Whistleblower tips

The SEC's Office of the Whistleblower received 3,238 tips in the past year and paid more than US$14 million to whistleblowers whose information substantially advanced enforcement actions.

The Year-by-Year Monetary Sanctions in SEC Enforcement Actions and Year-by-Year SEC Enforcement Statistics are available on the SEC website.

1.17 IOSCO report on regulatory issues raised by changes in market structure

On 13 December 2013, the International Organization of Securities Commissions published its final report *Regulatory Issues Raised by Changes in Market Structure*, which makes four recommendations that seek to promote market liquidity and efficiency, price transparency and investors' execution quality in a fragmented environment.

The report identifies possible outstanding issues and risks posed by existing or developing market structures and describes how these risks should be addressed. Finally, it recommends that regulators monitor the impact of fragmentation on market quality.

The report responds to a 2010 request from the G20 that IOSCO "develop recommendations to promote markets´ integrity and efficiency to mitigate the risks posed to the financial system by the latest technological developments."

The report looks at the trading of equities and exchange-traded funds on the most common trading spaces identified in a survey of different jurisdictions, including exchange trading market systems, non-exchange trading market systems, and trading over the counter (trading that does not occur on an exchange or non-exchange market system). It does not include the trading of derivatives products.

The report is available on the IOSCO website.

1.18 Revised policy framework for banks' equity investments in funds issued by the Basel Committee

On 13 December 2013, the Basel Committee on Banking Supervision published a final standard that revises the prudential treatment of banks' investments in the equity of funds within the Basel risk-based capital framework. The revised policy framework is scheduled to take effect from 1 January 2017 and will apply to banks' equity investments in all funds (e.g. hedge funds, managed funds and investment funds) that are not held for trading purposes.

The revised framework includes three approaches for setting capital requirements for banks' equity investments in funds. This hierarchy of approaches provides varying degrees of risk sensitivity and has been adopted to incentivise due diligence by banks and transparent reporting by the funds in which they invest.

The revised framework will help address risks associated with banks' interactions with shadow banking entities by ensuring that exposures to funds engaging in shadow banking activity are supported by adequate capital. The work of the Basel Committee therefore contributes to the broader effort by the Financial Stability Board to strengthen the oversight and regulation of shadow banking.

The standard is available on the BIS website.

1.19 CCLSR Bell Group seminar video now available online

The Centre for Corporate Law and Securities Regulation at Melbourne Law School is pleased to offer you the opportunity to view a recent seminar online: "The Bell Group settlement: where does it leave us?"

Seminar details

Dr Katy Barnett, Dr Pamela Hanrahan and Emeritus Professor Michael Bryan discuss various aspects of the *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* decision of the Court of Appeal of the Supreme Court of Western Australia, following the settlement in late 2013 of the 20-year-long litigation just prior to the hearing of an appeal to the High Court of Australia. Many in Australia's commercial law community had been looking forward to the High Court's consideration of a number of key issues arising from the Court of Appeal's decision, including the content and nature of directors' duties, the correct foundations for liability under the knowing receipt and knowing assistance limbs of *Barnes v Addy*, and the proper bases for calculating equitable compensation. These issues were considered at a seminar recently co-hosted by the Centre for Corporate Law and Securities Regulation.

This seminar by three of Melbourne Law School's equity and corporations scholars provides an overview of the state of the law post-Bell and the implications of the decision for commercial practice.

Cost

$55.00 (inclusive of GST)

Please click here to pay and a video link and password will be sent to you via email. Further information is available on the Melbourne Law School webpage.

2. Recent ASIC Developments

2.1 Presentation of financial statements by stapled entities

On 8 January 2014, ASIC announced it would extend Class Order [CO 13/1050] which allows issuers of stapled securities (stapled entities) to continue to present consolidated or combined financial statements.

The amended class order extends the relief given to stapled entities for future financial years pending further consideration of reporting requirements by the IFRS Interpretations Committee.

Stapled entities are listed entities whose securities are traded together such that each investor has the same proportionate interest in each entity.

