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March 2014 e-Bulletin

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April 26-29
Hosted by Lee and Li

PRAC 56th International Conference
Chile 2014
November 8 - 11
Hosted by /Carey

PRAC @ IPBA Vancouver
May 8, 2014

PRAC @ IBA Tokyo
October 20, 2014

PRAC @ INTA Hong Kong
May 11, 2014

Details for all events

www.prac.org

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► CAREY Acts for VTR in Liberty Global Reorganization of its Credit Pools
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► DENTONS Advises KG (US) Oilers Corp in Cross-border Acquisition of the Bakersfield Condors
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ARIAS & MUÑOZ ANNOUNCE PARTNER ADMISSIONS IN HONDURAS AND NICARAGUA

01 March, 2014: The appointments of **Mario Agüero, Roger Perez** and **Gustavo-Adolfo Vargas** are a result of their excellence and commitment, and is also part of the expansion and strengthening process of Arias & Muñoz's local offices throughout the Central American region, and consolidates the firm's leadership, widely renowned in the legal market.

With 8 years' experience within the firm, **Mario Agüero** has been promoted to Partner in our offices in Honduras. Mario has focused his practice in the areas of Corporate, Aviation and Telecommunications Law. In numerous emblematic transactions conducted in Honduras, his work has always been marked by professionalism and dedication, always taking care in providing the best customer service. He holds a Masters in Business Law from the IE Law School in Madrid and a degree in Law from the Universidad Nacional Autónoma de Honduras.

Roger Perez has extensive experience in Corporate law, Real Estate, Labor Law, Mergers and Acquisitions and Tax and Fiscal Planning. He assists local and international clients in contracts, corporate affairs and investments, establishment of free trade zones, as well as mergers and acquisitions and financing. Additionally, Roger is a Professor of Mercantile and Commercial law at the Universidad Americana since 2010. He has a Master's Degree in Labor Law Counseling from Centro de Estudios Garrigues, Spain, through a scholarship from Fundación Carolina and has a Diploma in Finance from Universidad Americana (UAM) in Nicaragua. He obtained his Law Degree from Universidad Americana (UAM) and a Business Administration Degree at the same University. He is authorized as a Practicing Attorney and Notary Public by the Supreme Court of Justice of Nicaragua. Roger practices in our offices in Nicaragua.

Gustavo-Adolfo's practice includes Corporate and Commercial, Real Estate, Project and Infrastructure Finance, Mergers and Acquisitions, Technology, Media and Telecommunications, Energy and Mining areas, participating in numerous complex transactions, representing financial institutions, banks, multilateral agencies, as well as local and international companies. He holds a Master of Laws (LL.M.) with emphasis in Business and Corporate Law from Northwestern University School of Law, Chicago, IL. He obtained his Bachelor of Laws (LL.B.) from the Universidad Americana (UAM), Nicaragua. He is authorized as a practicing Attorney and Notary Public in Nicaragua and practices in our Nicaragua offices.

For additional information visit www.ariaslaw.com

DAVIS WRIGHT TREMAINE ADDS LABOR ATTORNEY

JFFREY S. BOSLEY JOINS EXPANDING LABOR AND EMPLOYMENT PRACTICE IN SAN FRANCISCO

26 February, 2014: Jeffrey S. Bosley, a lawyer with two decades of experience representing clients in labor and employment matters, has joined Davis Wright Tremaine LLP as a partner in the firm's San Francisco office.

Bosley comes to Davis Wright from Winston & Strawn LLP, where for the past 10 years he successfully represented and counseled employers concerning labor relations, collective bargaining, and all types of employment-related issues across a wide range of industries before state and federal courts and agencies. Among his notable cases, Bosley briefed and argued a precedent-setting case on the use of email in the workplace before the National Labor Relations Board.

"We are extremely pleased to add a lawyer with Jeff's outstanding skills and experience to the firm," said Henry Farber, chair of the labor and employment practice at Davis Wright Tremaine. "The scope of Jeff's practice and his dedication to top-notch client service make him an excellent fit for our team."

Bosley has written and spoken extensively on labor and employment topics, including the impact of social media and technology in the workplace and strategies to minimize potential liability from the use of social media. Since 2008, he has authored the NLRA notes column for the California State Bar's Labor and Employment Section Law Journal.

"I'm thrilled to join the labor and employment team at Davis Wright," said Bosley. "The firm's continued growth in California, and its commitment to technical excellence, collaboration, and efficiency will bring added value to my clients and practice."

For more information, visit www.dwt.com

UPCOMING PRAC EVENTS

• **PRAC 55th International Conference**
Taipei 2014 Hosted by Lee and Li
April 26-29

• **PRAC @ IPBA Vancouver 2014** May 8

• **PRAC @ INTA Hong Kong 2014** May 11

• **PRAC @ IBA Tokyo** October 20, 2014

• **PRAC 56th International Conference**
Chile 2014 Hosted by /Carey
November 8-11

Visit www.prac.org/events
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Events open to PRAC Member Firms only

DENTONS CANADA ADDS 46 LAWYERS

Toronto - 26 February, 2014: Dentons Canada LLP is pleased to announce that a total of 46 lawyers have joined the firm's offices in Montreal, Toronto and Calgary this month from Heenan Blaikie LLP, including a further five partners and 11 associates who have joined since previous announcements. These lawyers are joining key practice areas at Dentons, complementing and building on the strength of the firm's current groups.

"The dissolution of a respected firm like Heenan Blaikie is a sobering event for all of us in the Canadian legal community" said Chris Pinnington, Dentons' Canada Chief Executive Officer. "However, we are pleased that our new colleagues have chosen Dentons as the firm best suited to meet the needs and expectations of their clients and to enable them to continue to build their successful practices. They enhance our strength in a number of our key practices and sectors, in strategic alignment with our Canadian and global platform."

"These lawyers are highly sought-after professionals and it is a testament to our business vision and strategy that they are choosing Dentons as their new firm," said Elliott Portnoy, Dentons' Global Chief Executive Officer. "Our clients in Africa, Asia, Europe, the Middle East, UK and US – and, of course, Canada – will greatly benefit from the wealth of experience and legal talent these 46 lawyers add to our strong and dynamic team."

Our newly announced partners and counsel are:

> **Wendy Del Mu**l (counsel) and **Allen Garson** (partner) are joining Dentons' Corporate group in Toronto;
> **Kenneth Kraft** (partner) and **John Salmas** (partner) are joining Dentons' Insolvency group in Toronto; and
> **Tommaso Nanci** (counsel) joins Dentons' Infrastructure/P3 group in Montreal.

An additional 11 associates are now confirmed to join Dentons Canada. In Montreal, **Audrey Myette** (Tax) and **Lampros Stougiannos** (Infrastructure/P3); in Toronto, **Jayme Alter** (Entertainment), **Andrew Bourns** (Business Law), **Liane Fong** (Business Law); **Radha Kholsa** (Financial Services), **Michael Shedletsky** (Entertainment), **Larry Nevsky** (Tax) and **Rahim Suleiman** (Business Law); and in Calgary, **Darryl Douglas** (Energy Transactions) and **Danielle Mayhew** (Corporate Securities).

Dentons Canada has also hired a number of Heenan Blaikie's current articling, incoming summer and incoming articling students, and staff. Since Dentons' global combination became effective in March 2013, Dentons Canada has engaged in a targeted strategic recruitment campaign to grow key practices and further enhance the firm's client services.

For additional information visit www.dentons.com

GOODSILL EXPANDS CORPORATE & SECURITIES PRACTICE WITH PARTNER ADD, WELCOMES TWO ASSOCIATES AND PROMOTES TWO TO PARTNERSHIP

Honolulu - 26 February, 2014: Naomi Sakamoto has joined Goodsill Anderson Quinn & Stifel LLP as a partner. Naomi is a member of Goodsill's Corporate and Securities practice group. She represents clients in administrative proceedings, business transactions, international, corporate, healthcare, investment advisory and securities matters. She is also engaged in the representation and defense of financial services professionals and health care providers in regulatory investigations, disciplinary and enforcement proceedings.

Prior to joining Goodsill, Naomi practiced law at firms in Hawai'i and Maine, and has worked as a foreign legal advisor in the international finance department of a major Japanese securities firm in Tokyo, Japan. She has served as a director on the boards of the Maine International Trade Center, the World Affairs Council of Maine and the Mutual Housing Association of Hawai'i. A graduate of the University of Hawaii and the University of California at Berkeley, Boalt Hall School of Law, she is admitted to practice in Hawaiʻi, Maine, New Hampshire and New York.

In January, Goodsill welcomed two new associates to the firm. **Lynda L. Arakawa** joins Goodsill as a litigation associate. A former reporter for The Honolulu Advertiser, Lynda is a graduate of the William S. Richardson School of Law and was Co-Editor-in-Chief of the University of Hawaiʻi Law Review. She has externed for Associate Justice Simeon R. Acoba, Jr. of the Supreme Court of Hawaiʻi and Judge David Alan Ezra of the U.S. District Court, District of Hawaiʻi, the latter of whom she subsequently served as law clerk. Most recently she served as law clerk to Chief Justice Mark E. Recktenwald of the Supreme Court of Hawaiʻi.

Nathan H. Hall is a trusts and estates associate. He received his Juris Doctor from Santa Clara University School of Law and has a Master of Laws in Taxation from Georgetown University Law Center. Nathan externed at the Office of Chief Counsel for the Internal Revenue Service in Washington, D.C., and after being admitted to the California State Bar, he continued at the IRS Office of Chief Counsel as an attorney in San Francisco, CA.

Earlier this year, Goodsill announced the admission of Johnathan C. Bolton, Shannon E. Pierce and Randall C. Whattoff as partners to the firm. **Johnathan C. Bolton** joined Goodsill in 2012. His practice centers on business law matters with a specialization in business bankruptcy, insolvency and collections law. Johnathan is Board Certified in Business Bankruptcy Law by the American Board of Certification and holds a Certificate of Specialization from the Hawaii Supreme Court. He is a 2000 graduate of Baylor Law School.

Shannon E. Pierce was welcomed to Goodsill in 2011 as Counsel when she brought her experience in intellectual property, licensing, internet and ecommerce, privacy, and mergers and acquisitions to the firm. After receiving her J.D. from Boston University School of Law in 2001, Shannon practiced at Wilson Sonsini Goodrich & Rosati in Silicon Valley and then here in Hawaii. She enjoys advising start-ups, growth stage and large companies with IP strategy, compliance and especially with technology and IP-related transactions.

In 2011 Ran**dall C. Whattoff** joined Goodsill as an associate. He is an experienced litigator and has represented high-profile clients in contract disputes, complex commercial litigation and intellectual property disputes. Randall earned his juris doctor from Cornell Law School and served as a Judicial Extern for the Honorable Joel August in Hawai`i's Second Circuit Court.

For additional information visit www.goodsill.com

HOGAN LOVELLS ADDS TO COMMUNICATIONS PRACTICE

Hogan Lovells Welcomes Counsel Praveen Goyal to Communications Practice

Washington, D.C. - 10 March 2014: Hogan Lovells today announced that **Praveen Goyal** has joined the firm's Government Regulatory practice as Counsel. He will be based in the Washington, D.C. office and a member of the firm's Communications group. Goyal's arrival further extends Hogan Lovells' support to international telecommunications providers, wireless carriers and service providers, mobile satellite service providers, wireline telecommunications companies, and consumer IT manufacturers and developers.

"We're excited that Praveen will complement our expanding global TMT work for major IT vendors and manufacturers as well as telecom providers on emerging international and domestic policy issues," said Michele Farquhar, Practice Area Leader of the Hogan Lovells' Communications group.

Goyal was most recently vice president of public policy for BlackBerry (formerly Research In Motion), where he led the development of global public policy advocacy and compliance strategies to address emerging regulatory barriers for the manufacturer of the BlackBerry smartphone. Prior to that, he worked on BlackBerry's government relations team, developing advocacy and relationship management strategies for various government stakeholders. He has also served as counsel within the United States Congress and the Federal Communications Commission.

Goyal received a B.A. from Yale College and a J.D. from Harvard Law School. He is a frequent speaker on technology regulation, trade, and innovation issues.

For additional information, visit www.hoganlovells.com

PRACITES @ PDAC TORONTO 2014

PRACites @ PDAC Conference (March 2-5) in Toronto - Braving the extreme cold and snow!
(L-R) Rodrigo Viera (TozziniFreire, Brazil), Luis Visconti (TozziniFreire, Brazil), Susan Iannetta (PRAC, Toronto); Marcio Baptista (TozziniFreire, Brazil); Juan Allende (Allende Brea, Argentina)

MCKENNA LONG & ALDRIDGE LAUNCHES UNMANNED AERIAL SYSTEMS PRACTICE GROUP

Cross Practice Team Will Deliver Comprehensive Legal and Policy Advice in Evolving Commercial UAS Industry

05 March, 2014: Recognizing that the future of flight is changing, and in order better to service its growing Unmanned Aerial Systems (UAS) client base, McKenna Long & Aldridge LLP (MLA) announces the launch of its UAS Practice Group, an offering that is a natural extension of its long-standing representation of the aerospace industry. For more than 55 years, MLA has represented a cross-section of designers, manufacturers and integrators of cutting-edge aerospace systems used commercially, in military applications and in foreign air space. Combined with its substantial risk mitigation/insurance practice and its significant FAA aviation practice, MLA's UAS practice group is uniquely qualified to respond to and anticipate the needs of companies that are in or wish to enter this dynamic emerging marketplace.

Blending MLA's experience operating at the intersection of law, government and business, the UAS Practice Group will provide advocacy services during this critical period of federal and state rulemaking, as well as assist organizations in addressing the multitude of potential legal challenges that may arise, including:

Design and Operator Certification
Operating in U.S. Civil Airspace
Limiting Tort Liability, including through the U.S. SAFETY Act
Insurance and Risk Management
Commercial/Contracts
Emergency Response
Privacy Issues
Intellectual Property
Regulatory and Enforcement Issues
Hazardous Materials
Cybersecurity

"The launch of the UAS practice is particularly timely given that the Federal Aviation Administration (FAA), as mandated by Congress, is expected to issue a Notice of Proposed Rulemaking (NPRM) on small UAS in Fall 2014, with large UAS to follow," said Mark Dombroff, Co-Chair of MLA's UAS practice. In advance of the release of the NPRM, MLA is forming a "Think Tank" advisory group of large, middle-market and small companies that are active, or looking to be active in this space, to provide input and comments to the FAA prior to the release of the regulations.

MLA successfully led a similar "think tank" group in 2002 in conjunction with the rulemaking efforts related to the U.S. SAFETY Act, a landmark tort reform statute conceived by MLA attorneys in 2002. The SAFETY Act eliminates or minimizes enterprise-threatening tort liabilities for homeland security companies arising out of terrorist attacks if their anti-terror technologies have been pre-approved by the Department of Homeland Security. Because unmanned aerial systems could be the subject of terrorist activities, the SAFETY Act will have direct applicability to designers, manufacturers and integrators of such systems.

About UAS Practice With more than 55 years of experience in the aviation and aerospace and defense industries, MLA's UAS practitioners provide strategic, experienced guidance on a wide range of issues, including: operating in the highly regulated world of commercial airspace; managing and/or mitigating risks through insurance, contract and statutory protections; emergency preparedness and response; regulatory enforcement actions; the certification process for aircraft, pilots, and maintenance personnel; privacy concerns and how to avoid overstepping the boundaries; dealing with hazardous material issues when using UAS's; and transitioning from the DOD world to the FAA world.

For additional information visit www.mckennalong.com

SIMPSON GRIERSON WELCOMES 8 NEW SENIOR ASSOCIATES

03 March, 2014: Simpson Grierson is delighted to announce eight new senior associates.

Victoria Anderson is a corporate and commercial lawyer. She advises clients on a variety of transactions including mergers and acquisitions, joint ventures, and shareholding arrangements as well as complex contractual arrangements.

Warren Bangma advises councils, CCOs and corporate clients on a wide range of resource management and local government issues and appears regularly before council hearing committees and the Environment Court. He is particularly focused on major water, stormwater and transport infrastructure projects.

