


## Pacific Rim Advisory Council November 2011 e-Bulletin

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### CONFERENCES & EVENTS

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- 2012 March - PRAC Members Gathering @ PDAC Toronto
- 2012 April 21-24 - 51st International PRAC Conference - Houston  
Hosted by Baker Botts LLP
- 2012 May 5 - PRAC Members Gathering @ INTA Washington
- 2012 October - PRAC Members Gathering @ IBA Dublin
- 2012 October 20-23 - 52nd International PRAC Conference - Buenos Aires  
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Details at [www.prac.org](http://www.prac.org)

PRAC Conferences and Events are open to PRAC Member Firms only

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## PRAC WELCOMES NEW MEMBER FIRMS - ARIAS MUÑOZ (CENTRAL AMERICA) AND ARIAS FABREGA & FABREGA (PANAMA)

November 01, 2011 Toronto The Pacific Rim Advisory Council ("PRAC") is pleased to welcome its two newest member firms, **Arias & Muñoz** (Central America) and **Arias, Fabrega & Fabrega**, (Panama) effective November 01, 2011.



### Arias & Muñoz (Central America)

**Arias & Muñoz** is unique in Central America, operating as a single firm rather than as an alliance of firms and currently has eight, fully-integrated offices in six countries: Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama. It has become, today, not only a solid, but also an innovative legal firm that continues to spread its influence throughout the region. For clients, choosing the right legal partner is key. Arias & Muñoz and its dedicated lawyers, with their core experience over a broad range of practice areas and industries, unlock the region's intricacies and subtle differences in laws for them. The firm is truly a one-step, one-stop law firm offering clients the benefits and demonstrated advantages that come from having all their regional businesses served from one, fully integrated base.

For further information: **Arias, Muñoz** Centro Empresarial Forum | Edificio C, Oficina 1C1 | San Jose, Costa Rica | PO Box 12891 – 1000 | T: +2204-7575 | F: +506 2204-7580 | W: [www.ariaslaw.com](http://www.ariaslaw.com) | Key PRAC Contact: Jose Antonio Muñoz



ARIAS, FABREGA & FABREGA

### Arias, Fabrega & Fabrega (Panama)

**Arias, Fabrega & Fabrega**, or ARIFA as frequently called by clients, has been at the forefront of the legal profession in Panama for nearly a century. As a full-service law firm, ARIFA's practice spans over 28 areas of law, organized in 12 practice groups. ARIFA's strong offshore practice has developed a network of offices in Panama, London, Geneva, Hong Kong, the British Virgin Islands and Belize.

For further information: **Arias, Fabrega & Fabrega** | Plaza 2000, 16th Floor, 50th Street | Panama, Republic of Panama | T: +507 205-7000 | F: +507 205 7001 | W: [www.arifa.com](http://www.arifa.com) | Key PRAC Contact: Ricardo M. Arango

### About The Pacific Rim Advisory Council

The Pacific Rim Advisory Council is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 30 top tier independent member law firms.

Since 1984, Pacific Rim Advisory Council (PRAC) member firms have provided their respective clients with the resources of our organization and their individual unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region.

With over 12,000 lawyers practicing in key business centers around the world, including Latin America, Middle East, Europe, Asia and North America, these prominent member firms provide independent legal representation and local market knowledge. Whether you are an institutional client or an emerging business our member firms are leaders in their fields and understand your business needs and the complexities of your industry.

For additional information about Pacific Rim Advisory Council or our member law firms, visit us online at [www.prac.org](http://www.prac.org)

## BAKER BOTTS INTERNATIONAL TRANSACTIONS & PROJECTS LAWYERS JOIN LONDON OFFICE

LONDON, November 1, 2011 -- Neil Foster, who specializes in international transactions in the technology, media, telecoms and life sciences sectors, joined Baker Botts as a partner in the firm's London office. The addition of Foster will enhance Baker Botts' client service in these key industry sectors around the world.

In addition to advising U.K. companies, banks, venture funds and intermediaries, Foster represents a number of major U.S., Middle East and Asian corporations on their U.K. and European transactions. Recent deals include transactions for Vodafone, Sophos, Expedia, Inc., Liberty Global, Inc., Arcadia Biosciences, Inc. and Acorn Media Group, Inc., whom he advises on M&A, joint ventures, strategic investments, buy-outs and venture capital deals.

"Neil brings a wealth of experience that will strengthen our capabilities in these major practice areas," said Baker Botts Managing Partner Walt Smith. In 2010, Foster advised Sophos plc on the sale by the company's founders and TA associates to Apax for \$830 million, the largest European private equity deal in the IT sector that year. More recently, he advised Evo Electric, a venture capital-funded electric motors company on a new investment and a joint venture with a global engineering group.

"Neil is well-known throughout the U.K. in private equity and venture capital matters," said Tony Higginson, Partner in Charge of Baker Botts' London office. "Adding Neil to our London office continues our goal of building one of the strongest cross-border transactional legal teams in our core sectors of energy, technology and life sciences."

At his previous firm, Foster was head of private equity and venture capital. He regularly speaks at venture capital, technology, media, biotechnology and corporate finance events. He was a mentor to CEOs of emerging companies at the European Venture Academies in Copenhagen and London, specializing in fund-raising strategies and techniques. Foster is a member of British American Business, a transatlantic trade association, where he sits on their Information, Communications and Entertainment Committee. He serves on the Advisory Board for "Global Corporate Venturing" magazine. Foster is ranked by Chambers as a "leading individual" for M&A transactions.

LONDON, October 28, 2011 -- Mark Rowley has rejoined Baker Botts as a partner in the firm's London office. He has extensive experience working with clients in developing large-scale petroleum projects, including cross-border pipelines and LNG export matters.

Rowley left the firm in January 2010 to become General Counsel of Australia Pacific LNG in Brisbane, Australia. During his time as General Counsel, the APLNG achieved several significant milestones, including the announcement of a Final Investment Decision on Train 1 of a coal seam gas (CSG) to liquefied natural gas (LNG) development project. He also advised APLNG on its approximately \$A90 billion LNG sale to Sinopec; the single largest LNG sale from Australia.

"While 'down under', Mark gained valuable experience working in-house," said Baker Botts Managing Partner Walt Smith. "We are very pleased Mark has returned to the Firm."

Rowley first joined Baker Botts in 2001. He moved to Baku, Azerbaijan for client work in 2003, returning to London two years later. He worked on a number of significant transactions during that time, including the \$3.2 billion SCP/Shah Deniz gas pipeline (from Azerbaijan to Turkey) that included project structuring, production sharing, gas transportation and related issues.

"We are excited to have Mark back in London," said Tony Higginson, Partner in Charge of the firm's London office. "The in-house opportunity in Australia was a wonderful challenge for Mark, and added to his global energy project experience."

Rowley has been recognized for his projects expertise by *Chambers* and *Legal 500* researchers. He is a graduate of the University of Canterbury in Christchurch, New Zealand.

### About Baker Botts L.L.P.

Baker Botts is an international law firm with over 725 lawyers and a network of 13 offices around the globe. Based on our experience and knowledge of our clients' industries, we are recognized as a leading firm in the energy, technology and life sciences sectors. Throughout our 170-year history, we have provided creative and effective legal solutions for our clients while demonstrating an unrelenting commitment to excellence.

For more information, please visit [www.bakerbotts.com](http://www.bakerbotts.com).

**CLAYTON UTZ PARTNER APPOINTMENTS**

**Sydney, 10 November 2011:** Leading law firm Clayton Utz has announced the appointment of 8 new partners, with effect from 1 January 2012.

They are :



Brett Cohen  
Energy & Resources / Corporate  
Advisory / M&A, Perth



Brett Cook  
Litigation & Dispute Resolution,  
Brisbane



Damien Gardiner  
Environment & Planning,  
Melbourne



Richard Hoad  
IT / IP, Melbourne



Ross McInnes  
Litigation & Dispute Resolution,  
Sydney



Majella Pollard  
Government, Brisbane



Polat Siva  
Litigation & Dispute Resolution,  
Darwin



Adel van der Walt  
Energy & Resources / Corporate  
Advisory / M&A, Perth

Clayton Utz Chief Executive Partner Darryl McDonough said the appointments reflect the depth of legal talent at Clayton Utz, across practice areas and offices.

"I congratulate our new partners on their appointments. Their commitment to clients and the broader community is reflective of our culture of and commitment to excellence in everything we do," said Mr McDonough.

The appointments follow those of Shae McCartney (Workplace Relations & Safety, Brisbane), Mary Pringle (Real Estate, Perth) and Fran Rush (Banking, Sydney), who were promoted to the Clayton Utz partnership on 1 July 2011. Leading oil and gas expert John King also joins Clayton Utz as a partner on 15 November 2011, based in Perth.

For additional information visit [www.claytonutz.com](http://www.claytonutz.com)

## DAVIS WRIGHT TREMAINE VETERAN LAWYERS JOIN FIRM

**Anchorage - NOVEMBER 1, 2011** – Michael Jungreis, who has three decades of experience representing varied business clients in Alaska, including those in the mining, oil and gas industries, and Lisa D. Doehl, a natural resources attorney for 19 years, have joined Davis Wright Tremaine LLP in the firm's Anchorage office. Jungreis has joined as a partner; Doehl is of counsel. Jungreis and Doehl, who previously worked together at Hartig Rhodes Hoge & Lekisch PC, will significantly expand the real property, natural resources/mining law, and litigation practices at DWT.

"Alaska is the center of a vast natural-resources economy, with remarkable opportunities and complex legal and regulatory challenges that are unique to this state," said Joseph Reece, partner-in-charge of DWT's Anchorage office, who also practices in the real property/land use group. "Michael and Lisa bring highly developed skills and knowledge that can help all of our Alaska clients maximize their success."

Jungreis serves on the board of the Resource Development Council for Alaska, a statewide business association. His recent work includes the acquisition and sale of commercial property, mining property acquisition, formation of mining ventures, oil and gas transactions, and commercial financing issues. His varied work on complex commercial litigation includes disputes in the real estate, oil and gas, construction, banking, and insurance areas. He also has considerable experience assisting businesses with corporate matters.

"I'm delighted to be able to bring my practice to a firm with the scope, reputation, and significant resources of Davis Wright Tremaine," said Jungreis. "All of my clients will benefit."

Doehl has been advising two mining companies on a variety of matters and assisting other companies with regard to contaminants, gas exploration licensing, commercial property leases and development, and litigation. She came to private practice from the U.S. Department of the Interior, where she worked on matters related to the National Petroleum Reserve-Alaska, Alaska Native allotments, endangered species, property issues and more for the Bureau of Land Management, National

Park Service, Bureau of Indian Affairs, and the U.S. Fish & Wildlife Service.

"The work I enjoy most involves natural resources, environmental, wildlife, and land management and title issues," says Doehl. "I look forward to expanding my ability to serve clients in these areas as a member of the team at Davis Wright."

Jungreis earned his J.D. from the University of Miami School of Law and his B.A. from the University of Chicago. Doehl earned her J.D. (cum laude) and a Masters in Urban Planning from the University of Illinois College of Law and her B.A. at Columbia University.

