PACIFIC RIM ADVISORY COUNCIL

MARCH 2004 e-BULLETIN

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ALLENDE & BREA PARTNER ANNOUNCEMENTS

Allende & Brea has appointed Carlos M. Melhem and Valeriano Guevara Lynch as new partners following January 1, 2004, following the retirement of partners Enrique Garrido and Daniel E. Vilela

DAVIS WRIGHT TREMAINE LLP NAMES 11 NEW PARTNERS

SEATTLE, FEB. 18, 2004 – The law firm of Davis Wright Tremaine LLP has named 11 attorneys from four of its nine offices to partnership. The new partners, their office location, age, and primary practice area(s) are as follows:

Bellevue, WA: *Paula L. Lehmann,* employment law and litigation, including wrongful termination litigation, labor relations counseling and representing employers in collective bargaining.

Seattle: *Michele L. Earl-Hubbard*, 36, media and advertising litigation and counseling and general and commercial litigation; *Jane Eckels*, 32, intellectual property and information technology transactions and counseling; *Jason T. Froggatt,* 34, employee benefits and life sciences; *Eric M. Stahl,* 37, media and copyright litigation and counseling, and commercial litigation; and *Brian J. Todd,* 44, federal income tax law, limited liability company and partnership business transactions.

Portland, Ore.: *Eric L. Dahlin*, 36, commercial litigation, media and communications law; *Kathleen R. Dent*, 33, employment law (litigation and advising) and general litigation; *Broady R. Hodder*, 32, corporate finance, securities, mergers and acquisitions, business and corporate, emerging business and technology, and life sciences; and *Peter S. Leichtfuss,* 35, real estate and construction (transactional and litigation), fair housing and commercial leasing.

Washington, D.C.: *Daniel M. Adamson,* 43, energy, natural resources and environmental regulation/policy/legislation.

DWT is a full service business and litigation law firm, with more than 420 attorneys in its nine offices located throughout the Pacific Northwest, and in Anchorage, Los Angeles, San Francisco, New York, Washington D.C., and Shanghai, China.

For additional information about Davis Wright Tremaine LLP, visit our web site at www.dwt.com

HOGAN & HARTSON OPENS OFFICE IN MUNICH – IS THE FIRM'S 20TH WORLDWIDE

WASHINGTON, March 9, 2004—Hogan & Hartson L.L.P. announced today that the firm has expanded its presence in Germany to an office in Munich. Hogan & Hartson currently has 38 lawyers operating out of its Berlin office. Out of 20 offices worldwide, this is Hogan & Hartson's 17th office to open outside of its Washington, D.C., headquarters in the last 15 years.

The initiative comes in response to client demand particularly in the field of media and entertainment. The Munich office is led by Berlin partners Steven Ballew, Jan Hegemann and Johannes Schulte who will relocate to Bavaria along with corporate and media lawyer Christiane Stützle. Further hires are expected to be announced shortly.

"The firm continues to expand at a healthy rate and one which is appropriate based upon our clients' needs for service. We pride ourselves on being where our clients need us to be with the right resources and understanding of the local jurisdictions and customs," said Warren Gorrell, chairman of Hogan & Hartson. "The establishment of our second office in Germany enhances our ability to serve many of the firm's clients in Berlin and other major EU cities that have operations in Munich."

"This has been a fantastic year for Hogan & Hartson, and our move into Munich caps significant developments, including the addition of tax, structured finance, private equity and capital markets capacity to our European network," said Ray Batla, managing partner for the international offices. "It is key to our development as an international firm to offer full-service capability in our areas of operation and to extend our network of offices on an organic basis responding to client needs."

Attorneys in the Munich office will focus on international corporate, securities and finance, intellectual property and antitrust matters involving the telecommunications, media and entertainment industries.

About Hogan & Hartson

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

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

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

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LUCE FORWARD HAMILTON & SCRIPPS LLPS CHARLES A. BIRD HONORED WITH CALIFORNIA LAWYER ATTORNEY OF THE YEAR AWARD, APPELLATE DIVISION, FOR 2003

March 2003, San Diego - Charles A. Bird, a Partner, was recently honored by *California Lawyer* magazine as its California Attorney of the Year for 2003, for Appellate work. As stated by the editors of *California Lawyer*: Although much of law practice is collaborative, and any given project can span years, there are some achievements made by California lawyers that have such far-reaching impact that they cannot go unrecognized. The lawyers selected as Attorneys of the Year for 2003 substantially influenced public policy or a particular industry, brought about a significant development in their field of practice or in law-firm management, or achieved a notable victory for a client or for the public in a difficult, high-stakes matter. *California Lawyer*, March 2003, "California Lawyer Attorneys of the Year Awards for 2003".