Vivienne Bishop specialises in private client work. She advises on all areas of asset protection planning and acts for a number of the firm's high net worth clients.

Joanne Dickson is a commercial litigation expert. She specialises in resolving commercial and civil disputes, particularly those involving intellectual property issues and commercial contracts.

Zelda Gower handles financing transactions, including corporate banking, corporate restructuring, commercial terms, acquisition financing, and asset financing and leasing. Her experience includes advising on the Personal Property Securities Act and Personal Property Securities Register.

Rebecca Faull is a litigator with expertise in a number of specialist areas including contract, insurance, negligence, banking and insolvency disputes. She handles all areas of commercial dispute resolution, including negotiations, mediations,
arbitrations and court proceedings.

Andrew Matthews re-joins Simpson Grierson after working at Freshfields Bruckhaus Deringer in London for several years. He specialises in corporate work, focusing on public and private mergers and acquisitions, capital raisings and corporate governance.

Kate Stubbing is a specialist in resource management, environmental, and local government law. Kate advises corporate clients as well as local authorities and Auckland Council CCOs.

For additional information visit www.simpsongrierson.com

DENTONS

ADVISES KG (US) OILERS CORP IN ITS CROSS-BORDER ACQUISITION OF THE BAKERSFIELD CONDORS

Los Angeles 11 March, 2014: Dentons represented KG (US) Oilers Corp., an indirect subsidiary of the Edmonton, Canada based Katz Group of Companies, in the cross-border acquisition of the Bakersfield Condors of the ECHL. The Condors, a professional ice hockey team based in Bakersfield, California, is the ECHL affiliate of the National Hockey League (NHL)'s Edmonton Oilers, a sports franchise owned by the Katz Group.

The acquisition broadens the professional pool of minor league talent available to the Oilers while providing the Condors with access to the expertise and business operations of the major league team.

According to Kevin Lowe, Oilers President of Hockey Operations, the deal facilitates a coordinated approach to player development between the ECHL, NHL, and the American Hockey League (AHL), allowing for "more quality hockey players in our system, players that can contribute to the success of our organization at all levels, including the NHL."

The Condors will continue to play at the Rabobank Arena in Bakersfield under local management, preserving the team's strong ties to the community and loyal fan base.

"This move represents an investment in our future, a strengthening of our organizational structure, and a commitment to the city of Bakersfield," Condors Team President Matthew Riley said.

Dentons US was connected to the Canadian Katz Group by Edmonton Corporate partner **Shawna Vogel** of Dentons Canada. Los Angeles Corporate partner **Elizabeth Foster** led the US acquisition team.

For additional information visit www.dentons.com

CLAYTON UTZ

ADVISES CBA EQUITIES LTD ON APN NEWS & MEDIA'S $132 MILLION ENTITLEMENT OFFER

Sydney, 24 February 2014: Clayton Utz has advised CBA Equities Limited, as lead manager and underwriter, in connection with the A$132 million entitlement offer by APN News & Media Limited ("APN"), announced to the market on 19 February 2014.

The national head of the Clayton Utz Equity Capital Markets practice, **Stuart Byrne**, led the Clayton Utz team, supported by senior associate **Patricia Paton**.

The entitlement offer comprises a fully underwritten approximately A$112 million institutional component, which successfully completed last Friday, and a fully underwritten approximately A$20 million retail component, due to open on 27 February.

The raising is being undertaken to part fund APN's acquisition of 100% of Australian Radio Network Pty Limited and The Radio Network Limited from Clear Channel Communications Inc. In connection with this acquisition, a bridge facility was provided.

Clayton Utz also advised the bridge provider associated with the acquisition, with Banking partner **Alex Schlosser** and senior associate **Maria Ratner** advising on the finance aspects.

Commenting on the transaction, Stuart Byrne said: "We enjoyed working again with our valued client, CBA Equities, on this offer. We have supported them on a range of capital raisings over the years and the success of this offer is reflective of the more positive sentiment we're currently experiencing in the capital markets."

For additional information visit www.claytonutz.com

CAREY
ACTS FOR VTR IN LIBERTY GLOBAL REORGANIZATION OF ITS CREDIT POOLS

24 January 24, 2014: Liberty Global plc (Liberty Global) completed a reorganization of its credit pools. VTR GlobalCom and VTR Wireless, which operate Liberty Global's broadband and wireless businesses in Chile and are each 80% owned by Liberty Global, were placed in a separate credit pool with their parent, VTR Finance, an indirect wholly -owned subsidiary of Liberty Global.

In connection with the reorganization, VTR Parent was extracted from the UPC Holding credit pool and VTR Parent and certain of its subsidiaries entered into the following financing transactions:

a) The issuance by VTR Parent of USD1.4 billion principal amount of 6-7/8% senior secured notes due 2024 (the Notes) under Rule 144A and Reg S.

b) A USD200 million senior secured revolving credit facility entered into by VTR GlobalCom, VTR Wireless and VTR Banda Ancha (Chile), as borrowers and JPMorgan Chase Bank, BNP Paribas, Goldman Sachs Bank USA and Morgan Stanley Senior Funding as original lenders and JPMorgan Chase Bank as Facility and Security Agent.

Carey advised VTR through a team led by partners **Pablo Iacobelli, Guillermo Acuña** and **Felipe Moro**, and associates **Patricia Silberman**, **Juan Pablo Navarrete**, **Jaime Carey A., Feliciano Tomarelli** and **Agustín Fracchia.**

For additional information visit www.carey.cl

GIDE
ADVISES LUXURY BRANDS TTF AND ICICLE ON ESTABLISHMENTS IN FRANCE

Paris - 24 February, 2014: Gide has recently advised a luxury jewellery company and a high-end fashion brand on their establishmentin France.

Gide advised TTF, a luxury jewellery company and designer, on its establishment in France. Founded by Frank Wu in 2002, TIFF is recognised for its work with highly respected designers and artists from around the world to produce unique pieces of jewellery.

Gide advised TTF on setting up a flagship store on the |renowned Place Vendôme in Paris and on establishing a design centre in France. Gide also assisted with drafting transaction documents, and on French employment law and intellectual property issues.

The Gide TTF team was led by partners **Fan Jiannian** in Shanghai and **David Boitout** in Paris.

Gide has also advised Chinese company ICICLE, a renowned high-end fashion brand, on its establishment in France. ICICLE was founded in 1997 in Shanghai and is one of China's most respected fashion brands and the country's first on the eco-friendly clothing manufacturing segment.

Gide advised ICICLE on the establishment of two subsidiaries and the acquisition of premises in France. Gide also assisted the company in drafting transaction documents as well as on French employment law and intellectual property issues.

The Gide ICICLE team was led by partners **Fan Jiannian** in Shanghai, and **David Boitout** and **Arnaud Michel** in Paris.

For additional information visit www.gide.com

NAUTADUTILH
ADVISES NIDERA IN CONNECTION WITH EQUITY PARTICIPATION IN ITS CAPITAL BY COFCO

28 February, 2014: COFCO Corporation and Nidera signed an agreement pursuant to which COFCO will acquire 51% of Nidera. NautaDutilh acted as legal advisor to Nidera.

COFCO Corporation ('COFCO'), the largest grain, oil and foodstuff company in China, and Nidera, a global commodity trader and agribusiness company headquartered in the Netherlands, signed an agreement pursuant to which COFCO will acquire 51% of Nidera to establish a strategic partnership with this major player in the agricultural market with an annual turnover in excess of USD 17 billion. NautaDutilh has acted as legal advisor to the company and its sole shareholder Nidera Capital throughout the competitive sale process. The transaction is still subject to regulatory and antitrust approvals.

The M&A team is led by **Hein Hooghoudt** and **Lieke van der Velden**. ABN AMRO is the financial adviser of Nidera.

For additional information visit www.nautadutilh.com

HOGAN LOVELLS

ADVISES ALBERTSONS SENIOR MANAGEMENT IN US$9BILLION ACQUISITION OF SAFEWAY

Los Angeles - 10 March, 2014: Hogan Lovells has advised senior management of grocery store chain Albertsons in its US$9 billion acquisition of Safeway Inc. The deal, expected to close in the fourth quarter of 2014, will bring together two of the largest grocery store chains in the United States.

The deal was backed by a financial group led by Cerberus Capital Management and will be funded by US$1.25 billion in cash on hand, in addition to approximately US$7.6 billion in debt financing. Albertsons will pay Safeway shareholders US$32.50 per share in cash and the Safeway shareholders would receive some contingent other payments from Safeway, which combined would total approximately US$40.00 per share.

Los Angeles Office Managing Partner **Barry Dastin**, along with Los Angeles Partner **Russ Cashdan**, Washington, D.C. Partner **Carin Carithers** and New York Partner **Mark Weinstein**, led the Hogan Lovells team. They represented Albertsons' CEO Robert G. Miller and the other members of Albertsons' senior management team in connection with the transaction, with respect to their equity ownership in the combined company and their executive compensation arrangements.

For more information, see www.hoganlovells.com

KING & WOOD MALLESONS

ADVISES NRB ON ITS SUCCESSFUL INITIAL PUBLIC OFFERING OF A-SHARES

21 January, 2014: King & Wood Mallesons ("KWM") advised Changzhou Guangyang Bearing Co., Ltd. ("NRB") on its successful initial public offering and listing on the Small and Medium Enterprise Board of Shenzhen Stock Exchange. NRB issued 33.2 million A-shares with a placing price of RMB11.88 per share, among that approximately RMB390 million was raised through public issue of new shares. NRB will gain relevant financial support for upgrading its production, research and development capability.

Founded in 1994, NRB focuses on auto precision bearing R&D, manufacture and sales for 20 years. As one of the main suppliers of needle roller bearings, roller bearing and clutch release bearing used in domestic automatic transmission, NRB's customers include key vehicle manufacturing groups in China, such as FAW, Dongfeng, SAIC, Chana Auto, Sinotruk and Chery, as well as the largest domestic heavy truck, bus, car, mini-car transmission factories, such as Shaanxi Fast Auto Drive, Qijiang Gear, SAGW and Chongqing Tsingshan, and some internationally renowned transmission factories such as ZF, Eaton, AGC (Tangshan) and GETRAG (Jiangxi).

King & Wood Mallesons served as the legal counsel to the issuer. This project was led by partners Mr. **Zhang Mingyuan** and Mr.**Zhang Yi**. Partner Ms. **Zhou Ning** provided strong support to the project.

For additional information visit www.kingandwood.com

MCKENNA LONG & ALDRIDGE

FEDERAL APPEALS COURT REJECTS ATTORNEY GENERAL'S APPEAL; TABOR LEGAL CHALLENGE TO BE CONSIDERED ON MERITS

Denver - 07 March, 2014: The Tenth Circuit Court of Appeals affirmed a July 2012 U.S. District Court ruling that rejected the Colorado Attorney General's attempt to use procedural grounds to throw out *Kerr v. Hickenlooper*, the lawsuit challenging the constitutionality of the Taxpayer's Bill of Rights (TABOR).

The plaintiffs argue that, as a consequence of TABOR, the Colorado General Assembly has been deprived on a key legislative power – the power to raise revenue. Therefore, the plaintiffs assert, Colorado no longer has a "republican form of government," in violation of the U.S. Constitution and the federal statute that authorized Colorado to become a state.

As a result of today's ruling, the plaintiffs will have an opportunity to prove their case in U.S. District Court.

"The thoughtful decision by the Tenth Circuit Court of Appeals clears the way for a rigorous examination to determine whether Colorado retains a republican form of government," said former Colorado Senate Minority Michael Feeley, one of the attorneys representing the plaintiffs. The plaintiffs challenging the constitutionality of the law are a bipartisan coalition that includes four current state legislators, 13 other current officeholders, and several former state and local government officials.

"This is the first time in the 227-year history of the U.S. Constitution that a federal court has been called upon to interpret the provision of the Constitution that requires each state to have and maintain a viable legislative branch in order to have a 'republican form of government,'" **Herbert Fenster**, an attorney with McKenna Long & Aldridge LLP, explained. "While this decision does not determine that issue, it establishes that the plaintiffs in this case have the right to litigate this issue on its merits."

Feeley added, "the plaintiffs look forward to presenting their case and proving that, in Colorado, the genius of the Founding Fathers will not be undone by the politics of the moment."

TABOR deprives the state legislature – as well as county commissions, city councils, and school boards – of the power to raise revenue without a vote of the electorate.

The Court of Appeals heard oral argument last September on the Colorado Attorney General's interlocutory appeal of the decision by U.S. District Judge William Martínez rejecting the Attorney General's procedural motion to throw out the case. The case will now proceed to trial.

Lawyers from the Denver offices of McKenna Long & Aldridge LLP and Brownstein Hyatt Farber Schreck LLP are representing the plaintiffs without charging for their services. In addition to Fenster and Feeley, they include from MLA: Lino Lipinsky de Orlov and former Congressman David Skaggs.

Pleadings and court orders can be found on http://taborcase.org/index.html .

For additional information visit www.mckennalong.com

TOZZINI FREIRE

ACTS FOR SBA TORRES BRASIL ACQUISITION OF LARGE WIRELESS TELECOM COMPANY

TozziniFreire Advogados assisted SBA Torres Brasil in the acquisition of a company controlled by Telemar Norte Leste and Brt Serviços de Internet, which owns 2,007 wireless telecommunication sites and towers.

SBA Torres announced that it has entered into a definitive agreement with subsidiaries of Oi SA ("Oi"), one of Brazil's largest telecommunications service providers, and its affiliates, under which SBA will acquire 2,007 wireless sites in Brazil. Upon closing of the transaction, Oi will enter into a long-term lease with SBA, with monthly lease payments, for antenna space on each of these sites. The sites currently have 1.6 tenants per site (including Oi) and include leases with all of the major wireless carriers in Brazil.

The transaction, subject to customary closing conditions, is expected to close on or before March 31, 2014. This transaction follows SBA's previously announced acquisition of use rights to 2,113 sites from Oi, which transaction closed November 26, 2013. Upon consummating this transaction, SBA will own or have use rights with respect to over 5,000 sites in Brazil.

Fernando Cinci Avelino Silva, partner in the Mergers and Acquisitions practice group at TozziniFreire, was in charge of the transaction with assistance of associates Karen Dagan and Felipe Borges Lacerda Loiola.

For additional information visit www.tozzinifreire.com.br

BAKER BOTTS

WILLIAMS PARTNERS COMPLETES ACQUISITION OF WILLIAMS' CANADIAN ASSETS FOR APPROX. $1.2 BILLION

Houston - 03 March, 2014: On February 26, 2014, Williams Partners L.P. (NYSE:WPZ) entered into a contribution agreement to acquire from The Williams Companies, Inc. (NYSE:WMB) 100% of the membership interests in Williams Energy Canada ULC ("WECU") for approximately $1.2 billion. The transaction closed on March 3, 2014.

The primary assets of WECU include an oil sands offgas processing plant near Fort McMurray, approximately 260 miles of NGL and olefins pipelines and an NGL/olefins fractionation facility and butylene/butane splitter facility at Redwater. WPZ also acquired an in-progress expansion project at the Redwater facility. The expansion will provide additional fractionation business to WPZ related to development of offgas processing at the CNRL Horizon upgrader facility retained by WMB.

The consideration will consist of cash proceeds of $25 million and the issuance of 25,577,521 Class D payment-in-kind units of WPZ (the "PIK Units") and 521,990 general partner units. In lieu of cash distributions, the PIK Units will receive quarterly distributions of additional PIK Units. All PIK Units will be convertible to common units at a future date no earlier than February 2016. WPZ also has an option to issue up to $200 million of additional PIK Units to WMB for funding expansions at the Redwater facility.

