PACIFIC RIM ADVISORY COUNCIL

January 2010 e-Bulletin

MEMBER NEWS

- ►Clayton Utz Brisbane Office Closes Due to Flooding
- ►Davis Wright Welcomes Industry Veteran to Environmental Practice Group
- ►FMC Welcomes New Deputy Chair to Firm
- ►Gide Senior Counsel Joins Firm
- ►Hogan Lovells Adds Senior Policy Advisor
- ►Rodyk New Managing Partner Takes Helm
- ►Tilleke & Gibbins Welcomes IP Counsel
- ►Wilson Sonsini Names Nine New Partners

COUNTRY ALERTS

►ARGENTINA Medical Malpractice Insurance in Argentina ALLENDE BREA

►AUSTRALIA Boards to Face Spill After Remuneration Vote CLAYTON UTZ

►BRAZIL Remedies in Brazilian Antitrust Experience - Issues in Structure and Incentives TOZZINI FREIRE

►CANADA Visa and Mastercard Rules Challenged by Competition Bureau FMC

►CHILE Class Action for Construction Defects CAREY

►CHINA CBRC New Regulations on Credit Assets Transfer and Repayment Mechanism of Mid-Long Term Loan KING & WOOD

►COLOMBIA Amendment to Regulations on Derivative Transactions BRIGARD URRUTIA

►INDONESIA BI Regulation on Rupiah and Foreign Currency Reserve Requirements ABNR

►NETHERLANDS Dissolution of The Netherlands Antilles NAUTADUTILH

►NEW ZEALAND New Directives for Overseas Investments in New Zealand Farms SIMPSON GRIERSON

►TAIWAN Using a Trademark To Indicate A Place of Business on Maps Does Not Constitute Trademark Infringement LEE and LI

►UNITED STATES

►Supreme Court to Consider Federal Circuit's Deliberate Indifference Standard for Induced Infringement BAKER BOTTS

►Massive Hospital Settlement Stems From Largely Technical STARK Violations DAVIS WRIGHT TREMAINE

►SEC Proposes Rules to Require Registration of Municipal Advisors HOGAN LOVELLS

►Prevailing Wage eAlert That CFD Might Cost You Millions More Than You Thought LUCE FORWARD

►Proposed Treasury Regulations Expand the Meaning of Publicly Traded Debt for Tax Purposes WILSON SONSINI GOODRICH & ROSATI

CONFERENCES & EVENTS

- *PRAC Members Gathering @ INTA San Francisco - May 15, 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

►CAREY Represents Atacama Miners Intellectual Property Rights

►CLAYTON UTZ Bilfinger Berger A$1billion Sale of Valemus

►FMC Advises CA$226.5 million Acquisition Boralex Power Income Fund

► GIDE LOYRETTE NOUEL Advises Carlsberg Group on Further Asia Expansion

► HOGAN LOVELLS Advises Government of Mexico in Procurement of One Billion Dollar Satellite System

► KING & WOOD Siguler Guff Participates in First Major RMB FoF

► NAUTADUTILH Advises Eneco on Long-Term Gas Contract

►TOZZINIFREIRE Assists Anhanguera Educacional Participacoes SA

PRAC TOOLS TO USE

- PRAC Contact Matrix PRAC Member Directory Conferences & Events

Visit us online at www.prac.org

CLAYTON UTZ BRISBANE OFFICE CLOSES DUE TO FLOODING

12 January 2011

We have closed our Brisbane office in response to flooding in the Brisbane CBD. As a result we have had to shut down the IT systems for our Brisbane office.

Clients needing to contact Brisbane based partners are advised to do so via mobile phone. These numbers can be provided through the Sydney office if required. We are monitoring the situation closely and will provide further updates as they come to hand.

For all other urgent enquiries or further assistance please contact our Sydney office on **02 9353 4000** or send an e-mail to qldclient@claytonutz.com.

For additional information visit www.claytonutz.com

PRAC 49th International Conference
May 21—24, 2011

Hosted by

NautaDutilh
Register online at www.prac.org

DAVIS WRIGHT TREMAINE WELCOMES INDUSTRY VETERAN TO ENVIRONMENTAL PRACTICEGROUP

BELLEVUE, WASH., January 11, 2011

Craig K. Christian, a 12-year environmental industry veteran, has joined the law firm of Davis Wright Tremaine LLP and will practice from the firm's Bellevue, Wash. office. The move bolsters the firm's well-recognized Pacific Northwest environmental team.

Christian has gained environmental expertise handling general counsel work and program management Environmental International, Ltd./Lee & Associates and working as a senior environmental engineer at URS Corp.. Christian brings a range of experience with scientific and technical analysis, environmental regulation and policy advice, and litigation matters.

"Craig is a perfect complement to our existing team here in the Northwest," said environmental practice chair Larry Burke. "Many of our attorneys have engineering or other technical backgrounds or have worked in the environmental field, either in the private sector or government, and that unique perspective allows Davis Wright Tremaine to provide extra value in its client service."

Christian earned his J.D., cum laude, from Seattle University School of Law, after obtaining his M.S. in environmental science from Washington State University and B.S. in mechanical engineering from University of Notre Dame. He is licensed to practice law in the state of Washington and he is also a Washington state-licensed professional engineer.

For additional information visit www.dwt.com

FRASER MILNER CASGRAIN WELCOMES NEW DEPUTY CHAIR TO FIRM

Constance Sugiyama Joins Fraser Milner Casgrain LLP as Deputy Chair

11 January 2011

Fraser Milner Casgrain LLP (FMC), one of Canada's leading business and litigation law firms, is pleased to welcome Constance Sugiyama as Deputy Chair of the firm and a partner in FMC's Corporate Finance, Securities and M&A Groups. As Deputy Chair, Ms. Sugiyama will assume a leadership role at the firm working with FMC's team of respected professionals on the firm's relationships with the Canadian and international business communities.

"Connie brings a wealth of experience, talent and leadership to FMC," says Chris Pinnington, FMC's Chief Executive Officer. *"Her broad legal knowledge and expertise combined with her track record of accomplishment in senior leadership roles and ongoing commitment to corporate social responsibility will be a great asset to our firm, our people and our clients."*

"As a fellow SickKids trustee, I have valued during Connie's term as Chair, her strong commitment to building teams and inspiring collaboration to drive excellence and success in a leading institution", says John Thompson, Chair, TD Bank Financial Group. *"By combining her genuine interest and enthusiasm in everything she does with her organizational savvy and ability to motivate people, Connie is an exceptional leader and role model."*

With more than 30 years of experience in the legal profession, Ms. Sugiyama has advised numerous top-tier national and international businesses on a range of legal and business issues, with a focus on mergers and acquisitions, corporate finance and corporate governance.

Prior to joining FMC, Ms. Sugiyama was a senior partner at another major Canadian law firm, where she held significant leadership positions.

Ms. Sugiyama is recognized as a leading lawyer in Corporate and M&A Law by the *Chambers Global Guide* and *Best Lawyers in Canada*. She was named as one of the *Women's Executive Network's, Canada's Most Powerful Women: Top 100* and by The International Alliance for Women (an international organization representing more than 50,000 women worldwide) as one of their *2010 World of Difference 100*, an award that recognizes women whose efforts have advanced the economic empowerment of women locally, regionally or worldwide. In 2009, she was awarded the *Women in Capital Markets Award* for Leadership in recognition of both professional excellence and her significant role in the promotion and advancement of women in the capital markets.

Ms. Sugiyama's significant contributions to community service currently include serving as Chair of the Hospital for Sick Children's Board of Trustees; a director of the SickKids Foundation and the Toronto International Film Festival Group; special advisor to the Japanese Canadian Cultural Centre; and a member of the International Women's Forum (IWF), Women Corporate Directors and the advisory council of Women in Capital Markets (of which she was a founding director).

"Connie's business acumen, energetic leadership and social responsibility both within and outside her professional roles will combine to make her a strong role model within FMC," says Mr. Pinnington.

For additional information visit www.fmc-law.com

HOGAN LOVELLS ADDS LEADING PRIVACY PROFESSOR DANIEL SOLOVE AS SENIOR POLICY ADVISOR

WASHINGTON, D.C., 3 January 2011 – Hogan Lovells US LLP announced today that Professor Daniel J. Solove, an internationally-known leader in privacy law, has joined the Washington, D.C. office as a Senior Policy Advisor to the Privacy and Information Management Practice.

With Professor Solove's arrival, Hogan Lovells will be able to offer clients his insights and experience from years of scholarship in privacy and engagement with the privacy community.

Christopher Wolf, Director of the privacy practice at Hogan Lovells, said: "Having Dan Solove available to consult with us and our clients on privacy law matters is an amazing opportunity. Dan is universally regarded as one of the top privacy scholars in the country, someone who not only is a widely-heralded for his knowledge but also someone who understands the practical aspects of privacy protection."

Professor Solove is the John Marshall Harlan Research Professor of Law at the George Washington University Law School. Professor Solove is the author of numerous books, including *Nothing to Hide: The False Tradeoff Between Privacy and Security* (Yale, forthcoming 2011), *Understanding Privacy* (Harvard 2008), *The Future of Reputation: Gossip and Rumor in the Information Age* (Yale 2007) (winner of the 2007 McGannon Award), and *The Digital Person: Technology and Privacy in the Information Age* (NYU 2004).

Professor Solove is also the author of a textbook, *Information Privacy Law* with Aspen Publishing Co. now in its third edition, with co-author Professor Paul Schwartz. Professor Solove also co-authored with Professor Paul Schwartz the forthcoming *Privacy Law Fundamentals* to be published by the International Association of Privacy Professionals (IAPP) in 2011. Additionally, Professor Solove is the author of several other textbooks, including *Privacy and the Media* (1st edition, Aspen Publishing Co. 2009) and *Privacy, Information, and Technology* (2nd edition, Aspen Publishing Co. 2009), all with Paul Schwartz.

He has published nearly 40 articles and essays, which have appeared in leading law reviews, including the *Yale Law Journal*, *Stanford Law Review*, *Columbia Law Review*, *Michigan Law Review*, *N.Y.U. Law Review*, *Chicago Law Review*, *U. Pennsylvania Law Review*, among others.

Professor Solove has testified before Congress and has served as an expert witness in privacy cases. He has been interviewed and featured in several hundred media broadcasts and articles, including the *New York Times*, Wall *Street Journal*, *Washington Post*, *Chicago Tribune*, *USA Today*, *Associated Press*, *Time*, *Newsweek*, *People*, *Reader's Digest*, ABC, CBS, NBC, CNN, NPR, and C-SPAN's "Book TV."

Marcy Wilder, also a Director of the privacy practice at Hogan Lovells observed: *"One of the hallmarks of the Hogan Lovells privacy practice is the advice we provide to clients not only on existing legal requirements but on how to anticipate changes in privacy law and regulation. Having Dan Solove as part of our team enhances our ability to help clients 'look around corners' and be prepared for coming privacy developments."*

Warren Gorrell, Co-CEO of Hogan Lovells added: "*Our global privacy practice is recognized for its breadth and depth, and adding Professor Solove to the team is a real coup."*

For more about Hogan Lovells visit www.hoganlovells.com

GIDE SENIOR COUNSEL JOINS FIRM

Michel Vivant joins law firm Gide Loyrette Nouel:

On 3 December 2010 Michel Vivant, Professor at the Sciences Po Law School (Paris), joined the Intellectual Property and Technology practice (IP-TMT) at Gide Loyrette Nouel as Senior Counsel.

Holder of advanced postgraduate degrees (and the higher French agrégation degree in Law), a doctorate in Law, and an honorary doctorate from the University of Heidelberg, Michel Vivant joined the Institut d'Etudes Politiques (Sciences Po) in Paris as a professor in 2007 and is currently in charge of the Intellectual Property specialty on the master's course in economic law. He was previously Dean of the Law and Economics Faculty and Vice President at Montpellier 1 University where he founded and supervised the Droit des Créations immatérielles master's programme. He is also an arbitrator and, in particular, acts as an OMPI arbitrator for domain names.

Michel Vivant specialises in intellectual property law (copyright, patent law, trade mark law, etc.), new technologies law, IT law, Internet, e-commerce, international and European law.

The six partners in the Paris IP-TMT Department are delighted to welcome Michel Vivant whose arrival will *"add to the glowing reputation of our team of around thirty lawyers and bring our clients all the benefits of Professor Vivant's considerable experience."*

"I have always endeavoured to keep a decidedly practical approach to law and am delighted to be joining this high-profile team in my capacity as counsel and arbitrator," adds Michel Vivant.

For additional information visit www.gide.com

TILLEKE & GIBBINS WELCOMES IP COUNSEL TO FIRM

Bangkok, Thailand January 7, 2011

On January 4, Dr. Jakkrit Kuanpoth joined Tilleke & Gibbins' Intellectual Property group as Of Counsel. Dr. Jakkrit is a renowned lecturer, author, and public servant.

As an esteemed expert on intellectual property rights and other related global issues, Dr. Jakkrit's knowledge and advice has been sought after by organizations such as the World Intellectual Property Organization, the World Health Organization, the Ford Foundation, the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP), and the International Centre on Trade and Sustainable Development (ICTSD). Dr. Jakkrit has also sat on various Parliamentary committees and National committees at the request of the Thai government.

Dr. Jakkrit is both a legal practitioner and an academic, with teaching responsibilities in intellectual property law and other legal areas at the University of Wollongong in Australia. He has penned authoritative texts on patent rights in pharmaceuticals, patent rights in developing countries, TRIPS and intellectual property, TRIPS and free trade, biotechnology, globalization, economic development, and geographical indications. Dr. Jakkrit also previously served as a visiting Research Fellow at the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law in Germany.

