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January 2008 e-BULLETIN

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Gide Loyrette Nouel
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TOZZINI FREIRE ADDS TO LITIGATION PRACTICE

Marcus Perlingeiro is the new partner of Tozzini Freire Advogados, responsible for the Litigation practice group of the Rio de Janeiro office.

Marcus began his career in the financial area at Bank Boston. In 1999 he joined Light Serviços de Eletricidade S/A, where he worked for eight years as Legal Superintendent.

Within his career he acquired extensive experience in Corporate Law, having worked in questions involving real state, civil law, tax, criminal law, environmental law and energy.

Graduated from the Law School of Universidade Gama Filho of Rio de Janeiro in 1996, Marcus carried out MBA studies in Corporate Law from IBMEC of Rio de Janeiro. He is also post-graduated in Public Law from Universidade de Coimbra, Portugal and is currently pursuing another post-graduation diploma in Civil Rights.

Contact information for the new partner:

T 55 21 3535-2113

mperlingeiro@tozzinifreire.com.br

For additional information visit us at www.tozzinifreire.com.br

DAVIS WRIGHT TREMAINE LLP ADDS TO BUSINESS TRANSACTIONS PRACTICE

Davis Wright Tremaine LLP (DWT) announced today that John Baier has joined the Seattle office as an associate in its business transactions practice group. Most recently Baier was at Karr Tuttle Campbell, where he represented companies and investors in a variety of commercial transactions, including mergers and acquisitions, private equity, venture capital, and securities matters.

Prior to his career in law, he worked as a senior financial analyst at Quellos Group LLC and as a Certified Public Accountant at Ernst & Young LLP.

“John's diverse background gives him a unique understanding of business matters that will benefit our clients in many ways,” said Joe Weinstein, DWT partner and chair of the business transactions practice group.

DWT's business transactions practice group has more than 55 attorneys, representing clients such as Starbucks, Clearwire Corporation, and *The Seattle Times* .

Baier obtained a J.D., *cum laude* , from Seattle University. He received a B.A. in business administration and accounting from the University of Washington. He is on the board of directors for Mountains to Sound Greenway Trust and Our Lady of Guadalupe Catholic Parish. He has provided pro-bono legal work to the Seattle Emergency Housing Service to help homeless families.

About Davis Wright Tremaine LLP
Davis Wright Tremaine LLP is a national business and litigation law firm with more than 480 attorneys in nine offices: Seattle and Bellevue (Wash.), Portland (Ore.), Los Angeles, San Francisco, New York, Washington, D.C., Anchorage (Alaska) and Shanghai, China.

For additional information visit us at www.dwt.com

FRASER MILNER CASGRAIN—PUBLIC POLICY EXPERT JOINS FIRM AS STRATEGIC POLICY ADVISOR

(**Toronto, Canada)** – Fraser Milner Casgrain LLP (FMC), one of Canada's leading business and litigation law firms, announced today that Graham Fox has joined the firm's National Public Policy Group as Strategic Policy Advisor. Based in the Ottawa office, Graham adds senior-level experience in politics and policy development to the diverse expertise and knowledge of the Public Policy team at FMC. With significant experience in public policy as an analyst, candidate for public office, senior political staffer, and senior member of a prominent national "think tank", Graham will assist clients in developing their business through effective advocacy and experienced counsel.

"Graham's unique set of experiences have put him at the centre of public policy, government and business. He is ideally positioned to help our clients navigate Government and public policy issues, and assist them in growing their business," says Cyrus Reporter, Co-Chair of the firm's National Public Policy Group.

Prior to joining FMC, Graham was Vice-President of the Public Policy Forum, an independent, non-partisan organization dedicated to the pursuit of excellence in government. He has also served as Executive Director of the KTA Centre for Collaborative Government, a public interest research organization whose mission is the transformation of government for the information age. He also served as Director of Communications, and then Director of Legislative and Public Affairs, at the Institute for Research on Public Policy (IRPP), a leading Canadian think tank.

Graham has also held a number of positions in Canada's political arena. In Ontario's most recent provincial election, Graham served as the Progressive Conservative candidate in the riding of Ottawa-Orléans. He also served as Chief of Staff to the Right Honourable Joe Clark, leader of the Progressive Conservative Party of Canada, and as press secretary to the Hugh Segal national campaign for leadership of the PC Party. During the 2004 federal election, Graham was Secretary of Conservative Party Leader Stephen Harper's transition team.

Over the course of his career, Graham has been known for bringing together senior government officials and business leaders on major issues, in order to create the most effective policy solutions, and a better understanding across different sectors of the Canadian economy. At FMC, Graham will assist a national team of Public Policy experts in bringing together expertise in government relations, with the sound legal advice from one of Canada's top law firms.

"At FMC, our clients are getting the trusted legal counsel they need, combined with expert advice on public policy issues," says Michel Brunet, Chair and Chief Executive Officer. "Graham's extensive background in the public policy field and political arena builds on the already exceptional capacity of our National Public Policy Group in federal, provincial and municipal government."

Graham holds an undergraduate degree in history from Queen's University and a master's degree in political science from the London School of Economics and Political Science.

About Fraser Milner Casgrain LLP

For more than 165 years, Fraser Milner Casgrain LLP has distinguished itself as one of Canada's leading business and litigation law firms. With more than 550 lawyers in Canadian offices in Montréal, Ottawa, Toronto, Edmonton, Calgary, Vancouver and an office in New York, FMC offers the essential depth of experience and trusted legal advice to anticipate clients' needs and help them succeed.

For additional information visit www.fmc-law.com

GIDE LOYRETTE NOUELAPPOINTS 10 PARTNERS

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Gide Loyrette Nouel is pleased to announce that on 1 January 2008, it is appointing 10 new partners:

- Toufic Abi Fadel (Paris)
- Thomas Courtel (Paris)
- Richard Ghueldre (Paris)
- Karl Hepp de Sevelinges (Kyiv)
- Xiaojun (Warren) Hua (Beijing)
- Nicolas Jüllich (Paris)
- Antoine de La Gatinais (Paris)
- Samy Laghouati (Algiers)
- Laurent Modave (Paris)
- François d'Ornano (Belgrade)

For additional information visit www.gide.com

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Gide Loyrette Nouel

HOGAN & HARTSON ELEVATES 14 TO PARTNER; 14 APPOINTED COUNSEL

WASHINGTON, D.C., January 7, 2008 – Hogan & Hartson LLP has announced the elevation of 14 associates to the partnership and the appointment of 14 associates to counsel, effective January 1, 2008. Collectively, this group of new partners and counsel represents 14 practice areas from 12 of the firm's offices worldwide.

"We congratulate this talented group of lawyers for their commitment and dedication to our firm and our clients," said Hogan & Hartson Chairman J. Warren Gorrell, Jr.

The following associates were elected to the partnership:

Baltimore
Brian R. Chappell – Project and International Finance

Berlin
Wolfram Hertel – Real Estate, Communications, Energy, Environmental, International Trade, and Government Relations

Los Angeles
David R. Singer – Litigation

Miami
Brian L. Lerner – Labor and Employment, Litigation
Julie E. Nevins – Litigation

Miami/West Palm Beach
Wanda B. Whigham – Project and International Finance, Public Finance

Northern Virginia
Carine S. Stoick – Corporate, Securities, and Finance
Jon M. Talotta – Litigation

The

Washington, D.C.
Melissa K. Bianchi – Health
Aleksander Dukic – International Trade
Ajay Kuntamukkala – International Trade
Gregory F. Parisi – Corporate, Securities, and Finance
Elizabeth S. Roberts – Corporate, Securities, and Finance
Christopher R. Zaetta – Litigation

The following associates were elevated to counsel:

Berlin
Mareile Büscher – Intellectual Property, Litigation
Judith Heyn – Labor and Employment, Litigation
Christoph Wünschmann – Antitrust, Competition, and Consumer Protection

Colorado Springs
Peter J. Meza – Intellectual Property

London
Julie A. Lasso – Corporate, Securities, and Finance

Moscow
Dmitry V. Zhdanov – Corporate, Securities, and Finance
Iliya O. Zotkin – Corporate, Securities, and Finance

Munich/Berlin
Wolfgang Kircher – Corporate, Securities, and Finance

Northern Virginia
Michael E. Larner – Intellectual Property

Warsaw
Bogumila Ozarska-Karbowiak – Corporate, Securities, and Finance
Halina Wieckowska – Corporate, Securities, and Finance

Washington, D.C.
Anna J. Kurian – Intellectual Property
David L. Martin – Communications
Kevin G. Shaw – Intellectual Property

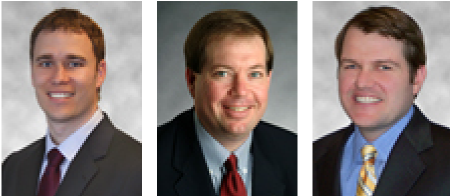
About Hogan & Hartson
Hogan & Hartson is an international law firm founded in Washington, D.C. with more than 1,100 lawyers in 22 offices worldwide. The firm has a broad-based national and international practice that cuts across virtually all legal disciplines and industries.

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.

LUCE FORWARD APPOINTS THREE PARTNERS

January 1, 2008



Jeremy B. Crickard, Randal J. Lejuwaan and William L. Marchant

Luce Forward today announced it has elected associates Jeremy B. Crickard and Randal J. Lejuwaan, and special counsel William L. Marchant as partners of the firm, effective January 1, 2008.

“Our three newest partners are outstanding lawyers who have each achieved stunning professional accomplishments thus far in their careers, and they will be a tremendous asset as we continue to build the firm’s presence statewide, said Robert J. Bell, Managing Partner of Luce Forward. “We want to extend our heartfelt congratulations to each of them and welcome them to the Partnership.”

Crickard, a member of the firm’s Family Wealth and Exempt Organizations practice group, is located in Luce Forward’s downtown San Diego office. He specializes in advising clients in all areas of estate planning, including wealth preservation planning for large estates, sophisticated estate and gift tax saving techniques, handling complex probate and trust administrations, fiduciary representation, and charitable planned giving. A member of the Executive Committee of the State Bar of California, Trusts and Estates Section, Crickard is also the treasurer and a board member of the Make-A-Wish Foundation of San Diego. He earned a Bachelor of Arts degree from Williams College and a Juris Doctor from the University of Michigan Law School.

Lejuwaan practices in Luce Forward’s San Diego and Orange County offices in the firm’s Real Estate practice group. Lejuwaan focuses his practice on commercial real estate transactions, including acquisitions, development, leasing and sales. He has particular expertise in assisting developers in the acquisition, leasing and subsequent sale of office, industrial and retail projects. He also has considerable experience representing landlords and tenants in leasing commercial, industrial and retail premises. He is a member of both the International Council of Shopping Centers (ICSC) and the National Association of Industrial and Office Properties (NAIOP). Lejuwaan received his bachelor’s degree from California State University Fullerton and his Juris Doctor from the University of San Diego.

Marchant, practices from its San Francisco office in the Real Estate Litigation practice group. His practice focuses on real estate, construction defect and land use litigation. He also represents landlords in commercial landlord/tenant disputes. In addition, he has experience in a wide range of general commercial litigation for a variety of companies and individuals, including cases regarding insurance coverage, employment disputes, and breach of contract claims. Marchant received his bachelor’s degree from University of California, Davis and a Juris Doctor degree from the University of San Francisco.

