PACIFIC RIM ADVISORY COUNCIL

August 2010 e-Bulletin

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● *49th International PRAC Conference - Amsterdam - May 21-24, 2010*

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DISPUTE RESOLUTION LAWYER DOMINIC PELLEW JOINS BAKER BOTTS LLP IN MOSCOW

Firm Continues to Build Global Reach, Strength of International Arbitration Practice

MOSCOW, August 9, 2010 -- In a move that continues the enhancement of Baker Botts L.L.P.'s prowess in the international arbitration arena, Dominic Pellew has joined the firm as a partner in its International Arbitration and Dispute Resolution group. He will be based in the firm's Moscow office.

Pellew's representations include acting for Renaissance Group in LCIA arbitration proceedings and associated court litigation in Cyprus and London; and representing Eco Telecom (part of the Alfa Group) in an ad hoc arbitration in Geneva under UNCITRAL rules. He is a qualified solicitor in England and is fluent in both Russian and French. Pellew joins Baker Botts from HoganLovells, where he led that firm's dispute resolution practice in Russia.

"Dominic's extensive arbitration experience adds depth to the service we provide our clients in this rapidly expanding practice area around the world," said Baker Botts Managing Partner Walt Smith.

In Russia, for example, the firm has an extensive practice representing some of the largest companies in the country, as well as the Russian Federation, in arbitration matters.

"Our international arbitration practice is diverse," said Michael Goldberg, chair of the International Arbitration and Dispute Resolution Practice group at Baker Botts. "We are equally active in investor-state and in commercial disputes. In both arenas, we represent claimants and respondents. This provides us with a diversity of views and perspectives."

The addition of Pellew is part of Baker Botts' plan to further expand the arbitration group's capabilities and to meet client demand with quality and experienced lead counsel, Goldberg said.

"The firm is poised for further international growth in this practice area with the addition of lawyers in our London, Houston, Washington, Dubai, Moscow and Hong Kong offices during the past year," he added.

Pellew has been recognized as a leading arbitration lawyer by Chambers Global, Who's Who Legal, Legal Business, and Global Arbitration Review. He earned his bachelor of arts degree in French and Russian from Oxford University and passed the Law Society Finals at the College of Law in Guildford, England. He is qualified as a solicitor in England and Wales and as a French avocat.

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About Baker Botts L.L.P.

Baker Botts L.L.P. is a leading international law firm with offices in Abu Dhabi, Austin, Beijing, Dallas, Dubai, Hong Kong, Houston, London, Moscow, New York, Palo Alto, Riyadh and Washington. With approximately 750 lawyers, Baker Botts provides a full range of legal services to international, national and regional clients.

For more information, please visit www.bakerbotts.com.

KING & WOOD ANNOUNCES NEW PROMOTIONS AND HIRES

Beijing – July 26, 2010

In the last few months, King & Wood has welcomed nine lawyers to the partnership and two senior counsel.

Managing Partner Wang Ling states, "We are extremely pleased to welcome these new partners and counsel to the King & Wood family. They all bring unique skills to our firm in their respective areas and will increase our competitiveness throughout mainland China, Hong Kong and in outbound matters."

Newly promoted lawyers include:

Andrew Fu - Securities & Capital Markets, Shanghai
Jiang Tao - Securities & Capital Markets, Shanghai
Zhong Xin - Finance, Shanghai
Rebecca Chao - Corporate, Tianjin
Xia Dongxia - Dispute Resolution, Beijing

Lateral Partner hires include:
Huang Wen - Corporate, Hong Kong
Cheng Xiaofeng - Corporate, Beijing
Chen Zetong - Dispute Resolution, Beijing
Wu Yihua - Patent, Beijing

In addition, the firm has appointed Liu Cheng, Of Counsel in the International Trade Group based in Beijing, and New York-based Senior Advisor, Intellectual Property Group, Matthew Seiden.

For additional information visit www.kingandwood.com

FRASER MILNER CASGRAIN APPOINTS CHIEF CLIENT OFFICER

Toronto—July 20 2010

Fraser Milner Casgrain LLP (FMC), one of Canada's leading business and litigation law firms, is proud to announce the appointment of John Rider as the firm's new Chief Client Officer (CCO). Mr. Rider will support FMC's partners and other firm members in the development of client relationships and related strategies and initiatives.

For close to two decades, Mr. Rider's professional career has encompassed various executive-calibre positions, where he acquired an in-depth understanding of clients and their needs in both legal and business environments. As FMC's new CCO, he will be responsible for looking externally at servicing client relationships and internally at strengthening the firm's overall culture and standards regarding client service.

"The role of CCO is fundamental to building strong bonds with our clients and ensuring we are continually meeting and exceeding their highest expectations," said Mr. Pinnington. "John's extensive experience has provided him with a clear understanding of client service as well as the operational side of businesses and professional services firms, all of which are essential to the CCO role and will be of tremendous value to FMC's partners, firm members and clients. We are delighted to welcome John to Fraser Milner Casgrain."

Mr. Rider began his legal career at FMC, joining the firm in 1989 as a summer student. He practised as a commercial real estate lawyer for a number of years before transitioning into business-focused roles. Most recently, Mr. Rider spent seven years as Vice President of the Commercial Division for First Canadian Title, the Canadian subsidiary of The First American Corporation (a Fortune 500 company, publicly-listed on the New York Stock Exchange). In this role, he managed the development of commercial title insurance in Canada, and was instrumental in strategic development, team building and client service programs for Canada.

Mr. Rider is a member of the Canadian Bar Association and a Fellow, American College of Mortgage Attorneys. He sits on the Planning Committee for Toronto's Real Estate Forum belongs to the National Association of Industrial & Office Properties and the International Council of Shopping Centers. He holds a B.A. (Honours) from Queen's University and an LL.B. from University of Western Ontario.

For additional information visit us at www.fmc-law.com

HOGAN LOVELLS NEW YORK OFFICE CONTINUES TO ADD DEPTH TO FINANCE PRACTICE

NEW YORK, 27 July 2010 - Hogan Lovells announced today that it has expanded its Finance practice group with Russell Slanover as a Hogan Lovells US LLP counsel in the New York office.

Slanover has spent more than two decades practicing corporate law, representing clients on matters pertaining to structured finance, project finance, corporate finance and acquisitions, both with respect to domestic and international transactions, including in emerging markets. He has represented issuers, underwriters, investors, and insurers in connection with the issuance of asset-backed and mortgage-backed securities, and he has rendered advice regarding the administration and servicing of such securities.

Slanover was most recently a counsel at Dewey & LeBoeuf LLP in New York.

According to Finance Co-heads Ben Hammond and David Hudd, "Russell brings great depth of knowledge to our Finance and Corporate practices. His years of experience and knowledge will greatly support our global team and benefit our clients."

"I am very eager to bring my practice to Hogan Lovells' globally competitive Finance group," said Slanover. "I look forward to growing my practice alongside my new colleagues."

Slanover received his law degree from Fordham Law School and his bachelor's degree in Mechanical Engineering and Engineering Science from the State University of New York (SUNY) at Stony Brook University. He also earned a Master of Law in Taxation from New York University and a Master of Science in Mechanical Engineering from SUNY at Stony Brook University, and he is also a licensed professional engineer.

For additional information visit www.hoganlovells.com

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TILLEKE & GIBBONS BOLSTERS TECHNOLOGY MULTIMEDIA AND TELECOM PRACTICE

Bangkok - July 29, 2010

The Technology, Multimedia, and Communications practice group at Tilleke & Gibbins has been bolstered by the addition of Jeffrey J. Blatt, who has joined the firm's Bangkok office as an Of Counsel. Jeffrey brings to the firm nearly 30 years' experience in helping high-tech and telecommunications companies to define strategic and business objectives, handle contract negotiation through closing and enforcement, and leverage technology acquisitions and capabilities to create new market opportunities.

From 1981 through 1996, Jeffrey was a partner at the law firms of Irell & Manella and Blakely, Sokoloff, Taylor & Zafman based in Los Angeles. He represented a broad spectrum of Silicon Valley clients, including Sun Microsystems, Apple Computer, Sony Electronics, and Intel, on issues of intellectual property, technology licensing, and transactional matters. In Hollywood, he worked with virtually every major studio on intellectual property protection and technology matters arising in motion picture production.

Following his experience in private practice, Jeffrey moved in-house, where he was the Group General Counsel to Usaha Tegas Sdn. Bhd., the Malaysian parent holding company of Astro, Maxis, and MEASAT Satellite. He was responsible for the business and legal affairs of Astro's operations in areas including technology acquisition, satellite procurement and space segment licensing, encryption and antipiracy, Internet products and interactive services, international regulatory and licensing matters, and dispute resolution. In 2000, he founded X [Ventures], a firm providing consulting and representation to the international satellite, television broadcast, film, multimedia, and high-technology industries.

Jeffrey will continue to serve as Special Counsel to Usaha Tegas Sdn. Bhd. and its group of companies. He is a member of the Board of Directors of Sri Lanka Telecom Plc (SLT), and also sits on its Senior Tender Board, where he provides guidance on end-to-end fixed and wireless telecommunications issues.

Within the Tilleke & Gibbins team, Jeffrey works closely with associates David Duncan and Yingyong Karnchanapayap in serving clients in all aspects of international technology, multimedia, and communications transactions. He can be contacted at +66 2653 5644 or jeffrey.b@tillekeandgibbins.com

For additional information visit www.tillekeandgibbins.com

TOZZINIFREIRE WELCOMES NEW TAX AND CORPORATE /OIL&GAS PARTNERS

As of August 2nd, TozziniFreire Advogados added Carlos Adolfo Teixeira Duarte to its group of partners. He will be in charge of the Tax practice group at the firm's Rio de Janeiro office. With 25 years of practice in Business Law, Carlos Adolfo is widely experienced in taxation, mergers and acquisitions and commercial contracts.

He worked for fifteen years for the Royal Dutch/Shell Group of companies, which included three years at Shell International Petroleum Company in London and The Hague, with responsibilities related to international taxation in a broad range of jurisdictions. He also acted as Shell Brazil's legal manager (Chemical Division) and Tax Director. Prior to joining TozziniFreire, Carlos Adolfo worked for several years as tax partner at the law firm Levy & Salomão Advogados and his last experience was as tax partner at Schmidt, Valois, Miranda, Ferreira & Agel Advogados. He represented the downstream (Brazil's Fuel & Lubricants Distributors' Union - Sindicom) and the upstream oil businesses (Brazilian Petroleum, Natural Gas and Biofuels Institute - IBP) in discussions on the Constitutional Tax Reform with the Executive Branch and the Congress.

Carlos Adolfo graduated from the Law School of Rio de Janeiro State University, earned a Postgraduate degree in Business Law from Getulio Vargas Foundation and authored several books and articles. He is a member of the Advisory Board of Brazilian Association of Financial Law (Brazilian IFA Branch), member of the International Fiscal Association and the International Bar Association.

TozziniFreire Advogados has just added Luiz Quintans to its group of partners. He will be responsible for the Corporate/Oil & Gas practice group at the firm's Rio de Janeiro Office. Quintans has Executive MBA in Petroleum Law from Rio de Janeiro State University/ Brazilian Petroleum, Gas, and Biofuels Institute (UERJ/IBP), and earned postgraduate degree in Business Law from Getulio Vargas Foundation (FGV-RJ) and in Procedure Law from Estácio de Sá University.

Quintans has had a successful career as Legal Manager at Eni Oil do Brasil for over six years and led legal departments of companies such as White Martins, Allied Domecq Brasil and PricewaterhouseCoopers for 15 years.

Specialist in the Oil & Gas industry and in international contracts, Quintans is also professor of Introduction to the Petroleum Industry at UERJ, Applied Course of Indirect Taxes at FGV-RJ, and Local Content at Candido Mendes University (UCAM). Quintans has authored several books and articles on the Oil and Gas industry.

Specifically in the Oil and Gas sector, TozziniFreire has been working on upstream and downstream activities for project sponsors, financiers, equipment and service suppliers, natural gas distributors and EPC providers.

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

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

CAREY Y CIA

ADVISES THE UNDERWRITERS IN ISSUANCE OF NEW CHILEAN SOVEREIGN BOND

Santiago: Carey y Cía. advised the underwriters, **HSBC, JP Morgan and Citibank** in the new sovereign bond for US$1.5 billion issued by the Chilean government. Chile raised US$1 billion through a sale of 10-year dollar-denominated bonds with a yield of 3.88%, and US$520 million in 10-year peso-denominated bonds at a yield of 5.50%.

The offering received in excess of US$9 billion in orders according to the managers of the transaction and represents Chile's first sovereign bond issuance in the overseas market since 2004. This is the first LatAm sovereign bond partially denominated in a local currency –which will likely mark the internationalization of the CLP.

The spread of the dollar-denominated bonds was 90bp above the 10-year US Treasury Note, the lowest spread that a Latin American sovereign bond has ever obtained.

The proceeds of the offering will be used for ongoing reconstruction efforts after the deadly earthquake and tsunami that hit Chile last February.

Carey y Cía. partners Salvador Valdés, Francisco Ugarte and Diego Peralta led the team formed also by associates Juan José Bouchon, Alejandra Donoso and Pablo Abumohor.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES THE NOBLE GROUP ON STRATEGIC SALE AND TAKEOVER BID

Sydney, 6 August 2010: Clayton Utz is advising Hong Kong based Noble Group on the sale of Noble's interest in the Middlemount Joint Venture to Gloucester Coal Limited.

The transaction, valued at A$437.5 million, comprises A$337.5 million in cash and the issue of A$100 million worth of new Gloucester shares to Noble.

To fund the acquisition of Middlemount, Gloucester has undertaken an equity raising (via a non-renounceable pro rata entitlement offer) of approximately A$434 million.

The Clayton Utz team advising Noble on the negotiations includes Energy & Resources partners Rory Moriarty and Stuart MacGregor and Corporate Advisory/M&A partners Karen Evans-Cullen, Stuart Byrne and David Landy.

Clayton Utz is also representing Noble in relation to its takeover bid for Gloucester, announced in April.

Commenting on the transaction, Mr Moriarty said it was "unique in that it involves three separate elements, making negotiations extremely complex".

Ms Evans-Cullen also noted that "the interaction of a live takeover bid, together with a large entitlement offer and a related party transaction has required a significant amount of strategic legal advice".

