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September 28 - October 1, 2013

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BAKER BOTTS NAMES PARTNER IN CHARGE OF PALO ALTO OFFICE

John Martin Named Partner in Charge of Baker Botts' Palo Alto Office - Technology Sector Chair Plans to Continue Firm's Silicon Valley, West Coast Growth

PALO ALTO, California, October 7, 2013 -- Baker Botts leadership has tapped John Martin, chair of the firm's Technology Sector and a highly regarded corporate lawyer, to assume the role of Partner in Charge of its Palo Alto office and to continue the dynamic growth and expansion the firm has experienced in Silicon Valley during the past five years.

Martin follows founding Partner in Charge B.C. Boren, who opened the Palo Alto office for Baker Botts in 2008 and who managed its growth from four lawyers to more than 20 partners and associates today. In addition to adding lawyers and staff to the firm's Silicon Valley operations, Boren orchestrated a recent move into office space designed to accommodate anticipated growth for the firm in Northern California and beyond.

"John is well-equipped to take on the challenge of building on the foundation B.C. established during his more than five years developing our Palo Alto office into a strong and vibrant resource for our clients," said Baker Botts Managing Partner Andrew Baker. "John's leadership of our Technology Sector efforts, as well as his well-respected corporate practice, makes him the logical choice to lead our growth plans in Silicon Valley and beyond."

Martin recently relocated to Palo Alto from Dallas to bolster the firm's Corporate practice in Silicon Valley and to leverage his Technology Sector leadership role within the firm. As Baker Botts' Technology Sector Chair, Martin oversees the delivery of integrated client offerings to the firm's technology clients, drawing on the firm's deep transactional, IP and litigation experience.

Martin's corporate practice focuses on mergers & acquisitions, corporate finance, and corporate governance matters. He has extensive experience in representing multi-national companies in M&A matters, particularly in the acquisition of technology and services targets. He also has significant joint venture, private equity and venture capital experience.

In addition to continuing to represent his clients, Martin will take on the challenge of expanding Baker Botts' Silicon Valley presence and developing markets outside that area, utilizing the firm's global strength in the energy sector and related industries to provide clients counsel on the complex legal issues these businesses and operations face on a daily basis.

"Our clients -- well established in Silicon Valley or with major interests in the region -- have been instrumental in fueling our growth since we opened our doors five years ago," Martin said. "As demand for quality legal counsel continues to increase here and across the state, we will add resources to make certain we maintain that high level of client service that has been a Baker Botts trademark for over 170 years."

For more information, please visit www.bakerbotts.com

DAVIS WRIGHT TREMAINE ADDS FORMER MARKETING COMPLIANCE IN-HOUSE COUNSEL

Jeff Giametta, former nationwide head of marketing compliance for E. & J. Gallo, joins DAVIS WRIGHT TREMAINE LLP

SEPT. 25, 2013 – Jeff Giametta, most recently an in-house attorney with E. & J. Gallo Winery, has joined the nationally recognized food and beverage team at Davis Wright Tremaine LLP. He will practice in the firm's Portland, Ore., office.

At Gallo, Giametta built and managed a team of regulatory professionals who handled marketing and promotions compliance activities nationwide. At DWT, he will lead a similar team to serve the firm's restaurant, hotel, and alcohol beverage supplier clients in licensing, permitting, and compliance projects.

"Jeff's management experience in solving alcohol regulatory and licensing needs will be extraordinary valuable to our clients," said Jesse Lyon, chair of Davis Wright's food and beverage practice.

DWT's nationally respected practice is widely known for its client-oriented, practical approach to alcohol beverage regulatory and policy issues. "Combined with the recent addition of former WineAmerica general counsel Cary Greene, Jeff's arrival will help us continue building out a group that provides the finest alcohol regulatory services offered by any firm in the country," said Lyon, "including cost-effective paralegal resources for licensing and permitting work in the Pacific Northwest."

Giametta's diverse experience includes directing the strategy of Gallo's marketing, advertising, and promotions compliance activities, with an approach that balances business client needs with an evolving regulatory environment.

"The group at Davis Wright is providing extraordinary service to its clients, and I am thrilled to be a part of the team," said Giametta. "The resources on the DWT alcohol regulatory team are tremendous, and I am proud to be able to build upon the foundation that Jess and others at the firm have developed over the past 30 years."

In its most recent guide to "America's Leading Lawyers for Business," Chambers USA listed Davis Wright Tremaine among the top firms nationwide in the Food & Beverages: Alcohol category.

Giametta received his B.A. in Biology from New York University and his J.D. from Albany Law School. He is currently licensed to practice in the state of Washington and is in the process of applying for Oregon admission.

For more information, visit www.dwt.com

UPCOMING PRAC EVENTS

PRAC @ PDAC Toronto
March 4, 2014

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

PRAC @ INTA Hong Kong 2014
May 10

PRAC Chile 2014
56th International Conference

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

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DENTONS CANADA ADDS TWO LAWYERS IN OTTAWA

October 1, 2013 - Dentons Canada LLP is pleased to announce that two new lawyers have joined their Ottawa office. Peter Burn is counsel in the Public Policy and Regulatory Affairs group, and Marc Doucet is a partner in the Construction group.

“Two highly respected lawyers with top tier skills are joining our team in Ottawa,” says Tom Houston, Managing Partner of Dentons’ Ottawa office. “Peter’s government and international experience and Marc’s broad construction law expertise are strong assets for Dentons’ clients, and for our firm’s global platform.”

Peter Burn has developed expertise in a variety of fields involving technology and regulation, including environmental regulation, clean energy development and climate change strategies; international trade and investment, strategic technology development and industrial security; aerospace and space policy; and financial services regulation. He has represented a number of domestic and foreign companies and industry associations involved in international trade disputes. He provides strategic counsel and advice to a range of corporations, industry associations and governments.

Formerly, Peter acted as counsel to Canada's Minister of Finance during the development and eventual negotiation of the Canada-US Free Trade Agreement and was involved in the privatization of a number of Canadian crown corporations. He also served as an advisor to Environment Canada’s GHG Reductions Directorate, and to former Canadian Environment Minister Jim Prentice.

Marc Doucet has practised construction law since 1987. He handles all matters from tendering issues, contract amendments, extras, delay and impact claims, and matters under *The Occupational Health and Safety Act*. He frequently assists clients in transition of their businesses whether it be a purchase and sale or succession plans with existing members of the enterprise.

Marc practices in both official languages and is a member of the Canadian Bar Association, Carleton County of Law Association, L'Association des juristes d'expression française de l'Ontario and the Ottawa Construction Association.

For additional information visit www.dentons.com

SIMPSON GRIERSON STRENGTHENS ITS COMMERCIAL LITIGATION PRACTICE

Simpson Grierson strengthens its commercial litigation practice with the appointment of Jania Baigent to the partnership, effective 1 October 2013.

Jania has established an impressive track record in litigation and dispute resolution, with specialist expertise in complex contractual, product liability and insurance disputes.

Jania is also an expert in corporate reputation issues. She regularly acts on disputes regarding the protection of confidential information, and advises clients on defamation and media law.

Jania's work includes acting for multinationals and insurers such as Bayer New Zealand Limited and HDI-Gerling Industrial Insurance Company.

"We are delighted to welcome Jania to the partnership," says Simpson Grierson chairman Kevin Jaffe. "She is a highly regarded litigator who achieves great outcomes for her clients."

Simpson Grierson has one of New Zealand's leading dispute resolution practices.

For additional information visit www.simpsongrierson.com

TOZZINIFREIRE WELCOMES NEW PARTNER TO LITIGATION AND ARBITRATION PRACTICE GROUP

TozziniFreire's Rio de Janeiro office has a new partner in the Litigation and Arbitration Practice Groups.