Consolidated or combined financial statements provide useful and meaningful information on investors' interest in the overall stapled arrangement and may be necessary to give a true and fair view of the individual entity financial reports. Transactions between the entities are eliminated in preparing consolidated or combined financial statements.

Under a new accounting standard on consolidation accounting, it is not clear that stapled entities would be permitted to prepare consolidated financial statements in the absence of the class order. The amended class order provides certainty that entities can continue their previous consolidated or combined reporting.

A stapled group which has not previously prepared a financial report under Chapter 2M can present consolidated financial statements under the class order.

Class Order [CO 13/1050] has also been amended to require disclosure:

- that the class order has been relied upon and whether consolidated financial statements or combined financial statements have been presented; and
- where consolidated financial statements are presented, of the amounts of the non-controlling interests that are attributable to the stapled security holders.

ASIC has extended the application of class order [CO 13/1050] on the understanding that the presentation of consolidated financial statements by stapled entities may be considered by the IFRS Interpretations Committee in 2014. The class order is intended to provide relief until the matter is resolved by that committee. ASIC may review its position in response to any future developments, particularly if the IFRS Interpretations Committee decides not to address the matter.

Having regard to the possible consideration of the accounting treatment by the IFRS Interpretations Committee, extension of the previous relief was supported by the majority of those responding to ASIC's *Consultation Paper 217 - Presentation of financial statements by stapled entities* (CP 217) which was released in October 2013.

Class Order [CO 13/1050] also allows stapled entities in a stapled group to present their respective financial statements together in a single financial report.

The class order is available on the Australian Government ComLaw website.

2.2 Australian banks achieve positive "substituted compliance" outcomes from the CFTC

On 23 December 2013, ASIC welcomed the US Commodity Futures Trading Commission's (CFTC) 20 December 2013 announcement on substituted compliance.

The CFTC decided that major Australian banks may substitute compliance with CFTC's rules by complying with the Australian regulatory regimes administered by ASIC and the Australian Prudential Regulation Authority (APRA). The decision followed an application by the Australian Bankers' Association on behalf of five Australian banks that are registered as swap dealers with the CFTC (ANZ, Commonwealth Bank, Macquarie Bank, National Australia Bank and Westpac).

The CFTC has also granted time-limited no-action relief until 15 May 2014 to the Australian trading platform Yieldbroker Pty Ltd, which holds an Australian Market

Licence (AML). ASIC expects to continue discussions with the CFTC and Yieldbroker on an arrangement under which Yieldbroker would maintain its AML while also registering with the CFTC as a Swap Execution Facility (SEF). In the meantime, Yieldbroker will be able to continue to provide services to US persons on its platform, ensuring Australian businesses are able to transact with a range of offshore counterparties to meet their hedging and funding needs.

Under a substituted compliance determination, overseas entities registered with the CFTC as swap dealers and major participants may comply with certain requirements from their own jurisdictions instead of complying with certain CFTC rules. On 20 December 2013 the CFTC made substituted compliance determinations for six jurisdictions: Australia, Canada, the EU, Hong Kong, Japan and Switzerland.

Further information is available on the ASIC website.

2.3 ASIC provides relief from new super disclosure requirements

On 16 December 2013, ASIC issued a class order and took a no-action position to assist the industry with the introduction of recent superannuation reforms. This ensures trustees have adequate time to comply with the reform timetable.

ASIC has:

- changed the start date for compliance with new fees and costs disclosure arrangements by class order from 31 December 2013 to 1 July 2014;
- provided conditional interim relief by class order so that RSE licensees do not have to provide a hard copy of the product dashboard with the periodic statement; and
- provided a no-action position for RSE licensees so that information about accrued default amounts does not need to be included in an exit statement.

In particular, the interim relief in relation to product dashboards and periodic statements will allow more time to consider how product dashboards should be included with periodic statements in the longer term.

The class order is available on the Australian Government ComLaw website.

2.4 Findings from 30 June 2013 financial reports

On 16 December 2013, ASIC announced the results from a review of 30 June 2013 financial reports that covered 280 listed and other public interest entities.

