

JUNE 2008 e-BULLETIN

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WilmerHale Hosted Reception

Wednesday June 18 — Additional Details and to RSVP

<http://wilmerhaleupdates.com/ve/ZZ889068y26V85kc89m>

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November 15-18, 2008

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- ▶ GIDE LOYRETTE NOUEL Advises SNCF For Its Cash Public Offer on Geodis
- ▶ HOGAN & HARTSON Advises Webster Financial in Offering of \$225 Million of Non-Cumulative Perpetual Convertible Preferred Stock
- ▶ TOZZINFREIRE Completes US \$25M Acquisition Finance by Societe de Promotion et de Participation pour la Cooperation Economique SA Propoarco to Aspro do Brasil Sisternas de Compressao para GNV Ltda.
- ▶ WILMERHALE Legal Counsel in Landmark Case Upholding Constitutionality of the Voting Rights Act

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HOGAN & HARTSON NEW PARTNER ADDITION EXPANDS INTELLECTUAL PROPERTY AND NEW MEDIA PRACTICES

WASHINGTON, D.C., June 9, 2008 – Hogan & Hartson LLP announced today that Zenas J. Choi has joined the firm as a partner in the firm's intellectual property practice. Choi will work out of the firm's Washington, D.C. office.

Choi's practice will focus on telecommunication services transactions and satellite transactions as well as IP license agreements. He will use his experience with new media and other clients to continue the growth of Hogan & Hartson's global new media practice.

Prior to joining Hogan & Hartson, Choi was a partner and co-practice group leader for the technology transactions team at the Washington, D.C. office of Sonnenschein Nath & Rosenthal, LLP. He previously served as corporate counsel for America Online, Inc., now known as AOL, LLC.

"It is exciting to join a firm with such an established and well-respected IP practice," said Choi. "I am eager to use my experience in IP, telecommunications, and new media ventures to help expand our global reach in this ever-changing field."

Ray Kurz, head of the firm's intellectual property practice group, said, "We are pleased to welcome Zenas to our IP team. His unique blend of transactional and regulatory experience in intellectual property issues will further expand our ability to meet the changing needs of our clients, particularly in the areas of telecommunications services and satellite transactions."

Choi received his law degree from Boston University School of Law in 1998 and his bachelor's degree in economics from Northeastern University in 1994.

About Hogan & Hartson

Hogan & Hartson is an international law firm founded in Washington, D.C. with more than 1,100 lawyers in 24 offices worldwide.

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

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

LOVELLS PROMOTES 46 TO OF COUNSEL

Lovells has made 46 appointments to the position of Of Counsel, Counsel or Consultant (depending on jurisdiction) with effect from 1 May 2008.

The jurisdiction spread reflects the international nature of Lovells' practice, covering each of the firm's four regions:

27 in Continental Europe
11 in London Six in Asia
Two in the US

Areas of specialisation reflect the broad spread of Lovells' practice:

Six in Banking
One in Business Restructuring & Insolvency
One in Capital Markets Three in Competition
One in Construction
13 in Corporate
Four in Dispute Resolution
Two in Employment/Pensions
Seven in Intellectual Property, Media & Technology (IPMT)
Six in Real Estate
Two in Tax

These appointments were confirmed in a firmwide announcement by Managing Partner, David Harris. David Harris said:

"I am delighted to be able to confirm these appointments to what is a senior and now well-established role within our international practice. This status recognises those senior lawyers who perform at the highest level and who contribute to the firm in a variety of ways beyond pure fee-earning. Promotion to this role therefore represents a significant career milestone."

For additional information visit www.lovells.com

LUCE FORWARD RENOWNED TRUSTS & ESTATES ATTORNEY JOINS FIRM

Barry C. Fitzpatrick has joined Luce Forward's Family Wealth and Exempt Organizations practice group. Fitzpatrick will practice from the firm's Rancho Santa Fe office, which houses some of the foremost trusts and estates attorneys in the country.

Fitzpatrick has practiced law for almost 40 years, including more than 32 years in Rancho Santa Fe where he works with accomplished individuals, primarily in the areas of estate planning, wills and trusts, and estate and trust administration. He previously practiced with Newnham, Fitzpatrick, Weston and Brennan, LLP, also in Rancho Santa Fe.

"Barry Fitzpatrick is an extremely accomplished attorney with an impeccable reputation, and we welcome him to Luce Forward," said Robert J. Bell, Luce Forward's managing partner. "We are dedicated to providing top-level attorneys to best serve our clients and aid in our goal of creating the West Coast's strongest trusts and estates practice."

Fitzpatrick is a Fellow of the American College of Trust and Estate Counsel, is listed in Best Lawyers in America and is a past Chair of the Executive Committee of the Trusts and Estates Section of the State Bar of California. Fitzpatrick is also a Director of Pac West Bancorp (previously First Community Bancorp), a Director of the Donald C. & Elizabeth M. Dickinson Foundation and was the pro-bono legal advisor to the Rancho Santa Fe Foundation for 19 years.

"Luce Forward's Family Wealth & Exempt Organizations Practice Group has an exceptional reputation, particularly in Rancho Santa Fe," Fitzpatrick said. "I look forward to working with these talented attorneys and further expanding the firm's capabilities in this area."

Fitzpatrick earned a Juris Doctor from the University of Virginia School of Law and a bachelor's degree from Princeton University.

Since 2006, a number of nationally recognized trusts and estates lawyers have joined Luce Forward, including Michelle Graham in Carmel Valley/Del Mar; James Cowley, Steven Chidester and Louis Mezzullo in Rancho Santa Fe; John Rogers and Geraldine Wyle in Los Angeles and Charlotte Ito in San Francisco.

For additional information visit www.luce.com

**MORGAN LEWIS & BOCKIUS LLP
ADDS LEADING STRUCTURED FINANCE TEAM TO CALIFORNIA**

SAN FRANCISCO, May 19, 2008: Morgan Lewis today announced the addition of **John Rosenthal**—a leading finance attorney whom clients turn to when faced with sensitive issues—and **Kristine Bailey** to the firm's Business & Finance Practice. John joins as partner, while Kristine joins as of counsel. Both will be resident in the firm's San Francisco office. They join Morgan Lewis from Nixon Peabody, where John previously headed that firm's global finance practice and co-chaired its corporate practice. John was the last chairman and managing partner of San Francisco's Lillick & Charles LLP, which merged into Nixon Peabody in 2001.

Known for their ability to find creative solutions to the most complex problems, John and Kris have devised innovative settlements of class actions and bankruptcy disputes involving debt and securitization products. They currently represent major creditors in two leading subprime bankruptcy cases—New Century Financial Corporation and American Home Mortgage Corporation—and are actively involved in numerous other subprime restructuring matters.