In 2009, Clayton Utz successfully represented Noble in its acquisition of control of Gloucester Coal which followed ground-breaking proceedings before the Takeovers Panel that resulted in a declaration of unacceptable circumstances in relation to the affairs of Gloucester Coal.

For additional information visit www.claytonutz.com

FRASER MILNER CASGRAIN

GEORGIA-PACIFIC COMPLETES ACQUISITION OF GRANT FOREST PRODUCTS' OSB MILLS IN ONTARIO AND SOUTH CAROLINA

On May 26, 2010, Atlanta based Georgia-Pacific LLC completed the purchase of Grant Forest Products Inc.'s oriented strand board (OSB) facilities at Englehart and Earlton, Ontario and Allendale and Clarendon, South Carolina. The acquisition, first announced in January, totaled approximately US$400 million.

The process for the acquisition involved a series of court and regulatory approvals on both sides of the border. These included approval of the Ontario court overseeing the Grant Forest Products *Companies' Creditors Agreement Act* filing and the US Bankruptcy Court in Delaware, as well as the Canadian Competition Bureau, the US Federal Trade Commission and Investment Canada.

Georgia-Pacific, headquartered in Atlanta, Georgia, is one of the world's leading manufacturers and marketers of building products, tissue, packaging, paper, cellulose and related chemicals. The company employs more than 40,000 people at more than 300 locations in North America, South America and Europe.

Grant Forest Products was represented in-house by Peter Lynch, Executive Vice-President and in Canada by Fraser Milner Casgrain LLP with a team led by Ross Walker (restructuring) that included Dan Dowdall, Jane Dietrich, Kate Stigler and Jarvis Hétu (restructuring), Kori Williams (financial services), Don Macintosh (corporate), Clayton Caverley and Susan Paul (competition), Wendy Brousseau (commodity tax), Mary Picard, Heather Di Dio and Mark Dunsmuir (pensions), Michael Horan (labour) and Andrew Salem (real estate).

For additional information visit www.fmc-law.com

HOGAN LOVELLS

ADVISES FORD MOTOR COMPANY ON DIVESTITURE OF VOLVO CARS

NEW YORK, 3 August 2010 – Hogan Lovells has advised Ford Motor Company on its $1.8 billion divestiture of Sweden-based manufacturer Volvo Cars to China-based Zhejiang Geely Holding Group Company Limited.

This global transaction involved a team of lawyers in multiple Hogan Lovells offices. Hogan Lovells partner Bill Curtin led the multi-disciplinary team and commented, "We are extremely proud to have had the opportunity to advise our longstanding client, Ford Motor Company, on this important matter. We are pleased to have brought the extensive cross-border resources of our global legal practice to this complex and multi-jurisdictional transaction."

Curtin was supported by partners Richard Horan (M&A/corporate), Audrey Reed (intellectual property), Jun Wei (China matters), Kevin Gralley (finance), Brent Singley (product development), John Basnage (M&A/corporate), Carin Carithers (employee benefits), Latane Montague (environmental and automotive regulatory), Lee Samuelson (real estate), Dan Davidson (tax), Michele Harrington (antitrust), Catriona Hatton (antitrust), Stephen Ito (pensions), Dennis Tracey (intellectual property), and Shelly McGee (intellectual property).

For additional information visit us at www.hoganlovells.com

GIDE LOYRETTE NOUEL

ADVISES IFC AND GOVERNMENT OF ANDHRA PRADESH ON PILOT PPP HEALTHCARE SERVICES IN FOUR PUBLIC HOSPITALS

Gide Loyrette Nouel (GLN) advised the IFC, a member of the World Bank Group, and the Government of Andhra Pradesh, India, for the structuring and implementation of a pilot PPP project to enable four public hospitals to offer advanced diagnostics services, such as MRI and CT Scan, to low and middle income individuals.

This public-private partnership will help the State of Andhra Pradesh to enhance public service delivery in the health sector by expanding access to affordable and high quality healthcare services for its citizens.

The scope of the private sector's responsibilities covers supplying and financing the equipment, including MRI and CT Scan, building or up-grading the radiology facilities and maintaining them, as well as providing high-end radiology services, in four public hospitals in the towns of Kurnool, Vishakhapatnam, Kakinada and Warangal.

GLN's scope of work included legal due diligence, project structuring, drafting of the tender documents and the project agreements, as well as assistance to the Government for the tendering and signing of the concession agreement. IFC acted as lead transaction advisor to the Government. Following this mandate, GLN will assist IFC and the Government of Andhra Pradesh in developing a comprehensive policy framework for public-private partnerships in the local health sector. The framework will aim at designing project structures and delivery processes that enhance performance of the public health and medical systems, improving the availability of quality healthcare in the state, especially to low and middle income people.

GLN's transaction team was led by partner John D. Crothers, assisted by Gregoire Lemiesle and Deborah Behar, associates.

For additional information visit www.gide.com

KING & WOOD

AGRICULTURAL BANK OF CHINA COMPLETES - CONTENDER FOR WORLD'S LARGEST IPO

July 16, 2010   On July 15 and July 16, 2010, Agricultural Bank of China Ltd. ("ABC"), one of China's four large state-owned banks, completes it's A and H-share offerings and lists on the Shanghai and Hong Kong stock exchanges. The closely watched IPO is expected to be the final 'big four' state-owned bank listing and could become the largest in the world. ABC issued 25,570,588,000 A-shares at a price of CNY 2.68 per share, raising total funds of CNY 68,500,000,000. The A-share listing employs strategic placement and offerings to institutional investors through an online trading system. The strategic placement includes 10,228,235,000 shares. 5,032,028,000 are offered to institutional investors and 10,310,325,000 through the online trading system. Concurrently, 25,411,765,000 H shares are offered globally with a 1,270,590,000 public offering in Hong Kong at HKD 3.20 per share raising HKD 81,300,000,000.

King & Wood advised the four underwriters of Agricultural Bank of China's A-share IPO: China International Capital Corporation Limited, CITIC Securities Ltd, Guotai Junan Securities Co., Ltd and China Galaxy Securities Co., Ltd. as their shared legal counsel. The team is led by Beijing-based partners Yang Xiaolei, Tang Lizi and Su Zheng.

For additional information visit www.kingandwood.com

NAUTADUTILH

BRUSSELS ADVISES SHIRE ON ITS 428 MILLION EURO TAKEOVER BID ON MOVETIS

NautaDutilh Brussels advises Shire, a UK/Irish biopharmaceutical company listed on the London Stock Exchange and on NASDAQ, with its voluntary takeover bid on all outstanding shares of Movetis, a Belgian biotech company listed on Euronext Brussels since November last year following a 100 million euro IPO.

The all cash offer has a total consideration of 428 million euro. The offer is recommended by the Movetis Board and reference shareholders have irrevocably committed to tender their shares.

The NautaDutilh team is headed by Brussels partner Marc van der Haegen. He is assisted by Elke Janssens and Nicolas de Crombrugghe on the transaction side. Several other lawyers from NautaDutilh are involved in the tax, corporate, employment, life sciences and intellectual property aspects of the transaction.

For additional information visit www.nautadutilh.com

Planning to attend the upcoming IBA annual meeting in Vancouver, Canada?
Join us for a casual visit with fellow PRAC members

PRAC members will be gathering
Monday, October 4
4:30pm – 6:30pm
Loden Hotel
Halo Penthouse –
1177 Melville Street - Vancouver, Canada
(a short walk from Vancouver Convention Center)

Invitation is open to all PRAC Member Firms
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RSVP reply email by September 15 to:
events@prac.org

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PERUVIAN CONSTITUTION COURT RULING CONFIRMS PERMIT LEGALITY

Dismisses Claim Brought by Indigenous Organization

The Peruvian Constitutional Court has dismissed as "non-proceeding" a claim brought by the indigenous organization *Asociación Interétnica de la Amazonía Peruana* (AIDESEP) against the Peruvian Ministry of Energy and Mines; Perupetro S.A. and the companies which operate Blocks 67 (**Perenco)** and 39 (**Repsol** and **Burlington Resources).** The claim demanded the prohibition of operations in the afore-mentioned Blocks 67 and 39 and amendment to the license agreements entered into by the named companies with Perupetro S.A. The grounds for the claim were that the oil exploration and production activities being undertaken constituted an imminent threat to the rights to life, cultural identity, healthy environment and consultation prior to the grant of rights to natural resources pursuant to the terms of the ILO Convention 169. In this regard AIDESEP claimed that indigenous communities are living in self-imposed isolation from the outside world in an area overlapping Blocks 67 and 39.

The procedure, known as an "*Acción de Amparo*" under Peruvian Law, commenced in July 2007 before a judge in the town of Iquitos and, after being processed through the Court of Appeal in Iquitos (and due to the nature of the rights in discussion), has ended with a final award from the Peruvian Constitutional Court [in Lima]. The Constitutional Court's decision confirms the previous Iquitos court decisions to dismiss the claim by ruling that the existence of isolated communities has not been evidenced. The Constitutional Court has, however, confirmed the rights of affected indigenous communities to be consulted prior to the grant of oil exploration rights.

The Constitutional Court ruled that, on the basis of the documentation provided by the companies, it had been satisfactorily demonstrated that Block 67 and 39 activities were being conducted in compliance with the applicable regulations. As a result of such compliance, it was consequently impossible to assert that there existed any damage or threat to the environment. Most important of all, the Constitutional Court established that, despite (i) the award of hydrocarbon licenses being made at a time when Peru was already party to the ILO Convention 169; and (ii) the absence of any evidence of consultation carried out prior to the grant of such award, the companies have nevertheless acted at all times in good faith and have complied with all local applicable regulations in relation to their respective activities. Therefore, the Constitutional Court has, among other matters, taken such behavior and corresponding responsibility of the Peruvian Government into account and concluded that its final decision could not require a greater sacrifice than the sacrifice it is tasked with protecting. . In a press release the Constitutional Court expressly stated that it has given all necessary security to investments in hydrocarbons in Blocks 67 and 39 and that, in this way, it has reassured and affirmed legal stability within Peru.

Augusto Astorga Philippon from Estudio Muñiz points out that *"this is an historic decision as it confirms the legality of all permits for natural resources which have been granted by the Peruvian Government since the ILO Convention 169 came into effect in Peru"*

Estudio Muñiz acted for Perenco Peru Limited as legal adviser.

For additional information visit www.munizlaw.com

TOZZINIFREIRE

ADVISES ENERGIAS RENOVAVEIS DO BRASIL S.A.

TozziniFreire assists Energias Renováveis do Brasil S.A.(“ ERB”) in the capitalization of the company through investments to be made by FI-FGTS and Rioforte Investments. TozziniFreire provided legal assistance to ERB – Energias Renováveis do Brasil S.A. in the capitalization of the company through investments to be made by FI-FGTS and Rioforte Investments. The value of the deal is R$ 120 million. It was announced in June, 2010 and executed in May, 2010.

Planned since 2008 by partners Paulo de Tarso Vasconcellos and Emílio Rietmann, ERB now enters the market with the purpose of developing integrated co-generation projects using biomass for industrial clients that use industrial oil or natural gas (such as food and beverage, textile and petrochemical companies). The company’s main focus is the replacement of the fossil fuel based energy sources for these companies for a clean and renewable fuel source, with gains in efficiency and cost to ERB’s client. Different from other biomass generators, ERB has full control of the production of the biomass alternatives they intend to use, and therefore is able to mitigate important risks usually associated to similar projects.

ERB is born already with a pipeline of projects with estimated value of R$ 1 billion. TozziniFreire Advogados has been working with the project sponsors since 2008, assisting in formatting the business, project structures and some off-take contracts, always with a project finance focus.

The company just received an investment from Rioforte Investments and Fundo de Investimento do Fundo de Garantia do Tempo de Serviço – FI-FGTS. They will be the controlling shareholders – each one holding 49% of the shares –, also having initial investor Jandir Antônio Cantele as partner.

Partners Pedro G. Seraphim (pseraphim@tozzinifreire.com.br), Heloisa F. Andrade Scaramucci (handrade@tozzinifreire.com.br), and associate Igor Gomes Domingos da Silva (igomes@tozzinifreire.com.br) acted in the transaction. For additional information visit www.tozzinifreire.com.br

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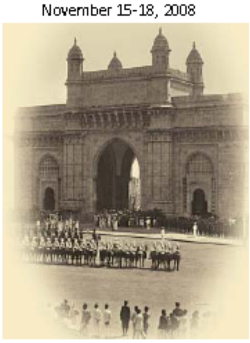

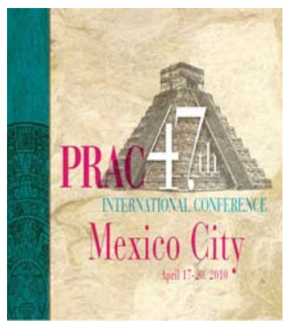

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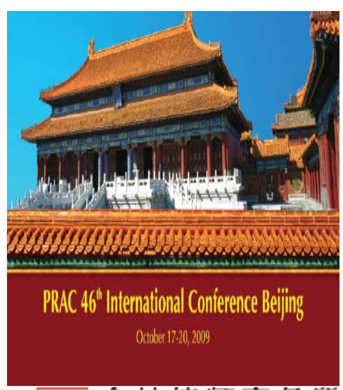

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ABOGADOS

Record-breaking fine for late filing in Argentina.

The Secretary of Domestic Trade of Argentina imposed the highest fine ever for not having filed a transaction since the antitrust control regime was established in 1999. Telefónica will have to pay a fine of AR$ 104.6 MM (approx. US$ 27 MM) for not filing the 2007 acquisition of Olimpia. Five other companies involved in the transaction were also sanctioned for failing to file said acquisition on due time, making a combined total of AR$ 241 MM (approx. U$S 63 MM).

The antitrust authorities understood that by this transaction Telefónica had obtained a controlling position vis-a-vis Telecom Argentina and therefore ordered the involved parties to file for antitrust approval. In August 2009, the Secretary of Domestic Trade rejected the transaction and postponed the decision on whether to sanction the parties for not having filed in time.

This fine, which the antitrust authorities promised that would be “exemplary”, is significantly higher than the previous highest late filing fine of AR$ 832,500 (approx. U$S 270,000 at that time) imposed in 2006. The parties appealed the fine.

