PACIFIC RIM ADVISORY COUNCIL

AUGUST 2004 e-BULLETIN

MEMBERSHIP Events

- October 30 – November 5 New Delhi/Agra 2004 PRAC Conference
  All Delegate Members must register on line @ www.prac.org Deadline August 15

- PRAC / IBA Calgary Canada Energy Conference - 19-21 September
  Conference Co-Chair Fraser Milner Casgrain LLP - Contact Nick.Kangles@fmc-law.com for details

- PRAC / IBA New Zealand Conference Attendees – 25 October Reception
  Contact Denis.McNamara@simpsongrierson.com for details

Tools to Use

- PDF version Directory 2003-2004 Member Firms **available** at PRAC web site
- Expert System 2003 available at PRAC web site Private Libraries

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Send member contributions to susan.iannetta@fmc-law.com on or before the 15th of each month

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ALI BUDIARDJO NUGROHO REKSODIPUTRO PARTNERS APPOINTED MEDIATORS

A regulation that is viewed by the Indonesian legal community as the most important regulation in the recent history of the Indonesian judicial system is Regulation of the Indonesian Supreme Court No. 2/2003 dated 11 September (ABNR Newsletters, December 2003). The Regulation is deemed important because it officially introduced a mechanism which makes it mandatory for parties in court cases to first settle their dispute by mediation before the judge deliberate the case.

Under the regulation, issued by the Supreme Court in its effort to overcome its problem of mounting cases queing for its handling, requires that all civil cases that are submitted to an Indonesian court must first go through a mediator assisted mediation process. Formerly, with every civil dispute that was brought before the court, under the Indonesian civil procedural law the judge in ex officio capacity had the obligation to first offer to the disputing parties mediation assistance for the purpose of reaching an amicable settlement. With the introduction of Regulation 2/2003, mediation becomes an obligation instead of a choice or opportunity for the parties to a civil dispute. Regulation 2/2003 furthermore sets forth that a mediator does not have to be a judge .

For the purposes of the implementation of the mediation requirement, the Supreme Court has appointed Pusat Mediasi Nasional ("PMN") as an accredited institution to organize a special training course for candidate mediators. Two of ABNR partners, Mr. A. Zen Umar Purba and Mrs. Ricky Nazir have participated in the course and passed its examination. They are now officially appointed as PMN mediators

CLAYTON UTZ BOLSTERS CORPORATE AND TMT TEAMS WITH ASIAN EXPERTISE

Sydney, 30 July 2004: Clayton Utz today announced the appointment of well-known corporate and TMT (technology, media and telecommunications) lawyer Michael Reede as a partner in the firm's national Corporate Advisory/M&A group. Mr Reede joins Clayton Utz from the New York law firm of Paul, Weiss Rifkind, Wharton & Garrison, where he was a partner in the firm's Hong Kong office for the last four years.

Mr Reede's corporate practice focuses on mergers and acquisitions, private equity and strategic corporate and commercial transactions. He has also acted for many clients addressing structural change in the telecommunications and media sectors . Prior to moving to Hong Kong in 2000 he was a partner practising extensively in the Australian market.

"I am delighted to be returning to Sydney and joining one of Australia – and Asia's – pre-eminent firms," said Mr Reede. "In the Asia-Pacific legal market, it is important that a firm has a dynamic outlook, clear direction and focused management. It is also important for the firm to have an international perspective. Clayton Utz has all of these qualities. For my part I believe that my experience of working in Asia with Paul, Weiss, one of the leading law firms in the United States, will help to enhance those qualities further."

According to Wally McDonald, head of the firm's national Corporate Department, the appointment is significant, further deepening the firm's already highly-regarded private equity and M&A teams.

"Michael is joining a highly successful team and his arrival enhances our breadth of talent in the TMT area. His experience in Asia is further testament to our position as a truly international firm," Mr McDonald said.

Michael's appointment follows the appointment to the firm of leading private equity specialists Philip Kapp and David Stammers, who joined the firm in April as partners.

Michael's recent work includes advising TCL, China's largest television manufacturer, on a global merger with the television manufacturing business of Thomson SA of France to establish TCL-Thomson Electronics, the world' largest television manufacturer by unit volume. He also advised TCL on its recently announced acquisition of Alcatel's mobile handset business. These transactions reflect the new externally focused ambitions of major Chinese corporations seeking control of foreign brands, technologies and distribution channels in international markets.

He has represented a variety of private equity investors in their investments in companies in China, India, Korea and Malaysia . In 2002 he was one of the partners advising the Shanghai Municipal Government on transactions to establish the Universal Studios theme park in Shanghai, mainland China's first international theme park.

He has also been a key adviser to a number of telecommunications carriers in Hong Kong and Australia for the last 10 years. These include Hong Kong Telecom (now PCCW) on legislative and regulatory change in Hong Kong for the last 10 years and its successful negotiations with the Hong Kong Special Administrative Region government in 1998 to relinquish its international exclusivity for a significant compensation package. He has advised many incumbent and new entrant carriers, pay television and satellite operators.

Michael is identified by clients and legal publications as a leading TMT lawyer in Asia, including Asia's Leading Lawyers, Chambers Global, European Counsel Global Communications Industry Report and Asia Pacific Legal 500.

ENDS

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Litigator Barton Aronson Joins Hogan & Hartson

WASHINGTON, August 6, 2004 – Hogan & Hartson L.L.P. announced today that Barton S. Aronson has joined the firm in the Washington, D.C. office as counsel in the litigation practice. An experienced litigator, Aronson focuses his practice on complex class action matters in the healthcare and products liability areas. He has represented a variety of insurers, including managed care companies, automotive manufacturers, and a wide range of other manufacturers.

“We are delighted to have such a seasoned litigator join our firm,” said Austin Mittler, litigation practice area administrator. “Our clients will benefit from the extensive litigation and class action experience that Bart brings to the table.”

Aronson most recently served as counsel to a Washington, D.C., firm. Before this, he served as an assistant U.S. attorney in Washington, where he handled criminal matters at the trial and appellate levels. In that capacity, he received three Special Achievement Awards for Sustained Superior Performance. Before going to law school, Aronson taught high school at a private school in Massachusetts.

Aronson is an adjunct professor at the Georgetown University Law Center and has written extensively for legal and business journals. He holds a law degree with honors from the University of Chicago Law School and a bachelor’s degree, *cum laude*, from Yale University.

Veteran of the Solicitor General’s Office Rejoins Hogan & Hartson To Head Up Firm’s Supreme Court and Appellate Practice

WASHINGTON, D.C., July 26, 2004 – Hogan & Hartson L.L.P. announced today that Gregory G. Garre has rejoined the firm as a partner in the Washington, D.C. office and the head of the firm’s Supreme Court and Appellate Practice. Garre most recently served as an Assistant to the Solicitor General of the United States from September 2000 to July 2004.

“Greg’s extensive Supreme Court experience and leadership skills will be invaluable to our clients and members of our appellate team,” said J. Warren Gorrell, Jr., chairman of Hogan & Hartson. “As a protégé of John Roberts,” a former firm partner who is now a judge on the D.C. Circuit Court of Appeals, “Greg learned from the best. We’re thrilled that Greg is returning to the firm.”

During his four Supreme Court Terms in the Office of the Solicitor General, Garre argued nine cases before the Supreme Court. Garre prepared the merits briefs filed on behalf of the United States in numerous additional cases in the Supreme Court. He also argued on behalf of the federal government on many occasions in the federal courts of appeals and district courts. Garre was extensively involved in the representation of the United States in some of the most high-profile cases decided by the Supreme Court in the past decade, including landmark cases involving constitutional challenges to the McCain-Feingold campaign finance law, the exercise of the President’s war powers, and state-financed school voucher programs. In addition, Garre successfully argued several nationally important cases in the area of copyright and intellectual property, employment discrimination, and punitive damages. In June 2003, Garre received the *Attorney General’s Award for Excellence in Furthering the Interests of U.S. National Security* for his representation of the President and the U.S. Armed Forces in war powers litigation.

Before joining the Office of the Solicitor General, Garre was a partner at Hogan & Hartson, where from 1993 to 2000 he represented state governments, corporations, trade associations, and individuals on a wide variety of appellate matters in the Supreme Court and federal and state courts of appeals. Before he first joined Hogan & Hartson, Garre clerked for the Honorable William H. Rehnquist, Chief Justice of the U.S. Supreme Court, and the Honorable Anthony J. Scirica, Chief Judge of the U.S. Court of Appeals for the Third Circuit. Garre received his J.D. with high honors from the George Washington University Law School in 1991, where he was editor-in-chief of the law review, and his B.A., *cum laude*, in government from Dartmouth College in 1987. Garre is an adjunct professor of constitutional law at the George Washington University Law School. He has written on constitutional and contemporary legal issues for nationally syndicated publications including *The Wall Street Journal*.

The Supreme Court and Appellate Practice

Garre joins a talented and experienced group of Supreme Court and appellate advocates at Hogan & Hartson, including Barrett Prettyman, Jonathan Franklin, Catherine Stetson, Chris Bartolomucci, and Lorane Hebert in Washington, D.C.; Ira Feinberg in New York; Parker Thomson and Carol Licko in Miami; and other attorneys in our Los Angeles, Colorado, Baltimore, and Northern Virginia offices. Hogan & Hartson’s Supreme Court and Appellate Practice consistently ranks among the nation's elite.as most recently noted by *The American Lawyer*, which hailed the firm's "appellate prowess" in its biennial survey of the country's top litigation departments.

Members of the firm's Supreme Court and Appellate Practice regularly handle Supreme Court merits briefing and argument, amicus briefs, petitions for certiorari, and oppositions to certiorari, as well as complex civil and criminal appeals before all federal circuit courts and many state appellate courts.