The team's arrival reflects Morgan Lewis's continued commitment to a corporate practice that meets the growing and changing legal needs of financial services clients. Their addition brings Morgan Lewis two seasoned finance professionals who have guided financial institution clients facing key challenges through multiple economic cycles. These challenges have ranged from managing intricate securitization products at the center of today's subprime debt crisis, to restructuring the debt of technology companies, insurers, municipalities, and project finance entities. They were attracted to the opportunity to combine their deal-making abilities with Morgan Lewis's strong financial services litigation and restructuring practices.

John and Kristine join a Business and Finance Practice that already spans the United States, Europe, and Asia, with more than 300 lawyers who focus on a wide variety of areas, including mergers and acquisitions, private equity, finance, and capital markets. They arrive at Morgan Lewis as the firm marks the fifth anniversary of its expansion into Northern California.

A transactional attorney versed in complex debt and securitization structures, John represents issuers, lenders, borrowers, and other participants in structured, corporate, project, and public debt finance matters. He also focuses on institutional trust risk management and regulatory issues, principally for financial institution clients.

Kristine represents clients in structured finance, public finance, institutional trust risk management, and general corporate matters. Her practice focuses on workouts and financial restructurings of securitization transactions, and state and federal court litigation on behalf of financial institutions and other creditors.

About Morgan, Lewis & Bockius LLP

Morgan Lewis is an international law firm with more than 1,400 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C.

For more information about Morgan Lewis, please visit www.morganlewis.com

FRASER MILNER CASGRAIN LLP

WINS SIGNIFICANT PERMANENT ESTABLISHMENT CASE INVOLVING CANADA-US TREATY

June 4 2008 On May 16, 2008, the Tax Court of Canada released a landmark decision in *Knights of Columbus v. The Queen*, which addresses the fundamental issue of Canada's ability (or inability) to tax the business profits of a non-resident enterprise under a bilateral income tax convention.

The *Income Tax Act* (the "Act") provides that any non-resident carrying on business in Canada is required to pay income tax on the profits attributable to its Canadian business activities. However, Canada has entered into numerous tax treaties with various countries that generally prohibit the taxation of a non-resident's business profits by a source country (i.e., the country in which the profits are derived) unless the non-resident has a "permanent establishment" in the source country. Generally, tax treaties contemplate two different types of permanent establishments: (1) "geographical permanent establishments" (i.e., a fixed place of business through which the business of the non-resident is carried out); and (2) "dependent agent permanent establishments" (i.e., a person who has, and habitually exercises, the authority to enter into contracts on behalf of the non-resident).

In this case, an insurance company (the "Knights") resident in the United States sold insurance products to Canadians through the assistance of commission-based Canadian sales agents. Generally, the agents would solicit insurance applications from Canadian and submit such applications to the Knights in the U.S. for consideration. A limited form of temporary insurance was provided while the application for permanent coverage was under consideration. Sale agents generally worked out of home offices and visited the homes of prospective applicants in soliciting insurance applications.

The Crown argued that the Canadian sales agents constituted "dependent agent permanent establishments" of the Knights for purpose of the income tax convention between Canada and the U.S. (the "Treaty") on the basis that the agents solicited and received applications that were routinely approved by the Knights. Moreover, the agents contractually bound the Knights through the provision of the temporary insurance. Alternatively, the Crown argued that the agents' home offices were each a "geographical permanent establishment" of the Knights for purposes of the Treaty primarily on the basis that the agents carried on activities of significant importance to the business of the Knights through these premises.

The Tax Court heard the evidence of three expert witnesses: Mr. H. David Rosenbloom (an expert in U.S. tax law and the chief negotiator of the Treaty at the time it was signed in 1980) Professor Brian Arnold (an expert in the interpretation of the OECD Model Income Tax Convention) and Professor Richard Vann (an expert in both the interpretation of the OECD and UN Model Income Tax Conventions). The expert evidence generally supported the position that, in order for a non-resident to have a "geographical permanent establishment", the non-resident must have some measure of control or disposal over that place (i.e., it is not sufficient that an agent conducts his or her agency activities in such place). The expert evidence further suggested that, due to the fundamental nature of their business, non-resident insurance enterprises are capable of conducting large-scale foreign insurance activities in a manner that does not create a permanent establishment for the purpose of most income tax treaties. If contracting states consider it appropriate to tax such insurance enterprises, they may include specific treaty provisions deeming the non-resident to have a permanent establishment. Many countries routinely include such provisions in their treaties and, in fact, both Canada and the United States have a history of including such provisions in certain treaties.

The Court found in favour of the Knights in respect of all issues. The Court concluded that the agents did not constitute "dependent agent permanent establishments" on the basis that the Knights concluded all contracts of insurance in the U.S. after undertaking a comprehensive review of each application solicited by the agents. The provision of temporary insurance was viewed by the Court as being akin to a "gift" which was outside the business proper of the Knights. Furthermore, the Court concluded that the Knights did not have sufficient control or disposal over the home offices to constitute "geographical permanent establishments". In this respect, the Court found that the agents carried on their own agency businesses through such locations and not the business of the Knights.

This decision is extremely important from both a Canadian and international perspective due to the significance of the term "permanent establishment" to the international taxation of multinational enterprises. The Court provided clear guidance on the circumstances in which an agent may give rise to a taxable presence of a non-resident as well as the criteria that must be satisfied before a fixed place may be considered a geographical permanent establishment of a non-resident. Non-residents will undoubtedly benefit from these guidelines in structuring the administration and operation of their international business activities.

Another significant aspect of the case is the use of expert witnesses, which provided the Court with a wealth of relevant and necessary knowledge and background to the issues under consideration. It is anticipated that this type of evidence will become increasingly important in tax treaty litigation in the coming years.

The taxpayer, Knights of Columbus, was represented by William I. Innes, Chia-yi Chua and Brendan Bissell of the Toronto office of Fraser Milner Casgrain LLP. For additional information visit www.fmc-law.com

HOGAN & HARTSON LLP

ADVISES WEBSTER FINANCIAL IN OFFERING OF \$225 MILLION OF NON-CUMULATIVE PERPETUAL CONVERTIBLE PREFERRED STOCK

WASHINGTON, D.C., June 9, 2008 – Hogan & Hartson LLP has advised Webster Financial Corporation (NYSE: WBS) in its public offering of \$225 million aggregate liquidation preference, non-cumulative perpetual convertible preferred stock.

The deal involved a team effort led by Hogan & Hartson partner Daniel Keating with assistance from associate Jean Blackerby. Others involved included Steven Ballew, Gregory Parisi, Daniel Meade, Jason McCaffrey, Nathaniel DeRose, Jonathan McKernan, Scott McClure, and Charles Dickinson. Merrill Lynch & Co. was the sole book-running manager for the offering, and JPMorgan and Sandler O'Neill + Partners L.P. acted as co-managers.

