

February 2011 e-Bulletin

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Reach. Reliability. Resources.

CONFERENCES & EVENTS

- *PRAC Members Gathering @ INTA San Francisco - May, 2011*
details tba
- *49th International PRAC Conference - Amsterdam - May 21-24, 2011*
Early Registration Open www.prac.org/events.php
- *50th International PRAC Conference - Singapore October 15-18, 2011*
Details at www.prac.org/events.php
- *PRAC Members Gathering @ IBA Dubai—October, 2011*
details tba

PRAC Conferences and Events are open to PRAC Member Firms only

MEMBER DEALS MAKING NEWS

- ▶ **CLAYTON UTZ** Advises Regent Pacific on BC Iron Acquisition
- ▶ **FMC** Advises Norsemont Mining Inc. - HudBay Minerals to acquire outstanding shares for \$520 million
- ▶ **GIDE LOYRETTE NOUEL** Advises on A63 Motorway Concession
- ▶ **HOGAN LOVELLS** Advises Rostelecom on its Acquisition of a Stake in National Telecommunications
- ▶ **KING & WOOD** Largest U.S. Nuclear Energy Operator Exelon signs MOC with CNNC Nuclear Power Company Ltd
- ▶ **NAUTADUTILH** Advising APG on Sale of AlInvest to Carlyle Group and AlInvest Management
- ▶ **RODYK & DAVIDSON** Acts for Morgan Stanley \$380 million divestment of the whole of its indirect interest in an investment holding company
- ▶ **SIMPSON GRIERSON** Assists Auckland Council in \$600m funding facility
- ▶ **TOZZINIFREIRE** Assists Banco Santander in the approval of the new plan of the judicial reorganization of Frigorífico Arantes

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Visit us online at www.prac.org

CLAYTON UTZ QUEENSLAND OFFICE REOPENS

28 January 2011

We hope all of our Queensland clients, community partners and their loved ones are safe and well after the challenges of the past two weeks.

We would like to thank all of our clients for your support. We could not have kept working throughout the period without your understanding, and the many kind offers of practical help, including the use of client premises while we were flooded.

We can now advise that our office at Riparian Plaza is fully operational and has reopened for business as of Monday, 24 January.

We know that some of our clients have been affected by this flooding disaster. If there is anything we can do to assist, please do not hesitate to contact your Clayton Utz partner or Michael Klug, Partner in Charge, Brisbane on 0414 619 990 or mklug@claytonutz.com.

As we discovered ourselves over the last few weeks, a crisis like the floods brings out the best in our neighbours. We look forward to working with each of you and the wider community to help Queensland recover.

For additional information visit www.claytonutz.com



PRAC 49th International Conference

May 21–24, 2011

Hosted by NautaDutilh

Early Registration Online at www.prac.org



DAVIS WRIGHT TREMAINE EXPANDS HOSPITALITY PRACTICE

Adds Hotel Industry Veteran in Portland

PORTLAND, ORE., JAN. 27, 2011 – Karen Thiessen, an accomplished transactional lawyer with more than a decade of experience working with the hotel industry, has joined Davis Wright Tremaine LLP as an associate in the firm's **Portland, Ore.** office. She comes to the firm from Dallas-based Gardere Wynne Sewell LLP and deepens Davis Wright's significant hospitality practice.

"Karen is a perfect fit for our team and our firm," said **hospitality** practice partner **Jesse D. Lyon**. "Our hospitality clients tell us they appreciate our passion for their industry, and it's authentic because our lawyers come from and devote their practices to the sector. Karen's knowledge of hotel industry management issues will complement the firm's existing hotel transactional practice and our similar strengths in the restaurant and alcoholic beverage industries. Great lawyers who offer a customized and industry-relevant approach is the key to helping our clients succeed."

Before beginning her law practice at Gardere Wynne Sewell LLP, Ms. Thiessen spent several years in management with Hilton Hotels Corporation, specializing in operations, market analysis, and development. As a lawyer, she brings experience advising clients on a variety of complex commercial and real estate transactions, as well as operational issues, for the hotel industry, including international and cross-border transactions in Asia, Europe, the Middle East, and Mexico.

Ms. Thiessen's passion for and background with the hotel industry dates back to her undergraduate studies at the world-class Cornell University School of Hotel Administration, where she earned her Bachelor of Science degree. She went on to earn her Juris Doctor degree from the University of Idaho College of Law and her Master of Business Administration degree from Washington State University College of Business Administration. She is licensed by the State Bar of Texas and plans to gain admission to the Oregon State Bar later this year.

Outside of her law practice, Ms. Thiessen maintained a strong involvement in the arts and culture community in the Dallas area. She held leadership positions with the Leadership Arts Institute, Friends of the Dallas Public Library, and the Arts and Culture Sub-Committee of the Dallas Chamber of Commerce Young Professionals Organization.

For more information, visit www.dwt.com

GIDE APPOINTS NEW PARTNERS

Gide Loyrette Nouel is pleased to announce that on 1 January 2011, it appointed two new partners:

Guillaume Jolly (Paris - Tax Law)

Grigory Marinichev (Moscow - Banking & Finance)

For additional information visit www.gide.com

GOODSILL ADDS LITIGATION ASSOCIATE

(HONOLULU, HI – January 7, 2011) – Kimberly A. Vossman has joined Goodsill Anderson Quinn & Stifel as an associate in the firm’s litigation practice.

A 2009 Summa Cum Laude graduate of the William S. Richardson School of Law at the University of Hawaii, Vossman focuses her practice in the area of civil litigation. Vossman was a member of the U.H. Law Review, and among her honors earned the Carl K. Mirikitani, Jr. Valedictory Prize. Before joining Goodsill, Vossman participated in an externship with the Honorable Kevin S.C. Chang, United States District Court for the District of Hawaii and clerked for Hawaii Supreme Court Chief Justice Mark E. Recktenwald. Vossman received her bachelor of arts in sport management and communications from the University of Michigan.

Goodsill Anderson Quinn & Stifel LLP traces its roots to 1878 and employs more than 65 attorneys. Keeping pace with client needs, Goodsill attorneys practice in all areas of civil law, extending personalized legal services with cutting-edge resources that are best found at a large firm.

For additional information visit www.goodsill.com

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LUCE FORWARD ADDS TO FAMILY WEALTH PRACTICE

January 19 2011

Catherine “Katie” M. Swafford recently joined Luce Forward as an associate in the firm’s San Diego office. Swafford will be a part of the firm’s Family Wealth & Exempt Organizations (FWEO) practice group.

Luce Forward’s experienced FWEO team addresses four general areas of client concerns: estate and tax planning, the responsibilities of fiduciaries in the probate and trust process, dispute resolution in the estates and trusts context, and the start-up and operation of nonprofit organizations. Swafford will focus primarily on trusts and estates matters, working closely with Luce Forward Partner Mary F. Gillick.

“Katie brings with her a strong background in trusts and estates work, along with general business and real estate litigation, which makes her a great addition to our firm,” said Kurt L. Kicklighter, Luce Forward’s Managing Partner. “As we continue to strategically build our practice groups and offices throughout California, we focus on attracting talented young attorneys, like Katie, who can foster the firm’s reputation for producing positive results for our clients.”

Prior to Luce Forward, Swafford was a general business, trusts and estates and real estate litigation associate at Lurie, Zepeda, Schmalz & Hogan in Beverly Hills, Calif. Much of her work focused on intense litigation, including multiple bench trials which she second- or third-chaired, opposing some of the top trusts and estates attorneys in the country. In her six-year legal career, Swafford has gained extensive experience in both the civil and probate courts. She received her undergraduate degree, cum laude from University of California, Los Angeles and her Juris Doctorate, cum laude from Pepperdine University School of Law.

“Luce Forward has long had a fantastic reputation in the trusts and estates arena, so I am very much looking forward to working with such a successful team,” said Swafford. “Based on my experience and strengths, I am confident that this will be a great fit for me.”

For additional information visit www.luce.com

HOGAN LOVELLS ADDS REGULATORY PARTNER IN WASHINGTON, D.C.

WASHINGTON, D.C., 2 February 2011 – Hogan Lovells US LLP announced today that it has expanded its Energy Regulatory Practice Group with the addition of Michael A. Yuffee, as a partner in the Washington, D.C. office. Yuffee joins from McDermott Will & Emery where he was head of the Federal Energy Regulatory Commission (FERC) Regulatory practice.

Yuffee focuses his practice on regulatory, enforcement defense, and transactional matters relating to the wholesale energy markets. He regularly represents and counsels clients in regulatory and compliance matters concerning the FERC and the Commodity Futures Trading Commission (CFTC).

According to Kevin Lipson, Director of Hogan Lovells' Energy practice, "As energy companies continue to face a ramp up in regulatory proceedings through the FERC and the CFTC, Michael's in-depth knowledge of the energy industry and regulatory compliance will be invaluable to our clients."

Warren Gorrell, Co-CEO of Hogan Lovells added: "Our global energy practice is recognized for its breadth and depth, and adding Michael to the team is a real coup as we continue to focus our work handling energy regulatory matters around the world."

Hogan Lovells' energy practice handles a full range of energy regulatory matters globally, including rate and tariff matters, administrative hearings, appellate litigation, reliability standards, enforcement actions, compliance planning and training, certificates and authorizations, industry restructurings, and corporate and finance activities.

Yuffee represents wholesale power suppliers, financial institutions, power marketers, and integrated energy companies with respect to regulatory facets of the wholesale power and natural gas markets, including: the formation and redesign of wholesale electricity markets, electricity transmission access, capacity market development, generation and transmission interconnection issues, natural gas pipeline proceedings, and general administrative and civil litigation matters.

Prior to entering private practice, Yuffee was an attorney-advisor in the FERC Office of Administrative Law Judges, where he assisted in all aspects of electricity and natural gas rate proceedings, mergers, and utility restructuring.

Yuffee is a frequent author of energy-related articles, has served as the Chairman and Vice Chairman of the Electric Regulation Committee of the Energy Bar Association, and is recognized as a leading energy lawyer in *Chambers USA*. Yuffee holds a J.D. from Washington University School of Law and a B.A. cum laude from Boston University.

About Hogan Lovells

Hogan Lovells combines the breadth of business-oriented legal advice and high-quality service that clients have come to expect through working with its two founding firms – Hogan & Hartson and Lovells.

"Hogan Lovells" refers to the international legal practice comprising Hogan Lovells International LLP, Hogan Lovells US LLP, Hogan Lovells Worldwide Group (a Swiss Verein), and their affiliated businesses, each of which is a separate legal entity. Hogan Lovells International LLP is a limited liability partnership registered in England and Wales with registered number OC323639. Registered office and principal place of business: Atlantic House, Holborn Viaduct, London EC1A 2FG. Hogan Lovells US LLP is a limited liability partnership registered in the District of Columbia.

For more about Hogan Lovells visit www.hoganlovells.com

SIMPSON GRIERSON APPOINTMENTS

Simpson Grierson Promotes Two to Senior Associate and Twelve Associates

Simpson Grierson is delighted to start 2011 with the announcement of two promotions to senior associate and twelve to associate.

Sally Carnachan is promoted to senior associate in the Auckland local government and environment group. She specialises in advising public and private sector clients on a range of resource management, environmental law and local government issues. Before joining Simpson Grierson, Sally worked as an environmental and planning lawyer in private practice and at a local authority in the United Kingdom.

Mary Hill is promoted to senior associate in the transactional banking and finance group in Auckland. She has experience in a broad range of domestic and international banking and finance transactions, with particular expertise in leveraged acquisition finance, debt restructuring, debt capital markets, US securities issuances, and financial regulation. She acts for banks, borrowers, arrangers, issuers, trustees, fund managers, and project sponsors. Mary joined the firm after several years' working in Hong Kong at "Wall Street" law firm Milbank, Tweed, Hadley & McCloy LLP, and prior to that in Sydney at Baker & McKenzie.

Simpson Grierson's twelve new associates are:

Banking & Finance - Anthea Bowater, Siobhan Cervin, Robyn Maher and Niki Montgomery.

Commercial - Victoria Anderson, James Harper, Leroy Langeveld and Kate Walters.

Litigation - Kimberley Burnside, Joanne Dickson, Sarah Hogg and Natalie Tindall

For additional information visit www.simpsongrierson.com

TILLEKE & GIBBINS PARTNER APPOINTMENTS

Bangkok, Thailand February 9, 2011 - Tilleke & Gibbins, the largest independent law firm in Thailand, proudly announces the appointment of Alan Adcock, Nandana Indananda, and Thomas J. Treutler as Partners of the firm.

Alan Adcock is known for his "detailed knowledge of the law" (The Legal 500 Asia Pacific 2010/2011), fluency in Mandarin, and outstanding client service. Alan represents diverse clients, from pioneers in the life sciences to the biggest IP owners in the world, and helps them achieve the dual goals of profit and protection in Asia. He specializes in IP acquisitions, technology transfer, IP contributions, clinical trials, IP licensing, IP enforcement, and regulatory affairs. Alan received his law degree from Columbia University and is licensed in New York and New Jersey.