Dr. Jakkrit has returned home to continue to champion intellectual property protection as a member of the firm's IP group. *"As a global leader in academia and advocacy, Dr. Jakkrit brings to the firm extensive expertise in patents and other crucial aspects of intellectual property rights. Dr. Jakkrit will be an excellent addition to our IP practice,"* said Darani Vachanavuttivong, Co-Managing Partner of Tilleke & Gibbins.

Dr. Jakkrit was educated at Ramkhamhaeng University (LL.B.), the University of Warwick (LL.M.), and the University of Aberdeen (Ph.D.). He is a member of the Thai Bar Association.

For more information visit www.tillekeandgibbins.com.

RODYK & DAVIDSON NEW MANAGING PARTNER TAKES HELM

Philip Jeyaretnam, SC succeeds Helen Yeo as Managing Partner of Rodyk & Davidson Change comes in time for Firm's 150th Anniversary celebrations in 2011

Rodyk & Davidson, Singapore's oldest law practice, announced its leadership change as of 1 January 2011.

Managing Partner Helen Yeo, who has served in this role for eight years since she merged HelenYeo & Partners with Rodyk in 2002, will step down at the end of December this year as she will have reached the contractual retirement age of 60 for equity partners in the firm. From next year, in her new role as Senior Consultant, Mrs Yeo will continue to look after valuable key client relationships that she has built for the firm and assist in developing new business.

Mrs Yeo will be succeeded by Mr. Philip Jeyaretnam, Senior Counsel. Mr. Jeyaretnam has worked for more than 18 years with her, from just before the founding of HelenYeo & Partners in 1992. Of her successor, Mrs Yeo says, "Philip has the leadership and vision to take Rodyk to new heights. He has built an impressive track record, including having shaped Rodyk's dispute resolution practice. I had believed in his potential from when he joined me at age 27. He has one of the finest minds in the profession." Mrs Yeo's partners credit her with raising Rodyk's profile significantly, infusing vitality and giving this venerable name a contemporary branding www.rodyk.com

Looking back, Mrs Yeo says, "I have built for Rodyk a strong team of partners, a culture of teamwork and accountability, and a highly efficient back office."

Since its merger with Helen Yeo & Partners, Rodyk has grown to its current strength of more than 150 lawyers and 170 other professionals and staff. Mrs Yeo played a significant role in building Rodyk's leading corporate real estate and banking practices, as well as sharpening its regional focus. Beyond Singapore, the firm has a strong presence in China and Indonesia. Helen Yeo & Partners, the first Singaporean firm to open in Shanghai in 1996, had brought into Rodyk a track record of regional expansion.

Mr. Jeyaretnam says, "Helen's success as Managing Partner has been founded on three principles - setting clear, strategic directions, working round the clock to get the execution right, and nurturing talent. I have been deeply fortunate to have her as a mentor, and I am delighted that she will continue with the firm, for us to continue to benefit from her experience, skills and excellent judgment."

"The firm is well-placed to build on Helen's success, with many talented and experienced lawyers, and a sterling reputation for quality work. Rodyk will continue to strengthen and deepen our talent pool, in order to serve clients fully and effectively. We will also leverage on our regional strengths," he adds.

The leadership succession comes at a significant time in its history: Rodyk celebrates its 150th year in 2011. The year-long celebrations will kick off in January 2011 with the launch of a book on Rodyk's 150 years. The book will, among other things, capture Rodyk's origins in the 1860s with Carr Woods, (who also founded The Straits Times), Bernard Rodyk and James Guthrie Davidson, and Rodyk's contribution to the Singapore success story.

Mr. Jeyaretnam says, "Rodyk will take the opportunity of our 150th anniversary not only to thank our clients and associates, but to also acknowledge our role in the legal profession's contribution to Singapore's progress. As we celebrate this important milestone, we will continue serving the business community here and regionally, with a first-rate team of lawyers, including Helen in her new capacity as Senior Consultant."

For additional information visit www.rodyk.com

WILSON SONSINI NAMES NINE NEW PARTNERS

PALO ALTO, CA (December 13, 2010) - Wilson Sonsini Goodrich & Rosati, the premier provider of legal services to technology, life sciences, and growth enterprises worldwide, today announced that the firm has elected nine new partners from its attorney ranks. The promotions will go into effect on February 1, 2011.

"Our new partners are exceptional attorneys who exemplify the highest standards of client service, possess outstanding leadership skills, and will bolster the firm's strength in key areas," said CEO Steve Bochner. "We are fortunate to welcome them to our partner ranks."

The new Wilson Sonsini Goodrich & Rosati partners-elect are:

Miranda Biven, Intellectual Property. Based in Palo Alto, Biven primarily focuses on representing life sciences clients in technology transactions. She received her LL.M. from Harvard Law School in 1999.

Richard Cameron Blake, Corporate & Securities. Based in Palo Alto, Blake specializes in private and public offerings, public company representation, mergers and acquisitions, and corporate governance counseling. He received his J.D. from the Brigham Young University Law School in 1998.

Todd C. Carpenter, Corporate & Securities. Based in Palo Alto, Carpenter concentrates on corporate finance and corporate law and governance, with considerable experience in the areas of mergers and acquisitions and venture capital. He received his J.D. from the George Washington University Law School in 2000.

Richard G. Frenkel, Litigation. Based in Palo Alto, Frenkel specializes in intellectual property litigation, with particular expertise in patent litigation. He received his J.D. from Loyola Law School in 1999.

Brian Keyes, Corporate & Securities. Based in Seattle, Keyes primarily represents companies and venture capital firms in a wide variety of corporate and securities matters. He received his J.D. from the University of Virginia School of Law in 2001.

Kelley M. Kinney, Litigation. Based in Palo Alto, Kinney focuses on securities and commercial litigation, including the defense of publicly traded companies in securities class actions, shareholder derivative suits, SEC investigations, and contested mergers and acquisitions. She received her J.D. from Loyola Law School in 2001.

Denny Kwon, Corporate & Securities. Based in San Francisco, Kwon represents public and private companies, private equity firms, and investment banks in merger and acquisition transactions. He received his J.D. from the New York University School of Law in 1999.

Michael Nordtvedt, Corporate & Securities. Based in Seattle, Nordtvedt concentrates on the representation of public and private technology, life sciences, and medical device companies, as well as investment banks, venture capitalists, and private equity firms. He received his J.D. from Georgetown University Law Center in 2001.

Daniel S. Peal, Corporate & Securities. Based in Washington, D.C., Peale focuses on the corporate representation of technology and other growth companies at all stages of development. He received his J.D. from the University of Pennsylvania Law School in 2001.

For additional information, please visit www.wsgr.com.

CLAYTON UTZ

BILFINGER BERGER A$BILLION SALE OF VALEMUS

Clayton Utz congratulates parties on Valemus sale

Sydney, 22 December 2010: Clayton Utz congratulates long-term client Bilfinger Berger on the announcement yesterday of the A$1 billion sale of its iconic Australian construction business, Valemus.

Continuing the firm's long association with Bilfinger Berger and having worked with the company on the proposed Initial Public Offering of Valemus earlier in the year, Clayton Utz assisted Bilfinger Berger through the entire sale process. Clayton Utz corporate partner Stuart Byrne led the transaction, with partners David Landy and Simon Truskett.

Commenting on the transaction, Stuart Byrne said: "We are very pleased to have been able to assist Bilfinger Berger in the sale of Valemus this calendar year, particularly after the disappointment of the IPO being withdrawn in August due to then-prevailing market conditions.

"Lend Lease clearly identified a number of attractive features in Valemus, including its diversified operations, broad customer base, large-scale engineering and construction platform, and strong senior management team. In many ways the sale process was representative of the way transactions proceeded in 2010 – execution was not straight forward, but opportunities existed for high quality assets such as Valemus if parties were willing to keep their heads down and work things through."

Mr Byrne said dual-track processes can be more involved to manage, requiring experienced advisers, but the market could expect to see more of this activity in 2011 as vendors tested an improved market sentiment which nevertheless remained picky. "We are still a long way from the point that vendors can push any old asset out the door with just a lick of paint and a silky marketing story."

Clayton Utz's appointment on both the earlier IPO process and the eventual sale of Valemus reflects the marketleading reputation of the firm's Equity Capital Markets and Mergers and Acquisitions practices, which have had advisory roles on many of the year's highest-profile transactions.

These include the A$6.7 billion IPO of rail freight company QR National (advising the Joint Lead Managers); the proposed merger of the Singapore Stock Exchange and Australian Stock Exchange (advising SGX); AMP Limited's bid to acquire AXA Asia Pacific Holdings Limited's Australian and New Zealand businesses (advising AMP Limited), and; Origin Energy's successful bid to acquire Country Energy and Integral Energy as well as gentrader rights to the Eraring power station.

For additional information visit www.claytonutz.com

FRASER MILNER CASGRAIN

ADVISES ON CA$226.5MILLION ACQUISITION BORALEX POWER INCOME FUND

Boralex Inc. Acquires Boralex Power Income Fund for $226.5M

On November 1, 2010, Boralex Inc. ("Boralex") completed its acquisition of Boralex Power Income Fund (the "Fund").

Unitholders of the Fund tendered more than 73% of the outstanding trust units of the Fund into the tender offer of a wholly-owned subsidiary of Boralex in consideration for, at the election of each unitholder, (a) $5.00 in cash or (b) 0.05 of a $100 principal amount of 6.75% convertible unsecured subordinated debentures of Boralex (the "Debentures"), for each trust unit of the Fund. Subsequently, the Fund and an indirect wholly owned subsidiary of Boralex effected a business combination under Québec law and the Fund became an indirect wholly owned subsidiary of Boralex. The transaction valued the Fund at approximately $226.5 million. Boralex issued $135 million aggregate principal amount of Debentures as part of the consideration for the trust units of the Fund and the cash portion of the consideration was funded from the issuance of $95 million aggregate principal amount of Debentures on a bought-deal basis. The transaction was unanimously approved by the board of directors of Boralex and board of trustees of the Fund, with the non-independent trustees of the Fund abstaining from voting thereon. BMO Capital Markets was retained by the Fund in order to deliver a formal valuation of the Fund's units and the Debentures.

Boralex is a major independent power producer whose core business is the development and operation of power stations that generate renewable energy.

Boralex was represented internally by Sylvain Aird, Vice President, Legal Affairs and Corporate Secretary, and by Fraser Milner Casgrain LLP with a team comprising Charles Spector, Guy Paul Allard, Giancarlo Salvo, Scott Rozansky , John Papagiannis (corporate/securities); Laurent Nahmiash (litigation); Susan Paul and Maxime Cloutier (competition); and Richard Gauthier (tax).

For additional information visit www.fmc-law.com

CAREY

REPRESENTS ATACAMA MINERS' INTELLECTUAL PROPERTY RIGHTS

Santiago

The 33 miners trapped under earth in the Chilean Atacama desert between August 5 and October 13, 2010, signed an agreement with Carey y Cía. and Remberto Valdés Abogados y Consultores, for the protection, licensing and sale of their intellectual property rights over the experience they lived in the depth of the San José mine.

The agreement includes the protection, licensing and sale either in Chile or abroad of their intellectual property rights over their life story, image and other rights.

With this aim a closed corporation has been formed, to which the 33 miners transferred all the rights arising from their life experience in the San José mine. The ownership of the corporation is divided in equal parts among the 33.

Another corporation is being formed to act as an agent in the sale of the intellectual property right of the miners. This corporation is open to local and foreign investor interested in investing in this project.

For additional information visit www.carey.cl

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 NOUEL

ADVISES CARLSBERG GROUP ON FURTHER ASIA EXPANSION

11 January 2011

Gide Loyrette Nouel (GLN) has advised the Carlsberg Group (Carlsberg) on its acquisition of an additional shareholding in Chongqing Brewery Co Ltd (CBC), a Chinese company listed on the Shanghai Stock Exchange. The acquisition takes Carlsberg's stake from 17.46% to 29.71%, making it the largest shareholder.

The purchase price for the 12.25% stake in CBC was RMB 40.22 per share or approximately RMB 2.385 billion (approximately USD 349 million) in total. The transaction has gone through all the necessary steps and received all the required approvals.

CBC operates 16 breweries in Chongqing and the surrounding provinces of Sichuan, Hunan, Anhui and Zhejiang. In 2009, CBC's Chinese beer volumes were approximately 10m hl. The Shancheng brand family, which is largely focused in the mainstream market segment, accounts for the majority of CBC's volumes. The Shancheng brand has a long-standing regional heritage and has been accorded the "China Famous Brand" status by the Chinese Government.

The GLN team, led by partner Warren Hua with assistance from senior associate Sun Jin, advised Carlsberg on all aspects of the acquisition including structuring, negotiation, documentation and regulatory formalities.

For further information, please visit our website: www.gide.com.

KING & WOOD

SIGULER GUFF PARTICIPATES IN FIRST MAJOR RMB FOF

28 December 2010

The first large-sized RMB FoF at State level of China, Guochuang FoF with the total size of RMB 60 billion was established on the 28th December.

FoF, which is also called fund of funds, is a special fund whose investment targets are equity investment funds. Guochuang FoF was jointly set up by CDB Capital Co., Ltd., a subsidiary wholly owned by China Development Bank and Suzhou Ventures Group Co., Ltd.

