PACIFIC RIM
ADVISORY COUNCIL

FEBRUARY 2004 e-BULLETIN

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MEMBERSHIP

- Vancouver 2003 Conference Materials NOW AVAILABLE at www.prac.org
- PERU May 15-21, 2004 – Invitation, Formal Registration and Program **NOW AVAILABLE**
- INDIA 2004 CONFERENCE (New Delhi / Agra - October 30 - November 5, 2004)

Tools to Use

- PRAC Contacts Matrix & Email Listing - February Updates (member version only)
- PDF version Directory 2004-2005 Member Firms **available** at PRAC web site
- Expert System 2003 available at PRAC web site Private Libraries

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Visit the PRAC web site www.prac.org to view this edition and other information on line

CAREY Y CIA ANNOUNCES NEW PARTNERS

January 1, 2004 - Carey y Cia is pleased to announced that **GUILLERMO CAREY, GONZALO FERNANDEZ** and **SALVADOR VALDES** became partners in our firm.

Mr. Carey is a graduate of the Catholic University of Chile Law School. His practice, as a member of the Intellectual Property and Information Technology Group of Carey, is mainly focused in Trademarks, Patents, IP Litigation, Franchising Distributorship, e-Commerce and Technology Transfer.

Mr. Fernandez, a graduate of the Catholic University of Chile Law School, has a master degree (LL.M.) from Harvard University and his practice is focused in Litigation, National and International Arbitration.

Mr. Valdes, a graduate of the Catholic University of Chile Law School, has a Master Degree (LL.M.) from University of Chicago and his practice is focused in Banking and Finance, Merger and Acquisitions and Securities Market.

For additional information please visit our web site at www.carey.cl

TOZZINI FREIRE TEXEIRA E SILVA PARTNER ANNOUNCEMENTS

We are pleased to announce that the associates

Fúlvio Pistoresi
resident in our Recife office

e

Maria Zuleika de Oliveira Rocha
resident in our Brasília office

have become partners of the firm.

Their admission as partners reflects the recognition of their performance, dedication and competence.

For additional information please visit our web site at www.tozzini.com.br

FORMER ONTARIO CABINET MINISTER DAVID TSUBOUCHI JOINS FRASER MILNER CASGRAIN

Toronto, February 4, 2004 - David Fuller, Chief Executive Officer of Fraser Milner Casgrain LLP, today announced that David Tsubouchi has joined the firm's Toronto office as a Consultant.

"We are delighted that David is joining us", said Fuller. "He brings with him a wealth of experience gained through his years in public service and in the private sector. David will practise planning and development law and will provide strategic counsel to our clients on public-sector initiatives and help our clients capitalize on opportunities."

Mr. Tsubouchi was the Chair of the Management Board of Cabinet and Minister of Culture in the Ontario Government.

"David will be an important addition to our Toronto Real Estate Development and Municipal Law practice" added Chris Pinnington, Managing Partner of the Toronto office of FMC. "As an experienced senior politician, a former municipal councillor and a lawyer, David brings a valuable perspective to our firm and his contribution will extend well beyond the real estate area. We will benefit from his ability to provide strategic advice to our clients in areas like public infrastructure provision."

"I am very excited to be joining Fraser Milner Casgrain for this phase in my career", Tsubouchi said, "FMC has an excellent reputation as a firm with superior expertise in dealing with the public sector and public policy issues. I am thrilled to be part of that team".

Mr. Tsubouchi was called to the Ontario Bar in 1977 and practised real estate development and franchise law in Markham until 1995. He was a member of Markham Council from 1988 to 1994 and a member of the Ontario Legislature from 1995 to 2003. He was successively the Minister of Community and Social Services, Minister of Consumer and Commercial Relations and Solicitor General before becoming Chair of the Management Board of Cabinet and Minister of Culture.

About Fraser Milner Casgrain LLP

For more than 165 years, Fraser Milner Casgrain LLP has distinguished itself as one of Canada's leading business law firms. With more than 550 lawyers in six full-service Canadian offices, and an office in New York, FMC offers the depth of experience and trusted legal advice to help clients succeed.

MARITIME ATTORNEY JOINS GOODSILL ANDERSON QUINN & STIFEL LLP

January 5, 2004 -

(Honolulu, Hawaii) – Goodsill Anderson Quinn & Stifel LLP is pleased to announce Evelyn Black – a lifelong Hawaii resident and experienced maritime attorney - has joined the firm as counsel.

Black concentrates her maritime practice in defense of Jones Act claims, longshore claims, passenger personal injury claims and diving accidents. Black is a certified PADI Open Water Diver and experienced water person.

“We are delighted to welcome Evie to the Goodsill team,” said Miki Okumura, managing partner at Goodsill. “With more than 17 years of experience in maritime law, Evie is highly regarded in the local maritime industry. She brings skills, knowledge and energy that will complement and expand the services we offer to our maritime clients.”

In 1996, Black formed her own maritime adjusting firm, which was acquired by John Mullen & Company in 1998. She most recently served as the Director of Marine Claims with John Mullen & Company. Black is a former Maui County and Honolulu police officer. She also serves as a trustee on the Queen’s Health Systems – Insurance Exchange Board and with the Lawyer's Fund for Client Protection of the Bar of the State of Hawaii.

Black received a Bachelor’s degree in Education from the University of Hawaii at Manoa. She received her Juris Doctor in 1986 from the University of Santa Clara School of Law. She is licensed to practice law in the State of Hawaii, the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court. Goodsill Anderson Quinn & Stifel LLP is celebrating 125 years of service to Hawaii. The firm traces its roots to 1878 and has grown from a one-man operation to a firm of more than 70 full-time attorneys. In keeping with client demands, Goodsill attorneys have a depth of knowledge and expertise in all of the traditional areas of civil law such as corporate law and securities, banking, real estate, tax, trusts and estates, international matters, public utilities and all types of civil litigation, and in specialized areas such as: health care, labor and employment, aviation, maritime, media, entertainment, environmental, administrative law, and technology.

INTELLECTUAL PROPERTY PARTNER JOINS HALE AND DORR’S NEW YORK OFFICE

February 5, 2004

Hale and Dorr announces that Matthew E. Langer, Ph.D., has joined the firm’s Intellectual Property Department in its New York office as a senior partner. Dr. Langer specializes in a wide range of patent-related matters, particularly with respect to pharmaceuticals and non-pharmaceutical chemicals.

Dr. Langer has extensive experience in advising clients on patent prosecution and patent-application filing strategies and counseling clients in the areas of patentability, infringement, freedom to operate, claim scope, claim validity and licensing. He has prosecuted patent applications relating to compositions of matter obtained from synthetic and naturally occurring sources, methods for their use and methods of chemical synthesis. Dr. Langer has collaborated with foreign patent counsel on foreign prosecution of non-United States patent applications and has argued before the Board of Patent Appeals and Interferences.

Dr. Langer joins Hale and Dorr after nine years in the New York office of Pennie & Edmonds LLP. Prior to attending law school, he was a research scientist for Unilever Research, U.S., in Edgewater, NJ. He was also a chemist with GE, where he developed novel, high-performance liquid crystalline polyesters with extreme heat and chemical resistance properties.

Dr. Langer earned his J.D. from Fordham University School of Law. He received a Ph.D. degree in organic chemistry from Yale University and a B.S. degree in chemistry from Tufts University. Dr. Langer is admitted to practice in the state of New York and before the United States Patent and Trademark Office; the United States District Court, Southern and Eastern Districts of New York; the United States Court of Appeals for the Federal Circuit; and the United States Supreme Court.

FOR IMMEDIATE RELEASE

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Hogan & Hartson Elects 27 Partners and Elevates 10 to Counsel

WASHINGTON, Jan. 14, 2004—Hogan & Hartson announced today the firm has elected 27 new partners and elevated ten associates to counsel. Having recently been included as one of the top 30 law firms on the *Legal Business* "Global 100" survey as well as the fastest growing firm on the list, the announcement tops off a year of continued growth and prosperity for the firm.

