Restructuring and Insolvency in the United Arab Emirates

March 2011
The federal laws of the United Arab Emirates (the “UAE”) provide a framework for the reorganisation, liquidation and bankruptcy of insolvent companies and individuals. The regime applicable to companies remains largely untested as there has yet to be a major corporate insolvency within the jurisdiction. Given the uncertainty surrounding the application of the regime, financially troubled major corporate entities in the UAE and their creditors are more likely to use consensual reorganisations than turn to formal legal mechanisms.

Section I of this note provides an overview of the UAE regime. Section II provides a quick reference tool comparing the UAE regime to the regimes in the United States and the United Kingdom.

SECTION I

The UAE Regime

1 LEGAL FRAMEWORK

1.1 Overview

The UAE Commercial Companies Law (Federal Law No.8 of 1984) (the “Companies Law”) sets out a procedure that ultimately results in the dissolution of a company and the termination of its existence. The most relevant trigger for this procedure relates to a substantial loss of capital.

The UAE bankruptcy regime is set out in Book Five of the Commercial Transaction Law (Federal Law No.18 of 1993) (“Law 18”). The laws and procedures set out in Law 18 apply to all ‘traders’. The definition of trader includes any person who undertakes commercial activity as his or her profession in his or her own name and any company undertaking any commercial activity or taking one of the forms stipulated in the Companies Law. The UAE bankruptcy regime in Law 18 is the UAE’s equivalent to Chapter 11 proceedings in the United States and liquidation proceedings in the United Kingdom.

In addition to the bankruptcy regime applicable to traders, there is a further civil regime in the UAE applicable to individuals who fall outside of the scope of the definition of ‘trader’. Professional consultant-type activities practised by individuals (doctors, lawyers, consultants, etc.) are not considered commercial activities and, accordingly, the individuals involved in such practises are not considered traders. A civil trader who ceases to pay his or her debts may not be declared bankrupt under Law 18, instead, he or she will be subject to certain administrative restrictions. The civil regime and applicable administrative restrictions are not discussed further in this note.

It is important to note that the bankruptcy provisions in Law 18 may not apply to state-owned entities as the Civil Procedures Law prevents the seizure of ‘public or private assets owned by the state or any of the Emirates’ — and this could be interpreted to include bankruptcy proceedings. State-owned entities may also be incorporated by decrees containing restrictions on instigating insolvency procedures against them. In addition, the UAE courts may defer or refuse a declaration of bankruptcy if to do so would be in the ‘best interests of the national economy’.

The key features and procedures of the UAE company dissolution and bankruptcy regime are summarised below.
1.2 Jurisdictional issues

Law 18 gives jurisdiction to the UAE courts to hear bankruptcy cases relating to foreign traders who have branches, local agencies or any other establishment in the UAE irrespective of whether or not they are also declared bankrupt abroad. The Companies Law provisions relating to the liquidation of insolvent companies apply only to companies that conduct their principal activity in the UAE or have their central management in the UAE.

1.3 Free zones and the Dubai International Financial Centre

The legal framework described above applies at a federal level. It is important to note that there are a number of designated ‘free zones’ within the UAE to which the UAE insolvency regime applies unless exempted. One such ‘free zone’ is the Dubai International Financial Centre (the “DIFC”), a financial free zone established in Dubai, which has developed its own legal and regulatory framework for the governance of all civil and commercial matters within the DIFC, including a comprehensive insolvency regime. The DIFC regime is discussed in detail in our client briefing entitled ‘Restructuring and Insolvency in the Dubai International Financial Centre’.

2 DISSELECTION

2.1 Key provisions

The Companies Law sets out the circumstances in which a company that may be dissolved. Not all such circumstances are insolvency related, for example, the expiry of the term of a company as specified in its constitutional documents, a merger or the fulfillment of the company’s stated objectives might trigger an obligation to dissolve a company.

Where a joint stock company incurs losses amounting to 50 percent or more of its capital, the board of directors of the company must convene an extraordinary general meeting to consider the continuation or dissolution of the company. In circumstances where the board fails to do so or the general assembly fails to adopt a resolution on the issue, any interested party may initiate proceedings for the dissolution of the company (Companies Law Article 285).