The June 2013 annual reports are the first since ASIC released guidance on the operating and financial review (OFR) in March 2013.

Since then there have been significant improvements in the quality of disclosures in the OFR, however some entities need to improve the description of the entity's business and the underlying drivers of reported results.

To date, ASIC has made inquiries of 70 entities on 100 matters. Of these:

- eight have made material restatements of reported net assets and profits;
- three have agreed to provide additional material disclosures; and
- twelve have been concluded without changes to their financial reporting.

Inquiries of other entities are being finalised in areas such as impairment, revenue recognition, consolidation of other entities, amortisation of intangibles, segment reporting and OFR disclosures. Inquiries of individual entities will not necessarily lead to material restatements.

Further information is available on the ASIC website.

2.5 New online tool helps Australians make the most of "interest-free" deals

On 13 December 2013, ASIC launched a new interest-free deal calculator to help Australians make the most of 'interest-free' credit.

95,000 Australians took up an interest-free deal in 2012 and of these, 52% had an interest-free deal worth more than $2,500.

The calculator is available on ASIC's MoneySmart website.

3. Recent ASX Developments

3.1 Response to consultation feedback on proposed changes to allocating International Securities Identification Numbers

On 2 January 2014, ASX issued a response to feedback on the consultation paper *International Securities Identification Numbers: Removing the ASX Code*, released on 16 September 2013 and that proposed changes to the methodology for allocating ISINs issued by ASX over listed equity and other products through its role as a National Numbering Agency.

ASX has considered the submissions received and determined to proceed with the proposal to change the current Basic Number regime by replacing the associated ASX Code or market ticker with a unique number.

All respondents were of view that the methodology proposed in the consultation paper should not have a material impact to internal operations, systems and development effort required to meet the change. Consultation feedback also suggested that an appropriate period, such as six months' prior notification, should be provided before the change is affected. Accordingly, ASX has agreed that a six-month notification period is appropriate and reasonable.

ASX is working towards confirming than the effective date of the change in allocating ISINs be in early July 2014.

The response to feedback and the original consultation paper are both available on the ASX website.

3.2 Straight-through processing of corporate action information

On 18 December 2013, ASX announced its intention to introduce straight-through processing of listed entity corporate action information. This will involve a new mandatory process for listed entities to advise the market of dividends and other key corporate actions, by filling in and submitting new Appendices via online forms instead of uploading a PDF document.

The new system is proposed to be implemented from 14 April 2014. ASX will offer listed entities a facility to test the new system in January - February 2014. A series of online training seminars will be held in March 2014. A downloadable on-line podcast tutorial will also be posted on the ASX website in January 2014.

For further information, see item 7 in ASX Listed Entities Update No 09/13, which is available on the ASX website.

3.3 Governance-related ASX Listing Rule changes deferred

On 17 December 2013, ASX announced that it is considering public submissions received on the proposed governance-related changes to its Listing Rules and consequently will defer the originally planned 1 January 2014 start date for some of those rules.

The proposed changes being deferred include the introduction of new Listing Rule 3.19B, requiring the disclosure of on-market purchases of securities on behalf of employees or directors or their related parties under an employee incentive scheme. They also include amendments to a number of Listing Rules that currently apply to "associates", extending their reach to "related parties".

ASX intends to release modified Listing Rules changes addressing these issues in the first quarter of 2014 for public consultation. If adopted, the modified rule changes will not come into effect any earlier than 1 July 2014. The deferment of these rules will align with the start date for a larger package of rule and guidance note changes intended to complement the reforms proposed in a new (third) edition of the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations.

Further information is available on the ASX website.

3.4 Response to consultation feedback on ASX 24 Exchange Traded Derivatives and OTC Interest Rate Derivatives Client Clearing

On 12 December 2013, ASX issued a response to feedback on the two consultation papers issued in August 2013 and October 2013 regarding draft Operating Rules for a new client clearing service for ASX 24 Exchange Traded Derivatives and OTC Interest Rate Derivatives.

