

March 2011 e-Bulletin

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CONFERENCES & EVENTS

- PRAC Members Gathering @ INTA San Francisco - May 14, 2011
Details at www.prac.org/events.php
- 49th International PRAC Conference - Amsterdam - May 21-24, 2011
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
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PRAC Conferences and Events are open to PRAC Member Firms only

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CLAYTON UTZ ADDS QC TO LITIGATION TEAM

Sydney, 14 February 2011: Leading London barrister and international arbitrator **John Rowland QC** today joins Clayton Utz's Litigation & Dispute Resolution team as a partner, giving clients access to a senior advocate in-house who can appear both before the courts and in arbitrations.

Mr Rowland QC – a senior member of the UK bar who was appointed a Queen's Counsel in 1996 – has over 30 years' experience in commercial dispute resolution across a wide range of industries including insurance (particularly product liability disputes), energy and resources and construction. He is also an experienced arbitrator and mediator, with both Australian and international experience.

In recent years Mr Rowland QC's experience has included advising a number of large insurers on D&O coverage in the wake of the global financial crisis, numerous disputes arising out of Business Interruption claims including two large claims involving flooding of mines in Queensland and Western Australia, and product liability claims arising out of a wide variety of products including asbestos, the herbicide Agent Orange, and breast implants.

Mr Rowland QC also worked alongside a Clayton Utz team in achieving a successful commercial outcome for client Anaconda Limited in a series of high-profile international and domestic arbitrations. The first, heard in London, related to enforcing a bespoke extended liquidated damages insurance policy. The second and third arbitrations were heard in Melbourne before well known international arbitrators Jan Paulsson (of Paris), John Uff QC and Philip Naughton QC (both of the London Bar). Each of these arbitrations was rated by *The American Lawyer* as in the top ten arbitrations in the world for the years in which they were heard.

The national head of Clayton Utz's Litigation and Dispute Resolution practice, **Brigitte Markovic**, said Mr Rowland's broad-ranging dispute resolution experience, together with his experience as an advocate, meant Clayton Utz would be able to provide clients with a unique dispute resolution service.

"Bringing John into our team means Clayton Utz will be able to offer a senior advocate to assist our clients and appear for them in disputes, both before the courts and in arbitration. That, combined with John's dispute resolution experience across many of the sectors and industries in which our clients operate, greatly enhances the service we are able to provide in the dispute resolution area, particularly arbitration," she said.

Clayton Utz's Chief Executive Partner **Darryl McDonough** said Mr Rowland QC's appointment reflected the firm's commitment to excellence in legal services. "Excellence in legal services is what we are about. John's appointment is part of our ongoing commitment to our clients to provide them with the best possible legal services available that reflects their commercial and business needs. This commitment is also reflected in other lateral appointments we have made over the last 12 months, including Bruce Cooper and Andrew Jinks to our Banking practice."

For additional information visit www.claytonutz.com

FRASER MILNER CASGRAIN NAMES 14 PARTNERS

February 23 2011 - National appointments strengthen firm's commitment to clients

Fraser Milner Casgrain LLP (FMC), one of Canada's leading business and litigation law firms, announces the admission of 14 new partners. These appointments support and drive the firm's collective success and strengthen the firm's commitment to its national and international client base.

The new partners have all been promoted from within the firm and represent expanded depth across Canada in Corporate/Commercial, Corporate Governance, Cross-Border, Energy, Oil & Gas, Environmental, Financial Services, Employment & Labour, Franchising, Insolvency/Restructuring, Litigation & Dispute Resolution, Mergers & Acquisitions, P3, Mining, Construction/Infrastructure, Real Estate, Tech Companies/Venture Capital, Land Use Planning/Leasing, Securities/Corporate Finance, Technology, Tax and Wealth Management.

The 14 new partners are:

Guy Paul Allard and Mylène Henrie
Peter Banks and Cristina Wendel
Anna Balinsky, Jane Dietrich, Christina Hall, Ryan Jacobs and Marina Sampson
Laura Estep
Jennifer Dezell, Marie-Claire Dy, Andrew Prior, Ginny Tsai

"As a key dimension of our commitment to our clients and our people, we encourage and promote talent from within," says Chris Pinnington, CEO. "These new partners have significantly contributed to the strength of their respective practice areas, and exemplify our firm's ability to provide unparalleled legal excellence. Their achievements and dedication to FMC offer great promise for our firm's continued growth and success, and align the delivery of our services with our clients' needs and expectations."

For additional information visit www.fmc-law.com

GIDE LOYRETTE NOUËL EXPANDS INTELLECTUAL PROPERTY AND TECHNOLOGY PRACTICE

PARIS, March, 2011 - 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

HOGAN LOVELLS SENIOR COUNSEL TO U.S. HOUSE COMMITTEE ON FINANCIAL SERVICES REJOINS FIRM

WASHINGTON, D.C., 7 March 2011 – Hogan Lovells US LLP announced today that Daniel S. Meade has rejoined the Corporate practice as a partner in Washington, D.C., having completed his work as Senior Counsel to the U.S. House Committee on Financial Services.

As Senior Counsel to the U.S. House Committee on Financial Services, Meade served as an advisor to the Committee's Chairman, and was a principal draftsman of substantial portions of the Dodd-Frank Wall Street Reform and Consumer Protections Act, and the Small Business Jobs Act of 2010. He also actively drafted and analyzed legislation and coordinated oversight functions within the Committee's jurisdiction, particularly with regard to bank, thrift and holding company safety and soundness, capital requirements, transactions with affiliates, industrial loan companies, deposit insurance, consumer protection, and the Community Reinvestment Act.

At Hogan Lovells, Meade will resume his practice representing financial services entities and other entities impacted by the regulation of those entities in connection with a broad range of regulatory and transactional matters, including issues related to the Dodd-Frank Act and all other financial regulatory matters, as well as mergers and acquisitions, anti-money laundering, financial privacy, and enforcement matters.

"We are thrilled to welcome Dan back to Hogan Lovells," said Hogan Lovells Co-CEO Warren Gorrell. "Dan brings instant marquee credentials in interpreting and implementing the most significant legislative and financial regulatory developments on the Hill. We are proud of his work on behalf of the House Committee on Financial Services and are confident that his experiences will benefit our clients and drive the growth of our financial regulatory practice."

According to Stuart Stein, Global Co-head of Hogan Lovells' Corporate practice, "As the Dodd-Frank Act rules take shape, our current and prospective clients will actively need our advice and counsel. Dan's first hand understanding of the Dodd-Frank Act, coupled with his years of experience at the Federal Reserve Board and in private practice will be invaluable to our clients."

Hogan Lovells' Corporate practice represents banks, brokers, insurers, asset managers, investment funds, regulators, and other market participants, large and small, on their most complex and challenging regulatory issues and transactions. The Corporate team assists clients with the full range of legal and regulatory issues confronting them, from the establishment of investment funds, insurance finance, consumer finance, outsourcing, product distribution, and payment systems to mergers and acquisitions in the financial services sector.

Earlier in his career, Meade served as a counsel to the Board of Governors of the Federal Reserve System in Washington, D.C. Meade holds a J.D. from The Catholic University of America, Columbus School of Law, an L.L.M from Boston University School of Law's Morin Center for Banking and Financial Law, and a B.A. from Providence College.

For additional information visit www.hoganlovells.com

About Hogan Lovells

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

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

KING & WOOD EXPANDS CHINA CROSS BORDER DISPUTE RESOLUTION PRACTICE

HONG KONG, February 21, 2011 – King & Wood announces recruitment of senior PRC litigator, Renee Gu. Ms. Gu, with over 20 years of China dispute resolution experience “has the rare combination of International and ‘PRC Bench’ experience”, states leading HK partner, Rupert Li, as she was a Shanghai Higher People’s Court judge for seven years before entering into private practice at the Hong Kong offices of Jones Day, Herbert Smith and Coudert Brothers.

Gu’s private practice has primarily focused on representing international and Chinese companies in litigation and arbitration throughout China, Hong Kong, the United States and Europe. “Renee’s unique PRC dispute resolution perspective will substantively increase King & Wood’s strength in this dynamic and burgeoning area in China,” states Ariel Ye, head of the firm’s cross-border disputes group. Ms. Gu has worked on some of the largest and most complex disputes in and outside China and at King & Wood she will focus on cross border disputes.

Her education is notable as shortly after receiving her LL.B and LL.M from Beijing University; she became one of the youngest Chinese High Court judges ever admitted. Additionally she was sent by the Supreme People’s Court of China to conduct a comparative analysis of the PRC and United States Judicial systems at Columbia University. In 1996, she received her second LL.M from New York University.

For additional information visit www.kingandwood.com

LUCE FORWARD ANNOUNCES LEADERSHIP CHANGES FOR 2011

SAN DIEGO, March 01, 2011 Luce Forward today announced partner

Peter H. Klee has joined the firm’s executive committee. In addition, the firm announced changes to the leadership of its Real Estate & Environmental Litigation practice group and a new Partner-In-Charge.

Klee, a partner in Luce Forward’s San Diego office, will be the newest member of the firm’s Executive Committee. Well prepared for the three-year-term, he is the founder and former practice group leader of the firm’s Insurance Litigation group. The Insurance Litigation group will now be led by partner Marc J. Feldman, who also works out of the firm’s San Diego office.

Further management changes include partner Roger C. Haerr being named practice leader of Luce Forward’s Real Estate & Environmental Litigation group, with partner Antony D. Nash serving as that group’s assistant practice leader. Partner Amy Giannamore is now the assistant practice leader of the firm’s Real Estate Securities & Finance group, which is currently led by partner Darryl Steinhouse. Haerr, Nash, Giannamore and Steinhouse all practice out of the firm’s San Diego office.