For more information, visit [www.dwt.com](http://www.dwt.com)

## TOZZINIFREIRE'S NEW OIL & GAS HEAD

Pedro Dittrich, one of the coordinators of the technical group that drafted the pre-salt bills at the Chief of Staff Office of the President of Brazil, is the new head of TozziniFreire's Oil & Gas Practice Group, and will be based at the firm's Rio de Janeiro office.

In addition to his expertise as a lawyer in the energy, biofuel, and oil and gas sectors, Dittrich also worked for seven years for the Brazilian Government, including the Ministry of Mines and Energy, and was an audit board member at energy companies and a legal adviser to draft the Regulation of the Gas Sector.

Graduated in Law and in Electrical Engineering from *Universidade Federal do Rio Grande do Sul*, and specialized in International Law from the same university, Dittrich has a master's degree in Corporate and Business Law from *Pontificia Universidade Católica de São Paulo* and is about to receive a Masters' in Oil Law from Dundee University, Scotland.

TozziniFreire Advogados is a leading law firm in Brazil and consistently provides legal services to domestic and international companies in a wide variety of business sectors. With 6 fully-owned offices in Brazil (two in São Paulo and one each in Rio de Janeiro, Brasília, Porto Alegre and Campinas), TozziniFreire is engaged in all areas of business law and ensures its clients the same outstanding services and one-firm resources in all offices. In addition to these features, we offer the convenience of an office in New York.

For additional information visit [www.tozzinifreire.com.br](http://www.tozzinifreire.com.br)

## HOGAN LOVELLS HIRES LATERAL PARTNER IN TOKYO

**HONG KONG, 31 October 2011** - Hogan Lovells has strengthened its international litigation and arbitration practice with the lateral partner hire of Patric McGonigal in Tokyo. Patric, an experienced litigator, will join Hogan Lovells on 31 October 2011 and will be based in the firm's Tokyo office. Patric was formerly a partner in Barlow Lyde & Gilbert's international commercial arbitration practice, leading a team in Singapore where he acted on a broad range of commercial, insurance, international trade and trade finance disputes. Prior to that Patric had spent nine years in London and over five years in Hong Kong and Shanghai, where he gained a detailed understanding of regional dynamics and issues impacting disputes in Asia generally. He has extensive regional experience of conducting arbitration cases before SIAC, HKIAC, CIETAC as well as in London and Europe before LCIA, LMAA, ICC, RSA, GAFTA and FOSFA.

In recent years, Patric has been involved in the Elektrim/Vivendi dispute, one of the highest value arbitrations reported in Europe. He has also worked on several recent trade arbitrations arising out of the grain and flour export ban in Russia as well as a series of recovery proceedings in Asia and London involving defective submarine telecommunication cables.

Patric is ranked as a leading lawyer in several legal directories, including in Chambers Asia 2011 and Asia Pacific Legal 500, and is a sought after speaker at energy, insurance, marine and trade industry sector conferences.

Commenting on Patric's arrival, David Harris, co-CEO of Hogan Lovells said:

"Patric is a seasoned partner with a strong track record in international litigation and arbitration, particularly on the ground in Asia. This experience combined with his close personal connections to Japan, make him the ideal partner to support the needs of our Japanese client base and to lead our established team on the ground in Tokyo".

Patric McGonigal said:

"Hogan Lovells is one of the leading global litigation and arbitration practices, with strength and depth across Asia and a presence in Japan which is one of the most established amongst international firms based in the country.

The firm's industry focus was also a major attraction, providing a perfect platform to leverage my track record acting on major energy, insurance, marine and trade related disputes. I look forward to working with the team in Tokyo, across the region and the international offices, to further consolidate the firm's status as one of the leading litigation and arbitration practices in Asia."

For more information, see [www.hoganlovells.com](http://www.hoganlovells.com)

## NAUTA DUTILH LUXEMBURG LAUNCHES DEDICATED IP/ICT DEPARTMENT

We are pleased to announce the launch of a Luxembourg IP/ICT dedicated department. The department will be led by Vincent Wellens and his team. Given our already strong IP/ICT law and litigation practice in the Netherlands and Belgium, we are pleased that this additional Luxembourg element will offer a more integrated full service on a Benelux level. Furthermore, other practice areas within the Luxembourg office will benefit and be in a position to respond to complex demands involving IP/ICT aspects. The banking practice will be able to assist on cloud computing issues and other IT outsourcing arrangements in the financial sector.

In addition, this launch will be instrumental to enhancing the strong position of the tax practice with regards to the development of intellectual property based management structures.

Vincent Wellens is specialised in IP/ICT and regulatory matters. Before joining NautaDutilh Luxembourg in 2011, Vincent was the EU regulatory and competition counsel at P&T Luxembourg, the largest telecom and postal operator in Luxembourg. Prior to this, Vincent practised law at first-tier Luxembourg and Brussels law firms in IP/ICT with a strong focus on regulated network industries.

Josée Weydert, managing partner of NautaDutilh Luxembourg says "We are enthusiastic about the launch of our Luxembourg IP/ICT practice. Due to the committed efforts of our government to develop an attractive legal, tax and R&D friendly environment, Luxembourg has become an attractive IP/ICT centre. With the establishment of this new practice in Luxembourg, NautaDutilh has become a true one-stop-shop for assisting its clients throughout the whole Benelux area."

Furthermore, Philippe Péters, IP partner of the Brussels office added, "The creation of the new IP/ICT department within our Luxembourg office will further enhance the strong reputation of our existing IP practice and furthermore reinforce the client-care and full-range legal offerings which is embedded in our Benelux corporate strategy. I am confident that Vincent and his team will make a valuable contribution to the firm and in particular the IP practice".

For additional information visit [www.nautadutilh.com](http://www.nautadutilh.com)

## **FRASER MILNER CASGRAIN APPOINTS NEW MANAGING PARTNER IN CALGARY**

October 31 2011 Fraser Milner Casgrain LLP (FMC), one of Canada's leading business and litigation law firms, is pleased to announce that Tamela (Tammy) Coates has been appointed the Managing Partner of the FMC Calgary office.

Tammy has been with FMC for 23 years, working as a top litigator in FMC's Energy, Communications, Environmental, Commercial and Intellectual Property groups. She was identified as the successful Managing Partner candidate through the firm's selection process. Tammy has also held the role of Manager of the Commercial Litigation Group in Calgary and Co-chair of the firm's National ADR Group.

"I am pleased to have the support of my partners to lead FMC's Calgary office," said Tammy. "My top priority is to ensure our team continues to deliver outstanding client service in one of the most dynamic legal markets in Canada."

As a Partner, Tammy appeared before all levels of the Alberta Courts, as well as the British Columbia Supreme Court and the Federal Court of Canada. She is frequently called upon by the firm and other members of the Bar to present on topics related to advocacy, principled negotiation and mediation, and litigation practice. Tammy has also provided pro bono counsel to several charities and non-profit organizations. She is recognized by Chambers Global as a leading dispute resolution lawyer.

"Tammy is one of FMC's top litigators and will bring outstanding skill to this role," said Matthew Lindsay, FMC Calgary's former Managing Partner. "This office has a strong team in place and, having known Tammy for more than 25 years, I am confident she will provide strong leadership to our team in Calgary, making it an even greater asset to our clients."

"At FMC, we recognize that a rich diversity of background and experience in our leadership team broadens and enhances our ability to provide our clients with the best possible advice and service," said Chris Pinnington, Chief Executive Officer, FMC. "Tammy is committed to the legal profession and to our firm, and brings extensive knowledge of the Calgary legal environment to her new leadership role. We congratulate Tammy on this achievement and wish her continued success throughout her term."

For further information, please visit us at [www.fmc-law.com](http://www.fmc-law.com)

**ABNR**

ASSISTS IN INTERNATIONAL AGREEMENTS FOR CLIMATE CHANGE AND ENVIRONMENT OBJECTIVES

On 29 September 2011, the Government of the Republic of Indonesia, the Government of the United States of America, the World Wild Life Fund for Nature-Indonesia (WWF) and The Nature Conservancy (TNC) signed the **Second TFCA Debt-for-Nature Swap Agreement** (TFCA II).

The TFCA II comprises two different agreements, respectively: (1) Second Agreement between the Government of the Republic of Indonesia and the Government of the United States of America regarding a Debt-For-Nature Swap with respect to Certain Debt Owed by the Government of the Republic of Indonesia to the Government of the United States of America; and (2) Forest Conservation Agreement between the Government of the Republic of Indonesia, TNC and WWF;

At this auspicious occasion, Ali Budiardjo, Nugroho, Reksodiputro (ABNR) had the privilege of making contribution by representing TNC under a semi pro-bono arrangement, and was tasked with preparing the agreements and ensuring that they were executed effortlessly. The team of lawyers consisted of Theodoor Bakker, Agus Ahadi Deradjat, Woody Pananto and Dinasti Brian Harahap.

The execution of the TFCA II marks another pinnacle in the Government of the Republic of Indonesia's efforts to protect the forests in the country's largest island of Kalimantan. Under the U.S. Tropical Forest Conservation Act (TFCA) of 1998, it reduces Indonesia's debt payment obligation to the Government of the United States of America by nearly \$28.5 million. In return, the Government of the Republic of Indonesia commits these funds to support the protection and restoration of Kalimantan's tropical forests.

ABNR also represented TNC in the first agreement that was signed back in 2009, which supports forest conservation activities on the island of Sumatra.

Both TFCA agreements contribute to the climate change and environment objectives of the USA-Indonesia Comprehensive Partnership.

For additional information visit [www.abnrlaw.com](http://www.abnrlaw.com)

**KING & WOOD**

WOLONG HOLDINGS SUCCESSFULLY ACQUIRES AUSTRIA'S ATB GROUP

On October 19, 2010, after many rounds of negotiations over the course of a year, domestic motor manufacturing giant Wolong Holdings Group Ltd. (Wolong Holdings) successfully acquired ATB Group, Austria's largest motor manufacturer. According to the agreement signed by the two sides, the Wolong's investment exceeds 100 million Euros.

ATB Group is Europe's leading manufacturer of electric motors and drive systems, with more than 120 years of experience in the motor vehicles industry. It is currently headquartered in Vienna, Austria, with 10 major manufacturing plants located throughout, Austria, Germany, UK, Poland, and Serbia. ATB has a sales network spanning 18 countries across Europe, Asia, North America, Africa, and Australia. ATB is one of Europe's main brands, along with ABB, and Siemens. As of the closing date, this transaction is the largest investment by a Chinese enterprise in Austria. King & Wood served as a key advisor in this important cross border transaction.

This project was led by Cheng Xiaofeng, a King & Wood partner based in Beijing. Cheng Xiaofeng said: " This deal strongly proves that that Chinese law firms have been matured in the area of cross border M&A services. Chinese law firms are taking the lead on complex cross border transactions initial by Chinese enterprises. Along with the national "go global" strategy of Chinese enterprises, it is the advantage of Chinese lawyers to understand the working habits and business culture of Chinese entrepreneurs, so that Chinese lawyers could be increasingly successful to help Chinese entrepreneurs close transactions efficiently if Chinese lawyers are able to understand the international business practices in relevant jurisdictions.

An increasing role for Chinese lawyers in international transactions is an inevitable part of China's economic booming, especially Chinese lawyers are playing more and more critical leading roles in the acquisitions occurring on non-US or UK markets, and this will construct a significant challenge to the international M&A practice which have been dominant by US and UK firms for long time. Although Chinese law firms still have a long way to go before catching up to their Anglo-Saxon peers, undoubtedly, completing the internationalization of Chinese enterprises is part of an important historical mission of Chinese law firms".

