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• Thailand 2006 Conference – May 13-19, 2006 (advance programme available on line)
• San Diego 2006 Conference – October 14 -18, 2006
• Los Angeles 2006 Follow on Program – October 18 -19, 2006

Tools to Use

• PRAC Contacts Matrix & Email Listing –Update (members’ version only)
• Directory 2005 Member Firms now available at PRAC web site
• Expert System available at PRAC web site Private Libraries (members only)
• Intellectual Property & Licensing Capabilities Survey – (members only)

PRAC e-Bulletin is published monthly
Visit us on line at www.prac.org
CLAYTON UTZ CONSOLIDATES STRONG GROWTH WITH NEW HIRE

Sydney, 3 March 2006: The arrival of corporate lawyer Matt Anderson to Clayton Utz as a partner signals the national law firm’s success in attracting top-flight lawyers to complement its capabilities and growth strategies.

Mr Anderson adds to Clayton Utz’ expertise in M&A, equity capital markets and funds management with his strong track record in advising on transactions in the infrastructure, property and financial services sectors.

Wally McDonald, the head of Clayton Utz' Corporate practice, said Mr Anderson's appointment enhances the distinguished list of lawyers whom Clayton Utz has welcomed recently as the firm pursues its policy of strategic growth off the back of its ‘one firm’ growth plan that was rolled out in mid 2000.

"Matt's hire reflects the firm's strategy of anticipating and responding to the needs of the market," Mr McDonald said. "The market continues to move towards asset classes such as property, infrastructure and energy and resources. We have invested heavily in those sectors to further enhance our ability to service those clients, particularly in the areas of M&A and equity capital markets.

"With his broad-ranging experience, Matt will further strengthen our corporate practice in helping us to build on our ECM, M&A and structured product expertise and our work in the listed and unlisted property and infrastructure market."

Mr Anderson said Clayton Utz was a natural choice given his practice focus. "The appeal of Clayton Utz was its depth in the core practice areas of equity capital markets, M&A, tax, infrastructure and property. Being able to complement that with my focus in financial services and funds and bring those resources together for my clients was a great opportunity."

ENDS

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Clayton Utz Media Releases are intended to provide commentary and general information. They should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this Media Release. Persons listed may not be admitted in all states

For additional information visit www.claytonutz.com
LOS ANGELES, CA, MARCH 6, 2006—The law firm of Davis Wright Tremaine announced the appointment of Mary Haas to partner-in-charge (PIC) of its Los Angeles office. Haas, a litigation partner who joined DWT 11 years ago as an associate, will take over for Andrew Hall, who had served in the position for over eight years (since 1998) and will now resume his full-time practice. “I’m thrilled about my new position,” says Haas, “and looking forward to building upon our firm’s historically strong practices in healthcare and media law, and expanding in our new growth areas of life sciences, employment law and entertainment financial transactions.”

“It has been my pleasure to watch Mary Haas’ practice and administrative experience grow over the past few years. Over the last decade, the LA office has grown from 12 to 35 attorneys and Mary, who has witnessed this expansion first-hand, is enthusiastic about furthering the firm’s continued evolution and prosperity.” said Richard Ellingsen, firmwide managing partner at Davis Wright Tremaine, who is also headquartered in the LA office. “Additionally, I want to thank Andy for his eight - plus years as the Los Angeles PIC. During his administration, Andy dedicated himself to the advancement of the Los Angeles office through the growth of our practice areas. I’m grateful for his commitment to the firm and we welcome him back to the full-time practice of law.”

Davis Wright Tremaine LLP is a national business and litigation law firm with more than 425 attorneys in nine offices located throughout the Pacific Northwest, and in Anchorage, Los Angeles, San Francisco, New York, Washington D.C. and Shanghai, China. For more information visit www.dwt.com

For additional information visit www.dwt.com

“We are proud to recognize these attorneys for their achievements, diligence, and unwavering commitment to our firm and our clients,” said Hogan & Hartson Chairman J. Warren Gorrell, Jr. “Each of them has a unique skill set in his or her area of practice that adds significant value to the work we do.”

The following counsel were elevated to the partnership:

Los Angeles
Robin J. Samuel – labor and employment

New York
Bart G. Van de Weghe – litigation

Washington, D.C.
Barton S. Aronson – litigation
John J. Smith – food, drug, medical devices and agriculture

The following associates were elected to the partnership:

Boulder
Kent A. Lembke – intellectual property

Denver
Andrew L. Spielman – environmental / legislative

Los Angeles
David H. Ben-Meir – intellectual property / litigation

New York
Amit Saluja – corporate, securities and finance

Northern Virginia
Timothy J. Lyden – intellectual property
Susanne Harris Carnell – labor and employment

Washington, D.C.
Ann M. Boeckman – food, drug, medical devices and agriculture
Evan R. Farber – corporate, securities and finance
Michelle A. Kisloff – litigation
Alethia N. Nancoo – public finance
Joshua D. Weinberg – litigation

In addition, the following associates were elevated to counsel:

Berlin
Annette Feißel – corporate, securities and finance
Sascha Herms – corporate, securities and finance

London
Sarah J. Atkinson – corporate, securities and finance

Moscow
Alla Y. Naglis – corporate, securities and finance
Kimberly D. Reed – corporate, securities and finance
Shanghai
Arthur C. Mok – corporate, securities and finance

Washington, D.C.
William L. Elder – aviation and surface transportation
Stephanie J. Gold – education
Alexander J. Park – corporate, securities and finance
Deborah K. Staudinger – lending, bankruptcy and creditors’ rights

About Hogan & Hartson
Hogan & Hartson is an international law firm headquartered in Washington, D.C. with over 1,000 attorneys practicing in offices around the globe. The firm’s broad-based international practice cuts across virtually all legal disciplines and industries.


For more information about the firm, visit www.hhlaw.com.
March 1, 2006

Back Row: Jonathan H. Park, Linda M. Rottman, Shelley R. Meacham, Robert J. Bell, Bruce S. Ross, Michael H. Bierman.