Nandana Indananda served as Judge of the Central Intellectual Property and International Trade Court (2006-2008), Research Judge of the Supreme Court (Intellectual Property and International Trade Division) (2003-2006), and Judge attached to the Central Tax Court (1997-2003). A lawyer who commands the respect of colleagues, clients, and opposing parties, Nandana specializes in intellectual property, international commercial transactions, e-commerce, biotechnology, and information technology laws. He is a frequent contributor to definitive legal journals and lectures at top universities in Thailand.

Thomas J. Treutler is the managing director of Tilleke & Gibbins' Hanoi and Ho Chi Minh City offices. Tom is fluent in Vietnamese and is registered to practice as a Foreign Lawyer in Vietnam. Tom is also licensed to practice before the United States Patent and Trademark Office and in California. Featured as a leading lawyer in Chambers Asia (2008-2010), Tom has expertise in both commercial law and IP enforcement. He has secured a number of landmark victories for foreign investors operating in the life sciences and technology sectors.

Darani Vachanavuttivong, Co-Managing Partner of Tilleke & Gibbins, says, "*Alan Adcock and Nandana Indananda each add tremendous value to the firm and our IP practice. Alan brings extensive on-the-ground experience defending intellectual assets in two of the toughest jurisdictions in the world, China and Thailand, while Nandana is known for his legal acumen, honed during his decade of service on the bench.*"

Tiziana Sucharitkul, Co-Managing Partner of the firm, adds, "*Under Thomas J. Treutler's leadership, our Vietnam practice is flourishing, particularly in the areas of commercial transactions and IP. All three new Partners are mentors and leaders, and they represent the bright future of our firm.*"

For additional information visit www.tillekeandgibbins.com

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For additional information visit www.tillekeandgibbins.com

TOZZINIFREIRE PARTNER APPOINTMENTS

The firm starts the year with new partners in four of its offices

With the upturn in the Brazilian economy and the growing demand for specialized legal services, TozziniFreire Advogados reinforces its strategies of multidisciplinary practice, industry focused groups and national coverage by starting the year with new partners from different practice groups, such as Corporate Law and Foreign Investment, Mergers and Acquisitions, Telecommunications, Information Technology, Litigation, Tax, Antitrust, International Trade, Compliance and White Collar Crimes. They are former senior associates at TozziniFreire and have been named partners in four of the firm's offices: São Paulo, Porto Alegre, Brasília and Campinas.

The promotions reflect the growth of TozziniFreire in 2010 following the vibrant moment of the Brazilian market and the impressive perspectives of investment across many sectors and regions where the firm is present with fully-owned offices, especially with the opportunities that are expected with the upcoming 2014 World Cup and the 2016 Olympic Games, as well as with the pre-salt layer discoveries. The fact that Brazil has been listed for the first time among the top ten countries for foreign investment just confirms the forecast that now it is the country's turn, and projects and businesses will demand even more the assistance of specialized and sophisticated legal services.

The new partners are:

São Paulo Office:

Cristina Cezar Bastianello – Tax Litigation

Fernando Cinci Avelino Silva – Corporate Law and Foreign Investment, Mergers and Acquisitions, Telecommunications and Information Technology

Francisco Eumene Machado de Oliveira Neto - Corporate Law and Foreign Investment, Mergers and Acquisitions and Publicly Held Corporations

Joana Temudo Cianfarani - Antitrust

Juliana Sá de Miranda - White Collar Crimes

Renata Muzzi Gomes de Almeida – Corporate Law and Foreign Investment, Mergers and Acquisitions and Compliance

Vera Kanas Grytz - International Trade

Porto Alegre Office:

Rafael Mallmann - Tax

Vinicius de Oliveira Berni – Litigation and Consumer Affairs

Brasília Office:

Isabela Braga Pompilio - Litigation

Campinas Office:

André Barabino - Litigation

TozziniFreire also announces the return of Corporate Law and Foreign Investment partner Cíntia Vannucci Vaz Guimarães. She worked with the firm from 1995 to 2008 and now returns to the same practice group after a sabbatical period.

For additional information visit www.tozzinifreire.com.br

WILSON SONSINI GOODRICH & ROSATI CELEBRATES 50TH ANNIVERSARY

PALO ALTO, CA (February 1, 2011) - Wilson Sonsini Goodrich & Rosati, the premier provider of legal services to technology, life sciences, and growth enterprises worldwide, is pleased to announce that it is celebrating its 50th anniversary in 2011. Founded in 1961—a decade before the term "Silicon Valley" entered the world's lexicon—the firm has grown from a single, modest office in Palo Alto into one of the nation's leading law firms, with nine offices throughout the United States and in China.

"Since its inception, the firm has been privileged to play a role in the evolution of Silicon Valley," said Chairman Larry Sonsini. "We started with a handful of attorneys dedicated to serving the area's emerging technology and venture capital communities—a daring thing to do at the time. From the beginning, our emphasis has been on representing growth enterprises, as well as the financial institutions that fund them. Over the years, we grew alongside these clients, expanding our services to meet their needs as they evolved into more mature companies. Today, the firm has more than 600 attorneys and our client base encompasses thousands of national and global growth enterprises, large and small, public and private. Throughout these changes, we always have remained proud of our Silicon Valley roots and our commitment to entrepreneurialism, diversity, and growth enterprises. The Valley's spirit of innovation and many contributions to technology have been a source of inspiration and strength for our country, and we take pride in the role we have played."

The firm began in 1961 as McCloskey, Wilson and Mosher. In his notes many years later, founder John Wilson explained that "the firm was formed to carry out the 'full service plan,'" which included a passion for "interesting work," a resolve to "stay in close touch with clients" to understand their needs and solve their business objectives, a willingness to "take some risks" if the firm believed in the client, teamwork, and a commitment to diversity.

"It's amazing how true the firm has stayed to those founding principles," Sonsini said. "They have proven to be the basis for a remarkably sound and flexible business model and helped us weather many changes over the years. As we reflect back on this past half century of service, we cannot thank our clients enough for their trust and support, and we look forward to many more years of partnership."

A Brief History

In 1961, Pete McCloskey, John Wilson, and Roger Mosher opened a small office on Welch Road in Palo Alto. McCloskey left six years later to represent California in the U.S. Congress. Larry Sonsini came on board in 1966, and the firm was renamed Wilson, Mosher & Sonsini in 1973. John Goodrich and Mario Rosati joined in 1970 and 1971, respectively, and after Mosher left in 1978 to start his own enterprise, the firm was renamed Wilson Sonsini Goodrich & Rosati. John Wilson remained a vital part of the firm until his death in 1999.

After several interim moves and expansions, the firm settled into its current headquarters at 650 Page Mill Road in Palo Alto in 1994. It opened its first national office in Kirkland, Washington, in 1998 (relocated to Seattle in 2004). Other national offices soon followed: Austin (1999); San Francisco (1999); Washington, D.C., area (2000); New York (2001); and San Diego (2004). The firm opened its first international office in Shanghai, China, in 2007 and one in Hong Kong in 2010.

During its 50 years of operation, Wilson Sonsini Goodrich & Rosati has been privileged to work with the world's most innovative companies and financial institutions, and has had a hand in many of the most significant and high-profile deals and cases coming out of Silicon Valley and beyond. The firm is widely acknowledged as a leader in the fields of corporate governance and finance, mergers and acquisitions, private equity, securities litigation, employment law, intellectual property, and antitrust, among many other areas of law.

For additional information, please visit www.wsgr.com

CLAYTON UTZ

ADVISES REGENT PACIFIC ON BC IRON ACQUISITION

Perth, 2 February 2011: Clayton Utz has acted for Hong Kong Stock Exchange listed diversified mining group Regent Pacific Group Limited (Regent Pacific) on its bid for Australian junior iron ore miner BC Iron Limited (BC Iron), to be implemented by scheme of arrangement. The transaction was announced on 21 January.

Perth M&A / E&R partner Heath Lewis is leading the Clayton Utz team advising Regent Pacific, which includes senior associate Brett Cohen and lawyer Francesca Coli.

Commenting on the transaction, Heath Lewis said: "This is a significant deal for Regent Pacific as its successful implementation would significantly contribute to Regent's strategy of becoming Hong Kong's next major mid-tier mining house focused on bulk commodities, base metals and gold in the Asia-Pacific region. It is further validation of the theory that Australian resources and resource projects remain attractive investment propositions for overseas investors, notwithstanding the strong Australian currency, and that Perth, Western Australia maintains its eminence in the world-wide energy and resources scene."

Currently a 19.9 per cent shareholder, Regent Pacific has made an all cash offer of \$3.30 per BC Iron share to acquire all remaining shares in BC Iron, valuing the company at approximately \$345 million.

Regent Pacific's operations are focused on the Asia Pacific region. It explores for and mines copper, zinc, gold, silver, lead and coal. BC Iron Limited is an emerging iron ore producer based in Western Australia's world-class Pilbara region.

Mr Lewis said this blue-chip instruction for Regent Pacific was an encouraging continuation of the cross-border transaction trend for the Clayton Utz deal team across a range of commodities, following recent roles advising Anatolia Minerals Development Limited in respect of its "merger of equals" with Avoca Resources Limited to create a circa \$2 billion gold enterprise, and advising Talison Lithium Limited on its \$350 million merger with Salares Lithium Inc and contemporaneous capital raising and listing on TSX.

For additional information visit www.claytonutz.com

KING & WOOD

LARGEST U.S. NUCLEAR ENERGY OPERATOR EXELON SIGN MOC WITH CNNC NUCLEAR POWER COMPANY LTD

Beijing - January 17, 2011 King & Wood assisted Exelon, the largest U.S. nuclear energy operator in drafting the MOC with CNNC Nuclear Power Company Ltd("CNNP"), China's largest nuclear energy owner/operator. The Memorandum is completed with the intent to enter into a series of agreements to promote safe and reliable nuclear operations by June 30, 2011 (or upon the completion of CNNP's visit to the Exelon facilities).

The deal was released while President Hu visited the United States, which marks the beginning of a long-term cooperation between the companies.

The King & Wood team was led by Jack Wang and George Zhao along with Zhang Shouzhi, Zhong Xin, Stanley Cha and Rebecca Chao. Pivotal ancillary support provided by Pan Yujie. The Exelon-CNNC' s MOC project was led by George Zhao.

For additional information visit www.kingandwood.com

FRASER MILNER CASGRAIN

ACTS FOR NORSEMONT MINING INC - HUDBAY MINERALS TO ACQUIRE OUTSTANDING SHARES FOR \$520MILLION

On January 10, 2011, HudBay Minerals Inc. and Norsemont Mining Inc. announced that they have entered into an agreement pursuant to which HudBay has agreed to acquire all of the outstanding common shares of Norsemont that HudBay does not already own by way of formal take-over bid.

The \$520 million takeover bid for Norsemont Mining Inc. (which owns the Constancia copper deposit in Peru) values the transaction at around US\$0.13 a pound for copper resources, well above other recent deals in the sector. The offer will be conditional on a number of matters including a minimum tender of 50-%plus one of the Norsemont shares.

FMC acted for Norsemont Mining Inc. with a team led by John Sabine, Abbas Ali Khan and Sander Grieve, including Peter Danner, Elianeth Alicea, Matthew Peters and Brian Abraham.

For additional information visit www.fmc-law.com



PRAC e-Bulletin is published monthly.

Member Firms are encouraged to contribute articles for future consideration.

Send to editor@prac.org.

Deadline is 10th of each month.

GIDE LOYRETTE NOUËL

ADVISES ON THE A63 MOTORWAY CONCESSION

The decree approving the concession agreement for the Salles - Saint Geours de Maremne section of the A63 motorway in south-west France, concluded between the Ministry of Ecology, Sustainable Development, Transport and Housing and the Atlandes company, was officially published (in the Journal Officiel) on 23 January 2011.

This 40-year concession concerns the upgrading, widening to a six-lane highway, financing and operation of this 104-kilometre stretch of the A63 motorway, formerly Route Nationale 10. Works are planned to last 41 months and the road will stay open during the whole period. In consideration for the State's handing over of the existing road and the works that have already been carried out under a public procurement contract, the concession agreement requires Atlandes to pay an upfront entry fee to the procuring authority of EUR400 million.

Atlandes is a special purpose company set up by a consortium of sponsors comprising the Colas group (Colas Sud Ouest and SCREG Sud Ouest), Spie batignolles, NGE, Egis Projects, HSBC European Motorway Investments 1 and DIF Infrastructure II BV.

The sponsors and Atlandes were advised by Gide Loyrette Nouel. From the launch of the competitive bid through to the conclusion of the financing, Gide Loyrette Nouel provided a dedicated team led by Bénédicte Mazel and Marie Bouvet-Guiramand, with Mathilde Bonnet, Estelle Carrère-Ricome and Charlotte Préaux.

For additional information visit www.gide.com

NAUTADUTILH

ADVISES APG ON SALE OF ALPINVEST TO CARLYLE GROUP AND ALPINVEST MANAGEMENT

27 January 2011 - The pension funds APG and PGGM are selling the investor AlpInvest to the American private-equity company the Carlyle Group and the management of AlpInvest.