For additional information visit us at [www.kingandwood.com](http://www.kingandwood.com)

**BAKER BOTTS**

FILES AMICUS BRIEF ON BEHALF OF NOVARTIS IN PROMETHEUS V. MAYO CLINIC

**NEW YORK, November 11, 2011** – Baker Botts L.L.P. filed an amicus brief on behalf of Novartis Corporation in the U.S. Supreme Court in Prometheus v. Mayo Clinic (no. 10-1150), supporting the patent-eligibility of therapeutic and diagnostic processes under §101 of the Patent Act, 35 U.S.C. §101.

The case raises the basic question of whether therapeutic methods that are predicated on making correlations, such as between a drug's metabolite levels and its safety and efficacy, are impermissibly directed to "laws of nature," which the patent law considers to be fundamental tools of science that should be free to all to use.

The brief argues that therapeutic- and diagnostic-method claims generally do not preempt "laws of nature" because they invariably are directed to applications of such laws and implicate transformative events, features that comfortably place these claims within the broad scope of §101. Indeed, by facilitating the diagnosis and treatment of diseases and disorders, these types of claims are directed to one of the most important applications of all-- namely, enhancing the quality of, and even sustaining the very existence of, human life.

The brief is noteworthy in that it extends the argument beyond the realm of therapeutic methods (such as those at issue in Prometheus) to even embrace diagnostic methods, thereby attempting to remove the cloud of uncertainty created by Lab. Corp. v. Metabolite Labs., 126 S. Ct. 2926 (2006). That case concerned a method of diagnosing vitamin B deficiencies by correlating cobalamin and folate levels to such deficiencies. Although the appeal was dismissed, a dissent led by Justice Breyer would have exercised appellate jurisdiction and held the claim patent-ineligible for preempting a law of nature.

To view the amicus curiae brief, visit: [http://www.bakerbotts.com/file\\_upload/documents/PrometheusCover.pdf](http://www.bakerbotts.com/file_upload/documents/PrometheusCover.pdf)

For additional information visit [www.bakerbotts.com](http://www.bakerbotts.com)

**CLAYTON UTZ**

TEAMS UP TO ADVISE PACIFIC EQUITY PARTNERS ON INNOVATIVE JOINT VENTURE

**Sydney, 8 November 2011:** Leading law firms Clayton Utz and Freehills have jointly advised Pacific Equity Partners (PEP) on its joint venture with Swedish-based global consumer goods company Svenska Cellulosa Aktiebolaget (SCA) to develop SCA's Australasian operations.

Partners Philip Kapp and Mark Williamson led the Clayton Utz team, which advised PEP on the joint venture arrangements.

Structured as an equal joint venture, the transaction is innovative in the Australian private equity market where 100 per cent acquisitions are more typical.

The transaction involved parallel negotiations in Australia and Sweden and required close collaboration between PEP, Freehills and Clayton Utz across a large number of practice areas.

Commenting on the joint venture structure, Clayton Utz partner and long-standing adviser to PEP, Philip Kapp, said it required his team to "think outside the square" to achieve an excellent commercial outcome for the joint venture partners.

Under the joint venture, PEP and SCA will invest in the expansion of SCA Hygiene Australasia's (SCAHA) operations, which span Australia, New Zealand and Fiji. SCAHA manufactures and markets a number of leading brands including Sorbent, Purex, Handee Ultra and Libra.

Lead corporate partners Philip Kapp and Mark Crean acknowledged the efforts and achievements of all involved: "The teams at PEP, Freehills and Clayton Utz have worked together seamlessly on this complex transaction to deliver a fantastic commercial outcome for PEP in what was a very tight timeframe."

For additional information visit [www.claytontuz.com](http://www.claytontuz.com)

**FRASER MILNER CASGRAIN****AMDOCS COMPLETES ACQUISITION OF BRIDGEWATER SYSTEMS FOR \$211 MILLION**

Amdocs Limited, through its wholly owned indirect subsidiary Amdocs Canada Acquisition Corporation (collectively, "Amdocs"), acquired all of the outstanding common shares of Bridgewater Systems Corporation ("Bridgewater") at a price of \$8.20 per share in cash pursuant to a court-approved plan of arrangement under the Canada Business Corporations Act. The aggregate consideration paid was equal to approximately \$211 million.

Amdocs is the market leader in customer experience systems innovation.

Bridgewater is the leader in intelligent broadband controls and provides pre-integrated solutions for mobile and converged operators to transform their networks, optimize mobile data growth and innovate with new services.

Bridgewater and Amdocs entered into an arrangement agreement on June 16, 2011. The arrangement was approved by Bridgewater's shareholders on August 5, 2011. A final order was issued by the Ontario Superior Court of Justice approving the arrangement on August 12, 2011. The arrangement was completed on August 17, 2011.

Bridgewater was represented by Fraser Milner Casgrain LLP with a team comprising Andrea Johnson, Charles Spector, Giancarlo Salvo, Rob Davis (corporate/securities); Young Park, James Wishart (litigation); Zahra Nurmohamed (tax) and Sandy Walker (competition).

For additional information visit [www.fmc-law.com](http://www.fmc-law.com)

**CAREY Y CIA****COUNSEL FOR CODELCO IN USD\$6.75 BILLION ACQUISITION LOAN AGREEMENT**

Carey y Cía. acted as counsel to Codelco, Chilean copper producer, in the debt financing to acquire interest in a world class copper mine owned by Anglo American. Codelco has secured a loan facility from Mitsui & Co. Ltd for the amount of up to US\$6.75 billion.

Carey y Cía. has advised Codelco in this complex transaction, the largest ever in Chile, through a team led by partners Juan Guillermo Levine, Cristián Eyzaguirre and Alex Fischer and associates Giannina Veniú and Sergio Silva.

For additional information visit [www.carey.cl](http://www.carey.cl)

**RODYK****COUNSEL IN CNY BONDS ISSUANCE**

Rodyk acted as Singapore counsel for Intime Department Store (Group) Company Limited, a company listed on the Hong Kong Stock Exchange, in its issuance of CNY1,000,000,000 4.65% Guaranteed Bonds due 2014. The Rodyk team comprised corporate partner Marian Ho and foreign lawyer Victor Chong.

Rodyk acted as Singapore counsel for Intime Department Store (Group) Company Limited, a company listed on the Hong Kong Stock Exchange, in its issuance of CNY1,000,000,000 4.65% Guaranteed Bonds due 2014. The Rodyk team comprised corporate partner Marian Ho and foreign lawyer Victor Chong.

For additional information visit [www.rodyk.com](http://www.rodyk.com)

**GIDE LOYRETTE NOUEL**

ADVISES SEB INTERNATIONAL ON EUR 400 MILLION ACQUISITION OF A FURTHER STAKE IN ZHEJIAN SUPOR

**November 3, 2011** Gide Loyrette Nouel (GLN) has advised SEB International (SEB), one of the world's largest manufacturers of cookware and small domestic appliances, on the acquisition of a further stake in Zhejiang Supor (Supor), a leading manufacturer of cookware and rice cookers which is listed on the Shenzhen Stock Exchange (002032.SZ).

SEB, whose brands include *All Clads*, *Krups*, *Moulinex* and *Tefal*, has received approval to increase its stake from 51.31% to 71.31% of Supor's capital. This follows approval from the Ministry of Commerce of the People's Republic of China (MOFCOM) in July and a successful review carried out by the China Securities Regulatory Commission (CSRC). SEB will purchase 115,450,400 shares in Supor, at CNY 30 per share, for a total purchase consideration of CNY 3,464 million (or approximately EUR 400 million). The Su family will retain a 12.5% stake in the company. The remaining shares make up the free float and will continue to be traded on the stock market.

This transaction follows SEB's unprecedented EUR 327 million takeover of Supor in 2007. That transaction, in which SEB acquired a controlling stake in Supor, was awarded *Merger & Acquisition Deal of the Year* at the *China Law & Practice Awards 2008*. The proposed increase in SEB's equity investment in Supor is intended to consolidate the strategic investment made in Supor in 2007 and demonstrates its confidence in the future growth of Supor.

Closing is expected to be completed in the forthcoming weeks, following completion of a number of administrative procedures.

Gide Loyrette Nouel is advising SEB on all aspects of the acquisition including structuring, negotiation, documentation and regulatory formalities. The GLN team advising SEB is under the supervision of Antoine de la Gatinais, partner and Head of GLN Shanghai and led by senior associate Fan Jiannian in Shanghai, with assistance from partner Li Hua.

For additional information visit [www.gide.com](http://www.gide.com)

**NAUTADUTILH**

REPRESENTS LEGO AGAINST BANBAO IN RESPECT OF IMITATION PRODUCTS

**November 2011-** NautaDutilh represents LEGO in litigation against Banbao concerning intellectual property infringement and otherwise unlawful acts.

On 24 October 2011, the District Court of The Hague ruled in preliminary relief proceedings that Banbao infringes LEGO's intellectual property rights and moreover acts unlawfully by "slavishly imitating" several elements.

NautaDutilh's team that advises LEGO includes Anne Marie Verschuur, Charles Gielen, Helmer Klingenberg, Paul van Dongen and Mart Kneepkens.

For additional information about this transaction visit [www.nautadutilh.com](http://www.nautadutilh.com)

**DAVIS WRIGHT TREMAINE**

3RD CIRCUIT REAFFIRMS REJECTION OF FCC'S "FLEETING IMAGES" POLICY - REVERSES SUPER BOWL FINE

On Nov. 2, 2011, the United States Court of Appeals for the 3rd Circuit reaffirmed and largely readopted its 2008 decision rejecting the \$550,000 forfeiture and finding of indecency violation levied against CBS for the 2004 Super Bowl halftime show featuring Janet Jackson and Justin Timberlake. The appeal involved the live broadcast of the show, which culminated in an unscripted nine-sixteenth-second exposure of Janet Jackson's breast.

The 3rd Circuit previously had held the FCC arbitrarily and capriciously departed from a prior policy of excepting fleeting broadcast material from the scope of actionable indecency, and that the agency could not impose strict liability on CBS, or hold it liable for conduct of Jackson and Timberlake, who were independent contractors not CBS employees. The 3rd Circuit reexamined that decision after the FCC appealed to the Supreme Court, which vacated the 3rd Circuit's original decision and ordered it to decide whether the Supreme Court's 2009 decision in *FCC v. Fox Television Stations* required it to reconsider its decision. In *Fox*, the Court held the FCC had not acted arbitrarily and capriciously in changing its indecency policy to enforce the law against broadcasts of "fleeting expletives."

In the remand proceeding, the 3rd Circuit reaffirmed its earlier decision to invalidate the fine imposed on CBS. It held that, while the FCC had recognized it was changing its policy that made fleeting expletives non-actionable, the Commission failed in the Super Bowl case to acknowledge the prior policy even existed, or to explain its departure from that position. The court granted the CBS petition for review in full, and vacated the FCC's decision.