During the last seven Terms, members of the group, including former partner John Roberts, have argued 20 cases before the Supreme Court on behalf of firm clients. Members of the group are currently counsel in two merits cases on the Supreme Court's docket for next Term -- *Alaska v. United States* and *Nebraska Cattlemen Inc. v. Livestock Marketing Association*.

Leading Denver Real Estate Attorney Joins Hogan & Hartson

DENVER, August 4, 2004 – A leading attorney on land use, real estate, public lands, and environmental law has joined Hogan & Hartson L.L.P., an international law firm with nearly 1,000 attorneys and 20 offices worldwide.

Hogan & Hartson today announced that Alan E. Schwartz, one of the architects of some of the nation's most innovative growth plans and a key developer of Colorado's "Vested Rights Act," a model land use statute reflecting a consensus among development interests, environmentalists and state and local governments,
has joined the firm's Denver office as a partner. Prior to joining the firm, he practiced in Aspen, Colorado and worked with a large Denver-based firm. Schwartz has represented public and private sector clients as well as non-profit organizations throughout Colorado on a wide range of issues over the course of his more than 25-year career in law. Schwartz also has a background in international business, having served as partner at Broadmark, a prominent investment banking firm in Paris, France, where he specialized in European
mergers and acquisitions and corporate turnarounds. He also has extensive legislative lobbying experience in the Colorado legislature and U.S. Congress. At Hogan & Hartson, Schwartz will continue to focus on land use, environmental issues, real estate, corporate and legislative matters. He also will be actively involved in the firm's international business practice.

"Alan brings a very unique depth and breadth of experience to the firm – both international and domestic," said Tom Strickland, managing partner of Hogan & Hartson's Denver office. "The firm's strong government regulation practice coupled with its international reach provided an ideal situation for Alan to continue
doing what he does best. He will be a great resource for our clients and I'm excited to have him on board."
Among his many other career highlights, Schwartz has served as special counsel to the City of Aspen, Town of Snowmass Village, Pitkin County, and other local governments in the creation, implementation and successful defense of some country's most innovative land use planning regulations. For example, he coauthored Boulder, Colorado's "Danish Plan", one of the first and most widely emulated community growth management plans in the country, and he successfully defended the constitutionality of Colorado's "minimum stream flow" statute in the Colorado Supreme Court, upholding one of the nation's first attempts
to protect instream flows for aesthetic and recreational purposes. In addition to his past representation of local governments and private development clients, Schwartz has provided pro bono legal representation to the National Wildlife Federation, Colorado Open Space Council, Trout Unlimited and other non-profit organizations. He currently serves on the boards of many civic organizations including the Aspen Music Festival, Colorado Conservation Trust, Colorado Public Radio and Urban Peak. He received his J.D. from the University of Texas, School of Law and has a B.A. degree from the University of Colorado.

About Hogan & Hartson
Hogan & Hartson is an international law firm headquartered in Washington, D.C., with close to 1,000 attorneys practicing in 20 offices around the globe. The firm's broad-based international practice cuts across virtually all legal disciplines and industries.

Hogan & Hartson has European offices in Berlin, Munich, Brussels, London, Paris, Budapest, Prague, Warsaw, and Moscow; Asian offices in Tokyo and Beijing; and U.S. offices in New York, Baltimore, Northern Virginia, Miami, Los Angeles, Denver, Boulder, Colorado Springs, and Washington, D.C.

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

HOST FIRM MESSAGE

07 July 2004

Dear PRAC Members,

It gives us great pleasure to host the 36th Pacific Rim Advisory Council Conference in New Delhi from 30th October to 3rd November, 2004 and a follow-on in Agra from 3rd November to 5th November, 2004.

We have endeavoured to prepare what we hope will be an interesting and exciting programme for all the delegates. Delhi, the capital of India, is a fascinating old and new city. For almost 3000 years, India has witnessed the rise and fall of various rulers - the Aryans, the Mauryas, the Guptas, the Turko-Afghan Slave Dynasty, the Mughals and the British - each of these rulers have left an indelible print on this historic city, the centre of power for much of this period. Delhi's culture, architecture and its cuisine reflects these various influences. We have attempted to prepare a programme that we hope would enable the delegates to experience some of these influences.

The business programme will cover multiple Practice Group meetings and include a Public Seminar on "International Finance", featuring guest and PRAC speakers and be attended by local industry leaders.

Earlier this year we received your Early Indications and we hope that all of you will now formally register. We have planned events and sightseeing during your stay in New Delhi and Agra and encourage your earliest attention to registration so as to avoid any disappointment. November is a busy time for Agra and we would not want you to miss visiting the monument that was inspired by love.

This is the first time PRAC is coming to India and we are looking forward to welcoming you all to our country.

Host Committee:

Rohit Kochhar
Manjula Chawla

KOCHHAR & Co.
ADVOCATES & LEGAL CONSULTANTS

Please Note : Deadline for Registration is August 15
Delegates must register On Line @ PRAC Web Site www.prac.org

LUCE FORWARD FORMS DEDICATED CONSTRUCTION LAW PRACTICE

August 2, 2004
Luce, Forward, Hamilton & Scripps LLP has established a dedicated "Construction Law practice area" enabling private- as well as public-sector clients to benefit from focused legal services that synthesize precise technical as well as "real world" practical expertise on construction-related issues.

The new "Construction Law Practice Area" is a focused "specialty subset" of Luce Forward's broad and long-dominant Real Estate, Real Estate Litigation and Business / Corporate practice areas, said Robert J. Bell, Managing Partner, who also is a member of the new practice area.

Robert J. Bell

"Construction law is very precise as well as very complex, and becoming more so every day," Bell said, "The client's goals most frequently include control and minimization of risks as well as meticulous management to optimize outcomes. The Construction Law practice area is synthesizing the exceptional depth of experience of our transactional law attorneys with the equally vast 'real world' experience of our trial attorneys. As a result, our clients and their projects will benefit from the team's unsurpassed understanding of all the practical, legal, financial and technical issues that are inherent in all construction-related matters."

Roger C. Haerr

"Roger C. Haerr, a Partner in Luce Forward's San Diego office and the leader of the new practice area, noted that what sets the new Construction Law practice area apart is its synergistic teaming of transactional and litigation law experts, whose command of construction-related issues is born of wide-ranging experience in the broader specializations of real estate and business law, including pre-construction planning, environmental law and construction litigation.

"The expertise that has been harnessed for the Construction Practice Area draws from many general as well as specialized areas of legal practice," Haerr said.

"Inherent in even the smallest construction-related project is the potential of significant exposure and immense amounts of money," he continued. "Luce Forward has established its Construction Law practice area so that clients can be assured of intellectual resources that are as expert in the exacting technicalities of construction law as they are in the broad precepts of transactional real estate and business law."

Attorneys of Luce Forward's Construction Law practice area bring to clients commanding experience in such broad construction-related issues zoning and permits, environmental, acquisition and leasing, and counseling on all aspects of risk management from entity formation, wrap and CGL insurance, indemnities, ADR, mold, construction doc ument and SB800.

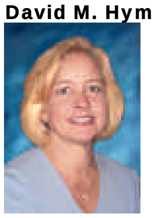
The specialized expertise of the practice area's attorneys also includes resolving bid disputes, differing site conditions, extra work and cost overruns, change orders, delay, acceleration, False Claims Act, construction defects, professional design malpractice, liens, and stop notices. The practice area's litigation experts are experienced trial lawyers practicing in the state and federal courts, and arbitration, mediation and other forms of alternative dispute resolution.

In addition to Haerr and Bell, the veteran Luce Forward attorneys who comprise the core of the Construction Law practice area are:

David M. Hymer, a transaction attorney and Partner in the San Diego office whose experience includes representing the master developer of a 3,400-unit community in all aspects of development and sale; complex real estate purchase and sale transactions; built-to-suit transactions; real estate loan transactions; and construction contracts. Hymer also is expert in techniques to limit owner/developer liability.

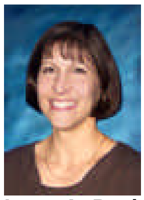
David M. Hymer

Cathy L. Croshaw, a transaction attorney and Partner in the San Francisco office who has wide-ranging expertise in residential and commercial real estate purchases and sales; leasing and development, including the preparation of homeowners association documents and CC&Rs; reciprocal easement and other land sharing agreements; and form sales documents, subcontracts, insurance, homeowner warranties and coordination of insurance and warranty programs with sales documentation. She also has considerable experience with the recent SB 800 "Right to Repair Legislation," including the development of compliance and training programs for developers.



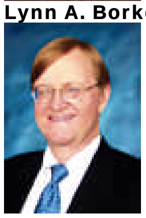
Cathy L. Croshaw

Lynn A. Borkenhagen, a real estate transaction Associate in the San Diego office who focuses on Department of Real Estate work and construction contracts, transactions and purchase/sale, and commercial leasing.



Lynn A. Borkenhagen

John B. McNeece III, a Partner in the San Diego office, whose expertise includes corporate transactions and international business transactions includes mergers and acquisitions, joint ventures, complex financial transactions, project development and venture capital.



John B. McNeece III

Valentine S. Hoy, a Partner in the San Diego office with expertise in the litigation and arbitration of commercial contract disputes, land-use litigation and construction law.

Valentine S. Hoy

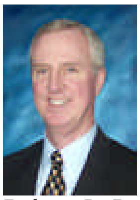
Christopher H. Findley, a Partner in the San Diego office whose practice emphasis is in real estate, commercial and general business litigation. Findley has conducted numerous jury trials, court trials and arbitrations, and has also appeared before local and state regulatory agencies.

Christopher H. Findley

Christopher K. Barnette, a Partner in the San Diego office who practices primarily in the area of real property litigation. Barnette has significant experience and expertise in commercial lease disputes, real estate transaction and land development issues, real estate finance, condemnation and construction cases.