Webster Financial Corporation operates as the holding company for Webster Bank, N.A., which provides business and consumer banking, mortgage, financial planning, and trust and investment services.

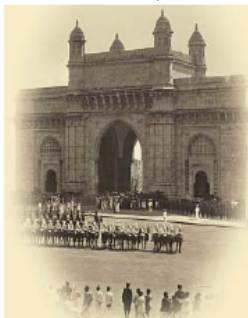
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TOZZINI FREIRE

COMPLETES US \$25M ACQUISITION FINANCE BY SOCIETE DE PROMOTION ET DE PARTICIPATION POUR LA COOPERATION ECONOMIQUE SA PROPARCO TO ASPRO DO BRASIL SISTERNAS DE COMPRESSAO PARA GNV LTDA.

The purpose of the finance was to provide Aspro do Brasil with the necessary funds for the payment of the acquisition of two Argentine companies, Delta Compresion SRL and Compresores Panamericanos SRL. Aspro do Brasil is owned by Axxon Group and Lupatech S.A., and was formerly owned by the Aspromonte Family, the same owners of Delta and Compresores. This was the first financing provided by PROPARCO in Brazil.

TozziniFreire Advogados acting in transaction Antonio Felix de Araujo Cintra (partner); Mateus Donato Gianeti (associate)

For additional information visit www.tozzinifreire.com.br

GIDE LOYRETTE NOUEL

ADVISES SNCF FOR ITS CASH PUBLIC OFFER ON GEODIS

Gide Loyrette Nouel Paris advises SNCF (France's national rail operator) in its voluntary and friendly public cash offer for Geodis⁽¹⁾ shares, which will be filed by the end of April by its subsidiary company, SNCF Participations, which currently holds 42.37% of the capital and 45.79% of the voting rights of Geodis.

The offer covers all Geodis shares not owned by SNCF Participations. The offer price of 135 Euros per share coupon 2,85 Euros attached, represents a valuation of Geodis of approximately 1.1 billion Euros.

This transaction falls within the framework of SNCF's objective of creating an enlarged freight transport and logistic division, which will include the activities of Geodis, SNCF Freight and TLP (Transport et Logistique Partenaires, a wholly owned subsidiary of SNCF Participations).

Legal Counsel to SNCF and SNCF Participations: Gide Loyrette Nouel

Stock Exchange Regulation: Youssef Djehane, Stéphanie de Robert Hautequère, Paul-Henri Dubois.

Competition Law: Antoine Choffel, Laurent Godfroid, François-Charles Dumonteil

Labour Law: Joël Grangé

Tax Law: Guillaume Goulard

For additional information visit www.gide.com

(1) France's largest freight firm

WILMERHALE

LEGAL COUNSEL IN LANDMARK CASE UPHOLDING CONSTITUTIONALITY OF THE VOTING RIGHTS ACT

On May 30, in *Northwest Austin Municipal Utility District Number One v. Mukasey*, the United States District Court for the District of Columbia issued a landmark ruling upholding the reauthorization of a key provision of the Voting Rights Act of 1965. In a unanimous decision written by Judge David Tatel, the panel rejected a challenge to the constitutionality of the Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, which extended for 25 years the preclearance requirement contained in Section 5 of the Voting Rights Act.

The 2006 reauthorization was passed with overwhelming support in Congress and was signed by President Bush in July 2006. The Utility District's lawsuit was filed shortly thereafter. Although the Court also found that the Utility District was not entitled to "bail out" from coverage under Section 5 of the Voting Rights Act, the main significance of the case rests upon the Court's unqualified rejection of the Utility District's argument that Section 5 had outlived its usefulness because the problem of racial discrimination in voting was no longer a sufficient problem to justify its requirements.

Conducting its own review of the extensive legislative record, and crediting the findings of the House Judiciary Committee, the Court concluded that "findings of continued efforts to discriminate against minority citizens in voting demonstrate that despite substantial improvements, there is a demonstrated and continuing need to reauthorize [Section 5]."

WilmerHale's Paul Wolfson led the firm's pro bono efforts as co-counsel to the Lawyers Committee for Civil Rights Under Law in this lawsuit, in which we represented the Texas State Conference of the NAACP and the Austin, Texas Chapter of the NAACP. The case was litigated with other civil rights organizations including ACLU, LDF, MALDEF, PFAW and Texas RioGrande Legal Aid, as well as the Department of Justice.

For additional information visit www.wilmerhale.com



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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.

Federal Treasury - Chance to shape financial services and credit reform



The Federal Treasury's new Green Paper "Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation" sets out some reform options for the financial services sector and the Commonwealth takeover of some aspects of regulation.

It's important to understand that although the Green Paper sets out options, there is still some uncertainty about what those options entail as the detail has not been fleshed out and nothing has been set in stone yet. The financial services sector thus has a good opportunity to offer its views now and help shape future Government action in this important area.

Consumer credit: Mortgages and other credit products

Currently the States and Territories regulate consumer credit products and lending (through the Uniform Consumer Credit Code (UCCC)) and, in some jurisdictions, consumer credit providers through different licensing regimes. Changes to the UCCC require approval by a Ministerial Council of the States and Territories and is slow and difficult to achieve. Only some States and Territories regulate mortgage brokers and they do this differently. Commonwealth regulation of financial services providers under the Corporations Act largely excludes credit facilities but the ASIC Act provides general consumer protection rules which cover credit.

Industry and consumer complaints about these unsatisfactory arrangements led the Productivity Commission in its [Report on a Consumer Policy Framework](#) to recommend transferring responsibility for regulating all consumer credit to the Commonwealth Government, to be regulated by ASIC. That Report recommended that the new regime should:

- cover all credit products and intermediary services (including broking services and the provision of advice)
- include a national licensing system for finance brokers and a licensing or registration system for credit providers, both requiring the availability of an approved alternative dispute resolution scheme, and
- re-enact the UCCC as Commonwealth law, to operate independently within the broader financial services regulatory regime.

At the March 2008 meeting of the Council of Australian Governments (COAG), the governments agreed in principle to the Federal Government's being the sole regulator of mortgage credit and advice, including persons and corporations engaged in mortgage broking activities.

Now the Federal Treasury has put out its proposals as to how this will be achieved in the [Green Paper](#).

Three options are set out:

- maintain the status quo (which in the face of the COAG agreement and the problems identified is unlikely);
- the Federal Government to regulate all credit - this would achieve uniformity and a single regulator but, says the Paper, there would be significant transitional and ongoing costs for both the Government and businesses; or
- the Federal Government to regulate all aspects of mortgage credit (mortgage lenders and brokers and mortgage advice) but not bank fees or charges, leaving the States and Territories with responsibility for all other consumer credit except margin loans (see below).