For additional information visit www.allendebrea.com.ar

CLAYTON UTZ

04 August 2010

Assigning your rights under a D&O policy: the High Court speaks

Assigning your rights under a directors' and officers' policy is a vexed issue, and this morning the High Court gave some welcome guidance on the issue (CGU Insurance Limited v One.Tel Limited (In Liquidation) [2010] HCA 26 - Clayton Utz acted for the successful respondent).

The director, the D&O policy, and the $20 million order

Mr Greaves had a problem - a $20 million-sized problem, to be precise. That was the size of the compensation order that had been made against him in favour of One.Tel, the company of which he'd been a director. He also was required to pay $350,000 to ASIC.

He then entered into a Deed of Arrangement under Part X of the Bankruptcy Act 1966, assigning to his Trustee, amongst other things, his rights in a D&O policy with CGU. There were three particularly important clauses in the Deed:

- clause 9, which said that once the Trustee realised any assets under the policy he would issue a certificate to Mr Greaves;
- clause 10, which said that once he had the certificate Mr Greaves would "be absolutely released and discharged from all liability in respect of the compensation and costs order"; and
- clause 11, which said that neither the Trustee nor any creditor would take any steps to enforce the compensation and costs order against Mr Greaves before the certificate was executed.

Proceedings were commenced but unfortunately the Deed expired before the Trustee realised the assets from the policy. So now what?

CGU to insured and creditors: Not our problem

CGU argued that the Trustee couldn't continue trying to recover assets under the policy once the Deed has expired.

Even if he had the power, said CGU, the Trustee would still be disappointed because there was no "loss" to which the policy responded. This turned on clause 11 of the Deed - if no-one is going to enforce an order against Mr Greaves, what has he lost?

High Court to CGU: Yes it is

The Trustee did have the right to continue the action against CGU - he had taken the right to recover under the Deed, and that survived the end of the Deed. In fact, the Deed gave the Trustee the **duty** to vindicate any rights Mr Greaves held under the Policy. Once the Deed expired, the Trustee remained a bare trustee, and still had that duty.

As for the second argument, CGU again received bad news from the High Court. Clause 11 expired at the same time the Deed did - and even if it didn't:

- clause 11 doesn't release Mr Greaves from the obligation of paying the compensation order - only a certificate under clause 9 would do that
- a "loss" under the policy includes judgments and settlements, and the compensation order is in that category

- even if the Trustee and creditors can't enforce the compensation order against Mr Greaves, that doesn't mean he still doesn't have to pay it
- clause 11 can't extinguish Mr Greaves' obligation to pay because that would make clause 9 meaningless.

What does this mean for directors, officers and creditors?

For directors, officers, and their creditors, this is a good decision. Although the High Court did not expressly decide the assignment was valid at law, it accepted that it was valid in equity, which was good enough in this case.

It also accepted that the Trustee retains some rights and duties, even after the Deed has expired, which means that any recovery under a policy like this in the future is less likely to be bogged down or halted if the Deed expires.

For further information, please contact Jennifer Ball, Zac Chami, David Cowling, Brigitte Markovic, Karen O'Flynn, Ron Schaffer, Paul James, Nick Poole, Gareth Jenkins, Caroline Bush, Cameron Belyea, Scott Sharry, Mark Spain, Fred Hawke, Douglas Bishop, Nick Cooper, Henry Herron, Jocelyn Kellam, Peter Mann, Nancy Milne, Mark Sammut, Sally Sheppard or Mark Waller.

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IN THIS ISSUE
AUGUST 2010

REGULATORY DEVELOPMENTS IN SECURITIZATION

BY JENNY CHU STEINBERG AND LEE-ANN GIBBS

The Canadian Securities Administrators (CSA) have issued a staff notice (CSA Staff Notice 45-307 – *Regulatory Developments Regarding Securitization*) and proposed a new national instrument (National Instrument 25-101 – *Designated Rating Organizations*), as a result of comments they received on a CSA consultation paper entitled *Securities Proposals Stemming from the 2007-08 Credit Market Turmoil and its Effect on the ABCP Market in Canada*. The staff notice and proposed national instrument are also based on regulatory developments in other jurisdictions as well as recommendations of the International Organization of Securities Commissions (IOSCO).

CSA Staff Notice 45-307

CSA Staff Notice 45-307 is worth noting for issuers that offer asset-backed commercial paper and asset-backed securities. Published on June 18, 2010, the staff notice is brief, but may lead to significant policy changes in two areas.

Firstly, CSA staff are considering changes to the way in which securitized products can be issued in the exempt market. In particular, the use of the short-term debt exemption for the distribution of asset-backed commercial paper is being reconsidered. The exemption currently allows for non-convertible negotiable promissory notes or commercial paper maturing not more than one year from the date of issue that has an approved credit rating from an approved credit rating organization (CRO), to be issued without a prospectus. In addition, the staff notice indicates that CSA staff have been considering whether to impose other conditions in connection with the exempt distribution of securitized products, including requiring disclosure.

Secondly, CSA staff are considering enhancements to the disclosure required to distribute securitized products by prospectus and considering proposals for more tailored continuous disclosure.

According to the staff notice, further materials respecting the above will be published for comment in fall 2010. Proposals relating to regulation of CROs were published on July 16, 2010 and are discussed below.

Proposed National Instrument 25-101

As CROs are not currently subject to formal regulatory securities oversight in Canada, proposed National Instrument 25-101 (NI) is intended to implement an appropriate Canadian regulatory regime for CROs.

Under the proposed NI, if a CRO wishes to have its credit ratings eligible for use where credit ratings are referred to in securities legislation, the CRO must apply to the securities regulatory authorities to become a "designated rating organization". Once the application is granted, the designated rating organization must establish and comply with a code of conduct. The code of conduct must comply with the Code established by the IOSCO or, if it deviates, the designated rating organization must explain how it deviates, and how it nonetheless achieves the objectives of the provisions in the IOSCO Code. The proposed NI does not purport to regulate the content of a credit rating or the methodology used by a designated rating organization to determine a credit rating.

In order to address conflicts of interest, the proposed NI lists certain prohibitions, which are not intended to be exhaustive. The prohibitions listed in the proposed NI include a prohibition on issuing or maintaining a credit rating if, among other things, the designated rating organization or a person that participates in determining or approving the credit rating owns securities in the issuer, or where the fee paid for the rating was negotiated by a person within the designated rating organization who has responsibility for, or participates in, determining credit ratings. A designated rating organization's code of conduct must address the various conflict of interest provisions referred to in the IOSCO Code. In addition, a designated rating organization must have policies and procedures reasonably designed to identify and manage conflicts of interest and must have a compliance officer that monitors compliance with the designated rating organization's code of conduct and securities legislation.

In addition, each designated rating organization must make an annual filing no later than 90 days after the end of each financial year, which is in the same form as the initial application and is meant to provide an update of the initial application. The annual filing requires, among others things, the following information:

- organization and structure of the designated rating organization;
- information respecting the directors and executive officers of the designated rating organization (by the completion of personal information forms);
- fee structure;
- procedures and methodologies used;
- code of conduct;
- policies and procedures preventing the misuse of material non-public information of issuers;
- policies and procedures respecting conflicts of interest;
- information respecting credit analysts, including the total number of credit analysts and credit analyst supervisors and the minimum qualifications of credit analysts, such as education and work experience;
- information respecting the designated rating organization's compliance officer;
- specified revenue information;
- largest users of credit rating services, including a listing of the 20 largest issuers and subscribers in terms of revenue; and
- audited financial statements for three years.

The CSA is requesting comments on the proposed NI by October 25, 2010. Specific requests for comments include: (a) whether a code of conduct must specify that waivers of the code of conduct are prohibited; (b) whether each director, executive officer and compliance officer of a CRO applying for a designated rating organization status should be required to submit personal information forms; (c) how the principal regulator of a CRO will be determined when the CRO does not have a head office or branch office located in Canada; and (d) whether it is appropriate to maintain an exemption found in current securities legislation that does not require a CRO, whose rating is referred to in a prospectus or other disclosure document, to file an "expert's consent", the filing of which would result in the assumption of statutory liability for a rating opinion.

CONTACT US

For further information, please contact Jenny Chu Steinberg or Lee-Ann Gibbs, or a member of our National Securities | Corporate Finance Group.

Opportunities of the new Criminal Liability for Legal Entities Act in Chile

Since coming into force, last December 2009, little has been said about the new Criminal Liability for Legal Entities Act. This is not consistent with the important innovations introduced by this law to our legal system: On one hand, it breaks with the fundamental principle of Criminal Law by which criminal responsibility is only recognized to individuals and, on the other hand, it gives form to a system of crime prevention that, if implemented correctly, may exempt companies from criminal liability, the major target of this rule.

In this new legal scenario, where companies face significant new challenges, the scope of the crimes addressed by the law must be clear and, in turn, take advantage of all the potential that the crime prevention system provides.

In relation to the first aspect, giving the law a first glance it may be concluded that it only refers to a limited list of offenses that can be attributed directly to the company, such as money laundering, terrorist financing and bribery of domestic or foreign public officials. In this regard, bear in mind that **the traditional association of money laundering crimes to drug trafficking is not accurate.** This offense also includes the contact or concealment of funds - in some cases even because of inexcusable negligence - coming from a wide range of crimes closer to business, such as insider information in the stock market or obtaining credits based on false or incomplete data, with damage to financial institutions. Also, it is necessary to consider that bribery does not materialize just by obtaining an illegal action from a public official in exchange for money, but by the simple offer of money.

In relation to a second issue ruled by this law, it seems important to emphasize the protection that the compliance system can offer to the company and its employees -beyond the scope of this law. Indeed, the crime prevention system of Law 20.393 allows for the exemption of criminal responsibility to the company in relation to the crimes defined by this law, but **implemented properly it can also prevent other crimes that are normally related to business,** such as tax offenses, public health offenses, informatics crimes and disclosure of trade secrets. The significant importance that compliance has achieved in countries such as Germany or Spain, who do not recognize criminal liability of companies, is a clear example of its virtues of preventing crimes by employees. The significant importance that compliance has achieved in countries such as Germany or Spain, who do not recognize criminal liability of companies, is a clear example of its virtues of preventing crimes by employees.

The enactment of Law 20.393 **improves the positioning of our country in the international arena** -which was one of the recommendations of the OECD when accepting our country as a member. The correct implementation of the prevention system, can improve the positioning of the company in relation to its commercial partners, the public opinion, increasingly sensitive to the social effects of these kind of crimes, and in regards to the State itself, that could reward this good practice in public procurement as well as in its role as supervisor.

From this perspective, more than a source of new costs for the company or a limitation to it, and beyond the preventive effect on crimes or defense of criminal sanctions, **the new law model of self regulation can turn into an interesting competitive advantage.**

Gonzalo Fernández.
Partner and head of Carey y Cía.'s Litigation Group

Colombian Antitrust Authority Adopts New Merger Review Guidelines

BRIGARD& URRUTIA

Date: 06 August, 2010
News Flash Number: 88
Team: Antitrust And Competition Law

COLOMBIAN ANTITRUST AUTHORITY ADOPTS NEW MERGER REVIEW GUIDELINES.

On June 30, 2010 the Colombian Antitrust Authority, the Superintendence of Industry and Commerce ("SIC") issued new merger guidelines (the "New Merger Guidelines") by means of Resolution 35006 of 2010, with the purpose of updating and clarifying the existing regulations.

The most salient features of the New Merger Guidelines are the following:

New merger clearance information requests

The New Merger Guidelines include new information requests for both Phase I and Phase II inquiries. The New Merger Guidelines set forth the list of the information required in order to analyze a merger. The main purpose of the New Merger Guidelines is to request general information regarding the transaction being reported and the market or markets affected by it, in order to make a first assessment of the relevant markets as part of a Phase I inquiry, and, if required, request further information in a Phase II inquiry.

The information that the SIC will require the parties to file in a Phase I inquiry is the general information regarding the transaction and the parties involved, the main characteristics of the products and geographical relevant markets, including among others, information on competitors and entry barriers.

As for Phase II, the New Merger Guidelines are intended to provide the SIC with detailed information in connection with the relevant market (i.e. calculation of monthly sales, price lists, cost structure), entry barriers, consumer segments and habits and, in case there is a local manufacturing process, information regarding this process and the raw materials that it requires.

The complete information requests may be found in the following links:

Phase 1 http://www.bu.com.co/Ingles/index.php/ourfirm/newsroom/75-new-room/219-colombian-antitrust-authority-adopts-new-merger-review-guidelines

Phase 2 http://www.bu.com.co/Ingles/index.php/ourfirm/newsroom/75-new-room/220-colombian-antitrust-authority-adopts-new-merger-review-guidelines

Fast-track procedure.

If the parties to a relevant market have a joint market share below 20%, a merger notice must be filed and the transaction is deemed to be cleared as of the date of the filing.

According to the New Merger Guidelines the following information must be submitted in the notice:

- A summary of the legal structure of the transaction.
- An indication concerning the relevant markets where the parties compete in the Colombian market (product and geographical market)
- List of all competitors within the Colombian relevant market.
- Market share held by each of the parties and its competitors in the relevant market.

The new Merger Guidelines indicate that fast-track merger notices must be submitted to the SIC prior to closing. If the notice is filed post-closing the parties may face fines imposed by the SIC.

For further information please contact:

Carlos Umaña cumana@bu.com.co
Alejandro Garcia agarcia@bu.com.co

Corporate Express | August 2010

Foreign Investment

Several Opinions of the State Council on Further Utilizing Foreign Capital

（Guo Fa [2010] No. 9）

The State Council issued the *Several Opinions of the State Council on Further Utilizing Foreign Capital* (the "**Several Opinions**") on April 6, 2010. The Several Opinions refer to the five matters, which include optimizing the structure of utilizing foreign capital, guiding foreign capital to central and west China and increase of investment, promoting diversification of utilizing foreign capital, deepening the reform of the foreign investment management system and creating a good investment environment. The Catalogue for the Guidance of Foreign Investment Industries shall be sixthly revised to expand the open areas and encourage foreign capital to high-end manufacturing, high and new technology industry, modern service industry, new energy and energy-saving and environmental protection industry and "High-polluting, high-energy-consuming and resource-dependent" and low-level and overcapacity expansion projects shall be strictly restricted in the Several Opinions. The Several Opinions made provisions that the Catalogue of Priority Industries for Foreign Investment in the Central-Western Region shall be supplemented to add the items of labor-intense projects and encourage foreign businessmen to develop the labor-intense industries qualified for environmental protection in the central and western region.