Luce, Forward, Hamilton & Scripps LLP has announced that veteran litigator Bruce S. Ross will join the firm as Partner-In-Charge of the Los Angeles office, effective March 1, 2006. Ross was formerly Executive Partner of the Los Angeles office of Holland & Knight. Nine Holland & Knight attorneys will join Ross at Luce Forward, expanding the depth of the firm's Los Angeles office.

Ross is a nationally recognized trial lawyer with over 30 years experience litigating trust, estate, and conservatorship cases. He is the incoming President of the American College of Trust and Estate Counsel, a former Chair of the Executive Committee of the California Bar's Estate Planning Probate and Trust Law Section, and a member of the Executive Council of the International Academy of Estate and Trust Law. Ross authored the leading textbook on probate administration in California, "California Practice Guide: Probate" (The Rutter Group) which he has supplemented annually since it was first published in 1986.

"I am honored to join one of California's most respected firms. Luce Forward's practice areas are exceptionally strong across the board, and their trusts and estates and litigation practices are outstanding," Ross said. "I look forward to contributing to Luce Forward's growth and expansion in Los Angeles and throughout the state."

Ross, who has served as Executive Partner of Holland & Knight's Los Angeles office since January 2003 added, "I have strong professional bonds and friendships with my Holland & Knight colleagues, and I am confident that we will have opportunities to work together in the future."

Joining Ross at Luce Forward will be Holland & Knight Partners John T. Rogers, Jr., Geraldine A. Wyle, Nelson J. Handy, and Sean K. Higgins; Senior Counsel Jeryll S. Cohen, Shelley R. Meacham and Linda M. Rottman; and Associates Vivian Lee and Jonathan H. Park, who all practice in trusts and estates litigation and planning and will join the firm on March 1.

In addition to trusts and estates litigation and planning, attorneys in Luce Forward's Los Angeles office practice in business / complex litigation, insurance litigation, commercial finance and insolvency, environmental, intellectual property litigation, entertainment and business / corporate law.

"Combining the talents of our new attorneys with Luce Forward's existing Trusts and Estates practice allows us to create one of the strongest Trusts and Estates practices on the West Coast," said Robert J. Bell, Luce Forward's Managing Partner. "Their expertise and the depth of their national practice increases Luce Forward's breadth of service and contributes to our strategic growth."

"We are proud to welcome each of these highly-regarded attorneys to Luce Forward," Bell added.
John T. Rogers, Jr. practices in trust, estate, and conservatorship administration and litigation, as well as estate planning, alternative dispute resolution, and professional responsibility. He is a fellow of the American College of Trust and Estate Counsel and chair of its Technology Committee. Additionally, Rogers is a former chair of the Trusts and Estates Section of the Los Angeles County Bar Association and co-author (with Ross) of The Rutter Group's upcoming "California Practice Guide: Trust Administration and Litigation."

Geraldine A. Wyle specializes in fiduciary and inter-generational family disputes and their resolution. She serves on the Board of Governors of the Beverly Hills Bar Association, and is former chair of its Trusts and Estates Section, and co-chair of its Managing Partners' Forum. Wyle is a frequent speaker on the subjects of trust, probate and conservatorships, as well as ethics in the estate planning context.

Nelson J. Handy focuses primarily on estate planning and trust and estate administration. He is certified by the State of California as a specialist in estate planning, probate and trust law, and previously practiced as a Certified Public Accountant. Handy is also a member of the Executive Committee of the Trusts and Estates Section of the Los Angeles County Bar Association.

Sean K. Higgins is experienced in complex trust, estate and conservatorship litigation, trust and estate administration, and estate planning. He has taught Estate Taxation as an adjunct professor at Golden Gate University's Masters in Taxation Program in Irvine, California.

Jeryll S. Cohen focuses primarily on post-mortem administration, allocation of assets, including community property issues, preparation and filing of estate tax returns, handling of estate tax return audits and distribution of assets in complex matters sometimes involving litigation. She is Program Co-Chair of the Beverly Hills Bar Association's Trusts & Estates Section.

Shelley R. Meacham represents clients in trust and estate litigation and in conservatorships. Her experience includes a broad range of civil litigation work, with particular emphasis on probate litigation and legal malpractice defense.

Linda M. Rottman practices in trust and estate litigation and also has experience in complex business litigation.

Vivian Lee, also a trust and estate litigator, serves as the Secretary of the Executive Board of the Los Angeles County Bar Association's Barrister's Executive Committee and as the Barristers Liaison for its Trusts & Estates Executive Committee. She is a member of the Board of Governors of the Korean American Bar Association.

Jonathan H. Park works on all aspects of trust and estate litigation including pre-litigation fact review, preparation of pleadings, document discovery, motion preparation and trial support.

For more information visit www.luce.com
March 9, 2006

Gary Born, one of the world’s preeminent authorities on international commercial arbitration and international litigation, has published the second edition of *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*—an extensively updated and revised guide to planning and drafting international arbitration agreements and forum selection clauses.

Mr. Born’s new book includes clear, practical explanations of the advantages and disadvantages of different forms of dispute resolution provisions, and detailed discussion of all elements of drafting arbitration and choice-of-court clauses. It also includes scores of revised model arbitration and forum selection clauses, providing precise working for use in a wide range of commercial contexts. Designed for easy reference and use by both general practitioners and specialists, the book is required for any international practitioner or corporate counsel engaged in international matters.

“Gary Born’s new edition of this classic work covers everything a drafter of dispute resolution clauses needs to consider, with useful model clauses, and is up to the minute on all recent developments.”

James H. Carter, Chairman of the Board, American Arbitration Association

“An excellent work by one of the world’s leading arbitration authorities and practitioners. This comprehensive review of international arbitration is bound to become essential reading for students and practitioners alike, especially for anyone drafting arbitration clauses.”

Roberto Dañino, Secretary General of the International Centre for Settlement of Investment Disputes (ICSID)

“Many books are devoted to the subject of international arbitration, but this is one of the few which stand out as particularly valuable due to its thoroughness, clarity, and reliability. … Mr Born’s excellent second edition is more than welcome.”