ASX received a total of 18 formal submissions from Clearing Participants, financial institutions, fund managers and professional and industry associations in response to the two consultation papers. ASX is taking a number of steps to address comments made on the proposals outlined in the first consultation paper. The proposals outlined in the second consultation paper received broad support and ASX does not intend to make any significant changes to those proposals.

The Response to Consultation document is available on the ASX website. More details regarding the OTC service, along with copies of the non-confidential submissions in response to the consultation papers, can be found on the OTC Clearing page on the ASX website.

3.5 Reports

On 6 January 2014, ASX released:

- the ASX Group Monthly Activity Report;
- the ASX 24 Monthly Volume and Open Interest Report; and
- the ASX Compliance Monthly Activity Report

for December 2013.

4. Recent Takeovers Panel Developments

4.1 Tranzact Financial Services Ltd - Panel declines to conduct proceedings

On 28 January 2014, the Panel announced that it had declined to conduct proceedings on an application dated 17 January 2014 from London City Equities Ltd in relation to the affairs of Tranzact Financial Services Ltd.

Tranzact is the subject of an off-market ($0.12 per share) cash takeover bid from Gro-Aust Holdings Ltd.

The Panel declined to conduct proceedings, concluding that there was no reasonable prospect that it would make a declaration of unacceptable circumstances because, among other things:

- the issues raised in the application regarding the expert report were predominately in relation to immaterial matters and matters of judgment in respect of which experts might reasonably disagree;
- the applicant's withdrawal from the market at $0.10 on or before 16 October 2013 did not in the Panel's view result in misleading disclosure of the bid premium that would require remedial action;
- it was not apparent that Tranzact shareholders were rushed into accepting the offer; and

- in the Panel's view, it was not apparent that ASIC's policy on joint bids would apply in these circumstances.

The Panel's media release is available on the Takeovers Panel website.

4.2 Tigers Realm Coal Ltd - Panel accepts undertakings

On 23 January 2014, the Panel announced that it had declined to make a declaration of unacceptable circumstances in response to an application dated 16 December 2013 from Bruce Gray in relation to the affairs of Tigers Realm (see TP13/70). The Panel did so following the execution of revised agreements between Tigers Realm Coal Ltd, Tigers Realm Minerals Pty Ltd (TRM), BV Mining Holding Ltd and Russian Direct Investment Fund and acceptance of undertakings from Tigers Realm and various of its shareholders.

The application concerned the terms of proposed placements by Tigers Realm to BV Mining and RDIF and whether there was an association between each of BV Mining and RDIF and TRM, a 22.86% shareholder in Tigers Realm, and certain other shareholders.

Tigers Realm, BV Mining and RDIF have amended the terms of the proposed placements so that, among other things:

- the entire placement to BV Mining is now subject to shareholder approval;
- the execution of escrow agreements by TRM and other shareholders is no longer a condition precedent to the BV Mining and RDIF placements; and
- the break fee payable to BV Mining has been removed.

The Panel considered that each of BV Mining and RDIF are associated with TRM and Antony Manini, Craig Parry, Owen Hegarty and David Forsyth, including because of the terms of the share subscription agreements between Tigers Realm, TRM and each of BV Mining and RDIF. Accordingly, those shareholders are not entitled to vote on the resolutions to approve the issue of shares to BV Mining and RDIF. Further, the other shareholders who stated their intentions to vote in favour of the relevant resolutions have modified their voting intentions statements such that they are subject to there being no superior proposal and the shareholders will consider any rival proposal in good faith and on its merits. The relevant shareholders have provided undertakings to the Panel to this effect.

The Panel considers that the revisions to the agreements, the revisions to the voting intentions statements and the undertakings sufficiently address the circumstances and that it is not against the public interest to accept the undertakings and decline to make a declaration of unacceptable circumstances. In doing so, the Panel notes that Tigers Realm and Dr Gray have settled claims in conjunction with the restructured placements. The terms of the settlement have not been before the Panel and it makes no comment on the settlement.

The Panel's media release is available on the Takeovers Panel website.