For more information, please visit www.bakerbotts.com

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March 4, 2014

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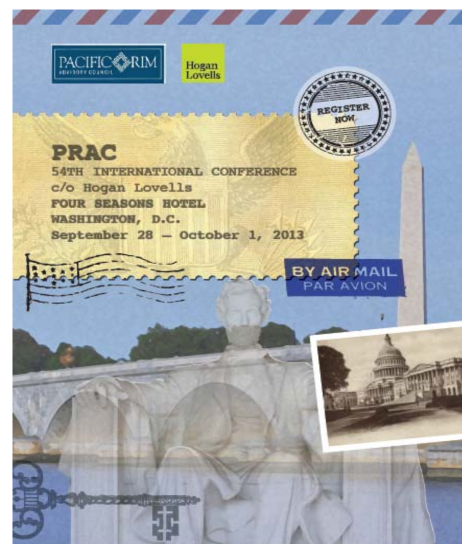

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11 March 2014

Trustees with a MySuper authority at risk of being locked out of the default superannuation market

Existing grandfather clauses in modern awards are being removed, so superannuation trustees risk losing access to award employees for MySuper offerings. Unless trustees successfully navigate the Fair Work Commission's review of default fund terms, they could be prevented from serving default fund employees who are covered by modern awards. The decision that two Expert Panel Members have potential conflicts will not cause any significant delays. The President of the Fair Work Commission appears set to reconstitute the Expert Panel.

Call to action

- The Fair Work Commission will soon invite applications from trustees for the Default Superannuation List and the Schedule of Approved Employer MySuper Products.
- Trustees should be preparing their applications now in anticipation of a relatively short time limit for making applications.

MySuper and default superannuation funds in modern awards

A trustee of a superannuation fund that holds a MySuper authority has been able to offer a MySuper product from 1 July 2013.

Under the current standard superannuation clause in most modern awards, unless an employee has chosen a superannuation fund, the employer must make contributions to a superannuation fund, or its successor fund, that is:

- listed in the modern award; or
- an eligible choice fund (under s 32D of the Superannuation Guarantee (Administration) Act 1992 (Cth)) to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008 (the grandfather clause).

Effective 1 January 2014, the Fair Work Commission made variations to modern awards to ensure that they only list superannuation funds that offer MySuper products.

Review of default fund terms

The Fair Work Commission has to conduct a review of the default fund terms of modern awards every four years, starting as soon as practicable after 1 January 2014. The Fair Work Commission has been progressing this review swiftly. It has already received comments on its draft notices and draft forms for the review, and is expected to launch its two-stage review process very soon.

The **first stage** will start when the Fair Work Commission publishes a notice on its website that invites superannuation funds that offer a standard MySuper product to apply to have the product included on the Default Superannuation List. The notice must specify the period in which an application may be made. At this stage, it is not known how long that period will be, but there has been some stakeholder support for a six-week period.

If an application is made in time, the Fair Work Commission must make a determination about whether to include the product on the Default Superannuation List. For the purpose of making that determination, the Fair Work Commission must be constituted by an Expert Panel.

Justice Ross, President, has made a statement that he considered two of the Expert Panel Members have potential conflicts and should no longer deal with the matter. The Fair Work Act 2009 (Cth) contains a mechanism for reconstitution of an Expert Panel where a member becomes unavailable. We anticipate that, in the coming days, the President will direct a member of the expert panel for annual wage reviews to join the expert panel for assessing default superannuation funds so that it can continue with the review.

In the **second stage**, the Fair Work Commission must:

- review the default fund term of each modern award;
- remove the grandfather clauses (it can also make transitional arrangements); and
- make a determination varying that term to remove every superannuation fund that is specified in the term and specify from two to 15 funds on the Default Superannuation List that satisfy the second stage test.

As part of its review, the Fair Work Commission must also make and publish the Schedule of Approved Employer MySuper Products. Trustees that wish to have an employer MySuper product included need to apply in the period specified by the Fair Work Commission in a notice inviting applications. This will also be a two-part process.

What superannuation trustees should be doing now to get their MySuper products listed

In our view, six weeks is a relatively short period of time for a trustee to prepare and lodge an application to have a MySuper product included in the Default Superannuation List. We recommend that a trustee act now to:

- identify modern awards that currently list the trustee's superannuation fund;
- identify other modern awards where the trustee considers that a MySuper product that it issues should be added;
- start preparing information regarding why, having regard to the nine first stage criteria, it would be in the best interests of covered default fund employees (or a particular class of those employees) for the modern award to include a MySuper product issued by the trustee - this information needs to make the best available case for the product being included on the Default Superannuation List and be evidence based, in order to deter adverse submissions being made in relation to the application;
- put a process in place to ensure that the trustee becomes aware when the Fair Work Commission invites applications; and
- engage with employers, employees and organisations representing their industrial interests that might be prepared to make written submissions requesting that the trustee's MySuper product be specified in the default fund term of a modern award.

It seems to us that the Fair Work Commission's first review will be completed before any changes are made to the Fair Work Act based on submissions received in response to the discussion paper "Better regulation and governance, enhanced transparency and improved competition in superannuation".

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

CAPITAL MARKETS

Brazil: Information on Capital Held Abroad – 2013

Individuals and corporate entities resident, domiciled or headquartered in Brazil are required to provide the Central Bank of Brazil ("BACEN") with information concerning any type of assets held outside Brazil, including currency.

Owners of assets amounting to less than US$ 100,000.00 (one hundred thousand US dollars) or equivalent amounts in other currencies, as of December 31st, 2013, are not required to provide information for BACEN.

Information relating to the year ended on December 31st, 2013, shall be provided until 6pm of April 7th, 2014, through the declaration form available at BACEN's website (www.bcb.gov.br).

Failure to comply with the obligations indicated above or the provision of false, incomplete and incorrect information or outside the terms and conditions provided in this regulation may subject the party to penalties in the amount of up to R$250,000.00 (two hundred and fifty thousand Reais) depending on the type of the infraction.

Alexei Bonamin
Partner – São Paulo

DENTONS

CRA Considers Tax Treatment of Crowdfunding

March 3, 2014

Hot on the heels of the **CRA's recent publication of a "fact sheet"** on its views on the tax treatment of Bitcoin currency (which has been in the news recently – see articles here and here), the CRA has published two technical interpretations on the tax treatment of "crowdfunding".

In **CRA Document No. 2013-0508971E5 (October 25, 2013)** and **CRA Document No. 2013-0509101E5 "Crowdfunding" (October 29, 2013)** the CRA was asked about the tax treatment of amounts received by taxpayers through a crowdfunding arrangement.

The CRA stated that it understood crowdfunding to be a way of raising funds for a broad range of purposes, using the internet, where conventional forms of fundraising funds might not be possible (and which may or may not involve the issuance of securities).

The CRA stated that, depending on the specific circumstances, crowdfunding amounts received by the taxpayer could represent a loan, capital contribution, gift, income or a combination thereof. The CRA noted its position described in Interpretation Bulletin **IT-334R2 "Miscellaneous Receipts" (February 21, 1992)** that voluntary payments received by virtue of a taxpayer's profession or carrying on of a business are considered taxable receipts. The CRA also noted that, on the other hand, a non-taxable windfall may exist where the taxpayer made no organized effort to receive the payment and neither sought nor solicited the payment. The CRA's view is that a business has commenced where the taxpayer has started some significant activity that is a regular part of the business or that is necessary to get the business going (see Interpretation Bulletin **IT-364 "Commencement of Business Operations" (March 14, 1977)**). Conversely, a gift may exist where the donor transfers property with no right, privilege, material benefit or advantage conferred in return.

These two recent technical interpretations follow an earlier publication (**CRA Document No. 2013-0484941E5 "Crowdfunding" (August 13, 2013)**), in which the CRA stated that amounts received by a taxpayer from crowdfunding activities would generally be included in the taxpayer's income pursuant to subsection 9(1) of the *Income Tax Act* as income from carrying on a business (and that certain expenses may be deductible).

These views from the CRA are helpful guidance for those who have undertaken or are considering crowdfunding. We agree that a taxpayer's specific circumstances will be determinative of the tax treatment of the crowdfunded amounts (i.e., on a case-by-case basis). However, because of the various activities for which crowdfunding may be sought, and the ease with which crowdfunding may be accessed, it is less clear when a taxpayer's activities (including seeking crowdfunding and any other associated activities) will result in the conclusion that a taxpayer has commenced carrying on business.

Accordingly, taxpayers who seek and obtain crowdfunding (for business and non-business purposes) should be aware of the potential tax implications, particularly in light of fact-specific results and the CRA's evolving views on the subject.

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Superintendency of the Environment: New Information Request to EAR Holders

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

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On January 6, 2014, the Superintendency of the Environment ("SMA") published in the Official Gazette the Exempt Resolution No. 1518, that Establishes the Consolidated, Coordinated and Systematic Text of the Exempt Resolution No. 574 of 2012, which requests deliver and / or update information to all holders of an Environmental Approval Resolution ("EAR").

For those holders who do not submit and / or update the information required, the SMA will have as updated the information that appears in their registry, without prejudice the possibility of initiating sanctions proceedings against them.[1]

1. **Required information. The EAR holders must submit, within the time and form the following information:**

a) Holder´s name, RUT, address and phone number
b) Legal representative´s name, address, email and phone number
c) Regarding the EAR granted:

- The individualization of the EAR (number and year of the exempt resolution);
- The way of entry to the Environmental Impact Assessment System (Declaration or Environmental Impact Study);
- The administrative authority that issued the EAR;
- The region/regions and boroughs where the project or activity is located;
- Geographic location (UTM coordinates system WGS 84 Datum);
- Typology of the project or activity;
- Purpose of the project or activity;

d) Responses to any consultation related to the obligation of entering to the Environmental Impact Assessment System of a project, or its modification, noting:

- The number of the resolution, letter or other instrument that contains it;
- The date of issue;
- The administrative authority that issued it.[2]

e) State or implementation phase of the project with EAR;
f) Minimum work, act or task that starts the execution of the project or activity, and must indicate the recital of the EAR containing it;[3]

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[1] According to Article 36 No. 2 Letter f) of Law No. 20,417, non-compliance with the instructions, requirements and urgent measures issued by the SMA is considered a serious infringement, which is punishable with fines up to 5,000 Units Annual Tax (UTA), the closure of a project or even revocation of the EAR.
[2] Documents of reply to the requirements referred to in point d) and g) must be loaded in PDF format.
[3] According to the provisions of Article 16, point D.5 of Article 60 and Article 4 transitional of the Supreme Decree No. 40/2012, of the Ministry of the Environment that sets the current Regulation of the Environmental Impact Assessment System.

g) Any amendments to the EAR.

2. Delivery term of the required information. Delivery information must be made within the following deadlines:

a) Holders of favorable EAR granted before February 28, 2014, must load the required information within 15 business days from that date, i.e., until March 21, 2014.
b) Holders of favorable EAR granted since February 28, 2014, must load the required information within 15 business days from the date of notification of the respective EAR.

3. Way of information delivery. The required information must be entered in the electronic form available on the website of the SMA (**http://www.sma.gob.cl**).

KING&WOOD MALLESONS
金杜律师事务所

Catalogue of Investment Projects Subject to Governmental Verifications (2013) Overhauls Chinese Outbound Investment Regulatory Regime

By Xu Ping* and Xiong Jin **

China Bulletin February 2014

Introduction

In the strong spirit of reform as enshrined in those key policy documents promulgated at the close of the Third Plenary Session of the Eighteenth Congress of the Communist Party of China's Central Committee, the State Council promulgated on the 2th December 2013, the "*Catalogue of Investment Projects Subject to Governmental Verifications (2013)*（《政府核准的投资项目目录（2013年本）》）" ("***2013 Catalogue***") [1], with a view to promoting the "reduction and decentralization, to the greatest extent possible, of verification powers to truly implement the investment decision-making power of enterprises".

This is the first revision made to the predecessor of such catalogue released by the State Council in 2004, the pillar policy which established the very verification regime which has been in force since then. The 2013 Catalogue mostly covers investments which require governmental verifications (as opposed to a simple process of filing for records) -- broadly speaking, there are three types of them:

a) projects subject to government verifications in 11 major sectors, including agricultural water conservancy, energy, transportation, information industry, raw materials, machinery manufacture, light industry, high and new technology, urban construction, other social undertakings and finance;

b) foreign invested projects; and

c) overseas investments by Chinese enterprises.

The significance of those changes is that for investments (projects) not listed in the "verification" category (or "核准" in Chinese, which in substance, is no different from "approval" in China's context whereby the investors must obtain them before being able to execute a concerned investment), they only require (post transaction) filing for records.

This article discusses the significant changes likely to be introduced by the 2013 Catalogue to the current regulatory regimes, which we believe will have profound ramifications to the future trends of Chinese outward investments.

I. Overview

Generally speaking, Chinese investors must seek verifications from three key regulatory bodies for their outbound investments[2], including:

- the National Development and Reform Commission (**NDRC**),
- the Ministry of Commerce of PRC (**MOFCOM**), and
- the State Administration of Foreign Exchange (**SAFE**).

NDRC verification is considered to be the most important approval and essential to obtaining other approvals.

Factors such as investor identity, investment amount, invested industry and destination country dictate the applicable verification levels of those regulatory bodies.

The 2013 Catalogue excites the market, as it proposes to remove a substantial amount of investments from the verification jurisdictions of NDRC and MOFCOM, as further elaborated by the "old vs. new" comparisons below.

II. The current NDRC regime

The outbound investment project verification regime administered by NDRC (which is essentially the legacy of the planned economy) has two broad aspects: the "preliminary review" regime and the (final) "project verification" regime.

Preliminary review regime

Under NDRC's "preliminary review" regime, Chinese investors proposing to make an investment over USD 100 million through competitive biddings or acquisitions must submit a "project information report" to the regulator before undertaking "substantive work" on such investment. Substantive work is generally taken to include signing binding documentation, making binding offers and commencing foreign investment review processes in the relevant jurisdiction. NDRC will then issue a confirmation letter (commonly known as "road pass" on the market) if the proposed investment is approved in principle.

This preliminary approval regime is designed to manage project risk and avoid Chinese investors from competing against one another for the same assets, at the ultimate cost to the Chinese state. For these reasons, whilst not expressly stated by NDRC, the market's perception is that NDRC will only issue one road pass at a time for any given deal.

Project verification regime

Whilst a "road pass" is contingent, all China outbound investments must first be approved by NDRC before the investor can be assured that they can go ahead with such investment.

"Special Project" must be verified by NDRC or by the State Council (following NDRC's initial review), which generally include: investment in countries without diplomatic relationship, investment in countries under international sanction, investment in countries and regions that are embroiled in ongoing war or riots, and outbound investment on basic telecommunication operations, cross-border water resource development and utilization, large-scale land development, key power grid, news and media, and other sensitive industries.

Importantly, NDRC verification regime distinguishes resources projects[3] and non-resources projects: investments over USD 300 million on the former and over USD 100 million on the latter must be verified by NDRC. The rest of the investments shall then be approved by NDRC's provincial counterparts.

As an exception, centrally-administered state-owned enterprises ("**CASOE**s") are given the same verification power as NDRC's provincial counterparts are. They are only required to make a filing to NDRC for investments which are less than USD300 million (resources projects) or less than USD100 million (non-resources projects). As such filing certificate is required for the MOFCOM verification and the SAFE registration purpose, our experience tells that it is not materially different from a verification process.

III. The new NDRC regime under 2013 Catalogue

The focus of the 2013 Catalogue is to distinguish "special projects" from "general projects":

For special projects (namely, those projects to be invested in "sensitive countries and regions" or "sensitive industries" – as further explained below), or projects over USD 1 billion, they must be verified by the "organ of the State Council charged with investment portfolio" (or "国务院投资主管部门" in Chinese, which is generally understood as the equivalent reference to NDRC at the central level); and

Save for those investments, all other investments by the CASOEs and provincial enterprises (SOEs or otherwise) at or over USD 300 million (up to USD 1 billion) are only subject to the after-the-event filing to the "organ of the State Council charged with investment portfolio" for records.

The 2013 Catalogue does not clearly define what "sensitive countries and regions" or "sensitive industries" are. These references were first used in "The Measures for Verification of Overseas Investment Projects" (Discussion Draft, issued by NDRC in August 2012 for public consultation, or "2012 Measures"). We consider they should still be valid for the purposes of the 2013 Catalogue, save that the 2012 Measures provides NDRC with extra powers to what could be considered as "sensitive countries and regions" or "sensitive industries".