Similarly, the board of directors of a limited liability company that suffers losses amounting to 50 percent or more of its capital is obliged to put the dissolution of the company to the general assembly for its consideration. A majority of the general assembly equal to the number required to amend the company’s constitutional documents may then resolve to dissolve the company. Further, if a limited liability company sustains losses amounting to 75 percent or more of its capital, shareholders holding 25 percent or more of the company’s capital may resolve to dissolve the company (Companies Law Article 289).

2.2 Dissolution procedure

Once the dissolution of a company has been approved by the requisite majority and the liquidation procedure is commenced, the words ‘under liquidation’ must be added to the company’s name. The Companies Law sets out general guidelines in relation to the liquidation process rather than a formal liquidation procedure to be adopted. A company may specify the manner in which it is to be liquidated in its constitutional documents or the partners of the company may agree upon the procedure at the time the resolution to liquidate is passed.

Whatever process is adopted, the liquidation will be carried out by a liquidator appointed by the general assembly of the company or, in circumstances where the liquidation is as a result of a court order, the court. The liquidator will review the company’s assets and liabilities and invite all known creditors to present their claims against the company. The liquidator is required to set aside a fund to deal with any disputed debts or known debts which have not been claimed.
The liquidator is required to pay all of the debts of the company, including deferred debts that are deemed due and payable upon dissolution of the company. If the company in liquidation does not have sufficient assets to discharge all of its debts then the debts will be discharged proportionately between the creditors without prejudice to the rights of preferred creditors. It is unclear whether the preferred creditors described in section 6 would be preferred creditors for the purposes of company dissolutions following a substantial loss of capital under Articles 285 and 289.

Once the distribution of the company’s assets has occurred, the liquidator is required to present a final account to the general assembly and register the completed liquidation with the companies register. The company’s registration will then be removed from the register signaling the end of the dissolution process.

Chapter 10 (Articles 281 – 312) of the Qatari Commercial Companies Law (Law No. 5 of 2002) (the “Qatari Code”) sets out the equivalent provisions applicable in Qatar. The Qatari regime substantially mirrors that of the UAE except that there is no equivalent of the Article 289 right for shareholders holding 25 percent or more of the company’s capital to dissolve the company when it suffers capital losses of 75 percent or more. Instead, Article 290 of the Qatari Code states that directors of a limited liability company which has suffered capital losses of 50 percent or more who neglect to consider the dissolution of the company or fail to form a resolution on the matter are considered jointly responsible for the company’s obligations as a result of their neglect.

### 3 BANKRUPTCY

A trader may voluntarily file for a declaration of bankruptcy if it is not able to pay its debts. A trader is legally obliged to file for a declaration of bankruptcy if 30 days lapse from the date on which it first ceases to pay its debts. Failure to do so results in ‘negligent bankruptcy’ which is a criminal offence under the UAE Penal Code, Federal Law 3 of 1987. The ultimate aim of the bankruptcy procedure is to provide the trader with a ‘clean slate’. A trader who makes full disclosure and complies with the relevant laws will be entitled to be discharged from its debts which is previously had no prospect of repaying.

The creditors of the trader, the public prosecutor and the court acting under its own initiative can also apply for bankruptcy of a trader. By petitioning the court to bankrupt a trader pursuant to Law 18, a creditor initiates formal proceedings against the trader with the aim of recovering the debt owed. The creditor may also negotiate a composition or scheme of settlement with the trader which will see him or her recover a proportion of what he or she is owed.

After a bankruptcy application is submitted, the court must take all necessary steps to preserve and protect the trader’s assets. The court will make all necessary investigations (with the assistance of experts if so required) into the financial affairs of the trader and the reasons for the failure to pay its debts. After concluding its investigations, satisfying all necessary procedures and resolving any disputes, the court will fix a date for the bankruptcy hearing and shall order that notice be given to all creditors to notify the court of any debts prior to the hearing. The court will then pass a judgment declaring the trader bankrupt on the prescribed hearing date and appoint a trustee in bankruptcy to assume control of the trader’s assets and business for distribution amongst its approved creditors — with the exception of holders of specific liens and pledges, a trader’s creditors are prohibited from pursuing claims against the trader’s estate after the declaration of bankruptcy.