“We are pleased these individuals have accepted the responsibilities of their new leadership positions. I’m confident they will be invaluable members of our management team,” said Kurt L. Kicklighter, Luce Forward’s Managing Partner. “Their intuition, understanding and natural leadership abilities will assist both our clients and the firm as we continue to grow strategically throughout California.”

For a full list of our management roster, visit www.luce.com

NAUTADUTILH ADDS TO COMMERCIAL REAL ESTATE TEAM

Prof. Nora van Oostrom-Streep joins NautaDutilh

15 February 2011 - As of February 2011, Prof. Nora van Oostrom-Streep (1972) will be joining NautaDutilh as an adviser. The arrival of Prof. Nora Van Oostrom will mean a further strengthening of NautaDutilh's position in the commercial real-estate practice, especially in notarial law.

Prof. Nora Van Oostrom will reinforce NautaDutilh's leading position in this area – academically in particular – both in terms of supporting the practice and in training.

Since 2008, Nora van Oostrom has been a professor of notarial law at the Molengraaff Institute for Private Law at Utrecht University and a Deputy Justice at the Arnhem District Court.

For additional information visit www.nautadutilh.com



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SIMPSON GRIERSON ADDS 3 TO FIRM ROSTER

22 Feb 2011 Simpson Grierson's banking and finance department is delighted to have secured the talent of special counsel Nicole Xanthopol. Nicole joined the Auckland transactional group on contract last year after returning to New Zealand from magic circle law firm Linklaters LLP in London, where she was a partner.

Nicole's experience includes working with banks and corporates on a variety of domestic and international lending transactions and complex tax structured financings.

The firm's corporate and commercial department also welcomes two new senior associates from leading London law firms. Jaron McVicar joins the Auckland corporate group from Hogan Lovells, after seven years in the UK. His practice encompasses a wide range of corporate transactional matters including mergers and acquisitions, joint ventures, private equity, and venture capital transactions. He frequently advises on corporate governance and constitutional matters.

Energy and infrastructure specialist Megan Bonetti joins the Wellington commercial group after ten years with Clifford Chance. Megan's experience encompasses a wide range of transactions including mergers and acquisitions, project structuring, joint ventures, governance and third party access, and other market based regulatory arrangements.

For additional information visit www.simpsongrierson.com

CAREY Y CIA

ACTS FOR 33 CHILEAN MINERS IN LIFE RIGHTS AGREEMENT WITH WME

SANTIAGO, March 01, 2011 - WME, the World's largest talent agency will represent the official life rights of the 33 Chilean miners who were rescued on October 12, 2010, after several months under earth.

The agreement negotiated by Carey y Cía. establishes that WME will represent their life rights in all areas, including television, film, books, commercials, theatre and lectures. This includes complete access to the daily journal kept by one of the miners throughout this ordeal. Until now, there has not been an authorized account of the miners' stories.

Carey y Cía. partners Jaime Carey and Guillermo Carey and director Fernando García led the team formed also by partner Cristián Eyzaguirre and associates Javier Allard and Paulina Silva

For additional information visit www.carey.cl

FRASER MILNER CASGRAIN

LEXAM EXPLORATIONS COMBINES WITH VG GOLD

On January 1, 2011, Lexam Explorations Inc. and VG Gold Corp. combined to form Lexam VG Gold Inc., having a market capitalization of approximately \$275 million, through a plan of arrangement under the Business Corporations Act (Ontario). Lexam VG Gold is listed on the TSX and has a strategic land position around Goldcorp Inc.'s Dome Mine Project that has produced 17 million ounces of gold in the centre of the Timmins Gold Camp.

Lexam Explorations was led by Nils Engelstad, Vice President, Legal, and represented by Fraser Milner Casgrain LLP with a team that included Michael Melanson, Ralph Shay, David Coultice and Maja Czubernat (corporate/M&A/securities), Michael Schafler and Arden MacLean (litigation) and Zahra Nurmohamed and Matthew Peters (tax).

For additional information visit www.fmc-law.com

CLAYTON UTZ

ADVISES NEW FORESTS ON AUSTRALIA'S LARGEST PRIVATE FORESTRY ESTATE

SYDNEY, 14 February 2011: Clayton Utz has acted for investment management firm New Forests on the largest private forestry estate transaction, by area, in Australian history.

Sydney Real Estate partner Peter McMahon and Corporate partner Matt Anderson led the Clayton Utz team which advised New Forests in relation to the acquisition of the timberland assets of Great Southern Plantations for a total purchase price of A\$415 million. The assets comprise 650 properties and 1200 titles and encompass over 2,500 square kilometres in prime forestry and agricultural regions across six Australian states.

Mr McMahon said *"the complex and multi-jurisdictional nature of the transaction required a highly collaborative firmwide response which included Clayton Utz's Sydney, Melbourne and Perth and Brisbane offices. "Each property represented a different set of issues, requiring close scrutiny and consideration. We were able to draw upon a broad range of skills of lawyers from across our offices to achieve a successful commercial outcome for New Forests."*

Commenting on what the deal signalled for the forestry industry more generally, Mr. Anderson said: *"This transaction reflects the international interest in Australian forestry products and the market opportunities available to investors. I suspect we will continue to see an increased demand for Australian forestry products in 2011."*

For additional information visit www.claytonutz.com

GIDE LOYRETTE NOUEL

ADVISES CHINESE GROUP COFCO ON ACQUISITION OF AOC VINEYARD IN BORDEAUX REGION

16 February 2011 - Gide Loyrette Nouel (GLN) has advised the giant Chinese agribusiness group COFCO on the acquisition of Château de Viaud, a leading vineyard set in the prestigious Lalande-de-Pomerol wine growing area.

This operation follows several other more modest acquisitions by Chinese private investors and is a sign of China's growing interest in French wine growing excellence and a response to the exponential increase in demand in the country for fine quality wines.

Listed in Hong Kong and majority-owned by the Chinese State, COFCO is the largest Chinese agribusiness conglomerate with annual sales of over USD 21 billion. COFCO, whose portfolio also includes the Great Wall wine brand, is the leading Chinese wine producer and was selected as the official supplier for the Beijing Olympic Games.

The seller, Philippe Raoux, is a Bordeaux wine grower and merchant who has been a significant driving force in the recent development of the local wine market. He owns several wine estates such as the Château d'Arsac (famous for its Margaux wines and works of art) and in 2007 opened La Winery, a unique complex dedicated to wine tourism in the Bordeaux region.

The GLN team advising COFCO was led by partner Guillaume Rougier-Brierre and Arnaud Lunel, from the Paris Office, assisted by Chen Aihua. COFCO was advised on financial aspects by Jean-Luc Coupet, the founder of Wine Bankers.

This same team is regularly instructed on transactions between China and Europe and, in the wine sector, previously advised Domaines Baron de Rothschild on a partnership with Chinese bank CITIC in Penglai, in the Shandong region, for the launch of a local fine wine.

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

HOGAN LOVELLS

SUCCESSFULLY REPRESENTS LABCORP IN VICTORY AGAINST FEDERAL TRADE COMMISSION

.WASHINGTON, D.C., 28 February 2011 – Hogan Lovells US LLP announced today that the U.S. District Court for the Central District of California recently denied a Federal Trade Commission (FTC) bid to temporarily block Hogan Lovells client, Laboratory Corporation of America (LabCorp), in a \$57.5 million deal for rival Westcliff Medical Laboratories Inc.

In early December 2010, the FTC sued to block the acquisition, alleging that LabCorp's acquisition of a medical lab in California violated antitrust laws. The Honorable Andrew J. Guilford denied the FTC's request for a preliminary injunction and also dissolved the temporary restraining order that had been in place since mid-December. He ruled that the FTC had not shown it was likely to succeed on the merits of its case during its administrative proceedings evaluating the merger. The FTC's hearing against the merger is scheduled to begin 2 May 2011.

The Hogan Lovells team representing LabCorp is led by partner and former FTC Chief Trial Council Robby Robertson and partner Corey Roush in the Washington, D.C. office, with assistance from associates Ben Holt, Leigh Oliver, Justin Bernick, Meghan Edwards-Ford, and Will Rawson.

For additional information visit www.hoganlovells.com

NAUTADUTILH**SUCCESSFULLY REPRESENTED RUSSELS CAPITAL REGION TO SET ASIDE FLEMISH DECREE ON CO₂ EMISSIONS TRADING FOR AVIATION FACILITIES**

4 March 2011 - NautaDutilh successfully represented the Brussels-Capital Region before the Constitutional Court in its action to set aside the Flemish decree on CO₂ emissions trading for aviation activities. The decree transposed Community Directive 2008/101/EC of 19 November 2008 in the Flemish Region.

The Constitutional Court found that the Flemish Region had exceeded its powers, as the decree is not limited to emissions occurring in Flemish airspace. Indeed, the decree also covers emissions occurring in the airspace of Belgium's other regions, over the maritime area for which the federal government is responsible, and even in the airspace of other EU and non-EU member states. Consequently, the Constitutional Court decided to revoke the Flemish decree in full.

The Court further found that the powers of the federal government and of the regions to transpose Directive 2008/101/EC and to regulate CO₂ emissions trading for aviation activities are interconnected to such an extent that they can only be exercised by means of a cooperation agreement. However, until such an agreement becomes effective or 31 December 2011 at the latest, the effects of the decree will be maintained.

NautaDutilh's team consists of François Tulkens, Patrick Peeters, Heidi Bortels and Nicolas Bonbled.