"We are pleased to recognize the hard work and contributions of this significant group of lawyers," said Warren Gorrell, Hogan & Hartson's chairman. "These attorneys bring tremendous value and incredible talent to our multidisciplinary practices and offices around the world."

The following associates were elected to the partnership effective Jan. 1, 2004.

Washington, D.C.

- Yaron Dori—communications practice
- Lorane F. Hebert—litigation practice
- E. Desmond Hogan—litigation practice
- H. Deen Kaplan—trade practice
- R. Daniel Keating—corporate, securities and finance practice
- Keith D. Larson—project and international finance practice
- Michael F. Mason—government contracts practice
- Shelly L. McGee—intellectual property practice
- Thomas C. Morey—corporate, securities and finance practice
- H. Keeto Sabharwal—intellectual property practice
- Patrick D. Traylor—environmental practice
- Ajit J. Vaidya—intellectual property practice
- Kevin L. Vold—corporate, securities and finance practice

Baltimore

- Nicholas G. Stavlas—litigation practice

-more-

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Berlin
- Markus Plesser—corporate, securities and finance, and intellectual property practices
- Johannes Schulte—corporate, securities and finance practice
- Hanno Timner—labor and employment, and corporate, securities and finance practices

Denver
- Sarah Kinnick Hilty—corporate, securities and finance practice
- Charles T. Mitchell—litigation practice

London
- Sean P. Harrison—corporate, securities and finance, and project and international finance practices
- Elizabeth L. Katkin—corporate, securities and finance, and project and international finance practices

Los Angeles
- Robert J. Benson—intellectual property/litigation practices
- Daniel B. Mestaz—litigation practice

New York
- A. Tiska—litigation practice
- Jeffrey J. Tolin—tax practice

Northern Virginia
- Alexander D. Cobey—corporate, securities and finance practice
- Michael S. Long—corporate, securities and finance practice

In addition, the following associates were elevated to counsel effective Jan. 1, 2004:

Washington, D.C.
- Erica S. Mintzer—antitrust
- Sharon L. Tasman—corporate, securities and finance, and intellectual property practices

Baltimore
- Mark S. Saudek—labor and employment practice

-more-

Hogan & Hartson Elects 27 Partners and Elevates 10 to Counsel 3-3-3

Beijing
- Roy G. Zou—corporate, securities and finance, international trade, and project and international finance practices

Brussels
- Wim Nauwelaerts—antitrust practice

Los Angeles
- Lawrence J. McClure—intellectual property and litigation practices

Miami
- Lori Piechura—litigation practice

Moscow
- Sergei V. Terentiev—corporate, securities and finance practice

New York
- Ann F. Robertson—corporate, securities and finance practice

Northern Virginia
- Robin K. Everett—corporate, securities and finance, and intellectual property practices

About Hogan & Hartson

Hogan & Hartson is an international law firm headquartered in Washington, D.C. with close to 1,000 attorneys practicing in 19 offices worldwide. The firm's broad-based international practice cuts across virtually all legal disciplines and industries. Hogan & Hartson has European offices in Berlin, Brussels, London, Paris, Budapest, Prague, Warsaw, Moscow; Asian offices in Tokyo and Beijing; and U.S. offices in New York, Baltimore, Northern Virginia, Miami, Los Angeles, Denver, Boulder, Colorado Springs and Washington, D.C. For additional information about Hogan & Hartson, visit www.hhlaw.com.

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PRAC 35th INTERNATIONAL CONFERENCE
Lima Cusco, Peru
May 15th 21st, 2004

Dear PRAC Members:

It gives us great pleasure to be the host of the 35th Pacific Rim Advisory Council Conference to be held in Lima and in the historic city of Cusco, Peru, from May 15th to 19th, 2004 and for those attending the follow on programme in Machu Picchu, from May 20th to 21st.

Cusco, a fascinating city steeped in history, tradition and legend, is now the oldest inhabited city in the American continent. The heart of the once mighty Inca Empire, it is the archaeological capital of the Americas, and reveals the various stages and cultures of its Pre-Inca, Colonial and Republican history. The conference program also includes activities in Machu Picchu, the Lost City of the Incas, declared a Cultural and Natural World Heritage Site by UNESCO. The beautifully preserved ruins consist of an enormous stone city hidden by a spectacular terraced green mountain plateau surrounded by three towering peaks. Social events included in the program will present to you Andean typical dances, songs and meals from the different regions of Peru.

Formal registration is underway and we encourage you to register by the 01 March deadline. This information and complete conference details, including on line registration are available at the PRAC web site at www.prac.org .

We look forward to welcoming you in our country, sharing with you our cultural and geographical variety, and extending to you our traditional Peruvian hospitality.

Jorge Pérez-Taiman
Host Committee Chair

MUÑIZ,
FORSYTH,
RAMIREZ,
PEREZ-TAIMAN &
LUNA-VICTORIA
ATTORNEYS - AT - LAW

SIMPSON GRIERSON PARTNER GAINS TWO NEW APPOINTMENTS

Press Release by Simpson Grierson at 10:33, 11-02-2004. First published by Newsroom

Carole Durbin, Partner and Head of Resources and Infrastructure at top-tier law firm Simpson Grierson, has been appointed to two new governance roles.

Carole has become a director of Fidelity Life, bringing her legal and governance skills to the board of New Zealand's only wholly New Zealand-owned and managed life insurance company. Carole says, "As a commercial entity Fidelity Life is an excellent example of a successfully run New Zealand company and I am very pleased to have the opportunity to add value to the operations of its Board."

In addition to the Fidelity Life directorship, Carole has been appointed by the Minister of Justice to Chair the Legal Services Agency, which is responsible to the Government, through the Minister of Justice, for overall strategy and governance of the Agency's operations. These include the pilot of a Public Defence Service in Auckland which will go into operation in May this year, as well as legal aid, contract relationships with Community Law Centres and law related education and information.

Carole says, "I am very pleased with the appointment. It is an opportunity to contribute at a governance level in an area which is of importance to the public and the profession." Simpson Grierson Chairman Rob Fisher says, "These two high profile appointments reflect Carole's excellent reputation in the legal and business communities."

Carole is also Deputy Chair of Mighty River Power, and a board member of the Earthquake Commission.

In her role at Simpson Grierson, Carole heads the Resources & Infrastructure Department, which encompasses the areas of construction, commercial property, resource management and local government. Carole advises on infrastructure projects including documentation, contracting, tendering and contracting out. She has significant corporate governance knowledge. Her specialist legal areas include arbitration, mediation, adjudication and disputes resolution.

ENDS

February 2004

TWO NEW PARTNERS AT SIMPSON GRIERSON

Simpson Grierson is delighted to announce that Shan Wilson and Heather Ash have become partners with the law firm, bringing the total number of partners to 48.

Shan is in Simpson Grierson's Litigation Department, and specialises in employment law. She assists clients at all levels across the spectrum of workplace issues, from development of employment relations strategies to quick advice on day-to-day issues. Her experience includes advice and assistance in restructuring, collective bargaining, union-related issues, senior executive issues, personal grievances and employment disputes. Shan is also experienced in health and safety, privacy and discrimination issues. She has practised employment law both in New Zealand and in the United Kingdom, where she worked for one of London's largest city firms, Allen & Overy.

Simpson Grierson has New Zealand's leading employment law practice. The influential Asia-Pacific Legal 500 directory recently said *"… (Simpson Grierson) clearly leads the pack and is some distance ahead of its rivals. The dedicated employment team boasts three of the country's leading specialists in Don Mackinnon, Phillipa Muir and Keith Binnie. The firm is chief employment adviser to Fonterra Co-operative Group, Telecom Corporation and Auckland City Council."*

Chairman Rob Fisher says, "Shan is an outstanding lawyer who adds even greater depth to what is already the biggest and best employment law practice in the country."