The article goes on to describe the accomplishments which ultimately led to this award:

In September, Bird won an en banc Ninth Circuit decision holding that employers may require, as a condition of employment, that employees agree to arbitrate any future disputes that arise under federal law. The decision overturned contrary precedent set in 1998. (*EEOC v. Luce, Forward, Hamilton & Scripps* 345 F.3d 742.) Bird also argued twice before the state Supreme Court in May, winning both cases in decisions that were handed down in August. In *Lantzy v. Centex Homes Corp.* (31 Cal.4th 363), the court resolved a conflict among appellate decisions when it held that the ten-year statute of limitations on actions for latent construction defects was not toiled during periods of attempted repair. And in *Sharon S. v. Superior Court* (31 Cal.4th 417), the court found that parties can waive the statutory termination of the birth parents' parental duties to an adopted child, which would otherwise occur upon adoption. The holding, which reversed an appellate decision, safeguarded an estimated 10,000 to 20,000 second-parent adoptions completed in the past ten years, most of which involved same-sex couples.

Mr. Bird is a Partner in the firm's San Diego office, and is a member of the Business / Complex Litigation practice area.

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

March 15, 2004

Dear PRAC Members:

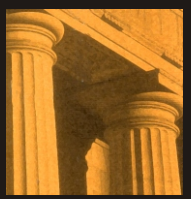
It gives us great pleasure to be the host of the 35th Pacific Rim Advisory Council Conference to be held in Lima and in the historic city of Cusco, Peru, from May 15th to 19th, 2004 and for those attending the follow on programme in Machu Picchu, from May 20th to 21st.

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.

Next month, we will distribute the Advance Conference Materials to all registered delegates. This information and complete conference details, including the latest updates, will also be available at the PRAC web site at www.prac.org . Please ensure your travel details are confirmed .

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

For Travel Confirmations - contact Carmen Gutierrez at gt21eventos@terra.com.pe

TILLEKE & GIBBINS INTERNATIONAL LTD HONORED WITH TOP IP SPOT; NAMES REGULAR PARTNER

Tilleke & Gibbins is number one for patent work in Thailand for a second year running, based on a survey by Managing Intellectual Property among 3000 IP (intellectual property) practitioners worldwide. Vipa Chuenjaipanich heads the IPD department at Tilleke & Gibbins International Ltd., which oversees trademarks and patents of over 5000 active clients. To contact her, please email vipa@tillekeandgibbins.com. IPD is complemented by IPE (Intellectual Property Enforcement) to provide a comprehensive "one-stop shop" for all legal services pertaining to the development and protection of intellectual property rights (trademark, patent, copyright, and trade secret). Ed Kelly heads IPE and can be reached via email at ekelly@tillekeandgibbins.com.

The board of Tilleke & Gibbins International Ltd. (TGI) announced on January 8, 2004, that Mr. Thawat Damsa-ard has been made a Regular Partner of TGI with effect from January 1, 2004. The announcement stated in part as follows: "The Board has recognised the many admirable qualities of Mr. Thawat Damsa-ard and his significant contributions to the growth and development of the firm. His skills as a top litigator have brought him many victories in the court of Thailand. He is recognised by everyone as a leader with an incisive and clear legal mind.

CAREY Y CIA. – SUPREME COURT CONFIRMS LEGALITY NEXTEL PROJECT IN CHILE

After more than two years of litigation, the Supreme Court of Chile confirmed on January 13, 2004, the legality of NII Holdings, Inc. ("Nextel") project in Chile and the obligation of all the telephone operators of the country to accept and establish interconnections with Nextel's digital trunking network. Such legality had been already confirmed by the Court of Appeals of Santiago (on October 7, 2003) and by the Ministry of Transports and Telecommunications (on April 25 and July 25 2002), who also rejected 13 different oppositions filed by all the mobile telephone operators (Telefónica Móvil de Chile S.A., Entel PCS Telecomunicaciones S.A., Bellsouth Comunicaciones S.A. and Smartcom S.A.) and some of their parent companies against Nextel's request for authorization to digitalize its system and interconnect it to the public switched telephone network (PSTN). The decision of the Supreme Court is final and conclusive and is not subject to any further remedy or recourse.

The decision of the Supreme Court is an important event for Nextel because it cleared-up any doubt in connection with the legality of its project in Chile. This decision is also relevant for the whole Chilean telecommunication market due to the fact that, for the first time, allows the interconnection between concessionaires of different public telecommunication services when such services are technically compatible.