It appears that Treasury intends that Option Three (and presumably also Option 2) would roll mortgage credit regulation into the FSR regime in Chapter 7 of the Corporations Act, meaning that credit providers (ADIs and non-ADIs) and mortgage brokers would be subject to the AFSL licensing regime and the product disclosure and financial advice disclosure requirements.

It is noteworthy that the Treasury does not discuss whether the other substantive regulation of credit in the UCCC (eg. advertising restrictions, enforcement, comparison rates, re-opening of contracts) would carry across into federal law as the Productivity Commission recommended (either for all consumer credit under Option 2 or for mortgage credit under Option 3). This is a key point which submissions could address - should federal regulation of credit to be based purely on a Corporations Act Chapter 7 model of licensing, disclosure and some market conduct regulation, or should it continue with the detailed rules developed over many years in the UCCC?

Some industry leaders have criticised Option 3 (Federal Government to take over only mortgage credit) because it would result in the many lenders who provide mortgage and non-mortgage credit answering to nine regulators instead of the current eight, and it would do nothing to fix the current problems with the UCCC for all other credit: eight jurisdictions need to agree to and implement any changes to the UCCC, making it very hard to change and hence unresponsive to market developments, and national credit providers need to deal with eight different enforcement agencies.

Margin lending

Consumers use margin loans to buy financial products (such as listed shares, fixed interest securities and units in managed funds) which act as the security for the loan. While the underlying financial product is already regulated, the margin loan to buy them mostly is not.

The Green Paper sets out three possible options:

- maintain status quo (so that margin lending would continue to be largely unregulated);
- include margin loans as a financial product under the Corporations Act and apply the Chapter 7 regime;
- develop a separate Commonwealth regulatory regime for margin loans (although this would largely mirror the Corporations Act and create regulatory overlap for businesses offering margin loans and other financial products).

Option Two therefore is similar to the options for mortgages – it would make margin loans a financial product regulated by the FSR regime, with the resultant need for licensing, and disclosure and financial advice requirements.

Trustee companies

The Council of Australian Governments has already agreed in principle to the Commonwealth as regulator for trustee companies. This could be done, suggests the Green Paper, either by regulation based on consumer protection and overseen by ASIC, or a regime based on prudential supervision by APRA.

Debentures

The Green Paper suggests the regulation of promissory notes should be harmonised, so that all promissory notes issued to retail investors will be treated as debentures.

So when are submissions due?

There is only a short window of one month to comment - all submissions must be in by 1 July 2008. Stakeholders are invited to comment on the options presented in the Paper, or to submit their own proposals; those comments will then go back to the Council of Australian Governments for consideration. you'd like help in drafting a submission, please contact your nearest Clayton Utz partner.

Disclaimer

Clayton Utz News Alert is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this bulletin. Persons listed may not be admitted in all states.

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Capital Markets

BRAZIL: INFORMATION ON CAPITAL HELD ABROAD - 2007

Individuals and corporate entities resident, domiciled or headquartered in Brazil are required to provide the Central Bank of Brazil (BACEN) with information concerning any type of assets held abroad, including currency.

Accordingly, information must be provided with respect to loan agreements, leasing transactions, direct investments and investments in securities, among others.

Owners of assets amounting to less than US\$ 100,000.00 or equivalent amounts in other currencies, as of December 31, 2007, are not required to provide information to BACEN.

Information relating to the year 2007, based on assets held on December 31, shall be provided between June 9, 2008 and July 31, 2008, through the declaration form available at BACEN's website (www.bcb.gov.br).

Failure to comply with the obligations indicated above may subject the party to penalties in the amount of up to R\$250.000,00 (two hundred and fifty thousand reais) depending on the type of the infraction.

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The Interplay of Non-Compete Covenants under the PRC Anti-monopoly Law

By Ding Liang*

A non-compete clause prohibits one party from competing in the same type of business as the other party for a specified period, within a specified geographical area, and is usually included in joint venture agreements, distribution agreements, OEM contracts, licensing agreements, and many other kinds of commercial agreements.

The non-compete clause is usually termed “covenant not to compete”, “restrictive covenant”, or “non-compete clause”. A specific term may be used to restrict various behaviors by one or more parties. For instance, “non-solicitation of employees” will prevent one party from soliciting, directly or indirectly, the employees of the other party. “Non-solicitation of customers” prohibits one party from soliciting customers of the other party. A “no-shop clause” is an agreement by one party, the owner of a business, to negotiate only with one specific party, the putative purchaser, for the sale of that business, for a specified period of time. The object is to prevent the vendor from “shopping around” for another purchaser. No-shop clauses are only relevant in the context of sale of business agreements.

Such non-compete clauses are treated with suspicion by the Anti-Monopoly Enforcement Agency. Therefore, it is prudent to conduct an in-depth analysis of the non-compete clause before the conclusion of agreements.

As China is a fairly young competition regime, there are few competition precedent cases regarding the validity of non-compete clauses. Further, we note that there are no guidelines or regulations accompanying the Anti-Monopoly Law (the “AML”)¹. Thus, this article will only explore the possibility of the treatment of non-compete clauses under the AML. It will be subject to further revision after detailed guidelines are issued.

I. The AML Provisions

In general, the AML contains no specific rules on non-compete clauses and does not provide explicit guidance on the legality of non-compete clauses. However, an agreement containing a non-compete clause would fall within the scope of a monopoly agreement and so would be subject to the AML.

According to Article 13 of the AML, monopoly agreements are agreements, decisions or some concert of action that eliminates or restricts competition. If an agreement reached between two or more operators containing a non-compete clause has the object or effect of eliminating or restricting competition, then it will be considered a monopoly agreement under the AML.

Monopolistic conduct involving horizontal agreements includes: (1) fixing or changing the price of commodities; (2) limiting the outputs or sales volume of commodities; (3) segmenting the sales markets or the raw material purchasing markets; (4) limiting the purchase of new technology, new facilities or limiting the development of new technology or new products; (5) jointly boycotting transactions; or (6) other monopoly agreements as determined by the AML Enforcement Agency.

Monopolistic conduct involving vertical agreements includes: (1) fixing the resale prices of commodities to third parties; (2) restricting the minimum resale prices of commodities to third parties; or (3) other monopoly agreements determined by the AML Enforcement Agency.

¹ The AML will come into effect on August 1, 2008.

Moreover, several provisions in other current legislation may provide examples as to how non-compete clauses will be treated. Article 7(2) of *Measures for the Administration of Fair Trading for Retailers and Suppliers* (the “Measures”) provides, “retailers shall not engage in the following acts that impede fair competition: ... (2) restricting suppliers from supplying products or providing services to other retailers.” Article 18(2) of the *Measures* provides, “the suppliers shall not, in the course of supply, engage in the following acts that impede fair competition: ... (2) restricting retailers from selling the commodities of other suppliers.”