Heather is in Simpson Grierson's Resources and Infrastructure Department. Heather works with local authorities, as well as national and international businesses, giving specialist advice on all aspects of environmental law and resource management. She has extensive experience in the Environment Court, and has appeared in both the High Court and Court of Appeal on judicial reviews of resource consent decisions. Heather has considerable expertise in resolving disputes through negotiation, mediation and arbitration.

Chambers Global said in its 2003 comments, " *The firm (Simpson Grierson) upholds its established reputation in local authority work, which rivals noted was bolstered by strong banking and property departments.*"

"Heather is a highly valued and experienced contributor to Simpson Grierson's leading local government, environmental and resource management areas" says Rob Fisher.

"These appointments reflect the continuing success of Simpson Grierson as a top-tier national law firm."

Ends

ANCHORAGE, Alaska--(BUSINESS WIRE)--Jan. 28, 2004--Announcement Made by Davis Wright Tremaine Attorney, David W. Oesting, Lead Counsel for Plaintiffs in Exxon Valdez Oil Spill Case.

David W. Oesting, lead plaintiffs' counsel for fishermen and natives in the Exxon Valdez oil spill litigation, confirmed today that federal Judge Russell Holland has directed ExxonMobil to pay $4.5 billion in punitive damages and approximately $2.25 billion in interest.

The order stems from the civil lawsuit following the 1989 grounding of the Exxon Valdez and was entered in federal district court in Anchorage, Alaska this afternoon. The money is to go to 32,000 fishermen, natives, landowners, small businessmen and municipalities in south central Alaska whose lives and livelihoods were devastated by the spill.

Oesting provided the following background: The Exxon Valdez ran aground on Good Friday, March 23, 1989, spilling 11 million gallons of oil, the largest oil spill in American history. The spill coincided with the beginning of fishing season. Hundreds of lawsuits followed and were consolidated in front of Judge Holland. The cases were tried in 1994, and an Anchorage jury awarded $5 billion in punitive damages against ExxonMobil on September 16, 1994. After initially contesting the award in front of Judge Holland, has since appealed the award three times. The case was before Judge Holland this last time to ensure that the amount of the award comported with constitutional limitations on punitive damages.

Oesting said that ExxonMobil is expected to appeal the ruling, further delaying payments to victims in the 15 year old litigation. However, he noted that the decision was an important step forward in resolving the massive case, and expressed hope that the appeal process would proceed expeditiously.

Oesting's chief trial lawyer, Brian O'Neill of Minneapolis, commented on Judge Holland's opinion: "The district court has affirmed a large award against ExxonMobil for the third time. As Judge Holland noted, Exxon executives at the highest level put a relapsed alcoholic in charge of an oil supertanker. This is the kind of irresponsible corporate conduct deserving of harsh punishment, especially when that recklessness injures 32,000 people. Judge Holland's careful review should bring an end to the litigation. However, a company as big as ExxonMobil, can grind the legal process to a halt. And that is what has happened here."

CONTACTS:

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David W. Oesting, 907-257-5300, daveoesting@dwt.com

LOVELLS WINS KEY HONG KONG IPO

Lovells' Hong Kong corporate team has advised on one of the most high profile listings to come out of mainland China in recent months.

The issue, for shares in agricultural company China Green (Holdings), was heavily over-subscribed, leading to hopes that the recent revival in the local capital markets will continue into 2004.

Lovells advised the sponsor, JS Cresvale Capital Limited, and underwriters in the placing and new issue of shares of China Green on the main board of the Hong Kong Stock Exchange. China Green is a Bermudan-incorporated company that grows and processes vegetables in China's Fujian province.

The Lovells team was led by partner Raymond Lau and consultant Colin Law.

For Additional information about Lovells please visit www.lovells.com

NAUTADUTILH INVOLVED IN NEDLLOYD DEAL

NautaDutilh is advising Royal Nedlloyd N.V. in the deal under which Royal Nedlloyd N.V. will buy out the interest of its partner, The Peninsular and Oriental Steam Navigation Company (P&O), in the P&O Nedlloyd Container Line joint venture (P&O Nedlloyd). Upon completion of the transaction, which is expected to be in April/May, Royal Nedlloyd N.V. will be renamed Royal P&O Nedlloyd N.V.

For additional information about NautaDutilh please visit www.nautadutilh.com

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focus

on

Competition

FRASER MILNER CASGRAIN LLP

February 2004

Canadian Competition Law 2003: The Year in Review

The year 2003 marked the end of the von Finckenstein era in Canadian competition law. It also saw the release of a Government discussion paper proposing significant amendments to Canada's competition legislation. Court and Competition Tribunal decisions added direction in some areas of competition law and practice.

A NEW COMMISSIONER OF COMPETITION AND A NEW CHAIR OF THE TRIBUNAL

In August 2003, after 6 years as Commissioner of Competition, Konrad von Finckenstein left the post upon his appointment as a Justice of the Federal Court of Canada. In November 2003, Sheridan Scott, most recently Chief Regulatory Officer at Bell Canada, was appointed the new Commissioner of Competition, effective January 12, 2004. In June 2003, Madame Justice Sandra Simpson was appointed Chairperson of the Tribunal after acting in that capacity since the departure of Justice William McKeown in August 2002.

PROPOSED AMENDMENTS

In June 2003, the Government of Canada released a discussion paper proposing significant and controversial changes to the *Competition Act,* including:

1. Amending the conspiracy provisions to create a two track framework: hard core cartels would be treated as criminal offences *per se* without proof of anti-competitive effects; other agreements would be civilly reviewable where they are likely to result in a substantial prevention or lessening of competition.
2. Amending the pricing provisions to repeal the price discrimination, geographic price discrimination, predatory pricing and promotional allowance sections as stand alone criminal offences, with a corresponding amendment to make such practices reviewable under the abuse of dominance provisions.
3. Permitting the Tribunal to order administrative monetary penalties (fines) in cases of refusal to deal, consignment selling, tied selling, market restriction, exclusive dealing, abuse of dominant position and delivered pricing. The Government has also proposed restitution for consumers who suffer loss as a result of false or misleading representations and the broadening of civil claims for civilly reviewable conduct. Although originally recommended by a House of Commons committee, the paper stops short of a proposal to grant power to the Tribunal to award damages and the extension of private access to the Tribunal for abuse of dominant position cases.
4. Enabling the Commissioner to ask an independent body to inquire into the state of competition in a particular industry.

Extensive comments on the discussion paper were received in the fall of 2003. A final report on the consultation is expected to be delivered to the Competition Bureau in 2004 for consideration by the Government in proposing the next round of legislative changes.

MERGERS

A number of mergers which raised concerns with the Competition Bureau were resolved in 2003, largely through consent divestitures and codes of conduct. These include the final approval of the divestitures required by the Bureau's review of the acquisition of Aventis Crop Science by Bayer; the indirect acquisition of Pharmacia Canada Inc. by Pfizer; and RONA's acquisition of Reno-Depot.

Superior Propane

In February 2003, after two appeals and two hearings on the merits, the merger of two leading propane suppliers was permitted to proceed. In August 2000, the Competition Tribunal held that the merger of Superior Propane and ICG Propane would result in a substantial lessening or prevention of competition in Canada, but that the anti-competitive effects of the substantial prevention or lessening were offset by the efficiencies generated by the merger. In April 2001, on appeal by the Commissioner, the Federal Court of Appeal sent the case back to the Tribunal for re-determination. In April 2002, the Tribunal released its second decision, which also held that the efficiencies of the merger offset even the broader definition of anti-competitive effects identified by the Federal Court of Appeal. In doing so, the Tribunal rejected the Commissioner's argument that the entire amount of the wealth transfer from the consumer to the producer should be counted as an anti-competitive effect and instead held that only "socially adverse" redistributions of wealth constitute anti-competitive effects. In February 2003, the Federal Court of Appeal dismissed the Commissioner's appeal, upholding the Tribunal's decision to permit the merger. The Court rejected the Commissioner's argument that efficiencies could not apply to a "merger to monopoly".