Jan Paulsson, President, London Court of International Arbitration

Visit www.wilmerhale for more details and to purchase the complete book entitled, “International Arbitration and Forum Selection Agreements: Drafting and Enforcing.”
MAKING NEWS – ASAHI KOMA LAW OFFICES ADVISED IN 2005 DEAL OF THE YEAR

Asahi Koma Law Offices is pleased to note that a deal (closed in November 2005) involving the securitization of revenues and whole-business cashflow for 31 pachinko halls of Kabushiki Kaisha Gaia, a pachinko hall management company, arranged by Deutsche Securities, Tokyo Branch (its present corporate name being Deutsche Securities Inc.) and for which the law firm acted as counsel to the arranger for the securitization, has been selected as the Deal of the Year 2005 - Japan by International Securitization Report published by International Financial Review, Thomson Financial.

MAKING NEWS - GIDE LOYRETTE NOUEL ADVISES FRENCH GOVERNMENT IN EURO 73bn MEGA DEAL

The international law firm Gide Loyrette Nouel is representing the French Government in one of the largest European mergers of the decade, the Euro 73bn (£50bn) merger of French utility giant Suez and state-owned Gaz de France. Gide Loyrette Nouel has advised the French Government in the recent IPO of Gaz de France.

The transaction, which will create a national power group with revenues in excess of Euro 64bn (£43.6bn), has already received the approval of both the GdF and Suez boards and is set to complete before the summer.

The Gide Loyrette Nouel team is led by Paris partners Youssef Djehane, Didier Martin and Jean-Emmanuel Skovron.

For additional information visit www.gide.com

MAKING NEWS – HOGAN & HARTSON SECURES FAVORABLE OUTCOME IN INTERNATIONAL ARBITRATION PROCEEDING IN GENEVA

GENEVA, February 24, 2006 — Hogan & Hartson's Geneva office recently successfully defended ALSTOM Power (Switzerland) Ltd. against a $7.7 million commission claim of an Irish offshore company which had acted as a commercial representative of ABB Power Ltd., with which ALSTOM merged in 2001. The claim arose out of the award to ALSTOM, in a tender competition which included an entity of the former ABB Power, of a contract for the construction of a hydroelectric facility in Morocco. The Arbitral Tribunal in this Swiss law, Geneva forum, French-language proceeding dismissed the claim in its entirety, and awarded costs and legal fees to ALSTOM.

Charles Adams, Managing Partner of Hogan & Hartson's Geneva office, represented ALSTOM Power, with assistance from associate Vanessa Liborio.

For more information visit www.hhlaw.com
MEMBER EVENTS

PRAC Member: Morgan Lewis & Bockius LLP
Date: March 22, 2006
Place: Morgan Lewis – Philadelphia, Pennsylvania

Please join us for a breakfast seminar, co-sponsored by Morgan Lewis and HayGroup.

Companies are redesigning executive compensation programs to take into account changes made by FAS 123R and Internal Revenue Code section 409A. These efforts will require consideration of proposals by the Securities and Exchange Commission (SEC) to expand significantly its executive compensation disclosure requirements. The SEC proposals will affect disclosure in proxy statements and other filings.

Topics to be discussed include:

• Proposed SEC disclosure requirements for annual compensation, incentive programs, equity grants, deferred compensation, SERPs, severance agreements and change of control agreements
• How the proposed SEC disclosure rules will affect compensation analysis and practices in 2006
• Update on design of deferred compensation plans, employment agreements and change in control agreements to comply with section 409A
• Update on equity plan design to address FAS 123R changes
• Market trends in executive compensation

Program:
8:00 – 8:30 am Continental breakfast and registration
8:30 – 10:00 am Program and discussion

Location: Morgan, Lewis & Bockius LLP - 1701 Market Street, Philadelphia, PA 19103
Conference Rooms 18 A&B

Presenters: Irv Becker, Joseph E. Ronan, Alan Singer, Mims Maynard Zabriskie. To register, email ph.events@morganlewis.com

PRAC Member: Wilmer Cutler Pickering Hale and Dorr LLP
Date: May 4, 2006
Place: Boston, Massachusetts
Event: WilmerHale Intellectual Property Conference

Please save the date for the 2006 WilmerHale Intellectual Property Conference to be held in the conference center of our 60 State Street office in Boston. Details forthcoming. Visit www.wilmerhale
Insurers must start developing a Fit and Proper policy that meets the new Prudential Standard, so that all senior management meet the new standard by the 1 October start date.

The final version of Prudential Standard GPS 520 - Fit and Proper differs little from the draft version which we looked at in our Alert last year. The focus is not on job title but the job actually performed - a person is senior management if he or she plays a significant role in relation to the management or control of the regulated institution, or provides services or support for it which are of a prudentially significant nature, such as:

- participating in decision-making;
- implementing strategies and policies approved by the Board of directors;
- developing and implementing processes or systems that identify, assess, manage or monitor risks in relation to business activities and operations; and
- monitoring the appropriateness, adequacy or effectiveness of risk management systems.

Types of disqualifying behaviour

The draft proposed that disqualifying behaviour should include serious or persistent failure to manage their own debt or personal affairs "in accordance with their contractual or other legal obligations [where] ... such failure caused loss to others". This has been retained. On the other hand, disqualifying behaviours do not automatically disqualify senior managers, so insurers could still employ senior managers. Although this decision belongs to the insurer in the first instance, APRA can override it and remove and disqualify.

What now?

As the Prudential Standard requires a Fit and Proper Policy based upon the Standard's minimum requirements, and that the Policy be part of the risk management system, insurers should make sure that their policies are in place by 1 October.

Section 52 route closed for personal injury and death claims

Plaintiffs will no longer be able to use federal laws against misleading or deceptive conduct for claims arising from personal injury or death. Mass tort and product liability claims will now either be brought under the reformed State and Territory fair trading and negligence laws or the specific product liability provisions of the Trade Practices Act 1974 (Cth) ("TPA").

The Ipp Report's recommendations have been implemented in several waves of legislative reform across the various States and Territories over the last three years. Since the TPA could be used for claims for personal injuries or death instead of the reformed State and Territory systems, the Ipp report also recommended several amendments to the TPA to appropriately restrict this route for plaintiffs. The Trade Practices Amendment (Personal Injuries and Death) Bill 2004 is the Federal Government's response.