II. Non-Compete Clauses in Horizontal Monopoly Agreements

Horizontal monopoly agreements are, in general, subject to the *per se* rule. Article 13 of the AML prohibits horizontal monopoly agreements segmenting sales markets or raw material purchasing markets among competing operators. Thus, a horizontal monopoly agreement containing a non-compete clause is, in general, prohibited under the AML.

However, a horizontal agreement can be exempted in certain circumstances if it meets the standards specified in Article 15 of the AML. Article 15 enumerates a number of specific exempted situations and then provides additional substantive requirements. According to Article 15 of the AML, an exemption is available if it is proven that the agreement in question was (1) to improve technology, R&D or new product development; (2) to upgrade quality, reduce costs, enhance efficiency, or introduce standardization; (3) improve efficiency or enhance the competitive ability of small and medium operators; (4) promote the public interest; (5) mitigate sales decreases during economic downturns; (6) ensure legitimate foreign trade and economic cooperation; and (7) other circumstances stipulated by the State Council.

For situations (1) to (5), the following substantive standards must also be met: (1) the monopoly agreement will not substantially restrict competition in the relevant market; and (2) consumers will share the benefits derived from the agreement. As a restriction on competition, the non-compete clause is unlikely to be exempted under Article 15.

III. Non-Compete Clause in a Vertical Monopoly Agreement

It is increasingly accepted that vertical agreements which are not related to price often have positive effects. Broadly, non-price vertical arrangements may have the effect of: (1) promoting non-price competition (such as the quality of services); and (2) optimizing a firm’s distribution processes.

However, a non-compete clause in a vertical monopoly agreement is likely to raise the following competition concerns: (1) where other suppliers in the relevant market cannot sell to the distributor directly, this may lead to a foreclosure of the market; (2) market shares may become more rigid and this may facilitate collusion when similar conduct is engaged in by several suppliers; and (3) inter and intra brand competition may be limited.

Typically, vertical arrangements will only give rise to competition concerns where the supplier is dominant or has substantial market power and where the supplier or distributor possesses market power in the relevant market and places restrictions (such as exclusive distribution) which materially lessens competition between suppliers/distributors.

For instance, the *Measures for the Administration of Fair Trading for Retailers and Suppliers* are only applicable to retailers whose annual sales volume is at least RMB10 million² and suppliers of such retailers. Thus, retailers that do not meet this threshold will be exempted from the *Measures*.

² See Article 3 of the *Measures for Administration of Fair Trading for Retailers and Suppliers*, which provides, “A retailer herein refers to an enterprise and its establishments that have handled the registration with the administrative authorities for industry and commerce and with direct sales of their products to consumers and with annual sale turnover (for an enterprise engaged in chain operations, the sale turnover includes the sale turnover of its chain stores) no less than RMB10 million.”

Therefore, if the parties to a vertical monopoly agreement with a non-compete clause do not possess a dominant market position, it generally will not raise competition concerns.

IV. Non-Compete Clause in an Acquisition Agreement

During negotiations for an acquisition of a Chinese business (the “target company”), foreign buyers may insist that sellers enter into a non-compete covenant with the buyer and the target company for a specified period. The aim of such non-compete clauses is to protect and preserve the value of the target company and to obtain certainty that the seller does not re-enter the market soon after the acquisition has been completed.

According to the AML, operators must notify the Anti-Monopoly Law Enforcement Agency in advance where the concentration of operators reaches the threshold for notification prescribed by the State Council. Until they have done so, they may not proceed with the proposed acquisition.

The non-compete clause contained in an acquisition agreement may be allowed by the Anti-Monopoly Law Enforcement Agency, after its anti-competitive effects is weighted against any pro-competitive effects of concentration. According to Article 28 of the AML, “if the operators concerned can prove either that the favorable impact of the concentration on competition obviously exceeds the adverse impact, or that the concentration is in harmony with the public interests, the Anti-monopoly Law Enforcement Agency under the State Council may decide not to prohibit the concentration.”

Once the notification is approved by the Anti-Monopoly Law Enforcement Agency, the proposed acquisition can proceed. However, in certain cases, the Anti-Monopoly Law Enforcement Agency may decide to impose restrictive conditions, such as removal of the non-compete clause, in order to reduce the adverse impact of such acquisition on competition.

V. Conclusion

In conclusion, it is apparent that non-compete clauses protect the interests of parties in different types of agreement. Since these clauses involve the balancing of interests between promoting competition and protecting the interests of suppliers, retailers and investors, their interpretation and application can be quite complex.

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INDONESIA – Ali Budiardjo Nugroho Reksodiputro

INCOME TAX INCENTIVE FOR PUBLIC COMPANIES (2008-04-29)

The Government of Indonesia reduces the income tax rate of publicly listed companies that meet the conditions for the reduction. The income rate reduction is regulated in Government Regulation No. 81 which was issued on 28 December 2007 (“GR 81”).

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Under the GR 81, Indonesian publicly listed limited liability companies can apply for a 5 per cent reduction of their income tax rate if the following conditions are met: (i) at least 40% of their total paid up shares are owned by the public; (ii) such shares are owned by at least 300 shareholders; (iii) each of these shareholders owns less than 5% of the total paid up shares, and (iv) the aforementioned conditions are met by the resident corporate taxpayers within a period not shorter than 6 (six) months in one fiscal year. The regulation states that further provisions on the procedures for this tax facility’s implementation and supervision will be regulated by way of a Regulation of the Minister of Finance. The Government Regulation came into effect on January 1st 2008. (fk)

For additional information visit www.abnrlaw.com

TAIWAN – Lee and Li

INSURANCE COMPANIES NOT SUBJECT TO ARTICLE 211 OF THE COMPANY ACT ©J. C.