The Commissioner did not seek leave to appeal the decision to the Supreme Court of Canada but supported a private members' bill, Bill C-249, to amend section 96 of the *Competition Act* to eliminate the efficiency defence and relegate efficiency gains to being a relevant factor only if the benefits are passed on to consumers. Bill C-249 was passed by the House of Commons, and was before the Senate but died on the order paper when Parliament prorogued in November 2003. This Bill would, if passed, make significant and controversial changes to the role of efficiencies in Canadian merger law. It remains to be seen whether it will be re-introduced when the next session of Parliament commences in February 2004.

Canadian Waste Services

The Commissioner's challenge to the proposed acquisition of the Ridge landfill in Ontario by Canadian Waste Services also continued to generate significant litigation in 2003. In 2001, the transaction was held to result in a substantial lessening and prevention of competition in waste disposal markets in Southern Ontario, and Canadian Waste was ordered to divest the landfill. Canadian Waste's appeal to the Federal Court of Appeal was rejected in March 2003 and its application for leave to appeal to the Supreme Court of Canada was dismissed on January 8, 2004. In May 2003, Canadian Waste applied to the Tribunal to vary or rescind the 2001 divestiture order on the basis of changed circumstances. The hearing of the application to vary was completed in December 2003, with the release of the Tribunal's decision expected in the first half of 2004.

Other Merger Developments

In 2003, the Bureau commenced a review of its 1991 *Merger Enforcement Guidelines* ("MEGS"). A draft of the revised MEGS is expected to be released for public consultation in Spring 2004. In November, the Bureau requested public comment on the 1998 *Bank Merger Enforcement Guidelines* ("BMEGS"). The Bureau has promised to release revised BMEGS by the end of June 2004.

On April 1, 2003, the Competition Bureau made several changes to its Fee and Service Standards policy, including raising the "size of transaction" threshold for pre-notifying the Bureau of an acquisition of shares or assets from $35 million to $50 million, and doubling the filing fee for merger notification and requests for advance ruling certificates from $25,000 to $50,000. In addition, the Bureau published an interpretation bulletin to clarify its position with respect to the exemption to pre-notify where the acquisition relates to real property or goods "in the ordinary course of business".

REVIEWABLE PRACTICE CASES

Air Canada

Phase I of the Commissioner's application alleging that Air Canada abused its dominant position in response to WestJet and CanJet's entry into eastern Canadian airline markets was heard and decided in 2003, with the Tribunal's first interpretation of the "avoidable cost test" as set out in the *Regulations Respecting Anti-competitive Acts of Persons Operating a Domestic Service.* The Tribunal held that all costs which are not overhead are avoidable, and concluded that Air Canada had operated below its avoidable costs in responding to WestJet and CanJet. The other elements of the abuse case against Air Canada remain to be heard in Phase II of the application, which is stayed pending Air Canada's emergence from CCAA protection. The Tribunal's approach to the avoidable cost test is expected to have important ramifications for predatory pricing cases generally.

In January 2003, the Quebec Court of Appeal held that the Commissioner's power under section 104.1 to make temporary orders in abuse cases against domestic airlines was invalid. The power was used against Air Canada with respect to its conduct on one Eastern Canadian route in the fall of 2000. The Court held that the order deprived Air Canada of the right to a fair hearing in accordance with the principles of fundamental justice contrary to section 2(e) of the *Canadian Bill of Rights* and was therefore inoperative. Leave to appeal to the Supreme Court of Canada was granted in August 2003.

CIVIL DECEPTIVE MARKETING PRACTICES

Sears Canada

The first contested application under section 74.01(3) of the Act commenced in 2003. That section deals with representations to the public as to the price at which a product is "ordinarily supplied". The Commissioner alleged that Sears misled customers by using inflated regular prices when advertising tires at sale prices. Sears' response included a challenge to the constitutional validity of section 74.01(3), claiming it is an unjustifiable infringement on freedom of expression. Tribunal hearings began in October 2003 continue into 2004.

Suzy Shier

In June 2003, a consent agreement between the Commissioner and Suzy Shier filed with the Tribunal required Suzy Shier to pay a $1 million administrative monetary penalty and to publish notices in specified Canadian newspapers and on its website. The Commissioner alleged that Suzy Shier had placed price tags on its products indicating an inflated regular price and had not sold a substantial volume of the clothes at the regular price.

Para Paints

A consent agreement was also reached resolving the Commissioner's concerns about Para's representations regarding the energy saving properties of a line of paint known as Radiance. The consent agreement did not impose the payment of a monetary penalty but did require Para to clarify its Radiance performance claims.

CRIMINAL CASES

There were no major contested criminal proceedings in Canada in 2003. The year was again marked by numerous charges for telemarketing fraud and announcements of guilty pleas and fines ranging up to $2.9 million, paid by one company for conspiring to fix the price of a chemical ingredient used in numerous commercial and consumer products. In addition, Toyota Canada Inc. agreed to a prohibition order (without admitting guilt to price maintenance allegations) which required it to amend its sales, promotion, training and monitoring practices for the Access Toyota Program to ensure that dealers were aware that they could sell for less than the Access program prices. As part of the settlement, Toyota made voluntary donations totalling $2.3 million to several charitable organizations across Canada.

The Commissioner's investigatory powers were subject to challenge in 2003 in the Fine Paper inquiry. The challenge raises the issue of access by parties who have been searched to the materials used to obtain the search warrant, and the ability of the Commissioner to protect the identity of informants. The Federal Court ruled in January, 2004 that the parties are entitled to a redacted version of the information.

PRIVATE ACTIONS

Chadha v. *Bayer*

In January 2003, the Ontario Court of Appeal upheld a decision to overturn certification of a proposed class action by indirect purchasers of iron oxide, a pigment used in bricks, for alleged losses suffered as a result of an alleged price fixing conspiracy. The Court held that the proposed class were not in a position to prove that any damages stemming from the alleged conspiracy had been passed on to them through numerous different distribution chains. The Court of Appeal was careful not to foreclose certification of an indirect purchaser class in another set of facts and endorsed the U.S. "presumed impact" approach which requires the plaintiff to provide economic evidence to support a finding that the improper price increase was passed on to the proposed class. The Supreme Court of Canada denied the plaintiffs' application for leave to appeal in July 2003.

Vitamin Class Actions

Proposed class actions in Ontario have tested the extent to which proposed plaintiffs may have access to discovery in parallel class actions in the United States. The proposed plaintiffs in Ontario brought a motion in a U.S. court seeking access to confidential discovery evidence in parallel U.S. proceedings. The Ontario defendants countered with a motion in Ontario to prohibit the plaintiffs from proceeding with the U.S. production motion. The Ontario Courts denied the defendants' motion and leave to appeal to the Supreme Court of Canada was denied in November 2003. The U.S. court will therefore decide whether proposed Canadian class plaintiffs may be granted access to U.S. discovery evidence for the purposes of Canadian proceedings.

Empagran

The 2003 decision of the U.S. Court of Appeals in *Empagran S.A.* v. *F. Hoffman-LaRoche* could also have important ramifications for future competition class actions in Canada. Foreign purchasers commenced a class action in the U.S. against foreign and domestic vitamin producers, alleging an overarching international conspiracy to fix the price of vitamins worldwide. The U.S. Court of Appeals refused to dismiss the action on jurisdiction grounds and held that where the alleged anticompetitive conduct has the requisite harm on U.S. commerce, foreign plaintiffs may sue in the U.S. even if they are injured solely by that conduct's effect on foreign commerce. The United States Supreme Court decided in December 2003 that it will hear an appeal of the case, which is scheduled to proceed in 2004.