The initial size of Guochuang FoF is RMB 15 billion, which consists of a PE (Private Equity Investment) FoF and a VC (Ventures Capital) FoF.

The PE FoF, named Guochuang Kaiyuan Equity Investment Fund with the initial size of RMB 10 billion, and mainly to be managed by CDB Capital, will invest in the equity investment funds which focus on industry integration, M&A and restructuring. The VC FoF, named Guochuang Yuanhe Ventures Capital Fund with the initial size of RMB 5 billion, and mainly to be managed by Suzhou Ventures Group, will invest in the VC funds whose investment targets are the enterprises at early -stage and growth-stage.

Siguler Guff, an internationally renowned FoF manager, has been invited to participate in managing Guochuang FoF.
Mr. Zhang Yi and Mr. Alan Du of King & Wood acted as the legal counsel to Siguler Guff in the said transaction.

For additional information visit www.kingandwood.com

NAUTADUTILH

ADVISES ENECO ON LONG TERM GAS CONTRACT

27 December 2010 - Eneco has entered into a long-term agreement for the supply of gas with WINGAS, a joint venture of the German company Wintershall and the Russian company Gazprom. The agreement runs up to and including 2030 and involves an annual supply of one billion cubic metres of gas. Negotiations had been going on for two years before the agreement was finally concluded.

Kees-Jan Rameau, a board member of Eneco Holding N.V., stated the following when the agreement was signed. It is unusual to enter into such a long-term obligation on the current natural gas market. However, we are convinced that, with WINGAS as a reliable partner and one of the most important suppliers, our purchase portfolio will be balanced in the future too. And he added the government wishes to make the Netherlands the gas hub of North-West Europe. Thanks to the collaboration with WINGAS, Eneco has a gas supply to support this objective.

The agreement with WINGAS is the third contract Eneco has concluded in four years with various parties to try to ensure its long-term gas requirements. NautaDutilh was involved in the conclusion of all these previous contracts.

Each year, Eneco uses approximately seven billion cubic metres of natural gas to supply its clients and for use in its power plants.

NautaDutilh partner Harm Kerstholt and senior associate Paul Verkleij assisted Eneco in the conclusion of the agreement with WINGAS.

For additional information visit www.nautadutilh.com

PRAC 49th International Conference
May 21—24, 2011

Hosted by

NautaDutilh
Register online at www.prac.org

HOGAN LOVELLS

ADVISES GOVT OF MEXICO IN PROCUREMENT OF ONE BILLION DOLLAR SATELLITE SYSTEM

NEW YORK, 21 December 2010

Hogan Lovells has represented the Government of Mexico in its recently-announced $1 billion contract with Boeing to deliver an end-to-end satellite communications system. The system, known as MEXSAT, will provide secure communications for Mexico's national security needs, as well as enhanced coverage for the country's civil telecommunications. Corporate lawyers Steven Kaufman in Washington, D.C. and Randy Segal in Northern Virginia led the Hogan Lovells team representing Mexico in the contract.

The Government of Mexico has described the contract as the country's most significant investment in telecommunications in 20 years. MEXSAT will provide communications to even Mexico's most isolated populations, allowing the government to quickly and broadly disseminate vital information such as warnings about natural disasters. All of Mexico will be connected to e-education, e-health and e-government services by telephone and Internet. At the same time, emergency and military workers will have a system of communication available that is not dependent on terrestrial infrastructure and susceptible to damage from natural disasters.

MEXSAT will consist of three satellites, two ground sites, associated network operations systems and reference user terminals. Under the contract, Boeing will deliver a complete turnkey satellite system and also will develop two ground sites in Mexico with advanced beam-forming flexibility to direct mobile user spot beams to government agencies operating in Mexico and its patrimonial seas, including the Pacific Ocean and Gulf of Mexico. Orbital Sciences Corporation will provide the complete Fixed Satellite Services (FSS) segment of the MEXSAT satellite system.

For additional information visit www.hoganlovells.com

TOZZINIFREIRE

ASSISTS ANHANGUERA EDUCACIONAL PARTICIPACOES SA

Sao Paulo, 27 December 2010

TozziniFreire assisted Anhanguera Educacional Participações S.A. in the issuance of common shares and implementation of a public offering of such common shares. The deal was executed on December 23rd and announced on December 27th. The status of the deal is completed and its value is R$844.10 million.

The transaction was led by Banco Itaú BBA S.A., with the offer of 23 million common shares in the global amount of R$ 844.10 million.

The underwriters of the transaction were Banco Itaú BBA S.A., Banco Santander (Brazil) S.A., Banco Merrill Lynch de Investimentos S.A., Banco BTG Pactual S.A. and Banco de Investimentos Credit Suisse (Brasil) S.A.

About Anhanguera Educacional Participações S.A.
Anhanguera is one of the Brazil's largest private institutions of higher and professional education.

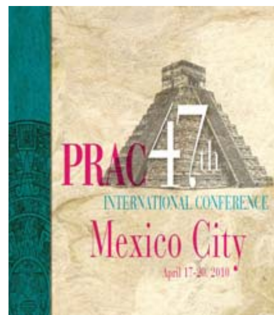
TozziniFreire partner Antonio Felix de Araujo Cintra) and associates Francesco Giuliano Mariana Amaral Guenka, Paulo Roberto Martins de Toledo Leme and Michelle Baldi Ballon Sanches acted in the transaction.

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

PRAC 48th International Conference
Kuala Lumpur Oct 16—19, 2010

SKRINE

PRAC Conference Materials
Available online at www.prac.org

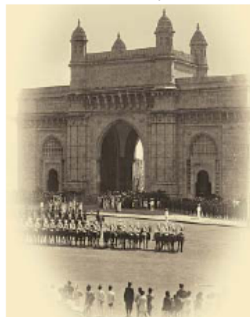


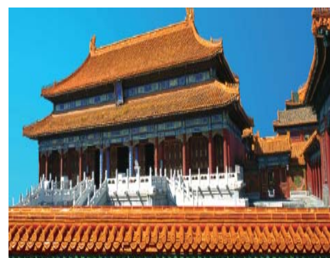
SANTAMARINA Y STETA

Gide Loyrette Nouel

Mulla & Mulla
& Craigie Blunt & Caroe
Advocates, Solicitors and Notaries

Mumbai, India
November 15-18, 2008





SEOUL 2007
October 20-24

LUCE FORWARD
ATTORNEYS AT LAW • FOUNDED 1873

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.

ARGENTINA - Medical Malpractice Insurance in Argentina

The number of claims on the grounds of medical treatment has increased in recent years. In these situations, whether from the focus of the claimant or the health professional involved, it is important to take into account certain important aspects related to the liability of physicians and the coverage that may be taken out for such risks.

Best endeavor obligation

Obligations emerging from professional medical liability in Argentina are generally considered to be best endeavor obligations and therefore the professional cannot guarantee a particular result, but chooses the appropriate technique from amongst the treatments considered correct in accordance with the accepted scientific medical principles. For this reason, the means to reach a certain diagnosis must be stepped up, and it is necessary to do so within an appropriate time frame.

Nevertheless, it should be noted that there are some exceptions to the general principle, such as the performance of plastic surgeons, whose obligations are considered to be result obligations.

Informed consent

In this respect, it is necessary to highlight that Argentinean case law has resolved that health professionals must respect the will of the patient, that is, the consent of patient or their representatives must be required before carrying out a procedure, and must be given in writing for a dangerous operation. As it is the patient who must suffer the consequences and costs of a medical treatment, the professional must give full information on the risks entailed by the proposed treatment, the possible alternatives to the suggested treatment and the relative chances of success.

Thus, under the doctrine of informed consent, the physician may be questioned on circumstances in which the trigger for negligence on his part was not so for much using an inadequate treatment but rather for acting without the consent of the patient—or going beyond the consent given, or not having informed the patient of the risks of a particular treatment.

Burden of proof

In the field of medicine, the principle of discretion should be foremost, as it is down to the physician to decide upon the best course of treatment out of the available treatments that suit the specificities of the case.

For this reason, the burden of proof falls on the claimant alleging the professional's liability, even more so if the party claiming compensation bases its argument on the poor performance of the physician.

In order to attribute professional liability to a physician, the relation of causality between the alleged transgression by the professional and the claimed injury must be proven.

However, and despite the general principle mentioned, there is case law which considers that, in order to determine professional negligence and the causal connection between the conduct of the physician and the injury, the burden of proof falls upon the professional, in view of the fact that the latter is better positioned to provide the means necessary to usefully prove his lack of negligence.

Insurance

In Argentina, medical malpractice insurance is normally Claims Made, on the basis that insurers will provide an indemnity to the insured for the third party claim made within the time limits of the policy, including any extended periods agreed therein.

Although medical malpractice insurance is not compulsory in Argentina, it has spread in recent years as a result of the increase in claims made against health professionals.

For additional information visit www.allendebrea.com

CLAYTON UTZ

21 December 2010

Boards to face spill after remuneration vote

Directors of listed companies may face automatic spill motions under new remuneration rules unveiled by the Government yesterday.

If a listed company's annual remuneration report receives a 25% NO vote two years in a row, the AGM will then have to vote on a motion to spill the entire board. If that motion is passed, the company will convene (within 90 days) a general meeting. Immediately before that general meeting, all board positions will be vacated, forcing directors to renominate for their positions.

This is just one of the significant changes contained in draft legislation which the Government has just released.

Other changes include:

- *Remuneration consultants* - Companies that are a disclosing entity will have to disclose details of the use of remuneration consultants. Remuneration consultants will have to be engaged by non-executive directors, and report to non-executive directors or the remuneration committee (rather than company executives).
- *Restrictions on remuneration report vote* - Key management personnel (KMPs) and their closely related parties will be prohibited from voting on the remuneration report. They will also be prohibited from voting undirected proxies on all remuneration related resolutions. This restriction would also apply to votes on the "Two Strikes" spill motion.
- *Hedging of remuneration* - KMPs and their closely related parties will be prohibited from hedging the KMP's incentive remuneration.
- *No Vacancy rule* - Public companies will need member approval before making a "No Vacancy" declaration. A "No Vacancy" declaration currently allows a board to restrict the number of directors to less than the maximum in the company's constitution.
- *Directed proxies must be voted* - Currently, only the chairman is required to vote directed proxies. Under the draft legislation, all proxy holders will be required to cast all of their directed proxies on all resolutions.
- *Remuneration report in consolidated entity* - Remuneration disclosures currently apply to key management personnel of consolidated and parent entities (and the five most highly remunerated officers, if different). Under the draft Bill, disclosures will be confined to key management personnel of the consolidated entity.

The Government has also released a discussion paper on a proposal to *claw back remuneration* paid to company directors and executives where a company's financial statements are materially misstated.

Details of the Two Strikes Rule

The "first strike" would occur if a remuneration report for a listed company received a NO vote of 25 per cent or more.

The next year's remuneration report would be required to explain whether and how shareholders' concerns had been taken into account.

If that second remuneration report also received a NO vote of 25 per cent or more at the AGM, the Two Strike Rule would automatically apply.

The AGM would be presented with a motion to call a "spill meeting". The notice of the AGM would have to inform members of the possibility of a spill motion and presumably would include a proxy form to cover that eventuality.

If the "spill motion" were passed by a simple majority:

- the company would be required to call the spill meeting within 90 days;
- all board positions would be vacated immediately before the spill meeting;
- the spill meeting would vote on whether to re-appoint the existing board.

This requirement would be subject to two exceptions:

- there would be no need to hold the spill meeting if the entire board resigned and was replaced before the spill meeting was due to be held;
- the spill motion would not affect managing directors who, under listing rules, continued to hold office indefinitely without being re-elected to the office.

The spill meeting would only vote on whether *existing* directors would remain in office. There would be no opportunity to vote in a different board. If the meeting did not re-elect at least two directors, the draft Bill says that the two directors with the highest votes would be elected. This ensures that the company retains the minimum of three directors required by the Corporations Act (the managing director and two non-executive directors).

Existing directors who were re-elected at the spill meeting would effectively be deemed to have continued in office as though the spill had never happened: in other words, their existing terms of office would be unchanged.

Comment

The Two Strikes proposal appears to be aimed more at forcing directors to assuage shareholders' complaints about remuneration than turfing them out of office.

That is, presumably, why the trigger for the "spill motion" is a mere 25% vote against the remuneration report, while the spill motion itself requires a 50% vote. In most (if not all) cases, the rejection of the spill motion would be obvious before the vote was even taken (where the vote to reject the remuneration report was less than 50%). Nevertheless, the disruption and adverse publicity caused by even having to hold a spill vote would encourage boards to try to avoid the 25% NO trigger.

Perversely, it is not inconceivable that the Two Strikes rule will end up reducing the number of votes against remuneration reports. Institutional investors who may be tempted to send a shot across a board's bows by casting a non-binding vote against the remuneration report may not be so eager if the outcome is a spill motion which could adversely impact on the company's market price.

What happens now?

The draft Bill is stated to begin on 1 July 2011. However, there would effectively be a one year transition period for the Two Strikes Rule, because it will only apply where *both* remuneration votes have taken place after 1 July 2011.

In the meantime, the Government is taking submissions on the draft Bill until 20 January.