Octavio Fragata M. de Barros is the new partner in the Litigation and Arbitration Practice Groups at TozziniFreire's Rio de Janeiro office. With 13 years of experience, he worked on several arbitrations before the International Chamber of Commerce – CCI (Paris), American Arbitration Association (AAA), Arbitration Center of the Brazil-Canada Chamber of Commerce, Chamber of Conciliation, Mediation and Arbitration CIESP/FIESP, Brazilian Center of Mediation and Arbitration, and Fundação Getulio Vargas.

His practice also comprises advising companies on corporate and commercial disputes in various industries, such as oil and gas, energy, mining, construction and information technology, among others.

He holds a Master's and a Doctorate degree in course from International Law and Economic Integration from Universidade do Estado do Rio de Janeiro (UERJ), earned a specialized degree in Private International Law from The Hague Academy of International Law, Netherlands, and attended an extension course in Arbitration, Negotiation and Mediation at Fundação Getulio Vargas. He is a graduate of the Law School of Universidade Candido Mendes.

Octavio is ranked in three categories of the guide Chambers and Partners Latin America in 2013, and worked as a foreign associate at Dechert LLP, in Paris, and as a senior associate in Barbosa, Müssnich & Aragão. He is a professor in the postgraduate programs of Fundação Getulio Vargas and Escola Superior de Advocacia. In addition, Octavio is a member of the Regional Coordinating Committee of the Latin America Chapter of the Young Arbitrators' Forum.

For additional information visit www.tozzinifreire.com.br

BAKER BOTTS

REPRESENTS REGENCY ENERGY PARTNERS IN $5.6 BILLION ACQUISITION OF PVR PARTNERS

HOUSTON, October 10, 2013 -- Regency Energy Partners LP ("Regency") (NYSE:RGP) and PVR Partners, L.P. ("PVR") (NYSE:PVR) today announced that their respective boards of directors have unanimously approved a definitive merger agreement, pursuant to which Regency will acquire PVR. This acquisition will be a unit-for-unit transaction plus a one-time cash payment to PVR unit holders that collectively imply a value today for PVR of approximately $5.6 billion, including the assumption of net debt of $1.8 billion.

The transaction, which is expected to close in the first quarter of 2014, will create a leading gas gathering and processing platform with a scaled presence across North America's premier high-growth unconventional oil and gas plays in Appalachia, West Texas, South Texas, the Mid-Continent and North Louisiana. The combination continues to build on Regency's fee-based cash flows. The acquisition better positions the combined company to capitalize on the long-term growth momentum of North American gas production through incremental, high-value expansions around its core asset base, as well as other growth and acquisition opportunities.

Baker Botts represented Regency Energy Partners in the acquisition.

For additional information visit www.bakerbotts.com

CAREY

ACTS AS LOCAL COUNSEL IN PUBLIC OFFERING OF SHARES OF COMPANIA CERVECERIAS UNIDAS

Carey acted as local counsel to J.P. Morgan Securities , Citigroup Global Markets, Deutsche Bank Securities and Goldman, Sachs & Co., as international underwriters, and J.P. Morgan Corredores de Bolsa, Banchile Corredores de Bolsa and Larrain Vial, as local underwriters, in the public offering of shares of common stock in the form of shares and American Depositary Shares (“ADSs”) of Compañía Cervecerías Unidas, a Chilean company engaged in the diversified beverage and confectionery business operating principally in Chile, Argentina and Uruguay, for USD297 million.

Carey advised this clients through a team led by partners Cristián Eyzaguirre, Pablo Iacobelli and Salvador Valdés and associates Patricia Silberman and Cristián Figueroa.

For additional information visit www.carey.cl

CLAYTON UTZ

HELPS COTTON ON STICH UP SUCCESSFUL SUPRE ACQUISITION

Melbourne, 8 October 2013: Clayton Utz has provided strategic legal advice and support to retailer Cotton On Group to help it successfully complete its first major retail acquisition, of the Supré retail fashion chain. The transaction completed on 30 September 2013.

Clayton Utz Melbourne Corporate partner Michael Linehan led the firm's core M&A team, which included lawyers Quentin Reidy, Angela Manolakos and Brooke Coghlan. In a collaborative, cross-practice effort, the team was supported by Banking partner Dan Fitts and his team of senior associate Elliot Raleigh and lawyer Katherine Turner, and Property senior associate Caroline van Grieken.

Commenting on the transaction, lead partner Michael Linehan said: "To successfully meet the transaction timetable, our M&A and banking transaction teams worked seamlessly and collaboratively over a two-week period to finalise the necessary transaction documents as well as a refinancing for the purposes of the acquisition.

"The transaction presented a number of unique challenges that required us to deliver practical and effective solutions to achieve a successful commercial outcome for our client, Cotton On. The Clayton Utz team is pleased to have been a part of Cotton On's first major acquisition in the Australian market and to be able to work closely with the management team of such a successful Australian retail business."

Founded in 1991, Cotton On Group is one of Australia's most successful retailers, with over 1000 stores globally and a stable of brands including Cotton On, Cotton On Body, Cotton On Kids, footwear label Rubi shoes, and gifts and stationery retailer, Typo.

As well as stores in Australia and New Zealand, Cotton On Group has a growing international presence in countries including Singapore, Hong Kong, Malaysia, Germany, South Africa, Thailand and the US. The acquisition of Supré will add over 150 stores in Australia and New Zealand to Cotton On Group's expanding retail portfolio.

For additional information visit www.claytonutz.com

DENTONS

ADVISES STANDARD CHARTERED BANK AND A SYNDICATE OF BANKS IN USD $300 MILLION SYNDICATED FACILITY TO STANFORD ASIA HOLDING COMPANY

Abu Dhabi, UAE—Dentons is pleased to announce that it has advised Standard Chartered Bank and a syndicate of banks in relation to a US$300 million syndicated facility to Stanford Asia Holding Company.

The five-year syndicated facility was arranged by Standard Chartered Bank, Emirates NBD, Mubadala GE Capital PJSC, Noor Islamic Bank PJSC, Abu Dhabi Commercial Bank PJSC, Barwa Bank and Mashreqbank PSC.

The financing, which is split into conventional and Islamic tranches, replaces existing financing and will be used to refinance ships owned by the Stanford Marine Group.

Paul Jarvis, head of banking for Dentons in the UAE and Middle East, said: "We have a long track record of acting for banks on complicated ship financing structures, especially those involving Islamic tranches. This is one of the biggest shipping deals in the MENA region so far this year, so we were delighted to be able to assist the syndicate and the Stanford Marine Group in closing this significant transaction."

The Dentons team was led in the UAE by **Paul Jarvis** and included banking associates **Helen Munro** and **Tien Tai.**

For additional information visit www.dentons.com

GIDE

ADVISES SCOR ON STRUCTURING AND RAISING OF ITS FIRST INFRASTRUCTURE DEBT FUND

23 September 2013 - Gide Loyrette Nouel advised SCOR Global Investments SE in connection with the setting up of the SCOR INFRASTRUCTURE LOANS fund dedicated to the purchase of receivables held on companies located in the European Union and arising from infrastructures financing. The fund aims to raise 500 million euros.

This is one of the first *fonds de prêts à l'économie* within the meaning of article R. 332-14-2 of the French *Code des assurances* as newly amended by decree no. 2013-717 of 2 August 2013 that modified certain investment rules for insurance companies.

The multi-disciplinary team that advised SCOR Global Investments SE comprised partners **Stéphane Puel** and **Xavier de Kergommeaux**, and associates **Julien Vandenbussche** and **Arnaud Lacroux**.