Private Access to the Competition Tribunal

In 2002, the *Competition Act* was amended to allow private parties to bring applications before the Tribunal for refusal to deal, exclusive dealing, tied selling and market restriction cases, where leave to the Tribunal is granted. In December 2002, the Tribunal dismissed the first application for leave on jurisdictional grounds. However, the Tribunal also set out the applicable test for leave as demonstrating a *bona fide* "reason to believe" that a person is directly or substantially affected in his business by the conduct alleged. In November 2003, two additional applications for leave were filed with the Tribunal for alleged refusals to deal in furniture and bar code technology, and in January 2004, leave was granted in the *Bar Code* case. The Tribunal's decision suggests a low threshold for leave.

DISCOVERY IN TRIBUNAL CASES

In *Canada Pipe*, the Tribunal issued its first decision on the 2002 amendments to the Tribunal rules for non-merger cases. Those rules require parties to disclose the documents they intend to rely on in the case, but do not require disclosure of documents which may be helpful to the other party. Canada Pipe argued that the Rules violate a respondent's right to a fair hearing under paragraph 2(e) of the *Canadian Bill of Rights*. The Tribunal held that the *Bill of Rights* applies to Tribunal proceedings, but that the Rules do not violate it. The Tribunal held that any additional discovery rights are to be determined by the Tribunal in each case. Finally, the Tribunal held that the Commissioner must decide whether to assert public interest privilege over a document early in a case, and thereby forego relying on the document.

THINGS TO LOOK FOR IN 2004

1. A new round of legislative amendments.
2. New Merger Enforcement Guidelines and Bank Merger Enforcement Guidelines.
3. Bank mergers and more mergers generally.
4. Private access jurisprudence.
5. Continued investigations and prosecutions of international cartels followed by civil actions (especially class proceedings).

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The European Prospectus Directive (the "Directive"; 2003/71), which is considered to be the fundamental part of the European Commission's Financial Services Action Plan, came into force on 31 December 2003; Member States have until 1 July 2005 to implement the Directive into their national law. It aims to replace part of the Directive on Admission of Securities to Listing (2001/34) and the entire Directive on Prospectuses (89/298), and establishes a largely new regime for the publication of prospectuses, the main objective being to provide for an effective single passport regime for issuers of securities in the EU so that a prospectus, once vetted and approved by the competent authorities of one Member State, will be accepted for public offers in any other Member State.

A prospectus is now required to be published where an offer of securities is made to the public or securities are admitted to trading on a regulated market. An "offer of securities to the public" refers to a communication presenting sufficient information on the terms of the offer and the securities to be offered so as to enable an investor to decide to purchase or subscribe for securities. It should be noted that, under the Directive, resales in the secondary market subsequent to exempted offers are regarded as separate offers, which, if directed to the public, will be subject to the obligation to publish a prospectus. "Securities admitted to trading on a regulated market" includes securities traded on other than the official segments or markets of stock exchanges, and the Directive therefore extends the obligation to produce a prospectus beyond the previous provisions.

<u>Exemptions</u>

Several exemptions are specified from the requirements of the Directive, and are more extensive than those available under the previous regime. The Directive distinguishes between those situations which are beyond its scope and those which fall into the scope of the Directive but are exempted specifically from the obligation to produce a prospectus.

Outside the scope of the Directive are above all securities issued by Member States or public international bodies; units issued by open-ended collective investment undertakings; certain non-equity securities issued in a continuous or repeated manner by credit institutions; and securities included in an offer with a total consideration of less than €2.5 million over a period of 12 months.

Exemptions from the obligation to publish a prospectus include offers which are: addressed to qualified investors or which are addressed to fewer than 100 persons (other than qualified investors) per Member State; addressed to investors who acquire securities for a total consideration of at least €50,000 per investor; securities denominated into units of at least €50,000; and offers with a total consideration of less than €100,000 over a period of 12 months. It is unclear why offers with a total consideration of less than €100,000 are exempt, when they will by definition be excluded from the scope of the Directive in any case.

Whilst these exemptions are in part intended to preserve the state of affairs in the wholesale market (following the maxim "if it ain't broke, don't fix it"), it is likely the large minimum denomination requirement of €50,000 will cause a number of problems, in particular in the situation where institutional investors wish to split securities over various accounts.

<u>Home Member State</u>

Contrary to the previous regime, the Directive requires that all prospectuses are approved by the competent authority of the home Member State.

For EU issuers of equity securities or debt securities with a denomination of less than €1,000, the home Member State is the Member State where the issuer has its registered office. For non-EU issuers of equity securities and debt securities with a denomination of less than €1,000, it will be the Member State where the securities are offered to the public for the first time or where the first application for admission to trading on a regulated market is made. As these rules came into force with the Directive on 31 December 2003, care should be taken by non-EU issuers not to establish a competent authority as their regulator inadvertently, as it will be this Member State which will approve their prospectus and will be where they will file their disclosure for any future such securities issues.

For all issuers, whether EU or non-EU, of debt securities with a denomination of more than €1,000, the issuer may choose its home Member State as either the Member State where the issuer has its registered office, or the state where the public offer is made or the securities are admitted to trading. It would appear that this choice is irrespective of the Member State to which issuers have been previously admitted.

The prospectus

The prospectus should contain all the information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses and prospects of the issuer, and the rights attaching to the securities. The issuer has the choice of whether the prospectus should take the traditional form of a single document, or whether the required information should be split over three separate documents. If it is chosen that the prospectus should be split over three parts then these should consist of:

(A) a registration document, containing disclosure information relating to the issuer and its business;
(B) a securities note, which is produced only when an issue is undertaken, and contains information on the securities which are to be offered to the public; and
(C) a summary document, which should normally not exceed 2,500 words.

The securities note and the registration note, or the single document, must contain a clear and detailed note of contents, the risk factors linked to the issuer, and general information and the type of security covered by the issue. Following the "building block approach", separate schedules in the implementation regulation contain the disclosure requirements for different types of securities, and are supplemented by the particular disclosure requirements which are applicable in specific circumstances.

Both the single prospectus and the registration document remain valid for 12 months and may be used for further issues throughout this period. If there have been material changes during the period, those changes have to be disclosed through a supplement to the single prospectus or in the new securities note to the registration document, as the case may be.

The Directive allows the issuer to publish a base prospectus containing all relevant information regarding the issuer and the securities, except the final terms which are unknown at the time of publication, in the case of non-equity securities issued under an offering programme or issued in a continuous and repeated manner by a credit institution. The final terms should be provided to investors and filed with the competent authority when each public offer is made as soon as practicable. If an update to the base prospectus is necessary, a supplement should be drawn up and approved in the same way as the original prospectus.

The Directive only provides for a general framework as to the contents of the prospectuses and much of the detail of the content requirements for the prospectus is still to be determined by the European Commission and the European Securities Committee. The content requirements will form part of detailed implementing measures, of which a first informal draft has been produced by the European Commission on 12 November 2003 (working document ESC 36/2003). The implementing measures are based on international disclosure standards, especially those of the International Organisation of Securities Commission ("IOSCO") and will have to be adopted by 1 July 2004.

Issuers are required to disclose historical financial information in accordance with International Financial Reporting Standards ("IFRS"). However, EU issuers may still apply local accounting standards if their home Member State does not require the preparation of consolidated statements according to IFRS, which in some cases will still be possible until 1 January 2006. Non-EU issuers are permitted to publish information in accordance with their national standards if these standards are equivalent to IFRS – there is as yet little guidance as to the standard which will be considered to be equivalent and the procedure of assessment of equivalence has yet to be carried out. However, it is considered by the Committee of European Securities Regulators ("CESR") that transitional provisions recognising US GAAP as equivalent until 2007 for EU companies complying with certain requirements, whose securities are admitted to public trading in a non-EU state, should be extended to non-EU issuers.

The Directive requires that a summary of the prospectus is included, which should set out in a brief manner, and in non-technical language, the essential characteristics and risks associated with the issuer, any guarantor and the securities. This summary must read as an introduction to the prospectus.

Where offers are made in several countries the prospectus may be drawn up in either the language accepted by the competent authority of the host Member State, or a language "customary in the sphere of international finance", which is considered to be English. If the offer is also made in the home Member State then the competent authorities of the home Member State may prescribe a publication in the local language. The competent authorities of any other host Member State may only request a translation of the summary into the official language of that state.