Christopher K. Barnette

Robert D. Buell, a Partner in the San Diego office who represents commercial and residential owners, investors and developers of real estate projects, including shopping centers, major office projects, and residential communities. He represents owners in all types of lease transactions, including shopping center leases, office leases and ground leases, and represents developers and owners in the negotiation and preparation of construction contracts.



Robert D. Buell

Both Bell and Haerr noted that the specialists comprising the Construction Law practice area will continue their diverse law practice group work in addition to their work in the new team environment.

Haerr's law practice focus includes complex real estate projects and issues, business, construction, environmental and insurance litigation, jury trials, appeals, and alternate dispute resolution, including AAA and JAMS arbitration and mediation.

Bell specializes in residential real estate development, commercial development, leasing, sales and brokerage matters. He has extensive experience in residential and redevelopment issues.

For additional information about Luce, Forward Hamilton & Scripps LLP please visit www.luce.com

CLAYTON UTZ HELPS NEW SOUTH WALES GOVERNMENT STAY ON TRACK

Sydney, 10 August: The appointment of Clayton Utz as legal advisers to the New South Wales Government for the high-profile rail carriage project further reinforces the law firm's expertise in public private partnership (PPP) activity.

The Rail Corp project is estimated to be worth $1.5 billion; and involves a PPP between the Government and the private sector for the finance, design and construction of 498 new train carriages to replace existing, non-air conditioned carriages by 2010.

Mr Doug Jones AM, one of Australia's leading construction and PPP lawyers said Clayton Utz has a long and successful his tory of advising governments particularly the NSW state government on major infrastructure projects.

The NSW appointment follows previous advisory roles to the (then) State Rail Authority (now Rail Corp) for its previous new train procurements, namely the Millennium, Hunter Cars and Outer Suburban Cars.

Clayton Utz is highly experienced in the use of PPPs in both economic and social infrastructure projects and has advised on some of Australia's (and the Asia Pacific region's) largest PPP projects. The firm has also played an integral role in the formulation of some Australian states' current PPP policies and is involved in the current PPP debate, frequently presenting and publishing papers on the topic.

For additional information about Clayton Utz visit our web site at www.claytonutz.com

HOGAN & HARTSON RANKED IN TOP 10 FOR UNDERWRITING ACTIVITY

The international law firm Hogan & Hartson is among the top-10 firms in capital markets activity for the second quarter of 2004 according to information released by Thomson Financial.

In worldwide equity issuance by U.S. issuers, Hogan & Hartson ranks No. 8

- In U.S. equity and equity-related matters – issuer legal advisor - Hogan & Hartson ranks No. 6
- In U.S. common stock transactions – issuer legal advisor – Hogan & Hartson ranks No. 6
- In U.S. preferred stock – issuer legal advisor – Hogan & Hartson ranks No. 6.

Hogan & Hartson moved higher on each of these lists over the same quarter in 2003.

Thomson Financial compiles rankings based on globally standardized criteria. Overall, total proceeds from U.S. debt, equity and equity-related activity gained 10% compared to the same time last year.

LUCE FORWARD ACTS IN BARRATT AMERICAN MANAGEMENT ACQUISITION

August 9 - Carlsbad - The management team at Barratt American Inc. has signed an agreement for the private acquisition of the company from its British-based corporate parent, Barratt Developments PLC, it was announced jointly by David Pretty, group chief executive of Barratt Developments, and Michael D. Pattinson, president of Barratt American. Luce Forward represented the management team for Barratt American. The purchase price, according to the announcement, is $165 million.

"This transaction presents an opportunity to continue Barratt American's strong growth in the supercharged California housing market," Pattinson stated.

The emerging privately held company will maintain the name Barratt American, the same long-established top management, headquarters offices in Carlsbad, California, and its full project and land inventory in Southern California.

"Barratt American is a successful and profitable division, but a relatively small part of our total Group operation," Pretty said. "When we were approached by the management team, we felt it was the right time to review our options. This is a good strategic move for us and the sale to the very able Barratt American team will enable us to concentrate our activities in the UK, where there are significant opportunities for further growth.

It is, however, a move we make with some sadness because we have had a long and warm relationship with our team. Nevertheless, we leave the company in excellent hands, we wish them well and both sides are happy with the deal."

Barratt Developments is listed on the London Stock Exchange under the symbol BDEV. It is the UK's largest home builder, having completed more than 250,000 homes since it was founded in 1958 in Newcastle Upon Tyne, England. Barratt entered California in 1980 and has since built more than 17,000 homes there. In addition to Pattinson, who has been president of Barratt American since 1991, the management team includes Stephen R. Reid, CFO; J. Michael Armstrong, general counsel; G. Jack Becker, president / San Diego division; Robert Laing, president / Urban Development division; Lou Ochoa, president / lnland Empire division, and Donna Rowley, company secretary. All are long-time residents of San Diego County or south Orange County and participate in local industry, civic and charitable activities.

Pattinson is a past president of the California Building Industry Association and an area vice president of the National Association of Home Builders. He was elected to the California Building Industry Hall of Fame in 2003.

Barratt American's fiscal year 2003 / 2004 ended June 30 with record sales of 702 residential units and $305 million in revenue. The fiscal year witnessed the restructuring of the company into three distinct divisions- San Diego, Inland Empire and Urban Development - to focus on the three primary areas of activity. San Diego and Urban Development divisions are headquartered in Carlsbad and Inland Empire in Perris.

The company has also launched an aggressive expansion into the field of urban redevelopment. This has resulted in architecturally distinguished projects in coastal La Jolla and downtown San Diego's burgeoning ballpark district, as well as other major projects in planning and design for San Diego County and elsewhere in Southern California.

Barratt American in the past year solidified its reputation as a builder that produces housing across the full market spectrum. offering entry-level homes from the low $200.000s to baronial estate residences with multimillion-dollar price tags. Barratt was recognized with two national architectural design awards earlier this year for Whitehouse overlooking Carmel Valley and Surrey Farm at Ladera Ranch in south Orange County.

"Launching trends has long been a favorite theme at Barratt American. whether in innovative home design, third-party construction inspections, builder-owncd insurance protection to cut building costs, or do-it-yourself master-planned infrastructure,'" Pattinson said.

"In today's widespread merger-and-acquisition consolidation of home-building firms, a corporate spin-off to permit an independent emphasis on one regional marketplace is definitely a fresh idea. Baratt American's new independence will elevate the company from a subsidiary to a full-fledged local player.

"Barratt American finds itself in an especially solid strategic position as a result of a strong balance sheet and major land acquisitions in recent years, including the 2,600-acre Fanita Ranch in Santee."

Financial arrangements for the acquisition of Barratt American are being handled by long-time financial partners, Bank of America and Guaranty Bank.

For additional information visit www.luce.com

MUNIZ ACHEIVES MAJOR WIN FOR PLUSPETROL – CAMISEA PROJECT MOVES AHEAD AS PLANNED

The Constitutional Tribunal of Peru, in a unanimous decision published on June 28, found groundless a complaint aimed at declaring unconstitutional the municipal zoning change implemented by the Municipality of Pisco, in an area where a joint venture operated by Pluspetrol is nearly completing construction of a US$240 million facility to treat liquids from the Camisea Natural gas fields. A declaration of unconstitutionality in this action, brought by the Architects and Biologist Associations of Peru against the Municipality of Pisco, would have considerably delayed the US$1.6 billion Camisea project with great damage to the project, the investors and the country. The court decision permitted the Camisea natural gas and liquids to reach the Peruvian coast on August 9, 2004, as originally scheduled.

Pluspetrol was not a party to this claim, but given its direct material interest in the outcome of the case it successfully requested the Tribunal to admit it as an interested party. This allowed the company to actively participate in the case to evidence that the plant did not constitute a treat to the environment and the Paracas National Reserve.

The plaintiffs expressed in their complaint that the Municipality of Pisco had illegally changed the zoning of an area near the Paracas Natural Reserve, for the following alleged reasons: the Municipality did not involve other competent agencies, the ruling changing the zoning was not properly published, the zoning change violated Peruvian Law and international treaties executed by Peru, the construction and operation of the facility to be built in the area would constitute a treat to the natural life in the Paracas Reserve.

The Tribunal unanimously concurred with the arguments presented by Pluspetrol in the sense that the Municipality was fully competent to order a zoning change, other agencies (including several Peruvian environmental authorities) became competent only at the time of the granting of a construction license for the projected plant, such authorities did participate actively in the granting of such construction license, such authorities unanimously approved the project for the plant after a long process in which they imposed several changes to the project (all of them satisfactorily met by the builders), Peruvian law and international treaties binding Peru allow the cons truction of the facility subject to compliance with strict environmental standards that were met by the builders, and the ruling from the Municipality of Pisco ordering the zoning change was indeed published and it was in the public domain.

The court stated that it would be unreasonable to grant pre-eminence to an alleged threat to the National Reserve of Paracas located near the plant, (a threat that competent Peruvians authorities have discarded), over the real social and economic benefits that the project will bring to the community.

Estudio Muñiz senior partners **Nelson Ramirez Jimenez** and **Jorge Perez-Taiman,** assisted by senior associates **Armando Arrieta** and **Miguel Grau** represented Pluspetrol.

For additional information contact Nelson Ramirez Jimenez or Jorge Perez-Taiman in Lima or visit us at www.muniz-law.com.pe

NAUTADUTILH WINS TRADENAME AND COPYRIGHT ACTIONS; COUNSELS VOLKSWAGEN IN MAJOR ACQUISITION

NautaDutilh wins key trade name case

In the past years, the company increasingly experienced problems as a result of the confusion caused by the name ATOS ORIGIN. Atos Beleidsadvies en –onderzoek was legally advised by Professor Charles Gielen, a partner at NautaDutilh which has one of the biggest practice groups in the Benelux in the field of intellectual property.