Interestingly, the 2013 Catalogue is silent on the verification jurisdiction of NDRC's provincial counterparts, although it does have a reference to "provincial governments" which is not quite clear on which organ of the provincial governments it refers to.

It is clear from the 2013 Catalogue and subsequent comments by the government spokesperson, investments are not explicitly listed in the Catalogue shall be subject to the filing for records. This means that for all the investments currently subject to the verifications at the provincial levels, investors only need to file for records going forward.

IV. The current MOFCOM regime

MOFCOM regime essentially approves the establishment of offshore business vehicles, which may be undertaken as part of the outbound investment process (meaning, with specific projects or assets to invest) or as a stand-alone process.

MOFCOM verification generally follows NDRC verification, both as a matter of Chinese law (in terms of sequence) and of market practice (as a matter of empirical experience – we have never seen a case where MOFCOM approval wasn't given notwithstanding NDRC approval was granted).

The current verification regime administered by MOFCOM consists by a "substantive process" and a "summary process".

Very much in line with NDRC approval levels (save for the investor identity factor), the approval levels of MOFCOM regimes are dictated by factors from investment size, investment destination and asset (industry) type:

Projects verified by MOFCOM: investments in countries without diplomatic relationship with China, or in specific country or region or involving multi-national (multi-territorial) interests; establishment of offshore special purpose vehicles (for China round-trip investment purposes); investment over USD 100 million; and

Project verified by the provincial counterparts of MOFCOM: investment over USD 10 million but less than USD 100 million; energy and mining investment; investment requiring domestic financing.

Investments less than USD 10 million (without any of the above conditions) can go through the summary process, meaning Chinese investors are only required to submit an "Outbound Investment Application Form" online, which will be reviewed by the relevant MOFCOM provincial counterpart and the verifications shall be given within three days.

V. The new MOFCOM regime under 2013 Catalogue

Under the 2013 Catalogue, to establish offshore enterprises (save for financial enterprises) requires MOFCOM verification if such offshore enterprises are to be established in "sensitive countries/regions", or concern "sensitive industries".

The 2013 Catalogue does not define both concepts either. But our view is that the same references used for NDRC regime shall apply.

The rest of offshore enterprises are subject to filing for records regime. In that respect, CASOEs shall file to MOFCOM, whilst local enterprises shall file to the “provincial governments”.

VI. Comments

Appreciating NDRC and MOFCOM have yet to release any revisionary or implementation rules, questions remain as to the alignment and harmonization of the clear tensions existing between the current regimes and the proposed new regimes:

Special projects aside, does other investment over USD 1 billion only require filing to MOFCOM for record, rather than seeking verification beforehand (in the sense that the only verification is to be sought from NDRC)?

The 2013 Catalogue is silent on the “Project Preliminary Information Report” (the road pass) regime. Does this indicate that such regime has come to an end?

It is very unusual that the 2013 Catalogue does not mention in any form, the jurisdictions of the provincial counterparts of NDRC. Does this mean investments less than USD 300 million made by provincial enterprises will now be filed to the “provincial government” for records instead?

The 2013 Catalogue does not consider the verification or filing issues concerning offshore re-investments made by offshore entities already acquired by Chinese (mainland) investors -- does this mean that NDRC/MOFCOM regime contemplated under the catalogue shall automatically apply by reference, or require no such verifications or filing (noting that NDRC currently still requires the mainland parents of such entities to seek verification for their offshore investments)?

For projects requiring filing for records, when shall the filing confirmation be obtained? As we understood, filing for records is meant to be undertaken post completion of the investment. Such interpretation means that NDRC and MOFCOM filing confirmation documents are not necessary for the purposes of completing the SAFE foreign exchange registration formalities, which is obviously very different from the current transaction practice and would appear to run against the Chinese government’s strict control on capital outflows.

In any event, the 2003 Catalogue demonstrates clearly to the market that the Chinese regulators now only have interests in monitoring Chinese outward investments in those “special projects” or otherwise over US 1 billion.

Most Chinese investors have long felt in their cross-border M&A activities that their competitiveness in the global market has been considerably restrained by China’s opaque and difficult regulatory processes. Foreign counterparts, on the other hand, generally tend to show less interest in Chinese bidders (if everything is equal) citing, amongst others, the perceived uncertainties associated with such regulatory process. Or, as a result, they otherwise would insist “sellers’ protective measures” (such as reverse break fees) be included in the transaction documents, or a “China premium” be added on top of the standard evaluations. Thanks to the

new regime, Chinese investors shall be able to compete in the global capital and M&A markets with much more freedom and flexibility, and their transaction costs are likely to be reduced as a result.

(This article was originally written in Chinese, the English version is a translation.)

* Xu Ping is a partner in Corporate Group, Beijing Office.
** Xiong Jin is a partner in M&A Group, Beijing Office.

[1] The overhaul repeals, delegates and transfers totaling 49 verification powers, including repealing 19 verifications requirements and change them to filing requirements, delegating 20 verifications powers to local governments, transfer 10 verification powers to industries management departments of the State Council. According to a preliminary assessment, the quantity of the deals that must be vivificated at the central levels will be reduced by 60% after the overhaul. Refer to "Implement the *Decision of the Third Plenary Session, Revise the Catalogue of Verifications -- Introduction to The Catalogue of Investment Projects Subject to Governmental Verifications (2013) by the spokesperson of National Development and Reform Commission".*

[2] Depending on factors such as investor identity and assets (industry) to be invested in, those investments may further require approvals and consents from the *State-owned Assets Supervision and Administration Commission of the State Council (SASAC), China Securities Regulatory Commission (CSRC), China Banking Regulatory Commission (CBRC), and China Insurance Regulatory Commission (CIRC).*

[3] According to Article 4, "*The Interim Measures for Verification of Overseas Investment Projects*"(《境外投资项目核准暂行管理办法》第四条), resources projects refer to projects that conduct outbound investment to explore and develop resources such as crude oil, mines, etc.

Actions against money laundering

Tue, 03/04/2014 - 09:33 *NewsFlash: 232*

Superintendence of Companies issued new regulations for the real sector regarding obligations to adopt policies on AML and anti-terrorism financing

On February 19th of 2014, the Superintendence of Companies (the "Superintendence") issued the External Regulation No. 304-000001 (the "Regulation No. 304-000001"), by means of which, the Superintendence recognizes the real sector as a vulnerable sector to asset laundering and terrorism financing ("AL/TF"). As a consequence, the Superintendence sets forth certain parameters that must be observed by legal entities with an income exceeding 160.000 monthly minimum legal salaries (salarios mínimos legales mensuales vigentes "SMMLV" for its Spanish acronym) (approximately US$49 million) as for December 31st of 2013.

Therefore, the legal entities subject to these obligations shall initiate an analysis to (i) identify the situations which could increase risks of AL/TF in their operations, businesses and contracts, (ii) establish due diligence procedures and (iii) determine and implement policies for the management of AL/TF related risks. In addition, such legal entities will be required to train their employees on the reports that must be filed before the financial intelligence unit (Unidad de Información y Análisis Financiero "UIAF", for its Spanish acronym) of any suspicious operation ("ROS" for its Spanish acronym). Compliance with these obligations must be observed before December 31st of 2014.

In case of non-compliance with Regulation No. 304-000001, the Superintendence will be entitled to impose fines, either consecutive or not, up to 200 SMMLV (approximately US$60,000). The aforementioned, without prejudice of different and additional criminal and civil actions that may be imposed in connection with these matters.

GIDE
GIDE LOYRETTE NOUEL

client alert

FOREIGN EXCHANGE | CHINA | FEBRUARY 2014

SAFE FURTHER RELAXES FOREIGN EXCHANGE CONTROLS

On January 24, 2014, the State Administration of Foreign Exchange ("**SAFE**") released the *Circular on Further Improving and Adjusting Foreign Exchange Policies for Capital Accounts* (Hui Fa [2014] No.2) ("**Circular 2**"). Circular 2, which went into effect on February 10, 2013, removes or streamlines certain regulatory checks on capital accounts that existed under previous laws.

OVERVIEW

Over the past couple of years, SAFE has gradually allowed greater flexibility in using foreign exchange for investments in China[1]. In this latest round of loosening controls, the following regulatory items have been deregulated:

- Offshore claims of domestic financial leasing companies;
- Transfers of domestic non-performing assets ("**NPA**") to foreign investors;
- Pre-expenses of outbound investments of domestic entities;
- Offshore lending by domestic companies;
- Remittances of profits abroad by domestic entities;
- Forex sales and payments for transfers of personal property; and
- Securities Business Forex Operation Permits ("**SBFOP**") of domestic securities companies.

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[1] *Circular on Further Improving and Adjusting Foreign Exchange Policies for Direct Investments* (Hui Fa [2012] No. 59), issued November 21, 2012, and effective December 17, 2012 ("**Circular 59**"); and *Circular on the Administrative Provisions for Foreign Exchange in Domestic Direct Investment by Foreign Investors* (Hui Fa [2013] No. 21), issued May 10, 2013, and effective May 13, 2013 ("**Circular 21**").

KEY CHANGES

This section focuses on changes brought by Circular 2 that we believe are most relevant for foreign investors and operations in China:

- ***Transfer of domestic NPA to foreign investors***

Old measure	Circular 2
Within 15 working days after filing or NDRC's approval, financial assets management companies must apply to SAFE for approval of foreign exchange payment and remittance for transfers of domestic NPA to foreign investors.	No SAFE approval necessary
SAFE approval of Forex income received by financial assets management companies for transfers of domestic NPA to foreign investors	No SAFE approval necessary; banks may directly process the settlement.
SAFE approval of exchanges and remittances of foreign investors' income generated from the disposal of NPA	No SAFE approval necessary; banks may directly process the transactions.

- ***Offshore lending by domestic companies***[2]

Old measure	Circular 2
Domestic companies may provide direct lending to their (i) offshore wholly-owned subsidiaries, (ii) companies in which they have shares, and (iii) their offshore parent companies.	Domestic companies may provide direct lending to offshore companies with which they have an equity relationship[3].
The balance of overseas lending cannot exceed 30% of such lender's owner's equity or its total investment amount in the borrower. Any lending extended over these limits must be reviewed by the local SAFE and approved by the central SAFE.	Overseas lending balances are no longer limited to a lender's total investment amount in the borrower. Any lending exceeding 30% of a lender's owner's equity must be approved by the local SAFE on the basis of collective consideration.
Overseas lending quotas approved by SAFE are valid for 2 years. Domestic companies may apply for an extension if they still need to use their quota after it expires.	Domestic companies may apply any reasonable term to their overseas lending quotas according to their business needs.
Not specified.	If a domestic lender cannot recover the principal and interest due on a loan because of objective reasons, it may deregister the loan with its local SAFE, which will approve the deregistration on the basis of collective consideration.

[2] Domestic companies refer to companies incorporated in the People's Republic of China, including domestic-funded companies and foreign-invested companies.

[3] The scope of this "equity relationship" needs to be further defined by SAFE. We do not know, for example, whether it includes offshore indirect holding companies.

- ***Remitting profits abroad by domestic companies***

Old measure	Circular 2
Banks must review the following documents when remitting profits abroad for domestic entities: i. Forex registration certificate; ii. Board resolution on profit distribution; iii. Latest capital verification report and audit report; and iv. Tax certificate.	Remittances of up to USD 50,000: in principle banks do not need to review any transaction documents; Remittances of more than USD 50,000: Banks must review all documents except the capital verification and audit reports.
The amount any entity may remit in a year is capped at the sum of "payable dividends" and "undistributed profits" belonging to the foreign shareholders in such entity's latest audit report.	No annual remittance cap

COMMENTS

Along with Circulars 59 and 21, Circular 2 demonstrates SAFE's forward direction in terms of opening up capital account items. Continuing the trend of streamlining administration of foreign exchange transactions, Circular 2 removes certain redundant approval items and changes other regulatory formalities from a one-time approval to regular monitoring. The result of these changes should lead to more efficient administration and ease the administrative burden for many companies.

Although some policies still need further clarification on how to interpret and implement them in practice, Circular 2 is certainly a welcomed reform for foreign investors.

As always, Gide will closely follow any legal and practical developments in this area. Please contact us should you have any questions regarding this or other Forex issues in China.

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INDUSTRY LAW UPDATE

Indonesian Government Introduces New Law on Industrial Affairs

The Indonesian Government recently enacted Law No.3 of 2014 on Industry ("**the new Industry Law**") to amend Law No. 5 of 1984 on Industry. The enactment of the new Industry Law aims to strengthen Indonesia's national industrial structure amid economic globalisation and increased competition within the industrial sector. In response to changing industry conditions, the new Industry Law looks to promote business certainty and competitive practice.

Effectiveness

The new Industry Law repeals Law No.5 of 1984 on Industry, and is effective as of the date of promulgation (on January 15, 2014).

Coverage

The coverage of the new Industry Law is extensive; regulating policy, planning and licensing within the Industry Sector. The new Industry Law covers:

- implementation of government affairs in the Industry sector;
- the Master Plan for National Industrial Development;
- national Industry Policy;
- Industry zoning;
- Industry resource development;
- Industry infrastructure development;
- Industry empowerment;
- safety measures;
- licensing, investment and facilities;
- the National Industry Committee;
- community participation; and
- supervision and control.

The new Industry Law focuses particularly on the development of: (i) human resources, (ii) the effective use of natural resources, (iii) the development and use of technology, (iv) enhanced creativity and innovation, (v) and the provision of financial resources.

Transitional provisions

Article 122 of the new Industry Law stipulates a transitional provision for Industrial Companies and Industrial Zone Companies referred to in Article 30. Industrial Companies are defined as any person or corporation conducting business activities in the Industry sector. Industrial Zone Companies are organisations working to develop and manage an Industrial zone. Under the provision, such companies must conform to the new Industry Law within three years of its enactment.

Implementing regulations

Implementing regulations will be enacted within two years of the enactment of the new Industry Law.

Human resources

The new Industry Law provides for the development of human resources in the Industry sector by the Government, Regional Governments, Industry participants and the community.

Article 20 of the new Industry Law requires the Government and Regional Governments to facilitate the development of Industry education and training centers in Industrial growth areas.

The new Industry Law also stipulates that the Minister for Industry is responsible for preparing and enforcing an Indonesian National Standard of Work Competence (*Standar Kompetensi Kerja Nasional Indonesia*, "**SKKNI**"). The SKKNI must be met by all workers employed in certain types of industrial work as determined by the Minister for Industry. The kinds of work subject to the SKKNI requirement include work that poses a high risk to the security, safety, health and environment of the workers or the product.

Foreign workers provisions: Certain provisions of the new Industry Law protect the use of Indonesian workers over foreign labour. Primarily, limitations apply to the time foreign workers may work. Further, all foreign workers must meet the SKKNI and, in some circumstances, the Minister for Industry may ban the use of foreign labour in order to safeguard national industry.

Natural resources

The new Industry Law stipulates that natural resources must be processed and used in a manner that is efficient, environmentally friendly and sustainable. To support compliance, Industrial Companies

and Industrial Zone Companies are particularly obliged to formulate a plan for the use of natural resources with reference to the National Industry Policy (*Kebijakan Industri Nasional*).

In order to ensure the availability and distribution of natural resources to the domestic sector, certain Industrial Zone Companies and Industrial Companies stipulated by the Minister must undertake water and energy management in accordance with prevailing regulations.

Resource nationalism: In line with Law No. 4 of 2009 on Mining and implementing regulations, Article 31 of the new Industry Law aims to increase the value added by natural resources to Indonesia's economy by encouraging domestic processing of natural resources.

Technological resources

Article 36 of the new Industry Law obliges the Government and Regional Governments to use, improve and control Industry Technology. This is carried out by the Minister for Industry following consultation with relevant ministers and stakeholders.

Creativity and innovation

The Government and Regional Governments are obliged under the new Industry Law to encourage the use and development of innovation and creativity through the provision of: a creative industries development centre, creative spaces, training, consultation on intellectual property rights, and marketing.