Issuers who have securities admitted to trading on a regulated market also have an obligation to provide a document annually that contains all information they have published over the last 12 months in compliance with securities laws. This must be filed with the competent authority of the home Member State. This document is not required to be produced in the case of wholesale issues of securities with a minimum denomination of €50,000.

Information may be incorporated in the prospectus by reference. This is only allowed with respect to documents which have been published by the issuer pursuant to the various publication requirements to which it is subject and which have been approved by the competent authority of the home Member State or filed with it in accordance with the Directive. Non-EU issuers may only take advantage of the incorporation by reference rule if the documents have been filed with and approved by the competent authority of a home Member State; to the extent that they have not done so then a full prospectus will need to be put out. An additional burden may be posed by the fact that the documents will need to be in the same language as the prospectus.

Liability

The Directive specifies that Member States should provide that responsibility for the information in the prospectus should attach to at least the issuer or its administrative, management or supervisory bodies, and that laws on civil liability apply to those persons responsible for the information given in a prospectus. Whilst differing national laws governing liability for the contents of the prospectus may vary in scope and application, this is little different to the previous regime.

The Directive provides that no liability should “attach to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus”. However, it is possible that the interpretation of this too will vary extensively between Member States, as no guidance is provided as to how “misleading, inaccurate or inconsistent” should be interpreted. As the summary may be the only part of the prospectus to be translated, care should be taken in its preparation, especially so as not to omit any important information from the summary which may in any way cause a potential investor to be misled.

For additional information please visit NautaDutilh @ www.nautadutilh.com

NZX Reform – The Final Round

Early December has seen New Zealand Exchange Limited ("NZX") release for public submission the final instalments of its proposed overhaul of the NZX legal and regulatory framework. The proposals are in addition to the revised corporate governance amendments which came into force in late October 2003.

The latest releases set out NZX's proposals in relation to:

- the new disciplinary body set up to replace the Market Surveillance Panel and the extent of its powers and procedures;
- restructuring of the regulatory and monitoring framework that governs the conduct of NZX market participants; and
- further amendment of the NZX Listing Rules.

NZX Discipline Rules

As a corollary to its demutualisation and incorporation as a listed issuer, NZX has revised its surveillance and disciplinary regime in respect of the monitoring of market participants and issuers. The NZX Discipline Rules ("Discipline Rules") are intended to replace the current Market Surveillance Panel and its operations.

A new enforcement body, to be known as NZX Discipline, will be constituted with a range of representatives from the legal profession, market participants, the public and NZX.

NZX Discipline will operate through a divisional structure and will be responsible for hearing charges against market participants and issuers under the NZX Participant Rules and NZX Listing Rules.

Matters will be referred by NZX to NZX Discipline for determination by either a full or summary hearing procedure depending on the gravity of the matter.

Under both procedures, NZX Discipline will have full authority to gather evidence, such as requiring attendance before hearings, production of documents or information and the provision of affidavits or other written evidence in relation to the matter. Further, NZX Discipline will have the ability to suspend designation of a market participant or quotation of an issuer pending determination of the matter.

NZX Discipline has recourse to a wide range of penalties for breaches of the Participant Rules or Listing Rules. Penalties that may be imposed by NZX Discipline include:

- private reprimands;
- public statements and censure of the offender;
- revocation or suspension of a market participant's designation;
- suspension or cancellation of an issuer's quotation;

- pecuniary penalties of up to $500,000 for both market participants and issuers.

NZX Participant Rules

The new NZX Participant Rules ("Participant Rules") will replace the current three-part structure comprising the NZX Business Rules, Regulations and Code of Practice and is aimed at creating a "simpler, more flexible framework that will better reflect the evolving nature of our market".

Key changes incorporated in the Participant Rules include the introduction of new NZX Associate Firm and other NZX participant categories, the adoption of a Direct Market Access ("DMA") processing system and the change of terminology from "brokers" to "advisors".

NZX Associate Firms

There is only one category of member firm under the current NZX conduct rules. Such firms are subject to the full compliance and inspection requirements of the conduct rules, largely irrespective of the nature of their business.

In a number of instances this can result in additional, largely unnecessary compliance costs being incurred by firms with more limited business undertakings, with corresponding monitoring costs having to be met by NZX.

The Participant Rules would see the introduction of a new Associate Firm category for firms which do not undertake client trades on their own account. Such firms will be exempted from the various trading, delivery and settlement obligations, on the basis that these obligations would be met by any trading participant which undertakes the trades on the Associate Firm's behalf.

In all other respects, Associate Firms will be regulated in the same manner as full NZX member firms.

Participant categories

The Participant Rules also provide for a new participant category structure to accommodate the expanding class of entities involved in the NZX's various security exchanges at both the initial trading and post-trade stages.

"Trading Participants" include NZX firms, banks authorised to trade on the NZDX and other participants who trade solely as principals. "Delivery and Settlement Participants" are separately categorised as those who facilitate the delivery and settlement of securities and who access FASTER (the Fully Automated Screen Trading and Electronic Registration administration system) or DMA FASTER.

Trading Participants who do not undertake settlement will be required to enter into and maintain a formal 'post trade agreement' with a Delivery and Settlement Participant. This agreement will set out the terms, procedures and practices relating to the transfer of client funds and title in securities between the parties.

The Participant Rules also incorporate the "NZX Sponsor" role first introduced in the NZAX Listing Rules. An NZX Sponsor is a market participant who has been accredited by NZX as a NZX Sponsor for the purpose of bringing securities to the markets provided by NZX.

Also related to the initial bringing of securities to the market is the "Distribution and Underwriting Sponsor" designation for market participants who assist prospective issuers in the distribution and/or underwriting of debt or equity securities or derivatives.

The above designations will apply to market participants to the extent that the relevant activity forms part of that participants' business undertakings. As such, a market participant may have one or more designations, e.g. as both an NZX Sponsor and a Distribution and Underwriting Sponsor. Multiple designations will be more prevalent in 'full service' brokerage firms whose activities may range from advising and trading to acting as organising brokers.

The objective underpinning the participant categorisation is easier presentation and identification of applicable compliance and reporting obligations.

Direct Market Access

On the technological front, the Participant Rules provide for the adoption of the new Direct Market Access system, allowing greater independent access to the FASTER trading system. Access is provided to authorised persons to register orders directly into a Trading Participant's system for submission into the trading system by a DMA dealer. This will allow direct access into a Trading Participant's FASTER system not only by those authorised in New Zealand, but also to brokers operating in overseas markets.

Other key provisions

In addition to revamping the designations of NZX participants, the Participant Rules also aim to bolster transparency and accountability at all participation levels. Some key provisions include:

- the term "brokers" being replaced with the term "advisors" to better reflect the nature of the relationship between brokers and their clients;
- participants which operate under more than one 'market participant' designation, e.g. an NZX Sponsor and a Distribution and Underwriting Sponsor, will be required to provide the NZX with an outline of the "Chinese wall" practices and procedures that the participant has in place to avoid any conflicts of interest that might arise from those different business activities (Rule 3.23);
- NZX Advisors employed by Trading Participants must maintain a written record of all beneficial and non-beneficial material interests they hold in securities listed on an NZX exchange. Further, advisors will be required to disclose interests in securities to a client if that client places an order in that security (Rule A10.5);
- tighter regulation of discretionary accounts, including twice yearly reviews of all account transactions and mandatory segregation of discretionary account funds from other participant accounts (Rule 9.4);
- requiring Trading Participants to maintain a register of all trading errors and cancellations of $1,000 value or greater (Rule A10.71);
- empowering the NZX Board to impose additional liquid capital requirements at its discretion if it considers a participant may be affected by illiquid assets, risk profile or operational risks (Rule 15.8.2); and
- requiring that the calculation confirming liquid capital exceeds prescribed levels must be made and filed daily with NZX by participants in addition to monthly returns. An exemption from the daily reporting requirement may be obtained if the participant can produce evidence it will at all times maintain the prescribed level of liquid capital (Rule 15.9).

