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BAKER BOTTS INTERNATIONAL DISPUTE RESOLUTION GROUP STRENGTHENED

Expansion in IDR Matters Creates Need to Add Leading Arbitration Lawyers Escobar, Lim

HOUSTON, January 31, 2008 -- International arbitration lawyers Steven Y. H. Lim and Alejandro Escobar have joined Baker Botts L.L.P. as special counsel. Both have extensive experience representing clients in international arbitrations, including investment treaty and commercial disputes.

The addition of Lim and Escobar reflects the continued expansion of Baker Botts' international dispute resolution group. Lim, who joined the firm on January 1, 2008, is based in the Baker Botts Hong Kong office. Escobar will join the firm's London office on February 4, 2008. They will both handle dispute resolution and arbitration matters for clients arising throughout the world.

"The volume and importance of the arbitration matters we are handling created a need to add the legal skills of Alejandro and Steven to our dispute resolution group," said Michael Goldberg, head of the International Arbitration and Dispute Resolution group at Baker Botts. "We are extremely pleased to add such highly-qualified members to our team. Given the growth of our arbitration practice, adding Steven and Alejandro to our group will allow us to continue to provide our clients the best legal counsel in this field."

Lim, who is one of less than 30 international arbitration experts recognized throughout Asia by Chambers Asia, has more than 13 years of experience in arbitration and dispute resolution proceedings. Although previously based in Singapore, Lim has worked throughout Asia and has been recognized as a leader in international arbitration. Chambers Global editors praise him for his "extensive experience of cross-border arbitration." Chambers Asia recently described him as "meticulous, technically-minded and excellent at assessing the merits of a client's position."

"Baker Botts has a global reputation in international arbitration, with a strong practice in Asia-based work," Lim said. "The firm provides a solid platform to build on. I look forward to working with my new colleagues in Hong Kong, Beijing and throughout the firm to grow Baker Botts' arbitration practice."

Escobar is a public international law and arbitration specialist. Formerly a senior counsel at ICSID and most recently with Latham & Watkins, Escobar is widely respected for his investment treaty arbitration expertise. In addition to handling more than a dozen of the first investor-State arbitration proceedings ever brought, he has served as an arbitrator in LCIA proceedings and is a Visiting Professor at UCL. Escobar is recognized in leading publications, such as Who's Who in Commercial Arbitration, Who's Who in Public International Law, Chambers UK and Chambers Global, where he is described as a "leading light."

"Joining a talented and highly respected arbitration team such as Baker Botts' will allow me to continue to represent clients confronted with complex legal issues," Escobar said. "The firm's global footprint provides an excellent opportunity to continue building my practice."

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About Baker Botts L.L.P.

Baker Botts L.L.P., dating from 1840, is a leading international law firm with offices in Austin, Beijing, Dallas, Dubai, Hong Kong, Houston, London, Moscow, New York, Riyadh and Washington. With approximately 800 lawyers, Baker Botts provides a full range of legal services to international, national and regional clients. For more information, please visit www.bakerbotts.com.

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Gide Loyrette Nouel



CLAYTON UTZ BOOSTS ITS PROJECT FINANCE RANKS

5 February 2008: Clayton Utz is expanding its project finance capability in anticipation of increased market activity in 2008, hiring finance specialists Simon Irvine and Chris Redden in its Debt Finance group.

Simon joins the firm as a partner, having been a partner at Pinsent Masons in Hong Kong where he specialised in international finance transactions with a project finance focus. Prior to that, he spent 10 years at Allen & Overy where he advised on a wide range of high-profile project financings throughout the Asia Pacific region.

Chris meanwhile joins the Debt Finance group as a senior associate. Chris has recently returned to Australia from London, where he spent 6 years with Linklaters specialising in international project finance across a broad range of sectors.

Simon said he expected strong growth in the Australian project finance market in 2008 as governments continued to pursue PPP projects, and private sector investment in projects in the resources, energy, renewables and infrastructure areas continued to increase.

"Banks have recently been boosting their project finance teams in Australia to accommodate an upswing in activity, and Australian corporates and financial institutions are also expanding their Asian activity on the back of investment opportunities in the region. This will fuel an increasing need for support from law firms able to provide top-quality project finance lawyers with an understanding of both the domestic and international financing market," said Simon.

"We are also seeing increasing investment in infrastructure and energy projects across the country. The commodities boom and high oil prices are also likely to encourage greater investment in projects by independent small cap companies as they become more bullish about their development prospects. It is very exciting to join a first rate banking team looking to focus its activities in this growth area."

Clayton Utz Banking & Finance head Grant Fuzi said the appointments reflected the firm's aim of attracting talented senior practitioners with experience that complemented its growth strategy.

"Simon and Chris both have international experience on a range of major global project financings across several key sectors, which will give our finance team added capability as we look to capitalise on the expected upswing in project finance activity in 2008. Their experience in advising both project developers and lenders at an international level will be invaluable."

For additional information visit www.claytonutz.com

ENDS

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FRASER MILNER CASGRAIN—GIL REMILLARD NAMED CHIEF NEGOTIATOR FOR QUEBEC IN NEGOTIATIONS WITH THE GOVERNMENT OF FRANCE

January 22 2008 - Montreal

Jean Charest, Premier of Québec, has named Gil Rémillard as chief negotiator for the provincial government in negotiations with the government of France on the establishment of a Québec-France labour mobility agreement. Rémillard, Counsel at Fraser Milner Casgrain LLP (FMC), has served the Québec government in numerous positions during his 30 year career, including Minister of International Relations, Minister of Public Security, Minister of Justice, Attorney General and Minister responsible for Canadian Intergovernmental Affairs.

Charest noted that Rémillard's exceptional qualifications make him the ideal choice as negotiator in discussions that could potentially lead to a significant increase economic activity and movement of labour between France and Québec. The agreement proposed by Charest would ensure that France and Québec recognize each other's professional qualifications for doctors, nurses, engineers, etc. In signing the accord, Charest hopes to encourage a move towards a Canada-Europe free trade agreement. To view the press release, [click here](#) (available in French only).

For additional information visit www.fmc-law.com

LUCE FORWARD ANNOUNCES FIRM MANAGEMENT 2008

Robert J. Bell reelected as Managing Partner and John Leslie selected to serve on the Executive Committee

SAN DIEGO (January 10, 2008) – Luce Forward Hamilton & Scripps LLP today announced that Robert J. Bell has been re-elected to serve as the firm's Managing Partner. In addition, John W. Leslie, a partner in Luce Forward's Energy and Regulatory practice group, will join the firm's four-person Executive Committee. Remaining management positions will remain unchanged.

Bell began his law career at Luce Forward and has served as the firm's Managing Partner since January 2004. He has been elected to another two-year term. Leslie, who practices from the firm's Carmel Valley/Del Mar office, will replace Los Angeles partner Kathy Jorrie. Leslie previously served on the Executive Committee from 2005 to 2006.

Luce Forward's Executive Committee has the authority and responsibility to manage the business of the firm's partnership, and members are elected by the firm's partners. In addition to Bell and Leslie, other members on the Executive Committee include partners Charles A. Danaher and David M. Hymer.

"Being Luce Forward's Managing Partner has been both rewarding and educational," Bell said. "I am honored that they have chosen me to remain in this position and grateful for the opportunity to be continually surrounded by so many skilled attorneys."

"I am excited to again be elected to Luce Forward's Executive Committee and serve my fellow partners," Leslie said. "I am looking forward to helping build Luce Forward's statewide presence."

Founded in 1873, Luce, Forward, Hamilton & Scripps LLP is a full-service California law firm with offices in San Diego, Carmel Valley/Del Mar, Los Angeles, Orange County, Rancho Santa Fe and San Francisco.

For more information, visit www.luce.com

HOGAN & HARTSON COLORADO OFFICE LAUNCHES PILOT PROGRAM COMBINING ENVIRONMENTAL AND EMPLOYEE WELLNESS

DENVER, January 22, 2008 – Hogan & Hartson LLP has launched a unique pilot program in its Colorado offices designed to simultaneously promote “green” business practices while improving the health of its 175 Colorado employees. The firm will use its experience in Colorado to determine the direction of its efforts in its other offices around the world.

The firm’s new “EarthWell” initiative puts in place standards and policies to reduce energy use and minimize waste at the firm’s offices in Denver, Boulder, and Colorado Springs. At the same time, the firm is enhancing its employee wellness program by offering information, services, and incentives for participation.

“We see a direct relationship between protecting the environment and helping to ensure the long-term health and wellness of our people,” said J. Warren Gorrell, Jr., Chairman of Hogan & Hartson.

Cole Finegan, Managing Partner of Hogan & Hartson’s Denver office, said, “We’re asking everyone here to consider the impact their work has on our planet, and to help make sustainability an even stronger part of the firm’s culture. We also recognize that we’ve got a stake in the health and welfare of our employees in what may sometimes be a high-stress business environment.”

As part of its EarthWell initiative, Hogan & Hartson announced a commitment to purchase wind power credits for its Denver office, and has set a goal to reduce office waste in all Colorado offices. The firm is installing energy efficient office equipment, eliminating paper dishware, buying “green” office supplies, and has adopted a double-sided printing policy.

In addition, the Denver and Boulder offices have joined the American Bar Association’s Environmental Protection Agency Law Office Climate Challenge, which promotes sustainability among law firms and their vendors.