The sale was announced by AlpInvest on Wednesday morning. AlpInvest is one of the biggest private-equity investors with currently €32.2 billion under management. The acquisition by a strategic joint-venture between the Carlyle Group and the management includes all of the share capital. The parties involved expect to be able to complete the acquisition in March of this year.

After the transaction, APG and PGGM will remain AlpInvest's biggest clients. AlpInvest has announced that both pension funds have confirmed their commitment to AlpInvest with additional investment mandates to a total value of €10 billion for the period 2011-2015. AlpInvest was put up for sale at the beginning of last year, the Carlyle Group being mentioned as the most probable buyer at the end of last year.

The NautaDutilh team advising APG consists of Geert Raaijmakers, Larissa Silverentand, Willem Verschuur, Philippine van Leeuwen and Maarten ten Kate.

For additional information visit www.nautadutilh.com

TOZZINI FREIRE

ASSISTS BANCO SANTANDER IN APPROVAL PLAN JUDICIAL REORGANIZATION FRIGORIFICO ARANTES

The creditor's meeting approved the selling of some of the company's assets and the restructuring of R\$1,2 billion in commercial debts. It was also approved the transference of the assets and liabilities of Arantes to "Nova Arantes", a stock corporation that will be constituted.

The creditors from Class I did not vote, once there was no alteration in their payment conditions; the approval was made by 61,05% of Class II credits, 55,24% of Class III credits and also, by 100% of the present creditors that adhered to the Judicial Reorganization.

Tozzini partners Fábio Rosas and Luciana Burr and associates Luciana Faria Nogueira, Mariana Amaral Guenka, Raphael Augusto Cunha, and Carolina Matthes Dotto acted in the transaction.

For additional information visit www.tozzinifreire.com.br

HOGAN LOVELLS

ADVISES ROSTELCOM ON ACQUISITION OF STAKE IN NATIONAL TELECOMMUNICATIONS

MOSCOW, 8 February 2011 - Transaction is the largest in Russia so far this year and a top ten deal in the Russian telecoms market over the past 12 months. Deal follows on from advising X5 Retail Group N.V., the retail branch of Alfa Group and Russia's largest retailer in terms of sales, on the acquisition of the Kopeyka retail chain for a total of RUR51.5 billion (US\$1.65 billion) in December.

Hogan Lovells advised Rostelecom, a London listed key operating subsidiary of a Russian state owned telecom giant Svyazinvest, on its acquisition of a controlling stake in National Telecommunications (NTK). With the total value of \$1.076bn this deal is one of the top 10 telecom deals in the Russian market in 2010-2011. The transaction completed on 4 February 2011.

NTK is the largest independent cable TV operator and information provider in Russia. Rostelecom and its affiliates, Uralsvyazinform and North-West Telecom, acquired in total 71.8% stake in NTK from National Media Group, Surgutneftegaz and Raybrook Limited (a Severstal investment vehicle). This acquisition will enable Rostelecom to attain a leading position in the Russian pay-TV market. A sophisticated transaction structure had to be developed to accommodate Rostelecom's plans to merger with other subsidiaries of Svyazinvest. The transaction will potentially involve Rostelecom's public offer to the remaining shareholders of NTK.

The Hogan Lovells team was jointly led by Oxana Balayan, Managing Partner and Co-head of corporate practice in Moscow, and Marina Ries, Senior Associate, and involved Richard Cowie (Counsel, corporate), Eugene Suslov (Senior Associate, commercial), Ekaterina Stepanisheva (Associate, corporate), Eugenia Ivanyuk (Associate, corporate) and Alexandra Dolinskaya (corporate).

Managing Partner in Moscow, Oxana Balayan, said:

"We have been fortunate in seeing a good stream of M&A activity in the Russian market with this and the recent X5 deal. We are finding that clients and their financial advisers appreciate the depth of knowledge we have in Moscow combined with our recognized capabilities in London and New York.

We are delighted to have advised Rostelecom on this significant transaction which underlines its position of being on the leading edge of the rapidly developing telecoms market. This deal is a spectacular result of the team's dedicated efforts."

For additional information visit www.hoganlovells.com

About Hogan Lovells

Hogan Lovells combines the breadth of business-oriented legal advice and high-quality service that clients have come to expect through working with its two founding firms – Hogan & Hartson and Lovells.

"Hogan Lovells" or the "firm" refers to the international legal practice comprising Hogan Lovells International LLP, Hogan Lovells US LLP, Hogan Lovells Worldwide Group (a Swiss Verein), and their affiliated businesses, each of which is a separate legal entity. Hogan Lovells International LLP is a limited liability partnership registered in England and Wales with registered number OC323639. Registered office and principal place of business: Atlantic House, Holborn Viaduct, London EC1A 2FG. Hogan Lovells US LLP is a limited liability partnership registered in the District of Columbia.

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SIMPSON GRIERSON

ASSISTS AUCKLAND COUNCIL IN \$600M FUNDING FACILITY

16 Jan 2011 In a New Zealand first, Auckland Council closed a funding facility for \$600m with a banking syndicate led by the Bank of New Zealand. Simpson Grierson was pleased to be able to assist Auckland Council in closing the facility in December 2010.

The banking syndicate was the largest for a local authority in New Zealand and comprised Bank of New Zealand (as lead arranger), ANZ, Westpac Institutional Bank, Commonwealth Bank of Australia (parent bank of ASB) Citibank and HSBC. Demand to take part in the facility was also unprecedented with commitments of up to \$1billion being made.

Andrew Harkness head of Simpson Grierson's Banking & Finance department said, "It was pleasing to be able to assist the Treasury team at Auckland Council in securing this facility. The support shown by the banking syndicate was a clear sign of their confidence in Auckland Council's financial strength, and the substantial role that Auckland Council will play as a borrower in the New Zealand debt market."

The \$600m facility together with \$500 million in existing cash and reserves provides Auckland Council with just over \$1 billion or around 12 months cover with investment and refinancing. Auckland Council has said that it is its liquidity policy to ensure that if the economy tightens again it has access to the cash that it needs. The facility is available for a 3 year term in various tranches.

For additional information visit www.simpsongrierson.com

RODYK & DAVIDSON

ACTS FOR MORGAN STANLEY \$380MILLION DIVESTMENT

Rodyk & Davidson LLP acted for Morgan Stanley in the divestment of the whole of its indirect interest in an investment holding company which held four dormitories in Jalan Papan, Woodlands, Kian Teck and Tampines in Singapore. The transaction price for the divestment, which included the sale also of the remaining minority interests, was in the region of about S\$380 million.

Corporate partner, Jacqueline Loke, led on the corporate aspects of the transaction and real estate partner, Norman Ho, led on the real estate aspects. They were assisted by corporate associates, Jacquelynne Baey and Mark Tay, real estate partner, Low Boon Yean, and real estate senior associate Tan Shijie and associates, Chua Shang Chai and Colleen Lin.

For additional information visit www.rodyk.com



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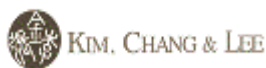
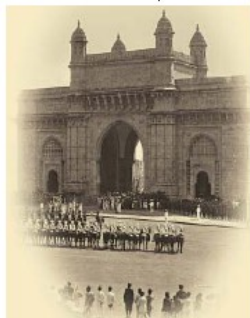
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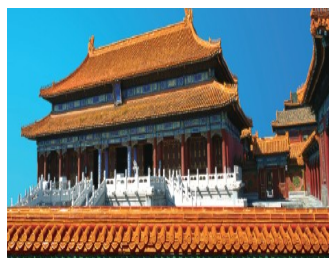
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07 February 2011

Price signalling reforms might not solve the problem

Last year the Government released draft legislation on price signalling prohibitions, the Competition and Consumer Amendment Bill (No.1) 2011, to introduce quite strict laws prohibiting the practice of price signalling between competitors. This Bill is currently the subject of [Senate Economics Committee](#) hearings.

The package was partly prompted by Graeme Samuels' suggestion that certain public comments by the CEO of a major Australian bank about intentions to lift its mortgage rates above the increase in official Reserve Bank rates could be considered a form of price signalling.

These proposed reforms would initially apply only within the banking industry but they may be extended to other industry sectors by regulation, and the ACCC is already pressing to extend the Bill to cover petrol retailing.

Whether the Bill (or indeed any bill) can, or should, address price signalling sensibly is another question.

So what is price signalling?

"Price signalling" refers to a practice engaged in by some competitors, which falls short of collusion but involves communicating or signalling a company's price rises or other strategies to its rivals, for the purpose of having them follow.

For some years the Australian Competition and Consumer Commission has been pressing for a general price signalling reform, usually in reference to petrol prices and claiming difficulties in proving collusion between competitors in some cases.

It is more likely to be a problem in concentrated markets where there are only a few competitors and one company signals its intentions, so as to increase the chance that others will follow and it will not be isolated and risk losing sales.

Are new laws really needed?

Currently, under our law, the concept of collusion requires proof not only that competitors communicated with each other about their intended prices, but they have reached some informal commitment or understanding between them to adopt that pricing.

For example, in one petrol case a company regularly rang one of its competitors and said "I am going to put my price up this afternoon".

Our law would recognise an illegal understanding, if the competitor receiving the call gave an indication that it agreed or would follow that price rise.

But in that case, the ACCC failed. In these phone calls, the competitor did not give any indication of how it would react to the price rise. Sometimes it did increase its price in response, sometimes it did not. The Court found that there was no implied commitment reached between these operators sufficient to establish an "understanding".

The ACCC is frustrated by this need to prove a commitment between competitors. This lobbying has led to the Government Bill which focuses on the mere communication of pricing and other information to competitors, not their response.

So how will the new Bill work?

Under the Bill there will be two separate prohibitions covering:

- private disclosures between competitors; and
- general public announcements.

All private disclosures of pricing information between competitors will be strictly prohibited, subject to a few exceptions.

A company's public announcements or disclosures about future pricing or capacity to supply, or the company's commercial strategies will be prohibited, if they are made for a purpose of substantially affecting or reducing competition.

What are the exceptions?

The proposed "permitted exceptions" are fairly narrow, that is, communications will not be illegal if:

- they are made to a competitor who also happens to be a customer or a supplier who needs to know the pricing information; or
- the communication is authorised by law, for example a continuous disclosure requirement for a stock exchange listed company; or
- a private communication to a competitor is accidental or beyond the company's control; or
- communications between parties to a joint venture or in relation to the sale or purchase of a business.

What would happen if a company engaged in forbidden price signalling?

These new offences will attract heavy penalties under the Act of up to \$10M or 10 percent of turnover but not criminal prosecutions. Companies in breach can also face class actions for damages for any losses inflicted on customers.

What are the problems with the Bill?

This is a very unusual way of amending the Competition and Consumer Act, which otherwise generally applies uniform rules across the economy.

Many believe the ACCC has not fully tested the scope of the existing law before asking for new laws to tackle these kinds of practices.

Our law already covers attempts to collude by companies deliberately passing on pricing information to competitors to try and reach an understanding. If the ACCC took actions for attempts to collude in these petrol cases, it could address much of the concerns.

There is no doubt that proving collusion can be difficult in some cases. This Bill however works from the other end of the spectrum, by banning many communications that are likely to be harmless.

There would also be a very large compliance burden on many legitimate forms of communication by companies, including investor and ASX announcements.

At the same time there is considerable scepticism whether this Bill will do anything to benefit consumers in the banking industry

Next there are claims by the ACCC and others that this Bill will bring Australian law "into line" with that in the United States and Europe.

That claim is open to challenge. Both Europe and United States law require some collective actions still to be proven, namely some effect on or response from the competitors who receive the information or some evidence that the "signalling" actually facilitates practices that reduce competition.

This Bill however will prohibit mere communications only irrespective of their effect.

It is a much stricter prohibition and will push Australia's laws well beyond these other jurisdictions.

Is there a better way to address the ACCC's concerns?

The ACCC's issues seem to be largely around the need to prove some commitment by a competitor which receives the information to "go along with" the suggested pricing.

That concern could be addressed directly by removing the need to show that kind of commitment in the definition of collusion. This would avoid many of the problems associated with this bill.

You might also be interested in ...

- [Price signalling](#)
- [Petrol prices too high? No, finds ACCC Inquiry - and dispels some myths in the process](#)
- [Cartel Regulation 2010](#)

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BOLETINS ANTERIORES

- Nova Regulamentação Prorroga o Início de Vigência da Resolução 224/2010
- ANAC Estabelece Novo Regime de Regulação das Tarifas Aeroportuárias
- Ofertas Públicas de Letras Financeiras por Instituições Financeiras
- Declaração de Capitais e Bens Brasileiros no Exterior Ano-Base 2010

Insurance and Reinsurance

BRAZIL: NEW REGULATION POSTPONES THE EFFECTIVE DATE OF RESOLUTION 224/2010

On January 27th, 2011, the Brazilian National Council of Private Insurance – CNSP issued Resolution 231/2011, which postpones to March 31st, 2011, the date in which Resolution 224/2010 will become effective.