NZX Listing Rule amendments

Further to earlier corporate governance amendments, NZX is proposing a number of changes designed to "enhance market efficiency and bring the rules into line with both current practices and overseas standards".

The following are a number of key changes included in the proposal:

- the introduction of a "dual listed issuer" category, providing a standard set of exemptions from the Listing Rules for ASX-listed Australian companies which are also listed on NZX;

- a requirement that appraisal reports set out the grounds for any opinion in relation to a transaction;

- the introduction of a 'hybrid securities' classification to clarify the treatment of convertible securities. Such securities will be treated as either debt or equity depending on their characteristics on initial quotation. The rules that would apply to the class of security into which a hybrid security may convert will subsequently apply on any such conversion;

- removing the discretionary power of NZX to require an issuer to prepare and distribute an information memorandum on instances of major changes in control or direction;

- removing the obligation on issuers to advise NZX of certain agreements involving the acquisition or disposition of assets representing in excess of 10% of an issuer's shareholders' funds;

- making payments to directors on retirement or cessation of office conditional on shareholder approval;

- removing the requirement for an organising broker for the quotation of securities that are rights to securities that have already been quoted, e.g. for a rights issue;

- including as a "material transaction" (requiring shareholder approval of it is with a "related party") issues or buy-backs of securities having an aggregate gross value in excess of 5% of the greater of shareholder funds or the average market capitalisation of an issuer; and

- setting thresholds for approval of remuneration packages as material transactions with related parties tied to the monetary value of the package in circumstances where the current materiality triggers would be inappropriate.

Concluding comments

The proposed NZX Discipline regime reflects a key change in the approach to market participant and issuer compliance. This is marked, in particular, by the proposed ability to impose monetary penalties of up to $500,000.

The amendments to the Listing Rules reflect an attempt to balance the need to bolster investor confidence while at the same time removing redundant and inefficient requirements.

Public submissions are currently being sought on the proposed NZX Discipline Rules by 23 January 2004 and on the NZX Listing Rules for receipt no later than 28 January 2004.

The introduction of the NZX Participant Rules is the first stage in NZX's reform of participant governance aimed at tailoring the compliance regime to its members' business undertakings. Further amendments are intended in 2004 relating to participants' capital adequacy requirements, underwriting and financial accounting.

Public submissions are also being sought on the proposed Participant Rules. Any comments must be forwarded to NZX by 2 January 2004.

Further information

If you require any further information concerning NZX Discipline, NZX Participant Rules or the amendments to the NZX Listing Rules, please contact any of the following members of Simpson Grierson Corporate Advisory:

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SEC update

SEC Issues New Interpretive Guidance Regarding MD&A

January 30, 2004

On December 19, 2003, the SEC issued additional interpretive guidance regarding disclosure in SEC filings known as Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A). The release encourages public companies and their managements to take a hard look at their MD&A with a view to providing more meaningful disclosure. The SEC's guidance is published in Release No. 34-48960.

The release represents a continuation of the SEC's effort to elicit improved disclosure in MD&A, but does not announce any new disclosure requirements. The SEC separately considers four principal areas of disclosure: presentation of MD&A; content and focus of MD&A; liquidity and capital resources; and critical accounting estimates. The existing requirements for MD&A addressed in the release are contained in Item 303 of Regulation S-K and Items 303(b) and (c) of Regulation S-B (for small business issuers). The SEC's guidance also applies to MD&A for foreign private issuers provided in Form 20-F.

Presentation of MD&A

Acknowledging that MD&A for many companies has become "necessarily lengthy and complex," the SEC nevertheless emphasizes that MD&A should be presented in clear and understandable language. To provide a focus on the most important information and improve clarity, the SEC recommends that companies consider including the following in MD&A:

- A tabular presentation of relevant financial and other information followed by a narrative discussion and analysis of that information;
- Additional headings to assist readers in following the flow of, or otherwise understanding, the disclosure;
- An introductory section or overview that includes the most important matters on which the company's executives focus in evaluating financial condition and operating performance;

- A "layered" approach to disclosure that highlights the most important factors, trends and themes relevant to a subject before providing a detailed discussion and analysis of the subject; and
- A discussion of prospective matters and other forward-looking information where that information will promote understanding.

A good introduction or overview will identify the most important themes relevant to management's evaluation of the company's financial condition and operating results. Such a "balanced executive-level discussion" would address economic or industry-wide factors relevant to the company, inform the reader about how the company earns revenue and income and generates cash, and provide insight into the short-term and long-term material opportunities, challenges and risks faced by the company and the company's business plan for responding to those opportunities, challenges and risks.

Content and Focus of MD&A

The release notes that companies can enhance the clarity of MD&A by highlighting material information and de-emphasizing or deleting immaterial information. Although the focus of MD&A will vary among companies, the SEC believes that the following disclosure principles are generally applicable:

Focus on Key Indicators of Financial Condition and Operating Performance. The SEC emphasizes that companies should focus their disclosures on key variables and other factors that are peculiar to, and necessary to understand and evaluate, their businesses.

- Companies should consider using key variables to tell the full story of how a company manages its business. Key variables may include both financial measures and non-financial business and operational data, such as industry-specific measures and interest rates, economic growth rates and other macro-economic matters.
- Companies should evaluate historical and forward-looking information they disclose in earnings releases or analyst calls and consider whether they must or should include this information in MD&A because of its materiality.
- From among the range of informational sources available to them, companies should include only that information which promotes an understanding of the company's business and should avoid subjecting readers to "unnecessary information overload."
- In organizing the information they present in MD&A, companies should select a format that enhances understanding, which may depart from the order in which prescribed disclosures are presented in Item 303 of Regulation S-K.
- Companies should provide a balanced view of the dynamics of their business by describing, in addition to their successes, any failures to achieve material goals.

Focus on Materiality. One of the major themes of the release is that companies must focus MD&A on the disclosure of *material* information.

- MD&A must specifically focus on known material events and uncertainties that would cause reported financial information not to be necessarily indicative of future operating performance or future financial condition.
- Companies should cull from MD&A unnecessary detail and redundant, irrelevant or stale disclosure that obscures material information.

- Companies should evaluate issues presented in prior periods and consider reducing or omitting the discussion of issues that are no longer relevant, or revise the discussion to emphasize the continued importance of those issues.
- Companies should provide segment data where such data are material to an understanding of consolidated information.
- Companies should not unduly rely on a discussion and analysis of changes in financial statement line items, as this approach can result in an excessive amount of duplicative disclosure. Companies should consider grouping line items for discussion and analysis and should avoid discussion of particular line items if the discussion of those line items would not provide material information.
- Materiality should be considered in light of the period to which MD&A relates, so that, for example, items that may be material for MD&A in an annual report may not be material for MD&A in a quarterly report. If the company makes adequate disclosure of a matter in MD&A in an annual report and in intervening quarterly reports, it may not be necessary for it to provide further disclosure on that matter in the current quarterly report.

Focus on Material Trends and Uncertainties. MD&A requires disclosure of a trend, demand, commitment, event or uncertainty unless the company is able to conclude either that (1) it is not reasonably likely that the trend, uncertainty or other event will come to fruition or (2) a material effect on the company's liquidity, capital resources or results of operations is not reasonably likely to occur. In identifying the known material trends and uncertainties, the company must consider whether it is also required to disclose the financial and non-financial information available to it relating to the trends and uncertainties. Because the quality and potential variability of a company's earnings and cash flow is a critical component of MD&A, quantitative disclosure of known material trends and uncertainties affecting this component may be required. The SEC emphasizes that material forward-looking information relating to known material trends and uncertainties is not optional, but required, disclosure.