As part of the employee wellness component of the firm’s EarthWell initiative, Hogan & Hartson recently hosted its first “health month,” which included complimentary health screenings, educational programming, and a fitness challenge with prizes to employees that excelled at meeting personal goals. Employees were given stainless steel water bottles and pedometers, to help meet a firm challenge for employees to walk between 5,000 and 10,000 steps each day.

To build awareness, the firm will provide regularly scheduled programs on both environmental and health topics, in addition to making a wide range of informational materials available.

“Individually, these are all small steps,” said Finegan. “But taken together across all of our three Colorado offices, and potentially our world-wide operations, it’s a big step for our employees and the communities we serve.”

About Hogan & Hartson

Hogan & Hartson is an international law firm founded in Washington, D.C. with more than 1,100 lawyers in 22 offices worldwide. The firm has a broad-based national and international practice that cuts across virtually all legal disciplines and industries.

Hogan & Hartson has offices in Baltimore, Beijing, Berlin, Boulder, Brussels, Caracas, Colorado Springs, Denver, Geneva, Hong Kong, London, Los Angeles, Miami, Moscow, Munich, New York, Northern Virginia, Paris, Shanghai, Tokyo, Warsaw, and Washington, D.C.

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

TOZZINI FREIRE ADDS NEW PARTNER TO BRASILIA OFFICE

Marta Mitico Valente is the new partner of TozziniFreire Advogados, responsible for the firm's Brasília office.

Marta has been working in the Federal District for more than 20 years, with wide experience in coordinating actions before the Executive, Legislative and Judicial Branches. Her practice includes proceedings in higher judicial courts, regulatory and banking matters, disciplinary and administrative proceedings, and legislative proceedings. In addition, she assists clients in hiring foreign manpower and in obtaining work visas.

Marta graduated from the Law School of Pontifícia Universidade Católica of São Paulo in 1981 and has a Master's degree in International Economic Law from the same university. She is also a teacher of Tax and Financial Law at

Universidade do Distrito Federal and at the Instituto Brasileiro de Estudos Tributários – IBET. Prior to joining

TozziniFreire, Marta worked as a partner of the law firm Pinheiro Neto Advogados.

Contact information for the new member:

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For additional information visit www.tozzinifreire.com.br



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Gide Loyrette Nouel



GIDE LOYRETTE NOUEL SHANGHAI

ADVISES AIR LIQUIDE IN CHINA ON ESTABLISHMENT OF JOINT VENTURE WITH TIANJIN SODA PLANT

5 February 2008

The Gide Loyrette Nouel Shanghai team advised Air Liquide regarding the negotiations and incorporation of a joint venture with Tianjin Soda Plant, a subsidiary of the Tianjin Bohai Chemical Industry group.

Air Liquide and Tianjin Soda have set up a joint venture in Tianjin, the capital of which is divided between Air Liquide (majority) and Tianjin Soda (minority). This entity is building two air separation units (ASU), which will each have a production capacity of 2,000 tons per day, in order to supply Tianjin Soda, as well as other clients located in the Lingang industrial park before the end of 2008.

Air Liquide will commercialize the oxygen, nitrogen and argon supplied by the new ASU. The initial investment of the joint venture will amount to approximately 80 million euros.

Legal counsel to Air Liquide:

Gide Loyrette Nouel A.A.R.P.I. Shanghai (David Boitout, partner, assisted by Bruno Grangier, senior associate and Jiang Xi, junior associate)

For additional information visit www.gide.com

HOGAN & HARTSON

REPRESENTS TATA CHEMICAL IN \$1BILLION ACQUISITION OF GENERAL CHEMICAL INDUSTRIAL PRODUCTS

NEW YORK, January 31, 2008 — Hogan & Hartson LLP is representing Tata Chemicals Limited (TCL), part of the TATA Group, in its definitive agreements to acquire the soda ash business of General Chemical Industrial Products Inc. (GCIP), a U.S.-based chemical company, for \$1.05 billion. Harbinger Capital Partners is GCIP's majority shareholder.

Tata Chemicals is a global leader in soda ash production. The merger will provide TCL access to markets in North America, Latin America, and the Far East, which will complement its existing markets. The transaction is subject to shareholder and regulatory approvals.

New York M&A partner Waajid Siddiqui of Hogan & Hartson's India practice is the lead attorney in this transaction. Corporate partners Deborah Staudinger and Marcia Wiss, tax partner Scott Friedman, environmental partner Scott Reisch, and employee benefits partner Joseph Rackman are also assisting in this deal, along with associates Natalia Nuckols and Wylie Levone.

For additional information visit www.hhlaw.com

LOVELLS

ADVISES URALS ENERGY ON £66MILLION SHARE PLACEMENT

Lovells has advised Urals Energy, an AIM-listed leading independent exploration and production company operating in Russia, on the placing of shares to raise £66 million.

The sums raised will be partly used to help fund Urals' US\$590 million acquisition of an interest in privately owned Russian exploration and production company, OOO Taas-Yuriakh Neftgazodobycha ("Taas"), a deal on which a cross-border Lovells M&A team advised in November 2007. Urals' acquisition of a 35.3% interest in Taas, which holds licences to develop the Srednebotuobinskoye oil, gas and condensate field in East Siberia, represents a landmark acquisition for Urals, as a result of which it will more than double its net proved-plus-probable oil reserves.

The initial share placement completed on 18 December 2007 and the over-allotment on 8 January 2008.

The Lovells team in London advising on the share placement was led by capital markets partners Andrew Carey and Katherine Mulhern, with assistance from senior associate Zhanna Zenina and associates Rahat Dar and Ozlem Gurakar. The initial acquisition of Taas was led by Moscow local managing partner Oxana Balayan and corporate consultant Maria Baeva with assistance from corporate associate Shamil Sadykov. Energy, power and utilities partner John Cooper led the Lovells' London M&A team, with assistance from senior associate Ben Higson.

Katherine Mulhern said:

"We are delighted to have acted for Urals Energy on this important financial transaction, which strengthens our existing relationship with this important client. The transaction also highlights our international capital market team's considerable experience in handling multi-jurisdictional transactions and was successfully concluded thanks to the co-ordinated efforts of our Moscow and London offices."

Andrew Carey said:

"Our Moscow and London capital markets practice is continuing to go from strength to strength. This transaction closed off a fabulous year which saw us act on deals raising in excess of US\$2.78 billion for Russian corporates and banks in the international markets."

For additional information visit www.lovells.com

Notes for editor

Lovells' Russian work

Since the early 1990s, Lovells have been advising foreign investors and Russian clients on a wide range of projects in the region. In 1997, our fully accredited office was established in Moscow. Our Moscow Office is headed by Oxana Balayan, ranked as a Recommended Lawyer by Chambers Global 2007, while Lovells' London capital markets practice is headed by Andrew Carey.

Today Lovells CIS is one of the leading law firms in Russia and has built a very strong legal practice serving the needs of Russian and international clients. According to Chambers Global 2007, "[clients] appreciate the firm's valuable connections: 'It is important that you can rely on a hub, someone who has contact with all the national institutions, authorities and key opinion leaders in the field.'"

Recent headline deals of Lovells CIS capital markets team include acting for Ritzio Central Region Limited on a US\$165 million credit-linked note in November 2007, acting for ABN AMRO and Standard Bank Plc on a US\$43 million issue of loan participation notes due 2017 and RUR 5.4 billion loan participation notes due 2009, and acting for Commercial Bank "Sudostroitelny Bank" (LTD) on the establishment of a US\$500 million programme for the issuance of subordinated loan participation notes and senior loan participation notes and issue of US\$50 million subordinated loan participation notes off this programme in December 2007.

MORGAN LEWIS

ADVISES PEARSON PLC WITH \$950 MILLION ACQUISITION OF HARCOURT

January 28, 2008

Morgan Lewis represented Pearson plc in connection with its \$950 million acquisition of Harcourt Assessment, owned by Reed Elsevier, before the Antitrust Division of the U.S. Department of Justice. In order to obtain U.S. antitrust clearance, Pearson agreed to divest up to four clinical assessment tests, including one in development. The tests that will need to be divested represent less than 1% of the total revenues relating to the business being acquired. The Morgan Lewis team consisted of partners Harry Robins and Willard Tom who were assisted by associates Heather Fuentes, Alexis Gilman, and Sarah Rabinovici.

Morgan Lewis also represented Pearson on the corporate side of the deal which was signed in May and is expected to close this week.

For additional information visit www.morganlewis.com

RODYK & DAVIDSON

SINGAPORE COUNSEL TO ATLANTIC BRIDGE VENTURE IN ACQUISITION OF LOGICACMG TELECOM PRODUCTS

Atlantic Bridge Ventures - GBP 265 million

Rodyk was Singapore counsel for Atlantic Bridge Ventures, a private equity fund, which led a consortium of private equity buyers in their acquisition of LogicaCMG's telecom products business. LogicaCMG Telecoms Products is the world's leading provider of converged mobile messaging solutions for text and multimedia messaging for 300 customers, who serve over one billion customers worldwide.

Partner S. Sivanesan led this transaction supported by associate Sunil Rai.

For additional information visit www.rodyk.com

MUNIZ RAMIREZ PEREZ-TAIMAN & LUNA-VICTORIA

ADVISES BARRETT RESOURCES (PERU) LLC IN SALE TO PERENCO

Lima, January 2008.- Perenco has acquired the totality of shares from Barrett Resources (Peru) LLC, Suc. del Peru, a hydrocarbons company that operates under license agreements in the Northern side of the Peruvian Jungle. Barrett's main asset is the License Contract for Hydrocarbons Exploration and Exploitation in the Block 67 in the Marañon Basin. Pursuant to this takeover, Barrett will change its denomination to Perenco Peru Limited. Paiche, Dorado and Piraña fields are part of the Block 67, and together they represent over 300 million heavy oil barrels, the estimated production potential of these fields - when completed - is 100.000 bppd. This transaction was performed under a share sales contract.