Resolution 224/2010 has been object of much criticism by the private sector. According to it, local insurers and reinsurers will not be able to cede risks assumed in insurance, reinsurance and retrocession in Brazil to related companies or companies of the same economic group located abroad. The effects of Resolution 224/2010 would begin on January 31st, 2011. Because of the private sector's request for more discussion on the subject, the date was postponed to March 31st, 2011.

We understand that such postponement may represent a willingness from the government to reopen a discussion and possibly revise the restrictions in Resolution 224/2010. The government's main concern is to prevent anticompetitive practices in the Brazilian market, which would be detrimental mostly to Brazilian insurers and reinsurers. The private sector reacted negatively with respect to the manner in which Resolution 224/2010 was enacted and has been trying to find an alternative solution to prevent non equitable practices.

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Chilean bank regulator authorizes Representative Offices to advertise credits

On October 1, 2010, Law 20,448 (“MKIII”), which introduces several changes to Chilean capital markets regulations, came into force.

Among others changes, MKIII amended article 33 of the Banking Law (DFL Nr. 3) to authorize Representative Offices of foreign banks to advertise in Chile the products or credit services offered by the parent bank, as authorized by the Superintendency of Banks and Financial Institutions. In this connection, on October 7, 2010, the Superintendency of Banks and Financial Institutions issued Resolution Nr. 3,509 relating to advertisement of credits offered by the Representative Offices of foreign banks, which provides that Representative Offices engaged in such advertising, shall clearly state in their advertisement the applicable cost conditions with regard to interests, expenses and fees, as well as the fact that the Representative Office will act as coordinator between the borrower and the foreign bank.

Additionally, MKIII amended article 70 letter a) of the Banking Law banning the banks from conditioning the granting of loans to the purchase of insurance offered by them. Therefore, all banking customers may purchase the insurance policy from any insurance company, provided that such insurance policy has the coverage required by the bank and that the beneficiary is the bank.

Author: Francisco Ugarte

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Posted at 5:16 PM on February 15, 2011 by King & Wood

China Issues Rules on National Security Review for M&A Transactions

On February 3, 2011, the General Office of the PRC State Council issued the Notice Regarding the Establishment of National Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (“国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知”) (the "**Notice**"), which will take effect 30 days after its promulgation. The Notice represents another major step that the Chinese government has taken in recent years in the area of regulating mergers and acquisitions (M&A) of domestic companies by foreign investors in China.

1 Background

As early as 2003, China issued provisional rules governing acquisition of domestic companies by foreign investors, and on August 8, 2006, these provisional rules were amended into the Rules on the Merger and Acquisition of Domestic Enterprises by Foreign Investors ("M&A Rule") by the Ministry of Commerce ("MOFCOM") and five other agencies. The M&A Rule, for the first time, called for notification and review of a transaction that might have an impact on China's "national economic security". Subsequent to the M&A Rule, the PRC Anti-Monopoly Law ("AML"), effective on August 1, 2008, mandates a broader "national security" review when a foreign investor participates in the concentration of business operators by merging or acquiring a domestic enterprise or by any other means where national security is involved. Following the AML, on April 6, 2010, the PRC State Council issued the Several Opinions on Further Improving the Work of Utilizing Foreign Investment, which directs the government to accelerate the establishment of a national security review mechanism on mergers and acquisitions of domestic companies by foreign investors.

2 Highlight of the Notice

The Notice sets up a ministry-level intra-agency joint meeting as the national security review committee. It also lays out the scope and content of national security review as well as the mechanism and the procedures for the review.

2.1 Scope of Review

National security review covers the following areas:

-
- national defense security, including foreign investors' acquisition of military enterprises and military supporting enterprises, enterprises adjacent to important and sensitive military facilities and other entities relating to national defense security; and
- other national security areas, including foreign investors' acquisition of enterprises involving important agricultural products, energy and resources, infrastructure, transport systems, key technology sectors and important equipment manufacturers which may have an impact on national security and foreign investors may acquire *de facto control* of such enterprises.

Under the Notice, the term "*de facto control*" refers to the following circumstances:

-
- a foreign investor and its parent company and subsidiaries hold in the aggregate more than 50% of total shares of a domestic company after acquisition;
- several foreign investors hold more than 50% of total shares of a domestic company after acquisition;
- a foreign investor holds less than 50% of total shares of a domestic company after acquisition, but the voting right of the foreign investor could have significant effect on the resolutions of the shareholder meeting or the resolutions of the board of directors; and
- other circumstances which may lead to a foreign investor's *de facto control* of a domestic company, including its operational decisions, financing, personnel and technology.

Foreign investors' M&A activities in relation to domestic enterprises include the following circumstances:

-
- share purchase, including a foreign investor (a) purchasing the shares of a non-foreign-invested enterprise in China or subscribing to its the capital increase to convert it into a foreign-invested enterprise; and (b) purchasing the shares from Chinese shareholders of a foreign invested enterprise or subscribing to its capital increase.
- asset purchase, including a foreign investor (a) establishing a foreign-invested enterprise to purchase assets of a domestic company and operate such assets, or purchasing shares of a domestic company through such foreign-invested enterprise; and (b) purchasing the assets of a domestic company directly to establish a foreign-invested enterprise with such assets.

2.2 Content of Review

The national security review committee will review, approve or block a transaction based on the following aspects:

-
- influence on national defense security, including influence on domestic manufacturing capabilities, services and related facilities and equipment required by national defense;
- influence on national economic stability;

- influence on basic social order; and
- influence on China's ability to research and develop key technologies for national security.

2.3 Review Procedures

(a) Review Body

The foreign investment security review committee will be guided by the State Council and led by the National Development and Reform Commission and MOFCOM, which will conduct reviews together with other agencies on as needed basis.

(b) Procedures

- **Notification**

Foreign investors shall make an application to MOFCOM when acquiring domestic companies. If the transaction falls into the scope of national security review, MOFCOM will submit the application to the committee for review within 5 working days. The Notice also permits the agencies of the State Council, national trade associations, competitors, suppliers and upstream and downstream enterprises to apply to MOFCOM for review of a transaction.

- **Review Process**

The review process starts with a "general review", and if a transaction fails to pass the general review, a "special review" will be required. If a transaction is deemed not have an impact on national security, the committee will send its review opinion to MOFCOM. Where a transaction is deemed to affect national security, a "special review" will be initiated by the committee and a security evaluation will be conducted and in the event of major disagreements, the committee will submit the transaction to the State Council for its final decision. After a final decision is made, MOFCOM will notify the applicant about the review result.

During national security review, the applicant may apply to MOFCOM to amend the transaction plan or cancel the transaction. Where the acquisition of domestic companies by foreign investors has had or may have a material impact on national security, the committee shall require MOFCOM, together with the relevant agencies, to terminate the transaction or transfer relevant equities/assets or take other effective measures to eliminate the transaction's impact on national security.

3 Comments

As mentioned in the beginning of this article, the requirement for national security review is already stipulated in the AML, however, there were no concrete rules in place until the newly issued Notice. In addition to the requirement for national review in respect of M&A activities, foreign investment in China must comply with the Catalogue for the Guidance of Foreign Investment Industries and, if required, complete anti-trust review in accordance with the AML. However, compared to developed countries, China's new requirement for national security review is not unique. For example, Australia has set up the Foreign Investment Review Board to review foreign investment projects, and the United States also has an intra-agency Committee on Foreign Investment in the United States, which reviews foreign investment in a US company that may result in foreign control or have an impact on national security.

While China's national security review may add additional burden and costs on foreign investors as well as uncertainty for M&A transactions in China, the Notice also provides a timeline for the review process and some level of transparency on the review procedures.

The Notice describes the scope of review in a broad stroke and some of the products or sectors are not sufficiently described or defined and this may give the review committee a lot of discretion. For example, the term "important agricultural products" are not defined and thus it is difficult to ascertain what kinds of products are covered, whether agricultural products include agricultural products processing, etc.

With respect to content of review, the Notice does not specify the criteria for evaluating influence on national economic stability and influence on basic social order. As the national review gets tested in real-life cases, there will likely be questions raised on the review process and procedures. It is possible that further explanations or regulations will be issued by the State Council or relevant agencies to make the national review more workable in the future.

If you have any questions or comments, please do not hesitate to contact us.

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Modifications to The Foreign Exchange Regime

Wednesday, 09 February 2011 00:00



Forex, Derivatives and Structured Finance
News Flash Número: 107

Modifications to The Foreign Exchange Regime

On January 28, 2011, the Colombian Central Bank amended Regulation DCIN-83 to modify certain requirements with respect to foreign investment in Colombia and investments abroad made by Colombian residents.

1. With regard to foreign direct investment, which is long term and the investor requires control, please note the following:
 - Regulation DCIN-83 establishes the possibility of transferring through the Foreign Exchange Market certain amounts with the exclusive purpose of registering capital surplus in local companies.

The conditions to register advances for future capitalizations were also modified, establishing that such amounts must be incorporated in the respective company's capital, with the release of the shares or quotas in the year following the completion of the operation through the Foreign Exchange Market.
 - In accordance with Decree 4800 of 2010 ("Decree 4800" which amends Decree 2080 of 2000 – "The general foreign investment regime") certain time limits for registration of foreign direct investment were amended to establish a period of 12 months from the respective act or contract to register such operations (e.g. contributions in-kind, the acquisition of shares in capital market operations financed by local credit and other types of operations that may be subject to specific regulation requirements).
 - Similarly, the registration deadline for certain types of Colombian investments abroad and for substitution and cancellation of both the registration of foreign investment in Colombia and Colombian investment abroad was extended.
 - Pursuant to the new regulations, only accounts payable arising from transactions of the type mandatorily traded through the Foreign Exchange Market may be capitalized as foreign investment in Colombia. Therefore, accounts payable arising from services rendered abroad cannot be settled by receiving shares in local companies.
 - Furthermore, the Regulation provides that the annual requirement to file Forms No. 15 "Assets Conciliation - Companies and Branches of the General Regime" and No. 13 "Register of Supplementary Investment to the Assigned Capital and Update of Financial Statements- Branches of the Special Regime" must be completed within six months from December 31, generally the close of the financial year.

2. On the other hand, Regulation DCIN-83, in accordance with the amendments made by Decree 4800, modified the registration requirements applicable to foreign portfolio investments, or those that are short-term and investors do not require control.

Local administrators (e.g. stock brokerage firms, trust companies and investment management companies, also known as "sociedades administradoras de inversión") must be appointed as representatives of foreign portfolio investors, who then are required to carry out the applicable registration requirements.

The special registration procedures now required pursuant to the amended Regulation DCIN-83, apply to the following types of investment operations:

- Foreign capital portfolio investments carried out under the framework of agreements between stock exchanges under any existing integration programs.
- Certificates representing depositary receipts programs (ADRs/ GDRs); and
- Exchange Traded Funds–(ETFs), including stock funds that replicate national indexes, international indexes and foreign pooled funds.

In general, the amendments made to DCIN-83 are applicable to investments and operations that occurred on or after December 29, 2010. Each situation that may be subject to these new regulations must be assessed on a case-by-case basis, in accordance with these amendments.

For further information, please 'j]g]hik k k 'Vi 'W'a 'W'cf' contact:

.....Carlos Fradique-Méndez cfradique@bu.com.co



Newsflash

Audit & Accountancy

Findings of the European Commission's Green Paper and Consultation on Audit Policy

11 February 2011

This newsflash is sent from our Brussels Office

Exactly 688 stakeholders participated in the Green Paper consultation on "[audit policy and lessons from the crisis](#)" launched by the European Commission on 13 October 2010. To discuss the Green Paper and the main findings of the consultation, the Commission hosted a high-level conference on 9-10 February 2011, which was attended by over 600 auditors, CFOs and lawyers, although more than 1,500 wished to register. Although only a few law firms participated, this topic is obviously relevant to lawyers as it raises a number of legal issues, particularly in the field of auditor liability.

The conference was web-streamed and can now be viewed [on line](#). Over the course of this two-day event, stakeholders held an open dialogue with the Commission and explained their positions. Commissioner Michel Barnier is deeply committed to moving forward on this subject and intends to submit a draft text to the European Parliament in May 2011, in order to have a final version by November of this year.

Purpose of the Green Paper

The financial crisis demonstrated the need to stabilise the financial and economic system. Today, the question arises as to how the auditor's role can be redefined in order to increase financial stability. In unstable times, trust is key. Companies need to be able to enter into agreements with full knowledge of the facts, and investors want to be able to trust the financial statements of the companies in which they are considering investing. In this context, auditors play a key role as they are entrusted with rendering an opinion on the fairness and accuracy of corporate financial statements. In this regard, the Green Paper identifies two major issues: firstly, a gap in expectations (between stakeholders and auditors) and, secondly, the fact that the consolidation of large audit firms has created a systemic risk, namely that the collapse of one such a firm could result in system-wide distortions. In view of these findings, the European Commission wishes to narrow the expectations gap while ensuring effective oversight and creating a genuine single market for audit services by introducing a European passport for auditors. As different players may have different needs, the European Commission addresses how the rules should apply to small and medium-sized companies and how medium-sized auditors can perform the auditor's role.