For additional information visit www.luce.com

ALLENDE & BREA

ADVISES MARFRIG IN USD$140M ACQUISITION QUICKFOOD

Marfrig Frigoríficos e Comércio de Alimentos SA, one of Brazil's leading meat packers completed the acquisition of 70.51% of the shares of Argentine meat-packing company Quickfood S.A. controlled by the Bameule family. The total value of the acquisitions was USD$ 140.875.000

The Marfrig Group is one of the largest producers of meat and meat products in Latin America. Quickfood is the leading beef processing company in Argentina. Its main activities include the slaughter, production, processing and exportation of beef and bovine by-products.

Allende & Brea represented Marfrig in this acquisition. Carlos María Melhem led the team and senior associates Juan Martía Allende, Eduardo Gonzalez Correas and Lucas Martín Romero worked with him.

For additional information visit www.allendebrea.com

BRIGARD & URRUTIA

ADVISES BANCO DE CREDITO IN USD$130 PREFERRED SHARES

Brigard & Urrutia advised Banco de Crédito, the prestigious Colombian commercial bank, in the issuance of USD$130 million worth preferred shares. The deal incorporated the book building mechanism, the first time ever used in Colombia.

The deal closed in December, 2007

The deal was lead by Brigard & Urrutia partner Carlos Fradique-Méndez, assisted by associates Andres Crump and Ernesto Gómez.

For additional information visit www.bu.com.co

GIDE LOYRETTE NOUEL MNP

CLOSES TWO MAJOR CENTRAL EUROPEAN PROPERTY FINANCING INITIATIVES FOR CALYON

Gide Loyrette Nouel London has acted as international legal counsel to Calyon S.A. (“Calyon”) Crédit Agricole Group's Corporate and Investment Bank, in connection with a EUR 80 million financing for the ING Real Estate Fund group of companies.

The financing was used by ING to fund the acquisition of existing real estate assets in the Czech Republic and Hungary. Gide’s Prague and Budapest offices also provided local law support on the financings.

This transaction follows three other Calyon led financings to ING in the last 15 months involving Gide, and follows Gide acting as international counsel to Calyon’s financing of Tamweelview European Holdings S.A. (“TEH”) group of companies. The financing was used to fund the acquisition by TEH of real estate assets in the Slovak Republic, and constituted the first phase of a multi-phase financing expected to fund up to EUR 200 million. Once completed, the financing will be one of the largest real estate financings to-date in the Slovak Republic. TEH was advised by AXA Real Estate Investment Managers, as investment advisor and asset manager.

Calyon has been advised in each instance by London based Partner-elect Christopher Czarnocki, who commented *“This latest appointment once again illustrates the faith of a major lender such as Calyon in Gide’s ability to provide a high quality legal service across the various jurisdictions of Central and Eastern Europe, and is a vote of confidence in our growing banking and finance practice across the region.”*

For additional information visit www.gide.com

BAKER BOTTSLLP

DISCOVERY HOLDING ANNOUNCES AGREEMENT-IN-PRINCIPLE WITH ADVANCE/NEWHOUSE

NEW YORK, December 13, 2007 -- Discovery Holding Company (DHC) and Advance/Newhouse Programming Partnership (Advance/Newhouse) announced today the signing of a non-binding letter of intent to combine their stakes in Discovery Communications.

The transaction, if completed, will involve several steps:

. DHC will spin-off to its shareholders a wholly-owned subsidiary holding the networks and creative services businesses of Ascent Media Group (AMG);

. Immediately following the spin-off of AMG, DHC will combine with a new holding company and existing stockholders will receive shares of common stock of the new publicly-traded holding company; and

. As part of that plan, Advance/Newhouse will combine its interests in Discovery Communications and Animal Planet with the new holding company in exchange for preferred stock that, immediately after the closing of the transactions, will be convertible into shares representing one-third of the outstanding shares of common stock of the new holding company. The preferred stock held by Advance/Newhouse will entitle it to elect two members of the new holding company's board of directors and to exercise approval rights with respect to the taking of specified actions by the new holding company and Discovery Communications.

Baker Botts has served as regular outside counsel to Discovery Holding since its inception in 2005 and is currently representing Discovery Holding in this transaction. Baker Botts team members: Buzz McGrath, Bob Murray, Marc Leaf, Jonathan Gordon, Renee Wilm, John Winter, Jake Sabat, Laxmi Vijaysankar and Helen Lok all in New York; and Rob Fowler in Houston.

To read the Discovery Holding news release about the transaction, please visit http://ir.discoveryholding.com/phoenix.zhtml?c=191960&p=irol-newsArticle&ID=1087104&highlight

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About Baker Botts L.L.P.

Baker Botts L.L.P., founded in 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 regional, national and international clients. For more information, please visit www.bakerbotts.com.

HOGAN & HARTSON LLP

ADVISES NEWS CORPORATION ON SALE OF U.S. TELEVISION STATIONS

NEW YORK, January 4, 2008 – Hogan & Hartson LLP announced that it is advising News Corporation and its subsidiary Fox Television Stations on the sale of eight owned-and-operated FOX network-affiliated television stations to Oak Hill Capital Partners.

The sale is valued at approximately $1.1 billion in cash and, pending regulatory and other customary approvals, is expected to close in the third quarter of 2008.

The inter-disciplinary Hogan & Hartson team representing News Corporation and Fox Television Stations was led by partners Richard Horan (M&A) and Alex Johnson (M&A), and included corporate/M&A associates Carine Stoick, Tarah Grant, Jennifer Flynn, Liz Rhodes, Meaghan Atkinson, Amanda Krohn, and Aly Simons.

Other members from the firm's inter-disciplinary team included partners Ira Sheinfeld and Philip Altman (tax); partner Alex Cobey (broadcast transactions); partner Amy Freed (securities); partner Joseph Rackman and associate Vi Nguyen (employee benefits); partner Scott Reisch and associate Jennifer McClister (environmental); partner Paul Schwartz (intellectual property); partner Stan Brown and associate Dean Romhilt (labor); and partner Lee Berner (real estate).

Hogan & Hartson has represented Fox Television Stations in the acquisition and disposition of television station assets for more than 15 years.

For additional information visit www.hhlaw.com

LOVELLS ACTS FOR BNP PARIBAS ON VIETNAM FIRST

LOVELLS HAS ADVISED GLOBAL COORDINATOR, SPONSOR, BOOKRUNNER AND LEAD MANAGER BNP PARIBAS ON ONE OF THE FIRST HONG KONG LISTINGS OF A VIETNAMESE MANUFACTURER

The Hong Kong IPO of Vietnam Manufacturing and Export Processing (Holdings) Limited, a leading motorbike manufacturer in Vietnam, raised US$110 million in one of the first Hong Kong IPOs by a Vietnamese manufacturer. The offer comprised a Hong Kong public offer and international placing of over 226 million new and sale shares.

The Lovells team advised BNP Paribas on Hong Kong and U.S. securities law and provided on-the-ground support in Vietnam through Lovells' Ho Chi Minh City office. Jamie Barr led the team which included U.S. securities specialist, consultant Thomas Tarala, along with senior associates James Fong and Cindy Kao in Hong Kong and Christian Schaefer in Ho Chi Minh City. Commenting on the deal today, Jamie Barr Head of Asia Corporate Practice, said:

"Vietnam's economy is expanding rapidly and we are seeing an enormous amount of international interest in the country. The listing of VMEP is likely to be the first in a series of offshore listings by Vietnamese companies as the trend to raise funds for strategic investment increases. Our Hong Kong listing expertise and on-the-ground presence in Vietnam will give us a significant advantage in executing these deals.

Our team is once again delighted to be able to advise a leading investment bank, BNP Paribas, on one of the region's landmark listings. Following on from our work on the Country Garden, China Molybdenum and Sichuan Xinhua Winshare listings in Hong Kong this year, this IPO reinforces our reputation for advising on significant market transactions, this time from Vietnam where we have an established presence and are particularly well placed to support our investment banking clients.

Ends…

For additional information please visit www.lovells.com

MUNIZ RAMIREZ PEREZ-TAIMAN & LUNA-VICTORIA

ADVISES GRUPO DE SUPERMERCADOS WONG SA IN SALE TO CENTROL COMERCIALES SUDAMERICANOS (CENCOSUD)

Lima, December 2007.- Grupo de Supermercados Wong S.A. transferred 100% of its shares to Centros Comerciales Sudamericanos (CENCOSUD), valued at US $500 million. The agreement was signed on December 15, 2007, but the transfer will go into effect on January 31, 2008.

The transfer includes 23 supermarket chains, such as Wong, Metro, and Eco Almacenes, as well as American Outlet, shopping centers, power centers, Teleticket, and 17 plots of lands for the development of future commercial projects owned by Wong in Peru.

The transaction was structured as a stock purchase-sale agreement with an escrow contract. With part of the sales price, the Wong family acquired CENCOSUD shares, thus becoming the third largest individual shareholder of this business conglomerate that manages 500 commercial establishments in Brazil, Chile, Argentina and Colombia.

Acting for the Seller – Muñiz, Ramírez, Pérez-Taiman & Luna-Victoria Abogados (Peru): Mauricio Olaya (Partner) and Luis Córdova (Associate Lawyer)

Estudio Carey y Cia (Chile): Jaime Carey (Partner)

For additional information visit www.munizlaw.com.pe

NAUTADUTILH ACTS FOR VEDIOR

Vedior reached agreement with Randstad regarding a public offer that Randstad will now make for the Amsterdam-based staffing services company. Vedior will be valued at approximately 3.5 billion euros. The merging of these companies will create the second biggest temporary and contract staffing organisation in the world.

The NautaDutilh team assisting Vedior in the negotiations was led by Gerard Carriere, Christiaan de Brauw and Leo Groothuis.

For additional information visit us at www.nautadutilh.com

RODYK & DAVIDSON
ACTS FOR MACQUARIE GLOBAL PROPERTY ADVISORS

MGPA – Marina View – S$2.02 billion. Rodyk acted for Macquarie Global Property Advisors (MGPA), a private equity real estate fund management firm partly owned by Australia's Macquarie Bank Group, in its bid for a prime plot of land in Marina View.

Partner Leong Pat Lynn led this transaction supported by partners, Marian Ho, Lim I-An, consultant Dorothy Chia and associate Tan Shijie.

For additional information visit www.rodyk.com.sg

TOZZINI FREIRE

ACTS FOR PRIVATE PLACEMENT OF OGX PETROLEO E GAS

Summary of Transaction Private Placement of OGX PETRÓLEO E GÁS PARTICIPAÇÕES S.A.

Value of deal The total value of the transaction was US$989,450,000.00. The controlling shareholder Centennial Asset Mining Fund ("CAMF"), of the businessman Eike Batista, invested US$385,500.00.

The largest institutional investors were:

- Ontario Teachers`Pension Plan ("OTPP"), with US$450,000,000.00
- ZAM Ventures LP and ZAM Holdings LP ("ZAM"), jointly with US$156,304,167.00
- UBS Prestige Fund II LLC – Class 43 ("UBS"), with US$80,183,334.00
- Morgan Stanley Urugay Ltd. ("Morgan Stanley"), with US$64,250,000.00

Date of execution of the Stock Purchase Agreement December 18, 2007

Comments This transaction is one of the largest private placement conducted by a Brazilian company and was carried out in view of OGX`s outstanding performance in the 9th Bid Round of the Brazilian Oil and Gas Agency – ANP.

OTPP is the largest single-profession pension plan in Canada and invests the pension fund's assets and administers the pensions of 271,000 active and retired teachers in Ontario. OTPP has about U$2.5 billion of investments in Brazil.