About the companies. **Perenco** is a French petroleum company based in London that has hydrocarbons exploration and production activities in Colombia, Ecuador, Venezuela and Guatemala. **Barrett Resources (Peru) LLC, Suc. del Peru** is a hydrocarbons company that operates under license agreements in the Northern side of the Peruvian Jungle. **Block 67 Exploration LLC** is the sole owner of Barrett Resources (Peru) LLC, Suc. del Peru's shares.

Involved entities: Block 67 Exploration LLC, (*Seller*); Perenco (*Acquirer*)

Legal advisers of the seller Muñiz, Ramírez, Pérez-Taiman & Luna-Victoria Abogados: Jorge Pérez-Taiman, partner; Augusto Astorga, senior associate; Milagros Fernández, senior associate; and Patricia Kosa, associate.

For additional information visit www.muniz.com

NAUTADUTILH

OBTAINS LANDMARK VICTORY ON SAFEGUARD CLIENT-ATTORNEY PRIVILEGE

NautaDutilh obtained a landmark victory in a case regarding implementation of the Community directive on prevention of the use of the financial system for the purpose of money laundering. This decision is likely to have consequences for other countries as well.

François Tulkens and Vincent Ost acted in a case brought by the Belgian Bar Association and the CCBE (Council of Bars & Law Societies of Europe), amongst others, before the Belgian Constitutional Court seeking to set aside certain provisions of the legislation transposing into national law Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering.

The Constitutional Court, basing itself on the case law of the European Court of Justice and notably the Court's decision of 26 June 2007, after rightly stating that lawyers cannot and should not be confused with the authorities entrusted with investigating violations, held as follows:

information that becomes known to a lawyer through the exercise of activities essential to the legal profession, including in areas covered by the directive, namely assisting and defending clients in judicial proceedings, and even outside the context of legal proceedings, remains covered by the attorney-client privilege, like legal advice, and cannot be disclosed to the authorities;

a lawyer can be bound by a duty to disclose information only in the context of those activities listed in the directive and when the lawyer goes above and beyond the terms of his or her specific engagement of defending a client in judicial proceedings or providing legal advice;

to safeguard the attorney-client privilege, all information communicated to the authorities must be sent through the president of the bar association.

Moreover, the Court set aside the provisions that require non-lawyers employed by law firms to make a declaration about certain suspicious activities. In doing so, the Constitutional Court adopted a stance more protective of fundamental rights than the ECJ's.

It will be interesting to see how this decision will influence other jurisdictions confronted with similar questions regarding implementation of the Community anti-money laundering legislation into national law.

For additional information visit www.nautadutilh.com

WILMERHALE

SCORES FOUR VICTORIES IN ONE WEEK AT FEDERAL COURT

February 8, 2008

WilmerHale continues its remarkable record in IP litigation matters by winning four Federal Circuit cases in one week. The victories all involved patent infringement, and, in two cases, affirmed damage awards totaling \$74,720,000. This news comes just a few weeks after WilmerHale's "powerhouse IP litigation group" earned the *The American Lawyer's* highest accolade – "IP Litigation Department of the Year." The four case wins are outlined below.

TiVo Inc. v. EchoStar Communications Corp. – January 31 – Obtained for TiVo a favorable decision in which the Federal Circuit affirmed a jury verdict finding that EchoStar infringed a TiVo patent directed to digital video recorder ("DVR") technology, a damages award of \$74 million, and a permanent injunction. *WilmerHale legal team: Seth Waxman, Edward DuMont*

Monsanto Co. v. David – February 5 – Gained for Monsanto a favorable decision in which the Federal Circuit affirmed a judgment that defendant Loren David infringed Monsanto's patents on Roundup Ready biotechnology, affirmed an award of \$720,000 for enhanced damages and attorney fees, and remanded for calculation of a reasonable royalty. *WilmerHale legal team: Seth Waxman, Paul Wolfson.*

Prism Technologies LLC v. Verisign, Inc., RSA Security, Inc., Netegrity, Inc., Computer Associates International, Inc., and Johnson & Johnson Services, Inc. – February 6 – Represented RSA Security (a division of EMC Corporation) in a multi-defendant action in which the Federal Circuit summarily affirmed a judgment of noninfringement with respect to a patent directed to a security system for computer networks. *WilmerHale legal team: William Lee, David Bassett, Mark Selwyn, Greg Teran, Donald Steinberg.*

Ampex Corp. v. Eastman Kodak Co. – February 7 – Obtained for Eastman Kodak and Altek a favorable decision in which the Federal Circuit summarily affirmed a summary judgment of noninfringement in a case involving a patent directed to video still store technology. *WilmerHale legal team: William Lee, Donald Steinberg, Michael Summersgill, S. Calvin Walden.*

For additional information visit www.wilmerhale.com



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KIM, CHANG & LEE

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Deadline is 10th of each month.

What's a payment "under" a reinsurance contract?



Can the liquidator of an insurer avoid the requirement to forward reinsurance payouts to the parties it has insured?

A recent NSW Supreme Court decision (*re HIH Insurance Limited* [2008] NSWSC 9) raises this tantalising possibility - but leaves some vital issues hanging in the air.

Background

HIH took out reinsurance as agent for its subsidiary insurance companies. The premiums were paid by two of those subsidiaries.

The HIH group went into liquidation. Under the terms of the reinsurance contract, there was a deadline by which HIH had to give notice if it wanted to commute the contract.

No notice was given by the deadline. Nevertheless, HIH's liquidators and the reinsurer negotiated a termination of the reinsurance. Under the termination agreement, the reinsurer would pay a large sum of money to HIH (in settlement of "all existing and potential claims").

The liquidators wanted to distribute that money to the two subsidiaries which had paid the premiums. Before giving the go-ahead, the Court had to consider whether the payment was subject to section 562A (ie. was directly payable to claimants under insurance policies issued by the HIH subsidiaries).

Section 562A did not apply

The Court said that section 562A did not apply.

It started from the proposition that only the two subsidiaries which had paid the premiums were entitled to the benefit of the payout. It then held that section 562A did not apply to the payout, for two reasons:

- (1) There was no evidence that either subsidiary had incurred a liability (under an insurance contract) that was covered by the reinsurance.
- (2) The payout had not been received "under the contract of reinsurance" (section 562A(1)(b)). It had been received under a contract that was not the original contract of reinsurance:

"the parties to the [reinsurance contract] simply decided to put an end to it. Having negotiated terms upon which the existing contract was to be terminated and releases were to be given, they embodied those terms in a new contract to which they then committed themselves. To the extent that those terms entailed the payment and receipt of money, the payment and receipt were 'under' the new contract [as opposed to the reinsurance contract]."

Implications

This decision must be treated with caution.

It appears to say that section 562A will not apply to a payment received under an agreement to terminate a reinsurance contract (because that payment is not contemplated by the reinsurance contract itself).

The \$64,000 (or, in this particular case, \$214 million) question then is: can section 562A be avoided simply by terminating the reinsurance contract and negotiating a payment under a separate termination contract?

One obvious stumbling block is the fact that the relevant HIH subsidiaries did not have any insurance liabilities at the time of the termination. It is far from certain that a court would be willing to waive section 562A if the insurer was facing claims at the time of termination of the reinsurance. This could result in a broader judicial interpretation of what constitutes a payment "under" a reinsurance contract. On the other hand, a future court may take the view that this is a bridge too far, and that the only way to rope in this type of termination payment is by an amendment to section 562A itself.

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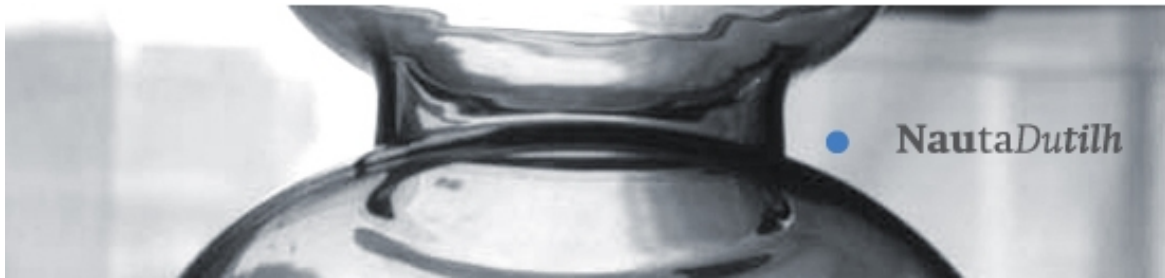
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print

Newsflash

Intellectual Property



Use of trademark as adword - continued -

Number 2, 16 January 2008

This newsletter is sent from our Amsterdam office

On 19 December 2006, a ND Newsflash was sent about a judgment of the Amsterdam Court of Appeal allowing resellers of branded products to use the trademark (and variants thereof) as an adword in search engines such as Google under certain conditions. On 9 January 2008, the District Court of The Hague confirmed the existence of such a right and even extended it to some extent in a judgment rendered in subsequent proceedings in the same case.