Key topics addressed by the Green Paper

This complex subject is divided into a number of sub-topics, namely:

- the auditor's role and how auditors can provide reasonable assurance while efficiently communicating with stakeholders using the International Standards on Auditing (ISA);
- the governance and independence of audit firms: how to deal with conflicts of interest when no binding rules on auditor remuneration or rotation exist;
- the supervision of the transparency of audit firms with respect to fees, additional non-audit services and the cross-border management of audit network operations;
- the systemic risk caused by the concentration of audit work in the hands of a few players, resulting, amongst other factors, from "Big Four only clauses" and difficult market entry for smaller audit firms;
- the creation of a truly European single market for audit services enabling cross-border cooperation without approval, registration and aptitude testing in each Member State;
- the need to adapt the current rules to meet the needs of small and medium-sized companies and practitioners;
- international cooperation on a European and third-country level.

Increased compliance and liability

In the stakeholders' position papers, liability is a recurring theme: an auditor cannot provide absolute assurance and risk can never be eliminated altogether. While auditors are not afraid of heightened liability, it is clear that their role should be better defined, appropriate compensation received in a transparent way, and measures taken on an international level, in consultation with other financial players. Soft regulation is preferred over "regulatory inflation". Analogies may clearly be drawn to other fields of law such as taxation (e.g. directors may be held liable for taxes, social security contributions and VAT, shareholders of shell companies may be held liable for corporate tax, etc.).

Future issues

If the ideas mentioned in the Green Paper are eventually transposed into new rules, various legal issues will undoubtedly arise, both between auditors and their clients and within audit firms. These issues include:

- What is the extent of auditor's liability?
- Can an auditor be held liable for fraudulent behaviour on the part of a client if the auditor's investigation of the client met reasonable expectations?
- To what extent can auditors waive their liability?
- How should auditors draft their mission statement?
- Can auditors be held liable in the event of a client's bankruptcy or similar insolvency proceedings?
- How should audit firms adopt a partnership model?
- How can audit firms raise money on the capital markets?
- How can auditors ensure that external stakeholders do not interfere with their work?

These and other questions will probably be addressed once the European Commission adopts a final position. NautaDutilh has set up a special Benelux task force to assist audit firms with these types of matters. The Belgian members of this team - Elke Janssens, Benoît Malvaux, Sophie Jacmain and Kurt Demeyere - would be delighted to answer any questions you might have.

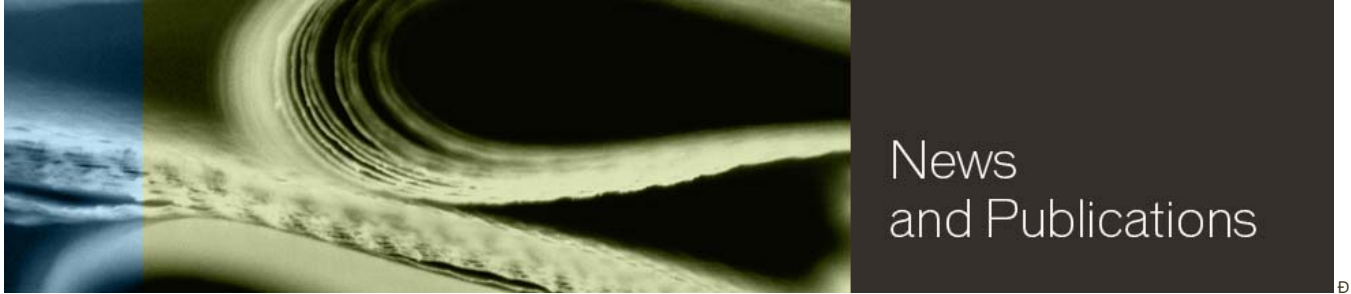
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31/01/2011

NEW REGULATION ON BANKS' BUSINESS PLAN

Indonesia's central bank, Bank Indonesia ("BI"), issued BI Regulation No. 12/21/PBI/2010 concerning banks' business plan (the "Regulation"). The Regulation, issued on 19 October last year, replaced the old BI Regulation No. 6/25/PBI/2004 on the same subject matter.

In the Regulation's consideration, BI cites that the obligation imposed on banks to annually draw up a realistic business plan will help ensure the application of the prudential and risk management principles by banks, as well as provide BI with a tool to do its supervisory tasks.

Article 1 section 3 of the Regulation defines "business plan" as an annually prepared document that describes the bank's short-term (one year) and medium-term (three year) plans including plans for the improvement of the performance of the bank's business units along with the strategy for the realization of the plans that are in line with the stipulated timing and targets, while keeping in mind compliance with the prudential and risk management principles (the "Business Plan" or the "Plan").

In the drawing-up of its Business Plan, a bank must take into account: (i) external and internal factors that may have an impact on the continuation of its business; (ii) the prudential principles; (iii) good management of the risks; and (iv) the principles of sound banking. The Business Plan must be approved by the bank's board of commissioners and communicated to the bank's shareholders. Regarding the content, the Business Plan must contain among others: (i) an executive summary; (ii) the policies and strategies of the bank's management; (iii) description of the bank's current application of the risk management as well as the bank's current performance; (iv) funding, investment as well capital plan; (v) plans for: organizational development, product issuance and new activities. Each of these elements is elaborated in Articles 6 – 17.

Banks' Business Plan for 2011 must have been submitted by end of December 2010. A submitted Business Plan may be returned to the bank concerned for revisions and adjustments. Banks are also required to submit a quarterly realization report regarding their Business Plan to the Central Bank, which includes explanation of the attainment and deviation as well as description of the follow-up actions that will be taken. The Regulation imposes monetary and administrative sanctions on banks' failure to comply with the requirements stipulated in the Regulation.

For its implementation purposes, the Regulation was accompanied by BI Circular No. 12/27/DPNP on the same subject, issued on 25 October 2011.

The Regulation became effective immediately on the day of its issue. (by: Hamud M. Balfas).



Malaysian Government Introduces Whistle Blower Protection Act

BEWARE THE RAT ACT!

Sheba Gumis answers some frequently asked questions on the Whistleblower Protection Act 2010

In its continuing efforts to combat corruption, the Malaysian Government introduced the Whistleblower Protection Act 2010 ("the Act") to encourage and protect individuals who report improper conduct. The Act came into force on 15 December 2010.

What is the purpose of the Act?

The purpose of the Act is to combat corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct. It also seeks to protect persons making those disclosures from detrimental action.

Who is a whistleblower?

A whistleblower is a person who makes a disclosure of improper conduct to the enforcement agency under Section 6 of the Act.

What constitutes "improper conduct" under the Act?

Improper conduct is any conduct which, if proved, constitutes a disciplinary offence or a criminal offence.

Does the Act apply only to the public sector?

No, it also applies to the private sector.

What is an "enforcement agency"?

An enforcement agency refers to any ministry, department, agency or other body set up by the Government or a body established by Federal or State law or a unit, section, division, department or agency of a body established by law. In each case that body or agency must be conferred investigation and enforcement functions.

What are the duties of an enforcement agency which receives a disclosure on improper conduct?

An enforcement agency which received a disclosure of improper conduct must conduct its own investigation regarding the disclosure and make a report as to its findings and the recommendations for further steps to be taken, if any.

If the enforcement agency makes a finding that the disclosure of improper conduct is unsubstantiated, it must notify the whistleblower.

If the improper conduct constitutes a disciplinary offence, the enforcement agency is required to make a recommendation to the appropriate authority (in the case of a public body) or to the employer or other appropriate person (in the case of a private body) to initiate disciplinary proceedings or to take appropriate steps against the person who committed the improper conduct.

If the improper conduct is a criminal offence and the Public Prosecutor decides to prosecute, the enforcement agency shall obtain periodic reports from the Public Prosecutor until the matter has been duly disposed of. If the Public Prosecutor decides not to prosecute, the enforcement agency shall inform the whistleblower.

Can an enforcement agency refuse to investigate into a disclosure on improper conduct?

No. The Act imposes a mandatory obligation on the enforcement agency to investigate the disclosure of improper conduct.

What protection is given to a whistleblower under the Act?

The whistleblower is accorded three types of protection under the Act, namely protection of confidential information, immunity from civil and criminal action (including disciplinary action) and protection against detrimental action. Protection against detrimental action may also be extended to any person related or associated with the whistleblower.

How is confidential information protected?

The Act prohibits the disclosure of improper conduct or any confidential information, including information disclosed by a whistleblower, obtained in the course of investigation of such disclosure. The prohibition extends to disclosure of such confidential information in proceedings in any court, tribunal or other authority.

Will the identity of a whistleblower be made public at any stage?

No. Information as to the identity, occupation, residential and work addresses or whereabouts of a whistleblower is deemed to be confidential information. As mentioned earlier, the Act prohibits such information from being disclosed. Further, a court, tribunal or authority is required to conceal or obliterate all passages which contain entries that may lead to the discovery of the whistleblower.

What is "detrimental action"?

Detrimental action is defined to include (i) action that causes injury loss or damage; (ii) intimidation or harassment; (iii) interference with a person's lawful employment or livelihood; and (iv) a threat of any of the aforesaid actions.

How is the whistleblower protected against "detrimental action"?

The Act prohibits any person from taking detrimental action against a whistleblower or a person related or associated to him in reprisal of a disclosure of improper conduct. The whistleblower may make a complaint to any enforcement agency of any detrimental action committed against him or any person who is related or associated to him. The enforcement agency will then investigate into this complaint in a procedure similar to the investigation of improper conduct.

Does the whistleblower have any remedy if detrimental action is taken against him?

Yes. The whistleblower may seek from the Court, damages or compensation, an injunction or any other relief that the Court deems fit.

Can the protection accorded to the whistleblower under the Act be withdrawn?

Yes. Section 11 of the Act sets out various circumstances in which the protection can be revoked. These circumstances include (i) where the whistleblower himself has participated in the improper conduct disclosed; (ii) where the whistleblower wilfully made a false material statement in his disclosure; and (iii) where the whistleblower makes the disclosure solely or substantially for the motive of avoiding dismissal or other disciplinary action.

Does the Act enable a whistleblower to change his identity as part of the protection accorded to him?

No, but the relevant public body or private body may relocate the place of employment of a whistleblower, or a person related or associated with him, if that is the only practical means of removing or substantially removing the danger or the effect of a detrimental action.

Can a whistleblower be rewarded for actions taken by him under the Act?

An enforcement agency can order rewards to be paid to a whistleblower for any disclosure of improper conduct or complaint of detrimental action in reprisal of such disclosure if such disclosure or complaint leads to the detection of cases on improper conduct or detrimental action or to the

prosecution of the person against whom the disclosure was made or the person who committed the detrimental action.

It has recently been reported (*The Star*, 10 December 2010) that the Government is in the midst of formulating a system to reward whistleblowers.

CLOSING COMMENTS

It is hoped that the protection conferred by the Act on whistleblowers, in particular the safeguards against discovery and detrimental action, will encourage more people to come forward to expose improper conduct. This will help to reduce corruption and abuse of authority in the public and private sectors.

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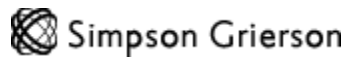
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Search and Enforcement Under the FMA

01 Dec 2010



A new Financial Markets Authority (FMA) is to be created to monitor compliance with financial market legislation as well as the governance, reporting and supervision required by financial market participants. The Financial Markets (Regulators & Kiwisaver) Bill, which establishes the FMA is likely to be passed early next year.

The purpose of establishing the FMA is to provide "a single market regulator with a culture of visible, proactive, and timely enforcement", and to help rebuild the confidence of "mum and dad investors" in financial markets.

The FMA will take over the functions of the Securities Commission, as well as some of the responsibilities of the NZX, the Ministry of Economic Development and the Government Actuary and will monitor compliance with various Acts including the Securities Act 1978, the Financial Advisers Act 2008; Securities Markets Act 1998, Superannuation Schemes Act 1989, and some provisions of the Companies Act 1993 and the Crimes Act 1961. The FMA will regulate financial advisers, securities trustees, statutory supervisors, and auditors.

In order to carry out its functions, the FMA has been given wide ranging information gathering and enforcement powers, which are set out in part 3 of the Bill. There are two key areas of interest which relate to 1) the information gathering powers of the FMA (in particular its search powers) and 2) the ability of the FMA to take civil action on behalf of certain persons as part of its enforcement powers.

Information Gathering Powers

The FMA will be able to:

- require any person to supply information, produce documents or appear to give evidence (clause 25); and
- enter and search a place for the purpose of ascertaining whether a person has engaged in or is engaging in conduct that constitutes a contravention of any provision of the financial markets legislation (clause 29). The FMA must be satisfied that there are reasonable grounds to suspect that a person has engaged in conduct that constitutes a contravention and that the search will find evidential material. However, the FMA may only enter and search if the occupier consents or a warrant is obtained from a judge of either the High Court or the District Court.