The court ruled that the two companies have been confused as a result of the slight difference in names and that - because of the fact that the activities of both companies have much in common - confusion about the identity of Atos Beleidsadvies en –onderzoek can arise. The market could think that Atos Beleidsadvies en -onderzoek forms part of ATOS ORIGIN. The court ruled that Atos Beleidsadvies en –onderzoek has the right to have the continuous infringement on its trading name brought to an end. The court further ruled that a period of three months is sufficient for ATOS ORIGIN to change its name, especially because ATOS ORIGIN had been warned before the company started to use the name in the Netherlands. In both trade names, the word Atos is the most distinctive and characteristic part. ATOS ORIGIN argued that there was no risk of confusion as both names differ sufficiently and activities hardly overlap. According to ATOS ORIGIN, the cases of confusion perceived by Atos Beleidsadvies en –onderzoek were just mistakes that could easily have been avoided. The court did not agree.

Charles Gielen: “The court took the right decision; my client’s company must be protected against unwanted confusion in the market.”

NautaDutilh wins key trade name case

Lancôme's lawyer, Professor Charles Gielen, a partner at the largest independent Dutch law firm NautaDutilh, succeeded in convincing the court that the blend of ingredients constituted an original work of authorship and that the cheap perfume produced by the defendant could only be classified as nothing more than a deliberate imitation.

This is the first time that physicochemical analysis was used in a copyright lawsuit. In this case, the analysis showed that the two perfumes had 24 olfactory components in common and that there were only two components of Trésor that had not been used by the defendant. In addition, the only component that was unique to the defendant's perfume was Gamma Dodecalacton, a cheap substitute for Musk Keton which is used in Trésor. The probability of a perfumer other than Lancôme independently and coincidentally creating a perfume containing 24 of the 26 olfactory components of Trésor was shown to be about the same as that of winning the lottery every day over a period of a hundred years.

The Trésor perfume was considered by the court as having an original character bearing the personal imprint of its creator, thus entitling it to copyright protection in the Netherlands. In view of this and the improbability of the resemblance to Trésor being coincidental, the court concluded that the defendant had deliberately and unlawfully infringed Lancôme's copyright.

It should be noted that the court ruled that the copyright protection of a perfume extends only to the scent-generating substance that is bottled and sold on the market. The court stressed that the smell of a perfume is too transient and too variable to be copyrighted.

Professor Charles Gielen, Lancôme's lawyer and partner NautaDutilh: “This case shows that intellectual property law is still open to change and innovation. It is NautaDutilh's belief that thorough legal analysis in combination with sophisticated research methods can lead to solutions that hitherto seemed unthinkable.”

NautaDutilh Dutch Counsel to Volkswagen in Lease Plan Acquisition

Rotterdam

NautaDutilh is assisting the Volkswagen Group in its acquisition of Lease Plan Corporation N.V. (Almere) from ABN Amro Bank N.V. (Amsterdam).

Following the completion of the transaction, the Volkswagen Group will hold 50% of the shares in Lease Plan, with 25% each being held by the internationally renowned Olayan Group (Athens) and the Mubadala Development Company, a state-owned company in Abu Dhabi. The acquisition is subject to regulatory approval from, *inter alia*, the European Commission and the Dutch Central Bank.

With around 1.2 million vehicles under management, total assets of € 10.8 billion and net earnings of € 193 million (as at 31 December 2003), Lease Plan is the leading multi-brand fleet management provider in Europe and a major player at worldwide level. The transaction is in line with the strategy being followed by Volkswagen Financial Services of positioning itself along the automotive related value chain. This strategy has been adopted in the areas of financing, leasing, banking services, insurance brokerage and, obviously, fleet management services.[1]

The transaction is expected to be completed by the end of this summer

About NautaDutilh

NautaDutilh is the largest independent Benelux law firm, with offices in the Netherlands, Belgium, Luxembourg, London and New York offering a broad range of top-rate legal expertise. NautaDutilh maintains close but non-exclusive ties with prominent law firms in all major cities worldwide.

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WILMER CUTLER HALE AND DORR WINS FOR OCEAN SPRAY BREACH OF CONTRACT TRIAL

July 12, 2004

On June 15, 2004, a US District Court jury found that our client, Ocean Spray Cranberries, Inc., did not breach a contract with two former competitors, Fonten Corp. and Belmann Corporation. The plaintiffs claimed that Ocean Spray's breach caused them to go out of business, resulting in more than $5 million in damages. The Court granted a directed verdict on the plaintiffs' claims that Ocean Spray violated the Massachusetts Unfair Business Practices Act and the implied covenant of good faith and fair dealing. After a one-week trial, the jury found that Ocean Spray also did not breach a contract between the parties. This verdict ended a long-standing, seven-year dispute between the parties.

Cynthia D. Vreeland and Brett R. Budzinski of Boston represented Ocean Spray before Judge Young of the United States District Court for the District of Massachusetts

[1] Source: Volkswagen press release 21 April 2004.

In South Australia, highly likely.

In NSW, yes ... or maybe not.

In the rest of Australia, perhaps.

That's the situation this week, as courts grapple with an unexpected side-effect of a 2000 amendment to the Corporations Act.

At issue is whether an indemnity out of trust assets can protect trustee company directors from personal liability for trust debts.

Until recently, directors weren't liable for trust debts if the company had such an indemnity - even if the trust's assets weren't sufficient to meet the indemnity. However, the South Australian Supreme Court late last year said that a little-noticed amendment in 2000 had completely changed the law.

Background

For reasons which no-one has been able to discover, section 197 of the Corporations Act was re-written by the first CLERP Act in 2000. The new provision says:

"A person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or a part of the liability if the corporation:

(a) has not, and cannot, discharge the liability or that part of it; and

(b) is not entitled to be fully indemnified against the liability out of trust assets.

This is so even if the trust does not have enough assets to indemnify the trustee."

Until the matter came up in the SA Supreme Court in December last year, no-one gave much thought to the new section. However, the SA Court in *Hanel's case* noticed that there is a problem with the last sentence. Does it refer to:

- the director's liability (in other words, *a director is liable if the trust does not have enough assets to indemnify the trustee company*); **or**

- the fact that an indemnity will protect a director from liability (in other words, *a director is not liable if the trustee company has an indemnity - even if the trust does not have enough assets to indemnify the trustee company*)?

The majority of the judge's in *Hanel's case* opted for the first meaning. This means that directors are personally liable if the trust doesn't have sufficient assets to meet the trust debts. An indemnity will only protect directors if there are sufficient trust assets to back it up.

This completely changes the law and greatly expands trustee directors' personal liability. Among other things, it means that trustee company directors can be liable for debts without any of the defences that are usually available for insolvent trading.

NSW weighs in

Given the significance of this, it's no surprise that it has been the subject of some debate.

The first shot was fired in a speech to a legal seminar by Austin J (NSW Supreme Court) in February. His Honour diplomatically (but firmly) indicated his disagreement with the *Hanel* decision.

Two weeks ago, the issue came up in a NSW Supreme Court case (*Intagro v ANZ Banking Group*). McDougall J endorsed Austin J's criticisms of *Hanel*. But (and it's a big but), he couldn't see a legally valid alternative argument.

Accordingly, he followed *Hanel*.

This means that, in SA and NSW, indemnities may not protect trustee directors if there aren't sufficient assets in the trust.

The tale took another twist last Friday. In the course of dealing with different legal issue, the NSW Court of Appeal took the opportunity to make it clear that *it* disagreed with *Hanel*. Unfortunately, the Court of Appeal didn't have to rule on the point, so its comments - although important - don't have any binding effect.

The outcome

The end result is one of legal confusion.

In South Australia, trustee directors are very likely to face expanded liability.

In NSW, they currently face expanded liability, but, if the matter ever goes to the Court of Appeal, that may change.

In the rest of Australia, the *Hanel* and Intagro decisions currently state the law. However, other States' courts are free to disagree if the matter comes before them.

This is clearly an unsatisfactory state of affairs. It can only be authoritatively resolved by:

- someone's taking the question to the High Court, which could then issue a definitive ruling binding in all States; or
- amending the Corporations Act to clarify what s 197 is supposed to mean.

In the meantime, trustee directors should consider managing their potential liability by:

- reviewing the trustee company's prudential arrangements with a view to minimising the risk of a shortfall;
- checking their directors' and officers' liability insurances;
- considering whether contractual arrangements might be able to reduce their personal exposure.

Tozzini Freire Teixeira e Silva Advogados

TFTS News

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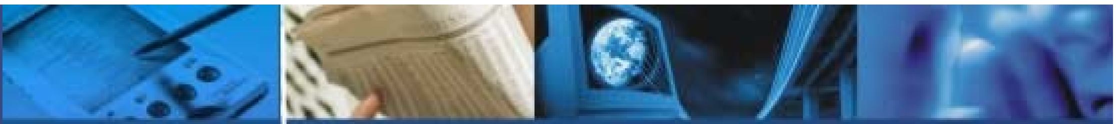

Capital Markets and Banking Law

Latest Issues

BRAZIL: NEW REGULATIONS ON THE ISSUANCE OF DEBT SECURITIES DENOMINATED IN BRAZILIAN CURRENCY

By virtue of a resolution enacted on July 29, 2004, the Brazilian Monetary Council regulated the issuance abroad of debt securities by Brazilian companies denominated in Brazilian Reais.

Pursuant to the new regulations, all funds arising from such issues shall be registered with the Central Bank of Brazil in the currency effectively remitted to Brazil.