Procedural framework

Portakabin (the producer of modular portable buildings and proprietor of the trademark "Portakabin") brought interlocutory proceedings against Primakabin (a reseller of modular portable buildings) to challenge the latter's use of Portakabin as an adword. The court ruled against Portakabin, which then appealed against that judgment to the Amsterdam Court of Appeal and also commenced full proceedings on the merits before the District Court of The Hague. The judgment in the full proceedings on the merits is the subject of this newsflash. In the meantime, Portakabin has appealed (in cassation) against the judgment of the Amsterdam Court of Appeal to the Netherlands Supreme Court, whose decision is still expected.

District Court of The Hague - adwords allowed and less restricted

In the full proceedings on the merits, the District Court of The Hague held, in line with the Amsterdam Court of Appeal, that resellers of branded products may use the trademark (and variants thereof) as an adword if (i) they are regular resellers of those products, (ii) the products have been put on the market in the EU by the trademark proprietor and (iii) the adword is used in connection with the sale of such products. The proprietor's trademark rights are in that case exhausted. Based upon the third requirement, the court held that Primakabin (the reseller) could not use Portakabin as an adword in combination with an advertisement for new and used units, since the advertisement related to Portakabin units as well as those of other brands and Primakabin offered only used Portakabin units. Primakabin could, on the other hand, do so in combination with an advertisement for "used Portakabin units" or even "used portakabins". Significantly, however, the District Court of The Hague (in contrast to the Amsterdam Court of Appeal) did not think it necessary for the link to Primakabin's website that appeared when the adword was entered in the search engine to take the potential customer directly to the subpage on which the relevant branded product was offered, i.e. *deep linking* was not required.

This judgment will enable resellers of branded products to advertise on the Internet even more effectively than they already could under the Amsterdam judgment.

Contact

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- Implementing Regulations to open the Brazilian Reinsurance Market
- Brazil: The Concept of "Large Companies"
- Brazil: New Tax Rates
- Brazil: Bankruptcy and Restructuring Law – The Interpretation of Courts in its Second Anniversary

Administrative Law

BRAZIL: CONCESSION OF BELTWAY OPERATION

On January 9, 2008, the State of São Paulo, through its transportation agency ARTESP, published the Invitation to Bid for the operation of the West Branch of Mario Covas' Beltway System (*Trecho Oeste do Rodoanel Mário Covas – "West Branch"*).

The West Branch is 32 Km long and cuts through the cities of Embu, Osasco, Carapicuíba, Barueri, Santana do Parnaíba, and São Paulo. The West Branch will be exploited for 30 (thirty) years under a concession system.

The winner bidder shall pay a fixed amount of R\$ 2 billion (approximately US\$ 1,2 billion) to the Roads Department of São Paulo within the first two years of the concession period. It shall also make certain construction works, as referred to in the Invitation to Bid, before starting the exploitation itself.

In addition, the future concessionaire shall pay to ARTESP a monthly variable regulation and inspection fee equivalent to 3% of its gross revenues, excluding financial revenues.

All documents specified in the Invitation to Bid shall be delivered **on March 11, 2008, at a Public Session**.

The bidder offering the lowest toll rate will be deemed the winner, provided that the documentation attesting its legal eligibility is in order.

Brazilian and foreign companies, individually or in a consortium, may participate in the public bidding. All bidders must post a bid bond.

The future concessionaire must be a stock corporation incorporated in Brazil and shall have the exploitation of the West Branch as its sole purpose.

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New Rules on Perfection of Mortgage over Movable Properties

By Li Jinnan* and Pan Ye**

I. Background

On October 17, 2007, the State Administration of Industry and Commerce (“SAIC” and its local counterpart “AIC”) issued the “Rules on Registration of Mortgage over Movable Properties” (“New Rules”)¹, which came into force on the same day. As an implementation of the recently effective Property Right Law of the People’s Republic of China (“Property Law”)², these New Rules supersede the previous Rules on Registration of Mortgaged Movable Properties issued by SAIC in 1995 (“Old Rules”)³. We herein set out an introduction on the key features of the New Rules in comparison to the Old Rules.

II. The Scope of Mortgageable Movable Properties

Under the 1995 PRC Security Law (the “Security Law”)⁴, which was partly superseded by the Property Law, only existing movable properties could be mortgaged. Accordingly, the Old Rules only allow the registration of mortgage over existing movable properties. In contrast, the Property Law has broadened the range of mortgageable movable properties by allowing the mortgage of certain kinds of future movable properties, including (i) production equipment; (ii) raw materials; (iii) semi-finished products, and (iv) finished products⁵. According to the New Rules, the mortgage of such existing and future movable properties shall be registered with the county level AIC at the domicile of the mortgagor⁶. The permission to mortgage future properties, as deemed by many practitioners, would provide what is in effect a floating charge over those movable properties.

III. The Legal Effect of the Registration

Under the Security Law and the Old Rules, a mortgage agreement in relation to the mortgage of movable properties may only take effect upon the completion of mortgage registration⁷. The New Rules, along with the Property Law, took a different approach by clearly stating that a mortgage over movable assets would come into effect upon the effectiveness of the relevant mortgage agreement while the mortgage agreement would come into force upon its conclusion⁸. This means the mortgages over movable assets could be effective even without

¹ State Administration of Industry and Commerce order No. 30, October 17, 2007;

² Adopted by the fifth session of the National People’s Congress on March 16, 2007 and effective as of October 1, 2007;

³ State Administration of Industry and Commerce order No. 35, October 18, 1995;

⁴ Adopted by the Standing Committee of the National People’s Congress on June 30, 1995 and effective as of October 1, 1995;

⁵ Article 181 of the PRC Property Law “enterprises, practitioners, agriculture producers may mortgage their existing or future production equipment, raw materials, semi-finished products, and finished products. The creditor shall have priority over the mortgaged moveable property when the debtor cannot discharge its obligations when due or upon occurrence of the circumstance as agreed to enforce mortgage.”

⁶ Article 2 of the New Rules: “mortgage of existing or future production equipment, raw materials, semi-finished products, and finished products provided by enterprises, practitioners, agriculture producers shall be registered at the Administration of Industry and Commerce at county level where the mortgagor locates. Without such registration, the mortgage may not withstand a bona fide third party.”

⁷ Article 41 of the Security Law: “The mortgage of properties falling into the categories listed in Article 42 shall be registered and the mortgage contract goes into effect as of the date of registration.” Article 3 of the Old Rules: “The mortgage of the following moveable properties other than air plans, vessels and vehicles shall be registered at the relevant administration of industry and commerce, and the mortgage contract goes into effect as of the date of registration: ...”

⁸ Article 15 of the PRC Property Law: “Unless otherwise provided by law or in the contract, a contract establishing, modifying, transferring or terminating property rights shall come into effect when the contract is concluded. The effect of the contract is not affected by failure of registration of the property rights.”

registration. However, the mortgagee still needs to perfect such mortgage through registration to guard its security interest against bona fide third parties⁹.

IV. The Registration Fee

Different from Old Rules setting forth how to charge mortgage fees and the default allocation of such fees between the parties, the New Rules are silent on such fee issues. Such silence may signal that the AICs would not charge any registration fees for the registration of mortgage over movable properties. This still needs to be tested in practice.

V. Documents to Be Submitted

For the purpose of applying mortgage registration, the New Rules only requires the submission of (i) mortgage registration form and (ii) identity certificates of the mortgagor and the mortgagee¹⁰. If the mortgagor and the mortgagee entrust a third party to handle the registration, the identity certificate of such third party and a power of attorney will also be required. Previously, under the Old Rules, the mortgagor and the mortgagee were required to submit a large number of documents, including the mortgage contract and the relevant primary agreement¹¹.

VI. Degree of Review

According to the Old Rules, before its acceptance of the registration application¹² the relevant AICs shall check, among other things, (i) whether the properties in question have been repeatedly registered for mortgage; and (ii) whether the security period will extend beyond the period within which the properties will be owned or used by the mortgagor. In contrast with the substantial review approach under the Old Rules, the New Rules seems to only require the relevant AICs confirm the completeness of the application materials presented and the truthfulness certified by both parties of the information therein¹³.

VII. Conclusion

The New Rules shall be applauded for providing a uniform guideline for the county level AICs to make the registrations of the mortgage over movable properties and to make available to the general public the inquiry of such mortgage, which will remarkably enhance the willingness of the banks to grant facility against such movable properties and broaden the finance channels of many production enterprises. However, it does leave several issues to be further explored and clarified, including how to crystallize the floating mortgage upon its enforcement; how long it will take to complete the mortgage registration; and whether mortgage could be registered to secure a debt higher than the value of the movable property. All these unresolved issues need to be further clarified and tested in practice.

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

⁹ Article 188 of the PRC Property Law: "For mortgage of properties listed in item (4), (6) or vessels or air plans under construction falling under item (5) of Article 181, the mortgage right is created upon conclusion of the mortgage agreement; without registration, the mortgage right may not withstand a bona fide third party."

¹⁰ See Article 3 of the New Rules.

¹¹ See Article 4 of the Old Rules.

¹² See Article 7 of the Old Rules.

¹³ Article 7 of the Old Rules provides documents to be submitted to AIC for review, while the New Rules does not provide such a requirement.

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**TO: GENERAL MANAGERS AND HEADS OF LEGAL
DEPARTMENTS OF BRANCHES OF FOREIGN COMPANIES
ESTABLISHED IN COLOMBIA**

SUBJECT: MEETING OBLIGATIONS - FIRST HALF OF 2008

The purpose of this memorandum is to inform you of the procedures that branches of foreign companies established in Colombia should carry out during the first half of each year, in order to comply with legal provisions of a commercial, foreign exchange, labor and regulatory nature.