For additional information visit www.gide.com

MCKENNA LONG & ALDRIDGE ACHIEVES TRIAL VICTORY FOR FRESH & EASY

Fresh & Easy Awarded Legal Fees

LOS ANGELES (October 10, 2013) — McKenna Long & Aldridge LLP (MLA) announced that Los Angeles partner Wayne Grajewski and associate Aimee Wong achieved a recent trial victory for client Fresh & Easy Neighborhood Market, Inc. that relieved the company from constructing a new store per a lease agreement with landlord Wilkins Family Partnership LP.

In February 2012, Fresh & Easy filed an action for declaratory relief and reformation in the Riverside County Superior Court. At the heart of the dispute was whether Fresh & Easy, as the tenant, had an obligation under the parties' lease to construct a Fresh & Easy store in Desert Hot Springs by July 1, 2012 or suffer the landlord drawing on a $1.2 million letter of credit for Fresh & Easy's failure to construct the store by that date.

On its face, the language of the lease appeared to support the landlord's position. Fresh & Easy argued that if the lease was reformed to reflect the parties' actual mutual intent then the letter of credit could be drawn upon if, and only if, Fresh & Easy began but failed to complete construction of the store. MLA argued that there was no basis to draw on the letter of credit because Fresh & Easy never started construction of the store.

In the alternative, Fresh & Easy sought a declaration from the court that there were no damages for the failure to build the store because Fresh & Easy was paying market rent, and allowing the landlord to draw on the $1.2 million letter of credit would impose an unenforceable penalty.

Shortly before the July 1, 2012 drop-dead date, Fresh & Easy obtained a preliminary injunction enjoining the landlord from drawing on the $1.2 million letter of credit. In May 2013, after a four-day bench trial, the court issued its decision in favor of Fresh & Easy and against the landlord. The court permanently enjoined the landlord from drawing on the letter of credit unless construction begins on the store but is stopped before completion. Fresh & Easy also prevailed on its alternative position that to allow the landlord to draw on the letter of credit without construction ever commencing would constitute an unenforceable and illegal penalty.

When the court issued its ruling, it denied Fresh & Easy's request for contractual attorneys' fees as the prevailing party in the action. The court reasoned that an attorneys' fees award was not appropriate because the court's decision was based on Fresh & Easy's reformation cause of action and it had merely reformed the lease to its true intent.

Fresh & Easy filed a motion for reconsideration asking the court to reexamine its ruling, and to award attorneys' fees to Fresh & Easy on the ground that both a reformation and a declaratory relief claim provide a proper basis for an award of fees. The court granted the motion for reconsideration on the procedural ground that it had prematurely denied attorneys' fees before the judgment had been entered.

Fresh & Easy then filed a motion for fees and the court awarded $437,600 in fees, the full amount requested. Fresh & Easy also recovered $24,740 in costs for a total of $462,340 in attorneys' fees and costs.

For additional information visit www.mckennalong.com

NAUTA DUTILH

ASSISTS NIBC BANK NV WITH LAUNCHING FIRST PASS-THROUGH COVERED BONDS WORLDWIDE

NautaDutilh's securitisation team assists NIBC with launching the first pass-through covered bonds worldwide

October 14, 2013 - NautaDutilh has assisted NIBC Bank N.V. with setting up of the EUR 5,000,000,000 conditional pass-through covered bonds programma and the first issue of EUR 500 million. This type of covered bond, backed by a pool of Dutch residential mortgage loans, is globally the first of its kind.

The conditional pass-through covered bond structure differs from the traditional covered bond structure, due to the absence of derivatives and inclusion of an orderly wind-down mechanism of the cover pool subject to strict conditions. This results in a better protection of the investors in case of a bankruptcy of the issuing bank.

The maturity mismatch between the assets (mortgage loans) and the liabilities (the pass-through covered bonds) has been reduced significantly by eliminating the potential need for a fire-sale of cover pool assets in the event of an issuer default as a result of which the probability of losses declines.

From an issuer perspective, the structure is attractive, as a pass-through construction results in a higher credit rating (AAA) than the credit rating of the issuing bank (BBB), while less over-collateral is needed. That makes these bonds a relatively inexpensive form of financing for banks.

The structure of the NIBC pass-through covered bond programme is expected to be implemented by other banks.

The NautaDutilh team assisting NIBC Bank N.V. consists of Arjan Scheltema, Elianne Bär, Nico Blom, Wijnand Bossenbroek and Inge Wolswijk.

For additional information visit www.nautaditilh.com

HOGAN LOVELLS

ADVISES ON INNOVATIVE KODAK PENSION PLAN RESTRUCTURING

LONDON, 11 October 2013 - Hogan Lovells advised the Trustees of the Kodak Pension Plan (KPP) on an innovative pensions restructuring, agreed by KPP members representing 92% of KPP's liabilities, to give members of the KPP the option to opt out of the UK Pension Protection Fund (PPF) and into a plan with better benefits than the PPF.

Eastman Kodak Company (EKC), the guarantor of the obligations of Kodak Limited, the KPP's sponsor, to the KPP, filed for Chapter 11 bankruptcy protection in the U.S. in January 2012. This resulted in the KPP Trustees filing unsecured claims for US$2.837 billion against EKC last year.

Last month the KPP acquired EKC's Personalized Imaging and Document Imaging businesses, valued at US$650 million. Hogan Lovells also advised on this transaction, which was paid for part in cash and part by release of claims. The ongoing income generated by these businesses will be used to fund member benefits.

The Pensions Regulator was unconvinced, however, that this would be sufficient to pay member benefits in full and was concerned about letting KPP continue in its current form. Hogan Lovells therefore devised an innovative process to offer members more affordable benefits which were better than PPF compensation and advised the Trustees on the complex communication of this new plan to the 15,000 scheme members. This resulted in a successful vote of 92% for joining the new plan and receiving better benefits than the PPF. There is much more confidence that these more affordable benefits will be paid in full.

The cross-border, cross-practice Hogan Lovells team advising the Trustees was led by London pensions partner Katie Banks, supported by associate Jim Davis, with significant contributions from U.S. partner Christopher R. Donoho III and associate Daniel Lanigan on business restructuring and insolvency matters; and London partner Karen Hughes on tax matters. Members of Hogan Lovells' global corporate, employment, IP, real estate, environmental, and antitrust and competition teams also provided major support on the transactions.

Commenting on the process, Katie Banks, partner in Hogan Lovells' London pensions team, said:

"Gaining member approval on such a scale for the new Kodak Pension Plan is a huge achievement which marks the end of the process of recovering value for the KPP from the EKC bankruptcy process. This is a hugely positive result for KPP members who wish to choose a more generous alternative to the PPF."

Steven Ross, independent Chairman of the KPP, said:

“Acquiring the profitable and cash generative Personalised Imaging and Document Imaging businesses from Eastman Kodak means that members who have voted for the new plan will avoid substantial loss of their pension benefits. In fact, all these members will receive 100% of the pension they are receiving or were expecting to receive under the old plan. This is substantially better than the compensation they would have received in the PPF".

For additional information visit www.hoganlovells.com

TOZZINI FREIRE

ASSISTS ENERGLAS RENOVAVEIS DO BRASIL IN EXECUTION OF INVESTMENT AGREEMENT TO RAISE R$ 300 MILLION FUNDS

TozziniFreire assisted ERB – Energias Renováveis do Brasil – in the execution of an investment agreement to raise R$ 300 million funds from BNDESPar, the investment arm of the Brazilian Development Bank (BNDES), and Caixa Ambiental, an investment fund managed by Mantiq Investimentos.