3rd Circuit's original holding that FCC decision was arbitrary and capricious

In the court's original opinion, the 3rd Circuit found that at the time of the 2004 Super Bowl halftime show, the FCC's policy was to exempt fleeting or isolated material—both images and words—from the scope of actionable indecency. "During a span of three decades," the court observed, "the Commission frequently declined to find broadcast programming indecent, its restraint punctuated by only a few occasions where programming contained indecent material so pervasive as to amount to 'shock treatment' for the audience." Contrary to the FCC's argument that it always treated fleeting images differently from fleeting expletives, the 3rd Circuit found that the agency's indecency enforcement history proved otherwise.

Moreover, regardless of whether the Super Bowl fine was unprecedented because the FCC had previously treated fleeting images and fleeting words the same (or never had articulated a specific policy on how it would treat fleeting images), the court held the FCC's inclusion of fleeting images within the scope of actionable indecency was an unexplained departure from prior policy.

Reaffirmation and Reissuance

On remand from the Supreme Court, the 3rd Circuit held, in an opinion by Judge Rendell, joined by Judge Fuentes, that "[w]hile we can understand the Supreme Court's desire that we re-examine our holdings in light of its opinion in *Fox* — since both involve the FCC's policy regarding - fleeting material - ... if anything, *Fox* confirms our previous ruling." Therefore, the court determined it "should readopt our earlier analysis and holding that the Commission acted arbitrarily in this case." In doing so, the majority held, there was no reason to depart from the prior ruling's extensive examination of FCC precedent, which found that it had never treated images and words differently in its historically restrained indecency enforcement policy under which fleeting live material was deemed non-actionable.

The court rejected the FCC's argument that "one small portion of the background section" in the Supreme Court's *Fox* opinion supported the position that the fleeting-material policy never applied to images, but always was restricted to words. The FCC claimed that the Court's brief reference confirmed the fleeting expletives policy was an exception to the general rule that other types of content – words or images – were actionable even if fleeting. But the 3rd Circuit held it could "discern no such meaning" in that language.

**DAVIS WRIGHT TREMAINE**

3RD CIRCUIT REAFFIRMS REJECTION OF FCC'S "FLEETING IMAGES" POLICY - REVERSES SUPER BOWL FINE

Cont'd from prev page

The 3rd Circuit explained that "summary recitation of the Commission's opinions ... appears in the Court's background discussion of the FCC's historical approach to indecent language, and is neither reasoning nor holding" but "mere characterization." In this vein, the court continued, "Fox says nothing at all about images" nor did it "suggest that the FCC's previous fleeting-material policy applied only to 'words,' or distinguished between words and images." In short "the Fox Court had no occasion" to consider the FCC's prior fleeting-material policy in the context of images.

The 3rd Circuit thus held it was "unwilling to read the Court's silence as overruling our conclusion, based on a careful review of three decades of FCC precedent" in the prior CBS decision. "If we were to read the Supreme Court's background discussion in Fox as indicating that the history of FCC enforcement in the area of fleeting material recognized an exception only for non-literal expletives, to the exclusion of images," the 3rd Circuit continued, "we would be accusing the Supreme Court of rewriting history."

The 3rd Circuit found that the Commission had attempted to convert "a passing reference in Fox's background section into a holding that undermines what the opinion otherwise makes clear: an agency may not apply a policy to penalize conduct that occurred before the policy was announced." The court thus readopted its prior decision, with some alterations to address other conclusions reached by the original majority opinion.

Specifically, the original decision had held that even if the departure from precedent did not invalidate the Super Bowl forfeiture, the FCC could not impose liability on CBS for the actions of Jackson and Timberlake because they were independent contractors and not CBS employees. It also rejected the FCC's argument that CBS had a "nondelegable duty" to comply with the indecency policy, because the First Amendment bars punishing a speaker for the content of expression absent a showing of scienter, i.e., knowing or reckless violation of indecency law. On all these liability and intent issues, the majority decision on remand held the prior discussion had been unnecessary, and thus excised that portion of the prior opinion from the reissued decision.

Judge Scirica, who had authored the 3rd Circuit's original opinion, dissented from its reaffirmance and readoption. In his view, the relevant passage of the Supreme Court's Fox decision, and the context in which it arose, supported the FCC's argument. Even so, Judge Scirica would not have upheld the FCC's fine against CBS. Instead, he opined, the FCC applied the wrong statutory provision, and misapprehended the level of "willfulness" that would have been required, in seeking to punish CBS. In that view, a remand to determine whether CBS had acted recklessly in airing the Super Bowl halftime broadcast would be required.

Davis Wright Tremaine attorneys Bob Corn-Revere and Ronnie London represented CBS before the 3rd Circuit and the FCC.

For additional information visit [www.dwt.com](http://www.dwt.com)

**HOGAN LOVELLS**

ADVISES BANKATLANTIC BANCORP INC ON SALE OF BANKATLANTIC TO BB&amp;T CORP

WASHINGTON, D.C, 4 November 2011 – Hogan Lovells announced today that it advised BankAtlantic Bancorp, Inc. on its definitive agreement to sell its wholly owned subsidiary, BankAtlantic, to BB&T Corporation. BankAtlantic Bancorp announced the deal signing on 1 November 2011.

In acquiring BankAtlantic, one of the largest financial institutions headquartered in Florida, BB&T will acquire approximately \$2.1 billion in loans and assume approximately \$3.3 billion in deposits. As part of this unique transaction, BB&T will acquire BankAtlantic's deposit franchise and loans, minus the criticized assets, including certain performing and non-performing loans and tax certificates, real estate owned and related reserves, which will be retained by BankAtlantic Bancorp. Following the closing, BankAtlantic Bancorp will provide specialty finance, including for commercial real estate loans as a non-bank lender.

The Hogan Lovells team advising Bancorp includes partners Stuart Stein (Washington and New York), Daniel Keating (Washington), Daniel Meade (Washington), and Scott McClure (Washington), with associates Jason McCaffrey (Washington) and Tammy Maloney (Washington).

For additional information visit [www.hoganlovells.com](http://www.hoganlovells.com)

**TOZZINI FREIRE**

ASSISTS KIRIN HOLDINGS COMPANY IN ACQUISITION OF ALL OUTSTANDING SHARES OF ALEADRI-SHINNI PARTICIPACOES E REPRESENTACOES

TozziniFreire assisted Kirin Holdings Company in the acquisition of all outstanding shares of Aleadri-Schinni Participações e Representações (a company that held 50.45% of the outstanding shares of Schincariol Participações e Representações) for R\$ 4 billion.

Kirin Holdings is one of the leading food and beverage companies in Japan and in the Asia-Oceania region. Grupo Schincariol is Brazil's second largest brewer. It produces the beer brands Nova Schin, Devassa Bem Loura, Glacial, Baden Baden and Eisenbahn, and carbonated soft drinks, juices and bottled water (Schin and Skinka). Through this deal, concluded in an unusual short period of time, Kirin will obtain a solid operation platform in Brazil and will seek to further accelerate Schincariol Group's growth by combining Schincariol Group's brands with Kirin Group's technologies, product development, research and marketing capabilities. Kirin expects a 10% growth in Brazil's beer and soft drink markets and aims to generate 30 percent of its sales and profits from outside Japan by 2015.

On October 11, TozziniFreire assisted Kirin Holdings Company in the dispute that has suspended the acquisition of 50.45% of Schincariol. The specialised Chamber of Business Law of São Paulo's Superior Court of Justice's judges voted unanimously to overturn the injunction and Kirin could take over the management of the company. The justice found that the acquisition was fair and respected the shareholders. This is the first major decision to be issued by the specialised chamber since it was created in June.

For additional information visit [www.tozzinifreire.com.br](http://www.tozzinifreire.com.br)

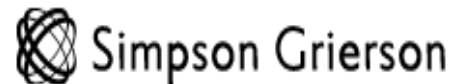
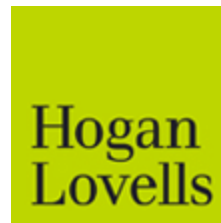


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Deadline is 10th of each month.

**- NEW FX REGULATIONS ON REPATRIATION OF FUNDS BY NON-RESIDENTS**

On October 28, 2011, the Argentine Central Bank (“BCRA”) issued Communiqué “A” 5237 whereby it modified the requirements for non-residents to access the domestic FX market to repatriate direct investments.

Through this new communiqué, the BCRA sets forth that for non-residents to repatriate the proceeds arising from their direct investments in Argentina (e.g.: capital contributions, purchase of interests in local companies and real estate), they must prove that the funds related to new investments resulting from new capital contributions and purchases of local company interests and real estate and disbursed by non-resident investors in foreign currency as from the effective date of this communiqué have been brought into Argentina through the domestic FX market. This way, the communiqué equalizes the treatment given to direct investments and portfolio investments, since for the repatriation of proceeds from portfolio investments, the existing BCRA regulations already required proof of the inflow of funds through the domestic FX market.

As regards offshore transfers of investment rights between non-residents, such requirement will be deemed met if the former owner proves to have fulfilled it and to the extent it is applicable because the investment was made after the effective date of the communiqué.

These requirements are also applicable to direct investments made in the country due to the purchase of local assets by non-residents from foreign companies directly or indirectly owned by residents, provided that the local assets have been incorporated to the assets of the seller after the effective date of this communiqué, i.e. direct investments made before the effective date of the communiqué will keep their original treatment.

# CLAYTON UTZ

03 November 2011

## Tablet patent wars down under - Apple wins interlocutory injunction and round one against Samsung

In the first Australian round of Apple's global patent war against Android tablets and smartphones, the Federal Court of Australia in *Apple Inc v Samsung Electronics Co Ltd* [2011] FCA 1164 granted Apple an interlocutory (preliminary) injunction preventing Samsung from launching its Galaxy Tab 10.1 onto the Australian market. In doing so, the Federal Court continued its trend of granting interlocutory injunctive relief to prevent patent infringement.

This decision more broadly demonstrates the Federal Court's willingness to accommodate the urgent needs of a patentee, so as to be able to hear an interlocutory injunction application and deliver judgment in as little as a matter of weeks after the application is brought. The Federal Court will hear Samsung's application for leave to appeal the round one decision and Samsung's application for injunctive relief with respect to Apple's new iPhone 4S over the next month.

### Apple's claim

Samsung had intended to launch in Australia a version of its tablet device, the Galaxy Tab 10.1, which runs the Android operating system. Apple alleges that the Galaxy Tab 10.1 infringes a number of Apple's patents, including those relating to the touch screen technology employed in Apple's iPad 2 tablet and iPhone. It sought an interlocutory injunction to restrain Samsung from releasing the Galaxy Tab 10.1 in Australia pending the final hearing of the matter.

Samsung denies Apple's allegations, and has filed a cross-claim seeking to revoke certain patent claims relied upon by Apple.

### Interlocutory injunctions: to grant or not to grant

Before granting an interlocutory injunction, a court must consider two questions:

- first, has the applicant made out a prima facie case, that is, if the evidence remains as it is, there is a probability that the applicant will be successful at the final hearing of the matter?; and
- second, the balance of convenience: does the inconvenience or injury that the applicant would be likely to suffer if an injunction were refused outweigh that caused to the respondent if the injunction were granted?

### Prima facie case

The Court held that this factor weighed in favour of the grant of an interlocutory injunction, saying:

- Apple had established a prima facie case of infringement;
- Apple's patents are prima facie valid by reason of their grant and registration. While Samsung had made out a prima facie case of invalidity of one patent, this was not sufficient to override Apple's prima facie case on infringement.