Liu/Ying-chen Chen

Article 211 of the Company Act requires that if a company's assets are obviously insufficient to compensate its liabilities, the board of directors should immediately declare bankruptcy. However, on 17 December 2007, the Financial Supervisory Commission issued a ruling to exempt insurance companies from the application of Article 211 for the following reasons:

- An insurance company is an enterprise that collects insurance premiums from policyholders and performs obligations according to insurance contracts; it plays a role in public welfare, and is regulated under the Insurance Act as an industry requiring special permit. With regard to the financial aspect, Article 145 of the Insurance Act requires insurance companies to set aside various reserves; Article 143-4 requires that a capital adequacy ratio of at least 200% be maintained and prohibits distribution of earnings if the capital adequacy ratio falls below the aforementioned level. The competent authority may, at its own discretion, impose other necessary sanctions or restrictions depending on the severity of the situation.
- If there is a likelihood that an insurance company's business or financial status may be detrimental to its sound operation, or there is an obvious deterioration in its business or financial condition that it is unable to pay its debts or to perform its contractual liabilities or there is a likelihood that the rights and interests of the insured may be adversely affected, the competent authority may impose sanctions under Article 149 of the Insurance Act depending on the severity of the situation.
- The liabilities of insurance companies differ from those of other industries, mainly in the form of various reserves (70% to 80% for non-life insurers, and 80% to 90% for life insurers), which should be regarded as contingent liabilities. Therefore, if an insurance company's assets are insufficient to compensate its liabilities, in order to assure the rights and interests of policyholders, the competent authority must order such insurance company to increase its capital as the first priority to enhance its solvency.

For additional information visit www.leeandi.com

CONSIDERATIONS FOR TERMINATING EMPLOYEES

by Chusert Supasitthumrong and Tiziana Sucharitkul



Left: Chusert Supasitthumrong, Litigator
Right: Tiziana Sucharitkul, Director
Dispute Resolution Department

A while back, media reported as to the financial relief employers obtained during the economic crisis period as a consequence of being able to terminate employees. However, shortly thereafter, labor issues ensued. A large number of complaints were lodged with the Labor Department by employees seeking severance from employers. Some employees also filed cases with the Labor Court seeking benefits, remuneration, severance and compensation for unfair termination.

It is undeniable that many employers now find themselves in a similar economic crisis and are seeking to terminate employees. If so, correct procedures must be adhered to and employers should also be informed as to when severance and/or other benefits must be paid to employees.

Pursuant to various Thai laws, if an employer terminates an employee, it has an obligation to pay severance, remuneration, and compensation to the employee. Exceptions apply and are discussed below.

Severance. With regard to severance pay, under the Labor Protection Act, an employer can terminate its employees without severance pay only if the employee:

(1) is dishonest in his duties or intentionally commits a criminal act against the employer.

(2) intentionally causes the employer to suffer losses.

(3) performs an act of gross negligence which causes the employer to suffer severe losses.

(4) violates the employer's work rules or regulations or orders which are legal and fair, and the employer has already given a written warning (except for serious violations of work rule for which the employer is not required to give warning). Note that the written warning shall be effective for a

period of one year from the date of the commission of the violation by the employee.

(5) neglects his duties for a period of three consecutive work days without reasonable cause, regardless of whether there is an intervening holiday during such period.

(6) is imprisoned by a final judgment, unless the offenses arise out of negligent acts or are petty.

We refer to item (4) above regarding the possibility of terminating an employee without payment of severance and without issuance of a warning letter in instances where there is serious violation of an employer's work rules. Note that in addition to the fact that the "serious violation" for which the employee is being terminated must be stipulated as such in the employer's work rules, the court will also consider whether or not the violation is "serious" to warrant a termination without issuance of a warning letter and without severance. Following are examples of Thai court precedent on this issue:

(1) Cigarette smoking beside a box of papers on the employer's premises is a serious violation. (Supreme Court Precedent Case No. 3495/1983)

(2) Cigarette smoking in an area approximately 2.5 metres from the paper warehouse and while standing on a wet floor is not a serious violation. (Supreme Court Precedent Case No. 1269/1983)

(3) Tearing a warning letter or refusing to sign/acknowledge a warning letter issued by the employer is not a serious violation. (Supreme Court Precedent Case No. 1458/1981, 3999/1981)

Remuneration. With respect to remuneration, if an employer wishes to terminate an employee (where there is no fixed period of employment), the employer will have to provide advance notice of at

least one payment period before any termination is to take effect, otherwise the employer will have to pay remuneration. However, an employer is excepted from paying remuneration if the employee (i) disobeys or habitually neglects the lawful commands of his employer, (ii) is absent from service, (iii) is guilty of gross misconduct or otherwise acts in a manner incompatible with the due and faithful discharge of his duty. Following are examples of court orders relieving the employer from paying remuneration.

(1) Where the employee sold personal goods to other employees during working hours. (Supreme Court Precedent Case No. 2299/1985)

(2) Where the employee operated a business to compete with the employer. (Supreme Court Precedent Case No. 3862 /1987)

Note, however, that the court found that an employer was obligated to pay remuneration to its employee who invited other employees to work at another company. (Supreme Court Precedent Case No. 1378/1992)

Compensation. If an employer terminates an employee without sufficient grounds, the employer will have to pay compensation for the unfair termination. Note also that where it has been determined that a termination is unfair, courts may issue orders forcing employers to reinstate employees instead of paying compensation.

With regard to termination of employees as a result of loss of/failure in business, the court has opined that such termination is fair. Accordingly, employers do not have to pay compensation although they do have to pay severance and remuneration (unless the exceptions listed above apply). ♦



Employee Benefits Advisory Bulletin

New Law Provides Additional Benefits to Employees in Military Service

By [Jeff Belfiglio](#) and Kim Kaald
[June 2008]

On May 22, 2008, Congress passed the Heroes Earnings Assistance and Relief Tax Act of 2008 (also called the Heroes Act or the HEART Act), and President Bush is expected to sign the act into law in the near future. The Heroes Act requires employers to provide certain additional benefits to employees on qualified military leave and permits employers to adopt some optional provisions that would be beneficial to service personnel.

The act provides additional protection for survivors of military personnel who die or are disabled during qualified military service, and thus are unable to return to work and use their Uniformed Services Employment and Reemployment Rights Act (USERRA) reemployment rights. It also standardizes the treatment of "differential pay" as taxable wages and as compensation for retirement plan purposes.

The employee benefits provisions of the Heroes Act generally apply to employees performing qualified military service as defined in Internal Revenue Code Section 414(u). This is the same definition of qualified military service currently used under USERRA laws that apply to qualified retirement plans. The provisions of the Heroes Act must be applied consistently and on a nondiscriminatory basis to all employees in qualified military service.

The following chart summarizes the most significant provisions of the Heroes Act that apply to employee benefit plans and includes information about mandatory and optional action steps that employers may need to take.