Regardless of the currency of registration, the amount in foreign currency that may be remitted abroad by the Brazilian company shall be the equivalent, in Reais, to the amount of principal, interest and any fees pertaining to the issue. Alternatively, the payment of any such amounts may be effected in Brazilian currency to a bank account held in Brazil by the foreign creditor or the relevant paying agent.

The Central Bank of Brazil shall further regulate this matter shortly, including with respect to the mechanism of registration of each issue of securities.

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INDONESIA – Ali Budiardjo Nugroho Reksodiputro – Plantation Laws Passed

The Indonesian parliament (“DPR”) on 15 July 2004 passed a new law on plantation (the “Law”), for further endorsement by the President within one month. The law is the first of its kind, as plantation matters have so far only been regulated by ministerial level regulations. The law, which is basically a compilation of provisions that have been issued under various previous ministerial regulations,, contains a number of important provisions on matters that pertain to land status, plantation management, forest fires, and forest crimes.

Although land issues have been extensively regulated under the agrarian law, a point worth highlighting here is the certainty provided by the Law with respect to the previously unclear issue of the extention of the validity period of land rights that are held by plantation companies. Article 11 of the Law specifies that the Right to Use for plantations is granted for 35 years, with an extension possibility of 25 years. At the expiration of the extension period, the Law provides that upon application there for, a renewal of the right will be granted for the same period (35 years), with the same extension possibility of another 25 years.

The government and parliament’s recognition of the Indonesian plantation potentials is further evidenced by the provision in the Law which directs the central as well as provincial and regency governments to promote and facilitate the development and business cultivation of the Indonesian plantation, by:
(i) providing financing;
(ii) preventing the imposition of levies that violate the laws and regulations; and
(iii) facilitating exportation of plantation products.

The government is futhermore assigned with the development of local human resources for the plantation industry, and with continued research for the development of the industry as well as finding ways to promote the products’ value added.

To address the frequent occurrence of forest fires in the country, the Law prohibits plantation companies from clearing their waste and trash by burning them, and imposed on such companies the obligation to look after and preserve the environment as well as to manage and monitor the environmental risks

For Additional information contact Ali Budiardjo Nugroho Reksodiputro in Jakarta

June 2004

Listing Rule Changes

Do You Need To Amend Your Constitution Further?

A raft of recent Listing Rule changes have taken effect. Listed issuers will need to focus on the implications of the changes and it is likely that all issuers will be required to amend their constitutions to deal with the changes, even if they have already adopted the corporate governance and other miscellaneous changes announced in October 2003.

Given the volume of changes recently it may be worth considering incorporating the Listing Rules into an issuer's constitution by reference – a practice now permitted under Listing Rule 3.1.1(a). Although such a "blanket" reference will require care to be taken when reading the constitution, in that the constitution will always need to be read alongside the Listing Rules, it will prevent the additional administrative burden of formal constitutional amendment each time the Listing Rules change.

Summary of major changes

General

- **Single Average Market Capitalisation threshold:** Average Market Capitalisation is now the only threshold for significant transactions and related party transactions. References to Gross Value of Assets and Shareholders' Funds have been removed.

- **Definitions of Debt Security and Equity Security:** There are amendments to the definitions of Equity Security and Debt Security. The definition of Equity Security now generally reflects a substance over form test referenced to the ranking of the security with general creditors – if the security ranks behind all general creditors then it will generally be viewed as an Equity Security. Convertible securities are excluded from the definition of Equity Securities if they convert only with the consent of holders or with shareholder approval. The exclusion for preference shares has been removed, so a preference share can now be an Equity Security. If an issuer has an existing class of convertible, preferred or hybrid securities on issue these should be checked to see how they fit with the revised definitions as classification issues may arise.

- **Appraisal Reports:** More information is required from issuers when seeking approval as to the independence of a person selected to prepare an Appraisal Report. More information is also required in an Appraisal Report, in that the reporter must now state the grounds for the reporter's opinion as to whether the transaction is fair and whether the issuer has provided sufficient information to shareholders in relation to the transaction.

- **Introduction of Dual Listing Regime:** The Listing Rules now incorporate a concept of Dual Listed Issuers. If an Australian incorporated issuer is listed on both the ASX and the NZX, and the issuer currently complies with the ASX requirements, that issuer is exempt from certain Listing Rules (as set out in Appendix 17 to the Listing Rules).

Directors

- **Directors' remuneration:** The rules surrounding directors' remuneration now extend to entitlements acquired as a director of the issuer's subsidiaries (other than listed subsidiaries) and not just the issuer itself.

- **Directors' retirement benefits:** Retirement benefits now require shareholder approval. Approval may be given to the amount of the payment or the means by which the amount is calculated. Approval is not required in relation to directors in office on or prior to 1 May 2004 who continue to hold office since that date provided that the total payments under such arrangements do not exceed the total remuneration earned by the relevant director from his/her position as a director of the issuer in any three year period (nominated by the issuer).

- **Directors' interest disclosure:** The requirements for directors to disclose relevant interests in the issuer's securities have been removed following the coming into force of the directors' and officers' disclosure requirements under the Securities Markets Act 1988.

Issues of securities

- **Approval of conversions:** Rules relating to approval of issues of equity securities by ordinary resolution now expressly apply to issues on conversion of any other security. Shareholder approval for issues on conversion will not, however, be required if the terms and conditions of the conversion were approved on initial issue of the relevant security.

- **Extension of issue time limits:** Issues of securities to employees must now be implemented within 36 months of shareholder approval having been given. All other issues must be implemented within 12 months of approval.

- **Exemption for equity issues under $5,000:** An issuer may now issue equity securities to existing equity security holders for a consideration of $5,000 or less per holder without shareholder approval, provided that the number of equity securities to be issued does not exceed 30% of the number of (fully paid) equity securities already on issue.

- **Dividend re-investment plans:** The existing exemption in relation to offers of equity securities under a dividend re-investment plan now requires that, following the offer, the plan will maintain the existing proportional voting and distribution rights for existing holders (on an assumption that all offers are accepted). Existing plans will need to be checked to ensure compliance with the revised rule.

NZX Procedure

- **Publication of Rulings and Waivers:** NZX now publishes its decisions with respect to applications for rulings and waivers, and the grounds for the decision. NZX can withhold publication if it chooses to do so or if the applicant satisfies NZX that there are grounds for maintaining confidentiality.

- **NZX Discipline and Market Surveillance Panel:** The Market Surveillance Panel no longer exists. Its functions are now split between NZX, NZX Discipline and NZX Discipline Special Division. The NZX Discipline Rules came into effect on 1 May 2004.

Other changes

There were also some other, more minor, amendments to the Listing Rules, including:

- Amendments to the disclosure requirements for a compliance listing.

- Takeover offers are now excluded from the significant transaction regime (so that offers can be made without the need for shareholder approval).

- The application of the Listing Rules to listed managed funds, fund managers and fund trustees is now clarified.

- Issuers must announce to the market the opening and closing dates for the nomination of directors by shareholders at least three months prior to the date of the annual meeting at which the election of directors is to take place.

- Following receipt of an announcement, the NZX (at its discretion but in consultation with the issuer) can require modification to the announcement, or require disclosure of further information following release of such announcement.

- Issuers are required to notify NZX of any change to those officers whose relevant interests are recorded in the interests register kept for the purposes of the (statutory) directors' and officers' disclosure regime.

- The limitations on issuers imposing any restriction on the right of a holder of its listed securities to transfer such securities are now limited to quoted securities.

Further Information

If you require any further information regarding the Listing Rule changes or the implication of these changes for your constitution, please contact any of the following members of Simpson Grierson Corporate Advisory:

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NETHERLANDS – NautaDutilh – New Law Eliminates Notification Requirement for Assignment of Receivables

1. Introduction

On 28 June 2004, a bill was adopted by the Upper House ("*Eerste Kamer*") of the Dutch parliament providing for the amendment of the legal requirements for the assignment of receivables to make it possible for assignments to be effected by means of a notarial or registered private deed, without notification of the assignment to the debtors being required. The new statutory provision will come into force on 1 October 2004.

The explanatory memorandum to the new legislation provides several arguments to clarify and explain the amendment. The most important of these is that, upon the introduction in 1992 of the requirement to notify debtors of an assignment, the Dutch legislature did not foresee the introduction of certain types of financial transactions, such as securitisation, that require the transfer of large portfolios of receivables. Since the first securitisation transaction in 1996, this type of transaction has become increasingly popular in the Dutch market. There is, however, no specific legislation in the Netherlands with respect to securitisation transactions and such transactions are therefore governed by the general rules of the law of contract and those pertaining to security rights.

2. Transfer of legal title to receivables under current Netherlands law

Under Netherlands law as it stands (Article 3:94(1) of the Dutch Civil Code), the requirements for a valid assignment of receivables are (i) a deed of assignment signed by the assignor and the assignee and (ii) notification of the assignment to the debtors. Until the debtors have been notified of the assignment, legal ownership of the receivables will not pass to the assignee. Under the Dutch Civil Code, notification is only completed upon receipt by the debtor of the notice, except if failure to receive notice is deemed to be for the risk of the addressee of the notice. Notification of the debtors after the bankruptcy or suspension of payments of the assignor has become effective (or - if the assignor is a bank or insurance company subject to supervision of the Dutch Central Bank or the Pension and Insurance Chamber - after emergency regulations have become effective with respect to the assignor) will not be effective. Consequently, in such event, the legal ownership to the receivables will not pass to the assignee.