For additional information visit www.nautadutilh.com



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WILSON SONSINI

CONGRATULATES TRANSPHORM ON ITS LAUNCH

On February 23, Santa Barbara, CA-based start-up Transphorm emerged from stealth mode and announced its power conversion solutions for devices ranging from servers to solar panels. Transphorm, which the firm has represented since the company's founding in 2007, has raised \$38 million in financing from KPCB, Foundation Capital, Google Ventures, and Lux Capital.

Further information on this transaction, can be found at <http://www.businesswire.com/news/home/20110223006229/en/Transphorm-Emerges-Stealth-Redefine-Energy-Efficiency>

For additional information visit www.wsgr.com

MUNIZ RAMIREZ PEREZ-TAIMAN & OLAYA

ACTS FOR MORGAN STANLEY IN PERUVIAN MARKET PLACEMENT

Muniz Ramirez Perez-Taiman & Olaya was counsel to Morgan Stanley in the placement in the Peruvian market of the Peruvian Nuevos Soles Senior Unsecured Fixed Rate Notes due 2019. The principal amount of the notes is PEN S/. 300,000,000 and was placed among Peruvian Private Pension Funds (AFPs) by means of a private offering.

For additional information visit www.munizlaw.com

TOZZINIFREIRE

ACTS FOR SOUTH KOREAN COMPANY - DOSAN INFRACORE ESTABLISHING ITS FIRST MANUFACTURING PLANT IN LATIN AMERICA

Tozzini Freire provided counsel assistance to Doosan Infracore, a Korean company, in the implementation of its first plant in Latin America in the State of São Paulo, Brazil, for manufacturing of excavators units.

According to Doosan, it is estimated the direct investment of US\$ 60 million and will generate about 300 direct jobs in the city of Americana, state of São Paulo. It will produce excavators with an annual capacity of production of 2,000 units.

About Doosan Infracore

Doosan Infracore is one of the companies of the South Korean Doosan Group and is one of the five largest manufacturers of construction equipments in the world. It is present in 23 countries and represents the brands Doosan, Bobcat, Montabert, Geith, Tramac, Doosan Moxy and Doosan Infracore Portable Power. The South Korean company counts with more than 12,000 workers. In 2009, its sales revenues surpassed US\$ 2.3 billion. Its main products are compact equipments, excavators, forklifts, articulated trucks, air compressors, generators, breaker hammers. By 2014, Doosan Infracore intends to reach the third position worldwide in the construction industry.

TozziniFreire Partner Shin Jae Kim (skim@tozzinifreire.com.br) and Associate Arquelau So (aql@tozzinifreire.com.br) acted in the transaction.

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



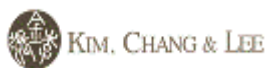
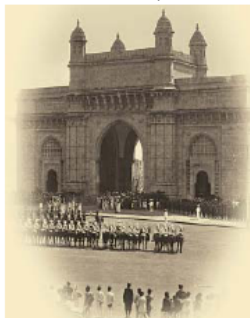
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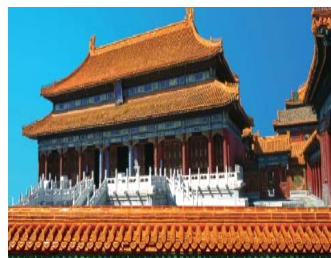
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Send to editor@prac.org.
Deadline is 10th of each month.

CLAYTON UTZ

09 March 2011

The known unknowns: trading halts made easier by ASX

Continuous disclosure continues to be front of mind for listed companies.

This is clearly evidenced by the Fortescue Metals case, renewed warnings by ASIC Deputy Chair Belinda Gibson and the "speeding ticket" handed out to Nufarm at the end of last year (to name just the most recent examples).

A new ASX Guidance Note aims to encourage the use of trading halts and voluntary suspensions to manage continuous disclosure issues – although it also highlights their limitations.

Background

Listing Rule 3.1 requires the immediate disclosure of price-sensitive information about a company.

This is subject to a few exceptions (such as where the information relates to a confidential and incomplete proposal). However, the scope of those exceptions is narrow and getting narrower.

So what should a company do if it's about to get into a price-sensitive situation, but can't make full disclosure to the market?

The answer is to seek a trading halt from ASX. This prevents trading in the company's shares on the basis of imperfect knowledge.

Trading halts are not the complete answer to the problem: they have to be individually negotiated with ASX, and they are very short term.

The new Guidance Note addresses one of these issues (by detailing ASX's policy on granting halts) but highlights the shortcomings created by the brevity of halts.

When will a single halt be granted?

Trading halts come in two flavours:

- a single halt of up to two trading days;
- back-to-back halts (a maximum of two consecutive trading halts).

They are not granted automatically, but the new Guidance Note provides a number of examples in which ASX would be likely to grant a halt:

- a halt to allow a "Competent Person" to review and consent to an announcement of a significant assay report for a mining company, where the Competent Person was out in the field and not immediately available;
- a halt to allow experts to examine damage to a mine affected by an earthquake;
- a halt to allow a company to complete negotiations which had become the subject of accurate speculation in the media (ie. the negotiations were no longer confidential);

- a halt to allow a company to conduct a book build as part of a significant issue of securities;
- a halt to allow a company to facilitate a book build for a major shareholder's sale of a significant stake.

In each case, the halt would be for no longer than was necessary to complete the process.

When would back-to-back trading halts be granted?

The new Guidance Note confirms our experience that back-to-back trading halts are less commonly granted.

It says that the "exceptional" circumstances required for a back-to-back halt for issues of securities have only been granted where the issue:

- is significant in the context of the entity's issued capital;
- is essentially pro rata to all holders (eg. an accelerated offering conducted in two stages, such as a Jumbo, AREO or SAREO offer); and
- involves the use of a book build process and requires a halt in trading of more than two, but not more than four, trading days to be implemented.

This reluctance to grant halts of more than two days is, in ASX's view, due to the availability of voluntary suspensions.

Voluntary suspension – not "a less attractive option"

Where a company's inability to disclose price-sensitive information is going to last more than a couple of days, ASX says that it should apply for a voluntary suspension from quotation.

A voluntary suspension can be for any period of time (even months).

On the surface, therefore, it appears to be a suitable avenue when a trading halt would be too short. However, as the new Guidance Note concedes, the problem with a suspension is that it can handicap the company's fundraising activities:

"30. Entities should be aware that one of the conditions of their eligibility:

- to offer securities without a disclosure document or product disclosure statement under a 'low-doc' rights issue (sections 708AA or 1012DAA of the Corporations Act) or under a share or interest purchase plan (ASIC Class Order 09/425); or
- to rely on the 'cleansing notice' provisions in relation to a secondary sale of securities issued without a disclosure document or product disclosure statement under a placement (sections 708A(5) or 1012DA(5) of the Corporations Act),

is that their securities have not been suspended for more than a total of 5 days during the shorter of the period during which the class of securities was quoted, and the 12 month period before the relevant offer or issue."

In other words, if the securities have been suspended for more than 5 days in 12 months, securities and rights issues become considerably more complicated and expensive (although ASIC may be prepared to grant relief if it believes that the suspension has not prevented the market's being fully informed).

It should also be noted that suspensions of more than two trading days prevent a company's offering shares or options to employees without a prospectus (under Class Order 03/184).

ASX comments that, "apart from this one issue, a voluntary suspension should not be perceived as a less attractive option for managing continuous disclosure obligations than a trading halt."

Comment

The new Guidance Note is welcome, because it provides companies and their advisers with precedents to use when approaching ASX for a trading halt. Given the short timeframe within which continuous disclosure decisions have to be made, this is a very useful tool.

At the same time, however, the Note also highlights the shortcomings of trading halts and suspensions as a continuous disclosure management tool.

The inability to trade in securities for a day (let alone an extended period) can create significant issues for all investors in those securities. This is why issuers avoid doing so unless there is no alternative.

Another issue is the qualitative difference between trading halts and voluntary suspensions. Despite ASX's comment that suspensions should not be seen as the "less attractive" of the two, the reality is that the adverse effects of a suspension will continue to dog their use.

You might also be interested in ...

- [Managing sensitive announcements - Continuous disclosure in uncertain times](#)
- [The ASX Corporate Governance changes at a glance](#)
- [Remuneration committees: all change, please](#)

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Administrative Law

BRAZIL: NEW REGULATIONS FOR AIRPORT TARIFFS

The Brazilian Civil Aviation Agency – ANAC, the governmental body responsible for the regulation and inspection of airport operation services, has enacted new rules dealing with airport tariffs for embarking, landing and permanence, through Resolution 180, published on January 27th, 2011. The Resolution does not apply to storage and cargo movement tariffs, which are regulated by specific rules.

The Resolution's draft was submitted to a public consultation process carried out by ANAC in November, 2010. Several companies and public entities, such as Infraero – the public company that manages the most important airports in Brazil, submitted contributions to the draft.

The new tariff model is applicable to almost all Brazilian airports, exception made to airports managed by private operators.

According to the new rules, tariffs shall be established up to certain ceilings to be calculated according to the methodology set forth in the Resolution. Such ceilings shall be adjusted for inflation annually and also subject to periodic revisions. The first revision process will be based on 2010 tariffs, and the second on 2013 tariffs. After 2013, the tariff revision process will take place every five years.

ANAC expects that the new system will be a driver for efficiency and quality in airport services, as well as promote lower tariffs.