Representing OTPP: TozziniFreire Advogados Team: Marta Viegas Rocha (partner), Fabiano Gallo (partner), Luis Antonio Maia Espínola de Lemos (partner), Eduardo Bezerra de Menezes Carreirão da Silva, Gustavo Pequeno Peretti Mattos, Felipe Rodrigues Caldas Feres (associates) and Carolina de Souza Andrade Santos.

For additional information visit www.tozzinifreire.com.br

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BRIGARD & URRUTIA

LUCE FORWARD
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Gide Loyrette Nouel

KIM, CHANG & LEE

SEOUL 2007
October 20-24

PRAC e-Bulletin is published monthly.
Member Firms are encouraged to contribute articles for future consideration. Send to susan.iannetta@prac.org.
Deadline is 10th of each month.

CLAYTON UTZ

media release

19 December 2007

Kyoto signing opens doors for corporate Australia

Sydney, 19 December 2007: If they haven't already done so, Australian businesses should begin examining buying and banking carbon credits to capitalise on the opportunities Australia's signing of the Kyoto Protocol presents, Clayton Utz partner and climate change specialist Brad Wylynko said today.

Speaking at a briefing on what the Kyoto ratification means for Australia's business community, Mr Wylynko, who attended the recent climate change meetings in Bali, said Australian businesses should be looking to manage their future carbon liabilities in the wake of the Australian government's commitment to reducing carbon emissions to 108% of 1990 levels by 2010.

"Ratifying Kyoto means we now have a firm target - and a commitment from the Federal government to enter into an Australian Emissions Trading System (AETA) a year earlier than originally proposed. It is well worth looking ahead to see where credits are available that might be cheaper today than tomorrow," Mr Wylynko said.

Mr Wylynko cautioned that there was a risk that credits purchased now would not be accepted under the new AETS, but this illustrated the point that each business needed to begin examining its own position.

"Businesses that buy carbon credits now - certified credits - may be in a better position when the domestic trading framework is introduced."

Mr Rob Fowler, the managing director of consultancy Abatement Solutions - Asia Pacific (AS-AP), who also spoke at the briefing, said while there was still a "lot of fog" around the Federal Government's current emissions trading proposals, Australian business needed to prepare now for the opportunities that would be available to it in the future.

"The key question for corporate Australia is do you understand how the proposed scheme will work and how it will impact you?" he said.

Mr Fowler said the accelerated implementation of an emissions trading regime in Australia meant that affected businesses - those with facilities emitting over 25,000 tonnes of CO2 per year - needed to properly understand their compliance obligations and how it would impact their operational decision-making. This included how they would go about purchasing and financing compliance units and ensuring their delivery, the impact on their cash flows and other financing obligations, and whether they were eligible for project credits.

"If you're a major emitter in Australia, you need to start developing a clear understanding of the value of carbon emissions and how that might evolve - and have a well thought out sourcing strategy for compliance units," Mr Fowler said.

ENDS

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

Update Intellectual Property

Benelux IP Update **14 December 2007**

This newsletter is sent from our Brussels office

Recent Developments in the Enforcement of IP Rights in Belgium
(This article is an extract from the Belgian chapter in *Intellectual Property Law in the European Community: A Country-by-Country Review, Second Edition.*)

The value of a company may be partly or even largely determined by its intellectual property rights and their management. In addition to awareness of the various types of intellectual property rights and the rules governing their ownership, awareness of the extent to which these rights can be protected and the legal remedies available in this regard is also crucial.
In the first seven months of 2007, three new acts[1] were published, all of which have important consequences for the enforcement of IP rights in Belgium.

This new legislation can be summarised as follows:

1. Transposition into Belgian law of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (the Enforcement Directive);
2. Centralisation of the adjudication of IP cases, by giving a limited number of courts exclusive jurisdiction to hear such cases;
3. Abolition of the prohibition against combining specific Belgian proceedings for injunctive relief (cease-and-desist proceedings) with proceedings to determine the infringement of IP rights;
4. Implementation of Regulation 1383/2003/EC of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (the "Anti-piracy Regulation"); and
5. Imposition of criminal sanctions for violations of all types of intellectual property rights.

1. Transposition of Directive 2004/48/EC (the "Enforcement Directive")

Although Belgium failed to meet the 29 April 2006 transposition deadline, it should be noted that the country's intellectual property laws were, to a large extent, already in line with the Enforcement Directive. However, because the Directive covers a broad range of topics, its transposition nonetheless necessitated important amendments to the existing IP legislation.

Damages for the infringement of IP rights

Article 13 of the Enforcement Directive lays down several rules on the damages to be awarded for the infringement of IP rights. To a certain extent, Belgian law was already in line with the Directive in this respect, *e.g.,* the damages award must be equal to the actual harm suffered and be based on lost profits or alternatively the royalties that would have been due had the infringing party obtained the right holder's consent to use the IP right in question. The Act of 9 May 2007 expressly incorporates the above rules into the various IP-related statutes and conventions applicable in Belgium.

In addition to transposing the Directive, the abovementioned act also provides that in the event of an infringement in bad faith of any intellectual property right, the court can take into account any profits made by the infringing party when determining the damages to be awarded. Previously, the courts were only allowed to do so for the infringement of certain types of IP rights, such as patents and Benelux trademarks.

These amendments entered into force on 10 May 2007.

Descriptive seizure proceedings

Belgian law already provided for so-called descriptive seizure proceedings (*saisie-description* or *beslag inzake namaak*), *i.e., ex parte* proceedings allowing the holders of certain IP rights to gather evidence on the extent, scope and origin of an infringement of their rights through a description of the infringing goods and to prevent aggravation of the damage by physical seizure of the goods.

Pursuant to the Act of 10 May 2007, the holders of all IP rights will now be entitled to initiate this type of proceedings. Although for most types of IP rights, this right was already largely recognised in the case law, it has now been codified in the new legislation.

In addition, the act clarifies the conditions to obtain descriptive relief, on the one hand, and seizure measures, on the other. In both cases, the relevant IP right must be prima facie valid. In order to obtain descriptive relief, the petitioner must establish the existence of indications of infringement or imminent infringement. The other conditions for seizure of the infringing goods are more stringent: (1) there must be no *prima facie* grounds to dispute the infringement, and (2) the seizure must be reasonably justified in light of the interests of the parties, including the public interest.

The act contains another important change with respect to seizure measures. If the court considers it appropriate given the circumstances of the case, the alleged infringer can be summoned before the court, in which case the petitioner can submit observations beforehand. However, the petitioner can decide to forego seizure of the allegedly infringing goods and limit its application to descriptive relief in order to preserve the element of surprise.

The above rules entered into force on 1 November 2007.

2. Centralisation of the adjudication of IP cases

Pursuant to the Act of 10 May 2007, exclusive jurisdiction to adjudicate IP cases is henceforth vested in a limited number of courts. The aim of this procedural change is to enhance the relevant courts' expertise in the area of intellectual property.

The relevant provisions entered into force on 1 November 2007.

3. Abolition of the prohibition against combining specific Belgian proceedings for injunctive relief (cease-and-desist proceedings) with proceedings to determine the infringement of IP rights

Specific proceedings for injunctive relief, also referred to as cease-and-desist proceedings (*action en cessation*/*vordering tot staking*) are proceedings on the merits initiated and conducted as summary proceedings, with the exception that a showing of urgency is not required. The measures that can be obtained are permanent and immediately enforceable injunctions, usually subject to a penalty for each subsequent infringement and/or day of delay in complying with the injunction and publication of the decision. Damages cannot be awarded in the scope of cease-and-desist proceedings.

It was in principle prohibited to combine the above type of proceedings with IP infringement claims. According to the case law, however, this rule is unconstitutional with respect to certain types of IP rights.

The Act of 10 May 2007 definitively repeals this prohibition with respect to all IP rights. The relevant provisions entered into force on 1 November 2007.

4. Implementation of the Anti-piracy Regulation

The Anti-piracy Regulation enables customs authorities in the EU to detain goods suspected of infringing certain IP rights. In this respect, Article 17(1)(a) of the Regulation allows the competent national authorities to destroy goods that are found to infringe an intellectual property right or to dispose of them outside commercial channels. However, the Regulation also makes it possible for the Member States to provide for a simplified procedure for the destruction of goods so detained, without the need to actually prove infringement before a court of law (Article 11).

By means of the Act of 15 May 2007, Belgium has taken the opportunity to enact national provisions to this effect.

Article 16 of the Regulation states that goods found to infringe an intellectual property right may not be allowed into or out of the EU or released for free circulation. In compliance with the provisions of Article 18 of the Regulation, the act lays down severe criminal sanctions for violation or attempted violation of this prohibition, namely fines of EUR 550 to EUR 550,000 and/or a prison term ranging from three months to three years. These provisions entered into force on 1 October 2007.

5. Criminal sanctions for the violation of IP rights

Under the old legislation, criminal sanctions could only be imposed in certain cases of trademark or copyright infringement.

However, with the entry into force of the Act of 15 May 2007 on 1 October 2007, Belgium now has a fully harmonised system providing for a series of criminal sanctions applicable to the infringement of all types of IP rights.

One of the major innovations brought about by the new legislation is that the competent officials will be able to commence criminal proceedings on their own accord. Consequently, it will no longer be necessary for the holder of the relevant IP right to file a complaint before criminal proceedings can be initiated. The rationale behind this amendment is that the purpose of criminal sanctions is not only to protect IP right holders but also the public interest since counterfeiting goes against public policy.

An infringement of an IP right will only be subject to criminal sanctions if it has been committed with malicious or fraudulent intent, the reason being that the legislature wished to restrict the scope of application of the new criminal provisions to the most important infringements of IP rights, *i.e.,* those that are committed with the intention of taking unfair advantage of, or harming, the right holder's interests.

There are several indications that organised crime is, in many cases, involved in the production and trafficking of counterfeit and pirated goods. The large sums available to criminal organisations enable them to produce such goods on a mass scale. Moreover, these goods are becoming increasingly difficult to detect. In order to be able to fight organised crime effectively, the legislature decided to extend the maximum prison term to three years which, pursuant to the Belgian Criminal Code, is the lower limit for offences committed by criminal organisations.

Another new development is that the competent law enforcement officials of the Ministry for Economic Affairs will be given considerable investigative and seizure powers with respect to suspected infringements of IP rights. The new legislation also provides for a preventive warning procedure, the purpose of which is to put an end to an infringement without actual prosecution of the relevant offender. However, this procedure will only be available if the competent official is of the opinion that the infringement is not severe or that no harm has been caused to third parties, including the IP right holder.

Lastly, officials will be able to propose that the offender pay a fine in exchange for the abandonment of criminal proceedings. If the offender accepts the offer and hands over the infringing goods to the state, criminal proceedings will not be initiated. However, this provision will only apply if the injured party has waived its right to file a complaint.

Given the broad powers of investigation and seizure, as well as the more stringent criminal sanctions provided for under the new legislation, holders of IP rights have high expectations that the authorities will take infringements of their rights more seriously, thereby contributing to the fight against piracy and counterfeiting.

[1] Act of 10 May 2007 on the judicial aspects of the protection of intellectual property rights (published on 10 May 2007); Act of 9 May 2007 on the civil-law aspects of the protection of intellectual property rights (published on 10 May 2007); Act of 15 May 2007 on the fight against counterfeiting and piracy (published on 18 July 2007).

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News

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Tax

BRAZIL: NEW TAX RATES

Due to the expiration of CPMF (the Brazilian tax on bank transactions, charged at a rate of 0.38%) on December 31, 2007, the Federal Government has increased the rates of certain taxes to reduce the revenue loss caused by the end of CPMF:

Increase of rates - Tax on Credit Transactions ("IOF/Credit"):

- For individuals: from 1.5% to 3% per year;
- For any credit transactions, including those with individuals: surcharge of 0.38% in each transaction;
- Foreign loans – i.e., loans in which the creditor is not a Brazilian resident – are exempt from IOF/Credit, and this exemption has not been changed.