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

TOZZINIFREIRE
A D V O G A D O S

REMEDIES IN THE BRAZILIAN ANTITRUST EXPERIENCE: ISSUES IN STRUCTURE AND INCENTIVES

Marcelo Calliari
Joana Temudo Cianfarani
Partners in the Antitrust Practice Group at TozziniFreire Advogados
mcalliari@tozzinifreire.com.br
jcianfarani@tozzinifreire.com.br

Introduction

The Brazilian merger control system is peculiarly complex, involving up to five different authorities in the review of every single case. This convoluted system, as well as the structure of the decision-making body itself, have a direct and – this paper will argue – negative impact on the outcome of the analysis of complex transactions, making the negotiation of remedies cumbersome and inefficient. These circumstances limit the opportunities and the incentives for merging parties to take the initiative to come forward and propose alternatives which could improve the quality of the intervention by the authorities. It is true that the authorities have made significant improvements in the way remedies are determined, within the constraints of the current law. However, the structural limitations of the system impose restrictions which must be taken into account by parties when planning a deal that is likely to raise competition concerns in Brazil.

This paper proposes first to briefly describe what that Brazilian system is like in its current format, explaining the roles and responsibilities of the different agencies involved. Then, it will go over some specific cases, to provide a brief overview of the kinds of transactions that have led to the imposition of remedies and what kinds of remedies have been preferred and adopted by the Brazilian authorities. Finally, it will conclude with an analysis of the incentives and disincentives for the negotiation of remedies provided by the merger control system previously described.

.. to read the entire article and / or download the entire article, visit
www.prac.org/newsletters/Tozzini_2011_Remedies.pdf

Focus On

Competition | Antitrust

DECEMBER 2010

1 Visa and MasterCard Rules Challenged by the Competition Bureau

2 Contact Us

Visa and MasterCard Rules Challenged by the Competition Bureau

By Barry Zalmanowitz, Q.C., Sandra Walker and Jenelle Matsalla

On Wednesday, December 15, 2010, the Competition Bureau announced that it filed an application with the Competition Tribunal for a remedial order prohibiting Visa and MasterCard from enforcing or continuing to impose their allegedly restrictive and anti-competitive terms on merchants accepting their credit cards.

According to the Bureau's filing with the Competition Tribunal, the terms at issue dictate that when a merchant accepts one of Visa or MasterCard's credit cards, the merchant must accept all credit cards offered by that company, even if the card imposes considerable costs on the merchant (e.g. premium cards). Further, the terms prohibit merchants from encouraging consumers to consider lower cost payment options like cash or debit and from applying a surcharge to the purchase price for customers who choose to use high cost cards.

The Bureau's application is brought under the price maintenance provision of the *Competition Act*. The pricing provisions in the *Competition Act* were amended in March, 2009, with the new civil price maintenance provision replacing the former criminal price maintenance offence. This application is the first brought by the Bureau under the amended price maintenance provision.

The price maintenance provision applies to any person: (i) whose business involves supplying or producing a product, (ii) extends credit by way of credit cards or whose business relates to credit cards, or (iii) who has the rights and privileges conferred by intellectual property (all simply termed "supplier"). Resale price maintenance

© 2010 Fraser Milner Casgrain LLP

arises where a supplier, by means of a threat, promise or agreement, influences upward or discourages the reduction of the price at which the person's customer supplies or offers to supply a product. In order for the Bureau to successfully challenge Visa and MasterCard, an adverse effect on competition must also be demonstrated.

The Bureau claims that the rules imposed on merchants by these credit card companies have upwardly influenced or discouraged reduction of the prices paid by merchants for credit card network services on their networks, resulting in increased costs for merchants, who in turn pass the costs along to customers by raising the prices of consumer goods.

The remedies available under the former criminal price maintenance provision included fines, imprisonment and private damage lawsuits. But while the new civil price maintenance provision has language similar to the former criminal prohibition, the only remedy available under this new provision for the type of conduct allegedly engaged in by Visa and MasterCard is an order made by the Competition Tribunal prohibiting the conduct where it adversely affects competition in a market.

The Bureau's decision to bring the application against Visa and MasterCard under the price maintenance provision of the *Competition Act* is interesting.   The sole remedy available for resale price maintenance is more limited than the remedies available for abuse of dominance. Under the abuse of dominance provision, in addition or in the alternative to the Tribunal issuing an order prohibiting the party from engaging further in the anti-competitive conduct, the Tribunal has the authority to issue an order directing the parties against whom the order is sought to overcome the effects of the anti-competitive conduct, as well as to impose administrative monetary penalties of up to $10 million for a first order where there has been a contravention of the provisions.

The Bureau may have decided to advance the application under the price maintenance provision rather than the abuse of dominance provision for a number of reasons. Although the companies appear to fulfill the dominance requirement under the abuse of dominance provisions at a glance (as Visa and MasterCard collectively processed over 90% of all consumer credit card transactions in Canada in 2009, according to the Bureau's application), the companies may not actually be jointly dominant. Further, the Bureau may have reasoned that it would be more straightforward to demonstrate to the Competition Tribunal that the conduct of the credit card companies has had, is having or is likely to have an adverse effect on competition in a market, rather than that the conduct is likely having the effect of preventing or lessening competition substantially in a market (as required by the abuse of dominance provision). Thus, there is a greater likelihood that the Bureau will be able to prevent the continuation of the alleged anti-competitive conduct under the price maintenance provision.

This application follows a similar challenge brought by the Bureau in early 2010 against the rules of the Canadian Real Estate Association ("CREA") restricting the use by Canadian property sellers of the multiple listing service ("MLS"). While the CREA case was settled in September, it indicates a trend by the Bureau this year in choosing to combat anti-competitive effects of networks on various markets in Canada.

Contact Us

For further information, please contact a member of our National Competition|Antitrust Group.

December 16, 2010

Class actions for construction defects

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Carey y Cía. contact.

Oscar Aitken
Partner
+56 2 928 22 23
oaitken@carey.cl

Juan Pablo Stitchkin
Associate
+56 2 928 22 23
jpstitchkin@carey.cl

This memorandum is provided by Carey y Cía. Ltda. for educational and informational purposes only and is not intended and should not be construed as legal advice.

Carey y Cía. Ltda.
Isidora Goyenechea 2800, Floor 43
Las Condes, Santiago, Chile.
www.carey.cl

The earthquake that struck Chile on February 27 2010 brought, as an additional consequence, a complete review of the legal framework that regulates construction and real estate development, not only regarding its technical standards but in connection with the liabilities of the persons and entities who participate in this market.

As a result of the above, on November 23th 2010 the law number 20.433 was published, which modifies the General Construction and Urbanism Act ("Ley General de Urbanismo y Construcción") making applicable class action procedures in case of error or defects in construction, procedures which so far where strictly reserved to claims under the Consumer Protection Act . This law presents some particularities over the Consumer Protection Act by allowing the award of damages for pain and suffering, a matter which is not allowed under de Consumer Protection Act.

In order to present a class action for construction defects the law requires that all properties involved where built under the same construction permit, and further requires a minimum of 6 affected parties, this is radically less than the 50 affected consumers required under Consumer Protection Act.

Finally, the fact that the property acquisition contracts may include arbitration clauses shall not be an impediment to class actions since the new law specifically provides that arbitration clauses will have no effect from the moment of the filing of the class action in court.

Likewise, all previously initiated procedures shall be accumulated to the class action suit unless they are in the procedural stage of awaiting final ruling ("citación para oir sentencia").

The new law is applicable to the contracts executed as of the date of its publication.

CBRC New Regulations on Credit Assets Transfer and Repayment Mechanism of Mid-long Term Loan | December 2010

1. Credit Assets Transfer

In order to regulate the credit assets transfer business of the banking financial institutions, following the *Notice on Issues Concerning Regulating the Credit Assets Transfer and the Wealth Management Based on Credit Assets Business* (《关于规范信贷资产转让及信贷资产类理财业务有关事项的通知》, "**2009 Notice**") issued on December 15, 2009, China Banking Regulatory Commission ("**CBRC**") issued the *Notice on Further Regulating the Credit Assets Transfer Business of the Banking Financial Institutions*" (《关于进一步规范银行业金融机构信贷资产转让业务的通知》, "**2010 Notice**") on December 3, 2010. Compared to 2009 Notice, 2010 Notice not only inherited some principles of 2009 Notice, but also set out some new principles and stricter regulatory requirements on the credit assets transfer business of the banking financial institutions.

2010 Notice clearly provided three principles for credit assets transfer business, namely the principle of truthfulness, the principle of integrity and the principle of clean transfer. The main points of these three principles are as follows:

(1) the principle of truthfulness

2010 Notice emphasizes the principle of truthfulness again, under which the banking financial institutions shall not arrange any express or implied repurchase clause in credit assets transfer transaction, or take any measures, such as entering into separate repurchase agreement or spot buy-out plus forward repurchase, for evasion of administration.

(2) the principle of integrity

The principle of integrity is newly adopted in 2010 Notice, according to which the transferor of the credit assets shall not transfer partial credit assets, namely, it shall not: (a) separate the outstanding principal and the interest accrued thereon; (b) make pro rata separation of outstanding principal or the interest accrued thereon; (c) make pro rata separation of the outstanding principal and the interest accrued thereon as a whole; (d) make separation of the outstanding principal or the interest accrued thereon by term of credit facility.

(3) the principle of clean transfer

The principle of clean transfer is another new requirement created by 2010 Notice, which mainly covers:

(a) The borrower's prior consent is required for the credit assets transfer.

2010 Notice prohibits the transferor from transferring the credit assets without the consent of the borrower, unless otherwise provided in the relevant loan agreement. It is much stricter than the general contract transfer principle set forth in the PRC Contract Law.

(b) A new agreement between the transferee and the borrower shall be entered into for the purpose of credit assets transfer.

2010 Notice requires a separate agreement being reached between the transferee and the borrower to confirm their rights and obligations under the transferred credit assets. Such requirement may cause operational difficulties to the banking financial institutions.

(c) The guarantor's prior consent in respect of the transferred credit assets shall be obtained.

2010 Notice prohibits the transferor from transferring the credit assets without the guarantor's consent. If the guarantor consents the transfer of the credit assets, the guarantor shall continue to be liable to the transferee under the relevant guarantee, otherwise the transferor shall negotiate with the borrower to replace the guarantor or provide new security for safety of the transferred credit assets. Such requirement is stricter than that set out in the Security Law and its judicial interpretation.

(d) The relevant procedures for the security interest change shall be completed.

Following the 2009 Notice, the 2010 Notice reiterates that the banking financial institution shall, upon the completion of the credit assets transfer, complete the registration procedures associated with the transfer of security interest or transfer the possession and delivery of the pledged assets to ensure that the transferee may lawfully and effectively enjoy the benefits and interests under relevant collateral. Such requirement may cause operational difficulties to the banking financial institutions.

© 2009 **King & Wood**. All Rights Reserved.

(4) Miscellaneous

2010 Notice also sets forth specific rules for transfer of syndicate loan, under which the syndicate members have the preemptive right to accept the transfer of any specific syndicate member's participation. Only when no syndicated member wishes to accept such transfer, with the consent of all the remaining syndicate members, could such participation be transferred to a banking financial institution outside the syndication.

In additional, 2010 Notice clearly requires the banking financial institutions to strictly comply with all the regulations on the credit assets transfer and the banking-trust cooperation in wealth management business, and prohibits the banking financial institutions from using wealth management funds to directly purchase credit assets.

In all, the promulgation of 2010 Notice shows that CBRC continues enhancing its supervision on the credit assets transfer of the banking financial institutions and tries to eliminate the scarcity of the laws and regulations under which the banking financial institutions increases their false credit and amends their financial data via transferring their credit assets. However, some provisions of 2010 Notice may to some extent affect the current market practices, and is worthy of attention.

2. Repayment Schedule of Mid-long Term Loan

To well manage the risks of mid-long term loan (excluding individual loans) including local government financing platform, CBRC issued the *Notice on Regulating the Mid-long Term Loan Repayment Schedule* (Yin Jian Fa [2010] 103, "**Notice**") on December 6, 2010. The main contents of the Notice are as follows:

(1) One installment repayment is not allowed for the mid-long term loan. Bank is required to reasonably determine the repayment schedule taking into consideration of comprehensive factors including but not limited to the anticipated cash follow and revenue of the project, and at least two installments repayment per annum of principal shall be arranged. Quarterly repayment is encouraged.

(2) The interest rate applicable to prepayment shall be that applicable for the actual term of use of the prepaid loans.

(3) In principle, no indulgence of the project construction period extension or project budget excess is allowed. Banks are prohibited from making use of the grace period to extend the agreed loan tenor.

Amendments Regarding Regulations on Derivative Transactions

Tuesday, 04 January 2011 00:00

NEWS BRIGARD & URRUTIA

Forex, Derivatives and Structured Finance
News Flash Number: 104

Amendments Regarding Regulations on Derivative Transactions

On December 28th, 2010, the Colombian Central Bank issued Regulation 37 to make certain amendments to Regulation DODM-144 of September 19th, 2008 in connection with derivative transactions. Please be informed that these regulations were issued to complement and harmonize financial and foreign exchange regulations applicable to the derivative transactions.

Hereinafter, we present the most relevant aspects of Regulation 37:

1. From a foreign exchange perspective, netting provisions may now be enforced at any time for derivative transactions entered into with the same counterparty, including the ability to set off collateral granted in connection with such derivative transactions, if so permitted pursuant to the relevant master agreement.

   Consequently, provisions such as Netting and Multiple Transaction Payment Netting under the ISDA Master Agreement and the Local Master Agreement are now enforceable under applicable foreign exchange regulations.