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Important new federal regulations affecting the Canadian fuel industry

On December 15, 2010, the Canadian Government brought into force the Renewable Fuels Regulations (SOR/2010-189) (the “Regulations”), which apply broadly to parties operating within the renewable and non-renewable fuel sectors in Canada. The Regulations introduce a five percent renewable fuel content requirement for gasoline produced or imported in Canada. There is also a two percent renewable content requirement for diesel fuel and heating oil, which is currently not in force, and is expected to be implemented by future amendment (pending the completion of a feasibility assessment). The Regulations include a largely self-regulated, market-based trading system as well as administrative, compliance and enforcement provisions, such as recordkeeping and reporting requirements. The overall structure of the Regulations is similar to the Renewable Fuel Standard in the United States.

The Regulations were passed in September of 2010, pursuant to the Canadian Environmental Protection Act, 1999 (the “Act”), following a period of public and stakeholder consultation which began in 2006, when the Canadian Government published the Notice of Intent to Develop a Federal Regulation Requiring Renewable Fuels. The Notice of Intent announced that the forthcoming regulation would contain the minimum renewable fuel content requirements, and anticipated that the five percent requirement for gasoline would come into effect in 2010, as it has, and that the two percent requirement for diesel fuel and heating oil would follow no later than 2012.

The Regulations are a key component of the Canadian Government meeting its commitment to reduce Canada’s total Greenhouse Gas (“GHG”) emissions by 17 percent from 2005 levels by 2020. The five percent renewable content requirement presently in force for gasoline is estimated to result in a one megatonne reduction of GHG emissions per year, which is reportedly the equivalent of removing a quarter million vehicles from the road. With the introduction of the content requirement for diesel fuel and distillate oil, this number is expected to quadruple.

Overview

The Regulations are based on annual volumes, not individual units. As such, not every litre of gasoline, diesel fuel and heating oil is required to contain renewable fuel, provided the annual total volume target is met. For the purposes of the Regulations, the term “renewable fuel” encapsulates a broad range of products. Along with the most common forms of renewable fuel for use in diesel and gasoline engines, biodiesel and ethanol, respectively, “renewable fuel” includes any liquid fuel (other than spent pulping liquor) that is produced from one or more of the specified feedstocks, which include grains, cellulosic material, starch, oilseeds, sugar components, potatoes, tobacco, vegetable oils, algae, plant materials, animal materials, and animal or municipal solid waste.

The only parties obligated to meet renewable fuel content requirements in the Regulations are “primary suppliers,” defined as persons who produce and/or import gasoline, diesel fuel or heating distillate oil. There are limited exemptions in the applicability of the Regulations, allowing that the content and reporting requirements do not apply to persons producing or importing less than 400m³ of fuel per year or persons that only produce or import fuel for special uses (which include: exports, aviation, scientific research, competition vehicles, kerosene heaters, lamps or stoves, military combat equipment, feedstocks in the production of chemicals, use in the Territories or north of the 60th parallel in Quebec). Producers and importers of fuel that are exempt from the content requirements are nevertheless subject to the record-keeping provisions detailed in the Regulations. Further, if a producer or importer that is exempt wishes to participate in the trading system by opting in and registering, all the applicable requirements of the Regulations would apply.

The Regulations put into place extensive reporting requirements on both primary suppliers under the Regulations, and producers or importers of renewable fuel. Further, the Regulations allow that the Minister may require producers, importers, or vendors of fuel or bio-crude (liquid feedstock) to provide additional information (including samples of the fuel or bio-crude) if the Minister so requests.

The most commercially relevant aspect of the regulatory framework is the establishment of compliance units. Ownership of a sufficient number of compliance units is the mechanism by which primary suppliers demonstrate that they have met their renewable fuel content requirements. In general, one litre of renewable fuel equates to one compliance unit. Primary suppliers may create the necessary units, or may acquire them from other trading system participants. Compliance units are generated through activities such as blending renewable fuel into petroleum fuel, importing petroleum fuels with renewable content, and using bio-crude to produce fuel. Although Environment Canada does not issue or validate compliance units, a compliance unit is not valid until it is recorded specifically pursuant to the Regulations, which also contain third party auditing requirements. The method of generating and validating compliance units is conceptually similar to the system used in Alberta for creating and validating compliance offsets and emission performance credits under the Specified Gas Emitters Regulation.

The Regulations specify that there may not be more than one creator of a compliance unit. For any given compliance unit, if there is more than one party involved in the compliance unit creation, the creator of the unit must be designated by written agreement between the parties. This is an important detail, because if the parties fail to designate a creator by written agreement, no compliance unit is created under the Regulations.

As the only parties obligated by content requirements, primary suppliers are the only participants able to acquire compliance units. As such, trading activity by third party intermediaries wishing to buy and sell compliance units is not permitted by the Regulations. Other parties that blend renewable fuel, import renewable fuel or produce, import or sell neat renewable fuel (renewable fuel that is produced at a facility that only uses only renewable fuel feedstock), however, may elect to become participants in the trading system by registering with Environment Canada. There is no central registry to determine how compliance units are to be traded or sold, or at what price. These details are left to market determination.

Compliance periods begin on January 1st and end on December 31st of a given year, except for the first compliance period, which is transitional and extends from December 15, 2010 to December 31, 2012. An additional three months is allotted at the end of a compliance period for compliance units to be traded. As such, compliance units may be traded for a given compliance period as of its start date, until the March 31st immediately following its end date. This is referred to as the trading period. Compliance units created or purchased within these additional three months may be carried back into the compliance period, up to a specified maximum. At the end of the trading period, compliance units that are neither used nor carried forward are cancelled. The extended trading period is intended to allow primary suppliers to review their records, assess compliance requirements and sell or trade away excess compliance units or acquire additional ones as needed.

This flexible regulatory framework allows for the creation of innovative and symbiotic trading arrangements between participants. Industry members are now in a position to act quickly and establish their compliance mechanisms early in the first compliance period. Although the Regulations create a framework that is largely reliant on the participants to self-regulate, compliance with the requirements of the Regulations is mandatory. Under the Act, non-compliance may lead to fines or imprisonment. In addition, the Minister may require additional steps to be taken by a non-compliant participant, including notification and mitigation requirements. Further, the Regulations add to and do not replace or diminish any existing provincial law, and both federal and provincial regulation must be complied with.

Please contact Julie Bedford, John Goetz or Vivek Bakshi at www.fmc-law.com/energy for more information or assistance.



Beijing: Minimum Wage Standard in 2011 Raised

On December 24, 2010, the Beijing Human Resources and Social Security Bureau (BHRSSB) issued the *Notice on the Adjustment of the Minimum Wage Standard in 2011 in Beijing* (BHRSSB Order (2010) No. 300). Since January 1, 2011, the Beijing minimum wage standard has been raised from RMB 5.5/hour and RMB 960/month to RMB 6.7/hour and RMB 1160/month. At the same time, the minimum wage of part-time employees has been raised from RMB 11/hour to RMB 13/hour, and the minimum wage of part-time employees working during public holidays has been raised from RMB 25.7/hour to RMB 30/hour.

King & Wood: After this raise in year 2011, Beijing's minimum wage standard has become the highest in China. The employer is advised to keep an eye on the adjustment notice of the local minimum wage standard and make the appropriate adjustment to its employees' wages. According to Article 85 of *the PRC Employment Contract Law*, if the employer pays its employees wages below the local minimum wage standard, the labor administration authority shall order the said employer to pay the shortfall, and if the payment is not made within the time limit, the said employer shall be ordered to pay additional damages to the employees at a rate of not less than 50 percent but not more than 100 percent of the amount payable.



Saturday, 05 March 2011 00:00



Foreign Trade and Customs
News Flash Número: 111

New tariff reductions in Colombia for imported machinery and equipment for the mining and hydrocarbons Sectors

On March 2 of 2011 the Ministry of Commerce, Industry and Tourism of Colombia by means of Decree 562/2011 reduced in 50% the applicable import tariffs for 17 subheadings related to the mining and hydrocarbons sectors.

These subheadings cover machinery, equipment and spare parts to be imported for the exploitation, benefit, transformation and transportation of mining activities, and the exploitation, transportation and refinement of hydrocarbons.

The principal purpose of these reductions is to provide an attractive scenario in Colombia for foreign investment related to the areas of mining and hydrocarbons, contributing in this way with the economic and social growth by incentivizing competition in these sectors and the entrance of new technologies for the exploitation of natural resources.

These benefits will be in force until August 16 of 2015.

Brigard & Urrutia's International Trade and Customs practice is ready and able to provide prompt assistance in order to take advantage of this incentive and all other available benefits in the Colombian customs and trade regime

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Since the global financial crisis of 2008/2009, the global regulatory environment for financial institutions has entered a new era of development and change. As the world economy recovers, new crises have emerged as well as new opportunities for growth. In the current era of uncertainty for financial institutions, this newsletter highlights significant regulatory and legal developments affecting the local financial services sector. Particular focus is paid to changes of interest to professionals in the areas of asset management including both private equity and hedge funds, banking, securities, insurance, and listings. This edition of the newsletter reports on some of the key developments since our last edition.



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Insurance

► Commissioner of Insurance issues revised Guidance Note on reserving for mortgage guarantee business

At the end of 2010, the Office of the Commissioner of Insurance (the "**Insurance Authority**") issued a revised Guidance Note (GN6) for insurers on reserving for mortgage guarantee business (the "**Guidance Note**"). The major revisions were:

- (i) requiring funds to be maintained in the Contingency Reserve ("**CR**") for 10 years instead of 7 years;
- (ii) increasing the CR required for direct non-standard mortgage guarantee business from 50% to 75% of the net earned premium income derived from such non-standard business in the year to be assigned to CR; and
- (iii) providing a definition of "direct non-standard mortgage guarantee business" for the purpose of the Guidance Note in part 11 (II)(e).