Provision of Law	Plan(s) Affected	Mandatory or Optional?	Action Steps
Section 104(a): Requires that additional death benefits (excluding benefits earned during military service) that would have applied if the participant had returned to employment and then died be provided to survivors of plan participants who die while performing qualified military service. For example, if the plan provides for 100 percent vesting upon death, the participant's plan benefits would become 100 percent vested. Likewise, some plans provide for special death benefits for participants who die while actively employed; those benefits would be extended to persons in qualified military service.	Qualified retirement plans (including 401 (k) plans), 403 (b) plans and government 457(b) plans.	Mandatory	Apply these rules in practice to deaths occurring on or after <i>Jan. 1, 2007</i> . Amend plan by the last day of the 2010 plan year (2012 for governmental plans).
Section 104(b): Provides that a plan <i>may</i> , for benefit accrual purposes, treat a participant who dies or becomes disabled while performing qualified military service	Qualified retirement plans (including 401 (k) plans), 403	Optional	<i>If this optional provision is adopted:</i> The plan may apply these rules in practice to deaths

<p>as if the individual had returned to employment on the day before the death or disability and then died or became disabled on the actual date of death or disability. This would allow the participant or his or her beneficiaries to receive all or part of the benefit accruals that the plan is required to provide under USERRA to reemployed veterans.</p>	<p>(b) plans, 457 (b) plans and Simplified Employee Pension (SEP) plans.</p>		<p>occurring on or after Jan. 1, 2007, or a later effective date.</p> <p>Amend plan by the last day of the 2010 plan year (2012 for governmental plans).</p>
<p>Sections 105(a) and 105(b): If an employer elects to pay differential pay to an employee during a period of qualified military leave, the Act requires that this differential pay be treated as compensation for plan purposes and as wages for income tax withholding purposes.</p>	<p>Qualified retirement plans (including 401 (k) plans), 403 (b) plans, 457 (b) plans, SEP plans and IRAs.</p>	<p>Mandatory</p>	<p><i>If you pay differential pay to employees on qualified military leave:</i></p> <p>Treat differential pay as wages for income tax withholding purposes for payments made after Dec. 31, 2008.</p> <p>Treat differential pay as compensation for plan purposes beginning with the 2009 plan year.</p> <p>Amend plan by the last day of the 2010 plan year (2012 for governmental plans).</p> <p>Note that treating differential pay as eligible compensation for plan purposes is currently an <i>optional</i> provision in the final regulations under Internal Revenue Code Section 415. If a plan has not yet been amended for these provisions, the plan sponsor may wish to consider including this provision now.</p>
<p>Section 105(b): An elective contribution plan must treat an employee on active military duty for more than 30 days as having terminated employment for purposes of taking a distribution of his or her tax-deferred contributions. This is available even though the employee is still considered employed while receiving differential pay. The employee's tax-deferred contributions must be suspended for six months after the distribution date.</p>	<p>Qualified retirement plans (including 401 (k) plans), 403 (b) plans and 457(b) plans.</p>	<p>Mandatory</p>	<p>The plan must apply these rules in practice in years beginning after Dec. 31, 2008.</p> <p>Amend plan by the last day of the 2010 plan year (2012 for governmental plans).</p>
<p>Section 107: Permanently waives the 10 percent early withdrawal penalty on early distributions to</p>	<p>Qualified retirement plans</p>	<p>Mandatory</p>	<p>Apply these rules in practice to employees called to active duty on or</p>

qualified reservists called to active duty.	(including 401 (k) plans), 403 (b) plans and IRAs.		after Dec. 31, 2007. This makes permanent the exception available under the Pension Protection Act through Dec. 31, 2007. No plan amendment required.
Section 114: Permits a tax-free distribution from a health flexible spending account in a cafeteria plan to an employee who is a qualified reservist and is called to active military duty for a period of more than 179 days.	Health flexible spending accounts (cafeteria plans).	Optional	Apply these rules in practice to distributions occurring on or after the date of the enactment of the Heroes Act.

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EXPORT CONTROLS & CUSTOMS UPDATE

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Census Bureau Issues Final Rule: New Foreign Trade Regulations

On June 2, 2008, the U.S. Census Bureau published in the Federal Register (73 Fed. Reg. 31,547) a final rule mandating the filing of export information through the Automated Export System (AES) and otherwise implementing provisions in the Foreign Relations Authorization Act. This rule also changes the name of the Foreign Trade Statistics Regulations to the Foreign Trade Regulations (FTR). Although the final rule's effective date is July 2, 2008, the Census Bureau will not implement provisions of this rule until September 30, 2008, in order to provide enough time for the affected parties to comply with the new requirements.

Specifically, the final rule:

- Requires mandatory AES filing for all shipments where a Shipper's Export Declaration (SED) is currently required.
 - Paper SEDs will no longer be accepted as of September 30.
 - The export information previously reflected on a paper SED is now referred to as the Electronic Export Information (EEI).
 - The EEI shall be filed through the AES by the U.S. Principal Party In Interest (USPPI), the USPPI's authorized agent, or the authorized U.S. agent of the Foreign Principal Party In Interest (FPPI).
 - The new rule provides that the FPPI could authorize the USPPI (in writing) to file EEI as an agent of the FPPI in a routed export transaction.
 - In a routed export transaction, the FPPI expressly assumes responsibility (in writing) for compliance with U.S. export control laws and the FPPI's U.S. agent is the exporter for EAR purposes.
 - If the FPPI uses another U.S. agent, the new rule requires the agent, upon request, to provide the USPPI with a copy of power of attorney or the written authorization giving the agent the authority to file EEI on behalf of the FPPI before the USPPI provides the agent with the information necessary to complete the EEI filing.
 - The new rule also specifies that the USPPI has four means to file EEI:
 1. Using *AESDirect*, the Census' free internet filing system



2. Developing AES software using the Automated Export System Trade Interface Requirements (AESTIR)
 3. Purchasing software developed by certified vendors using the AESTIR
 4. Using an authorized agent
- The FPPI can only file EEI using an authorized agent in a routed export transaction.
 - The new rule preserves the current \$2,500 exemption level
- Preserves the moratorium placed on post-departure filing (Option 4) on August 15, 2003, by the Census Bureau and the Department of Homeland Security's Customs and Border Protection (CBP).
 - Although new users cannot yet be approved for this option, previously approved users can continue to use the post-departure filing, following the procedures specified in the new rule.
 - The moratorium on new Option 4 users will remain in effect pending further review of the post-departure filing program. The new rule contains revised procedures for the post-departure filing option.
 - Significantly increases penalties for violations of the FTR (including a failure to file, delayed filing, false or fraudulent reporting or misuse of the AES, *e.g.*, misstating the value or Schedule B classification).
 - Criminal penalties include fines up to \$10,000 or imprisonment for up to five years, or both, for each violation. Persons convicted for criminal violations of the FTR also are subject to forfeiture penalties.
 - Civil penalties include fines up to \$10,000 per violation (including \$1,100 for each day of delayed filing, up to \$10,000). Any property involved in a civil violation of the FTR also may be subject to forfeiture.
 - Delegates enforcement of the FTR to the Department of Commerce Bureau of Industry and Security's Office of Export Enforcement (OEE) and the Department of Homeland Security's CBP and Immigration and Customs Enforcement (ICE). OEE and ICE, as assisted by CBP, may conduct investigations under the FTR.
 - Includes provisions for voluntary self-disclosure to the Census Bureau of suspected or actual violations of the FTR, indicating that such voluntary self-disclosure will be a mitigating factor in determining what actions to take.
 - The mitigating effect of voluntary self-disclosure could be outweighed by aggravating factors and the Census Bureau reserves the right to refer a matter to the Department of Justice for criminal prosecution.
 - The new rule also specifies procedures for initial notification of voluntary self-disclosure and a subsequent submission of the narrative account after conducting a thorough review of all export transactions where possible violations of the FTR are suspected.