Alfonso Silva (partner of Carey y Cia. and head of its Telecom Group) stated: "We are very pleased with the decision of the Supreme Court. We believe that it will increase the competition in the telecommunication market since the subscribers will have the possibility to enjoy a new and more efficient mobile telecommunication option. We are also pleased with the excellent team work we have developed over the last two years with Puga, Ortiz y Cía. and with the local counsel and management of Nextel."

Nextel is a multinational corporation with digital trunking operations in Mexico, Peru, Brazil, Argentina and Chile. Trunking (or Smart Mobile Radio-SMR) is a radio-communication service mostly used by industries and commercial establishments to co-ordinate its working force in an instant and efficient manner. Likewise, due to the incorporation of digital technology, the trunking systems may also interconnect to the PSTN.

The Supreme Court issued its final decision on January 13, 2004.

Carey y Cia. advised Nextel through a team lead by partner Alfonso Silva and associates Eduardo Martin, Esteban Ovalle and Deborah Kenrick.

DAVIS WRIGHT TREMAINE LLP ATTORNEY ACHIEVES LANDMARK DECISION IN SUPREME COURT CASE INVOLVING SIXTH AMENDMENT; COURT REDEFINES U.S. CONSTITUTION AND CONFRONTATION CLAUSE

WASHINGTON—(BUSINESS WIRE)—March 8, 2004—The U.S. Supreme Court, in an instant landmark decision, ruled today that criminal defendants have an absolute right to have prosecutors prove their case through live testimony that is subject to cross-examination. This ruling overturns a series of Supreme Court cases dating back to 1980, in which the Court had said that prosecutors could submit out-of-court testimony when witnesses became unavailable and courts deemed the testimony admissible under state evidence rules and otherwise "reliable."

The case at hand, *Crawford v. Washington*, involved a Washington state man who was convicted of assault with a deadly weapon. Crawford's wife was present during the violent altercation and gave a tape-recorded statement to the police shortly thereafter indicating that Crawford initiated the scuffle. When Crawford later claimed at his trial that he acted in self-defense, the prosecution introduced the wife's statement to undercut Crawford's claim, even though the wife was unavailable to take the stand to testify in person.

By a unanimous vote, the high court ruled that using the wife's out-of-court statement at trial violated the Confrontation Clause of the Sixth Amendment, which provides that the accused "shall have the right ... to be confronted with the witnesses against him."

More significant, a majority of the justices (from both the conservative and liberal wings of the Court) signed onto an opinion authored by Justice Scalia that declared an end to the Court's prior willingness to allow judicially created exceptions to the right to cross-examine adverse witnesses.

According to Justice Scalia: "When (out-of-court) testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"

Two justices — Chief Justice Rehnquist and Justice O'Connor — agreed that the statement here should have been excluded from evidence, but wrote separately to say that they saw no need to abolish the reliability exception with respect to future cases.

Attorney Jeffrey Fisher of Davis Wright Tremaine in Seattle, Washington agreed to represent the accused, Michael Crawford, on a *pro bono* basis after the Washington Supreme Court in 2000 ruled that the Confrontation Clause permitted the use of his wife's statement against him.

"I asked the U.S. Supreme Court to take the unusual step of abandoning a line of its own cases — the "reliability" cases — on the ground that this supposed exception to the right to confrontation was untenable in theory and unworkable in practice," Fisher says. "Courts across the country have been using this exception to admit the very kind of out-of-court statements that the Confrontation Clause is designed to prohibit."

Fisher's legal briefs in the Crawford case were unusual because he drew a parallel from a case four centuries old — the treason trail of Sir Walter Raleigh in 1603 England. Raleigh never came face to face with his accuser because the law permitted written statements alone as evidence. Raleigh was convicted and sentenced to death. Legal historians have noted that the Framers of our Constitution had the Raleigh case, and others like it, in mind when they included the Confrontation Clause in the Bill of Rights.

In Crawford's case, Fisher argued that the prosecutors' use of the wife's tape-recorded statement mirrored the use of the out-of-court testimony in Raleigh's case. The Court agreed, holding that introducing such out-of-court "testimonial" evidence could not be squared with the history or text of the Confrontation Clause.

"The Supreme Court's decision will fundamentally alter the way that criminal defendants are tried across the nation," Fisher says. "No more will governments be able to convict people of crimes on the basis of accusations that they are unable to cross-examine."