The Several Opinions encourage the foreign capital to participate in the restructuring and merger of domestic enterprises by means of equity participation and acquisition, bolster the qualified foreign-invested enterprises to publicly issue stocks, corporate bonds and medium-term notes within China, support to widen financing channel and guide the financial institutes to continuously strengthen support of credit loan for foreign-invested enterprises.

The Several Opinions support the A-share listed companies to bring in domestic and overseas strategic investors, require that the foreign capital participating in domestic securities investment and acquisition shall be in compliance with the laws and regulations and antitrust scrutiny shall be executed according to law and the establishment of the system of foreign capital merger and acquisition security scrutiny shall be sped up. The Several Opinions provide that the foreign investors shall be encouraged to invest to set up investment enterprises, private equity and investment funds shall actively be utilized and exit mechanism shall be perfected.

The Several Opinions require to make full clearance of approval items related to foreign investment, to shorten the time of approval, and to improve the approval mode.The competent authorities will gradually conduct the format approval of contract and article of association of foreign-invested enterprises across the country on the basis of conducting pilot program and summing up experience. The Several Opinions strongly promote online administrative licensing in order to regulate administrative acts.

KW Comments: The Several Opinions reflect the adjustment for utilizing the foreign capital, in which the attraction of foreign capital without any differentiation in earlier stage is changed to the selective utilization.The Several Opinions emphasize to expand the scale of overseas subjects issuing Renminbi within China steadily. Therefore, approvals from the Ministry of Commerce, Development and Reform Commission and Administration of Foreign Exchange may be obtained easily, such as the merger in the affiliates and special purpose vehicle, exchanging shares between offshore entities and onshore entities which have been strictly regulated in No. 10 Decreed.

Local Laws

Shaanxi Province

Implementation Opinions of People's Government of Shaanxi Province on Promoting Trade Mark Strategy **("Implementation Opinions")**

（No. 8（2010）, the People's Government of Shaanxi Province, March 16, 2010）

The Implementation opinions indicate the guidelines, objectives and tasks of trade mark strategy of Shaanxi Province at present and certain time in thefuture, and formulate several support policies for implementingtrade mark strategy:

1. Giving aid to trade marks registration. The Implementation opinionsstipulate that

enterprises in Shaanxi province applying for international registration of trade marks would be subsidized byprovincial Commerce Department, in accordance with relevant state regulations. Enterprises applying for agriculture-related trademark or Geographical Indication Certification Mark would be subsidized by provincial Department of Agriculture in accordance with relevant state regulations.

2. Rewarding the well-known and famous trademarks. The Implementation opinions stipulate that, from 2010, the Shaanxi provincial government will reward one million Yuan to the owner of which is designatedas well-knowntrademark of China； the Xi'an Municipal government will reward the owner of which is designatedas famous trademark of Shaanxi province.

3. Launching the pilot project onimplementing the trademark strategy, and promoting trademark right pledge loan. The specific measures for the implementation will be made by the provincial Administration Bureau for Industry and CommerceBureau together with the provincial Finance Office.

KW Comments:

First, under the guidanceof the National Intellectual Property Strategy OutlineandtheIntellectual Property Strategy Outline of Shaanxi Province (2008-2020), and integrated with thepractice of trademark development in Shaanxi Province , theImplementation opinions identified the objectives and tasks of trademark strategy in Shaanxi province, and formulatedspecific supporting policies for implementing trademark strategy.

Second, even though the Implementation opinions mentioned the supporting policies, it still lacks of maneuverability, and can only be implemented after the provincial Department of Commerce and other departments stipulate related specific measures.

Third, in terms of the trademark pledge loans, due to the issues that the trade mark right is difficult to be evaluated and also difficult to be liquidated in the after-loan disposition, thepledge loan of trademark is not common at present, especially for SME (Small-and-Medium-sized Enterprise). From my point of view, it is not optimistic for the SMEs to relieve their financial pressure through this way at present, and it requires the promotion of relevant departments.

ABNR NEWS

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

COUNSELLORS AT LAW

July 2010 Issue

This Newsletter is meant to keep our clients and friends informed of the recent regulations in Indonesia, which we feel may be interesting to them. You will, therefore, not find all recent legislations in this Newsletter and the selected items are also not dealt with in length. You will find that the articles contain only the general information about such recent regulations. If further information or a deeper analysis of the topics published in the Newsletter is needed, please contact us at the address or telephone and e-mail address indicated.

AREA OF PRACTICE

ABNR is principally engaged in the provision of legal services to foreign companies, banks and international institutions operating or setting up operations in Indonesia as well as to Indonesian enterprises contracting with foreign companies and institutions or with other Indonesian companies. ABNR specializes in the handling of commercial, corporate and financial legal matters. Such matters include financial and corporate restructurings, project finance, banking and financial transaction, mergers and acquisitions, joint venture arrangements, licensing arrangements, petroleum and energy sector operations, capital market transactions, mining operations, construction, shipping, aviation, labor matters and intellectual property matters. ABNR has a comprehensive database of all applicable Indonesian laws, regulation and administrative procedure.

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REGULATION ON CERTIFICATE OF ORIGIN (*SKA*) ISSUING AGENCIES

Another implementation regulation for Minister of Trade Regulation No. 43/MDAG/PER/10/2007 on Issuance of Certificates of Origin has been issued as Minister of Trade Regulation No. 24/MDAG/PER/5/2010. This implementation regulation specifically regulates the agencies that are nominated and authorized to issue the Certificate of Origin that accompanies goods that are exported from Indonesia ("Regulation").

The Regulation defines "Certificate of Origin" (*Surat Keterangan Asal* or "SKA") as "document that must accompany Indonesian exported goods in their entry into another country as evidence that the goods come from or produced or processed in Indonesia".

The Regulation states that SKAs may only be issued by state agencies that are approved by the Minister of Trade. The agencies that are authorized to issue SKAs are listed in Attachment I, II and III of the Regulation along with their physical locations throughout Indonesia. The SKAs may be issued either electronically or manually. The procedures for the issuance of SKAs, including the mechanics for the furnishing of the signatures and official seals and reporting requirements for the issuing agencies are provided in the Regulation.

The Regulation repeals and replaces the earlier implementing regulations on the same subject matter and has been in force since the day of its issue of 24 May 2010. ***(by: Hamud M. Balfas)***

Update Corporate

Update corporate remuneration / Update bestuurdersbeloningen **9 August 2010**

Recent developments on corporate remuneration within and outside the financial sector

Since the outbreak of the financial crisis, the issue of corporate remuneration has been the subject of a great deal of attention. This newsletter gives a description of the latest developments on this front, covering the following:

- *new legislation giving works councils of NVs the right to express an opinion on certain proposed shareholder resolutions;*
- *draft bills on the adjustment and claw-back of bonuses;*
- *the proposed statutory ban on the conclusion of employment contracts between listed companies and their management board members;*
- *a draft decree on balanced remuneration policies, under which the joint principles for balanced remuneration policies in the financial sector issued by the Dutch Authority for the Financial Markets (Autoriteit Financiële Markten, **AFM**) and the Dutch Central Bank (De Nederlandsche Bank, **DCB**) are to be given a legislative basis;*
- *the parliamentary examination of the financial system conducted by the De Wit Committee;*
- *the European Commission's Green Paper 'Corporate governance in financial institutions and remuneration policies';*
- *the European Parliament's resolution on remuneration of directors of listed companies and remuneration policies in the financial services sector; and*
- *the proposal for an EU directive on (among other things) the remuneration policies of banks.*

We also refer you to our newsletters of 15 December 2008, 18 May 2009, 25 January 2010 and 9 August 2010, in which we reported on earlier developments in the area of corporate remuneration. The subjects covered in those newsletters included:

- *the updated Corporate Governance Code;*
- *the Banking Code and the creation of a legislative basis for this code;*
- *the 'gentlemen's agreement' between the financial sector and the Dutch Minister of Finance;*
- *the 'Principles for Sound Compensation Practices' issued by the Financial Stability Forum;*
- *the 'Interim Report on Market Best Practices' issued by the Institute of International Finance;*
- *the Recommendations of the European Commission on the remuneration of directors in listed companies and on remuneration policies in the financial services sector; and*
- *the remuneration policy principles drawn up in the context of the G20.*

NV works councils: right to express opinion regarding remuneration policy

On 1 July 2010, new legislation giving works councils of public limited liability companies (*naamloze vennootschappen*, **NVs**) the right to express an opinion on certain proposed shareholder resolutions entered into effect. A description of the relevant bill was given in our newsletter of 23 December 2009.

As a result of the legislation, the Dutch Civil Code (**DCC**) now contains a rule providing that a proposed resolution to adopt the remuneration policy for an NV's management board members can only be submitted to the company's general meeting of shareholders after the works council (if any) has been given an opportunity to express an opinion on the same. The works council's opinion must be submitted to the general meeting at the same time as the proposed resolution. In addition, the works council (represented by its chairperson or a member he/she has designated) will be entitled to take the floor at the meeting for the purpose of explaining its opinion.

Adjustment and claw-back of bonuses

Introduction

On 28 May 2010, the Council of Ministers approved a proposal by the Minister of Justice to introduce rules under the DCC making it possible to adjust or claw back bonuses paid or granted to management board members.

At present, the Corporate Governance Code (for listed companies) and the Banking Code (for banks) already contain rules on the adjustment and claw-back of bonuses. Both codes operate on the apply-or-explain principle; consequently, deviations are allowed provided these are explained in the annual report. The explanatory notes to each of the codes state that the supervisory board should endeavour to modify existing contracts with management board members to bring them in line with the abovementioned rules in the relevant code. In practice, however, this is generally impossible to do if the management board member does not give his/her consent. The proposal makes it possible for bonuses to be adjusted or clawed back, even in cases where the management board member's consent is withheld.

At the same time that it approved the above proposal (i.e. also on 28 May 2010), the Council of Ministers approved a proposal by the Minister of Finance for additional rules enabling the adjustment and claw-back of variable remuneration in the financial sector, by means of an amendment to the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, **FSA**). The powers under these proposed rules are broader than those under the proposed DCC rules. The Minister of Finance considers this necessary because, in the financial sector in particular, the past few years have been marked by cases of unreasonably high bonuses and bonuses giving the wrong incentive, as well as requests by financial institutions to the government for financial support.

Both of the proposals are now before the Dutch Council of State (*Raad van State*). The texts as submitted to the Council of State have not been made publicly available. However, from earlier (publicly available) drafts of the proposals and statements by the relevant ministers, it can be seen that the broad outlines of the proposals are as follows:

Broad outlines of proposal to amend the DCC

- The proposed new rules in the DCC will be applicable to (i) NVs and (ii) private limited liability companies (*besloten vennootschappen*), cooperatives (*coöperaties*) and mutual insurance associations (*onderlinge waarborgmaatschappijen*) constituting a bank or an insurer under the FSA.
- The relevant entity will be required to have a remuneration policy for management board members, adopted by the general meeting of shareholders (in the case of cooperatives and mutual insurance associations, by the general meeting of members). Where there is a works council, it will be entitled to express its opinion on the proposed remuneration policy prior to the policy's adoption (see the preceding section on the right of works councils to express their opinion). In addition, the actual remuneration to management board members will have to be determined by the general meeting, unless another body has been designated for this purpose under the articles of association. Where another body has been designated, a proposal to grant remuneration in the form of shares or options will first have to be submitted by that body to the general meeting for the latter's approval. In the case of listed companies, and as set out in the Corporate Governance Code, it will generally be the supervisory board that is the competent body in this regard (it will hereinafter be assumed that the supervisory board is the competent body). It should be noted that NVs are already subject to the rules such set out in this bullet point.

- The supervisory board will have the power to adjust a bonus and set it at an appropriate level, if payment of the bonus at the original level would be unacceptable according to the criteria of reasonableness and fairness. According to the explanatory memorandum to the draft proposal, a 'bonus' means the variable component of the management board member's remuneration the granting of which is dependent on the achievement of specific pre-determined targets and which can be paid in the form of cash, a pension plan contribution or options, shares or other share-based forms of remuneration.
- Where the granting of a bonus becomes unconditional as the result of a public offer, the supervisory board will be required to adjust the bonus if payment thereof at the original level would be unacceptable according to the criteria of reasonableness and fairness. The same applies to bonuses whose granting is still on a conditional basis at the time the public offer is declared unconditional. The draft proposal does not cover takeovers of listed companies other than through a public offer, e.g. takeovers through an assets-liabilities transaction or a statutory merger. There does not appear to be any justification for this. According to the explanatory memorandum, the proposed rule is intended to replace the amendment previously adopted by the lower house of the Dutch parliament under which, in a 'change of control' situation, the relevant management board member is required to pay back to the company any increases in the value of the shares or options. The question is whether the lower house will agree to the rules now proposed.
- The company will have the right to claw back, as an undue payment, a bonus following payment thereof, to the extent that (i) the bonus has been paid on the basis of incorrect information, or (ii) the underlying pre-determined targets have not been achieved. Under the draft proposal, claw-back proceedings can also be initiated on behalf of the company by the supervisory board or, in the case of a company with a one-tier board structure, by the non-executive board members.
- In the annual report, the supervisory board will be required to report on any adjustments or claw-backs of bonuses. According to the draft proposal, this requirement will not apply in the case of 'closed' NVs (i.e. where the articles of association provide only for registered shares, contain share transfer restrictions and prohibit the issuing of bearer depositary receipts with the company's co-operation).