4.3 PaperlinX SPS Trust - Panel declines to conduct proceedings

On 17 January 2014, the Panel announced that it had declined to conduct proceedings on an application dated 13 January 2014 from Coastal Capital International Ltd in relation to the affairs of PaperlinX SPS Trust (see TP14/05).

PaperlinX SPS Trust is the subject of a takeover bid by PaperlinX Ltd. SPS Trust has on issue hybrid securities known as Step-up Preference Securities (SPSs). Coastal Capital sought a declaration and orders requiring further disclosure, preventing PaperlinX exercising any rights in respect of SPSs it acquires under its bid and requiring PaperlinX to exchange the SPSs for preference shares in PaperlinX.

The Panel declined to conduct proceedings, concluding that there was no reasonable prospect that it would make a declaration of unacceptable circumstances because, among other things:

- the circumstances identified by Coastal Capital did not appear to be coercive to SPS holders;
- it is not clear why the documents that Coastal Capital seeks to be disclosed are required now, given the length of time the SPS Trust has been listed; and
- there does not appear to be anything expressly prohibiting PaperlinX making the bid, or warranting that the Panel interfere with the bid. SPS holders are free to accept or reject the bid as they wish.

The reasons for the decision are available on the Takeovers Panel website.

4.4 Draft revised Guidance Note 18 on takeover documents

On 10 January 2014, the Takeovers Panel published a consultation paper regarding a revised version of Guidance Note 18 Takeover Documents.

The primary change to Guidance Note 18 relates to the accessibility of takeover documents. The Guidance Note encourages use of a summary section in takeover documents, primarily for retail shareholders, that gives an overview of the document.

The consultation paper is available on the Takeovers Panel website.

4.5 Draft guidance note on dividends

On 10 January 2014, the Takeovers Panel released a consultation paper seeking public comment in relation to a new draft Guidance Note on Dividends.

The draft Guidance Note clarifies that the value of franking credits attached to a franked dividend paid by the target during a bid cannot be included in the "headline" offer price and that a bidder must clearly state in its bidder's statement how any deduction for the value of franking credits would be done.

The consultation paper is available on the Takeovers Panel website.

4.6 Consultation paper: GN12 frustrating action

On 6 January 2014, the Takeovers Panel released a consultation paper seeking public comment in relation to its Guidance Note on Frustrating Action. The revised Guidance Note has been released following market participants' expressing views that the current frustrating action policy unduly restricts targets' activities.

The consultation paper is available on the Takeovers Panel website.

4.7 Keybridge Capital Ltd - Panel declines to conduct proceedings

On 20 December 2013, the Panel declined to conduct proceedings on an application dated 12 December 2013 from Keybridge Capital Ltd in relation to its affairs. Keybridge is the subject of an off-market takeover offer by Oceania Capital Partners Ltd (see TP13/68).

The Panel considered that the issues raised in the application concerning tax losses and a selective capital reduction proposal could be dealt with in Keybridge's target statement. The Panel did not consider that there was evidence of material issues concerning disclosure of Oceania's intentions for Keybridge. The Panel also thought that Oceania's bid was not coercive.

The Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.

The reasons for the decision are available on the Takeovers Panel website.

4.8 Warrnambool Cheese and Butter Factory Company Holdings Ltd - Panel decision

On 17 December 2013, the Panel announced its decision in response to an application dated 26 November 2013 from Murray Goulburn Co-operative Co Ltd in relation to the affairs of Warrnambool Cheese and Butter Factory Company Holdings Ltd (Warrnambool) (see TP13/63). The Panel was strongly of the view that unacceptable circumstances had occurred in relation to the announcements of 15 November 2013 and 25 November 2013 by both Saputo Dairy Australia Pty Ltd (Saputo) and Warrnambool.

On 15 November 2013, Warrnambool announced that it intended to declare special dividends (with associated franking credits) with a record date of 26 November 2013, subject to Saputo's bid reaching certain thresholds. Saputo announced on the same day that, subject to certain thresholds being reached, accepting shareholders would be able to receive part of their consideration in the form of franked dividends and that some shareholders would benefit from the associated franking credits. The Panel considers that Saputo and Warrnambool were bound by these statements under the truth in takeovers policy (see ASIC RG 25).