Remarks - As part of their solvency requirements, insurance companies are required to maintain adequate technical reserves for payment of future claims in relation to their insurance businesses. Such rules and regulations are established by the Insurance Authority, which regulates insurance companies and ensures their compliance with the solvency requirements. The strengthening of reserve requirements for mortgage guarantee business are the newest set of measures to be implemented in Hong Kong in response to the property market volatility - or more exactly, steeply rising prices and fears of a property bubble - over the past few months.

The Insurance Authority's circular and Guidance Note can be viewed [HERE](#).

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Securities

► SFC proposes expansion of lists of specified stock and futures exchanges

On 21 February 2011, the Securities and Futures Commission ("**SFC**") commenced a two-month consultation inviting comments on proposals to amend the lists of "specified" local and overseas stock and futures exchanges contained in Schedule 1 to the Securities and Futures Ordinance ("**SFO**") (the "**Lists**"). Most significantly, the SFC proposed including a selection of nine exchanges from Brazil, India and the People's Republic of China to the Lists.

Remarks: Exchanges included in the Lists are given "specified" status for certain purposes relating to licensing, recognised counterparty status, disclosure of interests and price stabilising. Generally, these purposes relate to a relaxation of certain requirements under the SFO or the SFC's rules and guidelines, such as recognition of an individual's work experience in markets with specified exchanges for the purposes of exemption from licensing examinations. Certain other legislation in Hong Kong also refers to the Lists, such as the Inland Revenue Ordinance. The SFC has stated that the addition of these nine exchanges to the Lists would facilitate the development of Hong Kong as an international financial centre by expanding the scope of tax exemptions to offshore funds with operations in Hong Kong engaged in futures trading.

The expansion of the Lists to include certain exchanges from China (i.e. China Financial Futures Exchange, Dalian Commodity Exchange, Shanghai Futures Exchange and Zhengzhou Commodity Exchange) would be beneficial to persons and firms with businesses, experience or other connections with the relevant markets in China. It is expected that the SFC's proposals will be welcomed, although it is likely the SFC will need to clarify its decision for selecting the nine exchanges to include in the Lists and not other exchanges in these countries.

The SFC's press release and the consultation paper can be viewed [HERE](#).

► Regulatory regime for credit rating agencies to come into operation on 1 June 2011

On 18 February 2011, the Securities and Futures Ordinance (Amendment of Schedule 5) Notice 2011 (the "**Notice**") and the Securities and Futures (Financial Resources) (Amendment) Rules 2011 (the "**Rules**") were gazetted. The Notice amends the SFO to bring credit rating agencies under the regulatory regime of the SFC through the creation of a new Type 10 regulated activity under the SFO. The Rules set out the capital requirements for corporations to be licensed under the new Type 10 regulated activity. We last discussed the SFC's proposals for regulation of credit rating agencies in our October/November 2010 edition of the Hong Kong Financial Institutions

Newsletter, a copy of which can be viewed [HERE](#).

Subject to negative vetting by the Legislative Council, both the Notice and the Rules will come into operation on 1 June 2011. The SFC will also issue a new Code of Conduct for Persons Providing Credit Rating Services to assist the credit rating agencies and their rating analysts with compliance under the regulatory regime.

The Notice and Rules may be viewed [HERE](#) and [HERE](#) respectively.

► **Government proceeds with proposals to codify disclosure of inside information and price-sensitive information**

On 11 February 2011, both the Government and the SFC issued their consultation conclusions to their respective proposals on disclosure of inside information and price-sensitive information.

The Government conducted a 3 month consultation from March 2010 on its proposals to codify the requirements for listed corporations to disclose price-sensitive information (namely the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations.) The consultation paper sets out the proposed legislative framework as well as regulatory structure and related enforcement matters for the statutory regime. The Government will proceed to implement its proposals with revisions to the SFO, Securities and Futures (Fees) Rules and the Listing Rules. The Securities and Futures (Amendment) Bill 2011 is expected to be introduced to the Legislative Council in the 2010/11 legislative session.

In conjunction with the Government's consultation, the SFC also conducted a 3 month consultation from March 2010 on its "Draft Guidelines on Disclosure of Inside Information" (the "**Guidelines**"). The Guidelines were prepared to assist listed corporations to comply with the Government's proposed disclosure obligations. The Guidelines will be revised and finalised when the Securities and Futures (Amendment) Bill 2011 is passed by the Legislative Council and settled.

Remarks: The Government and the SFC take the view that a statutory regime for disclosure of inside information is necessary to enhance market quality and transparency, and to bring Hong Kong's regulatory regime for listed corporations more in line with those of overseas jurisdictions. As such, the proposed changes to the statutory regime and the SFC's guidelines will be broadly familiar to international institutions. An interesting aspect is the SFC's proposal to run a helpline on its guidelines for listed companies to source the regulators on disclosure issues. We previously reported on both the Government and the SFC's consultations in our April/May 2010 edition of the Hong Kong Financial Institutions Newsletter, a copy of which may be viewed [HERE](#).

The SFC's press release and Guidelines can be viewed [HERE](#). The Government's consultation conclusions can be viewed [HERE](#).

► **HKMA and HKEx to establish regulatory regime for OTC derivatives markets**

At the end of 2010, the Hong Kong Monetary Authority ("**HKMA**") and the Hong Kong Exchanges and Clearing Limited ("**HKEx**") announced their intentions for a new regulatory regime for over-the-counter ("**OTC**") derivatives trades in Hong Kong. The HKMA and HKEx intend to develop and launch a local trade repository ("**TR**") and a central counterparty ("**CCP**") for OTC derivatives trades in Hong Kong in 2012 and will work with the Government, the SFC, and other relevant stakeholders to build the new regulatory regime.

This new regulatory regime will include the reporting of OTC derivatives transactions to the TR and the clearing of standardised OTC derivatives transactions through the CCP. On an initial basis, the new regime will apply to interest rate swaps and non-deliverable forwards. As teething problems are smoothed out, the regime may be extended to cover other OTC derivatives asset classes. However, this will be further considered in line with local and overseas market developments (including further guidance from international regulatory bodies).

The industry will be consulted on the relevant supervisory requirements in the third quarter of 2011.

Remarks - International securities markets continue to see efforts to increase transparency and reduce the counterparty risks in the OTC derivatives markets in the shadow of the last global financial crisis. The Hong Kong authorities have been fully sold on the idea that for Hong Kong to continue as an international financial centre, it needs to comply with the international standards recommended by the G20. This includes that all standardised OTC derivatives contracts should be cleared through CCPs and all OTC derivatives contracts should be reported to TRs by the end of 2012.

The HKMA's article can be viewed [HERE](#) and the SFC's article [HERE](#).

Banking

► HKMA announces Basel III to be implemented in Hong Kong

On 26 January 2011, the HKMA issued a circular announcing that the Basel Committee on Banking Supervision ("BCBS") had issued the final element of the new regulatory capital requirements for Basel III (i.e. the Minimum requirements to ensure loss absorbency at the point of non-viability).

The HKMA announced that it intends to fully implement the Basel III reforms in Hong Kong. Implementation will begin on 1 January 2013 with full implementation by 1 January 2019.

The main elements of the Basel III reform package include:-

- (i) strengthening the global capital framework by changes to the definition and criteria for Tier 1 and Tier 2 capital, increases to the minimum regulatory capital requirements in relation to risk-weighted assets, and improvements to the transparency of the capital base;
- (ii) reducing procyclicality by establishing a "capital conservation buffer" and a "countercyclical capital buffer";
- (iii) supplementing the risk-based capital requirement with a leverage ratio;
- (iv) enhancing risk coverage by strengthening capital requirements for counterparty credit risk exposures in banks' derivatives, repo and securities financing activities; and
- (v) introducing global liquidity standards and monitoring metrics by imposing two minimum standards for funding liquidity (i.e. the Liquidity Coverage Ratio and the Net Stable Funding Ratio).

Remarks - Implementation of Basel III in Hong Kong will require amendments to the Banking Ordinance, the Banking (Capital) Rules and the Banking (Disclosure) Rules. A consultation on the draft amendments to the Banking Ordinance and related Rules is expected to be conducted in the third or fourth quarter of 2011.

In line with Hong Kong's established practice of applying the same capital standards to all banks, may they be internationally active or not, HKMA will apply the Basel III capital and liquidity standards to all locally incorporated authorised institutions ("AIs") on both a consolidated and unconsolidated basis.

The HKMA has stated it will be discussing implementation plans with individual authorised institutions (AIs) over the next few months to determine whether there will be any significant issues in complying with Basel III. However, in the interim period up to 1 January 2013, the HKMA will expect local AIs to take into account the revised definition of regulatory capital in their capital issuance planning. The HKMA will also be considering future guidance for the BCBS which is expected later this year and other foreign banking institutions.

The HKMA's circular can be viewed [HERE](#) and the Basel III documents [HERE](#).

► HKMA revises its Supervisory Policy Manual IC-1 "General Risk Management Controls"

On 31 December 2010, the HKMA issued a revised version of the Supervisory Policy Manual IC-1 "General Risk Management Controls" ("the SPM"). The SPM has been updated to reflect recent changes in international standards and practices. These relate mainly to general risk management issues with implications for the whole AI and include, for example, insufficient firm-wide risk management; oversight of risk management by the Board of Directors; ineffectiveness of senior management in risk identification, analysis and monitoring; and lack of system infrastructure and information to support financial risk management.

Other risk-specific issues, including counterparty credit risk, liquidity risk, and market risk have been or are being addressed in the relevant SPM for individual risks.

The HKMA's news release and the SPM can be viewed [HERE](#).