Contacts:

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For a copy of the opinion: *Crawford v. Washington* case (No. 02-9410), please contact:
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Brian Levitt, Law/Media Communications, (732) 901-1366

HOGAN & HARTSON PROVIDES LEGAL ASSISTANCE FOR CIENA CORP ACQUISITION

February 20, 2004

Washington - Lawyers with the international law firm Hogan & Hartson are representing CIENA Corp., a global provider of innovative network solutions, in its planned acquisitions of two privately held companies providing broadband service delivery solutions, Catena Networks, Inc. and Internet Photonics, Inc. for a combined purchase price of more than $600 million.

Hogan & Hartson's legal team includes Michael J. Silver, Thene Martin, Amy Freed, William Intner, John Booher, Bill Neff, Kim Stahlman, Michele Harrington, Joe Gormley, Scott McClure, Lori Jenkins, Cullen Taylor, Don Lehr, Kevin Gralley and Erik Lichter.

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 around the globe. The firm's broad-based international practice cuts across virtually all legal disciplines and industries.

Hogan & Hartson has European offices in Berlin, 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 more information about the firm, visit www.hhlaw.com.

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February 13, 2004

New Japanese Legislation Regarding Protection of Personal Data

Asahi Koma Law Offices
Takemi Hiramatsu
Osamu Ito
Kotaro Kubo

General Legislative Framework

The "right to privacy" has been recognized as a constitutional right under Japanese case law (see, e.g., Judgment of September 28, 1964, Tokyo District Court, 385 Hanrei Jiho 12, Judgment of September 5, 1995, Supreme Court, 1546 Hanrei Jiho 115), and infringement of privacy as between private individuals and entrepreneurs is actionable under the general provisions of torts in the Civil Code of Japan.

In recognition of the necessity for more specific protection of personal data under such "right to privacy", as against governmental authorities, the "Act for Protection of Computer Processed Personal Data Held by Administrative Organs" (Law No. 95 of December 16, 1988) specifically addressing personal data protection in the public sector, was enacted. In addition, there are many "Personal Data Protection Ordinances" promulgated by local governments, which govern the protection of personal data held by the administrative organs of local governments.

However, Japan had no comprehensive legislation addressing personal data protection in the private sector, relying on a self-regulation policy instead. As a part of such self-regulation policy, some ministries of Japan had provided guidelines for protection of personal data in the areas of their competence, such as "Guidelines for Protection of Personal Data in Telecommunications Business" (1991), "Guidelines for Protection of Subscribers' Personal Data Regarding Broadcast Viewers" (1996), "Guidelines for Protection of Computer Processed Personal Data in the Private Sector" (1997), issued by the Ministry of International Trade and Industry. Guidelines were also issued by private organisations in specific industries, such as the "Guidelines on the Protection of Personal Data for Financial Institutions" of the Center for Financial Institution Information Systems (FISC; 1987). These guidelines do not have the force of law.

However, there has been an increased demand for personal data protection legislation applicable to the private sector. One of the reasons is the occurrence of various cases involving unauthorized disclosure of personal data by individuals or companies in the private sector. Another reason is the necessity to harmonize with the international standards set by the OECD or the European Union.

Against such background, new legislation entitled "Act for Protection of Personal Data" (Law No. 57 of May 30, 2003; the "Act") was approved by the National Diet on May 23, 2003. Set out below is an outline of the Act. (We are not aware of an English translation of the Act that is publicly available.)

Outline of the Act

The Act is composed of approximately 59 articles within six chapters (1st - general provisions, 2nd - national and local governments' duties, 3rd - personal information protection measures to be taken by national and local governments, 4th - obligations of personal information handling entrepreneurs, 5th – miscellaneous, 6th – criminal sanctions). The Act became effective on May 30, 2003; however, Chapters 4, 5 and 6 (i.e., the provisions for obligations of private sector

entities as well as criminal sanctions) will take effect as from April 1, 2005. The Act applies to persons and entities using personal data (the definition of which will be discussed below) for the purpose of their business with certain exemptions for the press, authors, universities and other academic bodies, political and religious organizations. Also, organs of the national and local governments are excluded. In this regard, the above-mentioned "Act for Protection of Computer Processed Personal Data Held by Administrative Organs" was abrogated; and the "Act for Protection of Personal Data Held by Administrative Organs" (Law No. 58 of May 30, 2003) was enacted, in accordance with the new Act.

The features of the principal provisions of the Act for Protection of Personal Data are described below:

A. Personal Data to be Protected by the Act

As its key feature, the Act provides for various obligations of "Personal Information Handling Entrepreneur". "Personal Information Handling Entrepreneur" (hereinafter referred to merely as "Entrepreneur") is defined as "anyone who utilizes a database containing personal information for business". The definition involves a threshold regarding the volume of personal data to be handled, so that a person handling personal information for less than 5,000 persons is excluded from the definition. Personal information that is protected by the Act is defined as personal information: (i) regarding living individuals, and (ii) which leads to the identification of a specific individual.