Increase of rates - Tax on Foreign Exchange Transactions ("IOF/Foreign Exchange"):

- Inflow of foreign loans with maturity term of 90 days or less: from 5% to 5.38%;
- Outflow of funds corresponding to imported services: from zero to 0.38%;
- Inflow of funds corresponding to exported assets and services: from zero to 0.38%;
- Inflow/outflow of funds from portfolio investors located outside Brazil: zero rate was maintained;
- Outflow of funds in order to pay credit cards expenses: from 2% to 2.38%;
- Inflow/outflow of funds in inter-bank foreign exchange transactions: zero rate was maintained;
- Any other foreign exchange transactions, including inflow/outflow of funds related to foreign loans: from zero to 0.38%.

Financial institutions, insurance companies and other companies in the financial sector:

- Increase of Social Contribution on Profits ("CSLL") from 9% to 15% as of May 1st, 2008. Since such increase derived from a Provisional Measure, it will have to be approved by the Brazilian Congress within the next 90 days.

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Landmark Supreme Court Case Provides Continuous Disclosure Guidelines

Date – December 18, 2007

The Supreme Court of Canada's recent confirmation of the landmark decision of the Ontario Court of Appeal in *Kerr v Danier Leather Inc*[(1)] led many directors and officers of publicly traded companies in Canada to breathe a sigh of relief. The appeal concerned the continuous disclosure obligations of an issuer seeking to sell its shares to the public by way of a prospectus; specifically, whether an issuer could be held civilly liable for statutory misrepresentation for failing to update its prospectus with material information that becomes known during the period of distribution.

Background

In anticipation of an initial public offering (IPO) for its shares, Danier Leather Inc filed with the Ontario Securities Commission a prospectus which included the company's financial results for its first three quarters and a financial forecast for the fourth quarter of its fiscal year ending on June 27 1998. The prospectus included all the usual language warning prospective investors that the forecast was just that. The prospectus was filed on May 7 1998 and closing was scheduled to take place approximately two weeks later. Prior to closing, the company undertook a due diligence review to assemble and analyze the financial results for the first half of the fourth quarter. As of May 16 1998, these results showed that fourth-quarter revenues were lagging behind management's original forecast. After investigation, the slowdown in sales was found to be the result of unseasonably warm weather. Both the chief financial officer and the chief executive officer testified at trial that they were aware of these results, but believed that by year-end Danier would achieve or exceed the prospectus forecast. It was decided not to disclose the results or amend the original prospectus before closing. Shortly following the completion of the IPO, Danier announced in a press release that it had revised its forecast for the 1998 fiscal year to reflect the slowdown in sales due to the unseasonably warm weather throughout most of the country. Danier also filed a material change report to that effect. Prior to Danier's press release, its shares had been trading at C$11.65, but dropped to C$8.90 within a week. The IPO price was C$11.25. Despite its press release, Danier did ultimately achieve the forecast.

A class proceeding was commenced by Danier investors alleging that a misrepresentation had been made in the prospectus. The action was brought pursuant to Section 130(1) of the Ontario Securities Act. The plaintiffs alleged that even though the year-end sales forecast was reasonable on the filing date, lagging sales following closing rendered it misleading at the date of closing, and that those who had purchased shares in ignorance of this change were entitled to compensation.

Judicial History

Although the plaintiff class of investors was initially successful at trial, in late 2005 the Ontario Court of Appeal reversed on the following three grounds:

- While investors were entitled to assume that as of the filing date the prospectus provided "full, true and plain disclosure of all material facts", after filing they were entitled only to notice of a material change, and between the prospectus filing and closing there had been no material changes;
- The trial judge had erred in finding that the forecast contained an implied representation of objective reasonableness; and
- The trial judge failed to give adequate consideration and deference to the business judgement of Danier's senior management and had incorrectly substituted his own view as to the reasonableness of the forecast for that of senior management (for further details please see "Court Comments on Scope of Officers' and Directors' Liability").

Supreme Court

The Supreme Court confirmed that the obligation to disclose after an accurate prospectus has been filed is limited to providing notice of a material change and does not extend to material facts.[2] The court concluded that Danier's amended forecast was not a change made to Danier's business, operations or capital during the period of distribution, but rather was the result of an outside factor beyond Danier's control, which did not amount to a material change. Given the limited scope of the disclosure obligation, prospective purchasers were entitled to assume only that no material changes had occurred between the date of the filing and the date of closing.

The Supreme Court also found that the forecast carried an implied representation of objective reasonableness only until the date the prospectus was filed on May 6 1998. The forecast represented management's best judgement on that date based on facts and assumptions that reasonable business people in the same position with the same information would regard as reliable. Further, there was no promise made by Danier that the forecast would be updated if conditions changed beyond that date.

However, regarding the third issue of the applicability of the business judgement rule, the Supreme Court provided some relief for investors and a warning to issuers, ruling that while the business judgement rule can be relied on in the context of business decisions, it cannot be used to circumvent or qualify the legal obligation to disclose. In other words, the business judgement rule cannot be used as an excuse when disclosure should have been made. However, as Danier had already prevailed in the first two arguments, the outcome was not altered by the Supreme Court's findings on this issue.

Impact

The Supreme Court decision provides clarity to publicly traded companies, investors and other market participants. Most importantly, issuers must be mindful of the fact that they cannot

simply rely on the business judgement rule to defend the accuracy of a prospectus forecast. Issuers must exercise prudence and diligence to ensure they adhere to their legal obligation to disclose all material changes that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer in the course of an offering.

Class Actions

The Supreme Court also provided important guidance on the question of costs in class action litigation by ordering the investor class representative appellant to pay the legal costs of the case. In discussing the issue of costs, Justice Binnie wrote that "protracted litigation has become the sport of kings in the sense that only kings or equivalent can afford it". In the interests of not prohibiting access to justice, in recent years Ontario courts have protected plaintiffs from costs of class proceedings on the basis that they are frequently lengthy and thus expensive to pursue. However, in this case the Supreme Court found that both parties were highly sophisticated and well financed, thus alleviating any concerns of prohibiting access to justice in making a costs award against the representative plaintiff.

Endnotes

(1) [2007] SCC 44.

(2) See Section 57 of the Ontario Securities Act, RSO 1990, c S 5, as amended, which requires only disclosure of a material change.

Jonah Mayles, articling student at Fraser Milner Casgrain LLP, helped with the preparation of this update.

For further information on this topic please contact Kate Broer at Fraser Milner Casgrain LLP by telephone (+1 416 863 4511) or by fax (+1 416 863 4592) or by email (kate.broer@fmc-law.com).

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Fair Play or Foul: Digital Rights Management Challenges under Competition Law

By Peter Waters* and Rob Nicholls**

I. Introduction

This paper considers the changing consideration of digital rights management of music and video in the context of competition law, using the Apple FairPlay digital rights management (DRM) system as an example. The paper begins by considering the elements of a DRM system before considering the changing legal analysis of FairPlay (particularly in Europe). The paper traces the challenges to the FairPlay system commencing with an analysis of the French Competition Commission's view in 2004 that it was difficult to see how Apple could "behave independently". It then considers the consumer law challenges in Nordic countries and moves by the European Union in 2007 alleging breach of competition law. In each case, the paper examines the increasing interaction between DRM and competition law. The paper concludes by considering the role of technological protection measures in the context of competition law more generally.

II. Digital Rights Management

A. Introduction

DRM is a mechanism for determining how consumers of content can use that content. Applied to audio and video content, DRM systems determine whether consumers can experience the content once or multiple times, on which devices they can experience this content and their ability to share content with others.

Digital media, delivered in electronic rather than physical form, allows world-wide distribution of content at a quality that is indistinguishable from a store-purchased copy, without any revenue flowing back to those who provided the intellectual and financial investment to create the content in the first place. Consequently, content owners are highly motivated to implement a solution to control content and ensure compensation. Current approaches to controlling distribution of digital media are largely based on DRM.

B. Protecting Content

The objective of DRM is to use a technological protection measure to ensure that content is only used in accordance with the rights that are issued by the rights holder. The introduction of digital audio and digital video technology has created a significant potential problem for rights holders. Digital content can be duplicated ad infinitum without any degradation in quality. This led to the environment where consumers chose to duplicate compact discs or to rip content from those discs to be burned as MP3 content to be played on portable devices.

From a technical perspective, the challenge facing content owners in a digital world is to be able to implement a technological protection mechanism which permits those consumers who have paid for certain entitlements to enjoy those entitlements but to restrict the unauthorized copying and sharing of content, and to restrict other uses which amount to infringement of copyright.

C. Delivering Rights Information

In order to be able to grant consumers rights of use over content, certain rights information needs to be delivered to the device on which the consumer will enjoy the content. In its most basic form, rights information may simply be a "switch" which allows the content to be consumed provided that the customer has paid for the right of consumption.

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The challenge for DRM is to provide a means of delivery of rights information which permits consumers to enjoy personal use and fair use rights freely, but protects the interests of the rights holders at the same time. History demonstrates that initial implementations of DRM were too heavily balanced in favor of the rights holder compared to the consumer. Some of the frustration that arises from this imbalance is demonstrated by the recent public anti-DRM sentiment expressed in websites calling for "DRM rage".

Having learned some of the lessons of getting the DRM balance right, more recent implementations of DRM have fewer restrictions. For example, the DRM system used by Apple in the combination of iTunes and iPod works very well for iPod users. However, many users download content from illegal sources to play using an iPod. Apple's iPod device uses a proprietary DRM system which has caught the attention of a number of governments[1] as has the implications of the EU copyright directive on areas such as television[2] and DRM more generally.[3] It is not possible to play a song downloaded from iTunes using an MP3 device other than an iPod or an Apple DRM licensed device because of the proprietary nature of the Apple DRM known as FairPlay.

The FairPlay DRM entitles the user to play their music on up to five computers (with unlimited synching with iPods). That is, each of the five computers can synchronize with the user's iPod any number of times. FairPlay also, allows unlimited burning for individual songs and lets the user burn playlists up to 7 times each.

There are generally two types of delivery of rights information. [4] The first is to embed the rights information with the content for single delivery. This type of DRM is used in the Apple FairPlay system. As an alternative, rights information can be sent separately from the content. In this latter case, the content is sent in an encrypted form and is decrypted using keys which are part of the rights information. In the case of embedded rights, the content is also encrypted but relies on a key which is typically part of the device on which the content is to be played. The reason that iTunes songs can only be played on an iPod is that the iPod itself contains the decryption keys.

III. Apple FairPlay and competition law

A. French opening

The early interaction of FairPlay and the law occurred in France. On 9 November 2004, the French Competition Council (FCC) dismissed a complaint by VirginMega.fr against Apple where it was alleged that Apple had abused market dominance by refusing to license its FairPlay DRM system. [5] The FCC considered whether Apple had breached both French law and European law, specifically Article 82 of the EC Treaty. [6]

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[1] Mazziotti, G. 2005. "Did Apple's Refusal to License Proprietary Information Enabling Interoperability with its iPod Music Player Constitute an Abuse under Article 82 of the EC Treaty?" World Competition 28(2):253-275.

[2] Oest, Alexander G. 2005. "The Promise vs. the Taboo: Implications of the EU copyright directive on television software development." Telematics and Informatics 22(1-2):71-82.