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General

► Commencement of Parts 2 and 5 of the Companies (Amendment) Ordinance 2010 and the Business Registration (Amendment) Ordinance 2010

On 21 February 2011, Parts 2 and 5 of the Companies (Amendment) Ordinance 2010 came into operation. The main purposes of the amendments are to facilitate electronic company incorporation and electronic filing of documents with the Companies Registry. The Registrar of Companies (the "**Registrar**") is now empowered to issue electronic certificates, and electronic communications with the Registrar, including the delivery of documents in the form of electronic records and the signing of documents by digital signatures or passwords is now allowed. Since there are a large number of forms involved, new services for electronic submission of documents under the Companies Ordinance ("**CO**") will be introduced in stages. The first stage will be implemented in the first quarter of 2011, and it will provide for electronic submission of specified forms/documents for company incorporation and change of company name of local companies.

A one-stop company and business registration service was implemented on the same day upon the commencement of the Business Registration (Amendment) Ordinance 2010. Any person who applies for incorporation of a local company or registration of a non-Hong Kong company under the CO will be deemed to have made a simultaneous application for business registration. Upon approval of an application, the Registrar will issue a Certificate of Incorporation/Registration and the Business Registration Certificate in one go. Certificates in hard copy form will be issued for paper applications and in electronic form for electronic applications. Both types of certificates will have the same legal effect.

Pursuant to a new section of the Business Registration Ordinance ("**BRO**"), local and non-Hong Kong companies will be deemed to have notified the Commissioner of Inland Revenue of relevant changes under the BRO where such changes have been filed with the Registrar and the Registrar has transmitted the particulars of the changes to the Commissioner of Inland Revenue after the relevant notice/return has been registered or recorded.

We previously reported on the passing of the Companies and Business Registration (Amendment) Bills in our June/July 2010 edition of the Hong Kong Financial Institution Newsletter, a copy of which can be viewed [HERE](#).

The Companies Registry's circular can be viewed [HERE](#).

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If you would like to discuss any of the matters in this newsletter or wish to have further information on our financial institutions practice in Hong Kong, please contact the person at Hogan Lovells whom you usually deal with or:

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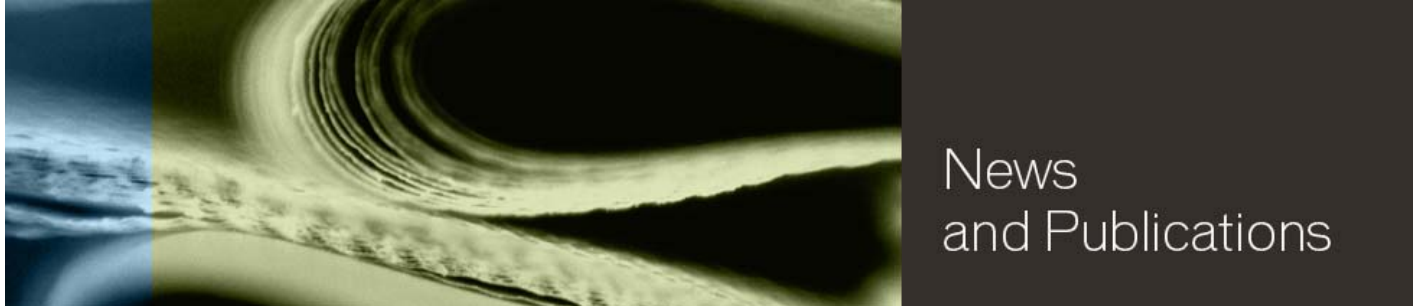
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News and Publications

NEWS DETAIL

28/02/2011

GOVERNMENT GUARANTY FOR INFRASTRUCTURE PROJECTS

To boost the credit worthiness of infrastructure projects in the framework of promoting private sector participation, the President of the Republic of Indonesia on 21 December 2010 issued Presidential Regulation No. 78/2010 regarding Infrastructure Guaranty for Government–Business Cooperation Infrastructure Projects (the “Presidential Regulation” or “Regulation”).

The Presidential Regulation is the first of its kind and is an implementation regulation of Presidential Regulation No. 67/2005 regarding Government–Business Cooperation in the Procurement of Infrastructures (as amended), which stipulates the forms and structures of the cooperation as well as the relationship between the government and the respective business entities in the development of infrastructures in the country.

Under this presidential regulation, the government infrastructure must be provided (i) with due regard to the principles of fiscal sustainability; and (ii) through the so-called Infrastructures Guaranty Company, which is a government owned business entity which was established by way of a 2009 government regulation.

The Regulation also stipulates, among others, the general requirements for the guaranty, which include risk sharing and risk allocation and risk mitigation, and the period of the guaranty. Events of default and conflict resolutions are also dealt with.

The Presidential Regulation was issued on 21 December 2010 and became effective on the day of its issue. (by: Hamud M. Balfas).

The Plaintiffs relied on their rights under the Copyright Act 1994 and claimed that the defendants had copied the broadcasts with the digitising process that converted the broadcasts from analogue to digital, and that the retention of the broadcasts in the customers' decoder box and the reproduction of the broadcasts infringed copyright.

In its defence, Young argued that, by broadcasting their content in Korea, the plaintiffs had given Young permission to view the content in New Zealand. The Court did not agree, stating that the licences were clear (that the broadcast was for Korea only) and therefore entitled to be restricted by territory. In fact, in the modern world, it is also common for Internet streaming licences to be limited by country. Young also ran an alternative argument, which relied on an exception in the Act, that the retention and reproduction of the data was transient or incidental as the decoder box did not store the content, and therefore it did not constitute copying. Again, the Court rejected this argument and found that the exception in the Copyright Act only applies where the reproduction is for non-infringing use or for lawful dealing in the work, which was not the case here.

Although the Court did not rule on the substantive copyright issues, it found that there was a serious question to be tried in relation to copyright infringement. The Court accepted the plaintiffs' submissions that the plaintiffs' broadcasts had been copied.

Interestingly, when assessing whether Young had communicated the work to the public under section 16(f) of the Copyright Act, the Court accepted that one-to-one communications of a work, in this case from Young's Baro TV system to its individual customer, were "to the public". The Court interpreted this phrase as not meaning the whole public or a large group of people, but rather the right could be infringed by a communication to a single person from the public, such as any subscriber to the Baro TV service.

Conclusion

The Court issued an interim injunction in favour of the plaintiff, preventing Young from continuing to broadcast the plaintiffs' content in New Zealand, finding that there was a serious question to be tried in relation to the copyright issues.

In a world where borders are rapidly shrinking and the rise of the Internet makes it increasingly easy to access content from other countries, this decision reiterates that rights, and restricted and permitted acts, relating to copyright works are territorial. Accessing content over the Internet that is readily available on websites originating in other countries may see you infringing New Zealand copyright.

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MINISTRY OF FINANCE ANNOUNCED ECFA PRODUCTS SPECIFIC RULES OF ORIGIN AND COUNTRY OF ORIGIN ASSOCIATED WITH THE ADMINISTRATIVE PROCEDURES

©Patrick Wong

Based on Cross-Strait Economic Cooperation Framework Agreement (ECFA), ECFA early harvest for trade in goods tariff reduction arrangement will be implemented on 1 January, 2011. For cross-strait cargo trade in goods, in addition to the early harvest under the ECFA list of products, businesses are still consistent with the "Provisional Rules of Origin Applicable to Products Under the Early Harvest for Trade in Goods (the "Provisional Rules of Origin")", and the rules and regulations laid down by its product-specific rules of origin (Product Specific Rules, referred to as the "PSR"), before it can be applied. With respect to the aforesaid two regulations and the necessary administrative procedures for the implementation of the Provisional Rules of Origin, the Consultative Group on business rules of origin of both sides have completed their negotiations and their determination were announced by the Ministry of Finance on 27 December, 2010.

According to Article 2 of the Provisional Rules of Origin, the cross-strait import and export goods must be either wholly obtained or produced entirely in one side or both, exclusively from originating materials. In case of the materials for the manufacture of the goods are imported from third country, the products must be conformed to their respective PSR, in order to identify the goods as originated from cross-strait products. ECFA early harvest products, such as trade in goods of non-originating materials used by the manufacturers, the assembling or manufacturing processes required to achieve substantial degree of transformation before they can identify the goods as originated from cross-strait products. PSR set the standards for real transformation for individual product lines according to their different characteristics, including the standards for the change of tariff rate, the regional value content standards, processing standards and so on.

The administrative procedures for early harvest for trade in goods under the Provisional Rules of Origin include the formation, issuance and application requirements, validity period, the conditions for the application of replacement, maintenance requirements of the certificate of origin of ECFA, and imports of related obligations verification of origin regulations, refusal to grant preferential tariff treatment of the case, the two sides of the channels of communication and so on. ECFA trade in goods to apply for preferential tariff rates of the early harvest industry, the export declaration is required before the application for ECFA Certificate of Origin (the certificate of origin of Taiwan will be issued by the relevant agencies appointed by the Bureau of Foreign Trade of the Ministry of Economic Affairs). In addition, the following items should be noted by the applicant:

-

To ensure that the goods apply for ECFA preferential tariff treatment are in the early harvest list.

- Except for special circumstances, the certificate of origin should be obtained before exportation.
- The initiative to declare the imported goods as originating goods, and apply for the preferential tariff treatment.
- To submit a valid certificate of origin.
- Application for ECFA early harvest trade in goods tariff concessions for goods, the goods must be exported on or after 1 January, 2011.
- Apply for preferential tariff treatment, in addition to the goods must meet the relevant standards determined origin, the goods must have cross-strait direct transportation, that is, unless there are special considerations which, meet specific conditions, the goods shall not transfer or stay in any third party.
- Manufacturers or exporters should keep the relevant documents of origin.