Section 6 of the Qatari Commercial Law (Law No. 27 of 2006) sets out the equivalent provisions applicable in Qatar. Again, the Qatari regime substantially mirrors that applicable in the UAE. The Qatari regime suffers from the same uncertainties as the UAE regime as it has not yet been tested by a major corporate insolvency.
4 VOIDABLE TRANSACTIONS

Following a declaration of bankruptcy, certain transactions are capable of being set-aside or annulled. Article 696 of Law 18 states that the giving of gifts, the payment of debts prior to the repayment date, the payment of debts with something other than that agreed upon or the provision of security or guarantees for a pre-existing debt will not be binding. Any other transaction detrimental to the trader’s combined creditors can be set aside if the contracting party was aware at the time of entering into the contract that the trader had ceased to pay its debts.

The court will consider transactions entered into during the ‘suspect period’ which commences on the date on which the trader ceases to pay its debts. The date on which the trader ceased to pay its debts may be fixed by the court on any date up to a maximum of two years before the ruling declaring the bankruptcy. The combined creditors can seek an order of the court voiding any transaction capable of being set aside where upon the relevant contracting party must return everything obtained from the bankrupt together with any profits and fees received in connection with the transaction. The counterparty is entitled to claim the amount of any consideration paid.

The laws relating to the dissolution and liquidation of companies discussed in Section 2 neither provide for ‘suspect periods’ nor the cancellation of antecedent transactions.

5 COMPOSITION SCHEMES WITH CREDITORS

5.1 Key provisions

A trader may avoid the consequences of an adjudication of bankruptcy if he or she is able to negotiate a composition or settlement with its creditors. Such compositions are preventative measures agreed prior to any adjudication proceedings (a “Protective Composition”). Further, judicial compositions may be initiated by a judge following a declaration of bankruptcy (a “Judicial Composition”).

Protective compositions are available to any trader other than a joint-stock company or a company in liquidation, in each case, whose business activities or financial stability is disrupted in a manner which leads to a cessation of the payment of its debts. Provided a trader has traded continuously for one year and complied with the requirements of all applicable laws, it may apply to the court within 20 days of the “cessation of payments” for a composition to prevent bankruptcy.

A request for a Protective Composition must be accompanied by an explanation of the cause of the disruption to the business, a detailed composition proposal and various other documents (including financial statements, confirmation from the Companies Register that all filing requirements have been complied with, statement of personal expenses). The composition proposal must provide for at least 50 percent of the trader’s outstanding debts to be paid within three years from the date of acceptance of the composition.

Upon the court issuing a decision to commence composition procedures, all bankruptcy proceedings, other claims and enforcement actions relating to the trader are automatically stayed and the court may make protective orders in order to preserve the trader’s assets until the application for composition is determined. The court will also appoint a composition trustee to register the proposed composition with the Companies Register and publish an invitation to all creditors to lodge their claims in two daily newspapers. Creditors failing to register their debts are not permitted to participate in the composition proceedings. The court will then convene a meeting of approved creditors at which the composition trustee will present a report on the financial condition of the trader together with his or her opinion on the terms of the proposed composition.

Throughout the composition procedure, a trader retains the right to manage his or her assets under the supervision of the composition trustee. However, the trader cannot obtain credit or grant security over any of its assets without the prior permission of the court.
Any unapproved contracts entered into or any voluntary payments made by the trader are unenforceable.

Alternatively the court may commence Judicial Composition proceedings which are involuntary composition proceedings following a declaration of bankruptcy. The procedure substantially mirrors that of a Protective Composition. Once initiated, a creditors’ committee is automatically established and all approved creditors are invited by the judge to hear the submissions of the trustee and vote on the proposed composition.