The Bill restricts personal injury and death claims

The Bill amends the TPA to prevent individuals and the Australian Competition and Consumer Commission, in a representative capacity, from bringing civil actions for damages for personal injury or death resulting from contraventions of Division 1 of Part V of the TPA (Consumer Protection - Unfair Practices).

This means that plaintiffs will not be able to seek damages for injuries or death under sections 52 and 53 of the TPA, which prohibit misleading or deceptive conduct by corporations in trade or commerce. This will operate prospectively. In line with the recommendations of the Ipp Report, plaintiffs will have to pursue damages at common law, under State or
Territory legislation or, where applicable, under the strict liability provisions of the TPA affecting manufacturers and importers of allegedly defective goods.

The Bill continues to allow for the recovery of damages under Division 1 of Part V in cases where the death or personal injury has resulted from smoking or other use of tobacco products. This right is subject to a limitation period of three years from the date of discoverability of the relevant cause of action.

TPA already has limitation periods and damages caps

The Bill complements the *Trade Practices Amendment (Personal Injuries and Death) Act 2004*, which inserted new restrictions on limitation periods and damages for personal injury and death claims made under the TPA, other than under Part V Division 1. It prevents plaintiffs using the TPA to avoid caps on damages imposed by State and Territory legislation. Unfortunately, Australia-wide, these legislative changes are not uniform and there are some significant differences between the States, Territories and the Commonwealth.

This latest amendment closes off a federal cause of action long favoured by the plaintiffs’ bar in framing mass tort claims and product liability actions. It crystallises the issue recognised by the Ipp Report, namely, that while section 52 and 53 claims are commonplace in commercial disputes, they are not appropriate for use in personal injury claims. For those involved in the defence of such actions, experience has shown that misleading and deceptive conduct claims are often not supported by sufficient evidence and, in some cases, deflect attention and resources away from the real issues to be litigated. The amendment provides Australian business with some additional certainty in the management of risk.

For additional information visit www.claytonutz.com

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Clayton Utz News Alert is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this bulletin. Persons listed may not be admitted in all states.
The possibility to solve disputes in contracts with the State or State-owned companies by means of arbitration has always been a polemic issue in Brazil, despite of the provisions of the Arbitration Law of 1996 that authorized the arbitration in such cases.

A recent change in the law that regulates general conditions to administrative contracts for concessions and permissions of public services has put an end to the controversy.

Federal Law No. 11,196 of November 21, 2005 (“Law 11,196/05”), which amended the Brazilian General Law of Concessions (Federal Law No. 8,987 of February 13, 1995 (“Law 8,987/95”), added a new Article (number 23-A), determining that the concession agreements might contain private mechanisms to solve disputes, including arbitration, provided, however, that arbitration is conducted in Brazil and in the Portuguese language.

This change evidences the growing prestige of arbitration as an alternative to resolve disputes in cases involving the State. As an example, Federal Law No. 10,848 of 2004, governing the commercialization of electric energy, and Federal Law No. 11,079 of the same year, that has established the rules for the so-called Public-Private Partnerships (PPP’s), allow the use of arbitration for resolution of disputes with the State, State-owned companies and mixed capital companies.

However, as provided for in Article 1 of the Arbitration Law of 1996, only patrimonial rights over which the parties may dispose should be subjected to arbitration. As a consequence, matters related to public interest are not.

These recent changes in Brazilian law authorizing the use of arbitration in agreements with the State or public owned companies allow a feasible and more cost effective alternative for dispute resolution, while being very important the financial structure and feasibility of projects.

For additional information visit www.tozzini.com.br
Operational Guidelines for Placing Listed Companies into the Custody of Local Governments (Part I of III)

By Zheng Zhibin and Zhang Ting *

To implement Several Opinions of the State Council on Promoting the Reform, Opening and Steady Growth of the Capital Market, improving the quality of listed companies, and propelling the healthy and continuing development of China’s capital market, China Securities Regulatory Commission (CSRC) drafted the Opinions on Improving the Governance of Listed Companies (referred to as “the Opinions”) upon an overall review of its experience in regulating listed companies for over a decade as well as public comments. The Opinions has been approved and issued by the State Council on November 1, 2005.

Article 25 of the Opinions clearly provides that local governments at all levels shall assume the responsibility of managing the risks of listed companies within their jurisdictions, to prevent and defuse such risks, and the listed company under distress or is likely to cause substantial impact on social stability shall be placed into custody when necessary. The Opinions provides a new approach of managing the risks of listed companies. The issuance of the Opinions has drawn extensive attentions of the public.

As government custody involves various issues, including state policy orientation, the future of the listed companies in crisis, the attitude of the state towards individual creditors’ right at the listed companies (relating to holders of corporate bonds), the operation of listed companies under custody, government supervision, the interference of private rights by administrative power, the relationship between court jurisdiction and administrative power and so on. These cutting edge issues are very complicated. Therefore, it is necessary to regulate on such issues concerning government custody as the function(s) of, the custodian, the business operation of the listed companies under custody, the protection of the rights and interests of the stakeholders, the procedures, time limit and result of custody as well as exits for listed companies under custody.

King & Wood orchestrated a preliminary research report and prepared the Operational Guidelines for Listed Companies under Custody of Local Governments, based on our experience in the finance, restructuring, liquidation and settlement of debts of listed companies and risk management of securities companies and financial institutions, as well as good practices adopted by our peers overseas.

Initiation of custody procedures

When a listed company satisfies the criteria for government custody, who shall and how to initiate such proceeding are the preliminary issues. In general, there are mainly two ways to initiate the custodial procedure one is passive government custody, when a listed company believes that it is qualified for the custodian management and applies for such management at the competent local government; the other is government-initiated custody,
when the local government considers that a listed company needs custody management. The preceding two ways have similarities and differences in terms of relevant procedures and are summarized as follows.

1. The initiation of custody application

The applicants include listed companies or shareholders with 10% or more equity shares of the company. When petitioning for custody, applicants shall submit written application and relevant evidence to ensure that all required information is stated in the written application. An application initiated may be withdrawn before the local government issues the approval. The local government may reject the withdrawal request of the applicant and place the company into custody when it believes that the company qualifies for custodial management which is necessary for the company.