### Balance of convenience

The Court considered a number of factors under this heading.

Factors which were **evenly weighted** were:

- the detriment, both to Apple from a refusal, and to Samsung from a grant, of the interlocutory injunction, would be significant;
- damages would not be an adequate remedy, because tablet devices have a short life cycle (typically 12 months) and an adverse outcome would be equivalent to denying that party some form of final relief which it may be found, at the final hearing, to be entitled.

**Favouring Apple**, however, were:

- Samsung's unwillingness to be available for a limited early final hearing in November 2011, which contributed to the fact that damages would not be an adequate remedy;
- the fact that Samsung proceeded with its eyes wide open when it launched the Galaxy Tab 10.1, knowing that it could face these claims by Apple in Australia; and
- the existence of a prima facie case in respect of two separate registered patents, which strengthens Apple's overall prima facie case for relief.

Accordingly, although the Court stated that "the balance of convenience is almost evenly weighted", it ultimately granted the interlocutory injunction.

### **Samsung appeals and also seeks interlocutory injunctive relief**

The Federal Court has expedited Samsung's appeal against this decision, which will probably be heard in December 2011.

Additionally, since the above decision, Samsung has also brought an application to restrain infringement of a number of its patents by sales of Apple's new iPhone 4S. Again the Court has indicated its willingness to deal with this application urgently.

### **Implications for patentees**

This case is significant for several reasons. Firstly, it continues the trend of Australian courts granting interlocutory injunctions to restrain patent infringement, with such relief being granted in all but two cases in the last six years.

Secondly, the Court did so where its decision could (subject to the decision in the appeal) result in the Samsung Galaxy Tab 10.1, a mass-market consumer good, being kept off the Australian market in the lead up to Christmas, a key sales period.

Thirdly, the case demonstrates the willingness and ability of Australian courts to address applications relating to urgent interlocutory relief to prevent patent infringement as quickly as necessary to protect patentees' rights.

### **Disclaimer**

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



## **International Public Procurement Group**

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### **BRAZIL: INTERRUPTION OF THE PUBLIC PROCUREMENT PROCEEDING FOR THE HIGH SPEED TRAIN**

A Brazilian court recently rendered a decision interrupting all public procurement proceedings for the operation of the high speed train connecting Rio de Janeiro and Campinas.

The decision was issued in a public civil action filed by the Public Prosecution Office against the Brazilian National Agency of Land Transport (ANTT) and the federal government. The lawsuit is based on alleged illegalities being committed by the government in awarding contracts for the international and interstate road transportation of passengers. Several contracts for road transportation have been executed without a prior bidding process.

Citing the necessity of carrying out a public procurement proceeding for the operation of these services, the court issued an injunction interrupting the bidding process for the high speed train.

ANTT has filed an appeal. The allegation is that they are already taking the required measures to regularize the bidding processes for road passenger transportation. ANTT has also argued that the high speed train project would not influence this matter and should be treated separately.

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## Focus on Securities | Corporate Finance

### NOVEMBER 2011

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### CSA Review of Prospectus Exemptions

By Keith Inman

On November 10, 2011, the Canadian Securities Administrators (the “CSA”) announced that they are reviewing the \$150,000 minimum amount prospectus exemption and the accredited investor prospectus exemption.

The review has been initiated as a result of the global financial crisis and recent international regulatory developments. The CSA is engaging in the consultation to identify any issues that stakeholders may have about the use of the exemptions and to obtain information that will assist in deciding whether changes to the exemptions are necessary or appropriate.

Both of the minimum amount and accredited investor exemptions are premised on an investor having one or more of (i) a certain level of sophistication, (ii) the ability to withstand financial loss, (iii) the financial resources to obtain expert advice, and (iv) the incentive to carefully evaluate the investment given its size.

### Minimum Amount Exemption

Some of the factors being considered by the CSA in determining whether changes to the minimum amount exemption are warranted include:

- **No assurance of sophistication.** The size of investment alone does not assure investor sophistication or access to information, particularly where the minimum amount exemption is used to sell novel or complex products without any accompanying disclosure. At most, the size of the investment is an indicator only of the investor’s ability to withstand financial loss.

- **Current threshold for the minimum investment.** The current \$150,000 threshold for the minimum amount exemption was set in 1987 and has not been changed or adjusted for inflation since. The \$150,000 threshold is equivalent to over \$265,000 in 2011 dollars. Some stakeholders have suggested that the \$150,000 threshold is too low and allows unsophisticated, retail investors to participate in the exempt market. Conversely, if the threshold is increased, the exemption may not be available to investors who do not need the protections provided by a prospectus offering.
- **Impact of a minimum amount concept on investment decisions.** An exemption based on a minimum amount invested may cause an investor to invest more than business or investment considerations may dictate solely to meet the threshold; for example, by investing \$150,000 when it may have made more sense to invest only \$50,000. Similarly, a higher minimum threshold may cause an investor to make a single investment of \$150,000 or more when a staged investment in smaller increments may better protect the investor's interests.
- **Use of the exemption to raise capital.** The minimum amount exemption is widely used by issuers to raise capital in some jurisdictions. If the investment threshold was increased or the minimum investment exemption was repealed, this could affect capital raising, especially by small and medium sized enterprises.

### Accredited Investor Exemption

Some of the factors being considered by the CSA in determining whether changes to the accredited investor exemption are warranted include:

- **Current thresholds for income and assets.** The thresholds for individuals to qualify as accredited investors were originally set by

the Securities and Exchange Commission (SEC) in 1982, and subsequently adopted by the CSA in the early 2000s. The thresholds have not been changed or adjusted for inflation since. Some stakeholders submit that these thresholds are too low by today's standards. The current threshold for an individual's income is \$200,000; in 2011 dollars, the threshold would be over \$443,000 based on 1982 dollars (the year of SEC adoption) or \$245,000 based on 2001 dollars (the year the Ontario Securities Commission first adopted the exemption). As with the minimum amount exemption, some say these thresholds are too low and allow unsophisticated, retail investors to participate in the exempt market, yet an increase in the thresholds may exclude investors who do not need the protections provided by a prospectus offering.

- **Qualification criteria.** Some stakeholders have suggested that income and asset thresholds are not adequate proxies for sophistication. Individuals may have significant wealth, but may lack investment or other experience that enables them to make an investment decision without the protections afforded by a prospectus offering.
- **Use of the exemption to raise capital.** The accredited investor exemption is widely used by issuers to raise capital. If the exemption was changed or repealed, this could affect capital raising, especially for small and medium sized enterprises.
- **Compliance with qualification criteria.** Regulators have concerns that some individuals purchasing securities under the accredited investor exemption are not, in fact, accredited investors.

## Have your say

The CSA is currently accepting written submissions from stakeholders, including investors, issuers, dealers and legal and other advisors. The consultation period is open until February 29, 2012 and interested parties should submit their comments directly to either the British Columbia Securities Commission or L'Autorité des marchés financiers at the following addresses:

### **Gordon Smith**

British Columbia Securities Commission  
PO Box 10142, Pacific Centre  
701 West Georgia Street  
Vancouver, British Columbia  
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## Contact Us

For further information, please contact a member of our [National Securities | Corporate Finance Group](#).



## RMB FDI Goes to Fast Track | October 2011

Further to Circular No. 145, on 14 October 2011 PBOC released new rules on RMB FDI, the *Measures on Administration of the RMB Settlement in relation to Foreign Direct Investment* ("**PBOC Rules**") to roll out PBOC's detailed management system. The PBOC Rules cover all the FDI aspects denominated in RMB, including capital injection, payment of purchase price in the acquisition of PRC companies, repatriation of dividends and distribution as well as RMB denominated cross-border loans. The PBOC Rules adopt similar methodology applied by SAFE to foreign currency FDI but appear to be more friendly. On the same day, MOFCOM also issued a circular ("MOFCOM Circular") to clarify certain issues in relation to cross-border RMB FDI transactions.

We highlight the following aspects we deem of significance:

### A. Establishment of an FIE and acquisition of PRC companies by using RMB

MOFCOM takes the role as the regulatory authority to approve RMB FDI transactions, including greenfield FIE project, capital increase or acquisition of PRC companies. The local counterparts are authorized to approve such transactions with the following exceptions which require the preliminary approval by the provincial counterpart of MOFCOM and final blessing of the head office of MOFCOM: (i) the capital contribution is more than RMB 300m; (ii) the transactions involving investment in guarantee companies, finance lease companies, micro-finance companies and auction houses; (iii) the transactions involving investment in foreign-invested holding companies, venture capital or equity investment enterprises; or (iv) the transactions involving investment in iron & steel, electrolytic aluminum, shipbuilding and other policy sensitive sectors.

### B. PBOC's approaches to regulate the RMB FDI transactions

**RMB Registration:** PBOC requires FIEs (newly-established or PRC companies acquired by foreign investors) to conduct a registration with the local branch of PBOC after the completion of the relevant RMB FDI transaction.

**Account Control:** PBOC sets out the RMB accounts that foreign investors, FIEs and PRC parties selling stake in their companies to foreign investors should open for different types of transactions. The account control system is quite similar to that adopted by SAFE. For example, a foreign investor is free to open a RMB Expense Account (人民币前期费用专用存款账户) to reimburse some expenses before the establishment of an FIE and the balance in such an account can be transferred to the RMB Capital Account (人民币资本金专用存款账户) of the FIE when it is established. If a foreign investor intends to use its RMB proceeds from distribution (dividends or otherwise) by its existing FIE subsidiaries, the foreign investor may open a RMB Re-investment Account (人民币再投资专用账户) to pool the RMB proceeds. Considering its nature being a non-resident account, the SAFE's approval for RMB re-investment may not be required anymore. The PBOC Rules also allow the PRC parties selling stake in their companies to foreign investors to open RMB accounts and receive the purchase price in RMB. This will help resolve the situation where PRC sellers had to open a foreign currency account to receive the purchase price in foreign currency under SAFE Circular No. 142 if they want to sell their companies to foreign investors.

### C. Usage of RMB Capital

PBOC Rules provide that all RMB proceeds should be used for any legitimate purpose but keep silent on the specifics. The MOFCOM Circular clarifies that such proceeds may not be used towards investment in securities, financial derivatives or entrustment loans.

### D. Entities will benefit from the new rules

The PBOC Rules and MOFCOM Circular clarify that foreign investment in real estate sector may be denominated in RMB although RMB foreign debt remains unavailable to FIEs in this sector. We anticipate that this would incentivize the developers to money via issuing CNH bonds.

It is worth noting that foreign-invested partnership enterprises ("**FIP**") are also allowed to receive RMB capital contribution from foreign investors and in turn use RMB to invest in portfolio companies. This new scheme to some extent may cool down the appetite of foreign investors to set up RMB funds using the pilot QLFP scheme in Pudong, Shanghai, whose primary objective is to help convert the foreign currency capital injected by foreign limited partners into RMB for the purpose of portfolio investment.

### E. RMB-denominated shareholder loan and foreign debt

The PBOC Rules clarify that an FIE can borrow foreign RMB debt from its parent, offshore affiliate and offshore financial institutions so long as it has sufficient foreign debt quota. PBOC special approval for RMB shareholder loan which is required by PROC Circular No. 145 is no longer necessary. We understand that MOFCOM will not approve the specific foreign

debt transaction and instead it will only state in its approval whether RMB foreign debt can be used to solve the funding issue of the FIE when approving the relevant RMB FDI transactions. The PBOC Rules do not release the FIE's obligation to follow SAFE's existing rules to complete the foreign debt registration.