The structure as announced, however, was essentially unworkable and on 25 November 2013 Warrnambool announced that it revoked its previous intention to declare the dividends. Saputo announced on the same day its intention to revert to takeover consideration which did not include franked dividends and associated franking credits. The Panel considers these announcements represented a departure from the previous statements to which the parties were bound.

Accordingly, the Panel was minded to make a declaration of unacceptable circumstances.

Notwithstanding this, the Panel has accepted undertakings from Saputo and Warrnambool and declined to make a declaration of unacceptable circumstances.

The Panel considers that the undertakings address the circumstances by offering all shareholders at least as much value (including full allowance for franking credits) as they would have been received under the special dividends proposal announced on 15 November 2013. In agreeing to accept the undertakings, the Panel was concerned to ensure a satisfactory practical outcome. Reinstatement of the 15 November 2013 proposal would not have been practicable as the proposal was essentially unworkable. Moreover, it is Panel policy that the public interest be generally served by accepting undertakings that address the unacceptable circumstances to the Panel's satisfaction (see Guidance Note 4: Remedies General).

The Panel is of the opinion that Warrnambool's intention to declare special dividends and set a record date ahead of any certainty of the dividends becoming payable caused confusion and disruption to the market for Warrnambool shares. This was even more problematic in the context of the competing bids for Warrnambool. The announcements put into place arrangements that were complex, created uncertainty and were most undesirable. The Panel would not want to see similar arrangements in future.

The Panel considers that it is not against the public interest to decline to make a declaration of unacceptable circumstances.

The undertakings include:

- Saputo extending its offer period and increasing the consideration offered;
- Saputo offering shareholders withdrawal rights; and
- Warrnambool making an announcement outlining the status of the three bids currently being made in relation to its shares.

The reasons for the decision are available on the Takeovers Panel website.

5. Recent Research Papers

5.1 The G20's performance in global financial regulation

This article assesses the performance of the G20 since the Global Financial Crisis by analysing the regulatory measures it has called for and their current stage of implementation. It then proceeds to consider the changes in the global financial system over the past 40 years and seeks to assess how adequate the G20's measures have been as a response to these fundamental systemic changes. The article concludes that the

G20 has met the first challenge far better than it has the second and goes on to propose four measures that would be appropriately responsive to the massive systemic changes of the past 40 years.

The paper is available on the SSRN website.

5.2 The legal determinants of shareholder activism: A theoretical and empirical comparative analysis

This study is an inquiry into the legal determinants of the brand of shareholder activism associated with activist hedge funds and other shareholder activist funds. The article pioneers a new approach to understanding the underpinnings and the role of hedge fund activism using a sequential model of four stages. An activist hedge fund first selects a target company that presents high-value opportunities for engagement (entry), accumulates a nontrivial stake (trading), determines and employs its activist strategy (disciplining) and finally exits (exit). The article identifies legal parameters for each activist stage and explains why the incidence, nature and evolution of activist campaigns differ among countries. The analysis is based on 432 activist hedge fund campaigns during the period of 2000 - 2010 across 25 countries.

The findings suggest that the extent to which legal parameters matter depends on the stage which hedge fund activism has reached. The author finds that mandatory disclosure and rights bestowed on shareholders by corporate law are likely to dictate how commonplace hedge fund activism will be in a given country (entry stage). Moreover, the examination of the activist ownership stakes reveals that ownership disclosure rules have important ramifications for the trading stage of an activist campaign. At the disciplining stage, however, shareholder protection seems to have little explanatory power. The analytical framework and the new evidence presented in this study can be a foundation for future empirical and policy analysis.

The paper is available on the SSRN website.