2. Examination on application for custody

Local governments shall appoint disinterested government officer or professional with relevant expertise and experience to conduct examination on such issues as the financial status, business operation and record of illegal acts of the listed company filing for custody management. And based on the result of examination, local government will decide whether the company shall be placed into custody.

3. Government-initiated custodial management

Where the local government finds that a listed company needs to be taken into custody, they shall initiate custody procedures at their discretion. The decision of local governments on whether custody is necessary for a listed company shall be based on a special examination on the company’s financial status, business operation and whether it has any record of illegal acts and so forth.

4. Decision of local governments and approval of CSRC on custody application

Local governments shall decide whether the listed company shall be placed into custody and notify the applicant of its decision. Before making such decision, local governments may consult securities regulatory and self-disciplinary agencies, competent authorities of the State Administration for Industry and Commerce, Administration of State Assets Management, as well as intermediary agencies for their comments on the application.

When the local government decides to take a listed company into custody, they shall file for approval with CSRC, whose decision shall be the final. When CSRC approves the custody application, the date of approval shall also be the commencement date of the custody procedures; when CSRC disapproves the custody application, the competent local government shall not place the subject company into custody.

The role of custodian group and its relationship with the listed company under custody
It is the key issues of custody and our focus what role the custodian group shall play, what power the group has, and what relationship it has with the company under custody. There are generally two types of views with regard to such issues.

One view is that custody is different from administrative order in that the custodian is the equivalent of the supervisor of the listed company and it cannot exercise the corporate power of the company. During the period of custody, the organs of power of the listed company in custody, such as the shareholders meeting and board of directors, shall continue to fulfill their duties under the law and the company bylaws but their actions are subject to the supervision of the custodian group. In addition, the decisions of the shareholders and board on material issues are subject to the approval of the custodian group. An important duty of the custodian group is to carry out all-round supervision on the shareholders meetings, board of directors’ actions, business operation and management of the company. However, the custodian group may act on behalf of the legal representative, shareholders and board of directors of the listed company to exercise their rights authorized by the shareholders meetings and board of directors. The debtor-creditor relationship of the listed company will not change because the company is under custody, and the business responsibility of the actions by the custodian group shall be borne by the company under custody during the period of custodial management.

Another theory is that during the period of custody, the legal person status of the listed company in custody continues to exist, but the company can no longer enjoy or exercise their corporate power, which is taken over by the custodian group. In this case, the custodian group has dual identities—one as a government or a special government agency and the other as the company’s organs of power to take charge of the business operation and management of the company under custody, and announce all corporate notices and decisions of the company.

The preceding two approaches both have advantages and disadvantages. The merit of the former approach is that it facilitates the stability of the business operation, since the organs of power of the company are familiar with and have a better understanding of the company’s business and operation. However, the downside is that such approach is not beneficial to the interests of the creditors, as such organs will very likely to be partial to the interests of the shareholders if they continue to manage the company. Although they are under the supervision of the custodian group and are required to get the custodian’s approval on their decisions on material issues. It is doubtful that how effectively such supervision will work, what matters shall be subject to the approval of the custodian group, and what the liabilities are for failure to obtain such approval. These are the issues need to be further clarified. Or it is a question whether the custody management plan can be implemented and how successfully the custodian group can carry out its works.

The latter approach is unreasonable as it deprives the corporate power of the listed company under custody and renders its organs of power only nominal authority. The purpose of custody management is to defuse risks and help the listed company under custody to strive out of the business and financial difficulties rather than taking it into liquidation. As a result, the power of the custodian group shall be different from that of the liquidator, and the custodian group shall not take over all the responsibilities of the organs of power as the liquidator does. Moreover,
the effect of custody is unpredictable since it is beyond the control of the custodian group, an outsider who is unfamiliar with the company’s business, how cooperative the shareholders and board of directors could be during the custody management, though the custodian group may require them to cooperate. If the board of directors and shareholders are deprived of all their powers, do they still need to bear the responsibility on the company’s operation during the period of custody management? It seems to be unreasonable to ask them to bear such responsibility. However, if the custodian group assumes the responsibility, it may be difficult to require the board of directors and shareholders to cooperate voluntarily. To overcome such shortcoming and facilitate the work of the custodian group, the custodian group may invite the directors and shareholders of the company to work with it on the management of the company to take advantage of their knowledge of and experience with the company and to promote their initiatives to assist the work of the custodian group.

Further study and discussion need to be conducted on the issues as to which of the two approaches is more practical, how to appropriately define the legal status of the custodian group, and what are the duties of the custodian group.

(The article was written in Chinese, the English version is the translation.)

* Zhang Ting is an associate at Litigation and Arbitration Group, King & Wood Beijing head office.
On 23 December 2005, the Public Construction Commission (PCC) announced amendments to the Regulations for the Organization of the Selection Committee and Evaluation for Private Participation in Infrastructure Projects. The amendments are mainly for improving the participation of outside committee members, requiring the arranging authority to provide a working group in all cases, enhancing the implementation of selection committees' opinions, and enabling committees to operate more efficiently. The amendments are outlined below:

Committee meetings must be attended by at least seven committee members, at least half of them must be outside members.

The old Regulations already required a selection committee to have between seven (7) and seventeen (17) members, but defined the quorum for resolutions as a proportion of the committee’s total membership, making no distinction between members recruited from inside and outside the arranging authority. Thus the number of members attending a meeting could be less than seven. Although the minimum number of members remains unchanged, in effect the amended Regulations require arranging authorities to set the number at more than seven. They also strengthen the role of outside members.

The arranging authority must set up a working group to assist the selection committee, and must provide review opinions of bids.

The old Regulations provided that for noncomplex cases, the arranging authority did not need to set up a working group to assist the selection committee in its work. But in view of the possibility that when working without a working group, a committee may directly select a first choice bidder after only perfunctory consideration, the PCC has deleted the provision allowing the omission of the working group. The amended Regulations expressly require the arranging authority to set up a working group to assist the committee, and also require the working group to provide the committee with a review opinion on each bid, for the committee’s reference.

Prequalification review is to be carried out by the arranging authority; the selection committee need only conduct substantive review of bids.

