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Australia Requires Expanded Disclosure of Equity Derivative Positions

Responding to the global proliferation of non-traditional ownership and economic arrangements, the Australian Takeovers Panel has adopted rules requiring expanded disclosure of Equity Derivatives (*Australian Takeovers Panel — Guidance Note 20, Equity Derivatives*). The new rules make final the draft position that the Takeovers Panel announced in September 2007 in response to a takeover bid launched by Centennial Coal for Austral in which Glencore International AG held undisclosed equity derivatives of 6.49%.

The new Australian rules are broadly drafted to require disclosure of all equity derivative positions where there is a transaction that affects or is likely to affect control or potential control of the subject company or the acquisition or proposed acquisition of a substantial interest in a company. There is an exception for derivative positions that are under five percent. Generally positions must be disclosed within two business days; however, in a takeover context they must be disclosed by 9:30 on the next trading morning.

The action of the Australian Takeovers Panel reflects regulatory recognition that investors increasingly deploy swaps and other equity derivatives to exert influence over corporate decision making with little or no apparent duty to disclose the existence or nature of these positions or their plans with respect to the issuing company. As we have previously written, a similar reporting gap exists under § 13(d) of the U.S. Securities Exchange Act of 1934. Equity derivative transactions directly implicate the principles underlying § 13(d) (and other comparable reporting schemes), and, as we indicated in our memorandum of March 3, 2008, corrective action similar to that now adopted in Australia is necessary to update § 13(d) to account for these increasingly complex ownership and hedging arrangements.

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