### 5.2 Creditor Acceptance of Composition Schemes

All approved creditors will be invited to vote on the proposed composition scheme (whether protective or judicial). In order for the proposed scheme to be approved and implemented, it must be accepted by a simple majority of the creditors who attend the meeting and vote in respect of the proposals, provided that the majority represents holders of at least two-thirds of the trader’s debts. In Judicial Compositions, creditors who do not attend the meeting are deemed to have rejected the terms of the settlement for counting purposes. In Protective Compositions, however, non-attending creditors are not counted in determining whether a simple majority has been reached. It should be noted that Law 18 prohibits creditors from voting in respect of their own secured debts.

In addition, in circumstances where a company has issued bonds of an aggregate amount exceeding 20 per cent. of the amount of its total debt, the composition scheme requires approval by the general assembly of bond holders in accordance with the procedure set out in the Companies Law (if the composition is inconsistent with the terms of the bonds) before the creditors’ meeting is convened. This is likely to require a quorum of bondholders representing at least 75 per cent. of the value of the bonds (decreasing over time if the quorum is not met and the meeting reconvened) and the approval of bondholders representing at least 50 per cent. of the value of the bonds at the meeting.

Court approval is required to formally ratify a proposed composition, the court will then publish a summary of the composition in the local press. The court will also record the composition with the local property register where any of the trader’s real property is located, creating a charge over said property to secure the rights of creditors party to the composition. Once the terms of the composition have been fulfilled, the charge is released.

### 6 SET-OFF AND NETTING

Law 18 provides for set-off and netting arrangements but certain requirements must be met before set-off or netting is enforceable on an insolvency. Set-off arrangements are enforceable on an insolvency to the extent that the rights and obligations of the parties are considered to be ‘connected’. A connection exists specifically if the right and the obligation result from a single cause or if they are comprised by a ‘current account’. Therefore, a UAE court may regard two or more separate transactions as insufficiently connected, with the result that set-off or netting arrangements upon insolvency might not be recognised.

### 7 RANKING OF CREDITORS

Law 18 gives first priority status to the payment of wages and salaries to employees accrued in the 30-day period prior to a declaration of bankruptcy. This is followed by certain preferred claims including rent due in respect of business premises and government taxes. Public funds used to cover the cost of the bankruptcy or liquidation procedures are also given priority status and are reclaimed out of the trader’s estate ahead of all other creditors.

The UAE regime regards secured creditors as ‘preferred creditors’ with rights over the specific assets pledged (the concept of a floating charge over all of a trader’s assets is not recognised under UAE law), however, it is unclear whether a court would grant priority to secured creditors over claims of the other preferred unsecured creditors listed above. It is also unclear what approach the courts would take in assessing the ranking of priority claims amongst themselves.
## Section II

### The UAE, the United States and England and Wales

The following table compares the key provisions of the UAE regime with the equivalent provisions of the regimes in the United States and England and Wales:

#### 1 Processes and Legislation

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#### 2 Stays of proceedings

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<tr>
<td><strong>Bankruptcy</strong></td>
<td>All claims by ordinary creditors against the trader shall cease from the date of the bankruptcy. Proceedings can only continue with the permission of the court. Creditors with specific security may, subject to court approval, make, or continue to make, claims against the trustee in relation to the specific assets over which they hold a security interest.</td>
<td>Chapter 7 Proceedings \nAutomatic moratorium takes immediate effect barring creditor enforcement actions (in respect of both secured and unsecured creditors). The court may grant relief from the automatic stay ‘for cause’.</td>
<td>Liquidation \nFrom the making of a winding-up order, any action or proceedings against the company or its property is frozen, except with the leave of the court. However, this will not restrict claims made by secured creditors made in respect of secured assets.</td>
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<tr>
<td><strong>Protective Compositions</strong></td>
<td>All bankruptcy proceedings, other claims and enforcement actions against the trader are automatically stayed pending determination of the composition procedure. Secured creditors may either waive their security interests and participate in the composition as a ‘general creditor’ or, subject to court approval, make, or continue to make claims, against the trustee in relation to the specific assets over which they hold a security interest.</td>
<td>Chapter 11 Reorganisation \nAutomatic moratorium takes immediate effect barring creditor enforcement actions (in respect of both secured and unsecured creditors). Court may grant relief from the automatic stay ‘for cause’.</td>
<td>Administration \nA statutory moratorium is imposed on other insolvency proceedings and other legal proceedings against the company. No steps may be taken to enforce any security held over company assets without the consent of the court or permission of the administrator.</td>
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## 3 Duties of insolvency administrator