ERB plans to use the new funds to build and operate cogeneration power projects in the next years. With such transaction, BNDESPar and Caixa Ambiental will share the control of the company with the existing shareholders FI-FGTS and RioForte Investments (part of Banco Espírito Santo – BES).

Pedro G. Seraphim, partner in the Energy industry group at TozziniFreire, was in charge of the transaction with assistance of the associate Walkyria Bozza Kluge.

For additional information visit www.tozzinifreire.com.br

SYCIP LAW

COUNSELS VESTAS IN CONNECTION WITH EDC BURGOS WIND POWER AGREEMENTS

August 08, 2013 - SyCipLaw acted as Philippine counsel to Vestas - Australian Wind Technology Pty Ltd., Vestas Services Philippines Inc., and Vestas Wind Systems A/S in connection with the agreements for the engineering, procurement and construction of a wind energy generation facility of EDC Burgos Wind Power Corporation executed on or about March 1, 2013.

The wind farm is located at Burgos, Ilocos Norte, Philippines, and it is expected to be able to generate approximately 86 MW of electricity.

Angel M. Salita Jr., partner, led the SyCipLaw team which included special counsel **Cecile Margaret E. Caro** and senior associates **Marie Corinne T. Balbido** and **Hiyasmin H. Lapitan**.

For additional information visit www.syciplaw.com

KING & WOOD MALLESONS

ADVISES BNP PARIBAS COMMODITIES ON SUCCESSFUL SETTING UP OF BNP PARIBAS COMMODITIES (SHANGHAI) CO., LTD.

On September 29, 2013, King & Wood Mallesons (KWM) advised BNP Paribas' subsidiary, BNP Paribas Commodities (Shanghai) Co., Ltd (BNP Paribas Commodities) on obtaining a license issued by the China (Shanghai) Pilot Free Trade Zone. BNP Paribas Commodities thereby has become one of the first companies settled down in China (Shanghai) Pilot Free Trade Zone. It has registered capital of US$40 million and total investment of US$100 million. BNP Paribas Commodities is the subsidiary of BNP Paribas, aiming to develop its commodities and futures bonded delivery service with the opportunities of economic and financial reformation in China (Shanghai) Pilot Free Trade Zone.

BNP Paribas is a leading global bank and financial service organization in the Europe, awarded one of the world's four major banks rated by the "Standard & Poor". BNP Paribas operates in more than 85 countries worldwide, and has an important position in global retail banking, asset management and services, as well as corporate and investment banking.

KWM provided legal services throughout the establishment of BNP Paribas Commodities (Shanghai) Co., ltd, and had offered perfect legal support on its investment mode, capital ratio, foreign exchange settlement, as well as the design of transaction structure and financing structure related to its main business area including but not limited to commodity trading and warehousing financing. This project was led by partner Mr. Wang Lianghua, together with the team member Mr. Yang Ming.

For additional information visit www.kingandwood.com

RICHARDS BUELL SUTTON

TWO IMPORTANT LEGAL ISSUES ADDRESSED BY BRITISH COLUMBIA SUPREME COURT

August 6, 2013 - Two important legal issues, arising at the end of a commercial tenancy, were recently addressed by the BC Supreme Court in *Van-Air Holdings Ltd*. v. *Delta Charters* (*1982*) *Inc*., 2013 BCSC 1322.

Richards Buell Sutton Partner, Scott MacDonald, acted as legal counsel for a tenant who operated a marina business under a long term lease which expired in January 2009. The tenant overheld with the landlord's consent, and continued to pay rent until July 2011, at which time the landlord gave one months' notice to the tenant to vacate the marina by the end of August 2011. The tenant objected to the short notice and also claimed the right to remove the docks and pilings which the tenant had rebuilt and expanded at significant expense in 2001.

The court found in favour of the tenant on the two key issues:

1. A tenant's over-holding upon expiry of a lease of a term for years, and the landlord's acceptance of rent, creates a year to year tenancy. This common law rule can be modified by the terms of the original lease or by subsequent agreement of the parties. The common law requires six months' notice of termination of a year to year tenancy, effective at the end of a tenancy year.

2. The docks and pilings were trade fixtures because they were installed in the marina by the tenant to use for the purpose of operating its marina business. The pilings were driven into the river bed and the docks were attached to the pilings in a manner which allowed them to be removed for dredging purposes, and then reinstalled once the dredging was completed. There is a presumption in law that articles attached to the land even slightly are to be considered part of the land. Although these docks and pilings became fixtures and could not be removed during the term of the lease, the tenant had a right to convert them back into chattels and to remove them upon termination of the lease.

For additional information visit www.rbs.ca

UPCOMING PRAC EVENTS

PRAC @ PDAC Toronto
March 4, 2014

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

PRAC @ INTA Hong Kong 2014
May 10

PRAC Chile 2014
56th International Conference

PRAC 56th International Conference
Santiago 2014
Hosted by Carey/
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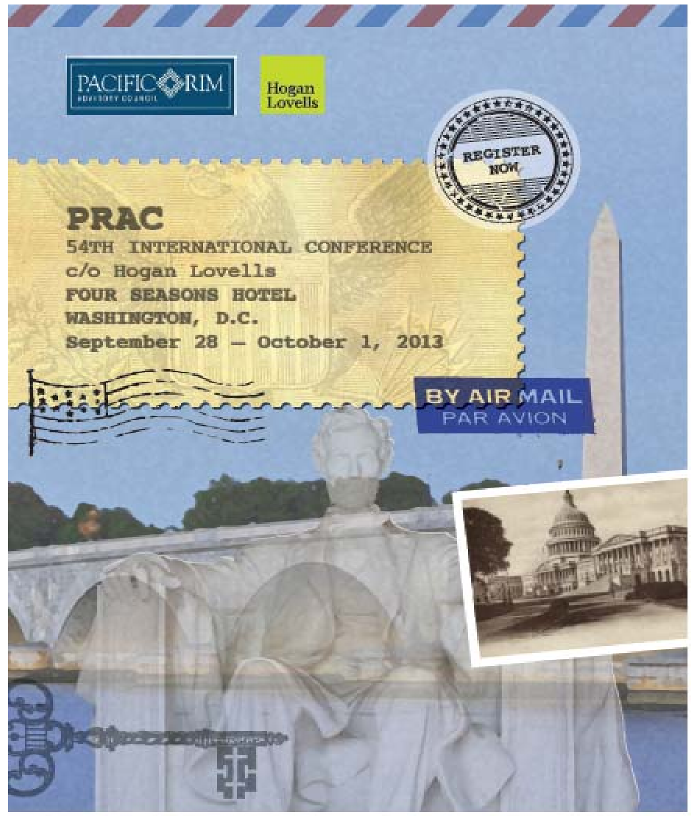

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10 October 2013

Linking superannuation funds to Australian infrastructure projects

By Owen Hayford.

Key Points:

Most PPPs aren't attractive investments for superannuation funds. Governments and other project sponsors need to structure infrastructure investment opportunities in a way which is attractive to superannuation funds in order to attract them as investors.

Australian superannuation funds are crying out for opportunities to invest in Australian infrastructure. At the same time, Australian governments are keen to tap into superannuation funds to help bridge Australia's infrastructure gap. So why isn't it happening?

Superannuation funds exist to provide retirement income for their members. They need to make a return on their funds to do so. Superannuation funds will only invest in a piece of infrastructure if the risk/return equation makes sense. Governments and other project sponsors need to structure investment opportunities in a way which is attractive to superannuation funds in order to attract them as investors.

Is a PPP model suited to superannuation funds investors?