I. Commercial and Foreign Exchange Obligations

1. Renewal of Mercantile Registration. The Commercial Code states that the mercantile registration of branches of foreign companies should be renewed during the first three months of every year; in other words, by March 31, 2008.
2. Depositing Financial Statements. The law states that a copy of the general financial statements, together with the respective management report on branch results, should be deposited with the Chamber of Commerce in the domicile of the branch.

Additionally, branches of foreign companies which, pursuant to the inspection power established in Article 83 of Law 222 of 1995, receive External Circular No. 100-000004 dated December 28, 2007 from the Superintendency of Companies, should submit financial information at December 31, 2007 in either electronic or physical format on the dates established in such circular. These dates range from March 25, 2008 to April 21, 2008.

3. Record of the Supplementary Investment to the Assigned Capital of Branches in the Hydrocarbons and Mining Sector. Branches of foreign companies belonging to the special regime of the hydrocarbons and mining sector should complete Form No. 13, "Record of the Supplementary Investment to the Assigned Capital and Update of Equity Accounts - Special Regime Branches" and either submit this physically or transmit it electronically by March 31 of the year following that in which the investment is made. This deadline can be extended by filling in Form No. 17, "Extension Application", and submitting this electronically.
4. Update of the Investment of Branches of Foreign Companies in the Hydrocarbons and Mining Sector. The legal representatives of branches of foreign companies belonging to the special regime of the hydrocarbons and mining sector should update their equity accounts each year by filling in Form No.

13, "Record of Supplementary Investment to the Assigned Capital and Update of Equity Accounts – Special Regime Branches" by June 30 of the year following the respective company fiscal year.

5. Capital Movements. Foreign exchange regulations establish an obligation to register changes in the home offices, changes in the use of foreign investment and cancellations of investments by accrediting the fact that certain legal requirements have been met. The deadline for meeting this obligation is March 31 of the year immediately following that in which the respective capital movement occurs.

II. Labor Obligations

In addition to the obligation to deposit severance payments for 2007 in the fund that each employee has chosen, branches of foreign companies should meet the labor obligations detailed below.

1. Certificates accrediting interest and monetary correction, for purposes and effects of acquiring housing, paid during the immediately preceding year, and health and education payment certificates for 2007. The branch should ask those of its employees who have housing loans for certificates accrediting the interest paid, so that it can update the monthly withholdings it makes to the employees' salaries. To the same end, the branch should request health and education payment certificates for 2007. The company should collect this information by April 15, 2008.
2. Income and Withholdings Certificate. Every year, the branch should provide its employees with a detailed list of payments made for all labor matters, together with the amount withheld on account of income taxes. This income and withholdings certificate should be issued by March 15, 2008, and should be retained for a period of at least five years from the date on which it is issued.
3. Annual General Report. The branch is obliged to submit a labor report to the Ministry of Social Protection, via the different Labor Offices, by the 30th of June of every year. This report should contain a general description of the extent to which the branch has met its labor obligations, together with general information about its workers and the branch itself.
4. Vacation Records. The branch should keep a special vacation register, in which it should record the date when each worker commenced its employment at the establishment, the dates between which he took his annual vacation, and the remuneration received therefor.
5. Interests on Severance Payment. Each year before February 14th, the branch is obliged to deposit the interests on severance payments liquidated as of December 31st of the previous year.

III. Obligations of a Regulatory Nature

1. Obligations on Branches of Foreign Companies that are subject to Supervision, Inspection and Control by the Superintendency of Ports and Transportation. In accordance with provisions stipulated in Resolutions 6051 and 6143 of 2007, branches of foreign companies that are subject to supervision, inspection and control by the Superintendency of Ports and Transportation are obliged to submit financial information relating to the 2007 fiscal year by the last business day of

April of this year. Furthermore, by this same date, branches subject to supervision by the Ports Division of the Superintendency of Ports and Transportation should submit to that Division a certificate of gross port income during the previous fiscal year, duly signed by the legal representative, the public accountant and the fiscal auditor. The information referred to under this number should be sent in both electronic and physical formats.

Finally, we would like to inform you that we have designed a virtual tax calendar, with a view to helping each branch meet the different tax obligations it has on both Capital District and national levels. This can be used for finding out expiry dates for submitting tax returns, information and documentation to the tax authorities, and changes to the regulations that occur during 2008. Our system will automatically send warnings to the e-mail addresses branches provide us with, well in advance of the date on which the respective tax obligation expires. If you wish to access the virtual tax calendar, you will need to register your branch on the firm's website (www.bu.com.co) and provide basic information about it, such as Tax Identification Number (NIT) and the e-mail addresses of the branch employees responsible for taxes.

Since the virtual tax calendar is a free service that is intended to serve as a guide for Brigard & Urrutia's clients, and considering that its correct operation depends on the programs and the equipment these are used in, our firm accepts no responsibility if any tax returns are overdue as a result of using the calendar.

Should you have any queries about the matters referred to in this document, please do not hesitate to contact us. We will be pleased to assist you in any activities resulting there from.

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The purpose of this newsflash is to give a summary in the specific field. In case of acting with this information, please contact our lawyers.



Corporate Advisory

Insider Trading Laws - A Sea Change

A number of important changes are about to be made to New Zealand securities law. The Securities Markets Amendment Act 2006 (**Amendment Act**), which is to come into force on 29 February 2008, will amend the Securities Markets Act 1988 (**Act**) and includes far-reaching changes to insider trading laws, changes to the disclosure by substantial security holders, new market manipulation provisions and a general dealing misconduct provision, and new disclosure requirements for investment advisers and investment brokers.

In this, the first of a series of publications on the changes, we consider provisions relating to insider trading. Separate publications will be released to address other changes to the Act.

The new insider trading provisions strengthen the law relating to insider trading by adopting a regime similar to that in Australia and include criminal penalties for those found guilty of insider trading.

Background

The pre-29 February insider trading regime focuses on the fiduciary duties owed by officers or agents of a "public issuer" (an entity which is, or has been, party to a listing agreement with a registered exchange) to that public issuer, and the information obtained as a result of a person's relationship with a public issuer (the **fiduciary**

duty rationale).

By contrast, the new regime focuses on the information an insider possesses rather than the position that they hold. The genesis of the new regime was a Cabinet paper published in July 2003. That Cabinet paper identified a number of problems with the current insider trading regime in the Act, including:

“...the new regime focuses on the information an insider possesses rather than the position that they hold...”

- the requirement that a person can only be an insider if they directly or indirectly receive information through their relationship with a public issuer

- a lack of co-ordination with the Australian insider trading regime

- concerns that the existing regime is not effective
- inconsistencies in, and difficulties with interpretation of, parts of the Act (with Justice Fisher, in the High Court, criticising the language of the Act as "absurd" and noting that "it is difficult to escape the conclusion that the drafter of this unfortunate statute has nodded off again").

The new insider trading regime focuses on the threat that insider trading poses to the integrity and confidence of the market, rather than fiduciary duties. It seeks to emphasise the need to maintain market integrity by

ensuring that investors can participate on a level playing field (the **market efficiency** and **fairness** rationales).

Key Changes

The key changes to the legislation are:

- a policy shift towards harmonisation with the Australian insider trading regime, and a clear intention to improve both monitoring of insider trading behaviour and enforcement action against misconduct
- the removal of the need for an information insider to have a relationship with a public issuer, or to have obtained information through a person with such a relationship. The new regime looks at the nature of the information that a person possesses, rather than the position occupied by that person. As a result, a person who has material price sensitive information that is not generally available to the market is considered an information insider, regardless of that person's relationship with the source of the information
- the introduction of criminal liability for insider trading
- the introduction of new exceptions and defences to allegations of insider trading.

Core Prohibitions on Insider Trading

The central provision in the insider trading prohibitions require that an information insider must not:

- trade securities of a public issuer (section 8C of the Amendment Act)
- disclose inside information (section 8D of the Amendment Act)
- advise or encourage trading (tipping) (section 8E of the Amendment Act).

Key definitions under the new regime are:

- **Information Insider** – someone who has information about a public issuer that is not generally available to the market, where that person knows, or ought reasonably to know, that

the information is material information and is not generally available to the market

- **Material Information** – information that a reasonable person would expect to materially affect a public issuer's share price if it were generally available to the market
- **generally available to the market** – information made known to or readily obtainable by persons who commonly invest in relevant securities (being securities which might reasonably be expected to be affected by the information).

Under the pre-29 February regime, someone is only an insider if they are an officer, employee, company secretary, substantial security holder, or receives confidential information from a person with such a relationship, of a public issuer. Someone who trades on inside information, but is more than two steps along the chain of communication, is not currently an insider.

“...a person who has material price sensitive information that is not generally available to the market is considered an information insider...”

By example, in 1999 a Fletcher Challenge employee acquired price sensitive information accidentally posted on an internal notice board, and forwarded that information to a relative who in turn forwarded that information to another relative. All three parties purchased Fletcher Challenge shares. The Securities

Commission investigated and found that neither relative was an insider because the chain of liability under the Act stops at two steps from the public issuer. The Amendment Act removes the need for a link between the insider and the public issuer.