B. Obligations Imposed by the Act

The Act provides for certain obligations of Entrepreneurs, while, as stated above, these obligations must be complied with as from April 1, 2005. These include, but are not limited to, the following:

1. Purpose must be Specified

When an Entrepreneur handles personal information, it must specify, to the extent possible, the purpose behind the use of such information and must use the information only to the extent necessary to achieve the specified purpose.

Also, it must provide an individual with a clear advance notice of the purpose behind the use of the information, when such information is to be obtained directly from the individual in writing (including via email and via Internet).

On the other hand, if personal information is obtained in unwritten form or indirectly from any third party, the Entrepreneur does not need to provide an advance notice, rather, it shall be sufficient to announce to the public, or provide a notice to the relevant individual immediately after obtaining, of the purpose behind the use of the information.

In the event that an Entrepreneur would like to use personal information outside the scope of the previously specified purposes, consent of the individual(s) must be obtained in advance. Also, when it has changed the purpose for which the personal information was collected, it must notify the individual(s) directly of the new purpose, or announce the same to the public, provided, that it must not change the purpose beyond the scope which is reasonably recognized as relevant to the previous purpose.

2. Proper Acquisition of Information

The Act prohibits any acquisition of personal information by false pretenses or other unjust means, such as false statement on the purpose behind the use of the information. The

Entrepreneurs must delete or stop using, upon request of the individual concerned, his or her personal information which was acquired by false pretenses or other unjust means.

3. Maintenance of Personal Information Database

Entrepreneurs must endeavor to keep the personal information databases accurate and up-to-date to the extent necessary to achieve the specified purpose. There is, however, no specific provision in the Act which requires Entrepreneurs to dispose of collected personal information after completion of the specified purpose.

Also, Entrepreneurs must take necessary and adequate measures to safe-keep "personal information compiled as database", preventing leaks, loss or destruction of such information. With respect to what measures are contemplated as "necessary and adequate", governmental authorities and/or private associations of companies are expected to provide guidelines which show specific measures that should be taken to maintain the confidentiality of the personal information.

4. Limitation of Disclosure

An Entrepreneur must not disclose personal data to any third party without first obtaining consent of the individual. Where it has already obtained the individual's consent to such disclosure before this obligation becomes effective (i.e., April 1, 2005), it is not necessary to obtain such consent again.

The aforementioned general rule has several exceptions. A non-exhaustive list of major exceptions to the rule (i.e., exemptions from the requirement of "first obtaining consent of the concerned individual") is as follows:

(1) Subcontract
Disclosure is allowed when it is to subcontractors who are engaged by the Entrepreneur for handling all or part of the personal information to the extent necessary to achieve the specific purpose. In such case, for the proper protection of the personal information under the Act, the subcontracting party (i.e., an Entrepreneur) must take supervisory responsibility for the subcontractors, with measures necessary and appropriate for safe-keeping of the disclosed personal data.

(2) Joint Use Among Group Companies
Joint use among group companies is allowed if the individual is notified in advance of, or can easily ascertain, certain prescribed information, i.e., the fact of the joint use, the scope of users, the items of information to be used, the purpose of the use, and the name of the person (individual or entity) in charge of information management.

(3) Public Interest
Disclosure to a third party is allowed where:

(a) it is required by law;

(b) it is necessary to protect human lives, bodies or properties, where it is difficult to obtain the consent of the individual concerned;

(c) it is truly necessary to improve public sanitation or to promote sound growth of children, where it is difficult to obtain the consent of the individual concerned; or

(d) it is requested for smooth operation of public affairs for the Japanese government or any subdivision, agency or instrumentality thereof.

5. Access, Correction and Deletion

If an Entrepreneur is expected to hold the personal data of an individual for more than six (6) month, it must respond to his/her request to the extent of the following:

(1) Access

Entrepreneurs must permit an individual to access his/her personal data, provided, however, that it may decline the access if such disclosure would have a material and adverse influence on the proper operations of their business.

(2) Correction and Deletion

An Entrepreneur must correct or delete personal data of an individual from the database, if such personal data is “inaccurate”.

(3) Stop Using and Providing

Entrepreneurs must cease using personal data of an individual, if the use goes beyond the purpose which is specified or if the data was acquired by unlawful means. Also, it must stop providing personal data of an individual to a third party, if such provisions are made in violation of the rules described above.