3. New legislation

The new statutory provisions enable the assignment of receivables to be effected by means of either a deed executed before a civil law notary or a private deed offered for registration with the Dutch tax authorities, without notification to the debtors being required. Registration of a private deed of assignment with the Dutch tax authorities will merely serve as evidence of the date of the assignment; there is, however, no publicly accessible register. Pursuant to the new legislation, such assignment without notification to the debtors would only be possible in relation to existing receivables ("*bestaande vorderingen*") or to future receivables ("*toekomstige vorderingen*") arising from a legal relationship between, for example, a creditor of receivables in a securitisation transaction (the "Originator") and the debtors already in existence at the time of the assignment of such receivables, to, for example, a special purpose vehicle in a securitisation transaction ("**SPV**").

According to the explanatory memorandum, the purpose of this new legislation is to provide for a mechanism for the assignment of receivables that is in line with the statutory provisions relating to the creation of an undisclosed right of pledge ("*stil pandrecht*") (i.e. without notification being required) in respect of receivables. Furthermore, it is stated that as a result of the amendment, Dutch legislation on the assignment of receivables will be brought into closer alignment with the laws of Belgium, France, Germany and the United Kingdom, where notification is not required for a transfer of receivables.

With respect to the position of debtors, the new statutory provision states that their position will not change as a result of the amendment. This means that as long as the debtor has not been notified by either the Originator or the SPV, it will be released from its payment obligation by paying the amounts due to the Originator. Only after notification of the assignment to the debtor will the debt be owed to the SPV and in such event any payment by the debtor to the Originator will not be deducted from the total amount of the debt. It should be noted that the fact that the debtor has any knowledge of the assignment of the receivable to the SPV is not relevant. Only after notification is the debtor obliged to pay to the SPV.

As of the date on which the new legislation will be effective, the Originator will be able to assign the receivables, and thus transfer the legal ownership, to the SPV simply by registration of the deed of assignment and will not be restricted to completing the assignment by notification to the debtors in case of the occurrence of any of the notification events. This means that if the Originator becomes bankrupt or is made subject to suspension of payments ("emergency regulations") before notification to the debtors but after the registration of the deed of assignment or the execution of the notarial deed, the receivables will no longer be part of the Originator's bankrupt estate. Furthermore, an attachment on the receivables levied by the creditors of the Originator after the registration of the deed of assignment or the execution of the notarial deed, will not be effective since the receivables will then be part of the estate of the SPV.

It is expected that the new legislation will have a positive effect on the structuring of securitisation transactions in the Netherlands. However, with respect to a specific asset class (residential and commercial mortgage loans) there is one issue which needs further discussion.

4. Securitisation of mortgage receivables

So far the assets of Dutch originators that have been the subject of a securitisation transaction mainly consisted of loans granted to a debtor to finance the purchase of residential property. To secure the repayment of the loan, the debtor grants a mortgage right on the residential property to the Originator. The receivables resulting from the loans which are secured by the mortgage rights (the "**mortgage receivables**") are sold and assigned to the SPV. It is common practice in the Dutch mortgage market for debtors to grant a mortgage right to the Originator securing not only the initial loan to purchase the mortgaged property but also any other amounts which are, or may become, due to the Originator under, for example, further loans and/or credits up to a maximum level ("**credit mortgages**") or also any other liabilities and monies that the debtor, now or in the future, may owe to the Originator ("**bank mortgages**"). This also applies in case of commercial mortgage loans.

Under Netherlands law, it is uncertain, in the event of assignment or pledge of a receivable secured by a bank mortgage or a credit mortgage, whether the assignee or pledgee, as the case may be, will benefit from such bank mortgage or credit mortgage. Based upon case law, it is assumed by Netherlands legal commentators that a bank mortgage or a credit mortgage will only follow the receivable that it secures, if the relationship between the assignor bank and the debtor has been terminated in such a manner that, following the transfer, the assignor bank is unable to create or obtain new receivables against the debtor. However, in recent legal literature the view has been defended that the credit mortgage or bank mortgage will partially follow the receivable to the extent that it has been assigned.

In order to ensure that the SPV and/or the security trustee in a securitisation will have the benefit of the mortgage rights securing the mortgage receivables, the following structure is used in securitisation transactions in the Dutch market. In the mortgage receivables purchase agreement, the Originator undertakes to partially terminate the relevant mortgage rights securing the mortgage receivables to the extent that the mortgage right secures debts other than the relevant mortgage receivables granted by the Originator to the relevant debtor. This partial termination is effected by giving notice thereof to the relevant debtors immediately prior to notice of the assignment being given. As a consequence of such partial termination, the mortgage right only secures the mortgage receivable assigned to the SPV and, in effect, ceases to be a credit mortgage or a bank mortgage. Although there is no case law that directly supports this view, it is generally assumed that there are no reasons to prevent the mortgage right from following the mortgage receivable upon its assignment if the credit mortgage or bank mortgage character is removed through partial termination prior to the transfer to the SPV of legal title to the mortgage receivables.

Under the new legislation, legal ownership of the mortgage receivables may be transferred to the SPV without notification to the debtors. However, the partial termination structure described above is only effective if the partial termination is effected prior to the assignment being completed, whether by means of notification or, following the enactment of the new legislation, registration or notification. Consequently, due to the partial termination structure in case of credit mortgages and bank mortgages securing the mortgage receivables, registration of the deed of assignment prior to the occurrence of certain events and, as a result thereof, partial termination of the credit mortgages and bank mortgages may not be in the best interest of the SPV. In such cases, further arrangements need to be made between the Originator and the SPV.

5. Transitory law

The new legislation does not contain a specific transitional provision. This means that the general transitional provisions of the new Civil Code ("*Overgangswet nieuw Burgerlijk Wetboek*") are applicable. According to those general provisions (more in particular Articles 68a and 69) the new rules for assignment of receivables will have immediate effect in respect of already existing receivables. However, in case of an assignment of a receivable whereby the debtor has not yet been notified of the assignment, the coming into force of the new legislation will not result in a complete and valid assignment of the receivable to the SPV.
In such cases, notification of the debtor is still a requirement for a valid assignment.

If you have any queries relating to this change of legislation, please contact any of:

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Summary of the Major Articles of the Labor Pension Fund Act ("Act")

Who is subject to the Act

All domestic labors who are subject to the Labor Standards Law ("LSL") shall be subject to the Act, excluding those labors whose pension fund reserves have been set aside in accordance with the Private School Law. Foreign labors are excluded from the protection of the Act.

In addition, in order to encourage those individuals who are not subject to the LSL to be financially prepared for their life after retirement, the Act provides that (i) employers; (ii) those domestic labors who are not protected by the LSL (after obtaining the consent of their employers); or (iii) officers or managers (after obtaining the consent of the company) may also volunteer to participate in the so-called "portable personal pension fund account" mechanism under the Act ("New Mechanism")[2].

Choose between Old Mechanism and New Mechanism

According to the Act, employees may choose the pension fund mechanism under the LSL ("Old Mechanism")[3] or the New Mechanism. We further summarize this issue below:

1. For those employees who are subject to the LSL before the enforcement of the Act

For those employees who are subject to the LSL before the enforcement of the Act, they may choose to be subject to the Old Mechanism. However, if they were to leave their current employers and be hired by other employers, they would be subject to the New Mechanism starting from their new employment.

In addition, before the enforcement of the Act, an employer shall inquire its employees in writing whether they prefer the New Mechanism or the Old Mechanism. Those employees who do not make a specific choice before the expiry of the consideration period prescribed by the employer shall be subject to the Old Mechanism. However, the Act provides them with a five-year grace period. In other words, those employees have one chance to change their mind and be subject to the New Mechanism within five years from the enforcement of the Act. Once they elect to be subject to the New Mechanism, they cannot change their decision.

2. For those employees who are subject to the LSL after the enforcement of the Act, they shall be subject to the New Mechanism without exception.

3. Setting Aside Pension Fund for those Employees under the Old Mechanism

As explained above, those employees who are subject to the LSL before the enforcement of the Act may choose the Old Mechanism after the enforcement of the Act. Their seniority and right to the pension fund payments under the LSL will still be well-protected. Hence, their employers would be required to set aside pension funds for them each month within five years to the extent that such funds would be sufficient for payment of their pension funds when they retire. The percentage at which their pension funds shall be set aside monthly shall be calculated based on the number of employees under the Old Mechanism, their salaries, their seniority and other factors by an actuary.

Seniority and Severance Pay under the Act

1. Seniority of those employees who are subject to the LSL before the enforcement of the Act and choose New Mechanism

For those employees who are subject to the LSL before the enforcement of the Act and choose the New Mechanism, their seniority before the enforcement of the Act shall be maintained ("Maintained Seniority"). Unless otherwise agreed between the employer and employees, the Maintained Seniority will not be cashed out upon the enforcement of the Act.

[2] Under the New Mechanism, an employer shall contribute a certain amount to its employees' individual pension fund accounts per month. Hence, an employee should receive his/her pension fund (monthly payments or in one lump sum) after meeting certain retirement criteria, even if he/she did not work for the same employer for a certain number of years.

[3] Under the LSL, an employee needs to work for the same employer for a certain number of years so as to receive a lump sum payment of pension fund from his/her employer.

In that case that the Maintained Seniority will be cashed out, such payment can be paid from the company's pension fund account in the Central Trust of China.

Nevertheless, when those employees become entitled to severance pay or pension fund in the future, their employers shall pay them the severance pay or pension fund based on the Maintained Seniority in accordance with relevant laws/regulations. However, if those employees leave their current employers without being entitled to severance pay or pension fund under the relevant laws/regulations, their Maintained Seniority will be canceled.

2. Calculation of Severance Pay of those Employees under New Mechanism

When calculating the severance pay of those employees under the New Mechanism, only their seniority under the New Mechanism will be used to calculate their severance pay. The formula is: for each year of service, an employee will receive a severance pay equivalent to 0.5 month of his/her average salary. The total severance pay shall not exceed six-month of his/her average salary. The period of services below one year shall be calculated proportionately. The provisions under the LSL in respect of the severance pay are not applicable.