The meaning of "generally available to the market" (section 4 of the Amendment Act) is complex and rather uncertain. The Australian equivalent of section 4 has been widely criticised after it led to two contradictory outcomes in two cases on largely the same facts (*R v Firms* and *R v Kruse*).

Firms and Kruse both became aware of the outcome of a court case in Papua New Guinea, and used that information to purchase shares in the company which was the subject of the court case. When the court decision became public, it resulted in the shares Firms and Kruse had purchased increasing in value. Kruse received the information by sitting in the court gallery in Papua New Guinea when the decision was announced and he was acquitted on the grounds that the information was readily observable. Firms received the information in Australia by

telephone and he was convicted on the grounds that the information was not readily observable (although his conviction was overturned on appeal where the New South Wales Court of Appeal found the information was readily observable).

Although the "readily observable" test from Australia has been replaced by a "readily obtainable" test (section 4(1) (b) of the Amendment Act), in New Zealand information may be captured by more than one part of the section 4 definition. As a result, there is uncertainty as to when information is readily obtainable (for example, whether information that is only available overseas – such as in a court in Papua New Guinea – would meet the requirement).

Penalties

The new regime introduces a number of new penalties, as well as recasting existing sanctions. The suite of sanctions now includes:

- criminal liability (including maximum penalties of five years imprisonment or fines of up to \$300,000 for individuals and up to \$1 million for a body corporate) for a contravention of any of the core prohibitions of the Amendment Act
- management bans for up to 10 years
- compensation payments of up to three times any profit made or loss avoided.

Criminal liability only arises if an information insider is found to possess actual knowledge that the relevant information was material and not generally available to the market.

Exceptions and Defences

The new regime contains a number of exceptions and defences that are designed to reflect legitimate trading activity, including:

- where trading or information disclosure is required by law
- protection for underwriting agreements and sub-underwriting agreements

- a defence of knowledge of a person's own intentions or activities
- protection for an agent executing trading instructions only
- protection for information obtained by independent research and analysis
- an equal information defence, where both parties to a transaction knew or ought to have known the same information
- a defence of absence of knowledge of trading.

In addition, the current defence of trading where access to information is protected by Chinese walls will remain under the new regime.

Removal of Company Officers' Safe Harbour

The new regime removes the pre-29 February exception from action for insider trading for company directors and officers who trade shares within defined share trading window periods under an approved procedure (the **company officers' safe harbour** exception). The removal of this safe harbour is consistent with the focus of the new regime, which views insider trading as harmful to the market as a whole rather than mainly to the company involved.

Company share trading policies still have considerable value and, following the experience in Australia, will continue to focus on ensuring that trading is not conducted by directors and officers while they are information insiders. In addition, a defence from insider trading will be available where company directors and officers trade under a fixed trading plan that was entered into at a time when the director or officer did not possess any inside information. The trading plan must be for a fixed period and the director or officer cannot have any input into trading decisions during the applicable trading period (the **fixed trading plan** defence).

Whilst the substance of companies' share trading policies are unlikely to be materially affected by the new regime, it is likely that many such policies detail the effect of compliance with the share trading policy (by describing the impact of the company officers' safe harbour). As this will no longer be the case, share trading policies should be reviewed and, where appropriate, updated to reflect the new regime.

“The new regime introduces a number of new penalties, as well as recasting existing sanctions.”

Looking Forward

Before the new regime takes effect, it is important that all public issuers, as well as directors, officers, investors and their advisers, understand its impact and its focus on maintaining market efficiency and fairness. Company directors and officers also need to understand the impact of the new regime's removal of the company officers' safe harbour, and how to qualify for the trading plan defence.

There seems little doubt that the Securities Commission will seek to take enforcement proceedings at the first

opportunity. This will allow the Securities Commission to test its new powers and provide an appropriate signal to the market to reinforce its recent statements about its commitment to use those powers.

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PROCEDURAL RULES FOR ADVANCE PRICING AGREEMENTS

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Article 23 of the Regulations Governing Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's-Length Transfer Pricing provides that when a profit-seeking enterprise intends to conduct a transaction that meets the conditions set out in Article 23 Paragraph 1 with a related party, it may file an application in the prescribed form, within the time limits set out in Article 23 Paragraph 2, with the competent tax collection authority for an advance pricing agreement (APA). In order to ensure that the five regional National Tax Administration (NTA) offices apply the same procedures when handling APA applications, on 21 September 2007 the Ministry of Finance (MOF) announced the Directions for Advance Pricing Agreements with Profit-Seeking Enterprises. The contents of the Directions are outlined below:

- . A tax collection authority may set up an APA review committee to process APA applications, consisting of 7 to 15 members.
- . The director of the First Examination Division should serve as executive secretary to the committee, and be responsible for the overall management and coordination of its work. The executive secretary may appoint persons with the requisite specialist abilities to form an assessment team to handle APA applications, and may designate one of them as team leader.
- . When a profit-seeking enterprise intends to conduct a transaction that meets the conditions set out in Article 23 Paragraph 1 of the Assessment Regulations with a related party, it may file an application in the prescribed form and, within the time limits defined by Article 23 Paragraph 2, with the competent tax collection authority.
- . The procedure by which a tax collection authority should process an APA application is as follows:
 1. Within one month after receiving an application, the assessment team should inform the applicant whether it will accept the application for processing. If it accepts the application, it should conduct a review and assessment after the applicant provides the documents and reports prescribed under Article 24 of the Assessment Regulations.
 2. Within one year after receiving the prescribed documents and reports from the applicant, the tax collection authority should complete its review and assessment, and render a decision. If due to special circumstances the tax collection authority needs to extend the assessment period, it should inform the applicant within the above time period, and may extend the assessment period by up to six months. If necessary, a further extension of up to six months may be made. But this limit on extensions does not apply in the case of a bilateral or multilateral APA involving a double taxation agreement.
 3. After completing its review and assessment, the assessment team should write an assessment report, which it should present to the APA review committee for consideration. If a party to the transaction envisaged by the applicant comes under the jurisdiction of another tax collection authority, the team should first consult the other tax collection authority and request that it provide its opinion within one month. The assessment team should review this opinion together with its own findings and should notify the other tax collection authority of its conclusions. If the other tax collection authority objects to the conclusions, it should put forward suggestions within two weeks, and the tax collection authority processing the application should convene a meeting to discuss and resolve the issues.
- . If, prior to an APA being concluded, material factors arise that will affect the anticipated transaction prices or profits, and the applicant fails to notify the competent tax collection authority in writing as required under Article 25 of the Assessment Regulations, or fails to present amended documents and reports within the prescribed time period, the tax collection authority may terminate the APA approval procedure by issuing a written notice.
- . If, after filing an APA application with the competent tax collection authority, but prior to the deadline for filing an annual income tax return for the first accounting period covered by the transactions that are the subject of the application, an applicant relocates to a location within the jurisdiction of another tax collection authority, the tax collection authority that originally accepted the application should transfer the case to the new competent tax collection authority, for the latter to continue processing the application. The second tax authority should also notify the original tax collection authority of the outcome. If the applicant relocates into the jurisdiction of another tax collection authority after the deadline for filing a final tax return for the first accounting period covered by the transactions concerned, the original tax collection authority should continue processing the application and sign any APA with the applicant, and should notify the second tax collection authority of the outcome.
- . If the applicant seeks an extension of the period of validity of an APA in accordance with Article 32 of the Assessment Regulations, the assessment team of the competent tax collection authority should conduct a review and assessment and render a decision.

. After an APA application has been discussed and approved by the APA review committee, a signed record of the conclusions should be submitted to the NTA director-general, and an APA with the contents prescribed by Article 28 of the Assessment Regulations should be signed with the applicant by the director-general or by a person granted signing authority by the director-general. If the committee determines that no APA can be offered, the applicant should be notified of this outcome in writing.

. If any dispute arises regarding an APA, the competent tax collection authority should investigate to ascertain the facts and should attempt to resolve the dispute by negotiation. If such negotiation fails to resolve the dispute, the applicant or the tax collection authority may apply to the MOF for conciliation. If the dispute still cannot be resolved after such conciliation, the parties may terminate the APA by mutual agreement.

The advantage for a profit-seeking enterprise in applying for an advance pricing agreement is that by reaching prior agreement with the tax collection authorities regarding the pricing or profit levels of its transactions with its related parties, and by filing income tax returns on that basis, the enterprise can avoid the risk of subsequent tax adjustments that may result in additional tax demands. Thus a profit-seeking enterprise may control tax exposure risks within acceptable levels. Based on the experience of other countries in implementing transfer pricing tax systems, APA applications have been increasing almost everywhere, and they now account for a considerable proportion of tax filings. The Directions will certainly be of great assistance both to taxpayers and to the tax authorities in defining the documents to be prepared and the procedures to be followed when filing or processing an APA application.

Lee and Li Bulletin

Employer Services Advisory Bulletin

FMLA Expansion Introduces Two Important Amendments

Caregiver and active duty leave provided for eligible military family members

By [Amy Pannoni](#) and [Courtney Mertes](#)
[February 2008]

On Jan. 28, 2008, President Bush signed into law the first expansion of the Family Medical Leave Act (FMLA) since its enactment in 1993. The National Defense Authorization Act (H.R. 4986) concerns injured members of the armed forces and provides leave for military families. Section 585 of the bill creates FMLA-qualifying events for eligible members of military families and applies to service members in both Reserve and National Guard duty as well. Even though the Department of Labor has not finalized regulatory guidance for employers under the new Act, eligible employers should be prepared to comply fully with the law's intent.