[3] Schneider, Markus and Anders Henten. 2005. "DRMS, TCP and the EUCD: technology and law." Telematics and Informatics 22(1-2):25-39. Towse, Ruth. 2005. "Economics and copyright reform: aspects of the EC Directive." Telematics and Informatics 22(1-2):11-24.

[4] For more detail, see Nicholls, Rob. 2007. "Technological protection measures: mobile digital; rights management." Journal of the Copyright Society of Australia 25(2):40-54.

[5] VirginMega.fr v Apple Computer, Inc. 2004. "Décision n° 04-D-54 du 9 novembre 2004 relative à des pratiques mises en oeuvre par la société Apple Computer, Inc. dans les secteurs du téléchargement de musique sur Internet et des baladeurs numériques." French Competition Council.

[6] Deneuter, Didier 2004. "No Abuse of Market Dominance by Apple According to the French Competition Council." In Eurojuris. Brussels: Eurojuris.
Helberger, Natali 2005. "Virgin Media versus iTunes." In INDICARE Project - Consumer issues on digital rights management (DRM). Brussels: INDICARE

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Article 82 (a) of the EC Treaty requires that companies in dominant positions must not refuse to supply their goods or services if refusal to supply would significantly impact competition. To make this assessment, the FCC considered two markets: portable music players and downloadable music. It found that Apple was dominant in both but that there was no separate DRM market. However, the FCC found that the refusal to license was not an abuse of either of the dominance positions. The rationale was that a FairPlay license was not indispensable for VirginMega to compete in the online music business.

Following the FCC decision, the French Parliament in 2006 voted to add unique interoperability provisions in its implementation of the EU copyright directive. [7] These provisions were significantly amended in the Senate and the specific provisions which would have made it difficult for FairPlay to be used in France without a requirement for Apple to license the DRM system were removed.

B. Consumer affairs

In Norway, provisions of the *Marketing Control Act* provide that:

> *Terms and conditions which are applied or are intended to be applied in the conduct of business with consumers can be prohibited if the terms and conditions are considered unfair.*

After consumer complaints that the FairPlay system only permitted iTunes downloads to be played on an iPod, the Norwegian consumer Ombudsman found in January 2007 that the license conditions imposed by Apple were unfair and contravened the *Marketing Control Act*. [8] As a result, the Ombudsman required that Apple indicate how it will resolve the issues or actually resolve them.

Consumer groups in Sweden, Denmark, Germany, France, Finland and the Netherlands have also followed the same course.[9]

C. US rumblings

Mazziotti, G. 2005. "Did Apple's Refusal to License Proprietary Information Enabling Interoperability with its iPod Music Player Constitute an Abuse under Article 82 of the EC Treaty?" World Competition 28(2):253-275.

[7] Välimäki, Mikko and Ville Oksanen. 2006. "DRM Interoperability and Intellectual Property Policy in Europe."

[8] Ibison, David and Emiko Terazono. 2007. "Norway declares Apple's iTunes illegal." Financial Times 25 January 2007.

Ferguson, Tom. 2007. "Europe vs. Apple Consumer Groups Across the Continent Follow Norway's Fight for iTunes Interoperability." In Billboard. London.

Hachman, Mark. 2007. "Norway, France, Germany Renew Fight Against iTunes; The Norwegian ombudsman said this week that it has sided with a consumer council in its claims that Apple's iTunes service unfairly locks in consumers. French and German consumer groups have also joined in." In PC Magazine. London.

[9] Ferguson, Tom. 2007. "Europe vs. Apple Consumer Groups Across the Continent Follow Norway's Fight for iTunes Interoperability." In Billboard. London.

Hachman, Mark. 2007. "Norway, France, Germany Renew Fight Against iTunes; The Norwegian ombudsman said this week that it has sided with a consumer council in its claims that Apple's iTunes service unfairly locks in consumers. French and German consumer groups have also joined in." In PC Magazine. London.

As a result of the collective action of the European consumers, EMI and Apple announced in the beginning of April 2007 that EMI Music's entire digital catalogue of music will be available for purchase without DRM from the iTunes worldwide in May. "Free-DRM music by iTunes, but EC starts official investigation" European Digital Rights, April 12, 2007.
http://www.edri.org/edrigram/number5.7/ituned-free-drm last visited on December 31. 2007.

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In a case heard on 20 December 2006, the US District Court of Northern California declined to permit Apple to dismiss a class action alleging violation of the Sherman Antitrust Act by Apple. [10] The plaintiff alleged:

> *that Apple has unlawfully tied sales of its iPod portable digital music player and online digital music files sold through its iTunes online music store in violation of federal and state antitrust laws.*

That is, the US case seeks to run the same tying argument that consumer advocates in Europe have alleged.

D. The European Commission

The iTunes system requires that consumers provide a credit card issued in the country in which they live in order to download songs: for example, it is not possible to use a credit card issued in the United Kingdom to download songs from the iTunes site set up to service the Netherlands. This facilitates the ability for Apple to charge on a differential basis between countries. In 2004, the consumer advocate group "Which" complained to the European Commission that the effect of the differential pricing was that UK residents paid up to 18% more for songs than residents in countries where the currency is the Euro. As a result of this complaint and increasing agitation from consumer groups in other countries, on 3 April 2007 the European Commission confirmed that it had sent a Statement of Objections to major record companies and Apple. [11]

In the statement, the European Commission said:

> *[the effect of the] Agreement between each record company and Apple that restrict music sales: consumers can only buy music from the iTunes' online store in their country of residence ..[is that] .. consumers are thus restricted in their choice of where to buy music, and consequently what music is available, and at what price. The Commission alleges in the Statement of Objections that these agreements violate the EC Treaty's rules prohibiting restrictive business practices (Article 81).*

That is, the European Commission considered a consumer led complaint but ultimately chose action under competition law rather than consumer law. It is interesting to note that the record companies were also joined into the action by the European Commission. The implication is that the differential pricing was not solely driven by a decision by Apple but rather was driven by the record companies seeking differential pricing. The result of the action by the European Commission is expected in the fourth quarter of 2007.

E. China

The *Anti-Monopoly Law* of the People's Republic of China which was adopted by the Twenty Ninth Session of the Standing Committee of the Tenth National People's Congress on August 30 2007, would also provide scope for a competition law consideration of the deployment of the FairPlay DRM system. Article 55 of the *Anti-Monopoly Law* distinguishes between normal use of intellectual property rights (which falls outside of the *Anti-Monopoly Law*) and

> *operators eliminating or restricting competition by the abuse of the intellectual property rights*

That is, the *Anti-Monopoly Law,* in contrast to legislation in both the European Union and the United States, considers that there is likely to be an interaction between intellectual property law and competition law. An

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[10] Melanie Tucker v. Apple Computer Inc. 2006. "NO. C 06-04457 JW." San Jose: United States District Court for the Northern District of California.

[11] European Commission. 2007. "Competition: European Commission confirms sending a Statement of Objections against alleged territorial restrictions in on-line music sales to major record companies and Apple." In EC Press Release. Brussels: European Commission.

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analysis of the position of FairPlay under the *Anti-Monopoly Law* would first require that a test be applied that provides: (1) evidence that there had been an abuse of intellectual property rights; and (2) that this abuse had led to the elimination or restriction of competition.

If this test has been met, then the analysis of the use of DRM to restrict normal competitive processes would be examined under either Chapter 2 (Monopoly Agreements) or Chapter 3 (Abuse of Dominant Market Position) of the *Anti-Monopoly Law*.

IV. Discussion and Conclusions

Digital rights management is a form of technological protection measure which is designed to enforce the rights of rights holders in respect of content which will be used by rights consumers. The Apple iTunes uses the FairPlay DRM and this has been designed to have a high level of flexibility (certainly when compared to DRM systems used in other consumer devices). However, the acceptance of the FairPlay DRM system by consumers has changed over the period 2004 to 2007. Instead of recognizing that FairPlay DRM protects rights holders, the DRM system is considered as a restriction on the use of content which has been acquired whether legitimately or otherwise.

Although the early consumer response was restricted to legal bodies which are tasked with ensuring that consumer legal rights are upheld, it has ultimately spilled into the area of competition law. That is, the electronic protection measures which typically form part of the intellectual property law of a state are being considered under competition law in the same state. Whereas most of the activity has occurred in the European Union where there is more scope for an international determination of competition law principles, the fact that there are antitrust actions in the US using the same basic courses of action, suggests that this will soon become a global phenomenon.

At a more fundamental level, the history of litigation concerning the Apple FairPlay DRM system suggests that differentiating pricing of identical content which is delivered electronically is going to be a complex issue which crosses the borders between intellectual property law and competition law. In respect of goods and services delivered electronically, the business opportunities that arise from differential pricing in the secondary market may diminish regardless of intellectual property law as competition law encroaches on this sector.

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INDIA
ANTITRUST AND COMPETITION LAW

After the economic reforms of the early 1990s, the Monopolies & Restrictive Trade Practices Act, 1969 (the MRTP Act) was considered to have become obsolete, as India had embraced a market driven economy while entering globalization. Hence there was a need to shift focus from curbing monopolies to promoting competition, leading to enacting the Competition Act, 2002 (the Competition Act). The raison d'etre of the Competition Act was to create an environment conducive to competition and was brought into force in stages.

The remainder of the said Bill was re-introduced in Parliament as the Competition (Amendment) Bill, 2006. This was thereafter referred to the Parliamentary Standing Committee. The recommendations of this Committee resulted in a Competition (Amendment) Bill, 2007 being promulgated in Parliament in November 2007. The Bill yet awaits the presidential assent under the Indian Constitution for it to have the force of law.[*]

In the Bill, merger control provisions prescribed threshold limits at Rs 500 crores[**] (currently valued at USD 126 million) for transactions, which when crossed, would render the transaction "a Combination" (i.e. a dominant enterprise having an adverse effect on competition) and attract the provisions of the Competition Act in relation to companies having assets exceeding USD 2 Billion or turnover exceeding USD 6 Billion. Under the Competition Act, 2002, notification of mergers to the Competition Commission of India (CCI) was only voluntary. The CCI under the 2002 Act was required to take a view within 90 days of receipt of complete information, after which the merger was deemed to have been irrevocably approved. This facilitated mergers/ acquisitions without practical difficulty unlike the new competition law, promulgated in November 2007, which now requires a compulsory notification to the CCI where the threshold limit of Rs.

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[*] This is the position as at 7th December 2007.
[**] Rs.5,00,00,00,000/-

500 Crores[**] / USD 126 Million is crossed, regardless of whether in the opinion of the company, it would render the transaction a Combination or not.

The CCI now assumes the role of evaluating each such transaction (where the threshold is crossed), whether the transaction results in a Combination adversely affecting competition. One needs to view whether the stipulated threshold in today's context, needs to be raised to a realistic figure. Over the last few years, even Indian corporates have been acquiring targets overseas of substantially high values (Corus acquisition by Tata for USD 12 Billion, Suzlon's acquisition of REpower Systems AG for USD 565 million etc).

To add to this, the CCI is now afforded a period of 210 days to render its decision - a full 7 months! The international competition laws of other market economies provide only 30 days. If the deal is held up for 7 months, could values change? Due diligences done, would they still be considered current? Issues to ponder over! Are the "wheels" off somewhere?