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| **Bankruptcy Trustee**  
Assume control of and realise the assets of the trader and distribute them to its approved creditors in the order prescribed in Law 18. | **Chapter 7 Trustee**  
Realise the assets of a company and distribute them to its creditors in the order prescribed in the Bankruptcy Code and dissolve the company. | **Liquidator**  
Realise the assets of a company and distribute them to its creditors in the order prescribed in the Insolvency Act 1986 and dissolve the company. |
| **Composition Trustee**  
Register the proposed composition with the Companies Register, send notices to creditors, verify debts and report on the proposed composition. | **Chapter 11 Trustee**  
Management retains control as ‘debtor in possession’ unless the court appoints a trustee for cause, including fraud, dishonesty, incompetence or gross mismanagement. If appointed, a trustee will be responsible for establishing creditor committees, reviewing and reporting on reorganisation plans, implementing reorganisation plans and preventing delay, appointing professional advisors and investigating any criminal, fraudulent or abusive conduct. | **Administrator**  
Carry on the business of the company in pursuit of a primary objective to maintain the company as a going concern. May sell and/or distribute company assets if such action is likely to promote the purposes of the administration |

## 4 Claims and appeals

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| **Bankruptcy**  
Creditors are required to submit proof of debt within 10 days of the bankruptcy ruling. Creditors have 10 days from the date of publication to appeal the final debt list (foreign creditors have 30 days). | **Chapter 7 Proceeding**  
Claims to be submitted within 90 days of the first date set for the creditors meeting. A debtor lists all known claims in its schedules of assets and liabilities and classifies them as ‘disputed’, ‘unliquidated’ or ‘contingent’. Creditors may object to a debtor’s characterisation of their claim and the parties can adjudicate the claim before the court. | **Liquidation**  
Creditors submit proof of claims to liquidator within timetable specified by the court and have 21 days to appeal against a liquidator’s decision to reject any debts claimed. |
| **Protective Composition**  
Creditors are required to submit proof of debt within 10 days of the publication of the Company’s decision to commence composition (foreign creditors have 30 days). Upon approval, the composition will bind general creditors. | **Chapter 11 Reorganisation**  
As above except that claims to be submitted within a court-defined timeframe rather than 90 days. | **Administration**  
The appointed administrator identifies the creditors of the company. Any creditor can challenge the conduct of the administrator by application to the Court. |
### 5 Priority claims

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<tr>
<th>UAE</th>
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<tr>
<td>Employees' wages and salaries (accrued in the 30-day period prior to the ruling of bankruptcy), rent due on business premises, government taxes (accrued during the two-year period prior to the declaration of bankruptcy), claims of secured creditors and the costs of the bankruptcy/liquidation procedure.</td>
<td>Expenses of administering the debtor’s estate and court fees and costs, claims arising during the ‘involuntary gap period’ from the time an involuntary petition is filed to the time the court enters an order granting the requested relief, claims for wages, salaries, commissions and similar items, claims for unpaid contributions to employee benefit plans, claims for certain kinds of consumer deposits, claims for taxes and customs duties and related liabilities assessed within a certain pre-petition time frame and claims for depository institution capital-maintenance commitments.</td>
<td>Certain payments due under occupational pension schemes, the costs and expenses of the insolvency proceedings and preservation of assets (including the costs and expenses of the officers of the company required to preserve its assets). In a reorganisation, the order of priority will be a matter of negotiation between the parties.</td>
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### 6 Approval of reorganisations