Failure to comply with a request from the FMA, providing false or misleading information or obstructing the execution of a search warrant will be a criminal offence (with a maximum fine of \$300,000) for either a company or an individual.

While the Securities Commission previously has had the power to require persons to supply information, it did not have the power to obtain and execute search warrants, and this is a significant extension to the information gathering powers.

There have been a number of public submissions on the Bill, some of which express concern about the scope of the information gathering powers that the FMA will have, and in particular with search warrants.

In general, the concerns are due to the fact that the FMA will have a wide range of functions spanning minor issues to criminal offences. The information gathering powers will apply to all of those functions. In its submissions on the Bill, the New Zealand Bankers Association has suggested a threshold be established which would exclude the search powers of the FMA in cases which involve less serious offences.

There is also a concern with the ability to require a person to provide information or evidence to the FMA where that person may face criminal charges (although a witness before the FMA will have the same privileges as they would have before a Court - clause 53).

Furthermore, the ability to challenge the exercise of these powers in Court will be dampened by clause 25, which allows the FMA to continue to require the information to be provided, evidence given or a search warrant executed until a final decision is given by the Court.

Enforcement Powers

Another issue that is causing particular controversy is the proposed ability of the FMA to exercise rights on behalf of investors, or others, either by commencing a civil action, or taking over a civil action that has already been commenced (clauses 34-41).

The FMA can even apply to the Court for an order that the person whose rights it is exercising meet the reasonable costs of the proceeding (clause 38).

There are some limits on the exercise of this power, including that it must be in the public interest and the FMA must consider the effect of the proceedings on future conduct in financial markets and whether it would be an efficient and effective use of the FMA's resources.

The power does not change the duties or liabilities of any person and its primary objective is to promote the public interest rather than to obtain redress for investors.

This is not a power that is currently available to any regulator in New Zealand and marks a significant change to enforcement, including for example enforcement of director's duties. The power is however similar to that available to the Australian Securities and Investment Commission.

It remains to be seen in what circumstances the FMA will exercise this power, but it has already created much controversy in the submissions process.

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Indemnities: Not Personal And Freely Assignable

December 2010 |

S SIVANESAN

HII Yu Yu

In *Shaw v Lighthouseexpress Ltd* [2010] EWCA Civ 161, the English Court of Appeal had to decide whether a contract providing an indemnity clause had been validly assigned to the purchaser of a business under a business sale agreement and, if so, whether the purchaser could claim repayment by way of indemnity from the other party to the contract.

Facts

The appellant, Shaw, was an independent financial advisor ("IFA"). He had a non-pointed representative contract ("ARC") with a partnership, Berkeley Wodehouse Associates ("BWA"), until he resigned in December 1999. Under the ARC, Shaw had agreed to indemnify BWA in respect of any costs, charges and expenses, including any excess, charged by BWA's professional indemnity insurers in connection with his provision of services. Shortly afterwards, in 2001, BWA sold its business to a company called Lighthouseexpress Ltd ("Company").

Before he resigned, Shaw had given advice to a client about an investment. In 2006 the Financial Services Ombudsman ("FOS") decided that the client had been misadvised and, accordingly, that she was due compensation. The Company, having taken over the business, paid the compensation. It then sought to recover the amount of that compensation from Shaw.

Shaw refused to pay and maintained that he was not liable and so the Company sued him. It succeeded in getting judgment in trial. Shaw appealed to the Court of Appeal.

Issue

The issue was whether there had been a valid assignment of the right of indemnity to the Company under the ARC.

Assignment

When a business is sold, its existing contracts would be vested in the new owner. The general principle is that the benefit of an agreement is freely assignable, provided the rights are proprietary (i.e. not personal to the parties concerned) and the assignment is not prohibited by statute or public policy.

Indemnity not personal and therefore could be assigned

The Court of Appeal considered whether a provision in the business sale agreement between BWA and the Company was effective to assign the benefit of the indemnity in an agreement, the ARC, which had already been terminated.

The business sale agreement stated that "the Vendor shall sell and the Purchaser shall purchase the Business as a going concern comprising Intellectual Property and the Goodwill and the benefit (so far as the Vendor can assign the same) of the Contracts at the Purchase Price". The court noted that an objective reader would know that the basic purpose of the business sale agreement

was to take over the entire business and assets of the partnership. So he or she would not expect anything, including the right of indemnity, to be left behind.

The definition of "Contracts" included "... current contracts, agreements and engagements of the Vendor at the Completion Date relating to the Business...". The court rejected the submission that the ARC was not a "current contract" because Shaw had resigned over a year before the business sale agreement was entered into. On the contrary, the court found that the indemnity on the ARC continued in effect following its termination and therefore the ARC remained alive so far as the indemnity clause was concerned. This being the case the court construed the term "current contracts" used in the business sale agreement widely so as to include live contractual obligations owed to or by BWA.

The court also found that there was nothing inherent in the nature of an indemnity which called for it to be unassignable, and here there was no reason why, on its true construction, the right of indemnity should be personal to BWA so as not to be assignable to the Company. There was always the possibility that the partners of BWA would change or the BWA business would be transferred to a third party: so there was no reason for the indemnity to remain "frozen" in favour of the partners of BWA as at the date that the indemnity was given.

Indemnity not void for uncertainty

The Court of Appeal found that the indemnity clause in the ARC was not void for uncertainty. The Court of Appeal stressed that in such cases it is not enough that the clause is difficult to construe: the test is whether the wording is "sufficiently definite to enable the court to give it a practical meaning". In this case a meaning could be found which made good business sense.

Appeal allowed on two grounds

While the Court held that the indemnity had been validly assigned, it allowed the appeal on two grounds: (1) the Company could not prove that the relevant sum paid fell within the scope of the indemnity clause; and (2) Shaw was protected by a limitation clause.

Scope of indemnity clause

The relevant part of the clause meant that the Company could only recover any excess charged by the professional indemnity insurers under the policy maintained by the Company on behalf of its appointed representatives. The Court of Appeal held that the legal burden of proof was on the Company to show that the sum paid to the client in respect of the FOS award was an excess charged by those insurers and the Company failed to do so.

Limitation clause

The Court of Appeal considered a clause in the ARC which stated that Shaw would remain liable for a period not exceeding six calendar years following resignation or termination. The court held that it was a limitation clause. The court felt that if the Company had notified Shaw within six years of his resignation of the fact that one of his clients had made a claim, the limitation clause as drafted would not have protected him. As the six year period had expired, Shaw would no longer be liable to the Company for any debts or liabilities.

Comment

Parties negotiating a business sale agreement should exercise caution when considering provisions relating to the transfer of business contracts. It is important for parties to consider whether provisions in the agreement will operate to transfer contingent assets and liabilities which may remain current despite the completion or termination of other obligations under those contracts.

CHINA'S COMMITMENTS ON TRADE IN SERVICES UNDER THE WTO AND THE ECFA

©Joyce C. Fan/I-Sha Liu

The Cross-Straits Economic Cooperation Framework Agreement (the "ECFA") between Taiwan and China was signed on June 29, 2010 and took effect on September 12, 2010. The Agreement consists of 16 articles and 5 annexes, which cover trade in goods, trade in services, investment and dispute settlement. The signing of the ECFA demonstrates that both governments are willing to improve cross-strait economic relationship. Many have predicted that the ECFA would create tremendous economic opportunities for Taiwan, since Taiwan's goods and services would enjoy preferred treatment when entering China in comparison to other countries'. In addition to the elimination of restrictive measures, the ECFA also provides an "early harvest plan" for trade in services where both Taiwan and China initially commit to providing better market access for select services sectors.

- Definition of "Service Suppliers"

Under Annex V to the ECFA, Definitions of Service Suppliers Applicable to Sectors and Liberalization Measures under the Early Harvest for Trade in Services, the early harvest plan for trade in services applies to "service suppliers" who are either natural persons or judicial persons of Taiwan or China. Specifically, a judicial person service supplier should be an entity formed in accordance with the laws of either Taiwan or China and can be in the form of a company, a trust, a joint venture, a partnership, a sole proprietorship or an association.

Furthermore, to be a qualified judicial person service supplier from either party to the ECFA ("Originating Party"), a supplier must (i) have provided in the Originating Party, for at least three consecutive years, the scope and nature of services that it intends to provide in the other Party (for banking institutions, insurance, securities and futures companies, stricter requirements on the length of operation history apply); (ii) have paid taxes in the Originating Party; and (iii) own or lease business premises in the Originating Party.

It is noteworthy that the ECFA does not expressly set a requirement for the nationality of the judicial person service suppliers' ultimate shareholders. Thus, it appears that persons who are not nationals of Taiwan (or China, as the case may be) may be able to enjoy the benefits of the early harvest plan by establishing a judicial person in Taiwan (or China).

For instance, if a Japanese enterprise wishes to enter a service sector in China that is

included in the early harvest plan but not yet opened under the WTO, it may first establish a subsidiary in Taiwan, and then through this subsidiary, (i) render the same scope of services in Taiwan for three consecutive years, (ii) file annual income tax returns in Taiwan, and (iii) lease or purchase business premises in Taiwan. When all of these conditions are fulfilled, it may enter the Chinese market through this Taiwan subsidiary and enjoy the benefits of the early harvest plan.

- Services under the Early Harvest Plan and China's Commitments under the WTO

Several of China's commitments under the early harvest plan are more favorable to service suppliers from Taiwan than its current concessions under the WTO. Nonetheless, such commitments do not affect its horizontal commitments under the WTO and do not include any commitment on mode four of service supply – presence of natural persons. The following is a brief introduction of China's commitments on non-financial service sectors under the early harvest plan.

1. Service sectors prohibited under the WTO

In China, the following service sectors are now open to service suppliers from Taiwan, but not foreign service providers under the WTO:

(1) Research and experimental development services on natural science and engineering (CPC 8510)

Taiwan service suppliers are permitted to provide such services through equity joint ventures, contractual joint ventures or wholly-owned enterprises. Under the United Nations Provisional Central Product Classification (the "CPC"), CPC 8510 includes the research and experimental development services in the following fields: physical sciences (CPC 85101), chemistry and biology (CPC 85102), engineering and technology (CPC 85103), agricultural sciences (CPC 85104), medical sciences and pharmacy (CPC 85105), and other natural sciences (CPC 85109)

(2) Specialty design services (CPC 87907)

Same as CPC 8510, Taiwan service suppliers may set up equity joint ventures, contractual joint ventures or wholly-owned enterprises to provide specialty design services in China. The CPC describes the "specialty design services" under this category as "services consisting in creating designs and preparing patterns for a variety of products by harmonizing aesthetic considerations with technical and other requirements." This category includes furniture designs, interior designs and decorations and aesthetic designs for various other consumer products, but excludes design of industrial products or graphic design.

(3) Hospital services (CPC 9311)

Taiwan service suppliers may establish wholly-owned hospitals in Shanghai

Municipality, Jiangsu Province, Fujian Province, Guangdong Province and Hainan Province. In other provinces, Taiwan service providers are permitted to set up hospitals through China-Taiwan joint venture or cooperation in China. Taiwan service providers must abide by relevant regulations on foreign investment in hospitals through joint venture, cooperation or sole-ownership.

2. Service sectors with superior commitments under the ECFA

(1) Where Taiwan wholly-owned enterprises are allowed

For the following service sectors, China's specific commitments under the WTO of mode three supply are qualified. In this regard, the early harvest plan under the ECFA provides better treatments for Taiwan service suppliers.

(a) Software implementation services (CPC 842), convention services (CPC 87909) and input preparation services (CPC 8431)

Under the WTO, China opened the markets for these services only to joint ventures, although allowing foreign majority ownership. However, under the early harvest plan, Taiwan service suppliers may establish wholly-owned enterprises to provide convention services, input preparation services and services under CPC 842, which includes systems and software consulting, systems analysis, systems design, programming and systems maintenance services.

(b) Aircraft repair and maintenance services (CPC 8868)

Under the WTO, foreign service suppliers are permitted to establish joint ventures for providing aircraft repair and maintenance services in China. However, it is required that the Chinese side hold controlling shares or be in a dominant position in the joint ventures. Under the early harvest plan, Taiwan service suppliers may establish wholly-owned enterprises to provide repair and maintenance services. The only condition is that such Taiwan service suppliers or the principal investors of a group of co-investors from Taiwan must be judicial persons.

(2) Where superior commitments are made

(a) Accounting, auditing and book-keeping services (CPC 862)

Before the ECFA, the "Temporary License to Perform Auditing services", which Taiwan accounting firms have to have for providing any auditing services in China, was valid for only six months. Under the early harvest plan, such a license is now valid for one year.

(b) Audiovisual services (CPC 83202)

Under the WTO, China imposes a quantitative restriction on importation of motion pictures for theatrical releases on a revenue-sharing basis of 20 movies per year. Under the early harvest plan, however, Taiwan-produced motion pictures are exempt from the quantitative restriction, contingent upon the following conditions:

- i. The movie concerned is a Chinese language motion picture;
- ii. The production company is established in accordance with Taiwan law;
- iii. The production company owns more than 50% of the copyright of the movie concerned;
- iv. The movie is approved by competent authority in China; and
- v. At least 50% of the principal personnel (e.g., director, screenwriter, leading actor/actress, and so on) of the production crew are Taiwan residents.