Financial resources

The new Industry Law also considers the availability of financial resources, stipulating that the Government will ensure the availability of competitive financing for the construction Industry through Government, Regional Government and/ or private enterprise.

Development of Facilities and Infrastructure

Chapter VII of the new Industry Law concerns Industry Standardisation, Industry infrastructure, and the National Industry Information System. Towards Industry Standardisation, the government plans, manages, develops and monitors Industry standards with reference to the Indonesian National Standard ("**SNI**"), technical specifications and/or procedures.

Generally, the implementation of the SNI is voluntary for Industrial Companies. However, the Minister for Industry may stipulate a mandatory SNI, technical specification and/or procedures. If obliged to meet the SNI, technical specification and/or procedures, the importer must do so prior to completing its customs obligations.

Under the new Industry Law, Industrial Companies are obliged to submit Industrial Data periodically to the Minister for Industry, Governor, and/or Regent/Mayor, through the National Industry Information System (*Sistem Informasi Industri Nasional*), as well as other data as requested by the Minister for Industry.

Industry Empowerment

Chapter VIII of the new Industry Law targets small, medium, Green and Strategic Industries for development and empowerment.

In the Green Industry sector, the Minister for Industry is responsible for devising a set of standards. The standards should include provisions on raw materials, complementary materials and energy, production processes, product, business management, and waste management. The standards currently operate as guidance for Industrial Companies. In the future, mandatory compliance will be gradually introduced and enforced by the Minister for Industry.

Use of Domestic Products

Under Article 85 of the new Industrial Law, the government shall increase the use of domestic products. Further details concerning this provision will be stipulated in a Government Regulation.

Industrial Permits

Under the new Industry Law, all industrial activities require an Industrial Permit (*Izin Usaha Industri*). Different Industrial Permits are allocated for small, medium and large Industries. The Minister for Industry holds the authority to grant a permit based on the industry's number of workers and level of investment. The Minister's authority in this respect may be delegated to the Governor or Regent/Mayor.

Industrial Companies holding an Industrial Permit must: (i) perform industrial business activities in accordance with their Industrial Permit; and (ii) assure the security and safety of their business' equipment, procedures, product, storage, and transportation. Industrial Companies expanding their

use of natural resources also require an Environmental Impact Assessment in order to obtain an Expansion License.

The new Industry Law further mandates that Industrial Companies must be located within an industrial estate, unless the company is located within a regency/city that: (i) has no industrial estate; or (ii) has an industrial estate but there are no available industrial plots. This exception also applies for: (i) small and medium Industries with no potential to cause environmental pollution with broad impact; and (ii) Industries using special raw materials and/or production processes that require a special location, as stipulated by the Minister of Industry.

In certain circumstances, the grant of an Industry Permits may be unavailable to certain applicants. For instance, small Industries, certain Medium Industries, and industries with importance to Indonesian heritage, may only be owned by Indonesian citizens.

Industry Facilities

The Government may provide facilities to accelerate development of industry. Facilities are given to certain industries of a particular nature, or in a particular field or area. These facilities can be fiscal or non fiscal.

Sanction Provisions

Non-compliance with the new Industry Law attracts various administrative sanctions as stipulated in the provisions. Generally, administrative sanctions include:

- written warnings;
- administrative fines;
- temporary closure;
- Industry Permit suspension; and/or,
- Industry Permit revocation.

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FIGHTING THE GOOD CHOCOLATE FIGHT

Melissa Long explains how the Court of Appeal resolved a dispute between chocolate manufacturers

INTRODUCTION

Following the recent Court of Appeal decision in *Chocosuisse Union des Fabricants Suisses & Ors v Maestro Swiss Chocolate Sdn Bhd* [2013] 6 CLJ 53, this case commentary highlights certain aspects of the decision on the tort of extended passing-off and actions brought pursuant to the Geographical Indications Act 2010 ("GIA").

BACKGROUND FACTS

The Appellants were Chocosuisse Union Des Fabricants Suisses de Chocolat, Kraft Foods Schweizs and Nestle Suisse SA. The former is a Swiss co-operative society for Swiss chocolate manufacturers. The latter two are Swiss manufacturers and exporters of various Swiss chocolate products under the "Toblerone" and "Nestle" brand.

On the Respondents' end were Maestro Swiss Chocolate Sdn Bhd and 3 of its related companies. They manufactured and marketed a line of 'VOCHELLE' chocolate and chocolate related products that bore a "Maestro SWISS" house mark on its packaging.

The Appellants' objected to the use of the words "Maestro SWISS" on the Respondents' locally manufactured chocolate products as they felt that the words would lead the public to believe that the Respondents' chocolates were Swiss chocolates.

Extended Passing Off

The Appellants relied upon the principles of 'extended passing off', founded on the English cases of *Bollinger & Ors v Costa Brave Wine Co Ltd* [1960] 1 RPC 16 (commonly known as the *Spanish Champagne* case) and *Erven Warnick BV v Townend & Sons (Hull) Ltd* [1979] 2 All ER 927 (the *Advocaat* case). In the classic form of passing off, trader X is aggrieved by trader Y misrepresenting trader Y's own goods as that of trader X. In the extended form of passing off, the complainant may be one of several traders mutually and non-exclusively sharing in the goodwill and reputation of a special trade name, who is seeking to protect that goodwill and reputation from goods that have been falsely ascribed with that special trade name.

It is imperative that in the minds of the public, the special trade name distinguishes its class of goods from other similar goods as that class of goods is believed to have distinctive qualities. In the *Spanish Champagne* case, champagne traders successfully prevented the defendant's Spanish sparkling wine from being labelled as 'champagne' in England as 'champagne' was recognised by the English public as being produced in the Champagne district of France.

In the present case, the Appellants mounted their claim for extended passing off on the goodwill and reputation of "Swiss chocolate" in that "Swiss chocolate" connotes chocolate made in Switzerland and is recognised as high quality and premium chocolate. On the strength of the reputation and goodwill of "Swiss chocolate", the First Appellant along with 2 other Swiss chocolate manufacturers had successfully brought a claim for extended passing off in England against Cadbury Limited for the use of "Swiss chalet" in relation to chocolate. This case was reported in *Chocosuisse Union des Fabricants Suisse de Chocolat and Others v Cadbury Limited* [1998] RPC 117 (Chancery Division) and [1999] RPC 826 (Court of Appeal).

Geographical Indications Act 2000

The Appellants further claimed that the Respondents were also in breach of the GIA. Section 5 of the GIA provides:

"(1) Any interested person may institute proceedings in the Court to prevent, in respect of geographical indications—

(a) the use in the course of trade of any means in the designation or presentation of any goods that indicates or suggests, in a manner which misleads the public as to the geographical origin of the goods, that the goods in question originate in a geographical area other than the true place of origin;"

The term 'geographical indication' is defined in Section 2 of the GIA as "*an indication which identifies any goods as originating in a country or territory, or a region or locality in that country or territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin*".

Locus Standi

One of the notable issues that arose in this case was whether the First Appellant had the necessary *locus standi* to bring the action for extended passing off. The Respondents contended that the First Appellant (a trade association) was not in itself in the chocolate trade and therefore did not share in the goodwill of "Swiss chocolate".

HIGH COURT DECISION

On Extended Passing Off

The High Court found that "Swiss chocolate" had goodwill attached to it in Malaysia which the Swiss chocolate manufacturers were entitled to protect. It was found that the Malaysian public considered "Swiss chocolate" to mean chocolates made in Switzerland and recognised this class of chocolates as high quality and premium chocolates.

Nevertheless, the High Court ruled that the tort of extended passing off was not established as the Respondents had not represented their products as "Swiss chocolates", and that no reasonable person would be confused by "Maestro SWISS" into believing the Respondents' chocolates originated from Switzerland.

Amongst its reasons, the High Court cited that (i) "Maestro SWISS" was part of all the Respondents' corporate names and served as a corporate logo; (ii) the visual appearance of the Respondents' packaging did not focus on the "Maestro SWISS" words (noting that the "VOCHELLE" mark was dominant and striking and that the "Maestro SWISS" words were given less prominence); and (iii) the packaging identified the Malaysian origin of the chocolates.

On Geographical Indications Act 2000

The High Court held that the use of "Maestro SWISS" did not violate the GIA as it was not used or presented as a geographical indication on the Respondents' packaging, unlike indications such as "Sabah tea" or "Sarawak pepper".

On Locus Standi

As regards the First Appellant's *locus standi*, the High Court accepted the Respondents' contention that the First Appellant had no relevant goodwill in the instant case as it was not in the chocolate business and therefore did not have standing to sue for passing off. The High Court referred to the UK Court of Appeal's decision in *Chocosuisse v Cadbury* in this finding.

COURT OF APPEAL DECISION

On Extended Passing Off

The Court of Appeal reversed the decision of the High Court and held that the Appellants' claim for extended passing off was established as there was a likelihood of confusion in the minds of the members of the public that the Respondents' chocolate products come from the distinctive group of "Swiss chocolates".

In coming to its conclusion, the Court noted that the details of Malaysian origin on the Respondents' products were on the back portion of the packaging and that members of the buying public do not normally examine details of the manufacturer printed on the back.

The Court took into account the Appellants' survey evidence, albeit with caution, and held that the High Court Judge was wrong in not giving the survey evidence any consideration at all. The Court found that the survey evidence supported evidence of the Appellants' witnesses that showed likely confusion in the minds of the public.

The Court also concluded that other evidence showed the Respondents' conscious use of "Maestro SWISS" to give the impression of a link to Switzerland, notably that it was placed on the front of the product packaging in the red and white colours of the Swiss flag.

On Geographical Indications Act 2000

The Court of Appeal disagreed with the decision of the High Court that "Maestro SWISS" as used did not constitute a geographical indication.

The Court nonetheless held that the Appellants claim under the GIA failed due to Section 27(2) of the GIA, as "Maestro SWISS" pre-dated the date of commencement of the GIA on 15 August 2001.

Section 27(2) provides:

"In respect of a geographical indication in existence before the commencement of this Act, no suit or proceedings shall be brought under this Act for anything done before the commencement of this Act."

It is unclear from the judgment whether the Court decided this on the basis that "Maestro SWISS" had only been used by the Respondents prior to the GIA, or whether it was because "Maestro SWISS" existed and was first used prior to the GIA. In the event of the latter, it would mean that the words "*anything done before the commencement of this Act*" apply to any geographical indication used prior to the GIA despite continued use post-GIA.

On Locus Standi

The Court of Appeal held that the First Appellant had *locus standi* in the extended passing off action on account that its members share a common interest in protecting the designation "Swiss chocolates". As a result, the Court held that the First Appellant belonged to the class entitled to share in the goodwill of "Swiss chocolates". The Court referred to dicta from *Chocosuisse v Cadbury* (Chancery Division) in which Laddie J stated "*Those entitled to use the word share a common interest in protecting its purity as a designation applied to a particular type of goods but in no real sense does it belong to an individual trader.*"

Interestingly, the court of first instance in *Chocosuisse v Cadbury* followed previous authority in deciding that Chocosuisse could bring proceedings only on its own behalf on account that membership may be affected if "Swiss chocolate" became unprotectable in England. The approach meant that Chocosuisse did not have *locus* to sue in a representative capacity i.e. on behalf of its members.

When the case went to appeal, the UK Court of Appeal similarly held that Chocosuisse did not have *locus* to sue in a representative capacity as it did not have the same interest as its members did in the proceedings. In addition, the Court took the view that Chocosuisse did not have *locus* to sue in its own right as the trade association did not have the business interest or goodwill necessary to bring the action for passing off against Cadbury. In other words, Cadbury's actions in contention did not 'pass off' any goodwill belonging to Chocosuisse in its own capacity as a trade association.

It would appear to this author that our Court of Appeal has taken a different approach in relation to the *locus standi* of a trade association if its members share in the goodwill and reputation of a designation.

CONCLUSION

The Court of Appeal's decision reaffirmed the tort of extended passing off in preventing traders from misusing distinctive designations which have goodwill and reputation attributable to a distinguishable class of goods.

The grapevine reports that the parties have applied for leave to appeal to the Federal Court. It is hoped that leave will be granted so that the disputes between the parties will be resolved with finality by the apex court of Malaysia. In particular, authoritative rulings on the interpretation of Section 27(2) of the GIA and the *locus standi* of a trade association to commence an action for extended passing off would be welcomed by the legal and business fraternities in Malaysia.

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NautaDutilh

Intellectual Property
Newsflash

ECJ: No copyright infringement if hyperlinking does not reach a new public **25 February 2014**

This newsletter is sent by NautaDutilh

Introduction

On 13 February, the Court of Justice of the European Union (hereinafter the "Court") rendered an important judgment on the scope of legitimate hyperlinking. Hyperlinking to protected works that are already freely accessible on another website does not constitute copyright infringement by the hyperlinking party because the works are not made available to a new public. The Court ruled that it is irrelevant in this respect if the hyperlinking party gives the impression that the work is appearing on its own website when the work in fact comes from another website. The case at hand is *Svensson et al./Retriever Sverige* and is the most recent in the following line of judgments: *SGAE*, *Football Association Premier League* and *ITV Broadcasting*.

Hyperlinks are very common in today's online world. A hyperlink gives the user of a site access to additional content by clicking on the link. This access is either direct – clicking on the link causes the user to be redirected to another website – or indirect through the intervention of the hyperlinking party, called embedded linking. In the case of embedded linking, the additional third-party content is presented within the hyperlinking website.

In the present case, Retriever Sverige's website provided the visitor with clickable links to press articles written by journalists Svensson et al. and published on, inter alia, the Göteborgs-Posten website, where the articles were freely accessible.

Hyperlinking to third-party content without the copyright owner's consent constitutes copyright infringement if the content is a protected work and the hyperlinking is considered to be an 'act of communication' of a work 'to the public' within the meaning of Article 3(1) of the Copyright Directive (Directive 2001/29 /EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society). However, a communication made by the same technical means as the initial communication authorised by the copyright owner will not be considered a communication 'to the public' unless it is directed to a *new* public, i.e. a public that was not taken into account by the copyright owner when authorising the initial communication to the public.

Act of communication?

It follows from previous case law of the Court – *Football Association Premier League* (cases C-403/08 and C-429/08) and *SGAE* (case C-306/05) – that the term 'act of communication' must be construed broadly. For there to be such an act, it is sufficient that a work is made available to a public in such a way that persons forming that public may access it, irrespective of whether they avail themselves of that opportunity.

In the *Svensson* case, the Court held that the provision by Retriever Sverige of clickable links to protected works must be regarded as the 'making available' of content and, therefore, as an 'act of communication'.

Act of communication to the public?

The Court then cited previous cases in which it had considered whether a protected work was in fact being communicated to a 'public'. In *SGAE* and *ITV Broadcasting* (case C-607/11) the Court

held that the term 'public' refers to an indeterminate number of potential recipients of the content and implies a fairly large number of persons.

Because the links provided by Retriever Sverige were aimed at all potential visitors of the site, and therefore at an indeterminate and fairly large number of recipients, the Court held that Retriever Sverige was making a communication to a public.

New public?

According to settled case law, inter alia *SGAE*, because Retriever Sverige's communication was made by the same technical means as the initial communication by the newspaper website, i.e. online, in order for Retriever Sverige's communication to constitute copyright infringement it had to be directed at a *new* public, i.e. at a public that was not taken into account by the copyright owners when they authorised the initial communication.

In *Svensson*, the Court observed that the hyperlinking did not lead to the works being communicated to a *new* public, because the public targeted by the initial communication already consisted of all internet users. According to the Court it is irrelevant for this purpose whether it was apparent to visitors of Retriever Sverige's website that the works came from a different site. On the other hand, where a protected work is no longer available to the public on the website on which it was initially communicated or is accessible on that site only to a restricted public, the users of a hyperlink giving access to that work must be deemed to be a new public.

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Simpson Grierson

March 2014

Local Government

Fluoridation is lawful.
Fluoridation is *not* compulsory medical treatment.