2. Additionally, provisions such as Early Termination, Close-Out Netting and Set-Off under the ISDA Master Agreement and the Local Master Agreement are now enforceable in the case of Termination Events and Events of Default. Furthermore, secured parties will from now on be permitted to liquidate cash and securities granted as collateral to ensure payment of any pending amounts as part of the Close-Out Netting provisions.

3. Netting and set-off of payments derived from the application of Recouponing provisions are now also permitted from a foreign exchange perspective.

4. Finally, Regulation 37 establishes additional requirements regarding payment with respect to and registration of derivable and non-deliverable derivatives with the Colombian Central Bank.

For further information, please contact:

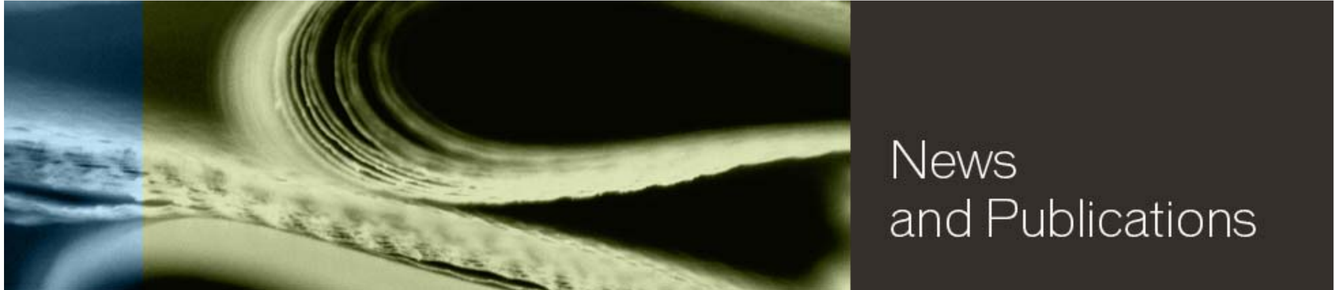
Carlos Fradique-Méndez cfradique@bu.com.co
Ana María Rodríguez arodriguez@bu.com.co
Carlos Kure Cantillo ckure@bu.com.co

Calle 70A No. 4 - 41
Bogotá - Colombia
Tel: (571) 346 20 11
Fax: (571) 310 06 09 - (571) 310 05 86
servicioalcliente@bu.com.co

BRIGARD & URRUTIA

Brigard & Urrutia. Copyright © 2010

ABNR
COUNSELLORS AT LAW



NEWS DETAIL

20/12/2010

BI REGULATION ON RUPIAH AND FOREIGN CURRENCY RESERVE REQUIREMENTS

Bank Indonesia issued, on 4 October 2010, Regulation No. 12/19/PBI/2010 regarding Rupiah and Foreign Currency Statutory Reserve Requirements (Giro Wajib Minimum or GWM\') for Commercial Banks ("Regulation").

In the Regulation's preamble, Bank Indonesia explains its rationale behind the issue of the Regulation, which could be summed up as: (i) inflation pressure and liquidity excess which if not controlled may cause a rise in the inflation; and (ii) the need to maintain monetary stability as well as the financial sector's stability by effectively managing the liquidity excess.

The required statutory reserve (or GWM as it is best known) may be made in Rupiah and in foreign currencies if the bank is a foreign exchange bank. GWBs in Rupiah comprise Primary Reserves, Secondary Reserves, and Loan to Debt Ratio (\'LDR\') Reserves.

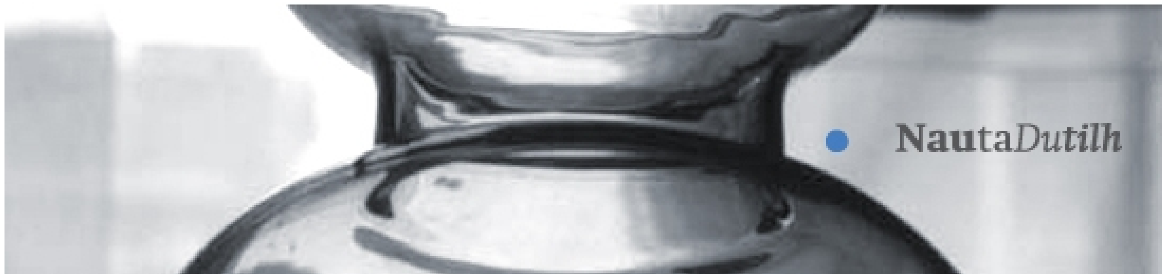
The primary and secondary reserves are set as 10,5% of the banks' Third Party Fund whereas foreign currency exchange reserves are set as 1% of the banks' foreign exchange Third Party Fund. For the LDR Reserves, the Regulation stipulates a separate formula. The stipulated percentages may be changed by Bank Indonesia from time to time. Chapter IV of the Regulations contains technical details regarding GWM calculations.

Commercial banks must maintain the required GWMs on a daily basis, and must submit periodical reports to Bank Indonesia. For the purposes of their GWMs, the banks must open an account with Bank Indonesia. Bank Indonesia will pay interest on a certain proportion of the GWM amount. Chapter VII of the Regulation regulates the sanctions for the banks' failure in fulfilling the obligations set forth in the Regulation.

The Regulation revokes the earlier regulation on the same subject matter, being Bank Indonesia Regulation No. 10/19/PBI/2008 (as amended), and will come into force on 1 November 2010. (by: Hamud M. Balfas).

© ABNR 2008

Newsflash Intellectual Property



Dissolution of the Netherlands Antilles **12 January 2011**

This newsletter is sent from our Amsterdam office

Netherlands Antilles ceased to exist. Action required before October this year to maintain trademark rights in Dutch oversees territory. NautaDutilh fully authorized to file confirmative applications for the Caribbean Netherlands.

The end of the Netherlands Antilles
As a result of a state reorganization per 10 October 2010, the Netherlands Antilles have ceased to exist. Bonaire, St. Eustatius and Saba are now municipalities of the Netherlands and are referred to as the BES Islands. The two other islands, Curaçao and St. Maarten, have become countries within the Kingdom of the Netherlands.

Separate TM registration required for BES Islands
Although the BES Islands are part of the Netherlands, trademark protection for these islands is not covered by a Benelux or CTM registration. The applicable trademark law in the BES Islands is the Trademarks Act BES (TAB) which is largely the same as the current Netherlands Antilles legislation. However, there is no provision for examination on absolute grounds.

NautaDutilh authorized representative for BES Islands
The Benelux Trademarks Office has been appointed to handle the trademark applications and registrations for the BES Islands. NautaDutilh is fully authorized to act as a trademark agent for the Caribbean Netherlands and we can manage your BES Islands portfolio directly from our Amsterdam office.

Confirmative application required before 10 October 2011
In order to maintain your existing national Netherlands Antilles trademark rights for the BES Islands, it will be necessary to file a confirmative application before 10 October 2011. For maintaining your national rights in Curaçao and St. Maarten, there is still uncertainty what steps are required. It is expected that these countries will install a transitional system similar to the BES Islands. We will keep you updated on further developments in this respect.

International registrations changed automatically
International registrations designating the Netherlands Antilles (registrations with country code AN) are treated differently. They will be automatically changed by WIPO to cover the new territories, without the need for further action. At present WIPO is working on subdividing the AN trademarks. The Caribbean Netherlands' country code will be BQ. Curaçao will be CW and St. Maarten SX. New international registrations must specify for which part of the former Netherlands Antilles the protection is required.

Office expected to be up and running by March 2011
Meanwhile, the Benelux Office has started to accept the first applications (approximately 70 until now), most of which are confirmative applications. The Office is building a database and installing an electronic workflow system, which should result in the first official publication around March 2011. Applications filed until then will be processed but obtaining a certificate of registration is not yet possible. Also it is not yet possible to conduct a trademark search through the Office database.

Confirmative applications can be filed
If your trademark portfolio in the Netherlands Antilles is handled by NautaDutilh, you have already received most of the above information early October last year. You can instruct us now to:

1. File a confirmative application in order to safeguard the BES Islands part of your existing Netherlands Antilles rights. An existing registration in the Netherlands Antilles has to be confirmed before October 10, 2011 to continue to cover the BES Islands. Please provide us with the details of the existing Netherland Antilles registration (if not available we can obtain a certified copy for you). A renewal can be done simultaneously. The costs for preparing and filing the confirmative application amount to Euro: 275,-

2. File a new application to cover the BES Islands. One application will cover the Caribbean Netherlands, consisting of the three islands. The costs for preparing and filing an application according to the standard classification in 1 up to 3 classes amount to Euro: 675,-

3. Perform any other prosecution work related to the BES Islands. Please ask for our schedule of fees.

Contact

For more information please contact Boudewijn van Vondelen (T. +31 20 71 71 694).

Privacy / General conditions / Disclaimer

This publication is intended to highlight certain issues. It is not intended to be comprehensive or to provide legal advice. If you would like to unsubscribe please use the unsubscribe option on the newsletter website. You can also send an e-mail to unsubscribe@newsletter-nautadutilh.com. Please make sure that you put the word 'unsubscribe' in the subject field of your e-mail.

Overseas Investment

17 Dec 2010

New Directives for Overseas Investment in New Zealand Farms

The Government released draft regulations and a Ministerial directive letter in relation to overseas investment in New Zealand farms on 9 December 2010. The regulations and directive letter are expected to come into effect on 13 January 2011.

The changes were signalled by the Minister of Finance the Hon Bill English in September this year. The changes are designed to strike an "appropriate balance" between providing clarity and certainty for potential investors while recognising the "genuine public concerns around overseas investment in our productive land".

In this FYI, we consider the following questions.

- What concerns does the Government hope to address with the new regulations and directive letter?
- What is the new 'economic interests' factor in the regulations?
- What is the new 'mitigating' factor in the regulations?
- What specific directions has the Minister given in the directive letter in relation to these new factors?
- What does all this mean for overseas investors looking to invest in New Zealand farms?

What concerns does the Government hope to address with the new regulations and directIve letter?

The directive letter explains how to interpret and apply the new regulations and identifies the Government's concerns relating to:

- overseas investment in vertically integrated firms which involve production, processing and distribution of products from the land-based primary sector on a large scale, which may reduce returns to New Zealand; and

- aggregation of farm land by overseas investors which may not be beneficial to New Zealand's economic interests.

To address these concerns, the regulations introduce two new factors to be considered by Ministers when assessing applications by overseas investors for consent to invest in sensitive New Zealand land - the '**economic interests factor**' and the '**mitigating factor**'. These factors will now form part of the wider consideration of the likely "benefit to New Zealand" which must usually be shown in order to obtain consent.

The directive letter explains the Government's policy approach to overseas investment in particular sensitive New Zealand land and explains the relative importance of the 'economic interests' factor and 'mitigating' factor, particularly in relation to investments in large areas of farm land.

What is the new 'economic interests' factor in the regulations?

The 'economic interests' factor allows Ministers to consider whether New Zealand's economic interests are adequately promoted and safeguarded.

An overseas investor in farm land will be more likely to obtain consent if it can be shown that, as a result of the investment:

- New Zealand will become a more reliable supplier of primary products in the future;
- New Zealand's ability to supply the global economy with a product that forms an important part of New Zealand's export earnings will be less likely to be controlled by a single overseas person or its associates;
- New Zealand's strategic and security interests will be enhanced; and
- New Zealand's key economic capacity will be improved.

What is the new 'mitigating' factor in the regulations?

The 'mitigating' factor enables Ministers to consider whether the new investment provides for New Zealand involvement or oversight in the investment.

This means that the level of involvement of New Zealanders will have in the running of the investment will be scrutinised. All or any of the following will be considered:

- Whether there is or will be a requirement that one or more New Zealanders be a part of the relevant overseas person's governing body (the "relevant overseas person" will usually be the person making the investment);
- Whether the relevant overseas person will be incorporated in New Zealand;
- Whether the relevant overseas person will have their head office or principal place of business in New Zealand;

- Whether the relevant overseas person will be a party to a listing agreement with NZX Limited or any registered exchange that operates a securities market in New Zealand;
- The extent to which New Zealanders will have any partial ownership or controlling stake in the investment; and
- The extent to which ownership or control of the investment is dispersed amongst a number of non-associated overseas persons.

What specific directions has the Minister given in the directive letter in relation to these new factors?

In the directive letter, the Government has directed the OIO to give the 'economic interests' factor and the 'mitigating' factor "high relative importance" when determining whether overseas investment in "large" areas of farmland is likely to benefit New Zealand. In the absence of such a specific direction, the OIO may determine the relative importance to be given to each relevant factor when determining whether an investment will, or is likely to, benefit New Zealand. There are 19 other factors specified in the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005.

The directive letter gives "ten times the average farm size for the relevant farm type" as an indicative guide of what would be considered "large". The OIO is expected to publish data on average farm sizes to assist investors. The Government's recent press release on the new guidelines provides some useful current figures which state that:

- the average dairy farm is 172 ha, so the threshold will be 1,720ha; and
- the average sheep farm is 443ha, so the threshold will be 4,430ha.

What does all this mean for overseas investors looking to invest in New Zealand farms?

Investors are not required to put in place measures, or respond positively, in relation to all aspects of the new factors in order to guarantee consent - there are 19 other factors taken into account when considering an application for consent. However, given the direction from the Minister that these factors are of "high relative importance", failing to adequately address these factors in an application for consent to invest in large farms could seriously jeopardise an investor's chances of obtaining consent.

Only time will tell exactly what the impact of these new guidelines will be. However, we think the following impacts will likely arise in the short term.