The old Regulations required review of bidders’ qualification to be carried out by the selection committee. But the purpose of prequalification review is to ascertain whether bidders meet the qualification requirements set out in the invitation to tenders, and does not involve evaluation of the bids’ substantive contents. Also, if documents submitted with a bid do not comply with procedural requirements, it is necessary to set a deadline for the bidder to provide supplementary information or clarification. When prequalification review is carried out by the selection committee, in such cases the meeting must be adjourned and reconvened at a later date, making the selection process less efficient. In view of these considerations, the amended Regulations transfer the task of prequalification review to the arranging authority.

Subsequent negotiations and finalization of the investment contract are to be based on the results of the selection committee’s overall evaluation.

In the great majority of cases to date, it has been stated in the invitation to tender documents that the arranging authority and the private sector to which the contract was awarded would need to amend the investment plan in accordance with the selection committee’s opinion and evaluation results. The amended Regulations now make it an explicit legal requirement that the results of the selection committee’s evaluation should be made the basis for subsequent procedures.

If a project is similar to previous cases or is noncomplex in nature, in order to make the selection process more efficient the arranging authority may circulate among the committee members the matters to be reviewed by the committee as well as the review criteria and methods, and obtain the written consent of all the selection committee members. It is then not necessary to convene a meeting of the committee to discuss these matters before the arranging authority makes its official announcement inviting private sectors to participate in the infrastructure project.

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Federal Banking Agencies Prohibit Limitations on Liability in Auditor Engagement Letters

On February 9, 2006, the federal banking regulatory agencies (FDIC, OCC, OTS, Federal Reserve, and National Credit Union Administration) published in the Federal Register an Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions in External Audit Engagement Letters (the “Advisory”). 1/ The Advisory states that limitation of liability provisions in auditor engagement letters threaten the thoroughness and reliability of external audits and, for this reason, are prohibited as an unsafe and unsound banking practice.

Scope of the Advisory

The Advisory applies to engagement letters for financial statement audits, audits of internal control over financial reporting, and attestations on management’s assessment of internal control over financial reporting. Several other services are not covered by the Advisory. Audits that are more limited in scope (such as audits of 401(k) plans and pension plans) are not covered. Non-audit services provided by the external auditor, and services performed by outside accountants other than the external auditor also are not covered. Services provided by non-accountants (such as attorneys and consultants) are not covered as well.

The Advisory is applicable to audit engagement letters executed on or after February 9, 2006. However, financial institutions with multi-year audit engagement letters that contain prohibited limitation of liability provisions are encouraged to seek to amend those engagement letters for periods ending in 2007 or thereafter.

Limitation of liability provisions as described in the Advisory fall into three general categories:

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• An agreement by a financial institution to indemnify its external auditor against claims made against the auditor by third parties.
• An agreement by a financial institution to hold harmless or release its auditor from liability for actual or potential claims that the financial institution itself might assert against the auditor.
• An agreement by a financial institution to limit the remedies available to it in an action against its auditor. With a limited exception for agreements by financial institutions to waive their right to seek punitive damages, the Advisory declares that the use of any of these limitation of liability provisions is an unsafe and unsound banking practice.

Rationale of the Advisory
In broad terms, the agencies are motivated by two factors in issuing the Advisory. First is a perceived “moral hazard” in limiting an auditor’s liability. Second is the reliance that financial institutions, the agencies, and the public place on the external audit of financial institutions. The banking agencies overruled objections raised by commenters on the earlier proposed version of the Advisory that the prohibition might raise the cost of audits, reduce the availability of audit services, and interfere with legitimate risk transfer mechanisms and the rule-setting authority of other organizations.

According to the Advisory, limitation of liability provisions reduce the auditor’s accountability, and, without the bracing discipline of potential financial liability, the auditor’s independence, objectivity, and performance may be adversely affected. To rely on audits performed under these circumstances would be an unsafe and unsound banking practice. Commenters asserted that this assessment was unduly bleak, because external auditors are subject to professional standards and possible discipline by several authorities, all of which are unaffected by private arrangements to limit financial liability. Commenters asked the agencies to provide evidence that the use of limitation of liability provisions had resulted in financial institutions sustaining losses, and argued that the Advisory was unnecessary. The response to these arguments was that the agencies’ responsibility is to guard against risk of loss by financial institutions, and that in view thereof they cannot wait for proof of harm. The agencies determined that professional independence standards for auditors are not sufficient to address concerns over financial institution safety and soundness, and that it is a sufficient basis for taking action that a “reasonable person” might consider audits conducted pursuant to limitation of liability provisions to be less thorough and reliable than they otherwise would be. In any event, the agencies noted, the Advisory is not in actual conflict with the auditor independence standards of the SEC and the AICPA, and, therefore, the existence of those standards is no argument against the Advisory.

To address a different set of objections to the Advisory, the agencies took the opposite approach, and relied directly on the SEC, the AICPA, and the Public Company Accounting Oversight Board. Commenters asserted that it was appropriate to permit auditors to be indemnified or held harmless when fraudulent or knowing misrepresentations by management of a financial institution’s condition contributed to the auditor's liability for an institution's loss. In such a case, they said, shifting the risk to the financial institution provided a proper incentive to the board of directors to understand its institution and perform its own oversight diligently. At a minimum, it was argued, a hold harmless agreement only protected an auditor from claims by a financial institution and not from third party claims. The agencies countered by citing the auditor independence rules of the SEC, AICPA, and PCAOB, and concluded that any sort of auditor protection that is prohibited thereby may lead to less frequent or less robust challenges to management representations and, for that reason, is an unsafe and unsound practice.

Limited Exceptions
In response to comments, one type of limitation of liability was taken under advisement and, at least for the time being, is not prohibited. Provisions in an audit engagement letter that prohibit a financial institution from
seeking punitive damages from its external auditor are not considered to be unsafe or unsound, in view of the auditor’s remaining underlying liability for actual damages. However, indemnification of the auditor against punitive damages sought by third parties is prohibited.