Focus on Analysis. MD&A requires an *analysis* as well as a discussion of the disclosure elements. Accordingly, MD&A should not merely be a restatement of financial statement information in narrative form. Companies should include a thorough analysis of known material trends, events, demands, commitments and uncertainties, explaining the underlying reasons or implications, the interrelationships between constituent elements, and the relative significance of these matters. The SEC cautions that identifying the intermediate effects of trends, events, demands, commitments and uncertainties alone, without describing the underlying causes of those effects, may be insufficient to promote understanding. If events or transactions included in the financial statements reflect material unusual or non-recurring items, aberrations or other significant fluctuations, the company should provide the analysis necessary for readers to ascertain the likelihood that the company's past performance is not indicative of its future performance.

Liquidity and Capital Resources

Consistent with its prior guidance, the SEC reminds companies that, to the extent material, the following information must be included in the discussion and analysis of liquidity and capital resources: historical information regarding sources of cash and capital expenditures; an evaluation of the amounts and certainty of cash flows; the existence and timing of commitments for capital expenditures and other known and reasonably likely cash requirements; discussion and analysis of known trends and uncertainties; a description of expected changes in the mix and relative cost of capital resources; indications of which financial statement items should be considered in assessing liquidity; and a discussion of prospective information regarding the company's sources of and need for capital.

The SEC also reiterates its previously published guidance that companies must evaluate separately their ability to meet their cash needs over both the short term (a period of twelve months or less) and long term (a period in excess of twelve months). The period over which a long-term discussion of liquidity is relevant depends upon the timing of the company's cash requirements, as well as the period over which cash flows are managed, so that a single reference to periods in excess of twelve months may not be sufficient. Unless no additional information is material, the SEC considers that it is not sufficient for a company merely to disclose that it has adequate resources to meet its short-term and long-term cash needs. The SEC states that such a disclosure, without more detailed information, would be insufficient if the company has any known material trends or uncertainties related to cash flow, capital resources, capital requirements or liquidity.

Cash Requirements. In identifying their known material cash requirements, companies should avoid immaterial matters and generic disclosure and, instead, discuss and analyze the following information:

- funds necessary to maintain current operations, complete projects underway and achieve stated objectives or plans;
- commitments for capital or other expenditures; and
- the effect that known trends or uncertainties may have on future cash requirements, the time periods in which resolution of the uncertainties is anticipated and the difficulties involved in assessing the effect of the uncertainties.

For example, if the company has incurred debt in material amounts, it should explain the reasons for incurring that debt and the use of the proceeds, and analyze how the incurrence of that debt fits into its overall business plan. If the company has incurred debt for general working capital purposes, it should discuss the anticipated amount and timing of its working capital needs. The SEC recommends that the tabular disclosure of contractual obligations be used as a starting point for the discussion of cash requirements.

Sources and Uses of Cash. The company's discussion and analysis of cash flows should not be a "mere recitation" of changes and other information evident from the financial statements, but should focus on material changes in operating, investing and financing cash flows, as reflected in the statement of cash flows, and on the reasons underlying those changes.

- *Operations*. Companies should address material changes in what the SEC terms the "underlying drivers" of operating cash flows, rather than merely describe items identified on the face of the statement of cash flows. An underlying driver might include, for example, cash receipts from the sale of goods and services, or cash payments to acquire materials for manufacture or goods for resale.
- *Financing*. The company must provide disclosure regarding its historical financing arrangements and their importance to cash flows. To the extent material, the historical financing arrangements to be addressed include external debt financing, use of off-balance sheet financing arrangements, issuance or purchase of derivative instruments linked to the company's stock, use of stock as a form of liquidity, and the potential impact of known or reasonably likely changes in credit ratings or ratings outlook (or inability to achieve changes). In addition, the company may have to discuss and analyze the types of financing that are, or are reasonably likely to be, available (or, in some cases,

unavailable), and the impact of any such financing on the company's cash position and liquidity. Disclosure of an external equity or debt financing that is proposed or reasonably likely to occur may require discussion and analysis of the amounts or ranges involved, the nature, terms and other features of the financing, and the impact on liquidity and (for such matters as interest payments) operating results.

Debt Instruments and Related Covenants. Companies that are, or are likely to be, in breach of material covenants related to outstanding debt, guarantees or other contingent obligations must disclose material information about the breach and analyze the impact on the company. To the extent material, the analysis should include disclosure of the following:

- the steps the company is taking to avoid the breach;
- the steps the company intends to take to cure, obtain a waiver of, or otherwise address the breach;
- the impact or reasonably likely impact of the breach on financial condition or operating performance (including the effects of any cross-default or cross-acceleration or similar provision); and
- alternative sources of funding to pay off resulting obligations or replace funding.

Companies must take a similar approach to discussion and analysis of mandatory prepayment provisions, "put" rights and other similar provisions.

Companies should consider the impact of debt covenants, such as debt incurrence and restricted payment limitations and ratio maintenance tests, on their ability to undertake additional debt or equity financing. If these covenants limit, or are reasonably likely to limit, a company's ability to undertake financing to a material extent, the company is required to discuss the covenants in question, the consequences of the limitations, any alternative sources of funds, and the costs and consequences of accessing those alternative sources.

Cash Management. The disclosure on liquidity and capital sources should describe known material trends or uncertainties relating to determinations of when and how companies use their cash resources to satisfy obligations and make other capital expenditures.

Critical Accounting Estimates

When preparing MD&A under the current requirements, companies should disclose accounting estimates or assumptions where (1) the nature of the estimates or assumptions is material due to the levels of subjectivity and judgment necessary to account for highly uncertain matters or the susceptibility of such matters to change and (2) the impact of the estimates and assumptions on financial condition or operating performance is material. This disclosure should supplement, not duplicate, the description of accounting policies already disclosed in the notes to the financial statements, should provide greater insight than such notes into the quality and variability of information regarding financial condition and operating performance, and should involve quantitative as well as qualitative information when quantitative information is reasonably available and will provide material information.

In May 2002, the SEC proposed rules on disclosure of critical accounting estimates that would broaden the scope of the disclosures required under the current rules.

Analysis and Recommendations

The release represents the first comprehensive interpretive guidance on MD&A by the SEC since 1989. It features many of the same themes that have appeared in other SEC pronouncements since 1980, when the SEC adopted the present form of MD&A disclosure requirements. In presenting the SEC's current views on disclosure considerations, the release highlights some of the deficiencies in MD&A disclosure which the SEC staff identified in its most recent review of corporate filings, including its review in 2002 of annual reports filed by Fortune 500 companies. The SEC has reaffirmed its long-standing emphasis on the need for MD&A to contain a clear, well-organized discussion and analysis that focuses on material information and provides sufficient insight for a reader to see the company's business through the eyes of its management.

Preparation of MD&A for upcoming filings will involve both the challenge of implementing the new guidance and that of complying with the rules adopted last year requiring MD&A disclosure of off-balance sheet arrangements and aggregate contractual obligations. (We discussed the new rules in our *SEC Update* dated February 10, 2003.) Among the steps companies can take are the following:

Take a Fresh Look at MD&A. The company should consider whether its current MD&A should be fundamentally revamped in light of the SEC's guidance, rather than simply updated and supplemented to comply with the new rules. Even if the overall presentation and focus of its MD&A is sound, the company should critically review the individual components of MD&A to identify potential areas for improvement.

Involve Top Management in Preparing MD&A. MD&A must extend beyond a review of financial measures to encompass a discussion and analysis of all of the most important matters on which management focuses in evaluating the company's business. Accordingly, the SEC encourages "early top-level involvement by a company's management in identifying the key disclosure themes and items."

Compare MD&A with Other Disclosures. The company should compare MD&A disclosure with other internal and external disclosures such as board packages, presentations to and by management, press releases and analyst calls to see if key indicators discussed outside of MD&A should be discussed in the MD&A.

Devote Sufficient Time to MD&A. The company should begin the MD&A drafting process at any early enough date to permit the internal team and any outside advisors sufficient time to prepare an MD&A that complies with existing and new requirements and that is responsive to the SEC's new guidance.

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

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