Contributions made by Employers to Employees' Individual Pension Fund Accounts

1. Contribution Percentage

The contributions made by an employer to an employee's individual pension fund account per month shall not be less than 6% of the monthly salary of such employee. The so-called "monthly salary" refers to those numbers set forth in the monthly wages and deposit rate chart (? ? ? ? ? ? ? ?) prescribed by the central competent authorities.

In addition, an employee may volunteer to deposit a certain amount in his/her individual pension fund account per month, up to 6% of his/her monthly salary. The amount of the additional deposit made by an employee may be deducted from the amount of his/her taxable income when declaring income tax.

2. Contribution Period

Except for certain specific reasons (such as sabbatical leave or serving military duties), employers shall deposit pension fund to employees' respective pension fund accounts from the day of the employees' commencement of employment till the date on which they leave the company.

3. Other Alternatives?

Except for the annuity insurance (see below), employers are prohibited from designing their own pension fund mechanism to replace the New Mechanism. However, an employer is allowed to provide additional retirement benefits to its employees.

4. Withholding or off-set of Contribution

According to the Act, an employer cannot withhold or off-set its monthly contributions as penalty when an employee leaves the company. Any agreement contrary to this Act would be deemed void.

Pension Fund Payment

Under the Act, there are two types of pension fund payment, namely, monthly payments and a lump sum payment.

1. Monthly payments

For those employees who are 60 years old or above and whose seniority is more than 15 years, they are entitled to monthly pension fund payments. However, when an employee meeting the aforesaid criteria applies for the monthly pension fund payments, he/she shall first pay a certain amount as the premium for annuity insurance. If such employee lives longer than the average life expectancy prescribed by the competent authorities, he/she will be paid from his/her annuity insurance thereafter.

The actual number of months that an employee may be paid monthly pension fund payments will be calculated based on the principals and accrued interests in his/her personal pension fund account in accordance with the annuity life chart (? ? ? ? ?) including other factors, such as average life expectancy and interest rates. It is preliminary estimated that if the growth rate of employee wages is 3% per year and the investment revenue rate of labor pension fund can reach 6% per year, an employee may receive a monthly pension fund payment of about 24% of his/her monthly wages after having worked for 30 years under the New Mechanism. In other words, for an employee under the New Mechanism who worked for over 30 years and whose average monthly wage is NT$40,000, he/she would receive a monthly pension fund payment of NT$9,600 for the rest of his/her life.

2. Lump Sum Payment

For those employees who are 60 years old or above but whose seniority is less than 15 years, they are only entitled to a lump sum pension fund payment, equivalent to the aggregate amount of the principals and accrued interests in his/her personal pension fund account.

3. Estate

If an employee dies before he/she applies for pension fund payment, the principals and interests in his/her pension fund account may then be withdrew by his/her heirs or designated persons. If an employee who is paid monthly pension fund payments dies before he/she reaches the average life expectancy prescribed by the competent authorities , his/her heirs or designated persons may also apply for the remaining pension fund payments.

Annuity Insurance

Industries meeting certain criteria may apply with the competent authorities to purchase annuity insurance under the insurance-related laws, in lieu of the New Mechanism. Those criteria are:

(1) An enterprise with over 200 employees;
(2) Having obtained the consent of a labor union, or over one-half of the employees, if there is no labor union; and
(3) Over one-half of the employees choose to join the annuity insurance, over participation in the Old Mechanism.

The payment of annuity insurance premiums by employers shall not be less than 6% of the average wages of the employees.

Liabilities and Penalties for Violating the Act

An employer who violates the Act and causes damages to employees shall be liable for the damages/losses sustained by the employees. If a company which owes pension fund to its employees distinguishes due to a spin-off, merger or assignment, its outstanding pension fund payment liability shall be assumed by the surviving/transferee company. In addition, the violation of the Act would incur certain penalties set forth under the Act.

The major penalties are as follows:

1. If an employer fails to report and contribute pension fund and fails to rectify such violation by the deadline prescribed by the competent authorities , the employer will be subject to a fine ranging from NT$20,000 to NT$100,000. Such fine can be imposed consecutively per month until the rectification.

2. In addition, if an employer fails to timely deposit pension fund or fails to deposit sufficient pension fund, it will be subject to a delay penalty ranging from 3% to 100% of the monthly deposit amount, calculated from the next day of the deadline for the deposit to the day prior to the rectification. If an employer still fails to rectify the aforesaid violation, the delay penalty will be increased to 200% of the monthly deposit amount per month until the rectification.

3. If an employer fails to set aside monthly pension fund under the Old Mechanism (as described in B.3 above), it will be imposed a fine raging from NT$20,000 to NT$100,000. Such fine can be imposed monthly and consecutively. The penalties set forth under the LSL will not be applicable any more.

Conclusion

As you can see from the above, the New Mechanism involves a higher percentage of contribution by employers, portable individual pension fund account, and the different method to calculate the severance pay and recognition of seniority. We believe that the enforcement of the Act will have a significant impact on the operation costs and employment relationship of industries in Taiwan. We would be pleased to provide you with further assistance or answer any further questions you may have in respect of this Act.

For additional information contact Lee and Li in Tawain.

Harsh Medicine: Anti-Counterfeiting Strategies to Suppress Fake or Unauthorized Parallel Drug Products in Thailand

By: Edward J. Kelly
Tilleke & Gibbins International Ltd.
June 2004

Thailand has recently made strong progress in stepping up enforcement efforts against pirate and counterfeit goods, particularly with respect to the copyright industry where we have seen a reduction in the number of factories manufacturing pirate CDs and DVDs. Other industries have noted these successes with cautious optimism, hoping that law enforcement will undertake similarly aggressive programs to suppress fake goods that continue to pose problems for consumers and IPR owners in Thailand.

The Emergence of Drug Counterfeiting

The commercial successes of blockbuster consumer drugs such as Viagra®, Cialis®, Propecia®, Vioxx® and others in Thailand have, of course, created incentives for organized criminal syndicates to try to capitalize on the success of the pharmaceutical industry here by manufacturing and trading in fake drugs in the black market. The supply of fake drugs in Thailand is not simply for the Thai market—counterfeits made here have been found to have been exported or smuggled into Hong Kong, Australia, the U.S. and South Africa, among other countries.

In studies conducted by the WHO, a counterfeit drug is defined as *"one which is deliberately and fraudulently mislabeled with respect to identity and/or source. Counterfeiting can apply to both branded and generic products and counterfeit products may include products with the correct ingredients or with the wrong ingredients, without active ingredients, with insufficient active ingredients or with fake packaging".*

The counterfeiting operations are not "mom and pop" operations stirring up small batches of products in their bathtubs. Counterfeit pharmaceuticals are manufactured and distributed by criminals, companies or syndicates who have the desire to make quick profits, without any concern for the health or safety of consumers.

The fakes usually contain too much, too little or no active ingredient, the wrong ingredients or high levels of impurities, contaminants and even toxic substances. They could be reject or out-of-date formulations withdrawn from the market which are obtained by counterfeiters, repackaged as bona fide products and introduced back into the market. Death and injury often are the result. Worse, the therapeutic benefit a patient and physician expect to realize from the treatment fails to materialize in the case of a product with no active ingredient.

It is difficult to measure the extent of the scale of the problem of pharmaceutical counterfeiting with any great precision for two reasons. First, in many instances, the results of counterfeit drugs go undetected because if there are no active ingredients, they are not causing an adverse reaction sufficient to be noted beyond the symptoms of the sickness itself. Second, to date no comprehensive global study on the subject exists and one is left with mostly anecdotal evidence from which to draw conclusions.

An example of regional studies here in Thailand suggests the problem is truly one with a disturbing scope. An oft-cited study carried out several years ago by Dr. Paul Newton of Mahidol University, Bangkok, concluded that around a third of anti-malarial treatments (including Artesunate®) on sale in Cambodia, Thailand and Vietnam contained no active ingredient. Public reports of seizures of fake drug products are hard to come by because many companies and government officials justifiably keep such cases confidential so as to not create a panic or loss of confidence in the health care system.

Here in Thailand we have seen a dramatic growth of "Internet pharmacies", many with undisclosed locations and uncertain prescription, dispensing and quality precautions. Likewise, the volume of express mail medical shipment is too large for customs officials to begin to check and control. This represents a substantial opportunity for counterfeiters.

Remedies against the Counterfeiters

In Thailand, when a case is presented and a manufacturer or retailer of fakes is identified, there are a number of legal bases for a rights-owner to pursue to take action against the offender.

Typically, a manufacturer may have recourse to remedies under various intellectual property statutes such as the Trademark Act B.E. 2534 (A.D. 1991), and often in the case of pharmaceutical products, to the Patent Act B.E. 2522 (A.D. 1979) (as amended). Remedies may be available under the Trademark Act where the manufacturer has registered a trademark in Thailand and the counterfeiting activities include the use of imitation or forged trademarks on the counterfeit drugs or their packaging. The remedies available under the Patent Act apply where the drug that is being counterfeited contains a patented compound, or is the result of a patented production process. Various unauthorized activities (including manufacture, importation and sale) of the patented drug would amount to patent infringement.

An infringement of a registered Thai trademark or Thai patent is a criminal offense and also amounts to an actionable civil wrong. Punishment for trademark and patent infringement is often accompanied by terms of imprisonment. The Patent Act explicitly provides for granting of preventive injunctions to patent holders in the face of infringing or threatened infringing activities.

In addition to the above causes of action which are based on specific intellectual property rights registered in Thailand, separate actions may also be brought against counterfeiters under the Penal Code, the Consumer Protection Act B.E. 2522 (A.D. 1997), and the Drug Act.