#### **F. Repatriation**

Based on the PBOC Rules and MOFCOM Circular, we tend to view FIEs may pay dividend/liquidation proceeds to its foreign parent in RMB regardless the capital contribution is made in RMB or not. This may not be applicable to RMB shareholder loan or foreign debt as the flexibilities of such transactions would provide too much room to arbitrage the appreciation of RMB exchange rate.

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**Liberalization of the Colombian foreign exchange regime regarding foreign loans**

Wednesday, 02 November 2011 00:00

**NEWS**

**Forex, Derivatives and Structured Finance**

News Flash Number: 133

**Liberalization of the Colombian foreign exchange regime regarding foreign loans**

On October 28, 2011, the Board of Directors of the Colombian Central Bank amended the External Regulation DCIN-83 to eliminate the restriction pursuant to which foreign residents were required to be organized as foreign financial institutions recognized by the Colombian Central Bank for purposes of granting loans in foreign currency to Colombian residents. As a result, any foreign resident are now entitled to grant loans to Colombian residents.

Notwithstanding, in the case of loans entered into with foreign residents who have not been granted an identification number by the Colombian Central Bank, the Colombian debtor must send a written notice to the Foreign Exchange Department of the Colombian Central Bank, indicating the type of creditor (e.g. Foreign exchange intermediary, subsidiary or branch of the Colombian bank, foreign financial institution, foreign corporation, etc.), and stating the name and country code of the creditor, prior to the filing of the foreign indebtedness report (Form No. 6).

In addition, the Central Bank determined that exporters may (i) borrow funds from any foreign resident for purposes of pre-financing its exports, including those involving capital goods and (ii) sell, with or without recourse, to any foreign resident, payment instruments in foreign currency received from the foreign buyer of its exports.

In any event, the abovementioned transactions must still be made through the formal so called foreign exchange market by filing the respective exchange declaration form.

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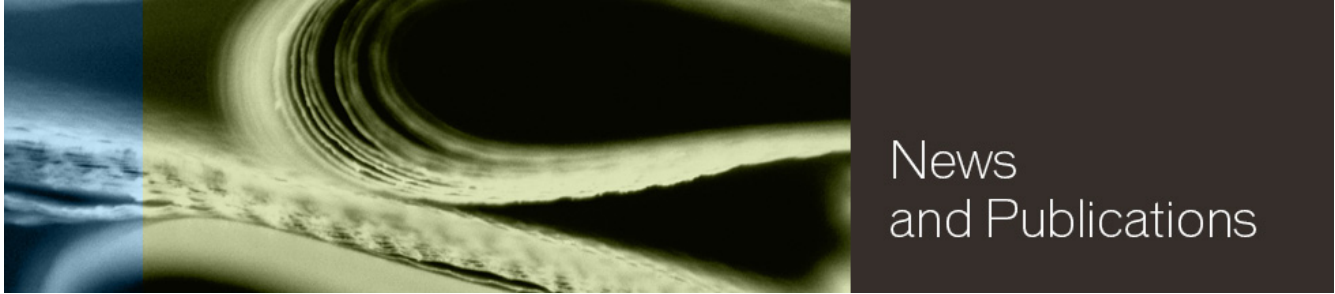
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LEGAL INFORMATION INTRANET WORK WITH US ESPAÑOL PORTUGUES



NEWS DETAIL

28/10/2011

**MINING BUSINESS AREAS AND INFORMATION SYSTEM ON MINERAL AND COAL MINING AREAS**

The Minister of Energy and Mineral Resources has issued the implementing regulations for Articles 21 and 38 of Government Regulation No. 22/2010 regarding Mining Areas. The implementing regulation is Regulation No. 12/2011 regarding Procedure for the Determination of Mining Business Areas and Information System for Mineral and Coal Mining Areas ("Regulation").

Articles 2 and 3 of the Regulation discusses the procedure and criteria for the determination of mining areas, and divides mining areas into the following Business Mining Areas ("BMA"): radioactive BMA, metal mineral BMA, coal BMA, non metal mineral BMA and rocks BMA. The Regulation also stipulates which agencies, i.e. the minister in charge of mineral and coal mining or respective governors and regents, are responsible for determining the aforementioned BMAs.

One important point of note is the provision in Article 4 which basically regulates the possibility of the issue of more than one mining business permit within one metal mineral, coal mining or rock BMA. This is to address the possible discovery of an associated mineral within the BMA, in which case an additional mining business permit for that associated mineral may be issued. The procedure for the issue of these mining business permits is further regulated in Articles 9 to 14.

The Regulation also stipulates the establishment of a mining area information system for the purpose of standardizing the determination of BMAs in order to prevent conflicting areas. For the standardization and mining permit purposes, the Regulation comes with three appendices: Appendix I provides the format for the mining area's coordinates; Appendix II provides the format for the mining area's map; and Appendix III provides guidelines for the codification of the mining area.

The Regulation repeals and replaces Minister of ESDM Decree No. 1603K/40/MEM/2003 regarding Guidelines for Mining Area Reserves and Minister of ESDM Decree No. 1614 of 2004 regarding Work Contract Application Procedures; and has been in force since the day of its issue of 11 August 2011. (by: Hamud M. Balfas)

# SKRINE

## TIGHTENING UP THE ACT

[Chan Su-Li summarizes the key amendments to Malaysia's Capital Markets and Services Act 2007](#)

This article provides an overview of the key changes that were made to the Capital Markets and Services Act 2007 ("CMSA") under the Capital Markets and Services (Amendment) Act 2011 ("Amendment Act"). The Amendment Act came into operation on 3 October 2011, with the exception of paragraph 25(a), which is not relevant for the purposes of this article.

### REGULATORY MATTERS

#### *Directorships*

Previously, Section 10 of the CMSA empowered the Minister of Finance ("Minister"), in consultation with the Securities Commission ("SC"), to appoint one-third of the number of directors on the boards of directors of an exchange holding company and certain stock exchanges and derivatives exchanges as public interest directors ("PID"). The section also required a person to obtain the concurrence of the SC before accepting an appointment or election as a director (other than a PID) of any of the afore-mentioned boards.

The supervisory powers of the SC in relation to board appointments for the above-referred entities under Section 10 have been expanded and clarified in the following respects –

- the term of office of a PID, as determined by the Minister, is now limited to 3 years but the person concerned is eligible for reappointment;
- a person is now required to obtain the concurrence of the SC before he accepts an appointment, reappointment, election or re-election as a director (other than a PID); and
- the Minister may, on the recommendation of the SC, vary the number of PIDs to be appointed in place of the one-third prescribed in Section 10.

The requirements of Section 10 in relation to the appointment, reappointment, election or re-election of a director also apply to a chief executive of an exchange holding company or a relevant stock exchange or derivatives exchange.

#### *Expansion of Powers to Compel Action*

Before the Amendment Act came into operation, Section 26(1) of the CMSA empowered the SC to compel an exchange holding company, a stock exchange, a derivatives exchange, an approved clearing house, a central depository or a relevant body corporate to take action to resolve conflicts of interest.

Section 26(1) has been amended to expand the circumstances in which the SC may compel the afore-mentioned entities to take action, that is where it is necessary or expedient to ensure fair and orderly markets, or to protect investors or in the public interest, or to ensure integrity of the capital markets, or for the effective administration of securities laws.

### *Assumption of Powers of an Exchange*

A new Section 26(6) has been introduced to confer power on the SC to discharge certain duties of a stock exchange or a derivatives exchange, namely the supervision of the capital market and market participants, the enforcement of the rules of a stock exchange that govern the quotation of securities on the stock market and the listing requirements or that govern compliance by participating organisations of the stock exchange or affiliates of the derivatives exchange.

The powers under this new provision are exercisable where the SC deems it necessary or expedient for the protection of investors or effective administration of securities laws or in the public interest.

### *Renewal of Licences*

The requirement under the CMSA for a licensee to apply for renewal of a Capital Markets Services Licence ("CMS Licence") or a Capital Markets Services Representative's Licence ("CMSR Licence") has been abolished by the Amendment Act. In other words, a licence once issued will remain in force until it is revoked in accordance with the CMSA.

### *Revocation and Suspension of licence*

The power of the SC under Section 72 to revoke licences issued under the CMSA has been amended in the following respects –

- non-payment of licence fees is now an additional ground for revoking a licence;
- the SC may now revoke or suspend a CMS Licence for dealing in securities or derivatives without obtaining the concurrence of the Minister;
- the SC is no longer obliged to give a licensee the right to be heard before it imposes restrictions on the activities of the licensee; and
- upon the revocation of a CMS Licence, the holder of a CMSR Licence will cease to hold its representative's licence for the holder of the CMS Licence and may apply for a variation of its licence.

### *Transfer of Licence*

A new paragraph (c) has been added to Section 69(1) to confer power on the SC to approve the transfer of a CMS Licence after the licensee has obtained a court vesting order under Section 139 of the CMSA.

### *Chief Executive*

As a result of the amendment to Section 74(2), the approval of the SC is now required before a person can be appointed as a chief executive of a holder of a CMS Licence.

## **CONDUCT OF BUSINESS**

### *Information on capital market products*

A new Section 92A has been introduced to empower the SC to specify information that must be disclosed to investors in respect of a capital market product, such as an explanation of the key characteristics of the product, the nature and obligations assumed by the parties and the risks associated with the product.

### *Protection of client's assets*

Section 125 of the CMSA empowers the SC to direct a licensed person or an approved trustee (i.e. a trustee which has been approved by the SC to act as a trustee for debentures or for unit trusts and prescribed investments schemes) to take such action or prohibit such person from taking such action as may be specified by the SC.

The Amendment Act has expanded the categories of market participants who may be subject to such directives or prohibitions by the SC under Section 125 to include a custodian of assets held in trust by a holder of a Fund Management Licence on behalf of its clients, an approved private retirement scheme administrator, a registered person and any person who maintains a trust account for clients' assets.

## **MANAGEMENT OF SYSTEMIC RISK**

The Amendment Act introduced a new Part IXA (Sections 346A to 346D) to address systemic risks. A "systemic risk in the capital market" refers to a situation when one or more of the following events occur, or is likely to occur, namely (a) financial distress in a significant market participant or in a number of market participants; (b) an impairment in the orderly functioning of the capital market; or (c) an erosion of public confidence in the integrity of the capital market.

The SC may require a person to submit to the SC any information or document which the SC considers necessary for the purposes of monitoring, mitigating and managing systemic risks in the capital market or where the SC receives a request from Bank Negara Malaysia. The person concerned is obliged to submit the information or document requested notwithstanding any obligation under any contract or arrangement to the contrary.

The SC may issue a directive to any person under a new Section 346C to take such measures as the SC considers necessary in the interest of monitoring, mitigating or managing systemic risk in the capital market.

The SC is required to give the relevant person an opportunity to be heard before it issues a directive under Section 346C unless the delay in issuing such directive would aggravate the systemic risk. In the latter event, the person is to be given an opportunity to be heard after the directive has been issued. A directive may be amended or modified.