- Overseas investors in large farms will need to consider the impact of their investment on New Zealand's economic position.
- There will initially be uncertainty about exactly how these guidelines will be interpreted and applied.
- The mitigating factor adds a new consideration into the mix when determining the optimal investment structure for an overseas investment in farm land. For example, it creates a

bias towards establishing a New Zealand subsidiary, as opposed to, say, a branch of an overseas company.

- All of the above is likely to lead to increased time and cost to obtain OIO consent to invest in large farms in New Zealand.

AUTHORS

Shelley Cave
Partner - Corporate & Commercial
DDI: +64 9 977 5260
Mobile: +64 21 660 090
Email: shelley.cave@simpsongrierson.com

Peter Hinton
Partner - Corporate & Commercial
DDI: +64 9 977 5056
Mobile: +64 21 446 866
Email: peter.hinton@simpsongrierson.com

Don Holborow
Partner - Corporate & Commercial
DDI: +64 4 924 3423
Mobile: +64 29 924 3423
Email: don.holborow@simpsongrierson.com

Michael Pollard
Partner - Corporate & Commercial
DDI: +64 9 977 5432
Mobile: +64 21 400 852
Email: michael.pollard@simpsongrierson.com

Peter Stubbs
Partner - Corporate & Commercial
DDI: +64 9 977 5010
Mobile: +64 21 955 230
Email: peter.stubbs@simpsongrierson.com

Stephen Ward
Partner - Corporate & Commercial
DDI: +64 4 924 3418
Mobile: +64 21 987 056
Email: stephen.ward@simpsongrierson.com

Greg.Allen
Senior Associate - Property & Infrastructure
DDI: +64 9 977 5164
Mobile: +64 21 534 464
Email: gregory.allen@simpsongrierson.com

Craig Nelson
Senior Associate - Corporate & Commercial
DDI: +64 9 977 5185
Mobile: +64 21 918 309
Email: craig.nelson@simpsongrierson.com

理律法律事務所
LEE AND LI
ATTORNEYS-AT-LAW

USING A TRADEMARK TO INDICATE A PLACE OF BUSINESS ON MAPS DOES NOT CONSTITUTE TRADEMARK INFRINGEMENT

◎Ruey-Sen Tsai

It is a common practice to use a trademark to indicate a place of business on a GPS map. However, whether such use without the consent of the trademark owner is deemed trademark use or trademark infringement remains controversial.

As explained in a letter from the Intellectual Property Office, if an electronic map manufacturer's use of a registered trademark on maps is to indicate or describe the position of the trademark owner's place of business, such use describes the goods or service provided by the trademark owner, thus enabling relevant consumers to know the position of the trademark owner's place of business in an area and as such, it should comply with the "fair use" specified under Article 30-1(1) of the Trademark Act, rather than "trademark use" specified under Article 6 of the Trademark Act.

According to Article 6 of the Trademark Act, the use of a trademark is a use of such trademark, for marketing purpose, either on goods, services or other relevant articles or in a two-dimensional graphic form, digital audio and visual form, or by way of electronic media or other media that is enough to enable a relevant consumer to recognize it as a trademark. Therefore, a trademark serves to identify the source of goods or services, and the use of a trademark should cause relevant consumers to recognize it as a sign that identifies the source of certain goods or services. If the purpose or method of using a trademark has to do with describing goods or services and cannot cause relevant consumers to recognize it as a sign that identifies the source of the goods or services, even though the words of the trademark are marked on relevant goods or services, such marking is not deemed trademark use and is not subject to the trademark owner's rights. As stipulated in Article 30-1(1) of the Trademark Act, where any party marks, with *bona fide* intent and fair use, his/her own name or title, or the name, shape, quality, function, place of origin or other descriptions of the goods or services, not as a trademark use, it is not subject to another party's trademark rights.

Copyright © Lee and Li, Attorneys-at-Law, All rights reserved.

VOLUME 7 ISSUE 12 | DECEMBER 2010

INTELLECTUAL PROPERTY REPORT

Articles

U.S. Supreme Court To Consider Federal Circuit's Deliberate Indifference Standard For Induced Infringement

Daniel Tsai

When it comes to the state of mind required to establish induced infringement in patent cases, the United States Court of Appeals for the Federal Circuit has not exactly made up its own mind on a clear standard. In *SEB S.A. v. Montgomery Ward & Co.*, the Federal Circuit introduced a new standard whereby an alleged infringer's deliberately indifferent state of mind can be sufficient to establish induced infringement. 594 F.3d 1360 (Fed Cir. 2010). In response to a petition for writ of *certiorari* and an *amicus curiae* brief on behalf of 26 law professors, the United States Supreme Court decided to take up the appeal in the *SEB* case and consider the Federal Circuit's new standard for the required state of mind to establish inducement.

Case Background

According to U.S. patent law, "whoever without authority makes, uses, offers to sell, or sells any patented invention . . . infringes the patent." 35 U.S.C. 271(a). The U.S. patent law also makes a person liable as an infringer if he or she "actively induces" others to infringe a patent. 35 U.S.C. 271(b). In *SEB*, plaintiff SEB S.A. ("SEB") sued a group of deep fryer manufacturers and retailers, among them Global-Tech Appliances, Inc. ("Global-Tech") and its subsidiary, Pentalpha Enterprises, Ltd. ("Pentalpha"), alleging infringement of Patent No. US 4,995,312 (the "312 Patent") relating to certain features of deep fryers.

During the trial, SEB provided evidence showing that Pentalpha designed its deep fryers by copying SEB's deep fryer design. *Id.* at 1366. Prior to offering its fryers for sale, however, Pentalpha obtained a "right-to-use study," *i.e.*, a freedom-to-operate opinion, from patent counsel, in which patent counsel conducted a search for prior art and analyzed 26 patents uncovered during the search.

Nevertheless, Pentalpha did not inform patent counsel that Pentalpha had copied SEB's deep fryer design and counsel did not uncover SEB's '312 Patent in his search. *Id.* Consequently, the freedom-to-operate opinion ostensibly gave Pentalpha a green light to make and sell its fryers. Although no evidence indicated that Pentalpha had actual knowledge of the existence of SEB's '312 Patent, the jury still found that Pentalpha induced others to infringe SEB's '312 Patent. *Id.* at 1368.

On appeal, the Federal Circuit affirmed the jury's verdict on the claim of induced infringement. *Id.* at 1378. First, the Federal Circuit reiterated the standard set forth in *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293 (Fed. Cir. 2006) (*en banc*), which requires that the plaintiff prove that "the alleged infringer knew or should have known that his action would induce actual infringements," including the requirement that the alleged infringer knew of the patent. *SEB*, 594 F.3d. at 1376. The Federal Circuit proceeded to state that "the standard of deliberate indifference of a known risk" is a form of actual knowledge. *Id.* at 1377.

Consequently, the Federal Circuit reasoned that even though the trial records do not show that Pentalpha had actual knowledge of SEB's '312 Patent, there was adequate evidence to support a conclusion that Pentalpha "deliberately disregarded a known risk that SEB had a protective patent." *Id.* In particular, the Federal Circuit pointed to evidence of Pentalpha's deliberate indifference, showing that Pentalpha failed to inform its patent counsel that Pentalpha copied SEB's fryer and that Pentalpha's president, John Sham, was knowledgeable about the U.S. patent system. The Federal Circuit considered these facts are highly suggestive of Pentalpha's deliberate indifference. *Id.*

Development Of The Law

The new deliberate indifference standard set forth in *SEB* has raised concerns and uncertainty as to the direction the Federal Circuit is heading in this particular area of law. Originally, the claim for inducement was derived from common law. As subsequently codified in the Patent Act of 1952, "[w]hoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. 271(b). The statute, however, does not indicate the culpable state of mind required to establish

inducement. The Federal Circuit has defined the state of mind required to establish inducement in a number of its precedential cases. In *Hewlett-Packard*, the Federal Circuit held that "proof of actual intent to cause the acts which constitute the infringement is a necessary prerequisite to finding active inducement." *Hewlett-Packard Co., v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed Cir. 1990). But the *Hewlett-Packard* panel did not clarify what level of intent qualifies for finding of active inducement.

Subsequently, the Federal Circuit determined that a plaintiff asserting induced infringement has the burden of showing that the accused infringer "knew or should have known that his action would induce actual infringements." *Manville Sales Corp. v. Paramount Systems, Inc.*, 917 F.2d 544, 553 (Fed Cir. 1990). Thus, in *Manville*, the Federal Circuit attempted to clarify the *Hewlett-Packard* general intent standard by promulgating the "knew or should have known" standard.

Fifteen years later, in *MGM Studios Inc., v. Grokster, Ltd.*, the U.S. Supreme Court "borrowed" the theory of inducement from patent cases to find induced infringement in a famous copyright case. 545 U.S. 913, 937 (2005). Thus, in *Grokster*, the Supreme Court indirectly offered some guidance regarding its understanding of the culpable state of mind required to find inducement in patent cases. Specifically, in *Grokster*, the Supreme Court agreed that an affirmative intent is required to prove inducement and that the inducement rule premises liability on "purposeful, culpable expression and conduct." Nevertheless, the Supreme Court stated that "mere knowledge of infringing potential or of actual infringing uses would not be enough" to establish inducement. *Id.* As such, there appeared to be some inconsistency between the Supreme Court's "mere knowledge is not enough" comment in *Grokster* and the Federal Circuit's "knew or should have known" standard set forth in *Manville*.

After the U.S. Supreme Court's *Grokster* decision, the Federal Circuit issued its *en banc* decision in *DSU Medical*, attempting to address apparent conflicts between the various decisions regarding the standard for induced infringement. The *DSU Medical* decision reiterated that the "knew or should have known" standard set forth in *Manville* is the standard for finding culpable state of mind for inducing infringement and emphasized the requirement that the accused infringer have actual knowledge of the patent. *DSU Med.*, 471 F.3d at 1304. In particular, in an effort to reconcile the Supreme Court's "mere knowledge is not enough" comment with its "knew or should have known" standard, the Federal Circuit explained that the "knew or should have known" standard requires evidence showing that an alleged infringer has "knowingly induced infringement, not merely knowingly induced the acts that constitute direct infringement." *Id.* at 1306. Thus, in *DSU Medical*, the Federal Circuit maintained the position that the Supreme Court had effectively endorsed the "knew or should have known" standard. *See id*. Four years after *DSU Medical*, the Federal Circuit further expanded the "knew or should have known" standard of *Manville* by introducing the deliberate indifference standard in the *SEB* case.

The Deliberate Indifference Standard

In the *SEB* decision, the Federal Circuit took an expansive view of the "knew or should have known" standard. In particular, the Federal Circuit set forth its view that deliberate indifference is a form of actual knowledge. Consequently, the *SEB* decision essentially expands the reach of the knowledge-of-the-patent requirement, such that an accused infringer may be found to have induced infringement, even though he had no actual knowledge of the existence of the patent. Moreover, the Federal Circuit commented that the deliberate indifference standard is not necessarily the outer limit of the type of knowledge required to establish inducement. The Federal Circuit noted that a "constructive knowledge with persuasive evidence of disregard for clear patent markings, similar to the constructive notice requirement in §287(a)," may be enough to establish an inducement claim. *SEB*, 594 F.3d at 1378. Therefore, according to Federal Circuit, besides the deliberate indifference standard, there may be various additional ways to impute knowledge without showing actual knowledge.

Conclusion

In *SEB*, the Federal Circuit introduced the deliberate indifference standard in an attempt to prevent an accused infringer from escaping liability by a head-in-the-sand approach of avoiding knowledge of competitors' patents. Although the deliberate indifference standard allows some flexibility for proving an accused infringer's knowledge of a patent, this new standard may introduce additional uncertainty as to what type of behavior constitutes "deliberate indifference."

From the facts of *SEB*, we can glean the lesson that a fact pattern in which an accused infringer fails to inform his patent counsel that he copied a competitor's product, combined with the accused infringer's substantial knowledge of the patent system is enough to prove deliberate indifference. Nevertheless, beyond the facts of *SEB*, the Federal Circuit did not set forth global guidelines regarding the specific kinds of behaviors that may constitute deliberate indifference, and instead based its decision largely on the jury's factual findings. This being so, the deliberate indifference standard, at least initially, has the potential to devolve into an I-know-it-when-I-see-it

case-by-case factual determination.

As long as the deliberate indifference standard is the current state of the law (*i.e.*, pending a Supreme Court opinion that may or may not reject or modify the reasoning of *SEB*), one thing is clear: it is no longer safe, if it ever was, to rely on a deliberate head-in-the-sand strategy when it comes to avoiding inducement. Thus, when obtaining a freedom-to-operate opinion, there may be consequences to withholding from patent counsel any relevant information. In particular, companies evaluating potential infringement allegations against their products may choose to provide information regarding similar products from competitors to counsel for analysis in the freedom-to-operate opinion.

It may be advisable to provide information regarding similar products from competitors to counsel for analysis in the freedom-to-operate opinion. Further, under the more expansive view of inducement, a non-U.S. manufacturer who imports products into the United States may no longer be able to escape liability for inducement by simply avoiding actual knowledge of its U.S. competitors' patents.

The U.S. Supreme Court granted *certiorari* in the *SEB* case on October 12, 2010. In the petition, Appellant-defendants request that the Supreme Court decide whether the deliberate indifference standard introduced by the Federal Circuit Court is consistent with the Supreme Court's *Grokster* opinion, which taught that "purposeful, culpable expression and conduct" to encourage infringement was the standard for inducement of copyright infringement. The Supreme Court's opinion will offer additional clarification regarding the state of mind required to establish claim of inducement. The Supreme Court is likely to hear the *SEB* case this coming winter and issue a decision by the end of June 2011. We will report further developments in this important area of infringement law as they occur.