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<tr>
<td>Protective Composition Composition to be approved by a simple majority of creditors who attend the meeting provided that such majority represents holders of at least two-thirds of the trader’s debts (creditors cannot vote in respect of their own secured debts).</td>
<td>Chapter 11 Reorganisation If two thirds in amount and more than one half in number of the claims or equity interests in a particular class vote to accept the plan of reorganisation, that acceptance will be binding on all members of the class.</td>
<td>Administration An administrator’s proposal requires the approval of a majority in value of unconnected shareholders.</td>
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<tr>
<td>NB Bond holder approval required if Trader has issued bonds of an aggregate amount exceeding 20 percent of its total debt.</td>
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<td>Schemes of Arrangement The relevant majority for approval is 50% in number and 75% in value of each class of creditors present and voting.</td>
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<td></td>
<td>Company Voluntary Arrangement The proposals must be approved by both the shareholders of the company and its creditors. The relevant thresholds are 50% in value of shareholders present and voting and 75% in value of the company’s creditors present and voting.</td>
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### 7 Voidable transactions

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<th>UAE</th>
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<tr>
<td>Gifts, payment of debts prior to the scheduled repayment date, payment of debts with something other than that originally agreed, the provision of security or guarantees for a pre-existing debt and any other transaction detrimental to the general body of creditors where the other party to the transaction was aware at the time of the transaction that the trader had ceased to pay its debts.</td>
<td>Preferences, fraudulent transactions and post-petition transfers made without necessary court authorisation.</td>
<td>Preferences, transactions at an undervalue and fraudulent transactions.</td>
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## Directors’ liabilities

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<tr>
<td>Directors and corporate officers of a company can be held personally liable to shareholders and third parties for acts of fraud, abuse of power, violation of law and constitutional documents and mismanagement of the company. Criminal penalties exist for fraudulent actions.</td>
<td>Absent wrongdoing, there is generally no personal liability for directors of a bankrupt company.</td>
<td>A director who does not apply for one of the formal insolvency procedures while knowing that the company had no reasonable prospect of recovery may be liable for wrongful trading and as a result may have to make a contribution to the assets of the company on liquidation (no criminal sanctions). Fraudulent trading may occur where a director carries on business with the intention of dishonestly and deliberately defrauding the creditors and carries criminal sanctions.</td>
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If you have any questions about Restructuring and Insolvency in the Dubai International Financial Centre please contact Bryant Edwards, Aaron Bielenberg or Christian Adams in our Dubai office on +971.4.704.6300.

Abu Dhabi
Nick Collins
Mark Godfrey  
+971.2.495.1700

Barcelona
José Luis Blanco  
+34.93.545.5000

Beijing
John Otoshi  
+86.10.5965.7000

Brussels
Howard Rosenblatt  
+32.2.788.6000

Chicago
Stephen Bowen  
+1.312.676.7700

Doha
Craig Stoehr  
+974.4406.7700

Dubai
Bryant Edwards  
Jackson Taylor  
Aaron Bielenberg  
Christian Adams  
+971.4.704.6300

Frankfurt
Hans-Jurgen Lutt  
+49.69.6062.6000

Hamburg
Gotz Wiese  
+49.40.4140.30

Hong Kong
Joseph Bevash  
+852.2522.7886

Houston
Michael Dillard  
+1.713.546.5400

London
John Houghton  
Jackson Taylor  
+44.20.7710.1000

Los Angeles
John Clair Jr.  
+1.213.485.1234

Madrid
José Luis Blanco  
+34.91.791.5000

Milan
Fabio Coppola  
+39.02.3046.2000

Moscow
Christopher Allen  
+7.495.785.1234

Munich
Jörg Kirchner  
+49.89.2080.3.8000

New Jersey
David McLean  
+1.973.639.1234

New York
Keith Simon  
+1.212.906.1200

Orange County
Scott Shean  
+1.714.540.1235

Paris
Olivier Delattre  
+33.1.4062.2000

Riyadh
Mohammed A. Al-Sheikh  
+966.1.207.2510

Rome
Fabio Coppola  
+39.06.98.95.6700

San Diego
Bruce Shepherd  
Joseph Bevash  
+1.619.236.1234

San Francisco
Scott Haber  
+1.415.391.0600

Shanghai
Rowland Cheng  
+86.21.6101.6000

Silicon Valley
Ora Fisher  
+1.650.328.4600

Singapore
Mark Nelson  
Joseph Bevash  
+65.6536.1161

Tokyo
Hisao Hirose  
+81.3.6212.7800

Washington, D.C.
Eric Bernthal  
+1.202.637.2200

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