Broad outlines of proposal to amend the Financial Supervision Act

- The proposed new rules under the FSA will be applicable to all financial institutions within the meaning of that Act, irrespective of their legal form. We would also point out that, in the draft of this proposal, the territorial scope of the rules has not been delineated and therefore, according to the draft, the rules would strictly speaking also apply to financial institutions that only carry out activities abroad and are consequently not required to obtain a licence in the Netherlands. In our view, it would be sensible to limit the applicability of the rules to financial institutions that have a licence under the FSA.
- The financial institution will have the power to adjust or claw back any variable-remuneration component that has been paid or granted if (i) it subsequently becomes clear that the component was granted on the basis of incorrect information, or (ii) in light of exceptional circumstances during the period in which the pre-determined performance criteria were or must be met, the component has led or will lead to an unfair outcome.
- The power to adjust or claw back variable-remuneration components will apply in respect of the remuneration of all persons determining the financial institution's day-to-day policy, and not only management board members as in the case of the proposal to amend the DCC. Furthermore, all variable (i.e. non-fixed) remuneration components are covered. According to the Minister of Finance, this category is broader than bonuses (as referred to in the proposal to amend the DCC) because it should also be understood to include, for example, profit participation rights.
- The abovementioned power will be vested solely in the financial institution's supervisory board or an equivalent body with a supervisory role. In the absence of a supervisory board or equivalent body, it will not be possible for a financial institution to adjust or claw back remuneration pursuant to the rules proposed by the Minister of Finance.
- With regard to regulatory supervision over the adjustment or claw-back of variable-remuneration components, the draft proposal does not provide for the introduction of additional powers on the part of the AFM or the DCB. However, according to the explanatory notes, the above areas will fall under the general supervisory powers of the AFM and the DCB with regard to the remuneration policies of financial institutions (see below in the section 'Legislative basis for AFM/DCB principles for balanced remuneration policies').

Proposed ban on employment contracts between listed companies and management board members

On 8 December 2009, the lower house of the Dutch parliament passed a bill to amend the rules in Book 2 of the DCC on management and supervision within NVs and BVs (also referred to as the one-tier board bill). This bill was the subject of our newsletter of 16 December 2009. It is possible that the relevant legislation will enter into effect on 1 January 2011.

The bill includes a rule stating that the legal relationship between a listed company and a member of its management board will not be considered as an employment relationship. However, existing employment contracts will continue to be respected. Under the Corporate Governance Code as well as the Banking Code, a departing management board member may not receive remuneration in excess of one year's salary. At present, the application of this principle is sometimes thwarted due to the existence of an employment contract, as the application of rules on employment contracts can result in a higher severance payment. Once the bill has become law, this will no longer occur in the case of listed companies.

Legislative basis for AFM/DCB principles for balanced remuneration policies

Introduction

On 6 May 2009, the AFM and the DCB published a set of joint principles for balanced remuneration policies in the Dutch financial sector (**Principles**). A description of the Principles has been given in our newsletter of 18 May 2009. Further thereto, on 9 April 2010 the Minister of Finance initiated a market consultation on the draft of a proposed 'Balanced Remuneration Policies Decree' (*Besluit beheerst beloningsbeleid Wft*). The proposed decree consists of amendments to the Financial Institutions Prudential Rules Decree (*Besluit prudentiële regels Wft*) and the Financial Institutions Business Conduct Supervision Decree (*Besluit gedragstoezicht financiële ondernemingen Wft*), both of which were issued pursuant to the FSA. The purpose of the new decree is not to incorporate the Principles in the two existing decrees, but to give them a legislative basis. The intention is that the Principles will then be used by the AFM and the DCB to interpret the general norms laid down in the Financial Institutions Prudential Rules Decree and the Financial Institutions Business Conduct Supervision Decree.

Amendments to Financial Institutions Prudential Rules Decree

The Financial Institutions Prudential Rules Decree lays down prudential rules for banks and other financial institutions under the supervision of the DCB, such as insurers and payment institutions. The decree contains, among other things, a section consisting of specific rules on the prudential conduct by the above financial institutions of their business operations. The proposed rules on a balanced remuneration policy that are to be included in the Financial Institutions Prudential Rules Decree will be incorporated in this section. The broad outlines of these rules are as follows:

- The above financial institutions will be required to draw up, as part of their risk policy, a remuneration policy that does not encourage the taking of greater risks than are acceptable for the relevant institution.
- This remuneration policy – which should be appropriate to the institution's size and organisation, as well as to the nature, scale and complexity of its business activities – must be laid down in writing, implemented and maintained.
- The remuneration policy must contain a description of the remuneration components and remuneration structures that could contribute to the institution taking greater risks than are acceptable for it, as well as the procedures to be followed and measures to be taken to prevent and control the risks attached to such components and structures.
- The relevant institution must publish a description of the remuneration policy.
- The DCB will have the authority to lay down rules (or supplementary rules) on (i) the manner in which the remuneration policy should be drawn up, adopted or approved, implemented, evaluated and amended; (ii) the manner in which remuneration components should be designed and managed; and (iii) the manner in which the remuneration policy should be published.

Amendments to Financial Institutions Business Conduct Supervision Decree

In addition to the above prudential rules, the draft decree contains rules on the supervision by the AFM over the business conduct of financial institutions (such as investment firms (*beleggingsondernemingen*), financial services providers (*financiële dienstverleners*) and investment institutions (*beleggingsinstellingen*). Pursuant to the FSA, financial institutions are required to treat their clients with due care: this general norm is the basis for the proposed new provisions in the Financial Institutions Business Conduct Supervision Decree on a balanced remuneration policy. The broad outlines are as follows:

- Financial institutions should draw up a remuneration policy aimed at preventing a situation in which the remuneration of the individuals who determine the relevant institution's policy, or of employees or other individuals who provide financial services or carry out other activities under the institution's responsibility, leads to a failure to treat consumers, clients or participants with due care. According to the explanatory notes to the draft decree, it is the institution's responsibility to determine which individuals carry out activities that could lead to such a failure. Such individuals in any event include not only those actually involved in the provision of financial services, but also (for example) individuals who are involved in product development.
- This remuneration policy – which should be appropriate to the financial institution's size and organisation, as well as to the nature, scale and complexity of its business activities – must be laid down in writing, implemented and maintained.
- With reference to the specific financial services or other activities provided or carried out by or in the name of the financial institution, the remuneration policy should contain a description of (i) the remuneration components and remuneration structures that could lead to a risk of failure to treat consumers, clients or participants with due care and (ii) the procedures to be followed and measures to be taken to prevent and control such a risk.
- The financial institution must publish a description of the remuneration policy.
- The financial institution must have procedures and measures implementing the policy.
- The AFM will have the authority to lay down rules (or supplementary rules) on (i) the manner in which the remuneration policy should be drawn up, adopted or approved, implemented, evaluated and amended; and (ii) the manner in which remuneration components should be designed and managed.

Parliamentary examination of financial system (De Wit Committee)

On 10 May 2010, the 'Temporary Committee for Examination of the Financial System' presented its report on the causes of the financial crisis. The report makes various recommendations for improving and strengthening the operation of the financial sector in the future. A number of recommendations relate to remuneration policies in the financial sector. In this regard, the committee has not launched any new ideas, but recommends that the general principles on remuneration at banks laid down in, among other things, the Banking Code and the Principles should also apply to other types of financial institutions, such as insurers and pension funds. The committee also proposes that the scope of certain principles regarding remuneration (including, but not limited to, severance packages) be expanded – possibly in amended form – to apply not only for management board members and/or senior management, but also for the rest of the organisation. In addition, the committee expressly leaves open the possibility of enacting the provisions of the Banking Code into law, if it becomes apparent that the code is not being complied with sufficiently. Finally, the committee has welcomed the proposals of the Minister of Finance to attach far-reaching conditions to the remuneration of management board members of financial institutions in the event that the relevant institution is granted financial support by the government.

European Commission Green Paper

Introduction

On 2 June 2010, the European Commission published its Green Paper on corporate governance in financial institutions and remuneration policies. The Green Paper contains recommendations, in the wake of the financial crisis, for measures to improve corporate governance in financial institutions. In addition, it contains proposed measures regarding remuneration policies in listed companies and financial institutions.

Broad outlines of proposals on remuneration policies

In the Green Paper, the European Commission has concluded that its Recommendations of 30 April 2009 on (i) the remuneration of directors in listed companies and (ii) remuneration policies in the financial services sector have been applied by EU member states only to a moderate extent, and that, insofar as measures have been taken at national level, there are wide variations between different member states in this regard. A description of the above Commission Recommendations is given in our newsletter of 18 May 2009. Through the Green Paper, the European Commission has initiated a 'brainstorming' exercise regarding the desirability and content of legislative measures in this area. Interested parties (such as the member states and the European Parliament) are invited to inform the Commission of their views on, among other things, the following subjects:

- the content and form, binding or non-binding, of possible additional measures at EU level on remuneration for directors of listed companies;
- whether directors' stock options should be regulated at EU level;
- the discussion at EU level of the favourable tax treatment given by certain member states to stock options and other similar remuneration;
- the strengthening of the role of shareholders and employees (and their representatives) in establishing remuneration policy;
- whether severance packages should be regulated at EU level;
- the reduction or suspension of the variable component of remuneration within financial institutions which have received public funding.

European Parliament resolution

With reference to, among other things, the European Commission Green Paper described above, on 7 July 2010 the European Parliament adopted a resolution in which it made a number of concrete suggestions regarding the regulation of remuneration policies in the financial sector and of listed companies. In the resolution, among other things, the European Commission is requested to establish 'strict and binding' principles for the remuneration policies in the financial sector. In the European Parliament's view, these principles should build on the proposed EU directive on (among other things) remuneration policies of banks (see below). For listed companies, a 'disclosure-driven regime' should be introduced, under which companies not complying with these principles must justify such non-compliance.

Proposed EU directive on (among other things) remuneration policies of banks

Introduction

Also on 7 July 2010, the European Parliament adopted a proposal for an EU directive (CRD III) 'amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies'. The proposed directive – which must next be approved by the European Council – contains rules on, among other things, the remuneration policies of banks. According to the European Parliament it is possible that these rules will enter into force in January 2011.

Broad outlines

With regard to banks' remuneration policies, the broad outlines of the proposed directive are as follows:

- The Committee of European Banking Supervisors (**CEBS**) and the national supervisors in EU member states should carry out comparative studies of remuneration in the financial sector. In addition, the national supervisors should collect information on the number of individuals whose remuneration amounts to EUR 1 million or more. This information should be forwarded to the CEBS, which will draw up and publish a report on it.
- The national supervisors will have the power to require banks to limit variable remuneration to a certain percentage of the relevant bank's total net revenues if the level of the latter is not consistent with the maintenance of a sound capital base.
- Banks should have robust governance arrangements which include remuneration policies and practices that are consistent with and promote sound and effective risk management. The remuneration policies should in any event apply to the remuneration of senior management, risk takers and control functions, as well as individuals receiving remuneration comparable to that of the preceding categories of staff. The policies should cover total remuneration, i.e. not only salaries but also, for example, discretionary pension benefits. When establishing and applying their remuneration policies, banks should comply with, among other things, the following principles in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities:
    - ♦ The total amount of performance-related remuneration should be based on a combination of the assessment of the performance of the individual and of the relevant business unit, as well as the bank's overall results. When assessing

individual performance, both financial and non-financial criteria should be taken into account. The assessment of performance should be set in a multi-year framework.

- Individuals in control functions should be remunerated in accordance with the achievement of the objectives linked to their functions, without regard to the performance of the business areas they control.
- There should be an appropriate balance between the fixed and variable components of total remuneration. The CEBS will set guidelines for determining the appropriate ratios in this regard.
- At least 50% of any variable remuneration should consist of an appropriate balance of, in brief, (i) shares (or, in the case of an unlisted bank, share-linked instruments or other equivalent non-cash instruments) and (ii) other long-dated financial instruments that adequately reflect the bank's credit quality, including for example instruments which, in the event that the bank has severe financial problems, are converted into equity or otherwise written down. If the bank does not issue long-dated financial instruments as referred to in (ii), it will be permitted to issue this part of the variable remuneration in shares or the other instruments referred to in (i).
- Variable remuneration should be paid on the basis of long-term performance. A substantial portion – at least 40%, or 60% in the case of particularly high amounts – should be deferred over a period that is at least three to five years and is correctly aligned with the business cycle, the nature of the business, its risks and the activities of the relevant individual.
- Variable remuneration should be paid or should vest only if it is sustainable according to the financial situation of the bank as a whole and is justified according to the performance of the bank, the relevant business unit and the relevant individual.
- Guaranteed variable remuneration is permissible only upon the entry into service of the relevant individual and should be limited to the first year.
- Severance payments should reflect the performance achieved by the relevant individual and should be designed in a way that does not reward failure.
- In the case of banks that are eligible for government support, additional rules should apply to the granting of variable remuneration. Such remuneration should be strictly limited to a percentage of net revenues and be consistent with the maintenance of a sound capital base and a timely exit from government support. No variable remuneration should be paid to the bank's directors unless this is justified.

We will keep you informed of any developments in the area of corporate remuneration. If you have any questions or would like to know more about a particular subject, please do not hesitate to contact one of the following persons:

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Changes to Credit Reporting Afoot

06 Jul 2010

Banks, finance companies, and the like may soon have access to more information about individuals.

The Privacy Commissioner is looking at relaxing the current ban on positive credit reporting. It is also considering letting credit reporting agencies use driver license information to check that they have the right individuals. Better credit reporting has privacy risks, but it may allow more informed decision making when loans are being sought. The closing date for submissions on the proposed changes is 13 August 2010.

A credit check usually includes a report from a credit reporting agency. Currently, credit reporting agencies may collect only certain "negative" credit information. For example, they may report on a past default that triggered recovery action. They are not allowed to collect or report "positive" aspects of a person's credit history. This would include reporting that an individual holds another credit account, or has paid off a previous debt. Without this information it is difficult for a credit provider to form a full view of a person's creditworthiness.

The reporting of positive information raises privacy issues. The rules on what information credit reporting agencies may use are in the Credit Reporting Privacy Code 2004 (**Code**) issued under the Privacy Act 1993. The underlying premise of these rules is that people who meet their credit obligations should not be forced to see information about their private financial dealings being published.

When the Privacy Commissioner (Commissioner) issued the Code it undertook to review it once it had been in operation. The first phase of the review has been completed, and changes to the Code have been announced (as discussed below). The second phase of the review will take place after the Australian government releases a draft of changes to the Australian privacy legislation later this year. This will probably lead to further changes to the Code.

The Commissioner set out the changes after the first phase of the review in an information paper released on 16 June 2010. **They are significant.**

The key changes are to allow credit reporters to provide more comprehensive credit reporting and use driver licenses for data matching - but balanced by restrictions on which credit providers may receive the additional information, and external accountability by credit reporters.

More Comprehensive Reporting

Currently, the Code limits the credit information that credit reporters may collect, and include in their reports, to:

- credit defaults of more than 30 days, if the creditors have taken recovery steps;
- summary installment orders or judgments for debts;
- bankruptcies, and
- fraud in obtaining credit and similar serious credit infringements.