The High Court's recent decision in *New Health NZ Inc v South Taranaki District Council* dismissed two key arguments, namely:

- that local authorities do not have a power to add fluoride to drinking water under the Local Government Act 2002; and
- fluoridation is inconsistent with the right to refuse medical treatment in the New Zealand Bill of Rights Act 1990 (**NZBORA**).

The first argument has an interesting background. In the 1960s, the Privy Council (NZ's highest Court at the time) held that local authorities have an implied power to add fluoride to drinking water under the local government legislation of the day. The High Court found that local authorities still have such a power in light of the Local Government Act 2002 and the Health (Drinking Water) Amendment Act 2007.

The second argument centred around how public health measures, like fluoridating drinking water, interact with an individual's right to refuse to undergo medical treatment in section 11 of NZBORA. The Court carefully reviewed and summarised the global authorities on fluoridation before dealing with this issue in the New Zealand context.

The Court concluded that although fluoridation has therapeutic purpose, being the reduced incidence of dental decay, it does not constitute "medical treatment". Therefore, the right to refuse to undergo medical treatment was not engaged.

The Court found that the wording of section 11 strongly suggests that "medical treatment" refers to medical services given by a qualified practitioner to an individual patient in a professional setting. By contrast, fluoridation is a public health initiative, like chlorinated drinking water, iodised salt, and pasteurised milk: all which have a therapeutic purpose, but none of which are "medical treatment".

It was also important that if the right to refuse applied to public health initiatives, an individual's right to refuse could act as a veto on public health initiatives. Such a veto could deny others' ability to enjoy the benefits of public health initiatives which the Court observed **"is not only the right but often the responsibility of local authorities to deliver".**

The decision comes at a time when many local authorities are grappling with fluoridation issues. Several local authorities have held off making their decisions until this judgment was released. The decision provides clear guidance on the law regarding fluoridation. It may yet be appealed.

Disclosure
We acted for South Taranaki District Council in the case and the Attorney-General intervened and was heard as well. We would be happy to discuss the implications of the decision with you.

What is fluoridation?
Fluoride is naturally occurring mineral in water. In New Zealand it occurs naturally at 0.1 - 0.3 mg/L, which is low compared to many places overseas. Fluoridation increases the concentration of fluoride to within 0.7 to 1.0 mg/L. At this level, the incidence and severity of tooth decay is reduced.

For more information on local government issues please visit us at www.simpsongrierson.com

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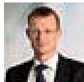

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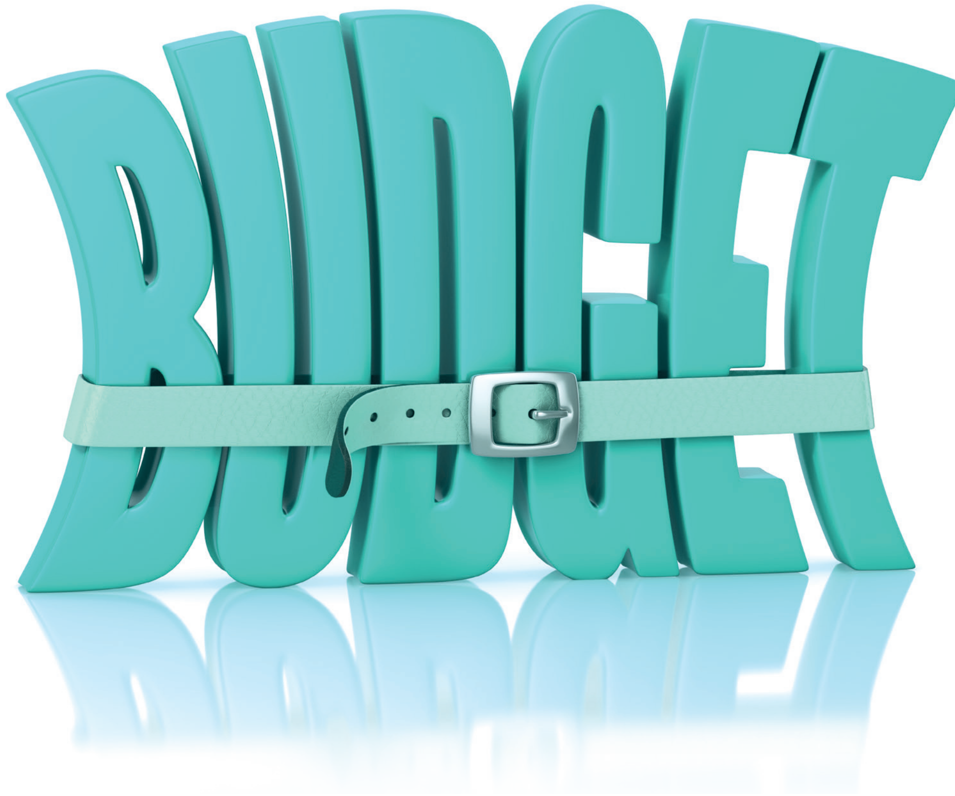

2014/2015 Budget Proposals - Tax Overview

By Ernest Mazansky, director: Werksmans Tax and Leon Rood, director

LEGAL BRIEF | FEBRUARY 2014

Last year we noted that, from a tax perspective, the number of proposed changes to the various fiscal Acts (mainly the Income Tax Act and VAT Act) were considerably fewer than in prior years.

INTRODUCTION

This year there are even fewer proposed amendments and they are less wide-ranging. This was not unexpected given that this is an election year, Parliament sitting for a shorter time in the year than usual; the Davis Tax Review Committee is yet to report and it would not be wise to make significant changes before receiving and considering the report; and, it must be said, Treasury has lost a considerable amount of skills in the tax area during this past year, which will obviously impact on their ability to consider and draft the changes.

Contrary to widespread speculation there were no increases in direct taxation, but rather there was some tax relief for individuals, to eliminate the effects of inflation.

A number of the proposed amendments which were announced are of a highly technical nature. We have thus attempted to limit ourselves to matters which are likely to be of more general and widespread interest.

INDIVIDUALS

Investing offshore through local policies

Investors take out policies with local long-term insurance companies which then re-insure with foreign reinsurers, which link the policy gains to underlying foreign investments. Currently reinsurance premiums and claims are disregarded in determining the insurance company's tax liability. It is proposed that the net returns be taxed, with the result that the return to the policyholder will obviously reduce.

Sickness and disability policies

Last year an amendment was introduced, to apply with effect from this year, that premiums will no longer be deductible and claims will no longer be taxable. It is proposed to clarify the legislation to prevent certain structured products from falling outside the ambit of the legislation, so as to ensure that premiums on all personal insurance policies will not be allowed as a deduction, and that the proceeds will all be tax-free.

Tax preferred savings accounts

The possibility of this savings incentive was raised in 2012, the proposal being that the maximum annual contribution would be R30 000, with a lifetime contribution limit of R500 000 (to be increased in line with inflation). The account will allow investments in bank deposits, collective investment schemes, exchange-traded funds and retail savings bonds. These proposals will now be proceeded with.

Fringe benefits

The major change proposed is that employer-provided residential accommodation will be valued on a different basis – currently it is valued by means of a formula applied to the employee's remuneration. As a first step, the focus of the change will be on rented and shared accommodation, as opposed to employer-owned accommodation. As regards rental accomodation, the value of use will be the cost to the employer; while as regards shared accommodation, it is proposed that a form of apportionment be considered.

BUSINESSES

Interest limitation rules

Last year interest limitation rules were introduced in relation both to debt borrowed from connected persons who were not taxable, and in relation to debt arising from reorganisation and acquisition transactions.

It is proposed to ease the rules relating to interest limitations on reorganisation and acquisition transactions. The changes proposed include:

- taking into account the previous year's EBITDA (for tax purposes);
- allowing an adjustment when the repo rate exceeds 8% and not, as it currently is, 10%; and
- ignoring assessed losses brought forward, which would otherwise reduce the tax EBITDA, and hence the amount of interest allowable.

Third-party backed shares

Extensive amendments were made in 2012, and small amendments in 2013, to section 8EA of the Income Tax Act which section, very shortly, removes the tax exemption on dividends from (mainly) redeemable preference shares if performance under the shares has been guaranteed by a third party. The major exception to this rule was where the preference shares were used directly or indirectly to fund an investment in an operating company (as defined).

It is proposed to extend the exception to where the investment is in an exploration company, which would not otherwise meet the requirements of being an operating company. Failure to extend this exception affects especially BEE parties investing in an exploration company.

Concessions will also be made in relation to certain limited pledges of the shares, and in respect of refinancing transactions.

Debt reduction rules

Revised rules were introduced in 2012 to reduce the tax effect of debtors being relieved of having to pay their creditors in full, particularly motivated by cases where the debtor companies faced financial hardship.

It is proposed that tax relief measures be considered for companies undergoing business rescue in terms of the Companies Act, and other forms of debt compromise.

Keyman policy

It is possible to elect that premiums under keyman policies be deductible, with the proceeds being taxable, or to allow the default position where the premiums are not deductible and the proceeds are not taxable.

Where the deductibility election is made, it is intended to tighten up the rules so that deductibility will be allowed only where the employer is insured against loss due to the death, disablement or severe illness of an employee or director, and not in other circumstances, such as to provide funds for the repayment of a loan.

Public Private Partnerships

Consideration will be given to allowing relief on depreciation to be claimed on improvements erected on land owned by the State, to improve the financial viability of the projects (there is already such an allowance contained in section 12N of the Income Tax Act, so presumably this allowance is to be enhanced in some manner).

Long-term insurance companies

Apart from the change referred to above in relation to foreign reinsurance, it is proposed that where a long-term insurer issues a risk policy (which is very little different to the types of policies issued by short-term insurance companies) the profits should be taxed in a similar way to a short-term insurance company, ie at 28%, rather than in one of the policyholder funds where the effective tax rate can be considerably lower.

It is also proposed to review the fairness of the taxation of the individual policyholder fund, where a tax rate of 30% applies, irrespective of the level of income of policyholders.

Venture Capital Companies (VCC)

The purpose of a VCC is to encourage investments into small and medium enterprises, and the major incentive is that an investment into a VCC is tax-deductible. Despite this, the VCC has not proved popular.

It is therefore proposed to enhance its attractiveness by:

- removing the recoupment provision when the investment in the VCC is disposed of, if the shares have been held for a minimum period of time;
- allowing transferability of tax benefits on disposal of the shares;
- increasing the amounts by which the VCC can invest in underlying investee companies;
- exempting the VCC from CGT; and
- expanding the permitted business forms for a VCC (eg, presumably to include trusts, limited partnerships, and the like).

Small and Medium Enterprises (SMEs)

A number of proposals have been made to encourage the establishment of SMEs by enhancing the tax system. These include:

- simplifying certain aspects of the turnover tax regime for micro businesses;
- replacing the reduced tax rate regime for small business corporations with an annual refundable tax compliance rebate (this being a recommendation of the Davis Tax Review Committee); and
- making grants received by SMEs tax-exempt, regardless of the source of the funds (presumably this means the exemption will no longer be limited to Government grants).

Public Benefit Organisations (PBOs)

Currently PBOs to which donations are made that qualify for an income tax deduction under section 18A of the Income Tax Act, must distribute up to 75% of their receipts within a year following the year-end of receipt.
It is proposed to relax this requirement to improve sustainability.

Taxpayer reference number

The Minister announced that in the next fiscal year the SARS will implement a single registration of taxpayers and traders for the main taxes. The Tax Administration Act already contains the regulatory and statutory framework for such a single taxpayer reference number.

INTERNATIONAL

Transfer pricing rules

Currently when there is a transfer pricing adjustment arising from a transaction between a South African resident and a connected person who is a foreign resident, a notional loan is deemed to come into existence, and ,in effect, notional interest thereon is deemed to accrue in subsequent years, which is also taxable, until the loan is "repaid" – presumably by a payment to the South African resident to compensate it for the under- or over-charge, as the case may be.

It is now recognised that this is cumbersome and it is proposed to substitute this so-called secondary adjustment with a different type of secondary adjustment, namely, treating it either as a dividend or a capital contribution, as the circumstances may determine (it will be recalled that under the previous transfer pricing rules, the secondary adjustment was deemed to be a dividend subject to STC).

Controlled foreign companies (CFCs)

Currently the profits of a CFC will not be taxed in the South African shareholder's hands where the CFC either has a qualifying foreign business establishment, or it is resident in a country where the tax that it pays there is equal at least to 75% of the tax it would have paid had it been a South African- resident company (the latter colloquially being referred to as the high-tax exemption).

Unfortunately the high tax exemption is somewhat problematical, because it was designed to alleviate the need to make CFC calculations, but it is still necessary to make the calculation in order to determine that it is no longer necessary to make the calculation!

To ease the compliance burden it is proposed that where a South African resident company owns a number of CFCs, an option be provided to deem the net income of the CFC to be nil if either the high-tax exemption or the foreign business establishment test, when applied to the aggregate taxable amounts, is met.

Cross-border retirement saving

Currently, expatriates coming to work in South Africa, who continue to contribute to foreign retirement funds, are only able to claim the deduction if the foreign fund is approved by the SARS (which is very rare in practice). A similar problem faces South African residents who work abroad. It is proposed to reconsider the cross-border pension issues over the next two years.

INDIRECT TAXES

Carbon tax

The implementation of the controversial carbon tax is to be postponed to 2016 to align the design of the carbon tax and the proposed desired emission-reduction outcomes.

VAT

There are two significant proposals:

- Notional input tax is allowed as a deduction to a registered vendor that acquires second-hand goods from a non-vendor. This concession is to be removed in the case of second-hand goods made from precious metals.
- Technically, a zero-rated sale of a business as a going concern is only possible where the purchaser is a registered VAT vendor. The SARS has dealt with this administratively whereby it allows zero-rating provided the application for registration is made before the agreement is concluded, in which case the registration is backdated to date of application, thereby ensuring that the parties qualify. The legislation will be amended to remove the uncertainty regarding whether a person must be a vendor before the acquisition of the going concern.

RESEARCH PROJECTS

A number of tax policy research projects are on Treasury's agenda over the next two fiscal years, including:

- A study of effective tax rates for companies in different sectors, including a review of the effectiveness of some tax incentives;
- the removal of the zero-rating provision of housing subsidies, and to make them standard-rated (but at the same time to increase the value of the grant); and
- a review of how educational services and public transport are treated for VAT purposes (currently they are both exempt, which means that no VAT is charged, and no input tax can be claimed, by the supplier).

EXCHANGE CONTROLS

Last year a tax and exchange control concession was introduced to allow a listed group of companies to designate, and register with the Reserve Bank, one subsidiary to conduct international treasury operations. This subsidiary is essentially free of exchange controls and the listed holding company is entitled to transfer to it, without exchange control approval, up to R750 million per annum (and more with approval).

The Minister announced that, as further steps to simplify trade with Africa, this regime will be extended to unlisted companies, and the limits for listed companies will be increased (though no amounts were mentioned in his speech).