5.3 The financial crisis of 2007-09: Why did it happen and what did we learn?

This paper reviews the extensive literature that has emerged on the subprime crisis of 2007-09. The focus is on extracting a coherent story about what happened, when and why, and what was done about it. That is, this review examines the pre-crisis conditions that represent plausible causal factors that contributed to the crisis, the triggers that lit the fire for the crisis to occur, the actual events of the crisis, the real effects of the crisis, and then the policy responses to deal with the crisis. It appears that these policy responses were influenced both by the initial belief that the crisis was primarily a market-wide liquidity crunch and the subsequent learning that insolvency and counterparty risk concerns were major drivers.

The paper concludes that we have learned much from the crisis but it is not clear that we have consensus on the kinds of policy initiatives that will be needed to deal with future crises, particularly since some of the initiatives used in the recent crisis are viewed as potentially engendering moral hazard going forward and there does not even seem to be agreement that these were the best initiatives to end the crisis. Moreover, attention needs to be focused not only on what should be done after a crisis arrives, but also on what should be done *ex ante* to diminish its likelihood. While a few simple steps are worthy of careful consideration, the complexity of post-crisis regulatory developments, combined with the persistence of a low-interest-rate environment, may potentially increase the vulnerability of the financial system.

The paper is available on the SSRN website.

5.4 Financial conglomerates and Chinese walls

The organisational structure of financial conglomerates gives rise to fundamental regulatory challenges. Legally, the structure subjects firms to multiple, incompatible client duties. Practically, the structure provides firms with a huge reservoir of non-public information that they may use to further their self-interests, potentially harming clients and third parties. The primary regulatory response to these challenges and a core feature of the financial regulatory architecture is the Chinese wall or information barrier. Rather than examine measures to strengthen Chinese walls, to date legal scholars have focused on the circumstances in which to deny them legal effect, while economists have focused on demonstrating Chinese walls' practical ineffectiveness in a range of important contexts.

This paper discusses the phenomenon of failing Chinese walls, explains why it occurs, and proposes a regulatory solution. The paper argues that limits on market discipline and evidential difficulties in detecting and proving the use of non-public information account for the failures of Chinese walls. It shows how the Volcker Rule, a core plank of the US *Dodd-Frank Act*, will likely reduce harms flowing from failing Chinese walls despite the rule's intended focus on financial stability. To address the ongoing regulatory challenges, the article proposes the use of statistical inference to both detect and prove trading by financial conglomerates using non-public information and thus the failure of Chinese walls. Employed in so-called forensic finance to detect wrongdoing, the analyses can be used to rule out benign rationales—including superior trading skill and mere coincidence—for financial conglomerates' abnormal trading returns.

The article designs a regulatory strategy based on the use of statistical analyses. The article, while recognising limits with the strategy, argues that it nevertheless holds promise in addressing the regulatory challenges of financial conglomeration.

The paper is available on the SSRN website.

5.5 Philanthropy, corporate culture and misconduct

This paper examines whether sustained philanthropic activities of firms are likely to engender a pro-social ethic and culture that is associated with less misconduct. Philanthropic activities are a manifestation of a culture in which firm reputation is important and is likely to discourage wrongdoing that tarnishes reputation. Further, corporate charitable programs might help attract and retain employees and executives with pro-social ethics who are less likely to engage in misconduct. Consistent with this notion, the paper finds that the decision to engage in philanthropic activities and the amount of giving are negatively associated with subsequent corporate misconduct. The results persist after the *Sarbanes-Oxley Act* and are robust to differing approaches to defining misconduct. As firm culture is a broader measure than the morals of the senior executives, the paper also examines its effect on the behaviour of employees and the board.

The findings show that the culture arising from philanthropic activities is associated with greater employee whistleblowing and greater likelihood of forced CEO turnover after misconduct. These results highlight the many channels through which corporate culture affects misconduct.

The paper is available on the SSRN website.

5.6 The value of corporate culture

The authors study which dimensions of corporate culture are related to a firm's performance and why. They find that proclaimed values appear irrelevant. Yet, when employees perceive top managers as trustworthy and ethical, a firm's performance is stronger. The authors then study how different governance structures impact the ability to sustain integrity as a corporate value. They find that publicly traded firms are less able to sustain it. Traditional measures of corporate governance do not seem to have much of an impact.

The paper is available on the SSRN website.