Therefore, credit reporters can essentially only provide information on one side of the ledger. They cannot report fully on an individual's credit history or creditworthiness.

As a first step, the Commissioner proposes permitting credit reporters also to report some positive information, subject to various controls.

New credit information

The new information the Commissioner proposes to allow is termed "credit account information". It covers information about:

- the types of credit accounts somebody holds (for example a mortgage, personal loan, and credit card);
- the credit limit on each account (ie the maximum available credit - not the amount actually outstanding at a given time);
- the individual's capacity in relation to each credit account (for example as borrower or guarantor);
- the details of each credit provider; each credit provider's client reference number;
- whether each account is open or closed, and when it was opened and (if applicable) closed.

However, credit accounts that have been closed for more than two years may not be included.

As may be seen, the proposed list of what counts as credit account information does not include all information that has a bearing on an individual's creditworthiness. In particular, it does not include information about an individual's repayment history. However, the Commissioner has signaled that the second phase of the review may lead to this.

Credit providers to whom new information may be reported

Because increased financial reporting heightens privacy concerns, the Commissioner proposes that the credit account information may only be given to credit providers who qualify as "registered credit providers". These will be credit providers who are registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSPA**), such as banks and finance companies. This will exclude prospective landlords, prospective employers, and debt collectors.

Similarly, credit account information will not be available to insurance companies. While they provide financial services and are FSPA-registered, they are not *credit providers* who are registered under the FSPA. Therefore they will not qualify as registered credit providers. They will not be entitled to the credit account information (specifically) of an individual who applies for insurance.

Purposes for which new information may be reported

The Code already contains a general ban on credit reporters' using credit information they obtain for one purpose, for a different purpose.

It is implicit in this ban that credit reporters may not use credit information for direct marketing purposes. The Commissioner proposes to make this explicit. This will then apply to all types of credit information, including credit account information.

Use of Driver Licenses

The Commissioner further proposes to allow credit reporters to use driver license numbers to identify individuals.

In practice, driver license numbers will be collected by the credit reporters' clients. There will be no obligation on individuals to provide their driver license numbers. The clients must make this clear when they ask individuals for this information, and the credit reporters will be required to have systems that ensure their clients do so.

Credit reporters will also need to have the necessary systems and take the necessary steps to ensure that driver license information is collected only from the holder shown on the driver license and to verify the license.

This is an inroad into the existing restrictions on the use of unique identifiers.

However, the Commissioner considers that this change will benefit individuals. It will allow credit reporters to match credit information to the correct individuals. This can help reduce the harm caused when credit reporters issue negative reports about the wrong individuals.

There will be controls to prevent a credit reporter from building up a database of driver license numbers. Once a credit reporter has verified a driver license number, it must convert the number to a hash value using an irreversible hash function. It may not enter the driver license number into any database or retain it any form other than as the hash value.

Only the hash value may then be used for information matching, to supplement other identification information such as the individuals' name, address, or date of birth.

External Accountability

The Commissioner proposes introducing new elements of external accountability for credit reporters, to balance the more comprehensive credit reporting.

The Code already requires a credit reporter to have compliance policies, procedures, and controls in place. Currently, however, the Code merely requires the credit reporter systematically to review these in order to identify any deficiencies it must remedy. The Commissioner proposes to strengthen this by requiring:

- the review to be conducted annually; and
- an annual report to the Commissioner about the review; and
- the involvement of an independent expert. Here, the first option will be for the report to the Commissioner to be prepared and submitted by an independent person with expertise in conducting systematic reviews, such as a qualified auditor. Alternatively, the report could be prepared and submitted by the reviewer's audit committee if it includes an independent person with expertise in Code compliance.

Other Proposed Changes

Other notable changes the Commissioner proposes are:

- mandatory time limits on how old information may be that is collected and reported, and on how long credit reporters may retain information;
- general explanations about their credit scores to individuals who are given access to their credit information (involving a statement that explains the general methodology used to create the individual's credit score and the score range in which it was placed);
- updates to the Summary of Rights (**Summary**) that credit reporters must provide to individuals if they decline their requests to see or correct their credit files; as well as obligations on credit reporters to provide the Summary in the precise wording prescribed and to make available any official translations of the Summary that the Commissioner releases.

Important Dates

The Commissioner has invited submissions by 13 August 2010.

Subject to those submissions, the Commissioner envisages phasing in the changes as follows:

1 April 2011	• mandatory time limits come into force • credit reporters may start using driving licence numbers to identify individuals • subscriber agreements to be updated • from now on, all copies of the Summary must mirror the prescribed wording exactly, and copies of it and any official translations must be conspicuously displayed on credit reporters' websites
1 October 2011	• updated Summary comes into force • credit reporters must give general explanations of credit scores

1 April 2012	• comprehensive reporting starts:
	  ◦ credit reporters may collect and report credit account information
	  ◦ subscriber agreements to contain relevant updates
	• Summary as further updated (to take account of comprehensive reporting) comes into force
	• external accountability obligations come into force

FAIR TRADE COMMISSION ALLOWS MICROSOFT AND YAHOO! COMBINATION WITH CONDITIONS

◎Yvonne Hsieh

On March 11, the Executive Yuan Fair Trade Commission (FTC), pursuant to Article 12 of the Fair Trade Act, allowed the extraterritorial combination of Microsoft Corporation and Yahoo! Inc. with certain conditions.

The combination will involve transitioning Yahoo!'s core search technology, search engine, and keyword advertising platform to Microsoft. Yahoo! will become the exclusive sales force for both companies' premium search advertisers. Microsoft will be Yahoo!'s exclusive search utility provider. The FTC asserted jurisdiction because the transaction fell within the definition of "combination" under Article 6, Paragraph 1, Item 4 of the Fair Trade Act. Moreover, the Taiwan subsidiaries of both companies reported last year more than NT$4.5 billion in revenue. The combination of these two companies will have a direct, substantial, and reasonably foreseeable impact on Taiwan's economy, and should therefore be regulated. Yahoo! also has more than 25% market share in both internet ad-vertising and keyword advertising in Taiwan. This triggers a filing requirement with the FTC.

The FTC noted that after the combination, the number of keyword advertising platforms in Taiwan will remain unchanged. In addition, even though Microsoft will become Yahoo!'s exclusive search utility provider, the two companies will continue to compete in keyword advertising and the operation of internet portals based on the revenue sharing mechanisms in the coordination agreement. The FTC will therefore not block the combination. It will, however, impose conditions pursuant to its authority under Article 12, Paragraph 2 of the Fair Trade Act. These conditions will account for Taiwan's market conditions, maintain fair competition, and ensure that the economic benefits from this combination will be greater than the disadvantage resulting from competition restraints. The conditions are the following:

- Microsoft and Yahoo! shall not use their improved market power to prevent their keyword adver-tising counterparties from transacting with other companies.
- Microsoft and Yahoo! shall not engage in unfair trade practices in dealing with their counterparties or require any contract provisions that will have the effect of restraining competition.
- Microsoft and Yahoo! shall not improperly set, maintain or change prices.
- Microsoft and Yahoo! shall not unfairly prevent other companies from competing or otherwise abuse their market power.

- At the end of December in each of the three years following the combination, Microsoft and Yahoo! shall provide the FTC with information on the structure of the keyword advertising business, in-cluding the size of the market, the number of people employed in Taiwan, and market share data.

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INTELLECTUAL PROPERTY REPORT

Articles

Ariad v. Eli Lilly: Federal Circuit Embraces Written Description As A Separate Requirement For Patentability

Rob Maier and Olujimi Akindele[1]

I. Introduction

On March 22, 2010, the United States Court of Appeals for the Federal Circuit handed down its *en banc* ruling in *Ariad Pharmaceuticals, Inc. et al. v. Eli Lilly and Company*, 598 F.3d 1336 (Fed. Cir. 2010), a case addressing the issue of whether 35 U.S.C. Section 112 paragraph 1 includes a written description requirement separate and apart from the statute's enablement requirement. The court held that the statute does in fact require a separate inquiry into whether the patentee's specification meets a threshold of adequacy as a written description of the invention claimed.

Section 112 stipulates what an inventor must disclose in the specification in order to receive a patent.

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.[2]

The first paragraph of Section 112 thus appears to set out respective best mode, enablement and written description requirements. The best mode doctrine requires that the inventor disclose the best mode contemplated by him at the time of the application for carrying out the invention.[3] The best mode requirement has two parts: (1) determination of whether an inventor had a subjective belief as to the best (or a better) way of practicing the invention at the time of filing and (2) whether that method of practicing the invention is adequately disclosed.[4]

The enablement doctrine requires that an application must include sufficient, technical information to enable a person of ordinary skill in the art to practice the invention, without undue experimentation.[5] The purpose of the enablement requirement is to ensure that the patent educates others on how to make and use the invention and to ensure that the claim scope does not exceed the scope of the disclosure.[6] The test for enablement has three elements: (1) enablement is to be evaluated as of the date of the patent application filing, (2) the disclosure must be sufficient to ensure that the scope of the disclosure is commensurate with the scope of the claims and (3) a person of ordinary skill in the art must be able to apply the specification and claims to make or use the invention without undue experimentation.[7]

Lastly, paragraph 1 of section 112 speaks of a "written description," which has often been taken as a separate requirement complementing the enablement requirement and serving to ensure that an inventor may not claim subject matter not disclosed in a filed application.[8] In *Vas-Cath Inc. et al. v. Mahurkar et al.* the Federal Circuit acknowledged that the courts have used the written description requirement to police priority.[9] Policing priority refers to disallowing claims submitted subsequent to the initial filing of an application, or when inventors file claims seeking the benefit of an earlier filed foreign or United States application under 35 U.S.C. § 119, or 35 U.S.C. § 120, respectively, to the extent such disallowance is based upon a determination that nothing in the original specification evidences the applicant's possession, at the time of application, of the subject matter of the new claims.[10]

Such issues also arise during interferences when a party may try to "swear back" the claims that correspond to an interference count.[11] Under such circumstances courts have used the written description requirement to determine if there is adequate support for the new claims in the earlier disclosure. The Federal Circuit's decision in *Regents of the University of California v. Eli Lilly and Company* significantly transformed the law of written description.[12] In that decision the court stated that the written description doctrine is a substantive patentability requirement – not only a means to police priority – and applies separate and apart from the enablement requirement.[13] This paper explores the development of the substantive written description requirement (hereinafter the "written description requirement") starting from *Regents of the University of California v. Eli Lilly and Company*[14] and culminating with the Federal Circuit's *en banc* decision in *Ariad Pharmaceuticals, Inc. v. Eli Lilly and Company*.[15]

II. Background On The Written Description Requirement

i. *Regents Of The University Of California v. Eli Lilly And Company*

In *Regents of the University of California v. Eli Lilly and Company* the Federal Circuit used the written description requirement to invalidate claims that it determined lacked adequate support in the specification.[16] The Regents of the University of California alleged that Eli Lilly and Company infringed two of its patents, U.S. Patent Nos. 4,652,525 and 4,431,740, directed to the manufacture of human insulin. The claimed invention in *Eli Lilly* related to biotechnological techniques for producing human insulin, specifically, the actual nucleic acid sequence and the prokaryotic host carrying the sequence.[17] In affirming the district court's opinion that the claims in one of the asserted patents were invalid for lack of an adequate written description, the court reasoned that "a patent specification must describe an invention, and do so in sufficient detail that one skilled in the art can clearly conclude that 'the inventor invented the claimed invention.'"[18] Whether or not claims are adequately supported under the written description requirement is determined by the same "in possession" test used in the priority policing context. "[T]he applicant must also convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention."[19] In this case, the court opined that the specification only provided a general method of obtaining a human insulin nucleic acid sequence and merely recited the nucleic acid sequence for rat insulin.[20] This being so, the specification's disclosure did not provide adequate support for claims directed to transgenic microorganisms that carry the human insulin nucleic acid sequence and claims generically covering vertebrate and mammalian nucleic acid sequences.[21]

In concluding that the asserted patent was invalid due to a lack of an adequate written description, the court differentiated the patentability requirements of enablement and written description.[22] "Whether or not [the patent] provides an enabling disclosure, it does not provide a written description of the cDNA encoding human insulin, which is necessary to provide a written description of the subject matter [of the claim]."[23]

ii. *Enzo Biochem v. Gen-Probe et al.*

In *Enzo Biochem, Inc. v. Gen-Probe Inc. et al.*, 323 F.3d 956 (Fed. Cir. 2002), the Federal Circuit clarified its position on whether a biological deposit can satisfy the written description requirement. In this case, Enzo, the assignee of U.S. Patent No. 4,900,659, a patent directed to nucleic acid probes capable of detecting a strain of gonorrhea-causing bacteria, alleged infringement by Gen-Probe. Enzo appealed a grant of summary judgment that had found the claims invalid for failure to meet the written description requirement.[24] After initially remanding the case, instructing that a biological deposit can not satisfy the written description requirement, the Federal Circuit articulated a more contextual standard for determining whether the written description requirement has been met. "Compliance with the written description requirement is essentially a fact-based inquiry that will 'necessarily vary depending on the nature of the invention claimed.'"[25]

The court held that the written description requirement is satisfied for claimed nucleic acid sequences, and their functional ability, when the specification references publicly accessible biological deposits that are otherwise difficult to describe. The *Enzo* case illustrates the difficulty in establishing what satisfies the "possession" test for determining the adequacy of the written description in the context of hard to describe technologies. Accordingly, the Federal Circuit's *Enzo* decision arguably lent greater flexibility to the written description requirement determination, though arguably only for some technical subject matter such as biotechnology.

iii. *Moba, B.V. et al. v. Diamond Automation, Inc.*

The Federal Circuit in *Moba, B.V. et al v. Diamond Automation, Inc.*, 325 F.3d 1306 (Fed. Cir. 2003) addressed both enablement and written description in determining the validity of the asserted patents. After the District Court denied the defendant's motion for Judgment as Matter of Law regarding plaintiff's infringement and willfulness, the Federal Circuit upheld the jury's finding of non-invalidity for lack of an adequate written description.[26] Nonetheless, Judge Rader issued a concurrence criticizing the use of the written description language of Section 112 as a separate patentability requirement.[27] Judge Rader argued that the *Moba* majority perpetuated a mistake made in *Eli Lilly*.