TAX UPDATE

Explanation of the Obama Administration's Oil and Gas Tax Proposals

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On February 14, 2011, the Treasury Department released a general explanation (the "Explanation") of the Obama Administration's (the "Administration's") tax proposals for its fiscal year 2012 budget. The Explanation describes the following proposed amendments to certain oil and gas provisions of the Internal Revenue Code that may be applicable to your business. These proposals are similar or identical to proposals that were described in the Administration's fiscal year 2011 budget.

1. Repeal Expensing of Intangible Drilling Costs

Generally, a taxpayer who pays or incurs intangible drilling costs ("IDCs") in the development of an oil or gas property located in the United States may elect under current law either to expense or to capitalize and amortize those costs, if the taxpayer holds a working or other operating interest in such property. The rule is an exception to the general rules requiring taxpayers to capitalize costs that provide a benefit to the taxpayer in future periods.

If a taxpayer elects to expense IDCs, the amount of the IDCs is deductible as an expense in the taxable year the cost is paid or incurred. In the case of an integrated oil company that has elected to expense IDCs, 30% of the IDCs on productive wells must be capitalized and amortized over a 60-month period. Further, a taxpayer may elect to capitalize and amortize certain IDCs over a 60-month period beginning with the month the expenditure was paid or incurred.

The Administration proposes to repeal the election to expense IDCs, as well as the election to amortize IDCs over a 60-month period. Under the proposal, all IDCs would be capitalized and amortized as depreciable or depletable property, depending on the nature of the cost incurred, in accordance with generally applicable rules. The proposal would be effective for costs paid or incurred after December 31, 2011.

2. Increase Amortization Period for Geological and Geophysical Costs to Seven Years

Geological and geophysical expenditures are costs incurred for the purpose of obtaining and accumulating data that will serve as the basis for the acquisition and retention of mineral properties. The amortization period for geological and geophysical expenditures incurred in connection with oil and gas exploration in the United States is two years for independent producers and seven years for integrated oil and gas producers.

The Administration proposes to increase the amortization period from two years to seven years for geological and geophysical expenditures incurred by independent producers in connection with all oil and gas exploration in the United States. Seven-year amortization would apply even if the property is abandoned, and any remaining basis of the abandoned property would be recovered over the remainder of the seven-year period. The proposal would be effective for amounts paid or incurred after December 31, 2011.

3. Repeal Percentage Depletion

The capital costs of oil and gas wells are recovered through the depletion deduction. Under the cost depletion method, the basis recovery for a taxable year is computed on the unit of production method proportional to the exhaustion of the property during the year. Certain taxpayers qualify for percentage depletion with respect to domestic oil and gas properties. The amount of the percentage depletion deduction is a specified percentage (from 15% to 25%) of the gross income from the property, subject to several limitations, including that the percentage depletion deduction for a year may not exceed 100 percent of the taxable income from the property.

A qualifying taxpayer determines the depletion deduction for each oil and gas property under both the percentage depletion method and the cost depletion method and deducts the larger of the two amounts. Because percentage depletion is computed without regard to the taxpayer's tax basis in the depletable property, a taxpayer may continue to claim percentage depletion after all the expenditures incurred to acquire and develop the property have been recovered.

The Administration's proposal would repeal the percentage depletion deduction with respect to oil and gas wells for taxable years beginning after December 31, 2011. Thereafter, all taxpayers would only be permitted to report a deduction for cost depletion to recover their adjusted basis, if any, in oil and gas wells.

4. Repeal Domestic Manufacturing Deduction for Oil and Gas Production

A deduction is allowed with respect to income attributable to domestic production activities. The deduction is equal to 6 percent of the lesser of qualified production activities income for the year or total taxable income for the year, limited to 50 percent of the wages incurred by the taxpayer for the year.

Qualified production activities income includes a taxpayer's gross receipts derived from the disposition of oil, natural gas or primary products thereof extracted or produced by the taxpayer within the U.S. minus the cost of goods sold and other expenses, losses, or deductions attributable to such receipts.

Under the Administration's proposal, gross receipts derived from the disposition of oil, natural gas or a primary product thereof would be excluded from the definition of domestic production gross receipts for taxable years beginning after December 31, 2011.

5. Repeal Passive Loss Exception for Working Interests in Oil and Gas Properties

The passive loss rules generally limit the deductions and credits of individuals, trusts and certain closely held C corporations arising from passive activities. A "passive activity" is generally defined as any trade or business activity in which the taxpayer does not materially participate.

Current law contains an exception, however, for certain oil and gas working interests. Under this exception, a working interest in an oil or gas property that the taxpayer holds directly or through an entity that does not limit the liability of the taxpayer with respect to the interest is not considered a "passive activity," even though the taxpayer does not materially participate.

The Administration proposes to repeal the oil and gas working interest exception for taxable years beginning after December 31, 2011. As a result, deductions and credits attributable to oil and gas working interests held by an individual, trust or closely held C corporation would become subject to the passive loss limitations described above, unless the taxpayer materially participates in the oil and gas activity.

6. Repeal of Credits for Enhanced Oil Recovery Projects and Production from Marginal Wells

The Administration proposes to repeal for taxable years beginning after December 31, 2011 (i) the 15% investment tax credit for domestic enhanced oil recovery projects and (ii) the production tax credit for oil and gas produced from marginal wells.

7. Repeal Deduction for Tertiary Injectants

Under current law, taxpayers are allowed to deduct the cost of qualified tertiary injectant expenses for the taxable year. Qualified tertiary injectant expenses are amounts incurred for any tertiary injectant (other than recoverable hydrocarbon injectants) that is used to augment the recoverable amount of hydrocarbons in their reservoir as a part of a tertiary recovery method (as such term is defined by regulation).

The Administration proposes to repeal the deduction for qualified tertiary injectant expenses for amounts paid or incurred after December 31, 2011. As a result, such costs would be capitalizable and recovered over time.

This tax update is intended only to provide a general summary of certain tax provisions. If you would like to discuss how any of these or other tax provisions may impact your operations, please contact any Baker Botts tax lawyer, including the authors of this update listed above.

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FCC Initiates Rule Making to Reinstate Video Description Regulations

03.04.11

By Maria T. Browne and Brendan Holland

On March 3, 2011, the Federal Communications Commission (FCC) initiated a rule making proceeding to reinstate its prior video description rules with certain modifications, as required by the Twenty-First Century Communications and Video Accessibility Act of 2010 (Act). The proposed rules would require large market broadcast affiliates of the top four national networks and most cable operators and DBS providers to provide programming with audio narrated descriptions of a television program's key visual elements beginning as soon as first quarter 2012. Davis Wright Tremaine previously summarized the Act in our earlier advisory available [here](#).

The Notice of Proposed Rule Making (NPRM) takes the first step toward restoring the video description regulations that the FCC previously adopted in 2000, but which were subsequently vacated by the U.S. Court of Appeals for the D.C. Circuit. Now with explicit Congressional authorization, the FCC seeks to restore the video description rules by Oct. 8, 2011, as required by the Act. The FCC proposes a quick implementation, with the video description and pass-through rules beginning Jan. 1, 2012. The most significant elements of the reinstated video description rules are:

- Broadcast affiliates of the top four national networks—ABC, CBS, Fox, and NBC—located in the top 25 television markets must provide 50 hours per calendar quarter of prime time and/or children's programming with video descriptions.
- The top five national nonbroadcast networks must provide 50 hours per calendar quarter of prime time and/or children's programming with video descriptions. The proposed rule would be applied to multichannel video programming distributors (MVPDs), including cable operators and DBS providers with 50,000 or more subscribers, and presumably then be applied to the top five networks through affiliation agreements.
- "Live" and "near live" programming is exempt from the rules.
- In order to count toward the requirement, the programming must not have been aired previously with video descriptions, on that particular broadcast station or MVPD channel, more than once.
- All broadcast stations, regardless of market size or affiliation, and all MVPDs, regardless of the number of subscribers they serve, must "pass through" video description when such descriptions are provided and when the station or program distributor has the technical capability to do so.

In addition to proposing to reinstate the rules previously adopted by the FCC, the item asks many practical implementation questions about refreshing market rankings, applicability of the rules to low power television, and what constitutes the "technical capability" to pass through video descriptions. In particular, the FCC seeks to refresh the list of the top 25 DMAs, as well as update the top five national nonbroadcast networks subject to the rule. In determining the top five nonbroadcast networks, the FCC proposes to exclude from the top five any nonbroadcast network that does not provide, on average, at least 50 hours per quarter of prime time non-exempt programming, i.e., programming that is not live or near-live. The NPRM specifically seeks comment from any network that believes it should be excluded from the top five covered networks because it does not offer enough pre-recorded prime time or children's programming.

The item also seeks input regarding the definition of "near live" programming, which the FCC proposes to define as programming performed and recorded less than 24 hours prior to the time it is first aired. Other than live or near live programming, the FCC proposes not to adopt any new categorical exemptions, but seeks input regarding an exemption based on a showing that compliance would be economically burdensome, similar to the existing exemption for closed captioning.

Finally, the FCC seeks comment on how to accommodate digital television stations that multicast multiple programming streams (i.e., whether it must include descriptions on all four streams), including if a station carries a top-four national network on another stream, and whether it should adopt quality standards for video descriptions, assuming that it has the authority to do so.

Comments in this proceeding will be due 30 days after the NPRM is published in the Federal Register, with Reply Comments due 60 days after publication. Interested parties may file comments with the FCC either in paper or electronically through the FCC's Electronic Comment Filing System. For further questions or assistance with preparing comments, please contact Burt Braverman, Maria T. Browne, Robert Corn-Revere, Paul Glist, Brendan Holland, Brian J. Hurh, or Ronald G. London.