When Australian governments want the private sector to invest in a new infrastructure project they will often develop the project as a public private partnership or PPP. Australia has a long and successful track record in attracting private sector investment in new infrastructure projects via the PPP model. But is the PPP model well suited as an opportunity for superannuation funds to invest in infrastructure?

While there is no doubt that infrastructure as an asset class is an attractive investment opportunity for superannuation funds, most PPPs are not attractive investments for superannuation funds, particularly at the development stage. There are many reasons for this, the principal ones being:

- PPPs are too risky, particularly those where investors take demand or patronage risk;
- construction risk is also a concern for superannuation funds, as is the high level of refinancing risk associated with Australian PPPs;
- PPPs are generally too highly geared – a characteristic which driven by the desire of government to minimise its financial contribution to a PPP project by minimising the project's financing costs;
- because of the low levels of equity relative to debt, the "ticket size" of equity investment opportunities in a PPP is usually too small to be attractive to superannuation funds;
- high bidding costs and the lack of a pipeline of PPP deals; and
- restrictions on the transfer of equity in PPP projects, which adversely affects the liquidity of the investment.

Although PPPs and PPP bidding process can be adjusted to:

- improve the risk/reward equation (for example by structuring the PPP as an availability payment PPP where government takes the demand risk, as is proposed for the East West Link in Melbourne);
- reduce the bidding costs; and
- relax restrictions on equity transfers,

most PPPs will continue to struggle to attract equity investments from superannuation funds at the development stage, prior to construction.

The Canadian experience also bears this out. Canada has a well-functioning PPP model, and yet its pensions funds are not major investors in it, despite Canadian pension funds being recognised as among the most significant and expert investors in infrastructure in the world.

The sorts of adjustments to the PPP model just mentioned, particularly government taking more risks, can also undermine the business case for doing the project as a PPP. If the risk transfer to the private sector under a PPP is no greater than that achievable under a publicly funded delivery model, government will usually achieve a better value for money outcome by adopting a publicly funded delivery model, and avoiding the higher cost of private sector finance, as is proposed for Stage 1 of the WestConnex project in Sydney.

The delivery of more infrastructure under this sort of delivery model, where government funds the construction of the infrastructure facility and then sells the right to generate tolls or other revenue from it, after construction is completed and the revenue stream has been proven, will create more infrastructure investment opportunities which meet the investment criteria of superannuation funds.

Similarly the sale of existing publicly owned infrastructure assets would create attractive infrastructure investment opportunities for superannuation funds and at the same time enable the public capital invested in such assets to be "recycled" and applied to the development of new infrastructure assets.

What about the debt piece in PPPs?

The debt piece in a typical PPP is much larger, and less risky, than the equity piece. Moving forward, there may be an opportunity to attract superannuation funds to provide debt finance to PPPs, particularly if a deeper market for corporate bonds can be established in Australia.

If the Federal Government were to raise debt for the purpose of investing in infrastructure, and did so by issuing long-term bonds, this would help create a pricing benchmark for privately issued bonds, and assist in the development of the corporate bond market.

Improving the deal pipeline

Superannuation funds continue to call for a deeper, more certain infrastructure investment pipeline, to enable them to invest in the people needed to assess and bid for infrastructure projects as they come to market.

Government's ability to improve the pipeline of new infrastructure projects is largely a function of its capacity to fund the projects. There is plenty of private sector finance available to finance the construction of infrastructure projects, but that finance needs to be repaid by someone. Politicians would love to announce an extensive pipeline of new projects, but Australian governments don't presently have the sources of funding required to repay that finance.

There are three main sources of funding for new infrastructure:

- taxes;
- user charges (eg road tolls); and
- asset sales (recycling of capital).

To improve the pipeline, superannuation funds, government and other industry participants need to convince communities that the benefits to communities from better infrastructure funded from assets sales, or user charges, outweigh the additional costs and risks.

You might also be interested in...

- The PPP model has a healthy future in Australia

BRAZIL: CREATION OF TAX FINANCIAL STATEMENTS AND THE CONCEPT OF TAX PROFITS

On September 16, 2013, the Brazilian Federal Revenue Secretariat ("RFB") enacted Instruction 1,397 ("IN 1397?), which requires certain Brazilian companies to prepare separate financial statements for tax purposes ("Tax Balance Sheets"), based on the old Brazilian GAAP in force until December 2007.

Just as a clarification, for statutory purposes, the law establishes that these companies must adopt the IFRS to prepare their accounting books. The new obligation aims at revealing what would have been the profits if the 2007 Brazilian GAAP was still in force for statutory purposes, creating the concept of "Tax Profits".

According to IN 1397, the tax exemption on dividends applies only to the portion of distributed profits that does not exceed the Tax Profits, regardless of the amount of accounting profits. Any excess must be treated as ordinary income, subject to income taxes.

IN 1397 also provides that interest on net equity ("INE", which is another form of remunerating shareholders under Brazilian law) must be calculated on the Tax Balance Sheet's net equity, which may either increase or decrease the payable INE.

The major concern of taxpayers is not exactly the additional ancillary obligations of preparing new financial statements, but rather the possibility of tax authorities trying to apply them retroactively. Given that IN 1397 reflects the tax authorities' interpretation of the law, this interpretation could be theoretically applied within the statute of limitation of 5 years.

However, Law 9,249, which granted the tax exemption on dividends in Brazil, does not limit the application of this exemption to Tax Profits, but generally to profits. Therefore, we understand that there are very good grounds to challenge the RFB's interpretation in Court. The same applies to the calculation of INE.

DENTONS

Case comment: *1043 Bloor Inc. v. 1714104 Ontario Inc.* (2013 ONCA). Prescriptive easements and the doctrine of lost modern grant

October 10, 2013

Key contact

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Prescriptive easements will only be awarded in the clearest of circumstances and not to the detriment of neighbourly conduct.

The doctrine of lost modern grant (the "Doctrine") is the last bastion of rights based on prescriptive easements. Its use was reined in significantly when the province of Ontario adopted the Land Titles System.

A recent Court of Appeal decision in *1043 Bloor Inc. v. 1714104 Ontario Inc.*[1] looked at the continued existence of the limited right to prescriptive easements. In this case, the Court of Appeal unanimously upheld the lower court's decision and refused to grant a right of prescriptive easement. In the process, the Court evoked policy considerations that support a high threshold for finding a prescriptive easement.

Facts

The parties own neighbouring properties in Toronto ("1045 Bloor" and "1043 Bloor") that are separated by a narrow laneway located almost entirely on 1045 Bloor. At least since 1980, the owners of both properties used the laneway to access the parking area behind their respective buildings.

In 1987, 1043 Bloor was sold to Mr. V, the appellant's predecessor. Mr. V attempted to have his neighbour, Mr. S, the respondent's predecessor and owner of 1045 Bloor, sign a right of way agreement over the laneway. Mr. S refused (these events were referred to in the Court of Appeal's decision as the "1987 Incident"). Following the 1987 Incident, Mr. V and his tenants continued to use the lane.

In 1989, Mr. S' son placed "private driveway" signs next to the laneway to protest its use by Mr. V, since the volume of cars using the laneway obstructed Mr. S' use.

Upon selling 1043 Bloor in 2008 to the appellant, Mr. V delivered a sworn statutory declaration stating that he and his predecessor had used the lane continuously and without interruption from 1980 to 2003 (when the property was con-verted to the Land Titles System). In response to the respondent's plans to develop its building to the lot line, the appellant sought a declaration that it had a prescriptive easement and right of way over the laneway. The relief sought in the application was based on the appellant's predecessor's assertion that he (directly and through the original owner) had enjoyed continuous and uninterrupted use for over 20 years[2].