> It defies over thirty years of case law. It finds no specific support in any statutory language. It creates a technology-specific rule in a technology-neutral statute. It distorts the statute's rules for adequate disclosure of inventions. It complicates biotechnology patent drafting to the point of near impossibility and invites invalidating mistakes. It prices non-

> corporate inventors out of some biotechnological invention markets. Last, but not least, it burdens both trial and appellate courts with unnecessary and confusing procedures in otherwise simple cases like this one.[28]

Judge Bryson also contributed to the debate, asserting that *In re Ruschig*, rather than *Eli Lilly*, was where the court went wrong:

> Put another way, if the *Ruschig* line of cases is sound as a matter of statutory construction, it is difficult to see why that construction does not apply equally in the Lilly non-priority context. Perhaps the entire line of cases stemming from *Ruschig* is wrong, and perhaps we should at some point address that question *en banc*.[29]

The *Moba* decision and its concurrences illustrate the debate that for some years persisted within the Federal Circuit bench regarding the legitimacy of the written description requirement as a standalone condition for patentability.[30]

III. *Ariad v. Eli Lilly*

On March 22, 2010, the Federal Circuit issued its decision in *Ariad Pharmaceuticals, Inc. v. Eli Lilly and Company*, 598 F.3d 1336 (Fed. Cir. 2010). Judge Bryson's wish came true, at least to the extent that he sought a clear *en banc* determination of the written description question. In its *en banc* decision, the Federal Circuit settled the debate over the interpretation of the first paragraph of §112, holding that the statute requires that a specification must include a written description of the invention that meets a separate standard of evidencing the inventor's possession of the invention as claimed, apart from the enablement requirement.[31]

In *Ariad*, the plaintiff alleged that Eli Lilly infringed its patent, U.S. Patent No. 6,410,516, directed to a method of reducing NF-kB activity in eukaryotic cells. Lilly among other things argued for a finding of invalidity due to a lack of an adequate written description.[32] Nonetheless, at trial the jury found the patent not invalid for anticipation, lack of enablement, nor lack of an adequate written description, and held Eli Lilly liable for infringement.[33] On appeal, the Federal Circuit panel upheld the existence of the written description requirement by holding that the asserted claims were invalid for lack of an adequate written description.[34] The court subsequently granted Ariad's petition for *en banc* review on this issue.[35]

On appeal to the *en banc* court, Ariad argued that the enablement test, whether the disclosure enables one with skill in the art to make and use the invention, adequately satisfies the disclosure requirements of §112 paragraph 1.[36] The court's *en banc* opinion noted that in interpreting the statute Ariad essentially adopted the following construction: Ariad would argue that the statute requires "two components: a written description (i) of the invention, and (ii) of the manner and process of making and using it."[37]

> The specification shall contain
> [A] written description
> [i] of the invention, and
> [ii] of the manner and process of making and using it,
> [B] in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same . . . .[38]

In Ariad's interpretation, then, there would be no separate written description requirement, rather the "written description" is simply that material which must enable.

Eli Lilly, on the other hand, argued that whether the invention is adequately described should be assessed separately from whether the specification enables the invention.[39]

> [Section] 112, first paragraph, contains three separate requirements. Specifically, Lilly parses the statute as follows:
> 'The specification shall contain a written description of the invention, and'
> 'The specification shall contain a written description ... of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and'
> 'The specification ... shall set forth the best mode contemplated by the inventor of carrying out the invention.'"[40]

On Lilly's view, then, as the *en banc* court characterized it, the specification must describe the invention *and* that written description must also enable the invention. The court commented that although the parties' respective views differed on the existence of a separate written description requirement, they did both broadly recognize that a patent must describe the invention and enable it.[41] The litigants differed only on which standard should be applied to determine whether the disclosure is adequate to support the claims.

In adopting Lilly's preferred construction of the statute, the court stated that "[w]e see nothing in the statute's language or grammar that unambiguously dictates that the adequacy of the 'written description of the invention' must be determined solely by whether that description identifies the invention so as to enable one of skill in the art to make and use it."[42] Further, the court noted approvingly a point raised in briefs submitted by certain *amicus curiae* parties that Ariad's contended-for interpretation of the statute would reduce the language, "and of the manner and process of making and using it" and "[a written description] of the invention" to surplusage, thereby violating the presumption of statutory construction that Congress does not use unnecessary words.[43] The court contended that the language of earlier Patent Acts reflected the existence of a written description requirement.[44]

The court further found that the *quid pro quo* policy underpinnings of the patent system support the application of a separate written description requirement.[45] Additionally, the court found that its interpretation of Supreme Court precedent; its predecessor court, the court of Customs and Patent Appeals' precedent; and its own jurisprudence supported the existence of a separate written description requirement.[46] Judge Newman wrote separately, Judge Gajarsa filed a concurrence and Judges Rader and Linn filed and joined in each others opinions dissenting-in-part and concurring-in-part.[47] Despite the divergences of opinion that seem from these concurring and dissenting opinions to continue to linger on the Federal Circuit bench as to the details of the written description requirement, *Ariad* makes clear that the standalone written description requirement for patentability, and its "in possession" test are clearly a separate condition of patentability under Section 112, at least unless or until the Supreme Court decides to opine on this issue.[48]

IV. Conclusion

For those hoping for greater clarity in the law on written description the *Ariad* decision is a small to moderate gain. Although the court did manage to settle the baseline question of the existence of a separate written description requirement for patentability, it left unresolved multiple potentially-ambiguous ideas on how that requirement can be met or adjudicated. As Judge Rader opined in his dissent, what is sufficient to satisfy the written description requirement is less than clear from the multiple precedential cases that have considered the issue.[49] *Eli Lilly*,[50] *Ariad*[51] and especially *Enzo*,[52] as discussed above, have all demonstrated the unique difficulties as to application of the written description requirement in the context of biotechnology. In *Capon et al. v. Eshar et al.*, 418 F.3d 1349 (Fed. Cir. 2005), the Federal Circuit responded to the difficulty in applying the written description requirement in the biotech context and emphasized that it should be applied with flexibility. "The written description requirement must be applied in the context of the particular invention and the state of the knowledge."[53] Such a statement is easy to agree with but hard to convert into a workable test that can be applied predictably across different patents and technologies.

The Federal Circuit has acknowledged the need for flexibility in the context of mechanical inventions as well.[54] Because the written description inquiry is a question of fact, ambiguity (or to put it more positively, judicial flexibility) in its application is not surprising.[55] Companies with exposure to patent issues will likely continue to monitor just how the district courts and Federal Circuit make use of such flexibility now that the fundamental question of whether the written description requirement has a life of its own has been settled.

1 Olujimi Akindele is a law clerk in the Patent Law group of Baker Botts L.L.P.
2 35 U.S.C. § 112 paragraph 1.
3 *Chemcast, Corp. v. Arco Industries, Corp.*, 913 F.2d 923, 927-28 (Fed. Cir. 1990).
4 *Id.* ("[W]hether a best mode disclosure is adequate, that is, whether the inventor concealed a better mode of practicing his invention than he disclosed, is a function of not only what the inventor knew but also how one skilled in the art would have understood his disclosure," (citing *Dana Corp. v. IPC Limited Partnership*, 860 F.2d 415, 418, 8 USPQ2d 1692, 1696 (Fed. Cir. 1988))).
5 Martin J. Adelman, Randall R. Rader, Gordon P. Klancnik, Patent Law 192 (2008).
6 *See*, *e.g.*, *O'Reilly v. Morse*, 56 U.S. 62 (1854).
7 Martin J. Adelman, Randall R. Rader, Gordon P. Klancnik, Patent Law 193-94 (2008).
8 *Id.* at 203.
9 *Vas-Cath Inc. et al. v. Mahukar et al.*, 935 F.2d 1555, 1560 (Fed. Cir. 1991).
10 *Id.*
11 *Id.*
12 *Regents of the University of California v. Eli Lilly and Company*, 119 F.3d 1559 (Fed. Cir. 1997).
13 *Id.* at 1567.
14 *Eli Lilly*, 119 F.3d 1559.
15 *Ariad Pharmaceuticals, Inc. et al. v. Eli Lilly and Company*, 598 F.3d 1336 (Fed. Cir. 2010).

[16] *Eli Lilly*, 119 F.3d at 1569.
[17] *Id.* at 1562.
[18] *Id.* at 1566 (quoting *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997)).
[19] *Vas -Cath Inc. et al. v. Mahurkar et al.*, 935 F.2d 1555, 1563-1564 (Fed. Cir. 1991).
[20] *Eli Lilly*, 119 F.3d at 1567.
[21] *Id* at 1569.
[22] *Id* at 1567.
[23] *Id*.
[24] *Enzo Biochem, Inc. v. Gen-Probe, Inc. et al.*, No. 99-CV-4548 (S.D.N.Y. Jan. 24, 2001).
[25] *Enzo Biochem, Inc. v. Gen-Probe Inc. et al.*, 323 F.3d 956, 963 (Fed. Cir. 2002).
[26] *Moba, B.V. et al. v. Diamond Automation, Inc.*, 325 F.3d 1306, 1321 (Fed. Cir. 2003).
[27] *Id.* at 1321-27 (Rader, J. concurring).
[28] *Id.* at 1326-27 (Rader, J. concurring).
[29] *Id.* at 1327-28 (Bryson, J. concurring) (citing *In re Ruschig*, 379 F.2d 990 (C.C.P.A. 1967)).
[30] *See* Denise W. DeFranco, Ashley A. Weaver, *Written Description and Enablement: One Requirement or Two?*, 15 Fed. Cir. B.J. 102 , 115 (2005); *see also University of Rochester v. G.D. Searle & Co.*, 375 F.3d 1303 (Fed. Cir. 2004) (Rader, J. dissenting) (Linn, J. dissenting) (Dyk, J. concurring).
[31] *Ariad Pharmaceuticals, Inc. et al. v. Eli Lilly and Company*, 598 F.3d 1336 (Fed. Cir. 2010).
[32] *Ariad Pharmaceuticals, Inc. et al. v. Eli Lilly and Company*, 529 F.Supp.2d 106 (D. Mass. 2007).
[33] *Id*.
[34] *Ariad Pharmaceuticals, Inc. et al. v. Eli Lilly and Company*, 560 F.3d 1366 (Fed. Cir. 2009).
[35] *Ariad Pharmaceuticals, Inc. et al. v. Eli Lilly and Company*, 595 F.3d 1329 (Fed. Cir. 2009).
[36] *Ariad*, 598 F.3d at 1342.
[37] *Id.* at 1343.
[38] *Id*.
[39] *Id.* at 1342.
[40] *Id.* at 1344.
[41] *See Id.*
[42] *Id.* at 1344.
[43] *Id.* at 1345 (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).
[44] *Id.* at 1345.
[45] *Id.* (maintaining that "A description of the claimed invention allows the United States Patent and Trademark Office ('PTO') to examine applications effectively; courts to understand the invention, determine compliance with the statute, and to construe the claims; and the public to understand and improve upon the invention and to avoid the claimed boundaries of the patentee's exclusive rights").
[46] *Id.* at 1345-54.
[47] *See Ariad Pharmaceuticals, Inc. et al. v. Eli Lilly and Company*, 598 F.3d 1336 (Fed. Cir. 2010).
[48] *Id.* at 1349 (affirming Lilly's articulation of the written description requirement, "that the specification objectively demonstrate that the applicant actually invented-was in possession of-the claimed subject matter).
[49] *See Ariad*, 598 F.3d at 1368 (Rader, J. dissenting-in-part, concurring-in-part).
[50] *Regents of the University of California v. Eli Lilly and Company*, 119 F.3d 1559 (Fed. Cir. 1997).
[51] *Ariad Pharmaceuticals, Inc. et al. v. Eli Lilly and Company*, 598 F.3d 1336 (Fed. Cir. 2010).
[52] *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 323 F.3d 956 (Fed. Cir. 2002).
[53] *Capon*, 418 F.3d at 1358 (admonishing the Board of Patent and Appeals and Interferences for its "inappropriate generalization" that nucleotide sequences for chimeric genes must be presented in the specification); *see also TurboCare Division of Demag Delaval Turbomachinery Corp. v. General Electric Co.*, 264 F.3d 111, 1119 (Fed. Cir. 2001) (holding that satisfaction of the written description requirement need not rely on an explicit statement if it is inherent in what is described).
[54] *Moba*, 325 F.3d at 1321 ("the *Lilly* disclosure rule does not require a particular form of disclosure because one of skill could determine from the specification that the inventor possessed the invention at the time of filing") (affirming the jury's finding of no lack of adequate written description in patent for egg processing apparatus).
[55] *Ariad*, 598 F.3d at 1351.

and the materials result in a client contact in such jurisdiction, Baker Botts may be prohibited from assuming representation of the client contact.

FCC Annual Regulatory Fees Due Aug. 31, 2010: Fee Filer Website Now Available

08.06.10

By Brendan Holland

All Federal Communications Commission (FCC) licensees and permittees, including radio and television broadcasters, must pay their annual regulatory fees for fiscal year 2010 by Aug. 31, 2010. Licensees and permittees are responsible for paying the annual regulatory fees required for the authorizations they hold to the FCC in a timely fashion, or they will face additional penalties and the possibility of delays in the processing of pending applications. Failure to remit payment by 11:59 p.m. EDT on Aug. 31 will automatically trigger a 25 percent late fee.

Although the Commission began mailing reminder notifications to broadcast licensees and permittees nearly two weeks ago, the Commission has only recently updated its Fee Filer website to actually permit the payment of this year's fees. As of Aug. 6, 2010, the FCC Fee Filer website contains the necessary information to allow payment of the 2010 regulatory fees. Accordingly, licensees and permittees may now log on to the Fee Filer website and remit their fees.

More information regarding the annual regulatory fees, including instructions for submitting the fees, is available from the Regulatory Fees page of the FCC's website. The FCC also has a "lookup" database to allow stations to confirm the amount owed for their stations, which is available at FCC's Regulatory Fee Information Website. For those needing more detail, please see the Commission's full Order, which contains the 2010 fees for all types of licensees.

Consistent with the procedures adopted last year, all licensees are required to pay the annual regulatory fees online via the FCC's Fee Filer website. In order to access the Fee Filer website and remit the regulatory fee payment, licensees must have a valid FCC registration number (FRN) and related password. Payment may be made electronically by credit card or debit card, or by check or money order. If a licensee prefers to remit payment by check or money order, the licensee must first use the FCC's electronic Fee Filer system to create a Form 159-E voucher generated by the Fee Filer system. That Form 159-E voucher must then accompany the submission of payment by check or money order, which must be sent to the FCC's receiving bank in St. Louis, Mo.