TAX RATES AND THRESHOLDS

Individuals

Relief will be granted by adjustments to the personal income tax table as follows:

Personal income tax rate and bracket adjustments

2014/15		2013/14	
TAXABLE INCOME (R)	RATES OF TAX	TAXABLE INCOME (R)	RATES OF TAX
0 – 174 550	18% of each R1	0 – 165 600	18% of each R1
174 551 – 272 700	R31 419 + 25% of the amount above R174 550	165 601 – 258 750	R29 808 + 25% of the amount above R165 600
272 701 – 377 450	R55 957 + 30% of the amount above R272 700	258 751 – 358 110	R53 096 + 30% of the amount above R258 750
377 451 – 528 000	R87 382 + 35% of the amount above R377 450	358 111 – 500 940	R82 904 + 35% of the amount above R358 110
528 001 – 673 100	R140 074 + 38% of the amount above R528 000	500 941 – 638 600	R132 894 + 38% of the amount above R500 940
673 101 +	R195 212 + 40% of the amount above R673 100	638 601 +	R185 205 + 40% of the amount above R638 600

	2014/15	2013/14
REBATES	R	R
Primary	12 726	12 080
Secondary	7 110	6 750
Tertiary	2 367	2 250
TAX THRESHOLD		
Below age 65	70 700	67 111
Age 65 and over	110 200	104 611
Age 75 and over	123 350	117 111

Retirement fund lump sum withdrawal benefits

2014/15		2013/14	
TAXABLE INCOME (R)	RATES OF TAX	TAXABLE INCOME (R)	RATES OF TAX
0 – 25 000	0% of taxable income	0 – 22 500	0% of taxable income
25 001 – 660 000	18% of taxable income above R25 000	22 501 – 660 000	18% of taxable income above R22 500
660 001 – 990 000	R114 300 + 27% of taxable income above R660 000	600 001 – 900 000	R103 950 + 27% of taxable income above R600 000
990 001 +	R203 400 + 36% of taxable income above R990 000	900 001 +	R184 950 + 36% of taxable income above R900 000

Retirement fund lump sum benefits or severance benefits

2014/15		2013/14	
TAXABLE INCOME (R)	RATES OF TAX	TAXABLE INCOME (R)	RATES OF TAX
0 – 500 000	0% of taxable income	0 – 315 000	0% of taxable income
500 001 – 700 000	18% of taxable income above R500 000	315 001 – 630 000	18% of taxable income above R315 000
700 001 – 1 050 000	R36 000 + 27% of taxable income above R700 000	630 001 – 945 000	R56 700 + 27% of taxable income above R630 000
1 050 001 +	R130 500 + 36% of taxable income above R1 050 000	945 001 +	R141 750 + 36% of taxable income above R945 000

The relief, insofar as it applies to individuals younger than 65 years, is illustrated in the following comparative table:

TAXABLE INCOME	2014/15 RATES	2013/14 RATES	TAX REDUCTION	% REDUCTION
R	R	R	R	R
75 000	774	1 420	- 646	- 45.5%
80 000	1 674	2 320	- 646	- 27.8%
85 000	2 574	3 220	-646	- 20.1%
90 000	3 474	4 120	-646	- 15.7%
100 000	5 274	5 920	-646	- 10.9%
120 000	8 874	9 520	-646	- 6.8%
150 000	14 274	14 920	-646	- 4.3%
200 000	25 056	26 328	- 1 273	- 4.8%
250 000	37 556	38 828	- 1 273	- 3.3%
300 000	51 421	53 391	- 1 970	- 3.7%
400 000	82 549	85 486	- 2 937	- 3.4%
500 000	117 549	120 486	- 2 937	- 2.4%
750 000	213 246	217 685	- 4 439	- 2.0%
1 000 000	313 246	317 685	- 4 439	- 1.4%

TAX FREE PORTION OF INTEREST

	2014/15	2013/14
	R	R
Interest - under 65	23 800	23 800
- over 65	34 500	34 500

TRAVEL ALLOWANCE

VALUE OF VEHICLE INCLUDING VAT (R)	FIXED COST (R p.a.)	FUEL COSTS (c/km)	MAINTENANCE COST (c/km)
0 – 80 000	25 946	92.3	27.6
80 001 – 160 000	46 203	103.1	34.6
160 001 – 240 000	66 530	112.0	38.1
240 001 – 320 000	84 351	120.5	41.6
320 001 – 400 000	102 233	128.9	48.8
400 001 – 480 000	120 997	147.9	57.3
480 001 – 560 000	139 760	152.9	71.3
Exceeding 560 000	139 760	152.9	71.3

MONTHLY MEDICAL TAX CREDIT

Description	2014/15	2013/14
	R	R
Medical scheme fees tax credit, in respect of benefits to the taxpayer	257	242
Medical scheme fees tax credit, in respect of benefits to the taxpayer and one dependent	514	484
Medical scheme fees tax credit, in respect of benefits to each additional dependant	172	162

CORPORATE INCOME TAX RATES

Income tax – Companies

For the financial years ending on any date between 1 April and the following 31 March, the following rates of tax will apply:

	2014/15	2013/14
TYPE	RATE OF TAX (%)	
Companies (other than gold mining companies and long term insurers)	28	28
Personal service providers	28	28
Foreign resident companies earning income from a South African source	28	28
Dividends Tax	15	15

Tax regime for small business corporations

2014/15		2013/14	
TAXABLE INCOME	RATE	TAXABLE INCOME	RATE
0 – R70 700	0%	Below R67 111	0%
R70 701 – R365 000	7%	R67 112 to R365 000	7%
R365 001 – R550 000	21%	R365 001 to R550 000	21%
550 001 +	28%	R550 001 +	28%

CAPITAL GAINS TAX

Effective capital gains tax rates

TYPE	2014/15	2013/14
For individuals and special trusts	13.3%	13.3%
Companies	18.6%	18.6%
Trusts	26.6%	26.6%

Capital gains exemptions

DESCRIPTION	THRESHOLDS 2014/15	THRESHOLDS 2013/14
	R	R
Annual exclusion for individuals and special trusts	30 000	30 000
Exclusion on death	300 000	300 000
Exclusion in respect of disposal of primary residence (based on amount of capital gain or loss on disposal)	2 million	2 million
Maximum market value of all assets allowed within definition of small business on disposal when person over 55	10 million	10 million
Exclusion amount on disposal of small business when person over 55	1.8 million	1.8 million

TRANSFER DUTY

The transfer duty table, which applies to all types of purchasers, is as follows:

VALUE OF PROPERTY (R)	RATE
0 – 600 000	0%
600 001 – 1 000 000	3% of the value above R600 000
1 000 001 – 1 500 000	R12 000 + 5% of the value above R1 000 000
1 500 001 +	R37 000 + 8% of the value exceeding R1 500 000

About Werksmans Tax practice

Our Tax practice is able to respond swiftly and efficiently on local and international tax matters. Team members have extensive experience in consulting to the commercial sector and are able to provide integrated advice and assistance on a wide range of tax issues.

Services range from consulting on the tax aspects of clients' commercial dealings to interacting on their behalf with the tax authorities and, where necessary, dealing with objections and disputes.

Special areas of expertise include the tax aspects of commercial activities such as mergers and acquisitions, private equity and black economic empowerment transactions, and corporate re-organisations.

Team members are also skilled in handling settlement negotiations, appeals in the Tax Court and High Court, and alternative dispute resolution processes.

In terms of international tax services, the team has a well-established track record in inward and outward investment matters and offshore structuring, taking into account the exchange control implications thereof.

Services include dealing with:

- Domestic tax: income tax, withholding tax, capital gains tax, employees' tax, value-added tax and securities transfer tax
- International tax: inward and outward investment
- Exchange control advice
- Estate planning
- Tax rules relating to financial services and products: encompassing insurance, private equity, securitisations, hedge funds, structured and project finance, debt and derivative instruments
- Tax structuring of transactions: including black economic empowerment transactions, mergers and acquisitions, unbundlings, reconstructions, management buyouts, distributions, funding, securities issues and buy-backs
- Tax litigation and dispute resolution: from liaison with tax authorities and regulators on settlement negotiations, alternative dispute resolution, objections and Tax Court appeals.

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Royalties paid in 2011 and thereafter for foreign patents and computer programs may be exempt from Taiwan income tax

02/06/2014

Royalties paid in 2011 and thereafter for foreign patents and computer programs may be exempt from Taiwan income tax

The Ministry of Finance (**MOF**) and the Ministry of Economic Affairs (**MOEA**) jointly issued a directive on 29 January 2014 stating the amendments to the Rules Governing the Applications for Exemption from Income Tax on Royalties and Technical Service Fees Collected by Foreign Profit-Seeking Enterprises from the Manufacturing Industry, Technical Services Industry and Power-Generating Industry ("**Rules**"). These amendments took effect retroactively on 1 January 2011.

Under the amended Rules, royalties paid for foreign patents and computer programs are exempt from income tax provided that the criteria prescribed under the Rules are met. With respect to technical service fees for technical know-how, they are no longer exempt from income tax under the amended Rules.

According to the Income Tax Act, the royalties and technical service fees received by a foreign entity for providing its patents, trademarks and technical know-how to a Taiwan entity are, in general, subject to 20% income tax which the Taiwan entity should withhold upon making the payment, unless tax exemption approval is obtained pursuant to the Rules.

Before the Rules were amended, the royalties paid for patents that were eligible for tax exemption were limited to those for patent rights approved by the Taiwan Intellectual Property Office. As a result, foreign entities may include their income tax cost in the royalties for their foreign patents, which meant an increase in cost to Taiwan entities.

Under the amended Rules, if the patent rights licensed are within their valid period and are licensed to a Taiwan entity (in any of the 20 industries listed below) for its use by way of technical cooperation, tax exemption could be granted. However, the amended Rules prescribe additional criteria for tax exemption, i.e., a patent is subject to the MOEA's special approval and confirmation that the underlying technology is indeed critical to the Taiwan entity but unavailable in Taiwan, or the technology available in Taiwan is not compatible with the Taiwan entity's

product specifications. With such additional criteria, the actual economic benefit of the amendments remains to be seen.

1. Precision machineries and intellectual automation industry
2. Motor vehicles industry
3. High-value metal materials industry
4. Wind-power generating industry
5. Solar-energy industry
6. New generation telecommunications and smart handheld gadgets industry
7. Smart electronics and parts industry
8. Displayer industry
9. LED lighting industry
10. Smart living industry
11. Cloud computing industry
12. High-value petrochemical industry
13. High-value textile industry
14. Photoelectric chemical materials industry
15. Health-care food industry
16. High technology industry
17. Resource recycling industry
18. Water-recycling and utilization industry
19. Information services industry
20. Design industry

In addition, the royalties paid to a foreign entity by a Taiwan entity in the manufacturing or technical service industry for the latter's use of the former's computer programs by way of technical cooperation are exempt from income tax, provided that the jurisdiction where the foreign entity is incorporated affords copyright protection to the works of Taiwan individuals and entities, the copyright of the computer program is within the valid period, and the MOEA's confirmation has been obtained.

With the cancelation of the tax exemption on technical service fees, such fees are subject to 20% income tax rate. Hence it is worth considering applying for the tax authorities' approval to impose tax at a lower rate (3%) so as to reduce tax cost.

If you have any questions or require any further information, please feel free to contact us.

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TAX UPDATE - FEBRUARY 28, 2014

Summary of Chairman Camp's Oil and Gas Tax Proposals

On February 26, 2014, House Ways and Means Committee Chairman Dave Camp released a discussion draft of the "Tax Reform Act of 2014." The draft bill proposes a host of significant revisions to the Internal Revenue Code, including amendments to certain oil and gas provisions of the Internal Revenue Code that may be applicable to your business.

Some of these proposals have appeared in the most recent Treasury Department general explanation of the Obama Administration's tax proposals for the 2014 fiscal year budget on April 10, 2013. Some notable similarities and differences between the Camp proposal and the most recent Treasury proposal are discussed herein.

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

1. No Repeal of Expensing of Intangible Drilling Costs

Generally, a taxpayer who pays or incurs intangible drilling costs ("IDCs") in the development of an oil or gas property located in the United States may elect under current law either to expense or to capitalize and amortize those costs, if the taxpayer holds a working or other operating interest in such property. In the case of an integrated oil company that has elected to expense IDCs, 30% of the IDCs on productive wells must be capitalized and amortized over a 60-month period. Further, a taxpayer may elect to capitalize and amortize certain IDCs over a 60-month period beginning with the month the expenditure was paid or incurred.

Recent Treasury Administration proposals, including the most recent proposal, included a repeal of the election to expense IDCs. The Camp proposal would leave the existing law regarding IDCs intact.

2. No Change to Amortization Period for Geological and Geophysical Costs

Geological and geophysical expenditures are costs incurred for the purpose of obtaining and accumulating data that will serve as the basis for the acquisition and retention of mineral properties. Under

current law, the amortization period for geological and geophysical expenditures incurred in connection with oil and gas exploration in the United States is two years for independent producers and seven years for integrated oil and gas producers.

The most recent Treasury proposal provided an increase to the amortization period from two years to seven years for geological and geophysical expenditures incurred by independent producers in connection with all oil and gas exploration in the United States. The Camp proposal would leave existing law regarding geological and geophysical costs intact.

3. Repeal Percentage Depletion

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

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

The Camp proposal would repeal the percentage depletion deduction for taxable years beginning after December 31, 2014. Thereafter, all taxpayers would only be permitted to report a deduction for cost depletion to recover their adjusted basis, if any, in oil and gas wells. This proposal is consistent with the most recent Treasury proposal.

The Joint Committee on Taxation ("JCT") estimates the repeal would increase revenues by $5.3 billion over 2014-2023.

4. Repeal Domestic Manufacturing Deduction, Including for Oil and Gas Production

Under current law, a deduction is allowed with respect to income attributable to domestic production activities. The deduction is equal to 9 percent of the lesser of qualified production activities income for the year or total taxable income for the year, limited to 50 percent of the wages incurred by the taxpayer for the year. The deduction is computed at a 6 percent rate for income attributable to the production, refining, processing, transportation, or distribution of oil, gas, or any primary product thereof.

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

deductions attributable to such receipts.

Under the Camp proposal, the domestic production activity deduction is phased out to 6 percent for taxable years beginning in 2015 and 3 percent for taxable years beginning in 2016, and the deduction is repealed for taxable years beginning after December 31, 2016. For individuals, the Camp proposal replaces the concept with a special 25% capped tax rate on income earned from these activities directly or through flow through entities (other than publicly traded partnerships). As the Camp proposal relates to oil and gas, it is consistent with the most recent Treasury proposal, which intended to repeal this deduction for oil and gas production and certain other nonmanufacturing activities.

The JCT estimates the phaseout and repeal would increase revenues by $115.8 billion over 2014-2023.

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

The passive loss rules generally limit the deductions and credits of individuals, trusts and certain closely held C corporations arising from passive activities. Deductions attributable to passive activities, to the extent they exceed income from passive activities, generally may not be deducted against other income. Deductions and credits that are suspended under these rules are carried forward and treated as deductions and credits from passive activities in subsequent years; the suspended losses from a passive activity are allowed in full when a taxpayer disposes of his entire interest in the passive activity to an unrelated person. A "passive activity" is generally defined as any trade or business activity in which the taxpayer does not materially participate.

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

The Camp proposal repeals the oil and gas working interest exception for taxable years beginning after December 31, 2014. As a result, deductions and credits attributable to oil and gas working interests held by an individual, trust or closely held C corporation would become subject to the passive loss limitations described above, unless the taxpayer materially participates in the oil and gas activity. This proposal is consistent with the most recent Treasury proposal.

The JCT estimates this repeal would increase revenues by $0.1 billion over 2014-2023.

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

The Camp proposal includes a repeal of (i) the 15% investment tax credit for domestic enhanced oil recovery projects as of the date of enactment of the bill and (ii) the production tax credit for oil and gas produced from marginal wells for taxable years beginning after December 31, 2014. These proposals are consistent with the most recent Treasury proposal.

The JCT estimates these repeals would have no revenue effect over 2014-2023.

7. Repeal of Recurring Item Exception for Spudding of Oil or Gas Wells

Under current law, an accrual-method taxpayer generally may deduct an expense only when all events have occurred that fix the fact of the liability, the amount of the liability is determinable with reasonable accuracy, and economic performance has occurred. An exception applies to certain expenses that are recurring in nature. To qualify, the expense must be paid no later than eight and a half months after the close of the taxable year to which it relates. The exception is not available for a "tax shelter", unless the tax shelter involves drilling oil or gas wells and the drilling commences within 90 days of the close of the tax year to which the expenses relate.

The Camp proposal repeals this 90-day exception for oil and gas arrangements that meet the tax shelter definition for taxable years beginning after December 31, 2014.

The JCT estimates this repeal would increase revenues by $0.2 billion over 2014-2013.

8. Repeal of Like-Kind Exchanges

Under current law, a taxpayer may defer gain or loss on an exchange of (i) property held for productive use in the taxpayer's trade or business, or property held for investment purposes, for (ii) property of a like-kind that is also held for productive use in a trade or business or for investment. For example, under current law, certain oil and gas working interests could be exchanged for other oil and gas working interests (e.g., in an acreage swap) without gain recognition. The taxpayer receives a basis in the new property equal to the taxpayer's adjusted basis in the exchanged property.