FMLA eligibility

The FMLA eligibility requirements for employers and employees remain unchanged. If you are an employer covered by the FMLA (generally having 50 or more employees), the new amendments apply to you. For an employee to be eligible to receive leave under the new amendments, the employee must have been employed for 12 months and worked 1,250 or more hours. The employee must work at a site with 50 or more employees or within 75 miles of that location, the same requirements for eligibility for any FMLA leave.

Caregiver leave

The first FMLA amendment, **effective immediately**, provides up to 26 weeks of leave during a 12-month period for spouses, parents, children, or next of kin (defined as "nearest blood relative"), to care for recovering military service personnel who develop a serious injury or illness while serving in the armed forces.

- **When does it apply?**

This caregiver leave applies when the service member develops an injury or illness in the line of duty while on active duty in the armed forces "that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating." *While the Department of Labor is still developing more specific guidance, employers should respond in good faith to requests for this type of leave and should follow the FMLA regulations and requirements when granting such leave.*

- **How often can an employee use this leave?**

An employee may take up to 26 weeks of military FMLA leave once during a 12-month period. The employee is entitled to a maximum of 26 weeks of leave. This means that, while an employee may also take 12 weeks of leave for a reason other than military care leave, the total amount that the employee may take (of both military and other FMLA leave) is 26 weeks.

"Call to Active Duty" leave

The second FMLA amendment provides leave to spouses, parents, or children of service members who are on active duty or have been notified of an impending call or order to active duty in the armed forces. Leave may be used for "any qualifying exigency" arising out of active duty or when the service member has been notified of an impending call or order to active duty "in the Armed Forces in support

of a contingency operation.”

An employer may require that a request for leave under this section “be supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe.” *This “Call to Active Duty” provision will not be effective until the secretary of labor issues final regulations defining “any qualifying exigency.”*

If this new law impacts you or your business and you would like to speak to our Employment Law group to ensure that you are in compliance, and that your employee handbooks and policies are current, please e-mail Amy Pannoni (amypannoni@dwt.com) or Courtney Mertes (courtneymertes@dwt.com).

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MEDICAL DEVICE UPDATE

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Foreign Corrupt Practices Act and the Healthcare Industry

2007 represented the busiest year to date for enforcement of the Foreign Corrupt Practices Act (FCPA) by U.S. government authorities. The 38 enforcement actions brought last year by the Department of Justice, Criminal Division (DOJ) and the Securities and Exchange Commission (SEC) more than doubled the previous record of 15 set in 2006. Press reports indicate that cooperation with non-U.S. anti-bribery enforcement agencies is on the rise, sometimes subjecting companies to dual enforcement actions in the United States and other countries.

Global healthcare companies are particularly susceptible to violations of the FCPA due to the number of customers and business partners (including physicians, among others) employed by public health care systems in other countries. As many such individuals qualify as non-U.S. "public officials" under the FCPA, any payment made to these persons in order to inappropriately influence their decisions concerning new or existing business may be considered an illegal bribe in violation of the FCPA.

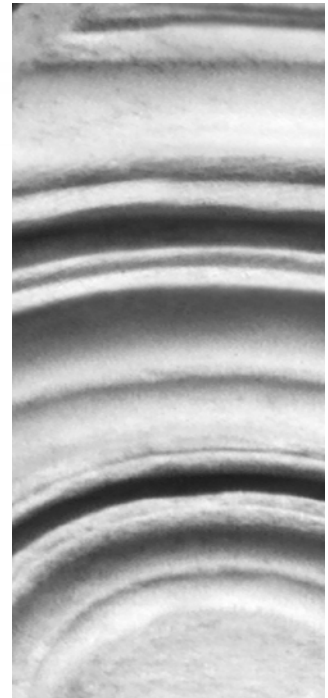
U.S. authorities increasingly are pursuing industry-wide investigations. For example, five orthopedic implant manufacturers (Biomet, Inc.; Medtronic, Inc.; Smith & Nephew plc; Stryker Corp.; and Zimmer Holding, Inc.) recently received letters from the DOJ and SEC requesting information concerning payments to government-employed physicians in foreign countries. This increased emphasis on the healthcare sector likely will continue into 2008 and beyond.

Overview of the FCPA

The FCPA's anti-bribery provisions apply to a broad range of entities and individuals, including:

- Corporations and other business organizations formed under the laws of the United States;
- Individuals who are citizens or residents of the United States;
- Companies and individuals who take any action in furtherance of an FCPA violation in the United States; and
- Companies with securities registered in the United States or that otherwise are required to file reports with the SEC (issuers).

The anti-bribery provisions make it illegal to pay, offer, authorize or promise to pay anything of value to non-U.S. officials (broadly defined) to obtain or retain business. The FCPA also contains accounting and recordkeeping provisions that require issuers to: (1) keep accurate and reasonably detailed books and records, and (2) maintain internal accounting controls aimed at preventing and detecting FCPA violations.



— TAKE A CLOSER LOOK —

03.10-11.2008

Hogan & Hartson lawyer, Hector Armengod to speak at the Latin America Clinical Trials Conference in Miami. ([details](#))

03.13-14.2008

Hogan & Hartson to sponsor Biotechnology Industry Organization's General Counsels' Committee Meeting and Dinner in San Francisco, CA.

04.03-04.2008

Hogan & Hartson Partner, T. Clark Weymouth to speak at the Anti-Corruption for the Pharmaceutical industry in London. ([details](#))

04.17-18.2008

Hogan & Hartson Partner, Stuart Langbein to speak at Advanced Reimbursement Symposium in Chicago, IL. ([details](#))

04.29-30.2008

Hogan & Hartson Partner, Linda Horton to speak at FCPA and International Anti-Corruption for Pharma & Life Sciences in New York. ([details](#))

The FCPA contains a narrow exception for so-called “grease” payments to facilitate or expedite performance of a “routine governmental action,” such as processing customs documentation, providing phone service, or loading and unloading cargo. However, any action involving discretionary decision making, such as selecting which goods or services to purchase, would not be covered under this exception. While there is no bright-line test for determining what is a permitted grease payment, it is commonly understood that such payments should be of limited value. Of course, the payments must be permitted under local law, and there are circumstances in which facilitating payments might be forbidden by the foreign country's law even if they would not otherwise be prohibited by the FCPA.

The FCPA also contains two affirmative defenses. One permits payments that are “lawful under the written laws” of the foreign country; it is not sufficient that such payments are merely “accepted practice” in the country. The other covers certain limited “reasonable and bona fide expenditures, such as travel and lodging expenses . . . directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.” These exceptions and defenses are very narrowly construed and should not be relied upon without the advice of counsel.

Violations of the FCPA may lead to substantial criminal and civil penalties. Under the anti-bribery provisions, companies are subject to a criminal fine of up to \$2 million per violation, while individuals may face criminal fines of up to \$100,000 per violation and five years' imprisonment. Criminal violations of the books and records provision carry an even steeper penalty, as a company may be subject to a fine of up to \$25 million, while individuals may face up to a \$5 million fine and 20 years' imprisonment. Also, the SEC may seek to impose civil penalties of up to \$10,000 per violation. Under the Alternative Fines Act, the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. Additional penalties may include injunctions, forfeiture of assets, disgorgement of profits, and suspension (or in some cases debarment) from doing business with the U.S. Government.

Summary of Recent FCPA Enforcement against Healthcare Companies

As noted above, in recent years U.S. enforcement actions have targeted the healthcare sector. Recent settlements of FCPA enforcement actions in the healthcare sector include:

- In December 2007 Akzo Nobel N.V., a Dutch pharmaceutical company with American Depository Receipts traded on a U.S. exchange, announced a settlement with the SEC and DOJ in connection with improper payments made by two of its subsidiaries to Iraqi government officials under the United Nations oil-for-food program. The subsidiaries allegedly made approximately \$280,000 in improper payments in the form of “after-sales-service fees” to facilitate sales of pharmaceuticals to Iraq. Akzo Nobel agreed to pay approximately \$2.9 million in combined fees and penalties to the U.S. Government, in addition to a fine of over \$500,000 to Dutch authorities. Note that neither Akzo nor the subsidiaries at issue is a U.S. entity; nonetheless, the FCPA applied to their activities, and the U.S. Government pursued an enforcement action against them.

- In June 2005 DPC Co. Ltd. (Tianjin), a Chinese entity, pled guilty to violating the FCPA and paid a \$2 million criminal fine. Its U.S. parent, Diagnostic Products Corporation, paid a \$2.8 million fine, an amount equal to the company's net profit in China, plus interest. Tianjin paid a total of \$1.6 million to Chinese physicians and laboratory workers at government-owned hospitals in exchange for agreements that hospitals would procure Tianjin's products and services. The company referred to the payments in internal documents as "commissions," which typically represented between three and ten percent of the sales.
- Micrus, a U.S. medical device company, paid more than \$105,000 to doctors at state-run hospitals in several countries. In exchange, these hospitals purchased Micrus' products known as embolic coils. These payments were made by officers, employees, agents and salesmen of Micrus and were disguised in corporate books as stock options, honoraria and commissions. An additional \$250,000 was comprised of payments for which Micrus did not obtain the necessary prior administrative or legal approval in accordance with the laws of the foreign jurisdiction. In March 2005 Micrus settled an FCPA investigation by agreeing to pay \$450,000 in civil penalties and adopting an internal FCPA compliance program. Micrus also agreed to abide by certain FCPA compliance obligations for at least two years, as a condition of a Department of Justice deferred prosecution agreement.