Although the regulatory fee covers the fiscal year Oct. 1, 2009, to Sept. 30, 2010, the current licensee of a broadcast station is the one responsible for the payment of the annual regulatory fee. Even if you just acquired a station, it is your responsibility to pay the 2010 regulatory fee for that station. Fees are based on the status of the station as of Oct. 1, 2009. So stations that have upgraded and received a license for new facilities since Oct. 1, 2009, will pay for the facility as it was licensed on Oct. 1, 2009. Similarly, new stations that were constructed and licensed after Oct. 1, 2009, pay only the fee for the construction permit that was in place as of Oct. 1, 2009.

In recent years, the FCC has aggressively enforced the regulatory fee filing requirement. A payment that is even one day late will automatically incur the 25 percent penalty. And if the fees and penalties remain unpaid after receipt of a late notice from the FCC, no applications for the licensee will be accepted or processed until the fees and penalties have been paid in full. That requirement has delayed the processing of innumerable applications in the last few years, and is something licensees should avoid.

Davis Wright Tremaine LLP

Although the FCC has already mailed notices to many licensees setting forth how much each station owes, in the past not every station or licensee has received the notice, and not every notice has been accurate. The FCC places the obligation on the licensee to ensure that addresses in the Commission's database are accurate. If the mailing address is not accurate, or if the notice is not received for any reason, the FCC will not allow that as an excuse for a late payment. In addition, the FCC's notices do not contain fee assessments for any broadcast auxiliary stations or earth stations, which the licensee must identify and include themselves. The bottom line is that licensees are responsible for paying their annual regulatory fees, whether or not any notice is received from the FCC.

Accordingly, licensees should submit their fees on time and make certain the payments are accurate. Be sure to keep a copy of all correspondence, electronic confirmations, and proof of payment when submitting the fees. We suggest that you take some extra time to ensure these fees are paid properly by Aug. 31, and that payment records are retained in order to avoid later problems.

For assistance with the 2010 FCC Regulatory Fees please contact any of the attorneys in Davis Wright Tremaine's Broadcast Practice Group.

Interested in what's happening in the broadcast industry? Check out our Broadcast Law Blog!

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Medical Device Alert
August 2010

Print

FDA Releases Highly-Anticipated Working Group Reports on 510(k) Program, New Science

On Wednesday, August 4, 2010, the Food and Drug Administration's (FDA) Center for Devices and Radiological Health (CDRH) released the highly-anticipated preliminary reports of two internal agency working groups evaluating ways to improve the premarket notification 510(k) program, and ways to incorporate advances in scientific knowledge into the regulatory decision-making process.

CDRH's Director, Jeffrey Shuren, M.D., J.D., established these working groups in 2009 to address challenges the agency has been facing in recent years with regard to: (1) concerns that the 510(k) program may not be achieving its goals of making available safe and effective devices and fostering innovation; and (2) how to adapt CDRH's processes as science evolves or new information on a device becomes available. As part of these reviews, the agency held a Public Workshop, titled *Strengthening the Center for Devices and Radiological Health's 510(k) Review Process* [1] on February 18, 2010, and one on February 9, 2010, titled *Incorporation of New Science into Regulatory Decision Making within CDRH.* [2] It is noted that in addition to the 510(k) Working Group, which is intended to identify actions CDRH can take to improve consistency in the 510(k) process in the short term under FDA's existing authority, the agency has also commissioned an Institute of Medicine (IOM) independent review of the 510 (k) program to recommend administrative, regulatory, and statutory changes. The IOM report on the 510(k) program is not expected until May 2011[3].

If the preliminary recommendations of the 510(k) Working Group and the Task Force on the Utilization of Science in Regulatory Decision Making ("New Science" Task Force) are implemented, these would likely represent the most sweeping changes to the 510(k) program by which the majority of medical devices enter the market in decades.

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While the reports detail numerous recommended changes (see links to the full reports below), some of the changes that have the potential to most significantly affect industry are described below:

A New "Class" of Device: The 510(k) Working Group recommends creation of a subset of class II devices called "class IIb" devices. Such devices, which may include implantable or life-sustaining or supporting devices, would usually require the submission of clinical data and manufacturing data in the 510(k) notice, as well as be subject to additional postmarket requirements. This could include "condition-of-clearance" studies that are suggested by the report. Within several other new recommendations in the Working Group report, the agency suggests staged implementation, starting with class IIb devices. For example, the report recommends consideration of a requirement for manufacturers to provide regular, periodic updates on device modifications made post-market, to be applied initially to class IIb devices.

Disallowing Certain Predicates: The 510(k) Working Group recommends clarifying the situations in which multiple predicates can be used to support a determination of substantial equivalence, and potentially disallowing the practice of "split predicates" (i.e., using one predicate for intended use and another for technological characteristics) altogether. The report notes an analysis performed by the Working Group showing that citing more than five predicates in a 510(k) is associated with increased adverse events, and recommends additional analysis of this finding. In addition, the report recommends the development of guidance on when predicates may no longer be used (for example, if a device has been removed from the market for safety concerns).

Changes to the Concept of Intended Use: The 510(k) Working Group recommends combining the concepts of "Intended Use" and "Indications for Use", and providing guidance as to what specific characteristics should be included in "Intended Use", to address the concern that future minor labeling changes could be considered a "new" "Intended Use". The report also suggests training for reviewers regarding what elements of a 510(k) can be used to determine intended use, including "device design (explicit or implicit)" and literature. In addition, the report recommends the consideration of a statutory amendment that would allow the agency the authority to consider off-label uses of a device in a 510(k) review.

Clarifying Substantial Equivalence Flowchart: The 510 (k) Working Group report recommends outlining criteria for identifying "different questions of safety and effectiveness" as described in the agency's 510(k) decision-making flowchart.

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Streamlining the De Novo 510(k) Process: Acknowledging the lengthy review times and unclear requirements of the de novo 510(k) process today, the Working Group proposes streamlining the process and clarifying the agency's expectations with regard to these devices. One option mentioned is creating a generic set of special controls for devices that are cleared via this process, to be supplemented by device-specific special controls.

Changes to 510(k) Submission Requirements: The report recommends changes to the regulations to require the submission of all known scientific information related to the safety or effectiveness of a device in a 510(k) notice, as opposed to just the information required to support a determination of substantial equivalence. In addition, the report discusses the option of using an "assurance case" framework concept for 510(k) submissions to demonstrate the validity of claims.

Improvements to 510(k) Database: The "New Science" Task Force recommends expanding the 510(k) database to include such information as device schematics, how cleared 510(k)s relate to one another, and device labeling. The report also suggests guidance for 510(k) Summaries to ensure they include all information required by the regulations.

"Notice to Industry": As part of the "New Science" initiative, the Task Force has proposed development of procedures for collecting new scientific information, decision-making based on this information, and communication of actions to stakeholders. As part of this process, the Task Force has recommended development of a "Notice to Industry" which would be sent to all manufacturers of a certain type of device when the agency has revised its regulatory standard for that type of device, based on new scientific information. The notice would provide the basis for the agency's decision. Although these notices would be immediately in effect, a public docket would be opened for comment.

At this time, these two preliminary reports are being circulated for public comment. Any interested party is welcome to comment on any of the recommendations contained in the reports, or to provide alternative suggestions. As described in the associated August 5, 2010, Federal Register notice[4], comments will be accepted until October 4, 2010, and can be submitted electronically at www.regulations.gov, referencing Docket No. FDA-2010-N-0348. Once the agency has compiled and analyzed the comments, it will announce which recommendations it intends to implement, with associated implementation timelines.

Please see below for links to the two working group reports, as well as an accompanying letter from the CDRH Director, and a link to a Q&A web page about the reports:

• CDRH Preliminary Internal Evaluations - Foreword: A Message from the Center Director

• CDRH Preliminary Internal Evaluations - Volume I: 510 (k) Working Group Preliminary Report and Recommendations

• CDRH Preliminary Internal Evaluations - Volume II: Task Force Utilization of Science in Regulatory Decision Making Preliminary Report and Recommendations

• CDRH Preliminary Internal Evaluations - Basic Questions and Answers on Preliminary Reports

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[1] edocket.access.gpo.gov/2010/pdf/2010-1620.pdf

[2] edocket.access.gpo.gov/2009/E9-30114.htm

[3] The Gray Sheet, "Broad 510(k) Reform Still On The Table; IOM Panel Enters Closed-Door Phase", August 2, 2010.

[4] edocket.access.gpo.gov/2010/pdf/2010-19339.pdf

Court Reverses Course, Allows Defendants in Insurance Bad Faith Lawsuits to Recover Costs After Making Joint §998 Offer to Husband and Wife Plaintiffs

Peter H. Klee

Anthony Dibenedetto

§998 Offer to Compromise

California Code of Civil Procedure §998 provides a mechanism for a litigant to recover certain costs when the opposing party has rejected a good faith offer to compromise. Under §998, if a plaintiff does not accept a defendant's good faith offer to compromise and then fails to obtain a more favorable judgment, the plaintiff must compensate the defendant for his or her post-offer costs. The court may also hold the plaintiff responsible for the defendant's expert witness fees. Therefore, §998 provides defendants with a powerful case-resolution tool.

Claims Brought Jointly by Husband and Wife

Historically, in cases involving joint plaintiffs claiming separate injuries, defendants were not allowed to make joint settlement offers, but rather were required to present a separate, unconditional offer to each plaintiff. Courts found that this limitation was necessary to prevent one plaintiff from depending on another for acceptance of a settlement offer and to avoid uncertainty regarding apportionment of a joint settlement offer among individual plaintiffs.

In *Weinberg v. Safeco Ins. Co. of America*, 114 Cal.App.4th 1075 (2004), the court applied this rule in a bad faith case arising from an uninsured motorist claim. The court reasoned that the husband and wife plaintiffs did not suffer a "single, indivisible injury" because each plaintiff may have "suffer[ed] varying degrees of emotional distress." Therefore, the defendant was required to make independent offers to compromise to each plaintiff in order to comply with §998.

Cases such as *Weinberg* constructively eliminated the use of §998 offers by defendants in insurance bad faith cases brought by husband and wife plaintiffs. The requirement that separate, unconditional settlement offers be made to each plaintiff created a significant risk that one plaintiff would accept the settlement offer while the other plaintiff would continue to pursue the full amount of any claim for policy benefits.

New Case Authorizes Joint §998 Offers to Husband and Wife Plaintiffs

On May 26, 2010, the same Court of Appeal that decided Weinberg reversed itself in *Barnett v. First National Insurance Company of America*, 184 Cal.App.4th 1454 (2010), a bad faith case brought by a husband and wife arising out of a homeowners insurance claim. The *Barnett* court noted that regardless of whether the injuries claimed by a husband and wife are "indivisible" or "separate," a cause of action to recover damages, as well as the actual recovery, are community property. Therefore, because California Family Code §1100(a) places control of community property in either spouse, either plaintiff could have accepted the insurer's offer to settle without obtaining the other plaintiff's consent. Further, because both spouses have equal interests in a potential recovery, allocation of damages is not an issue.

Ramifications of the *Barnett* Decision

In the past, defendants in bad faith cases brought jointly by husband and wife plaintiffs had little choice but to forego one of their strongest settlement negotiation tools. The *Barnett* decision, however, allows defendants to use this tool in such cases. Defendants now have significantly more leverage to compel joint husband and wife plaintiffs to accept a good faith offer to settle because failure to accept the offer will subject the plaintiffs to §998 penalties.

If you have any questions, please contact Peter Klee at 619.699.2412 or pklee@luce.com.

WSGR ALERT

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DEPARTMENT OF ENERGY EXTENDS RENEWABLE ENERGY LOAN GUARANTEE SOLICITATION

The U.S. Department of Energy (DOE) has announced that it is extending the final Part I application deadline for loan guarantees under its July 2009 energy efficiency, renewable energy, and advanced transmission and distribution technologies solicitation.

The new deadline for Part I of the loan guarantee application is October 5, 2010. The previous deadline was August 24, 2010. This gives companies an additional six weeks to apply for a Section 1705 federal loan guarantee for eligible projects, the credit subsidy costs of which are paid for by an appropriation under the American Recovery and Reinvestment Act (Recovery Act). The deadline for Part II of the application remains December 31, 2010. The DOE announcement can be found at http://www.energy.gov/news/9306.htm.

The stated purpose of DOE's deadline extension is to encourage more companies to apply for the loan guarantee. Note, though, that companies should expect an intensive application process, due to the detailed information and analyses required to be submitted to DOE in the application. Companies that meet certain threshold requirements in Part I of the application process are invited to submit a more detailed Part II application. The application and approval process can take 8-12 months from start to finish.

Established under Title XVII of the Energy Policy Act of 2005, and amended by the Recovery Act, the loan guarantee program is aimed at accelerating commercial use of new or improved energy efficiency, renewable energy, and advanced energy transmission and distribution technologies. The July 2009 program solicitation issued by DOE can be found at http://www.lgprogram.energy.gov/2009-ren-energy-sol.pdf.

Wilson Sonsini Goodrich & Rosati's government initiatives practice, led by John Mizroch, former Acting Assistant Secretary of DOE's Office of Energy Efficiency and Renewable Energy, is comprised of a team of legal and other professionals who have successfully represented clean tech companies in federal loan guarantee transactions. Those transactions include loan guarantees for Solyndra and Tesla Motors, as well as several companies currently in Part II of the Section 1705 application process. The government initiatives practice works closely with the firm's project finance and corporate finance teams to structure successful financings for renewable energy and clean technology companies. Please visit http://www.wsgr.com/PDFSearch/ctp_guide.pdf for the firm's guide to project finance for clean technology projects.

Wilson Sonsini Goodrich & Rosati also maintains the Clean Tech Resource Center, an online tool that provides clean technology entrepreneurs and companies with a searchable, easy-to-use source for federal and state government funding opportunities and guidance. The Clean Tech Resource Center is located at http://www.wsgr.com/cleantech.

For additional information about this or other government funding opportunities, please contact John Mizroch (jmizroch@wsgr.com), Chris Groobey (cgroobey@wsgr.com), or Andy Hirsch (ahirsch@wsgr.com) at Wilson Sonsini Goodrich & Rosati.

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