The materials in this document are made available by Baker Botts L.L.P. for informational purposes only and are not legal advice. The transmission and receipt of information contained in the document do not form or constitute an attorney-client relationship. If these materials are inconsistent with the rules governing attorney communications in a particular jurisdiction, and the materials result in a client contact in such jurisdiction, Baker Botts may be prohibited from assuming representation of the client contact.

Under the rules of certain jurisdictions, this communication may constitute 'Attorney Advertising'.

Abu Dhabi Austin Beijing Dallas Dubai Hong Kong Houston London Moscow New York Palo Alto Riyadh Washington

Copyright © 2010 Baker Botts L.L.P. All rights reserved.

Davis Wright Tremaine LLP

Massive Hospital Settlement Stems from Largely "Technical" Stark Violations

01.14.11

By Dennis S. Diaz, Aleah Yung, and Robert G. Homchick

The recent $30 million False Claims Act settlement in the Detroit Medical Center (DMC) case is the latest settlement entered into by the Department of Justice (DOJ) and a hospital stemming from violations of the Stark Law that were largely "technical" Stark violations.

While the settlement included findings of nontechnical Stark Law violations allegedly of above-market compensation to physicians, it illustrates the real-life risks of making payments under expired physician contracts, or hosting a few dinner meetings with physicians at a cost to the hospital exceeding $359 annually per physician.

DMC was planning to sell its hospitals and outpatient facilities to Vanguard Health Systems, based in Nashville, Tenn., at the end of last year. Prior to the sale, DMC voluntarily disclosed to the government that certain of its financial relationships and contracts with physicians may have violated the law.

The DOJ found that DMC had violated the Stark Law, the FCA, and the Anti-Kickback Statute, "by engaging in improper financial relationships with referring physicians." DMC denied wrongdoing. According to the DOJ, "[m]ost of the relationships at issue in this matter involved office lease agreements and independent contractor relationships that were either inconsistent with fair market value or not memorialized in writing." It has been reported that DMC also furnished tickets for sporting events and meals to several physicians that exceeded the annual monetary limits permitted by the Stark Law, and that some physician contracts were not signed.

The DOJ has taken the position that Stark Law violations can constitute false claims under the False Claims Act (FCA). Applying the FCA substantially raises the stakes for hospitals: Liability for false claims means that a hospital is liable not only for the amount of reimbursement associated with services performed in connection with the referral in violation of the Stark Law, but also up to $11,000 per claim in monetary penalties, and treble damages. The DOJ has refused to concede that minor or "technical" violations of Stark should result in leniency or reduced penalties for hospitals under the FCA.

This and other similar settlements highlight the need for hospitals to have effective procedures in place for physician contracts to prevent (or minimize) so-called "technical" and other violations of the Stark Law. Key areas to monitor and focus attention include: payments without written contracts, unsigned contracts, expired contracts where payments continue, contracts without fair market value validation, lease rental charges and compensation in personal service arrangements not set in advance, and personal service arrangements that do not cross-reference other agreements between the same parties. This may necessitate contract pre-approval and accounts payable hold procedures in order to detect emerging violations. Hospitals also should explore implementing safeguards relating to physician expenditures for entertainment and the like to ensure that annual Stark Law limits are not exceeded.

Disclaimer

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

Hogan Lovells

Hogan Lovells

Public Finance Alert

6 January 2011

See note below about Hogan Lovells.

SEC proposes rules to require registration of "municipal advisors"; municipal advisors defined broadly to potentially include appointed board members of municipal entities and conduit borrowers, employees of conduit borrowers, banks, underwriters, lawyers and others

Summary

On December 20, 2010, the Securities and Exchange Commission (SEC or Commission) voted to propose Rules 15Ba1-1 through 15Ba1-7 (collectively, the Proposed Rules) to, among other things, establish a permanent registration regime with the Commission for municipal advisors and impose certain record-keeping requirements on such advisors. The Proposed Rules, set forth in SEC Release No. 34-63576, are promulgated in accordance with Section 975 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which amended Section 15B of the Securities Exchange Act of 1934 (as amended by the Dodd-Frank Act, the Exchange Act) to require municipal advisors to register with the SEC effective October 1, 2010. On September 1, 2010, the Commission adopted an interim final temporary rule to establish a registration system to allow municipal advisors to satisfy temporarily the requirement that they register with the Commission by October 1, 2010. The interim registration procedures will be replaced by the new procedures established pursuant to the Proposed Rules, as adopted, and all municipal advisors will be required to register anew under the new system.

<u>As discussed below, the definition of the term "municipal advisor" is broad and the implications of qualifying as a "municipal advisor" for purposes of the Exchange Act are significant and will subject persons qualifying</u>

Contacts

For further information about the Proposed Rules, please contact any of the following lawyers in the Hogan Lovells US LLP Public Finance Practice Group:

Helen C. Atkeson
helen.atkeson@hoganlovells.com
303.899.7311

Michel Benitez
michel.benitez@hoganlovells.com
303.899.7365

Nichelle Johnson Billips
nichelle.billips@hoganlovells.com
202.637.2731

John M. Gardner
john.gardner@hoganlovells.com
303.899.7330

Anastasia G. Khokhryakova
anastasia.khokhryakova@hoganlovells.com
303.454.2407

Scott R. Lilienthal
scott.lilienthal@hoganlovells.com
202.637.5849

as municipal advisors to regulation by the Commission and the Municipal Securities Rulemaking Board (the MSRB). For example, the Proposed Rules suggest that an appointed board member of a municipal entity or of a 501 (c)(3) corporation or other conduit borrower that is an "obligated person" may qualify as a "municipal advisor" under certain circumstances. In addition, unlike employees of municipal entities, employees of such "obligated persons" are not excluded from the definition of "municipal advisor." Finally, banks are not specifically excluded on any basis, and professionals such as lawyers and accountants as well as underwriters are excluded on only a limited basis.

What/Who is a municipal advisor?

Generally

The term **"municipal advisor"** is defined in the Exchange Act as a person *(who is not a municipal entity or an employee of a municipal entity)* that:

> (i) provides *advice* to or on behalf of a *municipal entity* or *obligated person* with respect to *municipal financial products* or the issuance of *municipal securities*, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or
>
> (ii) undertakes a solicitation of a municipal entity.

There are a few limited categories of exclusions from this definition; otherwise, all persons taking action as described in (i) or (ii) will be encompassed by this definition. This includes banks, accountants, engineers and underwriters providing "advice" and lawyers not representing the municipal entity or conduit borrower who are deemed to be providing "advice" to the municipal entity or conduit borrower, such as underwriter's counsel, bank counsel, or swap counsel.

For purposes of the definition of a "municipal advisor," the Commission clarifies in the Proposed Rules that the definition of **"municipal entity"** includes, but is not limited to, public pension funds, local government investment pools, and other state and local government entities or funds, as well as participant-directed investment programs or plans such as 529, 403(b), and 457 plans. The Commission has also confirmed in the

$OHWKLD 1 1DQFRR
alethia.nancoo@hoganlovells.com
202.637.6969

David J. Scott
david.scott@hoganlovells.com
303.899.7314

Wanda Whigham
wanda.whigham@hoganlovells.com
305.459.6687

Visit us at www.hoganlovells.com

Proposed Rules that the term **"obligated person"** is consistent with the defined term in Rule 15c2-12 and therefore does not include providers of municipal bond insurance, letters of credit, or other liquidity facilities. **This means that entities acting as conduit borrowers such as private universities, non-profit hospitals and other 501(c)(3) organizations, and private corporations, all of which are obligated persons under Rule 15c2-12, will be impacted by the use of this term in the definition of "municipal advisor."**

The term **"advice"** is not defined in the Proposed Rules or the Exchange Act. As a result, if the meaning of the term "advice" is not clarified by the Commission in the final rules, rules of statutory construction will need to be applied to determine the meaning of the term "advice" for purposes of Section 15B of the Exchange Act.

Employees of a municipal entity excluded, but certain appointed board members of a municipal entity not excluded

Under the Exchange Act, the term "municipal advisor" specifically excludes "employees of a municipal entity." According to the Commission, the exclusion from the definition of a "municipal advisor" for "employees of a municipal entity" should include any person serving as an **elected** member of the governing body of the municipal entity to the extent that person is acting within the scope of his or her role as an elected member of the governing body of the municipal entity. In addition, the Commission states that "employees of a municipal entity" should also include (i) appointed members of a governing body to the extent such appointed members are *ex officio* members of the governing body by virtue of **holding an elective office** and (ii) persons appointed to fill the remainder of the term for an elective office.

Importantly, however, the Commission takes the position that appointed members of a governing body of a municipal entity who are not elected *ex officio* members should be included in the definition of a "municipal advisor." According to the Commission, this interpretation is appropriate because employees and elected members are accountable to the municipal entity for their actions. In addition, the Commission is concerned that appointed members, unlike elected officials and elected *ex officio* members, are not directly accountable for their performance to the citizens of the municipal entity. The Commission states that whether a municipal advisor is compensated for providing

advice should not factor into the determination regarding whether the municipal advisor must register with the Commission.

As mentioned above, the term "advice" is not clarified and could include a board member's participation in a meeting about alternative structures or timing of a bond transaction or execution of a swap or guaranteed investment contract. The term "advice" could possibly be interpreted so broadly that it would encompass action taken by a governing board to approve such a bond transaction or financial product even if there is no further discussion.

The Commission's position is significant because it would require most appointed board members of an authority, public university or other municipal entity who provide advice in connection with a municipal borrowing or financing instrument to register with the SEC, with the implications discussed below. This could have a significant chilling effect on the willingness to serve of the tens of thousands of volunteer board members on whom many municipal entities depend for governance.

Employees and appointed board members of 501(c)(3) corporations and other obligated persons not excluded

The Exchange Act and the Proposed Rules do not exclude from the definition of "municipal advisor" employees or board members of an "obligated person" for purposes of a conduit bond issuance. **Therefore, if the Proposed Rules are adopted in their current form, employees and board members of 501(c)(3) corporations or other obligated persons would qualify as "municipal advisors" subject to the registration requirements of the Proposed Rules if they provide advice to or on behalf of such obligated person with respect to municipal financial products or the issuance of municipal securities.** Since the term "advice" is not defined in the Proposed Rules or in the Exchange Act, it is unclear whether a chief financial officer, or other employee, of an obligated person becomes a municipal advisor subject to the registration requirements of the Proposed Rules simply by performing services with respect to municipal financial products or in connection with the issuance of municipal securities that are part of day to day responsibilities. The applicability of the Proposed Rules to the board members of a 501(c)(3) corporation or other obligated person is also unclear, and it is possible that any action taken by the board in connection with a loan agreement relating to a bond issuance, swaps or other municipal financial products would be considered "advice." As noted above, the

chilling effect on the willingness of volunteer board members to serve on nonprofit boards would be significant under the Proposed Rules.

Banks, underwriters and professionals may be considered "municipal advisors" subject to registration with the commission

Banks are not excluded from the definition of "municipal advisor" and would be required to register under the Proposed Rules if their agreement to purchase bonds, offer investment products, serve as trustee or provide other services are considered by the Commission to be "advice" to a municipal entity. Similarly, while accountants who prepare financial statements or issue comfort letters are excluded, other accountants such as those providing verification reports or revenue forecasts may be subject to the registration requirements of the Proposed Rules. The Commission proposes to exclude lawyers from the definition only when the legal services are "to a client of the attorney that is a municipal entity or obligated person." This limitation could have significant implications for lawyers representing other parties in municipal financing transactions. Finally, the definition of "municipal advisor" does not exclude broker-dealers in connection with actions such as bidding or recommending investments to the extent considered "advice" by the Commission.

Implications of municipal advisor registration with the commission

A municipal advisor required under the Exchange Act to register with the Commission will be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or the rules of the MSRB. **Violations of the rules of the MSRB or the Commission could subject municipal advisors to criminal and civil liability.**

To register with the Commission, a municipal advisor will be required to file with the Commission a form that requires the disclosure of, among other things: (i) personal information and employment history; (ii) information regarding past felony charges or convictions, violations of securities rules and regulations, and civil judicial actions or settlements involving the violation of investment or municipal advisor statutes or regulations; (iii) information regarding consumer complaints or arbitrations regarding investment-related matters; and (iv) information regarding bankruptcy or similar

proceedings in the last ten years, judgments, or denial of any bonds. Such information is to be maintained by the Commission and will be accessible by the public. A municipal advisor will also be required to certify that such municipal advisor and every natural person associated with such advisor has met or will meet within the required timeframes such standards of training, experience, and competence, and such other qualifications, including testing, as are required by the MSRB or the Commission. Municipal advisors will also need to comply with certain recording-keeping requirements required under the Proposed Rules, which, among other things, will require municipal advisors to make and keep current records for at least five years. The Commission has the power to grant or deny the registration of municipal advisors.

In addition, a municipal advisor will be required to appoint certain officials as agents for service of process in states where the advisor maintains its principal office or place of business. The appointment for service of process would allow private parties and the Commission to bring actions against the municipal advisor by delivering the necessary papers to the appointed agent. The agent could also receive service for investigation and administrative proceedings.