In addition to the aforementioned pending cases involving Biomet, Medtronic, Smith & Nephew, Stryker and Zimmer Holding, a number of other healthcare companies -- including Johnson & Johnson, AstraZeneca, Siemens, and others -- currently are under investigation by the DOJ and SEC for potentially improper payments prohibited by the FCPA. In most of these cases investigators have requested documents pertaining to payments made to government-employed physicians to influence the purchasing of medical products.

Avoiding FCPA Violations

Companies can take steps to reduce the risk of violations of the FCPA. First, a company should conduct an internal assessment to identify potential areas of risk under the FCPA, including various aspects of foreign operations such as use of, and/or relationships with, distributors, resellers, agents, representatives, joint venture partners and customers.

Second, a company should review its existing compliance policies and procedures to ensure that they address bribes and other improper payments to non-U.S. officials. Special importance should be given to analyzing financial relationships with physicians in countries with a large public health system. Ongoing FCPA training and monitoring procedures are a necessary part of all corporate compliance programs.

Hogan & Hartson has had extensive experience assisting clients in the healthcare and other sectors in their efforts to comply with the FCPA and other countries' anti-corruption measures. If you have any questions or would like a more detailed analysis, please contact any Hogan & Hartson attorney with whom you regularly work or one of the authors listed below.

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February 8, 2008

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Hot Off The Presses: Court Holds Arbitration Agreement Between Builder and Home Buyers Unenforceable

The California Court of Appeal has held an arbitration agreement between a builder and home buyers unenforceable as unconscionable. Last week's decision in *Baker v. Osborne Development Corporation* will, if it is not overturned on further appeal, have important implications for both completed projects and future transactional documents.

In *Baker*, buyers signed purchase agreements with Osborne which contained an arbitration provision limited to disputes about the buyers' escrow deposits. Shortly before the close of escrow, buyers were presented with an application to participate in a warranty program provided by the builder, but were not provided with the actual warranty agreement until after the close of escrow. The warranty provided that it was the exclusive legal remedy the buyers had against the builder for construction defects and required all claims to be decided by arbitration under the rules of Construction Arbitration Services (CAS). Under the CAS rules, CAS has the sole discretion to select the arbitrator, to set the time, date and place of all hearings, and to determine the scope of discovery. When several buyers sued for alleged construction defects, Osborne petitioned to compel CAS arbitration under the buyers' applications. The trial court denied the petition, finding the arbitration agreement in the warranty booklet unconscionable, thus unenforceable. Osborne appealed.

The Court of Appeal affirmed. Unconscionability is tested by both the procedure of making an agreement and the terms of the agreement. Osborne's agreement was found to be procedurally unconscionable because there was no bargaining over its terms, the buyers did not receive it until after close of escrow, and the substance of the arbitration-related terms was found to be a surprise to a reasonably diligent buyer. The manner in which the arbitration agreement was provided to buyers in this case made the agreement an easy target for invalidity.

The *Baker* court broke new ground in California law by finding substantive unconscionability because arbitration under the warranty program could only benefit the builder who demanded it. Although all potential claims by either party were subject to arbitration under the warranty, the court noted that the only potential claims after closing were by the buyers against Osborne. This holding implicitly conflicts with the principle expressed in earlier cases that arbitration is mutually beneficial. The home warranty program in *Baker*, particularly the CAS arbitration provision, is similar to a program that was required as a condition of writing construction defect insurance coverage and widely used in the homebuilding industry.

Baker presents new challenges to drafting and enforcing ADR provisions in home buyer contracts. There is no one-size-fits-all solution. The challenges must be addressed on a project-by-project basis.

Luce Forward's combined Real Estate and Real Estate Litigation practice is over 80 attorneys strong. Please feel free to contact any member of Luce Forward's Real Estate or Real Estate Litigation Practice Groups with any questions regarding drafting and enforcing ADR and warranty programs in light of the Baker case.

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Revised Guidance on FBI Name Checks, Arizona Employment Verification Law Challenge Dismissed by Federal Court, and REAL ID Final Rule Published

February 12, 2008

USCIS Issues Memorandum Revising Previous Guidance Regarding FBI Name Checks

On February 4, United States Citizenship and Immigration Services (USCIS) issued a memorandum modifying its existing policy regarding FBI name checks. The modification promises to relieve existing adjudication delays due to background checks. Upon receipt of an Application for Adjustment of Status (I-485), USCIS will continue to request an FBI name check. If the application is otherwise approvable and the FBI name check request has been pending for more than 180 days, the application will be approved. Before an application is approved, a definitive FBI fingerprint check and IBIS check must still be obtained and resolved. Please note this policy will also apply to the following applications: Application for Waiver of Ground of Inadmissibility (I-601), Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act (I-687), and Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of Public Law 99-603) (I-698). The policy does not apply to naturalization (N-400) applications.

If any derogatory or adverse information is received from the FBI after the application is approved, USCIS will determine if rescission or removal proceedings are appropriate and warranted. Subject to reporting requirements, the application or petition may be denied, dismissed, administratively closed, withdrawn, or referred to the Immigration Court at any time.

How This Affects You

Foreign nationals who have filed one of the above-mentioned applications will no longer be subjected to lengthy delays caused by FBI name checks if their application is otherwise approvable. However, USCIS will retain the right to take further action on the case if negative information is subsequently furnished by the FBI, including denial of the application or rescission of approval.

Arizona Employment Verification Law Challenge Dismissed by Federal Court

The most recent lawsuit challenging the Legal Arizona Workers Act (the Act) has been dismissed by a federal judge, though an appeal is expected. The Act took effect on January 1, 2008 and prohibits Arizona employers from intentionally or knowingly employing an unauthorized alien. The penalties are as follows:

1. For a first violation of an employer ***knowingly*** hiring an unauthorized alien, the employer faces mandatory suspension of all licenses for a maximum of 10 days and three years' probation.
2. For a first violation of an employer ***intentionally*** hiring an unauthorized alien, the employer faces mandatory suspension of all licenses for a minimum of 10 days and five years' probation.
3. For a second violation committed during a period of probation, the employer faces permanent revocation of their licenses.

In addition, the Act requires all employers to verify the employment eligibility of all new hires through E-Verify. Proof of verification of an employee's employment authorization through the E-Verify program will create a rebuttable presumption that an employer did not violate the new state law. For further information regarding the Act, please see our prior Immigration Alert at http://www.morganlewis.com/pubs/ImmigrationAlert_ArizonaImmigLaw_17dec07.pdf.

What Is E-Verify?

E-Verify is a web-based program operated by USCIS in partnership with the Social Security Administration. E-Verify aids employers in determining the employment eligibility of new hires by comparing information provided by the new employee on Form I-9 with database records.

How This Affects You

Participation in E-Verify is mandatory for all employers in the state of Arizona. In addition, employers who knowingly or intentionally hire an unauthorized worker face stiff penalties, including suspension and revocation of the employer's license(s).

REAL ID Act Final Rule Published by DHS

The Real ID Act, which is effective March 31, 2008, establishes the minimum standards for state-issued driver's licenses and identification cards that federal agencies will accept starting May 11, 2008. The standards focus on the information and security features that must be incorporated into each card, the application information used to establish the identity and immigration status of an applicant, and the physical security standards for facilities where the cards are produced.

Beginning May 11, 2008, unless a state has requested and obtained an extension of the compliance date from the Department of Homeland Security (DHS), federal agencies will not accept driver's licenses or identification cards for official purposes from any state that is not in compliance with the REAL ID Act. Should a state choose not to comply, or should it fail to request and obtain an extension, its residents would be unable to use a driver's license or identification card issued by the state to, among other things, enter a federal government building or board a commercial airplane. The deadline for a state to request an extension is March 31, 2008. Any initial extension will terminate on December 31, 2009 unless the state submits a request to DHS for a second extension through May 11, 2011 and certifies that the state has met certain benchmarks. The deadline for the second extension request is October 11, 2009.

Individuals in states that choose to comply with the REAL ID Act must replace their licenses and/or identification cards with the more secure cards by December 1, 2014 if born on or after December 1, 1964 and by December 1, 2017 if born before December 1, 1964.

Foreign nationals will receive a temporary driver's license or identification card that is only valid through the duration of their authorized period of stay. Foreign nationals without a set expiration date for their authorized period of stay, including those in F-1 status, will only be eligible to receive a driver's license or identification card that is valid for a maximum of one year.

By December 31, 2009, states will be required to verify that the applicant is lawfully present in the United States and confirm with the Social Security Administration that the Social Security Number presented is registered to that person.

Finally, the maximum period of validity of a driver's license or identification card for a permanent resident or U.S. citizen will be eight years.

How This Affects You

Any individual who is a resident of a state that either chooses not to comply with the REAL ID Act or fails to request and obtain an extension from DHS will not be able to use a driver's license or identification card issued by that state to enter a federal government building or board a commercial airplane.

Foreign nationals will only be eligible to receive a temporary driver's license or identification card that will be valid for the duration of their authorized period of stay. F-1 students and other foreign nationals with no set expiration date will only receive cards valid for a maximum period of one year. Renewals will be granted based on evidence of the extension of the authorized stay. It will therefore be critical that extensions of stay are requested as far in advance as possible to limit the possibility that a foreign national would be unable to drive.

Morgan Lewis will continue to monitor developments and will update you with any new information. If you have any questions about any of the issues raised in this Morgan Lewis Immigration Alert, please contact:

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