C. Sanctions against Non-Compliance

If an Entrepreneur violates the above obligations and it is necessary to protect rights of individual(s), the competent minister may recommend adequate measures to be taken by the violating Entrepreneur for abatement of the violation. If such measures are not taken by the violating Entrepreneur without justifiable reason regardless of impending infringement of rights of individual(s), the minister may issue an order to take such measures. Disobedience of such an order is punishable by imprisonment of up to six (6) months or a fine of up to three hundred thousand yen (JPY300,000).

Conclusion

The Act would affect the manner in which companies, whether Japanese or foreign, collect and handle personal information of Japanese nationals, as well as the ability of Japanese companies to transfer such information to foreign companies.

Finally, the Act stipulates that the central government must establish a “basic policy” in order to promote protection of personal data in an integrated and standardized manner. This basic policy is expected to be established by this spring. The Act is expected to be a “basic” law, which is applicable to the private sector in general; therefore, in accordance with the basic policy, separate laws which are applicable only to certain sectors or industries (e.g., the financial sector, medical sector and telecommunication sector), may further be enacted in the near future.

NETHERLANDS – NAUTADUTILH – Dutch Government Supports Corporate Governance Code

The Dutch government today announced that it will designate the Dutch Corporate Governance Code, drawn up by the Tabaksblat Committee, as the code of conduct with which Dutch listed companies will be required by law to comply. In a joint statement, the Ministers of Finance, Justice and Economic Affairs said that, in their opinion, the Code will contribute to restoring the confidence of investors and the public in the integrity of managing and supervisory directors and financial market parties.

According to the statement, the Dutch Corporate Governance Code, in essence a product of self-regulation, will enhance the corporate governance structure of Dutch listed companies. Like the Committee, the government feels that self-regulation with a statutory basis, rather than detailed legislation, is better suited to respond to changes in society and in the financial markets, while providing for more flexibility for a diversity of large and smaller companies.

For additional information please visit www.nautadutilh.com

FOCUS

NEW CAPITAL ADEQUACY REQUIREMENTS FOR FINANCIAL HOLDING COMPANIES AND BANKS

Hsin-Lan Hsu

I. Financial holding companies

On 25 November 2003, the Ministry of Finance (MOF) announced amendments to the Regulations Governing the Consolidated Capital Adequacy of Financial Holding Companies. The key points are as follows:

- The old regulations provided that the qualified capital of a financial holding company should be calculated in the same way as that of banks. However, in view of the fact that investments by financial holding companies are mainly long-term in nature, to avoid financially weakening a parent company and then its subsidiaries, the MOF now requires that the maturity of funds of a financial holding company should reach a certain minimum period.

  The MOF has therefore revised the definition of the qualified capital of a financial holding company to: the combined total of common shares, preferred shares, subordinated debts, prepaid capital, capital reserves, retained earnings or accumulated deficit, and equity adjustments (i.e., reserves for exchange minus losses from unrealized long-term equity investment plus/minus accumulated adjusted amounts), less goodwill, deferred assets, and treasury stock. Of the above, the original maturity date of preferred shares and subordinated debts must be seven years or more from their issuance, and during the last five years to maturity, their value is cumulatively discounted by at least 20% each year and the combined amount of such instruments included must not exceed one-third of the total qualified capital.

- The old regulations defined the statutory minimum capital of a financial holding company as its total risk-based capital (calculated as per the formula prescribed in the Regulations Governing the Capital Adequacy of Banks), multiplied by the statutory minimum capital adequacy rate for banks. However, given that the permissible short-term investments are regulated by Article 39 of the Financial Holding Companies Act, the risks associated with short-term funds are already controlled. Accordingly, to avoid limiting financial holding companies' flexibility in the use of their short-term funds, in the new regulations the, MOF has redefined the statutory capital of a financial holding company as its total assets, less cash and cash equivalents, the book value of its short-term investments, goodwill, and deferred assets.

- The old regulations provided that the qualified capital and the statutory capital of a trust enterprise should be calculated in the same way as that for banks. However, trust enterprises may not guarantee the principal of trust property, or promise minimum interest yields. Thus their business is different in nature from the main business activities of banks, such as lending and investment, which are mainly risk assets. Therefore the MOF has adopted the same rules for trust enterprises as those for futures enterprises and venture capital investment enterprises, by redefining a trust enterprise's qualified capital as its total assets less total debt; and its statutory capital must be at least 50% of its total assets.

- The amendments may bar preferred shares and subordinated debts already issued by a financial holding company from its qualified capital. To prevent this from impacting the group capital adequacy, new provisions allow those preferred shares and subordinated debts issued before 1 July 2003 with the approval of the competent authorities, that meet the conditions for inclusion in the qualified capital of a bank, to be included in the financial holding company's qualified capital; provided, that during the last five years to maturity, their value is cumulatively discounted by at least 20% each year.