The Application Judge dismissed the claim, finding that the claimant did not meet the legal requirements for a prescriptive easement. The Application Judge determined that the 1987 Incident had interrupted the prescriptive period required for an easement.

Doctrine of Lost Modern Grant

The Doctrine is the sole basis for granting prescriptive easements. The test for a successful prescriptive easement was enunciated in *Henderson v. Volk*:

- [T]he claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which is continuous, uninterrupted, open and peaceful for a period of 20 years[.][3]

The *use* required to establish a prescriptive easement must be “as of right” or “under a claim of right”. For use to be as of right, it must meet three requirements. It must be (1) without violence or force — violence is broadly defined and may simply amount to protest by the dominant owner[4]; (2) without secrecy; and (3) without permission.

The claimant’s enjoyment must be as if it had a right to the easement. This would be equivalent to the claimant having obtained a legal grant to the easement from the owner. Uninterrupted use with permission from the owner will not amount to a prescriptive easement.

A claim for a prescriptive easement will be defeated if at any time during the 20-year period there is an acknowledgement by the dominant owner that the use is not as of right. This appeal turned on whether such an acknowledgment was ever given by the owner of 1045 Bloor, and whether a single act could interrupt the prescriptive period.

Different Reasons, Same Result

The Court of Appeal agreed with the Application Judge’s decision. Gillese J.A. and Laskin J.A. arrived at the same conclusion but disagreed on the significance of the 1987 Incident and whether it in fact interrupted the prescriptive period for an easement.

Gillese J.A.'s view

Gillese J.A. viewed the 1987 Incident as an acknowledgement by Mr. V that his enjoyment of the lane was not as of right. Mr. V’s attempt to have his neighbour sign a right of way agreement was inconsistent with an entitlement to use the laneway.

According to Gillese J.A., the act of seeking Mr. S’ permission in 1987 was fatal to the applicant’s claim for pre-scriptive easement because it amounted to an acknowledgement by Mr. V that his use was not as of right and that any future use would be at the discretion of the true owner.

Macpherson J.A. agreed with Gillese J.A. but also concurred with Laskin J.A.’s view that the use was not “without “violence or force” which also interrupted the prescriptive easement, as discussed below.

Laskin J.A.'s view

According to Laskin J.A., the 1987 incident did not interrupt the prescriptive period. Mr. V undeniably sought permission to use the laneway by requesting that Mr. S sign the right of way agreement. However, the refusal of Mr. S to sign only established that Mr. V’s later use of the laneway was without consent. Mr. V’s acknowledgment that Mr. S had title to the laneway was irrelevant to the question of whether his use was as of right.

Mr. V’s claim was based on his uninterrupted use of the laneway and Mr. S’s acquiescence to that usage. It was Mr. S’ later conduct — posting “private driveway” signs — which defeated Mr. V’s claim for prescriptive easement. Mr. S was a non-confrontational man and the posting of the signs amounted to an overt act of protest to the use of the lane by Mr. V. This went against the broad requirement for prescriptive easements that the use be without violence.

Encouraging Neighbourly Conduct

This decision raises important policy considerations with respect to the limited availability of prescriptive easements in Ontario. In a general sense, where there is ambiguity on the validity of an easement, policy should discourage antithetical behaviour. Neighbourliness should not be discouraged and invoking the Doctrine should not go towards punishing the kind and rewarding the aggressor.

Gillese J.A. and Laskin J.A. both agreed that prescriptive easements should not be awarded carelessly, since they burden the true owners’ land without providing any compensation. A black letter law application of the Doctrine would create perverse incentives.

Laskin J.A. did not agree with Gillese J.A. on the significance of seeking permission from the true owner. In his reasons, Laskin J.A. believed that this view would promote undesirable behaviour and discourage amicable resolutions (i.e. Mr. V seeking an agreement from Mr. S which Laskin J.A. thought should be encouraged). The law should not discourage neighbours from approaching one another about potentially litigious issues.

While the Court of Appeal settled that the Doctrine should be used sparingly, Laskin J.A. was less unilateral in his condemnation of the dominant owner. Despite the heavy burden placed on a true owner’s property interest, courts ought reasonably to protect the dominant owner's interest where the use was open, uninterrupted and acquiesced to by the title holder.

Significance

The Court of Appeal made it clear that the Doctrine should only be invoked in the clearest of circumstances. Where there is ambiguity, the law should not punish neighbourly conduct.

The policy concerns evoked by both judges suggest that courts will avoid applying the doctrine when it would punish a considerate and thoughtful neighbour. However, the dominant user's reliance interest should carry weight when it has been open, uninterrupted and acquiesced to by the true owner. Great care should be taken by dominant owners not to take and steps that could be construed as an act that interrupts the prescriptive easement period.

References

[1.] 1043 Bloor Inc. v. 1714104 Ontario Inc., 2013 ONCA 91.

[2.] A prescriptive right rests on the judicial fiction that an easement was granted at some time in the past based on long, uninterrupted and unchallenged use; in Ontario, 20 years is the prescribed time.

[3.] Henderson v. Volk (1982), 1982 CarswellOnt 1343 at 12 (C.A.).

[4.] The dominant owner is the party who is gaining the benefit of the easement; the title holder or party granting the right is the servient owner.

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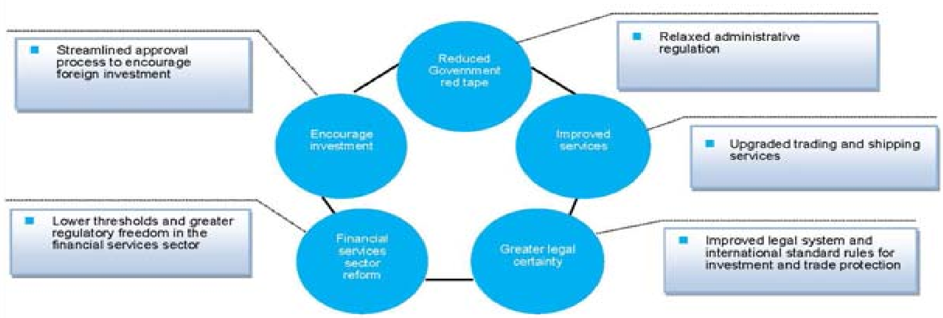
Overview of the FTZ General Scheme | October 2013

- The Shanghai FTZ, a crucial pilot program and potential guide to future economic reform in China, was formally launched on 29 September 2013.
- Established by the State Council under the General Scheme of China (Shanghai) Pilot Free Trade Zone, the FTZ is supported by a range of Administrative Rules issued by the Shanghai Government.
- In the General Scheme, the State Council indicated that the FTZ is a pilot program for more widespread economic reform across China in the next 2 to 3 years across a host of areas, from transforming government functions and cross-border investment administration, to liberalising foreign exchange controls and the financial services sector.
- While many of the FTZ components had been flagged in media reports, the official General Scheme included a number of important new items:
  - transforming government functions has been highlighted as the most important part of the pilot scheme – the government will be focusing on ongoing regulation of market players rather than pre-approval only; and
  - filings for foreign investment and outbound investment from the FTZ will be handled by the Shanghai Government.
- However, we also noted the following deviations from the draft general scheme and our last issue:
  - the 15% enterprise income tax incentive policy will not be adopted by the FTZ – the general China EIT across the country is 25%;
  - the provision allowing foreign investors to engage in heritage auction business has been removed;
  - the General Scheme did not specifically allow overseas future exchanges to set up or authorize commodities future delivery warehouses in the FTZ – this might be removed by CSRC, which appears to suggest that it will be much slower than expected for international commodities exchanges to set up or designate onshore delivery warehouses in China; and
  - the provision allowing foreign investors to apply for Payment Services License has been removed.
- This update provides an overview of the new policies introduced by the General Scheme and the Shanghai regulations. Later updates will provide analysis on reforms and opportunities on specific sectors such as foreign investment, outbound investment, custom and taxation, foreign exchange control, banking and finance, capital markets and insurance.