## **PRIVATE RETIREMENT SCHEMES**

A new Part IIIA (Sections 139A to 139ZM) provides a framework for the establishment of private retirement schemes ("Scheme"). It sets out the approval framework for participants in a Scheme and contains provisions to protect the interest of the members of a Scheme and to enable the SC to regulate and supervise this industry and its stakeholders.

## DERIVATIVES

All references to "futures contracts" in the CMSA have been replaced with the expression "derivatives". The CMSA now provides for two categories of derivatives, namely *standardized derivatives* and *over-the-counter derivatives*. Standardized derivatives are governed by sub-division 3 of Division 3 of Part III (Sections 99 to 107).

A new sub-division 4 of Division 3 of Part III (Sections 107A to 107J) has been introduced to regulate over-the-counter derivatives. This new sub-division establishes a trade repository which is to come into operation at the expiration of two years, or a further period not exceeding one year as the Minister may determine, from 3 October 2011.

Persons who deal in over-the-counter derivatives can be required to provide the trade repository with such information relating to those derivatives as may be specified by the SC and the repository may, in turn, be required to furnish the information to the SC.

## VESTING

Before the Amendment Act came into force, Section 139(1) of the CMSA required a holder of a CMS Licence for dealing in securities or dealing in derivatives to obtain the approval of the Minister (acting on the recommendation of the SC) for any agreement or arrangement for the sale or transfer of the whole or any part of its business or for any amalgamation, merger or reconstruction of such holder.

The foregoing approval power has been transferred from the Minister to the SC as a result of an amendment to Section 139(1). With this amendment, the SC is now the sole approving authority for all such agreements or arrangements entered into by a holder of any category of CMS Licence.

## ENHANCED SANCTIONS

The Amendment Act has introduced a mandatory term of imprisonment for certain offences under the CMSA. A person who commits an offence under Section 317A (causing wrongful loss to a listed corporation or any of its related corporations by a director or officer) or Section 320A (causing financial statements or the audited financial statements to be false or misleading) will now be liable to a mandatory term of imprisonment of not less than 2 years.

A mandatory term of imprisonment has also been imposed for an offence under Section 71 (false statements in relation to an application for licence), Section 368 (falsification of records), Section 369 (false reports to SC, exchange or clearing house) and Section 371 (destruction, concealment, mutilation and alteration of records).

## CONCLUSION

The amendments under the Amendment Act have streamlined certain administrative procedures in the CMSA and conferred greater regulatory powers on the SC. They have also introduced new provisions on systemic risks and private retirement schemes into the securities laws in Malaysia.

The amendments will go some way towards achieving the objectives set out in the Capital Market Masterplan 2 and towards addressing concerns about the efficacy of markets in the aftermath of the last global financial crisis.

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## RULES GOVERNING RENMINBI BUSINESS OF TAIWAN BANKS

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On 21 July 2011, the Financial Supervisory Commission (FSC) announced the Rules Governing Renminbi Business of Taiwan Banks (the "Rules"), allowing offshore banking units ("OBU") and third-area branches of Taiwan banks to engage in Renminbi business. The Rules took effect on the same date.

- Business Scope

OBU: the businesses set forth under Article 4 of the Offshore Banking Act (which sets out 10 business items, including accepting foreign currency deposits from individuals, juristic persons, government agencies within the territory of Taiwan, or financial institutions within or outside the territory of Taiwan).

Third-Area Branch: the businesses approved by the local financial authority where the branch is located, provided however that the bank shall obtain prior approval from the FSC if any of the businesses is not allowed under Taiwan financial laws and regulations.

- Counterparty

OBU: individuals, juristic persons, government agencies or financial institutions outside the territory of Taiwan, including individuals, juristic persons, organizations, other institutions in Mainland China and their branches in a third area.

Third-Area Branch: no restrictions.

- Agreement on Settlement and Clearing of Renminbi

If an OBU or third-area branch of a Taiwan bank intends to conduct the Renminbi business, the Taiwan bank should file an application to the FSC. To ensure that the source of Renminbi for the OBU or third-area branch is stable, an agreement on settlement and clearing of Renminbi should be included as part of the application documents:

1. A copy of the agreement on settlement and clearing of Renminbi to be entered into with a correspondent bank (e.g., a bank in Mainland China or its overseas branch); or

2. A copy of the agreement on settlement and clearing of Renminbi previously signed with a correspondent bank.

Lee and Li Bulletin\_September 2011 Issue

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## Hogan Lovells

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### SEC Update

November 8, 2011

See note below about Hogan Lovells

## SEC staff updates guidance on shareholder proposals

On October 18, the staff of the SEC's Division of Corporation Finance published Staff Legal Bulletin No. 14F (CF) (SLB 14F) with guidance on interpretive issues under Exchange Act Rule 14a-8. Rule 14a-8 sets forth the requirements applicable to proposals submitted by shareholders for inclusion in their company's proxy materials for annual and special meetings. SLB 14F provides guidance to companies on how to verify a proponent's eligibility to submit a proposal, how to address submissions of revised proposals, and how to withdraw no-action requests for proposals with multiple proponents. SLB 14F is the staff's seventh legal bulletin on Rule 14a-8, which highlights the procedural and substantive complexities associated with shareholder proposals. The new legal bulletin can be found at [www.sec.gov/interps/legal/cfslb14f.htm](http://www.sec.gov/interps/legal/cfslb14f.htm).

### Verifying eligibility under Rule 14a-8(b)

SLB 14F (1) clarifies which brokers and banks are considered "record" holders for purposes of verifying whether a beneficial owner of a company's voting securities is eligible to submit a proposal under Rule 14a-8, and (2) explains how to avoid common errors in proving share ownership in connection with the eligibility determination.

**Determining record ownership of securities deposited with DTC.** SLB 14F alleviates the confusion over shareholder eligibility verification that has resulted in part from a series of conflicting staff and judicial positions. The new guidance confirms that, for Rule 14a-8(b) purposes, only participants in The Depository Trust Company (DTC), and not "introducing" brokers, are considered "record" holders of securities deposited with DTC who may provide written verification that the securities are owned by a particular beneficial holder.

At the time a proposal is submitted under Rule 14a-8, the proponent must have continuously held at least \$2,000 in market value, or 1%, of the company's voting securities for at least one year, and must continue to hold the securities through the date of the shareholder meeting. When a shareholder holds its securities in "street name" through an intermediary such as a bank or broker, it generally



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must provide proof of its beneficial ownership by delivering to the company a statement from the "record" holder of the securities verifying the shareholder's ownership, in accordance with Rule 14a-8(b)(2)(i).

SLB 14F distinguishes between DTC participants and other types of brokers and banks for verification purposes. Securities intermediaries typically deposit their customers' securities with DTC and are listed with DTC as "participants." Although the intermediaries do not appear on the company's records as the record holder (which is shown as DTC or its nominee, Cede & Co.), the staff considers DTC participants to be record holders for purposes of Rule 14a-8(b)'s verification requirements. SLB 14F indicates that the staff will not extend this treatment to "introducing" brokers that engage in sales and other activities involving customer contact, but do not maintain custody of customer's securities and generally are not DTC participants. In drawing this distinction, the staff highlights the transparency of the DTC participant listing with respect to a company's securities, which permits the company to identify the number of its securities held by each participant. For the purpose of assisting both companies and shareholders in determining whether a particular bank or broker is a DTC participant, SLB 14F refers to the current DTC participant list available at [www.dtcc.com/downloads/membership/directories/dtc/alpha.pdf](http://www.dtcc.com/downloads/membership/directories/dtc/alpha.pdf).

**Avoiding errors in submitting proof of ownership.** SLB 14F identifies two common errors by beneficial owners in attempting to provide proof of ownership from a record holder:

- In some cases, a letter with proof of ownership does not cover the full one-year period up to and including the date on which the proposal is submitted to the company. For example, if the letter is dated two days before the submission of the proposal and verifies that the proponent has continuously held the securities for one year as of the date of the letter, a gap of two days will exist from the date of the proof of ownership letter and the date on which the proposal was submitted to the company.
- In other cases, a letter with proof of ownership simply will refer to a shareholder's ownership as of a particular date, but will fail to confirm continuous ownership.

To assist shareholders (and their banks or brokers) in avoiding these errors, SLB 14F provides the following sample language to include in a proof of ownership letter that would satisfy the requirements of Rule 14a-8(b).

As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities].

### **Addressing submissions of revised proposals**

SLB 14F answers common questions concerning whether a company must accept a revised proposal and whether updated proof of ownership under Rule 14a-8(b) is required from a shareholder submitting a revised proposal.

The staff indicates that the company must accept a revised proposal if the shareholder submits it before the Rule 14a-8(e) proposal deadline. In this event, the initial proposal will be deemed withdrawn and the shareholder will not be viewed as having violated the one-proposal limit of Rule 14a-8(c). By contrast, if a revised proposal is received after the Rule 14a-8(e) deadline, a company may accept the revisions, but is not required to do so. If the company does not accept the revisions, however, the company must treat the revised proposal as a second proposal and submit a notice, in accordance with Rule 14a-8(j), stating its intention to exclude the revised proposal. The notice may cite Rule 14a-8(e) as the basis for the exclusion.

In all cases involving revised proposals, SLB 14F clarifies that there is no requirement for the shareholder to submit new or updated proof of ownership under Rule 14a-8(b). The staff notes that the existing requirement that a shareholder must hold the minimum amounts of securities through the date of the shareholder meeting should serve as a safeguard for the company in this circumstance.

### **Procedures for withdrawing no-action requests for proposals with multiple proponents**

SLB 14F relaxes somewhat the procedures for companies to withdraw a no-action request

concerning a shareholder proposal.

In Staff Legal Bulletin No. 14C (CF), issued on June 28, 2005, the staff directed companies withdrawing a no-action request for a proposal submitted by multiple proponents to include documentation indicating that each proponent has agreed to withdraw the proposal. Alternatively, under this prior guidance, where the proponents have designated a lead proponent to act on their behalf, and the company can demonstrate that the designated individual or entity is authorized to act on behalf of the other proponents, the company need only include a letter from the lead proponent stating that it is authorized to withdraw the proposal on behalf of all proponents. SLB 14F indicates that the staff will now process a withdrawal request if the company merely submits a letter from the lead proponent that includes a representation that the lead proponent is authorized to withdraw the proposal on behalf of the other proponents.

### **Staff e-mail responses to no-action requests**

Finally, in a welcome procedural change, SLB 14F notes the staff's intention to respond to Rule 14a-8 no-action requests by e-mail rather than by U.S. mail. The staff encourages companies and shareholders to include e-mail contact information in no-action requests and related correspondence. The staff will continue to transmit the no-action response by U.S. mail to any company or proponent for which the staff does not have e-mail contact information. The staff intends to provide only its response in its e-mail communications, and not include the incoming no-action request or related correspondence. Those additional documents will continue to be available on the SEC's website when the staff's response is posted. The staff's use of e-mail to deliver its responses is expected to help speed the delivery of staff responses to companies and shareholders.