II. Banks

Article 4 of the Regulations Governing the Capital Adequacy of Banks is amended to allow certain capital instruments that combine characteristics of both equity capital and debt to be included in a bank's Tier 1 and Tier 2 capital. The MOF made the amendments after taking into consideration the Basle Committee on Banking Supervision's guidance on banks' hybrid capital instruments and innovative capital instruments, and the current practice in major countries of allowing banks to issue hybrid financial products and include them in their capital, in order to diversify their capital structure. The key points are as follows:

- The non-cumulative perpetual preferred shares and non-cumulative subordinated debts without a maturity date that meet the following conditions are entitled to be included in Tier 1 capital:

    1. the long-term subordinated debts and non-perpetual preferred shares are fully paid and non-accessible;

    2. the bank or its affiliates have not provided guarantees or collateral;

    3. the payment order of the holders of non-cumulative subordinated debts without a maturity date is subordinated to that of the holders of subordinated debts under Tier 2 capital and other general creditors of the bank;

    4. if the bank does not have any earning in the first half of a fiscal year and does not distribute any dividends to the holders of common shares, the bank should not pay the interests on subordinated debts;

    5. when the bank's capital adequacy ratio is lower than the lowest ratio stipulated by the authorities and the bank does not rectify such situation within six months, non-cumulative subordinated debts without a maturity date should be converted in whole into perpetual non-cumulative preferred shares; and

    6. ten (10) years after issuance, if the bank's capital adequacy ratio reaches the lowest ratio set by the authorities after redemption approved by the authorities, such instruments may be redeemed prior to the maturity date. If they are not redeemed, the bank may raise the contracted interest rate once only, by a maximum of one percent per annum or up to 50% of the originally contracted interest rate.

    The combined total of such instruments included in a bank's Tier 1 capital must not exceed 15% of its total Tier 1 capital. The amount exceeding the above threshold may be carried over to its Tier 2 capital.

- The cumulative perpetual preferred shares, cumulative subordinated bonds without a maturity date, and those convertible bonds that meet the following conditions may be included in Tier 2 capital:

1. the long-term subordinated debts and non-perpetual preferred shares are fully paid and non-accessible;

2. the bank or its affiliates have not provided guarantees or collateral;

3. if the bank's capital adequacy ratio is lower than the lowest ratio set by the authorities due to payment of interests, the bank may defer the payment of interests and dividends and the deferred interests and dividends will incur no interest;

4. if the capital adequacy ratio is lower than the lowest ratio set by the authorities and its accumulated losses exceed the combination of retained earnings and capital reserves, accumulated subordinated debts without a maturity date and convertible bonds shall be converted in whole into perpetual accumulated preferred shares;

5. five years after issuance, if the bank's capital adequacy ratio reaches the lowest ratio set by the authorities after redemption approved by the authorities, such instruments may be redeemed earlier. If they are not redeemed, the bank may raise the contracted interest rate once only, by a maximum of one percent per annum or up to 50% of the originally contracted interest rate;

6. convertible bonds must be subordinated bonds with a maturity date of not exceeding 10 years; and

7. convertible bonds can only be converted into common shares or perpetual preferred shares upon maturity; and before maturity, they may only be converted into common shares or perpetual preferred shares, unless the authorities approve a different mode of conversion.

- The combined total of long-term subordinated debts and non-perpetual preferred shares included in Tier 2 capital shall meet the following requirements and shall not exceed 50% of the total Tier 1 capital:

  1. the long-term subordinated debts and non-perpetual preferred shares are fully paid and non-accessible;

  2. the bank or its affiliates have not provided guarantees or collateral;

  3. their original term to maturity is at least five years; and

  4. their value is cumulatively discounted by at least 20% in each of the last five years to maturity.

FCC update

FCC to Examine Wiretapping Obligations of Internet-Based Communications Service Providers

February 19, 2004

Last week, the FCC announced that it will soon initiate a rulemaking to clarify the obligations of Internet-based communications service providers under the Communications Assistance for Law Enforcement Act (CALEA), as requested by the U.S. Department of Justice (DOJ) and the FBI. This rulemaking is likely to address the legal and technical issues associated with allowing law enforcement agencies to wiretap and monitor communications across Internet-based services.

The upcoming CALEA rulemaking, announced in the context of the FCC's adoption of a Notice of Proposed Rulemaking regarding Voice Over Internet Protocol (VOIP) communications services, could dramatically affect the legal and technical obligations of Internet-based service providers by expanding enforcement of the statute to non-traditional communications services and even companies who do not consider their services to be "telecommunications."