Remedies under the Consumer Protection Act are specifically relevant in the context of counterfeit pharmaceuticals as Section 47 of that Act makes it illegal to "intentionally cause the public to be misled about the origin, condition, or quality of another's goods." Various other advertising activities are outlawed under this legislation in addition to similar offenses under the Drug Act.

The creation of the specialized Thai Intellectual Property and International Trade Court (IP&IT Court) in 1997 has also provided manufacturers with greater access to judicial assistance in the enforcement of their rights. The IP&IT Court has exclusive jurisdiction over cases involving intellectual property issues. Preventive injunctions are also available for breaches of all intellectual property rights (not just patents) under the rules of this court.

Relevant Agencies

In confronting counterfeiters of consumer products that might pose a safety hazard, including food products, alcoholic beverages, tobacco products, medicines and cosmetics, generally speaking Thai law enforcement authorities cooperate with officials from regulatory agencies such as the Thai Food and Drug Administration (FDA), Excise Department, or the Consumer Protection Board, and lawyers/prosecutors will try to bring as much pressure to bear on the counterfeiting operation, sometimes relying on supplemental strategies based on Thai regulatory, tax, customs and even immigration laws in appropriate cases, all in addition to whatever intellectual property law that may have been violated.

A Need for Public Awareness

The legal bases outlined above, on their own, cannot eradicate the problem of counterfeit goods in Thailand. The public needs to be educated on general awareness of the adverse impact of counterfeiting – more often than not considered a "victimless crime". It is also important to educate consumers to give them specific awareness of the telltale features on products to identify them as authentic. In Thailand, we have seen many cases where physicians and patients brought the problems to the attention of the authorities.

Strength in Numbers

Finally, no one company can have a meaningful impact on the problem alone. Anti-counterfeiting activities carried out in isolation by individual companies can sometimes displace rather than eradicate the problem, and are only partially successful as a result.

We advocate joining forces within the industry to form specific alliances and associations to lobby for increased protection, pool knowledge and resources, undertake joint investigations and set common standards for securing products through the supply chain. In this way, we can deliver "harsh medicine" to the counterfeiters and mirror the success Thailand has experienced in taking on other industries hurt by piracy and counterfeiting. ✜

HOGAN & HARTSON LLP

SEC update

SEC Charges Company with Second Regulation FD Violation

July 28, 2004

On June 29, the SEC filed a civil action against Siebel Systems, Inc. alleging another violation by it of Regulation FD, or "Fair Disclosure." The SEC previously issued a cease and desist order against the company in 2002 for a prior violation of the regulation. The SEC's complaint names Siebel's CFO and SVP of corporate development and investor relations as defendants, alleging that they aided and abetted in Siebel's alleged violations of Regulation FD and the cease and desist order. The SEC complaint also alleges that Siebel failed to maintain adequate disclosure controls and procedures under Exchange Act Rule 13a-15. The Siebel case represents the first time the SEC has brought charges under the rule.

Summary of Regulation FD

The SEC adopted Regulation FD in August 2000 to eliminate the practice of selective disclosure of material nonpublic information to investment professionals and stockholders. The regulation applies to the disclosure of material nonpublic information by public companies and persons acting on their behalf to broker-dealers (including their investment analysts), investment advisers and managers, investment companies, hedge funds, and holders of the company's securities who can reasonably be expected to trade on the information. Persons deemed to be "acting on the company's behalf" include any senior official of the company, and any other officer, employee, or agent of the company who regularly communicates with market professionals or stockholders (such as employees in the investor relations or public relations department).

To promote its purposes, Regulation FD requires (1) simultaneous communication to the pubic of "intentional" disclosures of material nonpublic information made to market professionals, and (2) "prompt" communication to the public (i.e., by the later of 24 hours or the start of the next day's trading) of "non-intentional" disclosures of such information after a senior official discovers the disclosure and realizes, or was reckless in not realizing, that the information was material and nonpublic. The methods of public disclosure must be "reasonably designed to provide broad, non-exclusionary distribution" of the information to the public. These methods may include disclosure in a Form 8-K, or methods such as a widely disseminated press release coupled with a conference call that is adequately publicized in advance and open to the public. Mere website disclosure alone, however, is insufficient.

Prior Siebel Enforcement Action

In its previous enforcement action, the SEC found that Siebel had violated Regulation FD by disclosing material nonpublic information at an invitation-only technology conference hosted by Goldman Sachs & Co. in November 2001. In response to questions from the Goldman Sachs analyst who organized the conference, Siebel's CEO disclosed that the company was optimistic because business was returning to normal. The SEC found that these statements were material in part because they contrasted with negative statements that the CEO had made about the company's business three weeks earlier, and therefore significantly altered the total mix of information available to the persons attending the conference. Siebel's IR department had been told that the conference was not being webcast or otherwise publicly disseminated, although the CEO apparently was not informed of this. The SEC determined that the selective disclosures were intentionally made because Siebel knew the information being disclosed at the conference was both material and nonpublic.

The SEC issued an order that Siebel cease and desist from committing further violations of Regulation FD. Siebel settled the SEC action without admitting or denying the SEC's claims and agreed to pay a $250,000 civil penalty. The SEC's current complaint alleges that six months after its November 2002 issuance of the cease and desist order, Siebel committed further violations of Regulation FD.

Current Siebel Enforcement Action

The current Siebel enforcement action arises from the alleged disclosure of material nonpublic information by Siebel's CFO on April 30, 2003 in a "one-on-one" meeting with an institutional investor and a subsequent invitation-only dinner hosted by an investment bank and attended by institutional investors and the investment bank's research and institutional sales personnel. At each of these private events, which were attended by Siebel's CFO and its SVP of corporate development and investor relations, the CFO made comments about Siebel's business activity levels being "good" or "better" and about its transaction pipeline as "growing" and "building." The SEC contends that these statements materially contrasted with negative public statements by Siebel's CEO during the preceding four weeks regarding Siebel's business and its nexus with a poorly performing broader economy.

The SEC's complaint alleges that "within four trading hours" after the April 30 one-on-one meeting, the institutional investor in attendance converted its 108,220 share short position in Siebel stock into a 114,200 share long position. On May 1, the trading day following the private events, Siebel's stock price closed up 8% on volume "nearly double the average daily volume for the preceding 12 months." In response to increased trading activity and published rumors regarding what had been discussed at the April 30 private events, Siebel's general counsel questioned the CFO and SVP on May 1 as to the scope of the statements they had made at the events. Neither Siebel's CFO or SVP informed the general counsel of the CFO's positive statements regarding Siebel's activity levels and transaction pipeline. As a result, Siebel did not publicly disclose on Form 8-K or by press release the material nonpublic information selectively disclosed by the CFO on April 30.

Based on these facts, the SEC's complaint charges Siebel's CFO and SVP with aiding and abetting in Siebel's primary violations of Regulation FD and the SEC's November 2002 cease and desist order. The SEC alleges that Siebel's CFO knew or was reckless in not knowing that his disclosures constituted material nonpublic information, and that Siebel's SVP, who had responsibility for overseeing Siebel's Regulation FD compliance, "acted knowingly or recklessly because he failed to take any precautions to ensure that [the CFO] did not disclose material nonpublic information [when] he knew that the disclosures would not be simultaneously disclosed to the public." A disclosure is intentional within the meaning of Regulation FD when an issuer or person acting on its behalf knows or is reckless in not knowing that the information it is communicating is both material and nonpublic. As a result, non-intentional disclosures under Regulation FD generally are limited to errors in determining whether information is material or publicly available. If a person acting on behalf of an issuer makes a non-intentional disclosure of material information, the issuer must promptly disclose the information to the public to avoid violating Regulation FD.

The SEC's complaint also charges Siebel with violating Rule 13a-15 based on its alleged failure to maintain disclosure controls and procedures designed to ensure the proper and timely handling of information required to be disclosed in reports filed or submitted under the Exchange Act, and to ensure that management has the information it needs to make timely disclosure decisions.

The SEC seeks an order that would require Siebel to comply with the November 2002 cease and desist order, impose permanent injunctions and civil penalties against all defendants, and provide other equitable relief to ensure that Siebel adopts adequate Regulation FD compliance policies and practices and maintains adequate disclosure controls and procedures. A copy of the SEC's litigation release and complaint can be found at http://www.sec.gov/litigation/litreleases/lr18766.htm.

Conclusion and Recommendations

The Siebel complaint should sound a strong cautionary note to public companies, the senior officers who speak on their behalf, and the officers who administer their investor communications programs. The SEC emphasized in the complaint the need for Siebel to have taken affirmative action to prevent future violations of Regulation FD, including establishment of a formal compliance policy, training of senior officers regarding Regulation FD, and additional safeguards against private disclosure of material nonpublic information.

In addition to the measures prescribed by the SEC, there are other actions that companies can take to reduce the possibility of Regulation FD violations. These include:

- Limiting in writing the group of persons authorized to speak for the company under Regulation FD;
- Making conference calls with analysts readily accessible by the public;
- Encouraging analysts to ask all of their questions during the conference calls, thereby minimizing follow-up calls seeking private advice;
- Announcing materiality standards applied by the company to its earnings commentaries;
- Restricting private communications intended to manage analysts' earnings expectations;
- Adhering to a script in private conferences;
- Monitoring marketplace information about the company;
- Consulting with counsel; and
- Obtaining confidentiality agreements in cases of inadvertent disclosures.

The latest Siebel case underscores the need to ensure that company personnel, particularly those charged with Regulation FD compliance, receive adequate education and training regarding the regulation. The charge under Rule 13a-15 also points out the importance of establishing and maintaining adequate disclosure controls and procedures to provide management with the information it needs to make timely disclosure and filing decisions.

For more information about the matters discussed in this SEC Update, please contact the Hogan & Hartson L.L.P. attorney with whom you work, or any of the attorneys below who contributed to this Update.

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