Part 1 Key Elements



Part II Commodities Trading and Taxation

2.1 Commodities Trading

(1) Overview

Liberalising commodities trading in the FTZ

- **Inspection and Quarantine**
  - Relaxed quarantine and commodity inspection regulations.
  - Greater efficiency in quarantine and inspection procedures
- **Customs Regulation**
  - Replace the 'pre-approval' with a 'filing-only' system of regulation
  - Simplified filing lists and category-based regulation
  - Centralised electronic regulation and trade account information networks
  - Streamlined trading of goods between the FTZ, bonded zones and other customs areas
  - Set up platforms for bonded exhibition and trading in specific areas

(2) Comparison of Policies in Ordinary Areas, Bonded Zone and FTZ

Issue	Ordinary Areas	Bonded Zone	FTZ
Regulation of people	Mandatory quarantine and inspection	Some reduction in mandatory quarantine and inspection	Relaxed quarantine and inspection procedures
Regulation of commodities trade	Mandatory quarantine and inspection	Mandatory quarantine and inspection	Simplified quarantine and inspection upon entry into FTZ
	Subject to quotas and licence management	Special rules for inbound trade	Simplified trade filing lists
	Subject to supervision	Subject to quotas and license management	Centralised electronic regulation
	Subject to tariffs	Streamlined trading within the bonded zone	Streamlined commodity exhibition and trading

2.2 Taxation

- **Tariffs**
  - Remove tariffs on commodities passing between the FTZ and abroad
  - Tariffs will be levied on commodities imported from the FTZ to mainland China
- **Export Tax Refund**
  - Financial leasing enterprises registered in the FTZ and their SPV subsidiaries established in the FTZ

- [illegible] eligible for export tax refunds
  - Improved tax refund policies to allow refund at the departure port
- **Income Tax**
  - Expand avenues to pay corporate income tax and individual income tax by instalments
- **Value-Added Tax/Consumption Tax**
  - Expand reductions in import VAT for cross-border aircraft financial leasing through the FTZ
  - Import VAT/consumption tax levied on commodities produced or processed by FTZ companies and sold into mainland China
- **Tax Exemption**
  - Tax exemption on equipment used in the FTZ

2.3 Trading/Futures/Transportation

Futures Trading

- Expand bonded delivery of futures
- Allow alternative sources of trade and pledge financing
- Allow foreign participation in domestic commodity futures trading

Cross-Border Trading

- Establish international bulk commodities trading and resource allocation platforms
- Allow international trading of energy products, basic industrial raw materials and bulk agricultural products
- Support the enterprises in the FTZ to develop offshore businesses
- Establish an independent cargo trading and service industry
- Support cross-border e-commerce business

Cargo Transportation

- Develop shipping finance, management and brokerage
- Relax restrictions on foreign shareholding of Sino-foreign shipping JVs
- Streamline licensing procedures for international shipping operations
- Allow Chinese funded companies to own/control ships flying non-Chinese flags
- Allow international liners to carry out shipping business among domestic coastal ports

- Leverage direct links between the Waigaoqiao Port, Yangshan Deepwater Port and Pudong Airport International Hub Port
- Develop internationally competitive shipping systems and cooperation models
- Allow wholly foreign-owned international ship management enterprises
- Apply international ship registration policies

Part III Investment Management and Treasury Center for Multi-national Corporations (MNCs)

3.1 Getting MNCs to participate in the FTZ

	Investment Management Center	Financial Center
Objective	■ Encourage MNCs to establish regional headquarters and operational centers with fully integrated functions in the FTZ	■ Facilitate the centralised management of mutli-currency funds by MNC headquarters, and encourage MNCs to establish regional and global treasury centers in Shanghai
Relevant Measures	■ Allow the establishment of foreign-invested investment companies by stock share (similar to a public company in western jurisdictions) ■ Extend pilot measures for international trading settlement and explore cross-border service trade collection/payment and financing functions of special accounts	■ Pilot measures for cash pooling of multi-currency funds by MNCs, and gradually realise full convertibility of RMB under capital accounts ■ Encourage enterprises to make full use of domestic and foreign sources of financing

3.2 Reform on Financial Service Sectors

- Explore reform on foreign exchange control, and establish a tailored foreign exchange control system that accommodates the FTZ and facilitates cross-border investment and trading
- Improve foreign debt administration and promote cross-border financing
- Launch pilot programs on free conversion of RMB under capital accounts, interest rate liberalisation and cross-border use of RMB
- Launch pilot programs on market pricing of assets of financial institutions in the FTZ
- Integrate the reforms across the financial service sectors in the FTZ by establishing a Shanghai International Financial Center

3.3 More Liberal Investment Procedures

Issue	Current position under PRC law	FTZ position
Foreign Investment Regulations	■ Foreign investments are categorised into encouraged, restricted and prohibited investment and given differentiated treatment accordingly	■ No entry for investments falling under the "negative list" ■ Those not falling under the negative list will be granted national treatment (ie. foreign companies will be subject to the same restrictions as local companies) and will not be subject to requirements and restrictions on investors' qualifications, shareholding percentage or business scope
Inbound Investment	■ Pre-approval required for foreign-invested projects ■ Contracts and articles of association of foreign-invested enterprises require government approval ■ Foreign-invested investment companies must be in the form of limited liabilities companies (similar to a private company in western jurisdictions)	■ For foreign-invested projects outside the negative list, only filing with the Shanghai local authorities will be required and no pre-approval needed ■ Filing management will replace the approval requirement for JV contracts and articles of association of foreign-invested enterprises ■ The establishment of foreign-invested investment companies by stock shares will be allowed
Outbound Investment	■ NDRC is responsible for the approval of outbound investment projects ■ Authorities are responsible for approving specific offshore investment projects and issuing offshore investment certificates to Chinese enterprises	■ Outbound investment projects will generally require filing (with Shanghai local authorities) only, instead of pre-approval ■ Outbound investment by enterprises in the FTZ will generally be encouraged
Business Territory (Geographic)	■ No restrictions in general	■ No general restrictions. ■ Certain sector specific restrictions may apply
Industrial and Commercial Registration System	■ Traditional company registration system is based on the nature of industrial and commercial activities undertaken by the company	■ The company registration system will shift to a general business registration system ■ Registration procedure to be simplified ■ Company may be registered before specific licenses are granted ■ An annual report filing system will be established ■ An "irregular operation list" system will be established

3.4 Innovations in Capital Markets

- **International Trading Platform**
  - It will be possible to establish a globally-oriented trading platform in the FTZ
- **Equity Investment Funds**
  - Companies in the FTZ will be encouraged to engage in offshore equity investment
  - Eligible investors will be encouraged to establish a foreign-invested equity fund of funds (FoF)
- **Equity Trustee Agency**
  - Equity trustee and transaction agencies will be encouraged to establish a

comprehensive financial services platform in the FTZ

Part IV Other Sectors

4.1 Opening-up of Financial Service Markets

- **Transforming Shanghai into an international financial center through an open FTZ**