Background

Congress enacted CALEA in 1994 in order to enable law enforcement agencies (LEAs) to keep up with technological innovations such as wireless and digital communications technologies. CALEA requires that, as telecommunications companies upgrade or change-out their facilities, they ensure that their infrastructures continue to allow LEAs to conduct legally authorized surveillance — i.e., the ability to intercept calls and obtain "call-identifying information." The LEAs, carriers, and telecommunications industry associations have collaborated to establish a technical standard necessary to ensure wiretapping functionality for various technologies (the "J-STD-025" standard). Carriers are entitled to be reimbursed for certain network changes undertaken at the request of the FBI.

CALEA requires that carriers with telecommunications facilities placed in service after January 1, 1995, enable properly authorized LEAs to:

- intercept wire and electronic communications transmitted across those facilities;
- isolate "call-identifying information" (excluding data disclosing the physical location of the subscriber that may not be determined from the telephone number);
- receive such communications and information in a format and at a location of the LEAs' choosing other than the carrier's premises; and
- intercept such calls and obtain such information unobstrusively in a manner that protects the privacy rights of individuals and security of information not authorized for interception, while also safeguarding the secrecy of the LEAs' ongoing surveillance.

Controversially, the FCC's rules also require carriers to provide LEAs with additional, so-called "punchlist" capabilities requested by the DOJ and the FBI, including the following:

- "dialed digit extraction" (the ability to intercept those digits dialed by the subject of an investigation after completion of the initial call);
- "party hold/join/drop" (the ability to intercept information identifying all active parties on a conference call with the subject);
- "subject-initiated dialing and signaling" (access to all dialing and signaling information available from the subject);
- "in-band and out-of-band signaling" (access to the subject's network signaling and dialing information such as whether a line is ringing or is busy);
- content of "subject-initiated conference calls" (access to content of conference calls supported by the subject's service); and
- "timing information" (access to information that will allow LEAs to correlate call-identifying information with call content).

Although the U.S. Court of Appeals for the District of Columbia Circuit vacated certain of the punchlist requirements in 2002, the FCC reinstated them after further proceedings.

The Impact of Voice Over Internet Protocol

With the advent of VOIP technology, the LEAs are seeking extension of the CALEA regime to a new generation of companies and services. Up to now, the core issue in VOIP-related proceedings before the FCC has been whether certain types of services using different VOIP technologies should be classified as regulated "telecommunications" or unregulated "information services." The regulatory classification of a service could determine whether the service provider must pay access charges to local phone companies, whether it must make "contributions" to the universal service fund, and whether it must comply with other state and federal regulatory obligations, including CALEA. Last Thursday, the FCC determined the "Free World Dial-Up" VOIP service offered by *Pulver.com* should be classified as an "information service" and should remain free of regulation. This prompted concern from the LEAs, who fear an erosion of their ability to conduct surveillance across platforms and technolgies that the FCC chooses not to regulate.

The implications of the FCC CALEA proceeding for any company providing Internet-based services are potentially costly and far-reaching. The LEAs may attempt to persuade the FCC to impose broader CALEA obligations — including additional "punchlist" capabilities — upon

traditional telecommunications carriers providing services, in part or in whole, over Internet-based facilities. New obligations could also be imposed on emerging providers of VOIP and other communications services and technologies using Internet-based platforms — and by the same token, such providers may become eligible for reimbursement for certain activities. In addition, the LEAs may argue that, for CALEA purposes, services such as cable modem and digital subscriber line (DSL) services – which the FCC has deemed to be "information services" and, thus, not subject to regulation – are composed of a "telecommunications" infrastructure and thereby subject to CALEA obligations. This is closely related to the FCC's and other parties' efforts to seek further review of a recent U.S. Court of Appeals for the Ninth Circuit ruling that cable modem service is a form of "telecommunications service."

More broadly, the controversy over CALEA and VOIP pits two politically powerful agendas against one another. On the one hand, there is strong support for reducing or eliminating the regulatory burdens imposed on providers of Internet-based services, including many traditional telecommunications operators. On the other hand, with the nation's focus on homeland security and the war on terrorism, there will be a powerful impetus to strengthen the law enforcement community's ability to conduct investigations by obtaining access to Internet-based communications.

The DOJ and FBI are expected to file a petition for rulemaking shortly. The CALEA proceeding that results may subject a whole new range of services and providers to costly and significant law enforcement and technical obligations. We will continue to monitor these important developments.

Please contact the Hogan & Hartson attorney with whom you work or one of the attorneys listed below if you would like additional information about these issues.

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