Under the Camp proposal, the deferral of gain on like-kind exchanges would be repealed effective for transfers after 2014, except for exchanges pursuant to a written binding contract entered into on or before December 31, 2014 that is completed before January 1, 2017.

The JCT estimates the repeal would increase revenues by $40.9 billion over 2014-2023.

9. No Repeal of Deduction for Tertiary Injectants

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

The most recent Treasury proposal included a repeal of the deduction for qualified tertiary injectant expenses. The Camp proposal would leave the existing law regarding such expenses intact.

The text of the bill can be found here.

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Insight and Input on ONC's Proposed Roadmap for EHR Technology: ONC Issues Proposed 2015 Edition of Meaningful Use EHR Certification Criteria

03.11.14

By Jane Eckels and Amy L. Kauppila

On Feb. 21, the Office of the National Coordinator for Health Information Technology ("ONC") released a proposed rule for voluntary 2015 Edition EHR certification criteria for the Medicare and Medicaid meaningful use incentive programs and changes to the ONC HIT Certification Program. The 2015 Edition would be voluntary both for EHR vendors for purposes of meeting the certified EHR requirements in the meaningful use programs, and for providers participating in the programs with regard to the EHR technology they use to accomplish meaningful use. Because ONC plans on releasing a mandatory update to the EHR certification criteria effective in 2017, the proposed 2015 Edition criteria provides an opportunity for both insight and input on the standards, implementation specifications and criteria that are likely to become mandatory for 2017.

With the release of this proposed rule, ONC intends to issue more frequent, incremental rules regarding EHR certification criteria in order to give EHR technology developers more time to plan, develop and implement EHR technology updates. If EHR developers elect to implement voluntary certification requirements over time prior to their becoming mandatory, users may experience more gradual updates instead of facing periodic major systems upgrades.

Some of the changes to the EHR certification criteria and HIT certification program would:

- Require every EHR technology certified to the transition of care objective to transmit data in accordance with the Applicability Statement for Secure Health Transport (the primary Direct Project specification);
- Adopt the Health eDecisions standards and require their use in connection with processing, requesting and receiving clinical decision support guidance;
- Require EHR technology to be capable of filtering of clinical quality measures (CQM) results by patient population characteristics, such as practice site and address; provider identification number, diagnosis, health insurance coverages including Medicare/Medicaid eligibility, and demographics;
- Establish certification packages to reflect groupings of certification criteria, beginning with "care coordination" and "patient engagement"; and
- Allow certification for EHR technology intended for settings where providers do not typically qualify for participation in the meaningful use programs, such as behavioral health or long-term post-acute care settings, thus creating a category of "Non-MU

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In addition, the proposed rule solicits public comments on many other ideas under consideration for the eventual 2017 Edition criteria, such as:

- Options for how privacy and security criteria could be applied to the certification of EHR Modules;
- Whether, and what, standard to adopt for oral liquid medication dosing; and
- The potential adoption of a "Blue Button +" criteria for the ability to get patient records in a human-readable and machine-readable format, and allowing the patient to send them where they choose.

This proposed rule allows both EHR developers and real-world users—professionals and hospitals—to weigh in on what the future of EHR technology should be. The deadline for public comment is April 28, 2014.

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FDA Alert

10 March 2014

See note below about Hogan Lovells

FDA seeks comments on new draft guidance clarifying good reprint practices

In a 3 March 2014 *Federal Register* notice, the U.S. Food and Drug Administration (FDA or the agency) distributed a revised draft guidance document titled *Distributing Scientific and Medical Publications on Unapproved New Uses — Recommended Practices* (Draft Guidance) for comment. The Draft Guidance, when finalized, is intended to replace FDA's January 2009 final guidance titled *Good Reprint Practices for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved New Uses of Approved Drugs and Approved or Cleared Medical Devices* (2009 Guidance). While the Draft Guidance is largely consistent with the 2009 Guidance, restating and providing additional details that build on the existing criteria for distribution of journal articles describing unapproved uses of drugs and medical devices, it does include new requirements for the dissemination of medical or scientific reference texts and clinical practice guidelines (CPGs), neither of which are explicitly discussed in the 2009 Guidance.

The most notable difference between the Draft Guidance and the 2009 Guidance is the introduction of a new category of publications, i.e., CPGs, that can fall within the "safe harbor" for distribution of publications that discuss unapproved uses of drugs and devices. To fall within the scope of the Draft Guidance, CPGs must meet the Institute of Medicine's standards for CPG "trustworthiness," which require that the CPG:

- be based on a systemic review of existing evidence;
- be developed by a knowledgeable, multidisciplinary panel of experts and representatives from key affected groups;
- consider important patient subgroups and preferences;
- be based on an explicit and transparent (i.e., publicly accessible) process by which the CPG is developed and funded that minimizes distortions, biases, and conflicts of interest;
- provide a clear explanation of the logical relationships between alternative care options and health outcomes, clearly articulated recommendations in standardized form, and ratings of both quality of evidence and strength of recommendations; and
- be reconsidered and reviewed when important new evidence warrants modifications of recommendations.

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In its Draft Guidance, the FDA has also introduced new concepts for distribution of reference texts disseminated in their entirety (as opposed to select chapters). While new, these requirements are not wholly

different from those previously articulated, and the new concepts are consistent with the agency's 2009 Guidance. For example, as articulated in the 2009 Guidance, reference texts should be peer reviewed and published in accordance with peer-review procedures for the publisher, which should be easily accessible to the public. Among the newly articulated guidance for these publications are requirements that the reference text *should*:

- be based on a systematic review of the existing evidence;
- be published by an independent publisher, not substantially dependent on financial support from the manufacturer, who publishes scientific or medical educational content for healthcare professionals and students;
- be authored, edited, and/or contributed to by experts who have demonstrated expertise in the subject area; and
- be sold through usual and customary distribution channels.

In addition, reference texts and CPGs distributed in their entirety under this guidance should meet the following requirements:

- be the most current version of the publication;
- be distributed separately from delivery of information that is promotional in nature;
- be provided with the approved or cleared labeling of the manufacturer's product or products that are the subject of a primary substantive discussion within the publication; and
- contain a prominently displayed and permanently affixed statement identifying the distributing manufacturer and disclosing that some of the uses of drugs and/or devices described in the publication might not be approved or cleared by FDA. The statement should also disclose that the author(s) of some sections might have a financial interest in the manufacturer or its products, unless the manufacturer has verified that none of the authors for the publication has a financial interest in the manufacturer or a product being written about. This statement should be placed by sticker, stamp, or other similar means on the front cover or front page of the reference text or CPG, respectively.

The criteria for distribution of reference texts and CPGs when disseminated in their entirety serve as the foundation for distribution of selected chapters or sections from these publications, although additional requirements have been set forth for distribution of such materials when only a selected chapter or section is disseminated. Should the manufacturer wish to distribute a specific chapter or section of a reference text or CPG, respectively, the excerpted chapter or section should:

- be unaltered/unabridged and extracted directly from the publication in which it appears;
- when necessary, to provide context, be disseminated with other unaltered/unabridged chapters or sections extracted directly from the same publication, such as chapters or sections that provide related or supportive information; and
- contain a prominently displayed and permanently affixed statement consistent with that required under the 2009 Guidance.

Regardless of the type of publication distributed, the restrictions for what the publication must not and should not be are identical and consistent with the restrictions articulated in the 2009 Guidance, including that the publication cannot be false or misleading or contain information recommending or suggesting a use of the manufacturer's product that the manufacturer knows to be dangerous to health.

In sum, the FDA's new Draft Guidance articulates criteria for dissemination of scientific and medical publications that are largely consistent with those in its 2009 Guidance. The major differences between the Draft Guidance and the 2009 Guidance are: (1) the broadening of the scope of the guidance to include CPGs as an additional type of publication that can disseminated under the guidance's "safe harbor" and (2) the articulation of specific criteria for dissemination according to the type of material disseminated.

Consistent with prior agency policy and practice, if manufacturers follow the recommendations in the Draft Guidance to disseminate scientific or medical publications describing unapproved uses of their products, the FDA does not intend to use such distributions as evidence of the manufacturer's intent that the product be used for an unapproved new use.

The Draft Guidance has been published in the *Federal Register* to give the public the opportunity to provide comments and suggestions on the agency's recommendations. Any such comments and suggestions should be identified with Docket Number FDA-2008-D-0053 and submitted on or before May 2, 2014, to

http://www.regulations.gov or to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

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Informed Counsel

Analysis of Recent Legal Developments in Southeast Asia

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Pharmaceutical Marketing in Vietnam: Regulatory Restrictions and Permissible Activities

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Vietnam has one of the world's top growth rates in pharmaceutical spending, with *Thanh Nien* newspaper estimating that spending for 2013 would exceed USD 3.3 billion, an increase of 17% from 2012. Vietnamese consumers have additionally demonstrated that they are willing to pay more for the reliability of a foreign brand. However, connecting foreign supply to domestic demand continues to pose challenges, despite restrictions being relaxed in recent years.

In its World Trade Organization commitments, Vietnam did not commit to opening up the distribution market of pharmaceutical products to foreign companies. Thus, representative offices (ROs), liaising with Vietnamese distributors, have traditionally been the favored form of establishment for foreign market entrants. Since January 1, 2009, however, domestic legislation has allowed foreign investors to incorporate a Vietnamese wholly foreign-owned enterprise (WFOE) to import their own pharmaceutical products and then sell their imported products to licensed domestic distributors. The WFOE structure offers a number of advantages over an RO, including additional avenues for the marketing of drugs.

Drug Marketing Options

As in most countries, the marketing of drugs in Vietnam is subject to strict regulation. While nonprescription drugs may be marketed to the general public, prescription drugs may not; they may only be marketed to medical professionals (MPs)—including pharmacists and administrators—through certain approved methods. Chief among these is marketing through licensed medical representatives (called "drug introducers" in Vietnam). Other methods include the distribution of drug information documents, introduction seminars for MPs, and promotion programs. WFOEs that are licensed to import drugs may engage in all of these activities, whereas ROs are technically prohibited from all marketing activities, save seminars and the distribution of informative material to MPs.

A summary of the types of marketing activities allowed for a WFOE and an RO is set out below. (Note that this chart assumes that the RO's parent company has been authorized to circulate its drugs in Vietnam by the Ministry of Health.)

Entity \ Activities	Advertisement of prescription drugs	Advertisement of nonprescription drugs	Introduction through drug introducers	Distribution of drug information documents to MPs	Drug introduction seminars for MPs	Display of drugs at seminars	Sales promotion
WFOE (Vietnam subsidiary)	Prohibited	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Rep. Office	Prohibited	Prohibited†	Prohibited†	Allowed†	Allowed	Allowed	Prohibited

† Vietnamese legislation is inconsistent on this matter; see on page 2.

Continued on page 2

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Pharmaceutical Marketing (from page 1)

Advertising of Drugs

WFOEs engaged in pharmaceutical importing and exporting have the right to directly advertise their business activities and (nonprescription) products, or to hire an advertising service provider to advertise on their behalf. Nonprescription drugs with valid registration numbers for circulation in Vietnam may be advertised in printed material, online, via signs and billboards, and on radio and television. For radio and television, an additional stipulation is that the active ingredients of the drugs must be on the list of ingredients approved by the Ministry of Health, in a specific dosage form and/or strength.

In the Commercial Law, ROs are specifically prohibited from directly conducting commercial advertising anywhere, with the exception of some activities allowed on the RO premises. If there is a specific authorization from the parent company, however, the RO may enter into a contract on the parent company's behalf with an advertising company in Vietnam to carry out the advertising for the parent company.

Prescription drugs, vaccines, and nonprescription drugs for the treatment of certain specified conditions, such as diabetes and sexually transmitted diseases, are prohibited from being advertised to the general public in any form whatsoever.

Introduction and Provision of Information to Medical Professionals

While the advertising of prescription drugs to the general public is prohibited, "pharmaceutical trading companies" are permitted to introduce and provide information on prescription drugs that they have registered, manufactured, imported, and distributed to MPs. Under the Pharmacy Law, a WFOE legally importing drugs would qualify as a "pharmaceutical trading company" and would therefore be entitled to introduce and provide information on its drugs to MPs. It is unclear whether an RO would qualify as such.

The introduction of and the provision of information on drugs to MPs may be conducted through one of the following channels:

1. Through "Drug Introducers" (Medical Representatives). Circular 13/2009/TT-BYT (Circular 13) of the Ministry of Health defines a "drug introducer" as a staff member of a pharmaceutical trading establishment in Vietnam who has been appointed by the establishment to introduce its drugs to MPs. Drug introducers must have drug introduction cards issued by the provincial-level Department of Health and must meet certain criteria, such as having at least a two-year vocational postsecondary education, having completed a training program, and having worked at least two years for a lawful medical or pharmaceutical establishment.

In practice, the Ministry of Health (MOH) has routinely allowed drug introducers to be registered at ROs. However, though there is some inconsistency in the legislation, we believe that the more correct interpretation of the law is that only WFOEs or domestic companies may employ drug introducers, because this would be more consistent with the general principle that ROs are liaisons only and may not engage in profit-making or marketing activities.

2. By Distribution of Drug Information Documents to MPs. In the Commercial Law, ROs are specifically prohibited from introducing goods outside the premises of the RO. The "introduction of goods" is defined as activities of commercial enhancement conducted by a business entity using goods, and materials about the goods, to introduce the same goods to customers. Given the broad scope of the prohibition, ROs may not distribute drug information introduction documents to MPs. Under Article 30.2(e) of Circular 13, however, an RO of a foreign pharmaceutical company that has been authorized to circulate its drugs in Vietnam by the MOH may apply for approval from the MOH for the provision of drug information introduction documents to MPs.

3. At Drug Introduction Seminars for MPs. Interestingly, Circular 13 specifically authorizes an RO to organize seminars for MPs to introduce drugs that have been licensed for manufacturing and circulation in other countries.

4. Through the Display and Introduction of Drugs at Specialized Health Conferences or Seminars for MPs. While an RO is not allowed to directly display and introduce its parent company's products outside of the RO's premises, Article 17 of Circular 13 seems to specifically allow organizers or hosts of specialized health conferences and seminars to display and introduce drugs at such events. Due to the fact that an RO is allowed to organize seminars to introduce drugs, an RO should also have the right to display and introduce its drugs there.

Sales Promotion

The Commercial Law provides a broad definition of "sales promotion" as an act of commercial enhancement by a business entity aimed at enhancing the purchase and sale of goods and/or the provision of services by giving specified benefits to customers. Only Vietnamese business entities, branches of Vietnamese business entities, or branches of foreign business entities in Vietnam are authorized to hold their own sales promotions or engage a third party to do so in Vietnam. ROs of foreign business entities are notably excluded.

A sales promotion program in Vietnam may be conducted in various forms, including the use of samples or gifts, discounts, vouchers, contests, lucky draws, and customer reward programs. Promotion programs for pharmaceuticals cannot be directed at consumers, but must be directed only at pharmaceutical traders.

Technical Barrier to Operating as a WFOE

Given the clear advantages that WFOEs have over ROs in the modes of available marketing activities, and, in particular, in the right to employ medical representatives and conduct promotion programs, one would think that most foreign pharmaceutical companies would be operating in the legal form of a WFOE. But this is not the case. At present, most foreign pharmaceutical companies are still operating in RO form, because, according to Circular 47/2010/TT-BYT issued by the MOH in 2010 (and amended a year later), while WFOEs permitted to import drugs are allowed to incorporate, they may not engage in drug importing activity until new legislation, which will likely be joint legislation between the MOH and another body, is passed into law detailing importing procedures and storage practices.

This technical barrier has effectively halted an incorporated WFOE from becoming operational, because the common interpretation dictates that if a WFOE cannot operationally engage in importing, and hence cannot be a "trader," then it may not conduct marketing activities. Nevertheless, an increasing number of foreign pharmaceutical companies are choosing to create WFOEs and wait for the joint legislation to pass into law, in part, because it normally takes a year or more to incorporate a WFOE engaged in "drug trading" and, also, because of the belief that the joint legislation that has been promised for the past three years must eventually become law.