- The Future

The early harvest plan in Annex IV of the ECFA is a basis for future negotiations between the two governments. Although the plan still lacks details for implementation and requires further consultation, it will likely be the focus of the next round of negotiations. It is anticipated that a formal services agreement will not only create trade opportunities for local service suppliers in Taiwan but also for foreign service suppliers who are interested in providing services in China through a Taiwan subsidiary or joint venture entity.



INTELLECTUAL PROPERTY REPORT

[IP Report Homepage](#)

Articles

Eastern District Of Texas At Forefront Of Settlement Agreement Admissibility And Discoverability Issue

[Natalie Alfaro](#)

I. Introduction

Following the decision of the United States Court of Appeals for the Federal Circuit in *ResQNet.com, Inc. v. Lansa, Inc.*,¹ the admissibility of litigation-induced settlement agreements and the discoverability of underlying settlement negotiations has become an increasingly important issue facing federal district courts. The United States District Court for the Eastern District of Texas ("EDTX") is at the forefront of the issue with its judges having issued numerous decisions interpreting and applying *ResQNet*.² Although the decisions coming out of the EDTX have contained varying interpretations of *ResQNet*'s impact on the settlement agreement admissibility and discoverability issue, the decisions signify a shift in the law and highlight that specific determinations of admissibility and discoverability will ultimately depend on the facts of each case. Although the law is unsettled and the issue does not seem to have lent itself to a bright-line test, Judge Davis's most recent decisions in *ReedHycalog UK, Ltd. v. Diamond Innovations Inc.*³ and *Clear With Computers v. Bergdorf Goodman, Inc.*⁴ confirm that *ResQNet* will have an impact not only on patent litigation strategy, but also on patent licensing, both in and out of the litigation context.

II. Background — *ResQNet*

In *ResQNet*, the Federal Circuit vacated the damages award and remanded based on the district court's reliance on speculative and unreliable evidence.⁵ The district court had allowed the patentee to support its proposed royalty rate with evidence of royalty rates from seven previous *ResQNet* licenses. Five of these licenses were "re-bundling" licenses that neither mentioned the patents-in-suit, nor held any discernible relationship to the claimed invention.⁶ The other two "straight" licenses arose out of litigation over the patents-in-suit.⁷ In evaluating the specific facts of the case, the Federal Circuit observed "that the most reliable license in this record arose out of litigation," but recognized that "[o]n other occasions, this court has acknowledged that the hypothetical reasonable royalty calculation occurs before litigation and that litigation itself can skew the results of the hypothetical negotiations."⁸

The Federal Circuit further held that on remand, the district court may "consider the panoply of events and facts that occurred thereafter and that could not have been known to or predicted by the hypothesized negotiators," but cautioned the district court to "not rely on unrelated licenses to increase the reasonable royalty rates above rates more clearly linked to the economic demand for the claimed technology."⁹

III. *ResQNet*'s EDTX Progeny

While *ResQNet* did not purport to change the law on the admissibility of litigation-induced settlement agreements, the Federal Circuit's comment regarding the reliability of licenses arising out of litigation has been interpreted as opening the door to settlement agreements and negotiations once thought to be off limits. In *Tyco Health Care Group LP v. E-Z-EM, Inc.*, Judge Ward relied on *ResQNet* in granting a motion to compel the discovery of negotiations underlying a litigation license between defendants and a third party.¹⁰ After reviewing the Federal Circuit's comments in *ResQNet*, Judge Ward concluded that "[a] prior, related settlement agreement, where it exists, may be central to the fact-finder's determination of damages using a hypothetical negotiations analysis," and "in light of the admissibility and importance of prior related settlement agreements, *ResQNet* suggests that the underlying negotiations are relevant to the calculation of a reasonable royalty using the hypothetical negotiation damages model."¹¹

Two days later, in *Data Treasury Corp. v. Wells Fargo & Co.*, Judge Folsom denied an accused infringer's motion *in limine* seeking to exclude more than thirty litigation-related licenses, finding specifically that "[i]n light of *ResQNet*, litigation-related licenses should not be excluded."¹² In ordering the licenses admissible, Judge Folsom noted that defendants' concerns regarding the reliability of the licenses were "better directed to weight, not admissibility," and further allowed discovery by defendants

into the negotiations surrounding the licenses.¹³

While the *Tyco* and *Data Treasury* decisions appear to favor the admissibility of litigation-induced licenses and discovery into the underlying settlement negotiations, Judge Love has taken a more conservative approach. In *Fenner Investments, Ltd. v. Hewlett-Packard Co.*, Judge Love precluded defendants from introducing testimony or exhibits related to litigation-induced settlement licenses, noting that “the recent *ResQNet* decision has not altered the admissibility of agreements entered into under the threat of litigation.”¹⁴ Judge Love has taken a consistent position with respect to the discoverability of underlying negotiations, holding in *Software Tree, LLC v. Red Hat, Inc.* that “*ResQNet* has not upset this district’s case law regarding discoverability of settlement negotiations.”¹⁵

In *ReedHycalog UK, Ltd. v. Diamond Innovations Inc.*, Judge Davis observed that the Federal Circuit’s comment in *ResQNet* “was not the adoption of a bright-line rule regarding the reliability of litigation licenses nor even a ruling on their admissibility.”¹⁶ Applying *ResQNet* and recognizing the varying decisions among the EDTX judges, Judge Davis held that “the admissibility of litigation licenses—like all evidence—must be assessed on a case-by-case basis, balancing the potential for unfair prejudice and jury confusion against the potential to be a ‘reliable license.’”¹⁷ After ruling that the court would “assess[] litigation licenses on a case-by-case basis in determining their admissibility,” Judge Davis denied defendant’s motion in limine and allowed plaintiff to rely on the litigation settlement agreements with the condition that the licenses not be identified as “litigation licenses” at trial.¹⁸

Still applying his “case-by-case” approach, Judge Davis recently addressed the other half of the settlement agreement issue in *Clear With Computers v. Bergdorf Goodman, Inc.*¹⁹ In this case, Judge Davis granted defendants’ motion to compel documents and communications related to the underlying negotiations of settlement agreements already produced, finding that the communications were “likely to be key in determining whether the settlement agreements accurately reflect the inventions’ value or were strongly influenced by a desire to avoid or end full litigation.”²⁰ Judge Davis noted that he expected this case was “the exception.”²¹ The “exceptional” nature that Judge Davis perceived in this case is likely attributable to the following three factors: (1) plaintiff had previously settled with different defendants in the same industry, but the settlement amounts did not correlate to the companies’ potential damages exposure, (2) some defendants entered into secondary agreements that required them to pay less than the settlement amounts initially agreed upon and (3) the settlement agreements were likely to be the only licenses of the patents-in-suit available to measure the value of the inventions.²² The case was also noteworthy because it involved the use of information or negotiations from previous cases in aid of a lower damages theory by defendants, as opposed to a more typical case in which a plaintiff seeks to support a higher damages theory by using litigation-induced and allegedly precedential settlements.

IV. Conclusion

The landscape of litigation-induced settlement agreement admissibility has been altered as a result of *ResQNet* and its progeny. Although the law governing admissibility of settlement agreements in the EDTX is far from settled, Judge Davis’s decisions in *ReedHycalog* and *Clear With Computers* are particularly instructive. Importantly, these two decisions provide enough flexibility to tie together the arguably inconsistent prior EDTX decisions. The case law demonstrates that the issue is not a bright-line one, and specific determinations of admissibility and discoverability will be made on a case-by-case basis. Practically speaking, parties should assume settlement agreements and underlying settlement negotiations might be discoverable in future litigations involving the same patents-in-suit or claimed technology, and take caution when negotiating settlement agreements and patent licenses.

¹ *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 868–69 (Fed. Cir. 2010).

² See e.g., *Tyco Health Care Group LP v. E-Z-EM, Inc.*, No. 2:07-CV-262, 2010 WL 774878 (E.D. Tex. March 2, 2010) (Ward, J.); *Data Treasury Corp. v. Wells Fargo & Co.*, No. 2:06-CV-472, 2010 WL 903259 (E.D. Tex. Mar. 4, 2010) (Folsom, J.); *Fenner Investments, Ltd. v. Hewlett-Packard Co.*, No. 6:08-CV-273, 2010 WL 1727916 (E.D. Tex. Apr. 28, 2010) (Love, Mag. J.); *Software Tree, LLC v. Red Hat, Inc.*, No. 6:09-CV-097, 2010 WL 2788202 (E.D. Tex. June 24, 2010) (Love, Mag. J.); *ReedHycalog UK, Ltd. v. Diamond Innovations Inc.*, --- F. Supp. 2d ---, No. 6:08-CV-325, 2010 WL 3021550 (E.D. Tex. Aug. 2, 2010) (Davis, J.); *Clear With Computers v. Bergdorf Goodman, Inc.*, --- F. Supp. 2d ----, No. 6:09-CV-481, 2010 WL 4881801 (E.D. Tex. Nov. 29, 2010) (Davis, J.).

³ *ReedHycalog*, 2010 WL 3021550.

⁴ *Clear With Computers*, 2010 WL 4881801.

⁵ *ResQNet.com*, 594 F.3d at 868.

⁶ *Id.* at 870.

- ⁷ *Id.*
⁸ *Id.* at 872–73.
⁹ *Id.*
¹⁰ *Tyco*, 2010 WL 774878, at *2
¹¹ *Id.*
¹² *Data Treasury*, 2010 WL 903259, at *2.
¹³ *Id.* In *Data Treasury*, Judge Everingham later sustained defendants’ objection to the admissibility of seven license agreements because the agreements were negotiated as lump sums, and their probative value was low given that plaintiff’s damages model relied on a running royalty computed on a per-check basis. See *Data Treasury Corp. v. Wells Fargo & Co.*, No. 2:06-CV-472, 2010 WL 1640900, at *1 (E.D. Tex. Mar. 16, 2010) (Everingham, Mag. J.).
¹⁴ *Fenner*, 2010 WL 1727916, at *3.
¹⁵ *Software Tree*, 2010 WL 2788202, at *4.
¹⁶ *ReedHycalog*, 2010 WL 3021550, at *2.
¹⁷ *Id.*, at *3 (quoting *ResQNet*, 594 F.3d at 872).
¹⁸ *Id.*
¹⁹ *Clear With Computers*, 2010 WL 4881801, at *2.
²⁰ *Id.*
²¹ *Id.*
²² See *id.* In *Lectec Corp. v. Chattem, Inc.*, Judge Folsom quoted *Clear With Computers* in summarizing the current landscape of the law and relied on the *Data Treasury* rulings in finding lump sum settlement agreements inadmissible at trial because plaintiff sought a running royalty on a per-patch basis. No. 5:08-CV-130, slip op. at 13–14 (E.D. Tex. January 4, 2011) (Folsom, J.).

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New Rules Proposed for Reform of Universal Service and Intercarrier Compensation

02.08.11

By Michael C. Sloan

In its open meeting earlier today (Feb. 8, 2011), the FCC adopted a Notice of Proposed Rulemaking (NPRM) to reform the Universal Service Fund (USF) and the Intercarrier Compensation (ICC) system, both of which Chairman Julius Genachowski said are “plagued with waste and inefficiency.” Although the text has not yet been issued, we outline our expectations for the proposal in this advisory. After the NPRM has been issued, we will update our advisory as necessary.

Anticipated USF proposals

On the USF side, the NPRM will call for consolidating several of the separate funds into one fund to support deployment of broadband, moving away from supporting just “plain old telephone service.” The new fund (dubbed the “ConnectAmerica Fund” (CAF) in the National Broadband Plan issued last March) will be targeted first toward geographic areas where there is no broadband service currently, and where there is little prospect for private sector deployment of broadband. (How these geographic areas are defined will be an important issue to watch.) The CAF will be supplemented by a “Mobility Fund” for wireless broadband services, which the Commission called for in an NPRM issued last fall.

The Chairman said at the meeting, and the press release issued afterward reiterates, that “market-driven and incentive-based policies” will be deployed to “maximize the impact of scarce program resources and the benefits to all consumers.” We take this to mean that the FCC will propose to make awards based on a competitive grant process (such as that used to distribute broadband stimulus funds) and/or “reverse auctions,” in which existing and potential service providers bid for the lowest subsidy they would accept to serve an area (which in many markets could be zero). In all cases, we expect that the proposal would limit funding to one wireline and one wireless service provider in each area.

This effectively adopts the long-standing cable industry proposal that no subsidy should be provided where an unsubsidized competitor provides service, and would greatly reduce the number of areas where subsidies are provided. Competitive carriers that currently receive high-cost USF support as the second or third “Eligible Telecommunications Carrier” (ETC) in a market could be adversely affected by this proposal.