Further actions

The MSRB has recently amended certain rules, including Rule G-17 (the "fair dealing" rule), so that they are applicable to municipal advisors. The MSRB has indicated that it will be developing additional rules for municipal advisors in the future. The MSRB expects to adopt a rule governing "pay to play" in a manner comparable to existing Rule G-37 and a rule on gifts and gratuities. The MSRB has also stated that it expects to begin the development of professional qualifications tests and continuing education requirements for municipal advisors in the near future.

Comment period with respect to the proposed rules

The Commission is requesting comments with respect to the Proposed Rules from all members of the public and, in particular, persons who must register as municipal advisors, municipal entities, obligated persons, investors and other regulators. Comments on the Proposed Rules may be submitted within 45 days after publication thereof in the Federal Register. The Proposed Rules were published in the Federal Register on January 6, 2011.

Note
"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 with offices at 555 13th Street, NW, Washington, DC 20004, USA.

Disclaimer
This publication is for information only. It is not intended to create, and receipt of it does not constitute, a lawyer-client relationship.

So that we can send you this email and other marketing material we believe may interest you, we keep your email address and other information supplied by you on a database. The database is accessible by all Hogan Lovells' offices, which includes offices both inside and outside the European Economic Area (EEA). The level of protection for personal data outside the EEA may not be as comprehensive as within the EEA. To stop receiving email communications from us please click here.

The word "partner" is used to refer to a member of Hogan Lovells International LLP or a partner of Hogan Lovells US LLP, or an employee or consultant with equivalent standing and qualifications, and to a partner, member, employee or consultant in any of their affiliated businesses who has equivalent standing. Rankings and quotes from legal directories and other sources may refer to the former firms of Hogan & Hartson LLP and Lovells LLP. Where case studies are included, results achieved do not guarantee similar outcomes for other clients.

New York State Notice: Attorney Advertising.

© Hogan Lovells 2011. All rights reserved.

Prevailing Wage e-Alert: That CFD Might Cost You Millions More Than You Thought

Brian C. Fish
Partner
P: 619.699.2424
F: 619.6455395
bfish@luce.com
www.luce.com/brianfish

If you are a builder or developer and you only want to hear good news, stop reading this article now. For those of you still reading this, if you have used or intend to use a Community Facilities (or Mello-Roos) District ("CFD") or some other form of "public funds" to pay for some or all of your project's required public improvement work, you need to know about the recent decision in *Azusa Land Partners v. Department of Industrial Relations*. This case could require you to comply with prevailing wage requirements when building out some or all of your otherwise private development project.

California's prevailing wage laws (California Labor Code Section 1720, *et. seq.*) impose a host of costly obligations on certain projects "paid for in whole or in part out of public funds." For purposes of this e-alert, it is sufficient to note that a project subject to prevailing wage requirements must generally pay higher labor costs and comply with fairly complicated reporting, apprenticeship and monitoring obligations. In addition, builders who fail to comply could be subjected to costly administrative and legal proceedings and ultimately held liable for the payment of back wages and significant fines.

Given the above, the *Azusa Land Partners* case could have huge implications for the development community. By way of background, Azusa Land Partners is the owner and developer of a 500 acre master planned project approved for more than 1,200 homes and 50,000 square feet of commercial space. As a condition of approval, the City of Monrovia required Azusa Land Partners to construct a host of public improvements such as schools, parks, in tract streets and storm drain facilities. Azusa Land Partners asked the City to form a CFD and issue up to $120 million in bonds to pay for certain eligible facilities. Significantly, the CFD formation documents defined eligible facilities as including all "public infrastructure and facilities required as a condition of approval of the Project." However, Azusa Land only received $71 million in CFD bond proceeds even though the total cost of the City-required public improvements exceeded $146 million. An administrative complaint filed by a labor backed organization, followed by adverse rulings by the State Department of Industrial Relations and the trial court, led Azusa Land Partners to appeal the case to the Court.

Although CFD bonds are ultimately paid off by the private property owners who benefit, the Court found that CFD bond proceeds are "public funds" that trigger prevailing wage laws. The Court also rejected Azusa Land Partners' attempt to rely on post-CFD formation agreements to limit the prevailing wage obligations to those improvements actually paid for with CFD funds. Instead, under the above facts, the Court ruled that the entire master planned project was a "public work" subject to prevailing wage laws and that prevailing wage requirements applied to all of the project's public infrastructure work regardless of the source of funding.

Prevailing Wage e-Alert: That CFD Might Cost You Millions More Than You Thought

Now that you have picked your jaw up off the floor, you should note the following: First, the *Azusa Land Partners* case is just one appellate court's opinion on some issues not previously addressed in a published decision. Second, Azusa Land Partners' problems would have been exponentially worse if the court had applied prevailing wage requirements to all the project's construction activities rather than just the in public improvements. Third, an argument still exists that a project can rely on legislative carve outs in Labor Code section 1720(c) to further limit the law's coverage by, for example, establishing from the outset a more narrowly tailored infrastructure and funding agreement with the public agency. Finally, for those of you who are or will be relying on CFD proceeds or other forms of "public funds" to finance components of your project, the case is proof that labor backed groups are watching what you do, and it demonstrates why you should immediately consult with experienced counsel.

Luce Forward is a full service law firm with offices throughout California. The author, Brian Fish, is a land use/development partner at Luce Forward who advises clients about prevailing wage considerations in the context of real estate development. You can reach Brian Fish at 619.699.2424 or bfish@luce.com, or any of our other land use lawyers by searching at www.luce.com/landuse.

WSGR Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

WSGR ALERT

JANUARY 2011

PROPOSED TREASURY REGULATIONS EXPAND THE MEANING OF PUBLICLY TRADED DEBT FOR TAX PURPOSES

On January 6, 2011, the Internal Revenue Service (IRS) and U.S. Department of the Treasury issued proposed regulations expanding and clarifying the meaning of "traded on an established market," or "publicly traded," for purposes of determining the issue price of a debt instrument. Whether or not debt is publicly traded can have a significant impact on the tax treatment of debt exchanges and modifications, in particular whether the issuer is required to recognize discharge of indebtedness income. While the proposed regulations are not effective until final, clients contemplating debt restructurings should consider whether the debt would be treated as publicly traded under the current or proposed regulations.

Significance of Public Trading

When a debt instrument is issued in exchange for property, such as a debt-for-debt exchange in a workout, the issue price of the debt instrument under Section 1273(b)(3) is its fair market value if either the existing debt or the new debt is publicly traded. A debt-for-debt exchange also may be deemed to occur for U.S. federal income tax purposes as a result of a significant modification of existing debt. Given the declining fortunes of the issuer in the workout context, it often will be the case that the issue price of the new or modified debt instrument, if required to be determined based on public trading, will be less than the adjusted issue price of the existing debt. As a consequence, the issuer generally will recognize cancellation of debt income, and the new/modified debt will have original issue discount, which must be accounted for by both the issuer and the holder. These income tax consequences have been exacerbated by the recent turmoil in the capital markets, and temporary relief provided by the Internal Revenue Code expired on December 31, 2010.

Current Regulations and the Over-the-Counter Market

Issuers and their tax advisors have had difficulty determining whether a debt instrument or the property for which it was exchanged would be treated as publicly traded under the current regulations, particularly the portions of the regulations dealing with property appearing on a quotation medium or for which price quotations are readily available from dealers, brokers, or traders. The current regulations define a "quotation medium" as a system of general circulation (including a computer listing disseminated to subscribing brokers, dealers, or traders) that provides a reasonable basis to determine fair market value by disseminating either recent price quotations (including rates, yields, or other pricing information) of one or more identified brokers, dealers, or traders, or actual prices (including rates, yields, or other pricing information) of recent sales transactions.

In the current debt markets, trades commonly are executed over the counter in negotiated transactions between customers and securities brokers or dealers. The over-the-counter markets are relatively informal: Price quotations provided by a broker or dealer may be firm or executable quotes, or instead may be soft or indicative quotes signaling the willingness of the broker or dealer to trade a particular debt instrument, and some indication of its value, but not a firm price. Subscription and online services compile a variety of data relevant to a debt instrument's value, including actual trades, firm and indicative price quotes, and other available information. Notwithstanding the wide availability of quotation information that currently exists, the current regulations have not been considered by issuers and tax practitioners to give sufficient guidance as to whether or not a debt instrument is publicly traded.

Broad Standard under Proposed Regulations

In the preamble to the proposed regulations, the Treasury and the Internal Revenue Service take the position that the "traded on an established market" standard of Section 1273(b) should be interpreted broadly, on the grounds that the improved depth and transparency of the debt markets have diminished concerns that the trading prices of debt instruments may not reflect their fair market value. Thus, the preamble states, "to the extent accurate pricing information exists, whether it derives from executed sales, reliable price quotations, or valuation estimates that are based on some combination of sales and quotes, the Treasury and the IRS believe that that information should be the basis for the issue price determined under Section 1273(b)(3)."

The proposed regulations identify four ways for property to be traded on an established market. In each case, the time period for determining whether the property is publicly traded is the 31-day period ending 15 days after the issue date of the debt instrument (the "window period"). To be publicly traded,

Continued on page 2...

Continued from page 1...

during the window period (1) the property must be listed on an exchange, (2) a sales price for the property must be reasonably available, (3) there must be one or more firm quotes for the property, or (4) there must be one or more indicative quotes for the property. These four concepts are discussed more fully below. A debt instrument is not treated as traded on an established market solely because it is convertible into property that is so traded.

There are two exceptions to this expanded definition of publicly traded, for *de minimis* trading and small debt issuances, which also are discussed more fully below.

Exchange-Listed Property

First, exchange-listed property is publicly traded. Most debt instruments are not listed on exchanges, but it nevertheless could be the case that the property in exchange for which a debt instrument is issued is so listed, such as the stock in a stock-for-debt exchange. To be treated as exchange-listed property, the property must be listed on a national securities exchange registered under Section 6 of the Securities Exchange Act of 1934; a board of trade designated as a contract market by the Commodities Futures Trading Commission; a foreign securities exchange that is officially recognized, sanctioned, regulated, or supervised by a governmental authority of the foreign country in which the market is located; or any other exchange, board of trade, or other market that the Commissioner of Internal Revenue identifies in published guidance as an exchange.

Sales Price

Property is publicly traded if a price for an executed purchase or sale is reasonably available. For this purpose, the proposed regulations provide that the sales price of a debt instrument is considered reasonably available if the price (or information sufficient to calculate it) appears in a medium that is made available to persons that regularly purchase or sell debt instruments (including a price provided only to certain customers or to subscribers), or persons that broker purchases or sales of debt instruments. The preamble uses as an example of public trading under this rule a sale of a debt instrument that is reported electronically in the Trade Reporting and Compliance Engine (TRACE) database maintained by the Financial Industry Regulatory Authority. Other pricing services and trading platforms that report prices of executed trades (whether to subscribers or the general public) also would result in public trading if the reported trades were within the window period.

Firm Quote

Property is publicly traded if one or more price quotes for the property are available from at least one broker, dealer, or pricing service (including a price provided only to certain customers or to subscribers), and the quoted price is substantially the same as the price for which the property could be purchased or sold. A price quote will be considered a firm quote for this purpose if market participants typically purchase or sell at the quoted price, even if not legally obligated to do so. The identity of the person providing the quote must be reasonably ascertainable.

Indicative Quote

Property is also publicly traded if one or more price quotes for the property are available from at least one broker, dealer, or pricing service (including a price provided only to certain customers or to subscribers), even if the price quote is not a firm quote as described above. Although there is a presumption in the proposed regulations that the property's trading price, sales price, or quoted price is its fair market value (with multiple prices or quotes reconciled in a reasonable manner), if only indicative quotes are available, and the taxpayer determines that the indicative quote (or an average of the indicative quotes) materially misrepresents the fair market value of the property, the taxpayer can use any method that provides a reasonable basis to determine the property's fair market value. The taxpayer must establish that the chosen method more accurately reflects the property's fair market value than the indicative quote or quotes. A volume discount or control premium for an equity or debt instrument is not considered to create a material misrepresentation of value for this purpose.

Exceptions for *De Minimis* Trading and Small Debt Issuances

As noted above, there are two exceptions to the expanded definition of publicly traded under the proposed regulations. Under the first exception, property will not be treated as publicly traded if there is no more than *de minimis* trading of the property. A debt instrument will be treated as traded in *de minimis* quantities only if each trade during the window period is for quantities of US$1 million or less, and the aggregate of all such trades does not exceed US$5 million. Among other debt instruments, the *de minimis* trading exception may cover certain syndicated bank debt, such as revolving credit facilities, which trade infrequently.

Under the second exception, a debt instrument will not be treated as publicly traded if the original stated principal amount of the issue that includes the debt instrument does not exceed US$50 million.

If you have any questions regarding the tax consequences of a debt-for-debt exchange or any modification of a debt instrument under the current or proposed regulations, please contact Eileen Marshall, any other member of the firm's tax practice, or your regular Wilson Sonsini Goodrich & Rosati contact.

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under federal, state, or local tax law or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

Continued on page 3...

Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

This WSGR Alert was sent to our clients and interested parties via email on January 11, 2011. To receive future WSGR Alerts and newsletters via email, please contact Marketing at wsgr_resource@wsgr.com and ask to be added to our mailing list.

This communication is provided for your information only and is not intended to constitute professional advice as to any particular situation. We would be pleased to provide you with specific advice about particular situations, if desired. Do not hesitate to contact us.

650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300 Fax: (650) 493-6811
email: wsgr_resource@wsgr.com

www.wsgr.com

© 2011 Wilson Sonsini Goodrich & Rosati,
Professional Corporation
All rights reserved.