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[**] Rs.5,00,00,00,000/-

Nishimura & Asahi

New financial framework

January 2008

By Akio Kawamura

In late 2006, the author wrote an article about the Financial Instruments and Exchange Law (the FIEL), summarising the implications of the Law from the perspective of foreign institutions investing in Japanese securities or dealing with Japanese investors or counterparties in financial transactions (see "Financial products regulation revamped" in the *IFLR Guide to Japan 2007*). In August 2007, after an intensive public comment process, the FSA promulgated the Cabinet Order and Cabinet Office Regulations (collectively, the "ordinances") stipulating detailed regulations to enforce the FIEL. The FIEL became effective as of September 30 2007. This article is intended to provide an update on the legal issues under the FIEL discussed in the earlier article summarising important regulations relating to those legal issues stipulated under the ordinances.

Registration requirements

Unless an exemption or exception is permitted under the FIEL, any person who engages in financial instruments business either in Japan or with Japanese investors or Japanese counterparties must be registered with the Financial Services Agency of Japan (FSA). Six classes of financial instruments businesses are subject to registration requirements under the FIEL

1. The first financial instruments business

This is traditional securities business. The ordinances have made it clear that the qualification requirements for this business under the FIEL remain substantially unchanged from those under the earlier Securities and Exchange Law (SEL). Underwriting businesses and securities-related over-the-counter derivative transactions are no longer subject to the licensing requirement. Only proprietary trading system business, which is the Japanese counterpart of alternative trading systems in the US and Europe, remains subject to the licensing requirement.

2. The second financial instruments business

a. What does this business category mean?

This business means securities business concerning securities with lower liquidity as well as listed derivatives products. This category also includes the self-offering of interests in a collective investment scheme by an organiser (including a general partner) of the collective investment scheme. In a nutshell, a collective investment scheme means an investment contract whereby a passive investor invests money into a business enterprise operated by another person in return for a share of the profit.

b. What does a self offering mean?

By way of an example, if a foreign organiser of a fund collects money from Japanese investors for the purpose of organising its investment fund, it constitutes a regulated self-offering requiring this registration. This is a new requirement, introduced by the FIEL, presumably based on a legislative intent to regulate active investment activities of the fund managers of collective investment schemes.

c. Exemption of a self offering to a qualified institutional investor (QII) plus less than 50 non-QIIs.

In the case where a self-offering of interests in a collective investment scheme is accepted by at least one QII and less than 50 non-QIIs, the offerer only has to file a notification, but does not have to be registered as a financial instruments firm.

3. Asset management business (*Toshi Unyo Gyo*)

This business category means investment trust management

business, discretionary asset management business and self-management of a collective investment scheme and certain other funds investing primarily in securities and derivatives regulated under the FIEL. The registration requirement for the self-management of a fund is a new requirement. Similar to 2c above, there is a QII-related exemption for the self- management of a fund. By way of an example, if a general partner of the fund manages assets of investors who comprise of at least one QII and less than 50 non-QIIs, the general partner only has to file a notification, but does not have to be registered as a financial instruments firm.

For discussion on the applicability of this registration requirement to a foreign fund manager managing the assets of a Japanese investor, please see the paragraph below entitled "Regulations of Offshore Funds and Exemptions".

4. Investment advisory business

5. Agency or intermediary business for execution of investment advisory contracts or discretionary investment contracts

6. Financial instruments introducing brokerage business

Expanding the definition of "securities" and "derivatives"

1. The definition of "securities"

The FIEL has expanded the scope of the definition of securities by adopting a comprehensive definition of "a collective investment scheme". In addition to "securities" specified under the FIEL, the ordinances have designated a debenture issued by a school and a foreign CD as additional products covered within the definition of securities under the FIEL.

2. The definition of "derivatives"

The FIEL has expanded the definition of derivatives, consolidating the definition of derivatives under the SEL and those of the Financial Futures Act with the addition of some new derivatives products. In addition to the derivatives specified under the FIEL, the ordinances have designated derivatives involving variable indicators concerning natural phenomena, such as weather and terrestrial phenomena, and statistics concerning the national economy, such as GDP.

3. Certain derivatives transactions exempt from the regulation of the FIEL

The ordinances stipulate that the following derivatives transactions are exempt from the regulations of the FIEL: transactions (a) which are over-the-counter derivative transactions included in the definition of derivatives under the FIEL but not related to securities (defined as "Over-the-counter Derivative Transactions not Related to Securities"), including currency and interest rate swaps and credit derivatives, and (b) the counterparty of which is a financial instruments firm, Qualified Institutional Investors or a Japanese KK (*kabushiki kaisha*) or a foreign corporation comparable to a Japanese KK, having capital of no less than ¥1 billion (approximately $9 million). Accordingly, a foreign entity not registered with the FSA is able to engage in over-the-counter derivative transactions not related to securities with such qualified Japanese counterparties.

Overseas institutional investors

1. Professional investors v general investors

The FIEL has created a distinction between professional investors and general investors. Financial instruments firms transacting with professional investors are exempt from certain FIEL regulations that are primarily intended to provide investors with information important for investment consideration including information on the risks of the financial transaction contemplated.

The FIEL has also created two professional investor categories, further creating a distinction between permanent professional investors (namely, QIIs) and tentative professional investors who can opt out to become general investors for a less than one-year period if they wish to receive more investor protection. A tentative professional investor is able to exercise the option for each of the following four contract categories regulated under the FIEL; a contract for a securities transaction, a contract for a derivatives transaction, an investment advisory contract and an asset management contract.

2. Treatment of overseas institutional investors

The ordinances stipulate that overseas institutional investors, except where they fall within the definition of QIIs under the FIEL, are all classified as tentative professional investors, whereas overseas individual investors are all classified as general investors. Those overseas institutional investors are therefore able to opt out to become general investors and stay as general investors until the end of the less than one-year period set by the financial instruments firm at which they have an account. Before entering into any of the above-mentioned four categories of regulated contracts with a tentative professional investor for the first time, a Japanese financial instruments firm is obligated to notify the tentative professional investor of its right to opt out to become a general investor. Overseas institutional investors may from time to time receive such a notification letter from Japanese financial instruments firms.

Regulation of offshore funds and exemptions

1. FIEL regulation applicable to offshore funds

The registration requirement of the FIEL for asset management business extends to cover the management of an offshore collective investment scheme (for example, partnership) or the discretionary management by an offshore manager of third party clients' assets, which constitute an asset management business under the FIEL (*Toshi Unyo Gyo*), if the asset of a Japanese investor is involved under the management. However, as discussed below in this paragraph, in regard to an overseas fund operating in the form of a collective investment scheme, there are two exemptions from this registration requirement stipulated under the ordinances (the management of an investment trust set up outside of Japan lies outside of the scope of the FIEL registration requirement).

2. First exemption

First, to avoid undue extra territorial application of the registration requirements, the ordinances afford to an overseas fund operating in the form of a collective investment scheme an exemption from the registration requirement if (A) the Japanese investors holding interests in the fund comprise of less than 10 QIIs or certain other eligible entities specified under the ordinances and (B) the aggregate amount of such holdings by the Japanese investors constitutes less than one-third of the entire assets of the offshore fund.

3. Second exemption

Secondly, even if an offshore fund does not satisfy the requirement for the first exemption, the fund manager may still be able to take advantage of a provision under the ordinances that exempts the manager of a fund targeted primarily at QIIs. As far as the fund manages the assets of (1) at least one QII including a foreign institution that is a QII for the purpose of the FIEL and (2) less than 49 non-QIIs, the fund manager is not required to be registered and is simply required to file a report with the FSA providing certain prescribed information in relation to the fund manager and its activities.

Preferred structure and approach

1. Taking advantage of the exemptions

For an offshore fund manager who manages a fund in the form of a collective investment scheme, the fund structure that is the least onerous in terms of Japanese regulatory implications is an offshore fund in which Japanese investors comprise of less than 10 Japanese QIIs (or certain other eligible entities) taking advantage of the first exemption discussed above. Alternatively, the offshore fund manager may wish to set up a fund taking advantage of the second exemption discussed above.

However, if the offshore fund would like to set up an onshore Japanese business operation to engage in discretionary management of the assets of its offshore fund, or the assets of third party customers, it will need to apply for FSA registration to engage in discretionary asset management business.

2. The FSA's new registration requirements for discretionary asset management companies

Before the enactment of the FIEL, the Investment Advisory Business Law (the IABL) governed discretionary asset management business. Under the IABL, discretionary asset man-

agement business was subject to a licensing requirement as opposed to a registration requirement introduced by the FIEL. The application for the licence was a painstaking process, and many foreign fund managers viewed the licensing requirements as a practical impediment to engaging in the discretionary asset management business.

3. Qualification requirements for discretionary asset management business

The ordinances have made it clear that the qualification requirements for discretionary asset management business under the FIEL remain substantially unchanged from those of the former IABL, including the requirements for minimum capital and resources, as well as an appropriate compliance infrastructure. As was the case under the IABL, for example, only a Japanese KK having a board of directors as its governing body, or a foreign corporation comparable to such a Japanese KK, can apply for registration to engage in discretionary asset management business. Nonetheless, the application process for discretionary asset management business under the FIEL would be much less burdensome for the applicant. The change from a licensing requirement under the IABL to a registration requirement under the FIEL has had the effect of reducing the discretion of the FSA in the assessment of the qualifications of an applicant for discretionary asset management business.

Due to the complexity of the licensing requirement applicable to asset management business under the former IABL, there were offshore hedge fund managers who set up their Japan operations as the provider of only "investment advice" without applying for the required licence for discretionary asset management business. In light of the increased regulatory scrutiny of asset management business and enhanced compliance consciousness among institutional investors, I believe that this practice will cease to exist under the FIEL. However, one may need to consider possible tax implications. If the Japanese business operation is likely to have its overseas parent's fund(s) as the sole or primary customer, it may raise a permanent establishment issue that should be carefully examined by a Japanese tax adviser.

Regulation of securities transactions of overseas securities companies with Japanese investors

1. The FIEL and ordinances maintain the basic framework of the SEL

Under the FIEL, there is no substantial change from the SEL in the regulatory framework for securities transactions of overseas securities companies with Japanese investors. The FIEL maintains the exemption that was available under the former SEL applicable to securities transactions of foreign securities companies with QIIs and other sophisticated institutional investors.

The FIEL and ordinances also conceptually maintain the exemption available under the former SEL applicable to unsolicited securities transactions of foreign securities companies with Japanese investors in general. However, it is to be noted that under the ordinances such exemption to an unsolicited transaction is available only after the foreign securities company has received an order from a Japanese investor on an unsolicited basis.

2. Deregulations under the ordinances

Like the SEL, the FIEL excludes OTC securities derivatives transactions from the scope of the exemption of unsolicited securities transactions of foreign securities companies with Japanese investors other than the sophisticated investors. However, the ordinances have introduced an exception to this exclusion, enabling foreign securities companies to engage in unsolicited OTC securities derivatives transactions with a Japanese KK (*kabushiki kaisha*) having a capital of no less than ¥1 billion. This counterparty category is the same as a Japanese KK qualified to engage in over-the-counter derivative transactions not related to securities exempt from the regulations of the FIEL.

In addition, there is another exemption where a registered Japanese financial instruments firm is involved as an intermediary or introducing broker for a foreign securities company and the foreign securities company by itself does not engage

in solicitation. The ordinances enable the foreign securities company to enter into certain securities transactions including, if the counterparty belongs to the above qualified KK category, OTC securities derivatives transactions.

3. What is solicitation?
Solicitation is always an evasive concept and difficult to define. A foreign firm that wishes to avoid being deemed to have engaged in solicitation of business from Japanese investors other than the sophisticated investors, may wish to consider the following policies:

a. Do not send e-mail to investors unless their addresses are outside of Japan.

b. Do not place an advertisement or provide on-line trading services in the Japanese language on its web site.

c. Place a legend on its web site offering on-line trading services to the effect that Japanese resident investors are restricted from using the on-line trading services.

d. Set up procedures to decline opening accounts and use of trading services by Japanese investors by blocking their access if the investor enters an address in Japan.