We expect the plan to call for a fairly lengthy transition period—perhaps as long as a decade until all legacy high-cost programs would be eliminated under the proposal.

As Commissioner Robert McDowell noted, conspicuously absent is any proposal for reforming the USF contribution system, which is not only notoriously confusing but which has risen precipitously from less than 5 percent to upwards of 15 percent of consumer telephone bills as the USF fund has ballooned during a period of shrinking interstate telecommunications revenue.

Anticipated intercarrier compensation proposals

The problems with the current intercarrier compensation (ICC) regime are notorious. It does not appear that the NPRM will attempt to solve them all, but will instead focus on clarifying the treatment of interconnected VoIP traffic, phantom traffic, and traffic pumping. We address each below:

Interconnected VoIP traffic

The interconnected VoIP traffic issue arises from traffic exchanged by local exchange carriers (LECs) that is either destined to or originated by interconnected VoIP service providers. Some interexchange carriers (IXCs) take the position that this traffic is “information services” traffic and therefore exempt from access charges. LECs that want to *collect* access charges, not surprisingly, take the opposite view.

It appears that the FCC’s proposal may call for treating such traffic as telecommunications traffic, and therefore subject to either access charges or reciprocal compensation, as appropriate. This does not mean we expect the FCC to rule that VoIP itself is a telecommunications service. But we do think that it will clarify that when LECs exchange such traffic to facilitate calls to and from the public switched telephone network (PSTN), such traffic is telecommunications and subject to treatment as such.

Phantom traffic

“Phantom traffic” is another access charge avoidance scheme in which carriers attempt to exchange long-distance traffic over local trunks and disguise what they are doing by removing necessary call detail information. The Chairman indicated at the meeting that the NPRM will propose rules that require accurate call information in all signaling streams. The FCC might even propose a rule deeming the failure to provide such information a violation of the Communications Act and also propose various enforcement mechanisms to help ensure compliance.

Traffic pumping (a/k/a “traffic stimulation”)

“Traffic pumping”—also known as “traffic stimulation”—is a practice by which LECs with high terminating access rates—often 10 times higher than the norm among incumbent LECs—serve customers that generate large volumes of inbound traffic, such as conference bridges and chat lines. The result is large access bills for IXCs that terminate calls to traffic pumping LECs. The LEC often will charge its customers little or no fee or may even share revenues. Traffic pumping LECs typically operate in rural territories, such as Iowa and South Dakota, and are either small incumbent LECs or rural competitive LECs that are often affiliated with rural incumbent local exchange carriers (ILECs).

High terminating access charges are not a new issue. For example, in 2001, the FCC effectively capped competitive local exchange carrier (CLEC) access at the same level as the local ILEC, and, in *Total Telecom v. AT&T*, adjudicated a dispute between an IXC and a traffic pumping ILEC in favor of the IXC. In the spring of 2007 the issue came to a head when a number of carriers on both sides of the issue petitioned the FCC for relief and/or a clarification of their rights. In a Declaratory Ruling issued in June 2007, the FCC made one thing perfectly clear: Aggrieved IXCs may not block calls. But it did not provide IXCs any relief, and calls for reform continue to this day.

In October 2007, the FCC issued proposed new or revised rules to address traffic pumping concerns. In addition to seeking more factual information about the practice, the FCC proposed: (1) an adjustment to costing methodology that would reflect a cost decrease as demand increases; (2) a finding that a rate-of-return carrier that shares revenues with an end user customer is engaged in an unreasonable practice; and (3) tariff filing requirements and language that would modify switched access rates as demand increases.

We expect that the NPRM will largely readopt these proposals for dealing with the traffic pumping “problem.”

Conclusion

The USF and ICC reforms the Commission is calling for will affect nearly every segment of the communications industry. DWT is working with clients to help them assess the impact of these changes on their business. Please do not hesitate to contact your DWT contact or any of the attorneys listed above for additional information.



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Hogan Lovells



Second Circuit's rejection of corporate liability under the Alien Tort Statute stands

8 February 2011

See note below about Hogan Lovells.

Executive summary

In a short, but sharply divided decision rendered on 4 February 2011, the Second Circuit denied rehearing *in banc* of a 17 September 2010 panel decision in *Kiobel v. Royal Dutch Petroleum* holding that because corporate liability is not recognized under customary international law, federal courts do not have jurisdiction to hear cases brought against corporations under the U.S. Alien Tort Statute. By characterizing the case as one that "presents a serious issue and generates a circuit split" the dissenters clearly expressed the view that the issue is ripe for Supreme Court review. On the same day, the *Kiobel* panel rejected two-to-one plaintiffs' request for a panel rehearing. As a consequence, corporations will continue not to be subject to Alien Tort Statute claims in the Second Circuit.

Background

Plaintiffs, residents of the Ogoni Region of Nigeria, commenced this action in 2002 in federal court in New York, alleging that the Shell defendants were complicit in the Nigerian government's international law violations. The lawsuit was brought under the Alien Tort Statute (ATS), a 1789 U.S. statute under which plaintiffs have brought numerous claims against multinational corporations in the last two decades alleging serious violations of human rights. In 2006, the trial court dismissed certain of plaintiffs' claims, but denied defendants' motion to dismiss others. Both sides appealed the lower court's decision.

The Second Circuit's decisions

The Court's September 17 panel decision, written by Judge José Cabranes and joined by Chief Judge Dennis Jacobs, held that international law, not domestic law, governs the scope of liability for violations of customary international law under the ATS, and that the liability of corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations inter se. Because corporate liability is not recognized as a "specific, universal, and obligatory" international norm, as



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the Supreme Court required in its only ATS decision, the Court held that federal courts lacked subject matter jurisdiction to entertain ATS cases against corporations. Plaintiffs sought rehearing and rehearing in banc.

In an opinion dissenting from the Court's denial of rehearing in banc, Judge Lynch, joined by three others, argued that rehearing in banc should have been granted because the panel's decision conflicts with a decision of the Eleventh Circuit Court of Appeals and because "the panel majority opinion is very likely incorrect as to whether corporations may be found civilly liable under the Alien Tort Statute"

Even more interesting, though, are the opinions rendered by the *Kiobel* panel in rejecting a panel rehearing. Chief Judge Jacobs' opinion examines the real-world consequences of reading the concept of corporate liability into international law. Many ATS cases are commenced against foreign corporations, and many of those cases have provoked vehement protest from the defendants' home nations, impairing rather than encouraging comity among nations. Further, the Second Circuit's decision in *Presbyterian Church of Sudan v. Talisman Energy Inc.*, unanimously affirming the district court's grant of summary judgment in Talisman Energy's favor, held that a successful ATS plaintiff must demonstrate that the defendant aided and abetted human rights abuses "with the positive intention of bringing about a violation of the Law of Nations." (Hogan Lovells represented Talisman Energy in that case). As a consequence of the *Talisman Energy* decision, the only viable ATS action is one in which a corporation purposefully engaged in the most heinous international crimes known to man – examples of which are virtually non-existent. Despite that reality, Chief Judge Jacobs wrote, the ability of plaintiffs to plead around *Talisman* means that multinational corporations still would be subject to coercive pressures to settle ATS cases "even where a plaintiff's likelihood of success on the merits is zero." *Kiobel*, however, appropriately offers a threshold ground for the dismissal of such actions.

Judge Leval, who dissented from the panel decision in *Kiobel*, dissented also from the decision denying a panel rehearing. He argues that Chief Judge Jacobs' opinion "reveals an intense, multi-faceted policy agenda" and is founded on policy concerns that are inappropriate for the judiciary to consider and that do not justify the conclusion that corporations cannot be liable for violations of customary international law. In his concurring opinion, Judge Cabranes allows that grave policy decisions may influence a legislative determination as to whether corporations should be subject to ATS liability, but he observes that it was "fidelity to the law," not those policy decisions, that drove the majority's decision.

What's next?

It remains to be seen whether the *Kiobel* plaintiffs will seek Supreme Court review. And even if they do seek Supreme Court review, it is by no means certain that the Supreme Court will grant certiorari, having recently declined the opportunity to address the question of corporate liability under the ATS in *Talisman Energy*. At least for now, the courts within the Second Circuit remain closed to ATS litigants pursuing claims against corporations.

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WSGR ALERT

FEBRUARY 2011

SEC PROPOSES AMENDMENTS TO THE NET WORTH STANDARD FOR ACCREDITED INVESTOR STATUS

On January 25, 2011, the Securities and Exchange Commission (SEC) voted to propose certain amendments to the net worth standard for determining accredited investor status under the rules promulgated by the Securities Act of 1933. These amendments reflect the requirements of Section 413(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Although Section 413 was effective on July 21, 2010, upon enactment by operation of the Dodd-Frank Act, the SEC is still required to revise the Securities Act rules to reflect the new standard. In addition, the SEC is proposing technical amendments to Form D and a number of rules to conform them to the language of Section 413(a) and to correct cross-references to former Section 4(6) of the Securities Act, which was renumbered Section 4(5) by the Dodd-Frank Act. The proposed rules are available at <http://www.sec.gov/rules/proposed/2011/33-9177.pdf>.

New Net Worth Test

Under proposed Securities Act Rules 215 and 501, the value of a person's primary residence would be excluded for purposes of determining whether the person qualifies as an "accredited investor" on the basis of having a net worth in excess of \$1 million. Previously, the net worth standards required a minimum net worth of more than \$1,000,000, but permitted the primary residence to be included in calculating net worth.

The proposed amendments would define an accredited investor, among other things, as:

"Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of purchase, exceeds \$1,000,000, excluding the value of the primary residence of such natural person, calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property."

Neither the Securities Act nor the Securities Act rules define the term "net worth," so the proposing release states that the purpose of adding the phrase introduced by the words "calculated by" is to clarify that net worth is calculated by excluding only the investor's net equity in the primary residence. The SEC believes this approach is consistent with and advances the regulatory purposes of Section 413(a) because it reduces the net worth measure by the amount or "value" that the primary residence contributed to the investor's net worth before enactment of Section 413(a). The SEC also notes that some of its existing rules are similar in approach to the proposed rules. For example, Rule 701 under Regulation R provides for the exclusion of the value of a person's primary residence in applying a net worth standard and also provides for the exclusion of "associated liabilities," such as mortgages.

The proposed rules do not define "primary residence," although they provide that issuers and investors should be able to use the commonly understood meaning of the term—the home where a person lives most of the time.

Effectiveness of the Proposed Rules

There is no transition period for the new accredited investor net worth standards, since these new standards were effective upon enactment of the Dodd-Frank Act. Under the current rules, a company or fund is not permitted to treat an investor as accredited if the investor subsequently loses that status, even if the investor has previously invested in the company or fund at a time when it satisfied the accredited investor standard. Investors must satisfy the applicable accredited investor income or net worth standard in effect at the time of every exempt sale of securities to the investor that is made in reliance upon the investor's status as such. The proposed amendments would not change this situation. Nevertheless, the SEC is seeking comment on whether some transition and other rules might be appropriate to facilitate subsequent investments by an investor who previously qualified as accredited but was disqualified by the change effected by the Dodd-Frank Act.

Section 413(b) specifically authorizes the SEC to undertake a review of the definition of the term "accredited investor" as it

Continued on page 2...

SEC Proposes Amendments . . .

Continued from page 1...

applies to natural persons, and requires the SEC to undertake a review of the definition "in its entirety" every four years, beginning in 2014.

Effect of the New Net Worth Test

Among other things, the changes required by Section 413 of the Dodd-Frank Act impact the legal requirements governing unregistered offers and sales of securities, i.e., "private placement" exemptions from the registration requirements of the Securities Act relied on by companies in raising private capital from individuals. One of the requirements of certain private placement exemptions is for capital to be raised from accredited investors. By excluding the value of an investor's primary residence in calculating net worth, indebtedness secured by the primary residence would be netted against the value of the primary residence up to the fair market value of the property. This may cause fewer individuals to qualify as accredited investors, thereby reducing available private capital.

Notwithstanding the foregoing, it is still possible for individuals to qualify as accredited investors on other grounds. For example, Rule 501 of the Securities Act provides that an accredited investor shall also mean any person who comes within, or who the issuer reasonably believes comes within, any of the following categories:

- any director, executive officer, or general partner of the issuer of the securities being sold, or
- any natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years, and has a reasonable expectation of reaching the same income level in the current year.

As a result, while the net worth test promulgated pursuant to the requirements of the Dodd-Frank Act may be more restrictive, natural persons may still qualify as accredited investors under one of the other definitions provided in Rule 501.

What You Should Do Now

Because Section 413(a) became effective upon the enactment of the Dodd-Frank Act and it requires the exclusion of the value of a person's primary residence for purposes of determining whether such person qualifies as an "accredited investor," all companies that have not already done so should revise their standard forms of accredited investor questionnaire and investor representations and warranties in their standard forms of financing documents to ensure that an individual's net worth is properly calculated.

For any questions or more information on these or any related matters, please contact your regular Wilson Sonsini Goodrich & Rosati contact, or any member of the firm's corporate and securities practice.



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