Alternative dispute resolution provisions and jury trial waivers also are permissible. However, financial institutions are warned by the Advisory to be careful to determine that provisions of this nature do not also limit damages, remedies, or liabilities. For example, a provision to limit the auditor’s damages to an amount not to exceed the fees paid for the auditor’s services could result in a substantial unrecoverable loss by a financial institution, and is prohibited. Similarly, a provision limiting the transfer or assignment of claims against an auditor could limit the ability to pursue a claim against the auditor following a sale of assets or line of business, and also is prohibited.

Conclusion
The Advisory reflects banking agency concerns about a potential “moral hazard” in limiting auditor liability, and demonstrates that the agencies are not willing to wait for signs of decline in the reliability of external audits before acting to curtail the use of limitation of liability provisions. Risk-shifting from the auditor to the financial institution for fraud committed by the institution’s own management is a hard case for the agencies to address, but they have decided to just say no. Only when the services performed are less critical, such as when an external auditor is providing non-audit services, are limitation of liability provisions permissible. The agencies may take appropriate supervisory action if unsafe and unsound limitation of liability provisions are included in external audit engagement letters or other audit-related agreements executed after the date of the Advisory’s publication.

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Please call us if you have any questions or would like additional information on the matters discussed above.

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Malpractice Claims May Be Brought in State Court Against Firm That Allegedly Undervalued Stock Held in ESOP

In a recent ruling that could have an impact on professional service providers within the ESOP community, a federal district court magistrate held that ERISA does not preempt a state law claim for professional malpractice brought against a firm that provided valuations for an ESOP.

BACKGROUND

Ameritas Investment Corp. valued the stock of Clark Brothers Transfer, Inc. in connection with the termination of Clark Brothers’ ESOP. Based on the valuation price, all company stock held in the ESOP was redeemed and the ESOP was terminated. Within a year, the company was sold for a price substantially higher than the amount paid to the ESOP participants in the redemption.

Two plan participants filed suit in state court against Ameritas for professional malpractice, negligent misrepresentation, and breach of contract, alleging that Ameritas had rendered opinions that significantly undervalued the company stock held by the ESOP. Ameritas removed the case to federal court on the ground that the claims were preempted by ERISA. The plaintiff plan participants filed a motion to remand the case to state court.

The Complete Preemption Doctrine

Under the complete preemption doctrine, a state law claim can be converted into a claim under federal law if it can be shown that a federal statute has so completely covered the subject matter area in question that all claims should be deemed to fall only under the federal statute. When such preemption is established, the claim can be removed from state court to federal court, federal court procedures will apply instead of state court procedures, and the legal standards under the applicable federal statute will be applied instead of state law standards.

ERISA and Federal Preemption

The magistrate applied a three-prong test to determine whether the complete preemption doctrine should apply in this case: (1) whether the plaintiff has standing under ERISA Section 502(a) to pursue its claim; (2) whether the claim falls within the scope of an ERISA provision that the plaintiff can enforce under Section 502(a); and (3) whether the claim requires an interpretation of the ESOP plan.

The magistrate found that the first prong of the test had been met, because the plaintiffs, as participants in the ESOP, had standing to assert claims under ERISA.

The second prong of the test, however, was not met, according to the magistrate. In analyzing the second prong, the magistrate focused on the scope of ERISA Section 502(a)(2), which allows a participant or beneficiary to seek relief against a plan fiduciary for losses to the plan caused by breach of a fiduciary duty owed to the plan. The magistrate stated that
“in every case charging breach of fiduciary duty under ERISA, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary’s interest, but whether that person was acting as a fiduciary when committing the alleged acts set forth in the complaint” (citing the United States Supreme Court’s decision in *Pegram v. Herdrich*).

The magistrate held that the complaint did not support a claim against Ameritas for breach of fiduciary duty owed to the plan, because Ameritas was not a plan fiduciary. Ameritas was hired to provide stock valuation opinions to the ESOP’s Administrative Committee. Ameritas did not manage or administer the plan, or invest assets for or render investment advice to the plan, and it was not responsible for providing information to or maintaining the records of plan participants and beneficiaries.

The plaintiffs’ claims also failed the third prong of the magistrate’s preemption test, because resolving the claims would not require the magistrate to interpret the terms of the ESOP. According to the magistrate, this test requires more than a “tenuous, remote or peripheral” relationship between the plan and the plaintiffs’ claims. The plaintiffs had not alleged that any specific term of the plan had been violated, or that the terms of the ESOP defined how the stock should be valued or what method of valuation should be used. Accordingly, under the allegations of the plaintiffs’ complaint, there was a state common law duty of care regardless of whether the malpractice involved an ERISA plan, and as such the duty of care did not depend on ERISA in any way.

The magistrate, having ruled that the state law claims were not preempted, remanded the case to state court.

**IMPLICATIONS OF THE DECISION**

This decision – finding that ERISA does not preempt state law claims of professional malpractice against a firm providing valuations for an ESOP – has important implications for the ESOP community. There are a number of substantive and procedural differences between state and federal claims and courts. For example, in state court, common law claims of negligence and breach of contract are often tried by a jury, whereas ERISA does not permit jury trials. Moreover, the standard of care and burden of proof, as well as the type and extent of permissible damages, are often different under state law and under ERISA.

The magistrate’s decision in this case may be subject to challenge. In support of its arguments for preemption, Ameritas cited the U.S. Supreme Court’s recent decision in *Aetna Health Inc. v. Davila*. In that case, plan participants had brought state tort claims against ERISA plan administrators for wrongfully denying them medical coverage under certain benefit plans. The Supreme Court found that any right to recovery under those benefit plans was derived entirely from the rights and obligations established by the plans themselves, and held that the participants’ suits were completely preempted by ERISA.

Ameritas argued that the *Aetna* decision clearly holds that ERISA Sections 502(a)(1)(B) and (a)(2) not only delineate the recovery available against the plan and its fiduciaries, but also eliminate recovery for those losses from any other defendants, including non-fiduciary service providers. According to this argument, since the plaintiffs could have pursued recovery for their losses against the ESOP, its plan administrators, and its fiduciaries under ERISA Section 502(a), their claims against Ameritas should have been completely preempted by ERISA. The Ameritas magistrate rejected this argument, and found that the claims were not preempted. However, the magistrate’s order has been stayed pending review by the federal district court, so it remains to be seen whether this decision will stand.