Increased interest in the activities of overseas investors

1. Japanese brokers are expected to cooperate with the enforcement agency's request for information on overseas end customers

In today's markets, the trading activities of overseas investors are a matter of considerable interest to the Securities Exchange and Surveillance Commission (SESC), the Japanese enforcement agency. To collect information on trading activities, the SESC regularly sends inquiries to FSA-regulated financial instruments firms concerning the orders of their customers for particular stock during a time period in issue, including the orders of the end customers of their overseas affiliates executed by the FSA-regulated financial instruments firms.

To obtain enough information from the financial instruments firms on the end customers of their overseas affiliates who route their orders through the overseas affiliates, the SESC has made it clear that it expects Japanese financial instruments firms to set up a trade surveillance programme that allows them to review the identity of the end customers and their trade history. Such expectations of the SESC and FSA are clearly stated in the Inspection Manual of the SESC and the Guidelines of the FSA for the supervision of financial instruments firms.

Overseas fund managers will receive from Japanese financial instruments firms, or their overseas affiliates at which they have a trading account, an increasing number of requests for their consent to the disclosure of their trade information in response to the inquiries of the SESC.

2. How should overseas fund managers respond to requests for disclosure of their trading information?

Inquiries from the SESC do not necessarily imply the commencement of a SESC investigation into any illegal activity. The SESC frequently sends inquiries and information requests to financial instruments firms just for information on the trading activities of particular stock in which the SESC is interested. The SESC also sends inquiries when the trading activities of a particular stock are irregular or questionable and require further review, including the identity of the persons who placed orders for the stock.

Obviously, overseas fund managers are not subject to the jurisdiction of the Japanese SESC. However, overseas fund managers may wish to carefully re-evaluate their policy concerning their responses to those regulatory inquiries requesting trading information of their orders. If the fund managers have business operations in Japan or collect money from Japanese investors, they may wish to make it a general rule to permit disclosure of their trading information in response to requests from the Japanese SESC.

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Revised Property Fund Guidelines Enhances REITs Regulatory Regime

On 28 September 2007, the Monetary Authority of Singapore (“MAS”) issued revised Property Fund Guidelines ("Guidelines"). The Guidelines are found in the Code of Collective Investment Schemes ("Code").

This revision is intended to:

(1) improve safeguards for investors;
(2) provide greater clarity and flexibility for commercial transactions; and
(3) rationalise guidelines where compliance costs exceed benefits.

This article highlights some key amendments in this revision.

Improving Safeguards for Investors

Under the Guidelines, the long-term effects of short-term yield enhancing arrangements have to be disclosed.

Institutional investors are not entitled to discounts. However, this prohibition does not apply if such investors subscribe prior to the listing and assume the risks of non-completion of listing and/or have to pay for the units regardless of the success of listing.

These measures help level the playing field for small investors.

In addition, arrangements at listing which materially restrict the removal of REIT managers are now prohibited. Such arrangements may only be made post-listing and must be based on normal commercial terms and approved by a majority of unit holders at a general meeting.

For a REIT manager who wishes to declare dividends in excess of profits, the manager now has to certify, in consultation with the trustee, that it is satisfied on reasonable grounds that, immediately after making the distribution, the REIT will be able to fulfill, from its deposited property, its liabilities as they fall due.

Providing Greater Clarity and Flexibility

REITs are primarily intended to be income-producing vehicles investing in real estate. MAS has re-enforced this by requiring REITs to invest at least 75% of their assets in income-producing real estate. In addition, a property fund should not derive more than 10% of its revenue from sources other than rental payments or interest, dividends, and other similar payments from special purpose vehicles and other permissible investments of the REIT.

MAS has maintained the limit for property development investment at 10% of the REIT's assets. Thus, a REIT is allowed only a small exposure to risks associated with property development in proportion to its overall assets.

However, MAS has introduced greater investment flexibility by removing the restriction that a REIT may only invest a maximum of 5% of its assets in securities issued by a single party. In conjunction with this, the Code on Takeovers and Mergers has been extended to govern situations where one REIT tries to take control of another REIT.

Greater flexibility has also been introduced by allowing a REIT joint ownership through investments as tenants-in-common.

Reducing Compliance Costs

The Guidelines have also relaxed requirements in situations where perceived compliance costs exceed benefits. MAS has removed the previous restriction that valuers of a REIT's assets were only allowed to receive a maximum of $200,000 per financial year from parties buying from or selling assets to the REIT and has relaxed the valuation requirements prior to the issuance of new units in the REIT post-listing.

Looking Ahead

The amendments, hopefully, will give greater protection to the small investor and increase the transparency of the operation of REITs.

Following on from these amendments, MAS will be introducing a licensing framework for REIT managers under the Securities and Futures Act, Cap. 289.

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TAIWAN
DRAFT REGULATIONS ON LICENSING FOR TOXIC CHEMICALS HANDLING

◎Jason Chou

The Environmental Protection Administration recently announced a draft of Regulations Governing Licenses, Registrations and Approvals for Toxic Chemical Substances, which is outlined below:

. The draft Regulations identify five activities involving toxic chemicals—manufacture, importation, sale, use, and storage—as activities requiring the prior issuance of a license, registration document, or approval, as follows:

1.A toxic chemicals handler that handles quantities above the threshold for "large-scale handling" must appoint specialist technical management personnel, and must apply to the competent authority for the issuance of a license or a registration document.

2.A handler that handles quantities below the threshold for large-scale handling should apply to the competent authority for the issuance of an approval document, but does not need to appoint specialist technical management personnel.

. When toxic chemicals are discarded, they may be returned to the original manufacturer or seller, sold or transferred to another party, re-exported, or disposed of in accordance with waste disposal legislation. However, before discarding toxic chemicals of Classes I to III, a toxic chemicals handler should register each batch with the local environmental protection authority with jurisdiction over the handling premises, and may only discard the chemicals after receiving notification.

. Before exporting toxic chemicals of Classes I to III, for each batch the handler should apply for registration to the environmental protection authority for the location from which the chemicals are to be transported, and obtain a multi-part toxic chemicals transport manifest.

For additional information visit www.leeandli.com

January 2, 2008

ENERGY UPDATE

For more information please contact:

Energy Independence and Security Act of 2007 Prohibits Certain Petroleum Industry Conduct and Authorizes FTC Enforcement Authority and Million Dollar Civil Penalties

The Energy Independence and Security Act of 2007 ("the Act"), signed into law by President Bush on December 20, 2007, outlaws two new categories of conduct and makes them subject to Federal Trade Commission enforcement and million dollar civil penalties: "market manipulation" and false price reporting with respect to wholesale crude oil[,] gasoline and petroleum distillates. (Pub. L. No. 110-140, title VIII, subtitle B.)

Specifically, §811 of the Act, headed "Prohibition on Market Manipulation," makes it illegal to directly or indirectly use or employ any manipulative or deceptive device or contrivance in connection with the wholesale purchase or sale of crude oil, gasoline or petroleum distillates that violates rules and regulations to be promulgated by the FTC. Section 812, headed "Prohibition on False Information," makes it illegal to falsely report information related to the wholesale price of crude oil, gasoline or petroleum distillates to a Federal department or agency in response to a legally-mandated reporting obligation with the intent to affect data compiled by the department or agency for statistical or analytical purposes.

Among other terms, the Act fails to define "market manipulation" or "manipulative device," leaving unwelcome uncertainty -- at least until the FTC issues clarifying regulations -- as to the practical scope and limits of conduct proscribed under §811. While FTC advertising rules and guidelines provide solid footing to anticipate what the FTC may deem a deceptive device, what may constitute illegal manipulation in the petroleum industry is less well settled. The FTC's Spring 2006 report to Congress on the "Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases," may offer some early insight into its approach for construing the contours of its §811 "market manipulation" enforcement task, however. In that report, after noting that neither antitrust law nor economics defines "price manipulation" precisely, the Commission defined the term to include "(1) all transactions and practices that are prohibited by the antitrust laws, including the Federal Trade Commission Act, and (2) all other transactions and practices, irrespective of their legality under the antitrust laws, that tend to increase prices relative to costs and reduce output." In a footnote, the Commission tempered the impact of the definition's very open-ended second-prong by stating that unilateral conduct to raise prices or reduce output occasioned by supply disruptions "arising by natural disasters or sudden and unanticipated changes in demand ... should not be illegal because it entails each individual firm's independent decisions about how to allocate sales of its products among markets."

With one noteworthy difference, the Act's §811 language closely tracks language in the Energy Policy Act of 2005 ("the EPAct 2005") prohibiting manipulative or deceptive devices or contrivances in connection with the purchase or sale of natural gas, electric energy, or transportation or transmission services subject to FERC jurisdiction. The EPAct 2005, however, specifically directs that the terms "manipulative or deceptive device or contrivance" be used "as those terms are used in section 10(b) of the Securities Exchange Act of 1934." Accordingly, the resulting FERC rules (18 C.F.R. Part 1c) are modeled on SEC Rule 10b-5 and framed chiefly towards prohibiting acts of fraud and deceit. The Energy Independence and Security Act of 2007, however, contains no similar directive to the FTC -- presumably in deference to the agency's own extensive expertise prosecuting deceptive and unlawful trade practices. This leaves the FTC discretion to take a rulemaking approach different from FERC's.

The Act does not clearly delineate the boundaries between the new enforcement powers it grants the FTC and the Commodity Futures Trading Commission's ("CFTC's") jurisdiction to investigate and punish manipulation of commodity prices under the Commodities Exchange Act ("CEA"). Potential overlap between CFTC jurisdiction over commodities traded on futures exchanges and FERC jurisdiction over energy markets has exposed firms in the natural gas and electricity industries to the risk of duplicative investigations and penalties. Depending on the agencies' enforcement policies, firms in the oil, gasoline, and petroleum distillate industries may face similar risks of overlapping jurisdiction and parallel enforcement actions.

The potential breadth and current uncertainty associated with the Act's prohibitions, as well as the potential for significant penalties for noncompliance, weigh in favor of a cautious approach by firms engaged in wholesale transactions involving the covered products. In particular, the new prohibitions underscore the importance of identifying, assessing and seeking legal counsel for conduct with potential to raise prices or reduce output, or that involve questionable representations. Firms also should be attentive to rulemaking initiatives or further guidance from the FTC.

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HOGAN & HARTSON

SEC UPDATE

SEC Approves Rule for Regulation of Fairness Opinions

A new rule of the Financial Industry Regulatory Authority, Inc. (FINRA) that addresses conflicts of interest in fairness opinions provided by its member broker-dealer firms became effective on December 8. FINRA, which was formerly known as the National Association of Securities Dealers, originally proposed Rule 2290 in June 2005 to address concerns that the disclosures provided in fairness opinions to corporate boards may not adequately inform shareholders of potential conflicts of interest existing between the broker-dealer providing the opinion and the parties involved in the transaction. The Rule as originally proposed drew extensive public comment. After undergoing several rounds of revision, the Rule as adopted largely codifies current practice, but also imposes additional disclosure and procedural requirements. Rule 2290, which was approved by the SEC in October, is discussed in Release No. 34-56645. The text of the final Rule is available at http://www.finra.org/web/groups/rules_regs/documents/rule_filing/p019261.pdf.