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**Going, Going, Gone . . . California's Solar Incentives for Builders/Developers . . . Don't Delay . . .**

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**Rachelle A. Costa**

Over the past few months the California Energy Commission has reported a substantial increase in the number of rebate reservation applications received for New Solar Homes Partnership (NSHP) funding. **Due to this surge in program activity, the amount of monies requested will exceed current program funding.**

The California Energy Commission will hold a hearing on November 16, 2011 to address the shortfall in program funding. At present, commission staff is proposing to establish a waiting list for the NSHP and criteria for processing rebate reservation applications. If the staff recommendations are adopted at the upcoming hearing, incomplete rebate reservation applications will *not* be added to the waiting list and will be returned to the applicant. Builder applicants with incomplete applications would be permitted to re-apply for program funding by submitting a new rebate reservation application. However, the new rebate reservation application would be subject to any new requirements adopted, including any declining rebate levels.

Thus, it is critical that any builder with incomplete or yet unsubmitted NSHP rebate applications complete the application process right away before the rules for applying for the NSHP rebate change. Additionally, builders should confirm that all applications are complete and error free to prevent the application from being returned to the builder.

### Background On the New Solar Homes Partnership

The California Solar Initiative (CSI) created a statewide solar program that includes the New Solar Homes Partnership. The New Solar Homes Partnership provides financial incentives and other support for installing eligible solar energy systems on new homes that receive electricity from certain investor-owned utilities (PG&E, SCE and SDG&E). The partnership is administered by the California Energy Commission. See the *New Solar Homes Partnership Guidebook* (Third Revised Edition) - <http://www.gosolarcalifornia.org/documents/ns hp.php> - for program details.

To qualify for an incentive, the solar system and the residence must meet the requirements of the New Solar Homes Partnership Guidebook and the Energy Commission's Overall Program Guidebook for the Renewable Energy Program (Overall Program Guidebook). Builders, developers and building owners may apply for incentives for energy efficient, newly constructed residential buildings (including qualifying total rehabilitations), which include single family residences, condominiums, and apartments. Solar energy systems that may also be eligible for incentives include those servicing (i) mixed-use residential and commercial buildings, or (ii) common areas of residential and mixed-use communities.

Incentive levels decline over the life of the program and are based upon many factors, some of which include (i) the estimated performance of the system, (ii) whether solar is a standard feature or is offered as an option, and (iii) the type of community (e.g. market rate vs. affordable housing)."

The solar incentives may be reserved for up for 36 months for communities in which solar is a standard feature, and up to 18 months for communities in which solar is an option. As set forth in the Guidebook, there are different application procedures for solar-as-option communities and solar-as-standard communities. See: <http://www.gosolarcalifornia.org/builders/applying.php> to learn more about the application process.

## WSGR ALERT

NOVEMBER 2011

## EUROPEAN UNION AND UNITED STATES ANTITRUST AUTHORITIES UPDATE

### *BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS*

The Competition Directorate-General of the European Commission (DG Competition) and the Department of Justice (DOJ) and Federal Trade Commission (FTC) in the United States have jointly issued revised *Best Practices on Cooperation in Merger Investigations*. The revised *Best Practices* builds upon the experience gained by the agencies in merger investigations since the first *Best Practices* statement was issued in 2002—and responds to criticism from the business community, which was in need of clear recommendations on how to navigate the processes in these two very different regimes. In particular, the update expands the guidance to cover remedies and settlements. It also makes recommendations on how merging parties can assist the agencies in their review of a merger that has effects in the U.S. and the EU.

#### Framework for Interagency Cooperation

##### *Communication and Coordination between the Reviewing Agencies*

To be clear, not all transactions require coordination. The revised *Best Practices* deals with those transactions that raise competition issues in both jurisdictions. When a transaction raises such issues, the revised *Best Practices* encourages early and prompt communications between the EU and U.S. competition authorities. Interagency communication regarding the transaction is even encouraged during the EU pre-notification phase (i.e., when the deal has been initially communicated to DG Competition but before the Form CO has been accepted), thereby taking into account the

front-loaded nature of the EU's merger control system.

Where a transaction appears to present significant competition issues in both jurisdictions, the revised *Best Practices* recommends that the authorities establish a "tentative timetable" for interagency consultations, particularly at key stages of the investigation, namely:

- before the relevant U.S. agency either closes an investigation without taking action or issues a second request;
- no later than three weeks following the initiation of a Phase I investigation in the EU (i.e., upon receipt of the answers to the market test questionnaires when the European Commission starts forming its views on a concentration);
- before the European Commission opens a Phase II investigation or clears the merger without initiating a Phase II investigation;
- before the European Commission closes a Phase II investigation without issuing a Statement of Objections or before DG Competition anticipates issuing its Statement of Objections;
- before the relevant DOJ section/FTC division makes its case recommendation to senior leadership;
- at the commencement of remedies negotiations with the merging parties; and
- prior to a reviewing agency's final decision to seek to prohibit a merger.

The agencies' ability to coordinate their review of a merger is primarily dictated by the dates on which the merger notifications are filed, which is (in the EU, subject to receiving the European Commission's blessing upon closure of the pre-notification discussions) largely in the hands of the merging parties. The agencies want to avoid a situation where a jurisdiction has completed or almost completed their investigation before the other jurisdiction has received notification of the merger or acquisition. Therefore, the revised *Best Practices* has expanded the section on timing to include guidance for the merging parties to facilitate interagency coordination, as discussed below.

##### *Collection and Evaluation of Evidence*

The revised *Best Practices* encourages the agencies to share as much information as they can as early in the investigation as possible, subject to their local confidentiality rules. DG Competition and the reviewing U.S. antitrust agency may—to the extent permitted by their statutory non-disclosure obligations regarding the parties' confidential information and other applicable rules—share information or coordinate discovery requests that each may issue to the merging parties and third parties. The agencies also are encouraged to provide the parties with the opportunity to jointly present, or to have interviews with and to submit documents concurrently to both reviewing agencies.

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## Remedies and Settlements

Where the merging parties provide the agencies with sufficient time to coordinate, the revised *Best Practices* recommends that the reviewing agencies—when appropriate and consistent with confidentiality and non-disclosure obligations—share draft remedy proposals and hold joint discussions with the merging parties, prospective buyers, and trustees. Such cooperation may result in a single proposal for a remedial package addressing the concerns of both agencies.

## Guidelines for Merging Parties

Significantly, unlike the 2002 *Best Practices*, the revised *Best Practices* provides a set of recommendations for merging parties whose transaction is subject to review in both the European Union and the United States.

### Information about the Merger or Acquisition

The revised *Best Practices* encourages the merging parties to consult DG Competition and the relevant U.S. antitrust agency as soon as practicable, and to be prepared to provide the following general information about the transaction prior to formal notification:

- The names and activities of the merging parties
- The geographic areas in which they conduct business
- The sector or sectors involved (short description for both jurisdictions)
- The names of other jurisdictions in which they have made or intend to make a filing
- The actual or anticipated date for the filing in each jurisdiction
- Any issues relevant to the timing of the merger

## Coordination and Timing of Filings

The revised *Best Practices* urges the merging parties to file concurrently with both jurisdictions. However, the coordination and timing of filings are more complex than the rather straightforward recommendation to file concurrently seems to indicate: The EU and U.S. regimes differ greatly with regard to timing, but also with regard to the likelihood of cases going into an in-depth review. In Europe, few cases go into Phase II, and competition concerns are usually remedied in Phase I. This is facilitated by the front-loaded European process and the practice of often lengthy pre-notification contacts between the parties and DG Competition. Conversely, in the back-loaded U.S. regime, second requests are more frequent and the timing is often difficult to predict in advance. As a result, the pros and cons of coordinated filings should be carefully considered in light of the special features of each case.

Where filings are not made in parallel, the revised *Best Practices* recognizes that there still are many opportunities for merging parties to facilitate the coordination of investigations. In some circumstances, the merging parties can utilize the regulatory procedures in one or both of the jurisdictions to ease timing constraints on agency review. For example, after the issuance of a second request in the U.S. and the opening of a Phase II investigation in the EU, the parties can (i) negotiate a timing agreement with the reviewing U.S. agency based on the date the parties will certify compliance with the U.S., and/or (ii) request that DG Competition extend the review period by up to 20 working days.

## Confidentiality Waivers

Communications between DG Competition and the relevant U.S. antitrust agency are limited by the agencies' respective confidentiality and non-disclosure obligations. The revised *Best Practices* continues to strongly encourage the merging parties to

waive their confidentiality privileges with respect to interagency communications. Although confidentiality waivers are commonplace (model confidentiality waivers are available on the websites of the DOJ, FTC, and DG Competition), there are some risks associated with providing these waivers, particularly with respect to differences in the attorney-client privilege rules in the European Union and the United States.

For example, unlike the U.S. attorney-client privilege, the EU legal professional privilege does not extend to in-house counsel. A general waiver, therefore, could result in DG Competition providing information to the reviewing U.S. agency that would otherwise be protected from attorney-client privilege in the United States. Recognizing this, the revised *Best Practices* notes that DG Competition will accept a stipulation that excludes from the scope of the waiver evidence that is identified properly by the parties as qualifying for the in-house counsel privilege under U.S. law. Moreover, there are other differences in the privilege rules that the revised *Best Practices* does not consider—such as the fact that EU privilege rules extend only to counsel who are admitted to a bar in one of the Member States of the European Union—that the reviewing agencies may agree to carve out from their waivers.

Unfortunately, waiver stipulations may not adequately protect privileged communications in actions outside the purview of agency enforcement (e.g., in a private or other third-party action against the parties). Therefore, merging parties should carefully consider legal-privilege issues with outside counsel.

## Remedy Proposals

The revised *Best Practices* recommends that the merging parties coordinate the timing and substance of remedy proposals to DG Competition and the reviewing U.S. antitrust agency so that the merging parties can minimize the risk of inconsistent or conflicting

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remedies. Therefore, the merging parties should consider the benefits of submitting their notifications to DG Competition and the U.S. agencies concurrently or within a short time period of one another so that they have the option to submit a joint remedy proposal to both agencies.

### Conclusion

The revised *Best Practices* attempts to make the case for merging parties to facilitate coordination between DG Competition and the U.S. antitrust authorities. While facilitating coordination has its benefits, there are circumstances where it may be in the interest of the merging parties to seek early clearance in one jurisdiction rather than seeking a coordinated outcome. For example, where the parties have valid reasons to expect early clearance in one jurisdiction but a more prolonged investigation in the other, they may well opt for early clearance rather than go through a protracted coordination process. The revised *Best Practices* notes that the merging parties' decision not to follow the recommendations in the document will not of itself prejudice the conduct or outcome of the agencies' review. Nevertheless, now that the EU and U.S. antitrust authorities have published their recommendations, merging parties should consult their EU and

U.S. antitrust counsel as early as possible to factor the authorities' expectations into their strategy for getting their deal through a multi-jurisdictional review.

### For More Information

Wilson Sonsini Goodrich & Rosati recently strengthened its highly regarded competition law practice with the addition of an antitrust team in Brussels, members of which have held senior antitrust positions at the EU agencies and have extensive experience representing both U.S. and international clients in antitrust matters before the European Commission and other competition authorities. With this expanded expertise, the firm's global competition law practice is particularly well suited to provide representation regarding cross-border antitrust issues.

If you have any questions relating to the revisions to the *Best Practices*, or if you have a transaction that is subject to notification in the European Union and/or the United States, please feel free to contact Götz Drauz (32-02-274-5702), Michael Rosenthal (32-02-274-5701), Charles E. Biggio (212-497-7780), Scott A. Sher (202-973-8822), or another member of the firm's antitrust practice.



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