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**NO BREACH OF FIDUCIARY DUTY IN MERGING TWO ESOP PLANS**

In a recent case involving the merger of two ESOP plans, the U.S. District Court for the District of New Jersey held that plan fiduciaries did not breach their fiduciary duties in allowing the merger, despite allegations that the merger caused some participants’ rights to be diluted.

**THE LAWSUIT**

The case involved a leveraged ESOP sponsored by Herzog, Heine, and Geduld, Inc. (“HHG”), a privately held NASDAQ market maker. Under the terms of the ESOP and related agreements, HHG was required to make contributions to the ESOP, and the ESOP in turn used those funds to repay the loan that the ESOP had taken to purchase the HHG stock. As the ESOP repaid its debt, HHG shares would be released from a suspense account and allocated into participants’ accounts. Unallocated shares would continue to be held in the suspense account.

In July 2000, in response to a tender offer, the ESOP trustee sold the ESOP’s
stake in HHG to Merrill Lynch. In exchange, the ESOP received shares of Merrill Lynch worth approximately $354 million. The allocated and unallocated HHG shares were converted into allocated and unallocated Merrill Lynch shares, and the unallocated shares continued to be held in a suspense account. At the time of the acquisition, close to 27% of the ESOP’s holdings remained unallocated.

Following the acquisition, Merrill Lynch merged the HHG ESOP into the Merrill Lynch ESOP and announced that the Merrill Lynch ESOP would allocate any future releases of Merrill Lynch shares to all participants in the Merrill Lynch ESOP, including to Merrill Lynch employees who had never worked for HHG. Thus, unallocated Merrill Lynch shares that were previously held in the HHG ESOP were dispersed to a wider pool of employees than if the merger had not occurred, essentially diluting the number and value of shares that would have gone to the HHG employees had the merger not taken place.

The plaintiffs in the case were former employees of HHG and participants in the HHG ESOP. They filed an action against HHG, certain executives who had been trustees of the ESOP, and the current ESOP trustee, claiming that HHG and the HHG executives had breached their fiduciary duties in negotiating and approving the Merrill Lynch merger without safeguarding HHG employees’ rights to the unallocated shares. They also claimed that the ESOP trustee had breached its fiduciary duty by tendering the ESOP’s shares without first attempting to prepay the loan so as to allocate to HHG employees any HHG shares that remained unallocated.

**THE COURT’S DECISION**

The court granted summary judgment in favor of the defendants on the basis that the plaintiffs were not entitled to either monetary damages or equitable relief under ERISA. With regard to the claim for monetary damages, the court (following Supreme Court and other precedents) ruled that in order to state a claim for monetary recovery for breaches of fiduciary duty under ERISA Section 409, plaintiffs must demonstrate a “loss to the plan” and this loss must inure to the plan as a whole, rather than to individual beneficiaries or a subclass of beneficiaries. In this case, however, the plan sustained no loss resulting from the merger. All HHG shares held by the ESOP, whether allocated or unallocated, were converted into Merrill Lynch stock.

In their claims for equitable relief, the plaintiffs had asked the court to either reallocate to the accounts of all HHG plan participants the value of the unallocated shares or award money damages in lieu of equitable restitution. However, the court ruled that the plaintiffs were not entitled to either form of relief. The Supreme Court has held that equitable restitution under ERISA Section 502(a)(3) is available where “money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant’s possession.” In this case, however, the court found that the plaintiffs had no vested right to the unallocated shares held in the suspense accounts, because those shares were not accrued benefits protected under ERISA. Accordingly, the plaintiffs could not show that the defendants were in possession of something that rightfully belongs to the plaintiffs, and thus could not support a claim for equitable restitution or monetary damages for loss of the shares.

The court, in ruling that the plan had not experienced a loss resulting from the merger, observed that the plaintiffs had not contended that the HHG shares were of greater value than what the ESOP received for them. Had this been the case, the result may have been different, because there would have been a demonstrable loss to the ESOP. The court was impressed by the fact that the plan as a whole gained significantly as a result of the merger transaction. While it recognized that the plaintiffs were “angry that they . . . must now ‘share,’ for lack of a better term, the unallocated shares with employees never employed by HHG,” the court held that that had no bearing in determining liability under ERISA.
SEC NO-ACTION LETTER ISSUED REGARDING COMPANY’S STOCK TRADING PROGRAM

On October 20, 2005, the Securities and Exchange Commission issued a favorable no-action letter in connection with a proposed stock sale and repurchase plan for TEOCO Corporation, an employee-owned company. The TEOCO plan would establish a limited trading market in company stock in order to provide liquidity for employees who own company stock and to provide other employees with the opportunity to acquire additional shares. While the plan did not involve an ESOP, some aspects of the plan and the SEC’s response will be of interest to ESOP companies.

Under the plan, buy and sell orders from employees would be matched up twice a year during a specified window of time, a price would be determined based on an independent valuation, and all sales and purchases would be effected through the company. A number of protections were built into the plan, including eligibility requirements for participants, caps on the number of shares that can be sold, and provisions to ensure that participating employees receive complete information on which to base their investment decisions.

The no-action letter indicates that the SEC will not recommend enforcement action with respect to the TEOCO plan under the securities laws relating to broker-dealers, despite the fact that neither the company nor its employees or directors will be registered as broker-dealers. The SEC’s letter does not address any other aspect of the securities laws, such as whether the proposed transactions meet the requirements for exemption from registration under the Securities Exchange Act of 1934.

As ESOP companies have sought to provide more liquidity within ESOP plans, various versions of this type of “internal market” have been considered. While no-action letters are not legal precedent, this no-action letter provides a certain level of comfort to companies considering such plans, at least with respect to broker-dealer issues. As always, however, a word of caution is in order. Any company that is considering adopting an ESOP should be sure to obtain a federal and state securities law analysis of each particular transaction structure. Whether a specific transaction is structured in compliance with the securities laws will depend on all the facts of the particular transaction, including but not limited to the dollar amount involved, the sources of financing (including whether transfers are to be made from participants’ 401(k) accounts), the total value of the business being acquired, the qualifications of individual investors, whether debt or equity securities are involved, the states in which investors reside, and other transactions that have occurred in the past or are anticipated to occur in the future.

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