Disclosure Requirements

Rule 2290 requires that if, at the time of issuance to a board of directors (or a board committee), the member firm knows or has reason to know that the fairness opinion will be disclosed to the company's public shareholders, the member firm must make certain disclosures in the opinion, as summarized below.

Contingent Compensation. If the member firm has acted as a financial adviser to any party to a transaction that is the subject of a fairness opinion issued by such firm, the firm must disclose whether it will receive compensation contingent upon the successful completion of the transaction for rendering the fairness opinion or serving as an adviser, or any other significant payment or compensation that is contingent upon the successful completion of the transaction. Although the rule does not require the quantification of such compensation, the current practice of some member firms is to disclose these amounts.

Material Relationship. The member firm must disclose any material relationships that existed during the past two years or that are mutually understood to be contemplated in which any compensation was received or is intended to be received as a result of the relationship between the firm and any party to the transaction that is the subject of the fairness opinion.

Independent Verification of Information. The member firm must disclose whether it independently verified any information provided by the company requesting the fairness opinion

that formed a substantial basis for the fairness opinion, and provide a description of the information or categories of information that were verified. Notably, the Rule does not require the independent verification of any information provided to the member. Member firms may comply with the Rule by making a blanket statement confirming that no such independent verification occurred.

Fairness Committee. The member firm must disclose whether or not the fairness opinion was approved or issued by a fairness committee. Although this type of required disclosure is new, many member firms already require that a fairness committee approve a fairness opinion before it is rendered.

Compensation to Officers, Directors and Employees. The member firm must disclose whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation from the subject transaction to any of the company's officers, directors or employees, relative to the compensation to the company's shareholders. The Rule, however, does not require that the member firm perform this type of evaluation.

Procedural Requirements

Rule 2290 also requires that member firms have written procedures for approval of fairness opinions. The procedures must address the types of transactions and circumstances in which the firm will use a fairness committee to approve or issue an opinion, and, with respect to those transactions:

- The process for selecting personnel to be on the fairness committee;
- The necessary qualifications of those serving on the committee; and
- The process for promoting a balanced review by the committee, including participation by persons not serving on the transaction team.

Each member firm also must have written procedures that address the process it employs to determine whether the valuation analyses used in the fairness opinion are appropriate.

Conclusion

Rule 2290 prescribes minimum disclosure and procedural standards for the covered providers of fairness opinions to use in managing potential conflicts of interest. FINRA member broker-dealer firms will be required to review their fairness opinion procedures and disclosure practices to assure compliance with Rule 2290. Although most member firms already have written fairness opinion procedures in place, the new requirements should promote a uniform approach to the elements of the opinion process addressed by the Rule.

For more information about the matters discussed in this *SEC Update*, please contact the Hogan & Hartson L.L.P. attorney with whom you work, or any of the attorneys below who contributed to this *SEC Update*.

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New Jersey Enacts Baby WARN Act
With Important Differences from the Federal WARN Act and Stiffer Penalties

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New Jersey has joined a growing number of states that have enacted their own plant closure and mass layoff notification laws that supplement the federal Worker Adjustment and Retraining Notification (WARN) Act.[1] New Jersey's new law is called the Millville Dallas Airmotive Plant Job Loss Notification Act (the New Jersey Act), and became effective on December 20, 2007. While modeled generally after the federal law, the New Jersey Act contains several important differences—including significantly greater penalties in the form of extended severance obligations—that any entity engaging in a closing, transfer, or other significant reduction in force (RIF) in New Jersey must now carefully consider.

Basic Notice Requirements

Similar to WARN, the New Jersey Act generally requires employers with 100 or more employees to give at least 60 days advance notice of a transfer or termination of operations, or mass layoff, to (i) affected employees, (ii) any collective bargaining units at the establishment, (iii) the Commissioner of Labor and Workforce Development, and (iv) the chief elected official of the municipality where the establishment is located.

WARN requires notice in advance of a "plant closing" or "mass layoff" (as these terms are defined in WARN). By comparison, the New Jersey Act applies to "terminations" or "transfers" of operations that result in the permanent or temporary shut down of a single establishment, or one or more facilities or operating units within a single establishment, that results in the termination of employment of 50 or more full-time employees during any 30-day period. The New Jersey Act, however, defines an "establishment" to exclude facilities that have not yet been operated by the employer for at least three years. Similarly, a "mass layoff" is a RIF that is not the result of a transfer or termination of operations, but still results in the termination of employment at an establishment during any 30-day period of 500 or more full-time employees, or 50 or more full-time employees representing at least one-third of the full-time employees at the establishment. Similar to WARN, the New Jersey Act provides a 90-day window

[1] Other states with so-called "baby WARN Acts" include California, Connecticut, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, Oregon, Rhode Island, South Carolina, Tennessee, and Wisconsin. These and other states also have a variety of other state laws that may have an impact on facility shutdowns, workforce reductions, and similar changes.

for potentially aggregating two or more group terminations.

A "termination of employment" means the "layoff of an employee" without a commitment to reinstate the employee within six months, but does not include (i) a voluntary departure or retirement, (ii) a discharge or suspension for misconduct, (iii) any layoff of a seasonal employee, or (iv) any situation where an employer offers the same or equivalent employment to an employee at another location inside New Jersey that is not more than 50 miles from the previous site of employment. The law does not define the term "misconduct," which likely will be a subject of future litigation. A layoff that is announced to be six months or less, but is extended beyond six months due to unforeseeable business circumstances, also is not a termination of employment provided that notice of the extension is given once reasonably foreseeable.

Exceptions to Notice Under the New Jersey Act

The New Jersey Act does not contain several of the exemptions, exclusions, and notice-reduction provisions contained in the federal law.

- The New Jersey Act does not contain an express exclusion from the definition of the "termination of employment" in the case of the sale of all or part of the business. While notice under these circumstances would not seem consistent with the intent of the New Jersey Act and may become the fodder for litigation, the absence of exclusionary language provides sufficient cause for concern that the allocation responsibility for potential liability should be addressed clearly in any transactional documents.
- The New Jersey Act does not contain the notice-reduction provisions for a faltering business or unforeseeable business circumstances that are available under federal law.
- The New Jersey Act expressly exempts a *termination of operations* (but not a transfer of operations or mass layoff) that is made necessary by a fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, or certain other very limited circumstances.

Notice Requirements

The New Jersey Act contains some unique requirements for the required notice. Among other things, the notice shall include:

- A statement of the number of employees whose employment will be terminated, the date on which the transfer or termination of operations or mass layoff will occur, and the date on which each termination of employment will occur
- A statement of the reasons for the transfer or termination of operations or mass layoff
- A statement and certain information regarding employment available to employees at any other establishment operated by the employer
- A statement of any employee rights regarding wages, severance pay, benefits, pension, or other terms of employment as they relate to the termination of employment
- A disclosure of the amount of severance pay that is payable as a penalty for failure to provide the required 60-days' notice
- A statement of the employees' right to receive information, referral, and counseling from the Department of Labor and Workforce Development's response team (discussed in the next section)

The employer is required to provide the notice on a form to be developed by the Commissioner of Labor and Workforce Development, which is required to be available by March 19, 2008.

Creation of a Response Team

The New Jersey Act also mandates that the New Jersey Department of Labor and Workforce Development create a response team that must be available to provide appropriate information, referral, and counseling to workers who receive layoff notices. For each transfer or termination of operations (but not for mass layoffs), the response team shall (i) offer to meet with representatives of management to discuss available programs to prevent or delay the transfer or termination of operations, and (ii) meet with workers to provide information, referral, and counseling regarding, among other things, employee rights under the New Jersey Act or any other law that applies to the employees with respect to wages, severance pay, benefits, pensions, or other terms of employment as they relate to the termination of employment. In what many employers may find to be highly intrusive, the employer must provide the response team with "the amount of on-site work-time access to the employees . . . that the response team determines is necessary" to carry out its duties.

Steep Penalties for Failure to Provide the Required 60-Days' Notice

The New Jersey Act provides for potentially far more significant penalties for violations than under the WARN Act. Whereas the federal law provides for a day of back pay for each day of violation (with disagreement in the courts about whether this means 60 days of pay versus the number of paid days an employee would normally work of a 60-day period), an employer that "provides less than the number of days of notification" required by the New Jersey Act shall pay to each full-time employee whose employment is terminated severance pay equal to one week of pay for each full year of employment. In what employers may view to be a fairly draconian penalty, the New Jersey Act does not expressly reduce its penalty for partial compliance. Although this is likely to be another dispute to be addressed in litigation, it is conceivable that employees will seek full penalties even if the notice provided is no more than one day late, making it extremely important to ensure as much advance notice as possible. The severance provided under the New Jersey Act shall be in addition to any other severance to which the employee may be entitled, though any penalties owed pursuant to the WARN Act's provisions will offset that amount owing under the New Jersey Act. As with WARN, nothing in the New Jersey Act would appear to prohibit an employer from offsetting severance entitlements by amounts payable under the New Jersey Act. Accordingly, employers should review and, if necessary, amend their severance pay plans to ensure that severance obligations provide for such offsetting.

Proper Implementation of a Reduction in Force

The implementation of the New Jersey Act serves as a reminder that, in connection with any RIF, one element remains the same—an employer may be required to answer for its business decisions in court. Therefore, careful consideration and planning is critical to implementing a RIF that will be viewed by employees as fair given the circumstances, and ultimately defensible if challenged by governmental agencies or in litigation. After determining if a RIF is necessary, an employer should define and document the business rationale for the RIF, establish termination selection criteria consistent with that rationale, and be guided by this rationale and criteria when making the remainder of the decisions associated with the RIF. Beyond WARN and the New Jersey Act, when planning and implementing a RIF, employers should consider and ensure compliance with other applicable state and federal fair employment practices laws (e.g., Title VII, the ADEA, the New Jersey Law Against Discrimination).

Employers also should review their severance, retirement, and other relevant policies and plans to ensure that they act in accordance with those plans and policies, or make necessary modifications with such plans and policies in advance of the RIF and in accordance with applicable federal and state laws. Employers with unionized workforces also should take care to review current collective bargaining agreements to ensure that they act in accordance with applicable layoff, notice, and severance requirements contained in those agreements. Employers should also review employment agreements that may exist with individual employees (particularly executives) to determine what obligations may exist under such agreements in the event of the employee's termination.

Finally, if the employer is seeking a waiver and release agreement in exchange for a separation package including a severance payment, employers should review all waivers and releases carefully to ensure that they are appropriate for the specific situation. And it remains critical to make sure waivers and releases satisfy the detailed (and sometimes highly technical) requirements imposed under the Older Workers Benefit Protection Act (OWBPA). There have continued to be many recent significant court decisions regarding the content and enforceability of release agreements, employers should review their agreements with counsel to ensure compliance with federal law and the laws of the jurisdictions in which such agreements will apply. (Click here to see our LawFlash distributed on July 17, 2007.)

Conclusion

The New Jersey Act is much less detailed than the WARN Act and its regulations, which unfortunately leaves many questions to be answered by the courts. Employers will need to carefully study the requirements of the New Jersey Act for each event that may potentially trigger a notification requirement and attempt to provide at least 60 days advance notice where possible. In addition, any employer entering into a business transaction that may implicate the New Jersey Act's notification requirements should attempt to address responsibility for liability in the controlling transactional documents.

Our Morgan Lewis/Workforce Change team focuses on management of employment law issues that arise out of mergers, acquisitions, startups, workforce reductions, and other types of business restructurings, and frequently handles issues arising out of terminations and transfers of operations such as those implicated by the New Jersey baby WARN Act. If you would like further information regarding the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

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