Disclaimer

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California Appellate Court Clarifies “Reporting Time Pay” Requirement for Employees Who Attend a Mandatory Meeting on Their Day Off

Under California law, an employer must pay “reporting time pay” in two circumstances: (1) when an employee reports to work for a regularly scheduled day of work, but is not put to work or is provided less than half of his or her scheduled day’s work or (2) the employee is asked to attend a meeting or training on a day that the employee is scheduled to be off work. Historically, the Division of Labor Standards Enforcement (“DLSE”) - the government agency responsible for enforcing California wage and hour laws – has issued conflicting enforcement policies regarding how much an employer must pay an employee for “reporting time” in these two circumstances. In its most recent enforcement policy, the DLSE concluded that in *both* circumstances, employees should receive reporting time pay in the amount of fifty percent of their usual or scheduled shift (up to a maximum of four hours). The DLSE had previously determined, however, that employees who are required to attend mandatory meetings on their scheduled day off need only receive two hours of reporting time pay. Recently, a California appellate court ignored the DLSE’s current enforcement position and ruled that an employee who was required to attend a termination meeting on his scheduled day off was only entitled to two hours of reporting time pay.

In *Price v. Starbucks*, the plaintiff, a coffee barista, was asked to come to the store on his scheduled day off for a meeting with his manager. The plaintiff reported to work for the meeting and his manager told him he was being let go. The meeting lasted approximately forty-five seconds. The plaintiff was paid two hours of “reporting time pay” for the termination meeting. The plaintiff sued Starbucks, arguing that he should have received additional “reporting time pay” in the amount of fifty percent of his usual or scheduled day’s work.

Citing the DLSE’s previous enforcement position, the appellate court held that employees who are *not* scheduled to work and do not *expect* to work their usual shift, but instead must report to work for a *meeting*, should only be paid the minimum of two hours. In reaching this conclusion, the court noted that the primary purpose of the reporting time pay provision is “to guarantee at least partial compensation for employees who report to work expecting to work a specified number of hours and who are deprived of that amount because of inadequate scheduling or lack of proper notice by the employer.” Thus, where an employee is required to report to work for a brief meeting - and does not expect to work a regular shift - the employee is only entitled to two hours of reporting time pay. Because the plaintiff in *Starbucks* was not scheduled to work on the day he reported to the termination meeting, he was not entitled to more than the two hours of pay he received.

Employers are advised to update and publish their reporting time pay policies before changing their reporting time pay practices. Additionally, employers should be aware that the DLSE may attempt to enforce its current position notwithstanding this important appellate court decision.

For more information, please contact the authors or any member of Luce Forward’s Labor & Employment group.

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WSGR ALERT

FEBRUARY 2011

DELAWARE CHANCERY COURT UPHOLDS AIRGAS BOARD'S REFUSAL TO REDEEM POISON PILL

In a landmark ruling this week, the Delaware Court of Chancery forcefully affirmed the right of a board of directors to maintain a "shareholder rights plan"—more commonly referred to as a "poison pill"—in response to an all-cash tender offer so long as the board determines, in good faith and in accordance with its fiduciary duties, that the offer is inadequate. In *Air Products and Chemicals, Inc. v. Airgas, Inc.*, No. 5249-CC (Del. Ch. Feb. 15, 2011), Chancellor William B. Chandler III explained that under existing Delaware Supreme Court precedent, a corporate board, while subject to "rigorous judicial fact-finding and enhanced scrutiny" of its use of the pill, can maintain the pill to prevent shareholders from accepting a tender offer that the board believes does not adequately value the company, even if that offer is not "structurally coercive." The *Air Products* decision reaffirms the scope of a corporate board's managerial authority in responding to tender offers it views as contrary to the best interests of the corporation's shareholders.

Background

Air Products first expressed its interest in acquiring Airgas in a private meeting between the two companies' CEOs. Offers of \$60 and \$62 per share were made and rejected, with Airgas's CEO indicating that the Airgas board was not interested in pursuing negotiations in the price range suggested by Air Products' offers.

Air Products responded by taking its offer public. Its first public offer was for \$60 per share, and was conditioned upon, among other things, a majority of outstanding shares tendering into the offer, and the Airgas board

redeeming the company's poison pill. The Airgas board received opinions from two different financial advisors stating that the offer was inadequate, and the board publicly and repeatedly told shareholders that Air Products' offer grossly undervalued the company. Air Products, meanwhile, nominated a slate of three new directors for the staggered Airgas board. Air Products promised that the nominees would be "independent" and able to "consider without any bias [the Air Products] Offer." Air Products also proposed amending Airgas's bylaws to require the company to hold all subsequent annual shareholder meetings in the month of January. The amendment would have had the effect of permitting Air Products to secure the election of a second slate of Airgas directors more quickly.

The two companies continued to argue publicly over the merits of Air Products' offer, which was raised first to \$63.50 and then to \$65.50. At the annual Airgas shareholder meeting, the shareholders elected Air Products' slate and approved Air Products' proposed bylaw amendment. (The Delaware Supreme Court subsequently invalidated the bylaw amendment. For a WSGR Alert regarding that important decision, please visit http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/pdfsearch/wsgralert_shortens_directors.htm.) The new directors, however, ultimately reached the same conclusion as the incumbents: that Air Products' offer was inadequate, and that the poison pill should be kept in place. A third financial advisor, hired at the behest of the new directors, further supported this decision. Air Products brought suit, and after a bench trial on the matter—but before the court

issued its ruling—raised its offer to \$70 per share, which Air Products represented was its "best and final" offer. The Airgas board claimed that the offer was still inadequate, sticking to its position that, while it was not categorically opposed to a sale, the value of Airgas in a sale was, according to its analyses, "at least \$78 per share."

The Chancery Court's Decision

The Chancery Court ruled in favor of the Airgas board and dismissed all claims against the Airgas board with prejudice. The court began its analysis by finding that where a poison pill is being maintained as a defensive measure and a board is faced with a request to redeem the pill, the well-established two-part "intermediate standard" of review set forth in *Unocal Corp. v. Mesa Petroleum Co.* applies, instead of the more lenient "business judgment rule." Under the first *Unocal* prong, the target board must show that it had "reasonable grounds for believing danger to corporate policy and effectiveness existed." Under the second prong, the target board must show that its response was "reasonable in relation to the threat posed."

Chancellor Chandler found that the Airgas board had met both prongs of the *Unocal* test. With respect to the first prong, he found that the Airgas board had undertaken a good faith and reasonable investigation concerning the adequacy of Air Products' offer. This investigation included securing reports from three different outside independent financial advisors, as well as advice from two different law firms, one of which was retained by the Air Products nominees. The court further found that the board itself was comprised of

Continued on page 2...

Delaware Chancery Court Upholds Airgas . . .

Continued from page 1...

a majority of outside, independent directors (including the three Air Products nominees), which, under *Unocal*, "materially enhanced" proof of the board's good faith and reasonable investigation.

The court next addressed the issue of whether a tender offer that is not "structurally coercive"—defined as one that does not punish non-tendering shareholders with less favorable treatment than tendering shareholders—can present a cognizable "threat" to the company. The court recognized the argument that the law should not find a cognizable threat in such circumstances; the Airgas shareholders were admittedly a "sophisticated group" that had an "extraordinary amount of information available to them with which to make an informed decision about Air Products' offer." Nevertheless, the court felt "bound" by Delaware Supreme Court precedent teaching that a tender offer that is not "structurally coercive" can still be "substantively coercive," and therefore pose a legally cognizable threat to which the board is entitled to respond. The court concluded that the Airgas board faced just such a threat, in light of the danger that the arbitrageurs who held a majority of Airgas's stock would tender their shares notwithstanding the long-term value of the company.

Turning to the second *Unocal* prong, the court began by acknowledging that a defensive measure will not be upheld if it is "preclusive." Although the court found that the Airgas board's refusal to redeem the pill "in fact precluded" Air Products' tender offer, it nevertheless felt "constrained" to conclude that the defensive measure still was not "preclusive" under Delaware Supreme Court precedent, because Air Products could have nominated, and the shareholders could have elected, a second slate of directors at the next

annual Airgas shareholder meeting. Chancellor Chandler also concluded that the Airgas board's response to the offer was within the "range of reasonableness," as evidenced, again, by the good faith and reasonableness of the board's investigation, and the fact that Air Products' own nominees believed that Air Products' \$70 offer was inadequate.

Implications

The *Air Products* ruling is significant in many respects. First, because it is not being appealed, Chancellor Chandler's thoughtful and comprehensive opinion will represent Delaware law for the foreseeable future. If and when a question of the use and/or validity of a shareholder rights plan under Delaware law is litigated again, Chancellor Chandler's discussion of existing precedent makes his opinion very persuasive authority for other courts.

The decision also is important because it clarifies that existing Delaware Supreme Court precedent "allow[s] a board acting in good faith (and with a reasonable basis for believing that a tender offer is inadequate) to remit the bidder to the election process as its only recourse." More fundamentally, the decision makes clear the board's primacy over the question as to whether or not a company should be sold. Thus, the decision endorses, in the words of the court, "Delaware's long-understood respect for reasonably exercised managerial discretion, so long as boards are found to be acting in good faith and in accordance with their fiduciary duties (after rigorous judicial fact-finding and enhanced scrutiny of their defensive actions)."

For more information on the *Air Products* case or any related matter, please contact a member of Wilson Sonsini Goodrich & Rosati's securities litigation practice.



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