About this update

Please contact Beth Peters or Craig Lewis if you have any questions or would like a more detailed analysis of any specific provisions in the new FTR.

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E-Verify to be Mandatory for Federal Contractors

June 9, 2008

Under an amendment to Executive Order No. 12989, signed by President Bush on Friday, June 6 and announced by the White House this morning, federal contractors will have to use E-Verify to confirm that their employees are lawfully eligible to work.

In accordance with the Executive Order:

Sec. 5. (a) Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security [E-Verify] to verify the employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract.

The following is a link to the full text of the Executive Order:

<http://www.whitehouse.gov/news/releases/2008/06/20080609-2.html>

What is E-Verify?

E-Verify is a web-based program operated by U.S. Citizenship and Immigration Services (USCIS) in partnership with the Social Security Administration. E-Verify aids employers in determining the employment eligibility of new hires by comparing information provided by the new employees on Form I-9 with database records.

How This Affects You

If you are a federal government contractor, or a subcontractor on a federal government project, you will be required to participate in E-Verify. The Executive Order leaves open a number of questions related to timing of implementation, whether it will apply to future or current contracts, and other details. We will continue to monitor the situation and to provide more information as it becomes available.

I-9 eSource Technology from Morgan Lewis

Morgan Lewis offers clients a hosted, web-based software product that ensures Form I-9 compliance and seamlessly interfaces with the E-Verify program. The following links will provide you with additional information about I-9 eSource:

Brochure: <http://www.morganlewis.com/pubs/I-9eSourceBrochure.pdf>

Description: <http://morganlewis.com/documents/I-9eSourceNarrativeBrochure.pdf>

If you have any questions about any of the issues raised in this Morgan Lewis Immigration Alert, please contact:

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Vietnam Issues Official Letter on Automobile Industry

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On 4 February 2008, Vietnam's Government Office issued *Official Letter No. 819/VPCP-CN On the Implementation of the Strategy and Master Plan for the Development of the Automobile Industry* ("Official Letter 819"). *Official Letter 819* provides insight into the Vietnamese Government's strategies for developing the automobile and auto parts industry, and can be considered a signal that the Government hopes to jumpstart the domestic auto industry. In particular, in *Official Letter 819*, Deputy Prime Minister Hoang Trung Hai directed the Ministry of Planning and Investment ("MPI") to increase calling for, and attracting, foreign investment in the development of the auto industry in accordance with the approved Master Plan, especially in the area of producing auto components and parts. A summary of the contents of *Official Letter 819* appears below.

More specifically, according to *Official Letter 819*, pursuant to a proposal from the Ministry of Industry and Trade ("MIT"), in regard to implementing the Strategy and Master Plan for the Development of the Vietnamese Auto Industry Through the Year 2010, With a View Toward the Year 2020, Deputy Prime Minister Hoang Trung Hai was of the following opinion:

The MIT shall monitor and inspect the situation of investment, assembly and production of automobiles and automobile parts of enterprises in all economic sectors in accordance with the Strategy and Master Plan for the Development of the Vietnamese Automobile Industry Through the Year 2010 With a View Toward the Year 2020 that has been approved. MIT shall periodically update and adjust the Master Plan as suitable with the situation of socio-economic development of the country and international commitments. MIT is to lead and coordinate with relevant authorities to perfect regimes and policies regarding:

- (a) Encouraging investment in the production of automobiles and production of automobile parts domestically in a manner that is reasonable and suitable with commitments on [international economic] integration of Vietnam;
- (b) Strengthen management of the market to combat counterfeit goods, knock-off goods, and commercial fraud, and to develop and open up to society the system for distribution of automobiles to contribute to automobile market stabilization;
- (c) Strengthen the promotion of commerce, and assist in activities for seeking and developing export markets for products of the automobile industry; and
- (d) Draft and announce standards having the characteristics of technical barriers for complete automobiles imported into Vietnam.

The Ministry of Science and Technology (“MOST”) must: lead and coordinate with relevant authorities to draft and promulgate technical standards on quality for automobiles and auto parts in respect of automobiles circulating domestically, ensuring suitability with WTO principles, and preventing the assembly and production of automobiles and production of auto parts of inferior quality which cause pollution to the environment. MOST must also inspect and closely monitor the transfer and receipt of technology of enterprises assembling and producing automobiles and producing auto parts, ensuring that the technology transferred is truly advanced technology.

The Ministry of Finance (“MOF”) shall lead and coordinate with MIT and relevant agencies to urgently draft and submit to the Prime Minister for promulgation a regime for assisting projects in the production and manufacture of automobile engines, gear boxes and transmissions. The MOF shall, based on the commitments of Vietnam in the WTO and CEPT/AFTA, draft and announce a roadmap for reducing import duties on automobiles and automobile parts that is suitable. Also, the MOF shall research and perfect special consumption tax policy and other financial policies in respect of automobiles, suitable with the objectives of the Strategy for Developing the Automobile Industry and for developing domestic transportation and which is suitable with international standards.

According to *Official Letter 819*, the Ministry of Transportation shall urgently complete the review, finalization and promulgation of new regulations and technical and safety standards and conditions for automobiles produced and imported with the aim of increasing quality and safety standards, to replace regulations which are no longer suitable.

The Ministry of Planning and Investment shall increase calling for, and attracting, foreign investment in the development of the auto industry in accordance with the approved Master Plan, especially in the area of producing auto components and parts.

Under *Official Letter 819*, local governments were also to direct the strict adherence to processes for evaluating investment projects in the assembly and production of automobiles and the production of auto parts, focusing on the evaluation of the following items: Technical level of technology, financial capacity of investors and equipment and solutions for protecting the environment to avoid situations where investors are licensed but do not commence with investment or investors take advantage to import equipment and technology that is outdated, overuses power and raw materials, or does not meet environmental protection standards. Local agencies are to increase inspections and monitoring of environmental pollution levels of facilities assembling or producing automobiles or producing auto parts in their respective regions, and to timely propose measures to rectify pollution. Local authorities are to strictly and closely implement regulations in force on the evaluation of designs for facilities in the assembly and production of automobiles and the production of auto parts locally.