Banks

Relax Restrictions on Market Entry

- Allow domestic banks to establish branches in the FTZ quickly
- Allow eligible foreign-invested financial institutions to establish foreign-invested banks in the FTZ. Track record timing requirements (from rep office to branch) will be liberalised
- Allow eligible private capital funds and foreign-invested financial institutions to jointly establish Sino-foreign joint venture banks in the FTZ
- Allow restricted license banks to be established in the FTZ when appropriate (similar to bank access regulations in the UK and HK)
- Establish green channel for CBRC approvals
- Improve regulatory approach to banks' ratios requirements, including loan-to-deposit ratio

Expand Business Scope

- Launch pilot program for interest rate liberalisation in the FTZ and apply market pricing to the price of assets of financial institutions
- Allow eligible Chinese banks (and their branches and sub-branches) in the FTZ to conduct offshore businesses
- Encourage banks in the FTZ to engage in cross-border investment and financing business
- Allow foreign-invested banks to obtain RMB businesses in the bonded zone within a shorter period
- Further liberalise regulations on foreign debt and promote cross-border financing

Part IV Other Sectors

4.1 Innovations in the Financial Market

Non-Bank Financial Institutions

Relax Restrictions on Market Entry

- Allow foreign investment in credit investigation companies (formerly a restricted industry)
- Launch pilot program for foreign investment in health and medical insurance
- Encourage financial leasing company to set up SPVs in the FTZ
- No limitation on minimum registered capital for single-aircraft or single-vessel SPV established by financial leasing companies in the FTZ

Expand Business Scope

- Allow financial leasing companies to engage in commercial factoring businesses in connection with their main businesses
- Support cross-border RMB re-insurance businesses, and cultivate and develop the re-insurance market
- Gradually allow overseas companies to trade commodities futures onshore

4.2 Opening of Other Markets

In addition, the FTZ looks to open up a number of previously restricted markets to foreign investors.

- **Recruitment Agencies**
  - Increase foreign investor cap for recruitment agencies from 50% to 70%
  - Allow service providers from Hong Kong and Macau to establish wholly-owned recruitment agencies
  - Lower the minimum capital requirement for foreign-invested talent agencies to US$125,000
- **Education and Training**
  - Allow Sino-foreign joint venture education institutions
  - Allow Sino-foreign joint venture vocational skills training
- **Medical Services**
  - Allow wholly foreign-owned medical institutions
  - Allow foreign-owned professional health and medical insurers
- **Construction**
  - Simplify the qualification requirements (mainly the track record requirement) for foreign-owned engineering enterprises (excluding project survey) that render services to Shanghai
  - Waive the local investment requirement for wholly foreign-owned construction enterprises in the FTZ that contracts construction projects in Shanghai
- **Culture, Entertainment, and Tourism**
  - Waive the equity ratio restrictions on foreign-invested performance organisations and allow wholly foreign-owned performance brokerage agencies to provide services to Shanghai
  - Allow wholly foreign-owned entertainment venues in the FTZ
  - Allow Sino-foreign joint venture travel agencies registered in the FTZ to conduct outbound tourism business (except to Taiwan)
  - Allow foreign-invested enterprises to produce and sell electronic gaming and recreational equipment for sale nationwide
- **Information Services**
  - Subject to internet and information security review, allow foreign-invested enterprises to operate certain telecommunication-based services (eg, online games, call centers and e-commerce)
- **Legal Services**
  - Explore closer co-operation between Chinese law firms and foreign law firms

Raw materials and capital goods 0% tariff

Tue, 07/30/2013 - 16:30
NewsFlash: 202

Customs and International Trade

Certain raw materials and capital goods will enter with 0% tariff

The Ministry of Trade, Industry and Tourism published the draft decree "Which partially amends the Customs Tariff".

This decree would establish a tariff duty of zero percent (0%) for imports of products classified under tariff subheadings listed in it (raw materials and capital goods that currently do not have registered domestic production record to July 1, 2013, excluding subheadings belonging to the Andean Automotive Agreement). The tariff reduction will apply for the term of two years beginning on August 16, 2013.

The Committee on Customs, Tariffs and Trade will receive feedback, comments and suggestions on the draft decree until July 31, 2013, via e-mail: comitetriplea@mincit.gov.co

For more information please contact :

- Carlos Fradique Méndez
- José Francisco Mafla
- Santiago Martínez Ojeda

wwww.bu.com.co

September 30, 2013

Mandatory Electronic Filing of Tax Returns

Dear client,

As of 1 October 2013, taxpayers must prepare and submit the following forms electronically using the EDDI-7 software package:

- D-105 Simplified Tax Regime - now made up of two separate forms, one to declare income tax and the other to declare sales tax;
- D-120 Real Property Transfer Tax; and
- D-121 Vehicle Transfer Tax.

The EDDI-7 software program helps you prepare and electronically submit tax returns. Use of this software is mandatory; however, standard forms that are filled out manually may be used while supplies last.

Sincerely,

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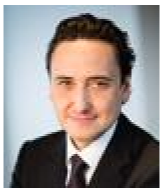

Stéphane Puel

AIFMD | Positioning for the Future

A New Era - The Alternative Investment Fund Managers Directive (AIFMD) will shape the investment management sector in Europe and globally for years to come. Its impact is extending far beyond regulatory compliance to affect distribution, business strategy and market composition.

It is impossible to be certain how the European market will look in six years' time when the transitional provisions relating to national private placement regimes (NPPR) are due to come to an end. How managers respond to this challenge will define their strategy and competitiveness in the new era. Here we consider the marketing and other strategic choices which need to be made by managers, together with the way in which their decisions look set to shape the future of the industry.

Marketing considerations

Given that access to the EU market now comes with significant regulatory implications, firms are considering whether they are (or need to be) based in the EU and whether it is worthwhile for them to actively market in the EU. The benefits of accessing EU investors should be weighed against the additional regulatory requirements that need to be met. Non-EU managers wishing to access EU investors are required to identify their gateways to the EU.

Reverse solicitation

The AIFMD[1] defines marketing as a direct or indirect offering or placement at the initiative of the alternative investment fund manager (AIFM) or on its behalf of units or shares of an alternative investment fund (AIF) it manages to investors domiciled in the EU, or having a registered office in the EU.

Therefore any reverse solicitation or passive marketing whereby an investor initiates the transaction is not in scope of the AIFMD. Reverse solicitation may therefore appear an attractive solution for those managers challenged by compliance with the AIFMD or NPPRs. However, very careful attention will need to be given by managers to the differing rules and evidential requirements relating to reverse solicitation in each relevant EU jurisdiction. Managers should also take steps to limit the litigation risks, as well as the regulatory risks, associated with reverse solicitation, not least because a disgruntled investor might one day (rightly or wrongly) claim that active marketing took place.

EU marketing passport

With the implementation of the AIFMD in July 2013, the marketing passport is the only way for authorised EU AIFMs to market EU AIFs to professional investors in the EU, with NPPRs no longer available to them.

The marketing passport is also due to be made available to EU AIFMs marketing non-EU AIF, and to non-EU AIFMs marketing EU or non-EU AIFs in the EU in July 2015 (at the earliest). However this is subject to positive advice from the European Securities and Markets Authority (ESMA) and the adoption of enabling legislation by the European Commission.

National private placement regimes

Non-EU managers and EU managers with non-EU funds have the option of maintaining private placement for as long as permitted. In some cases moving funds, or even an entire operation, outside the EU to achieve this may be an option worth considering.

NPPRs, where they exist, will continue in parallel with the marketing passport regime until at least July 2018. Thus marketing under NPPRs to EU investors of non-EU AIF managed by EU AIFM, and EU and non-EU AIF managed by non-EU AIFM, is continuing to be permitted subject to compliance with certain provisions of the AIFMD[2].

However, even this more or less limited compliance means that NPPRs under AIFMD can in no way be regarded as a continuance of the pre-AIFMD status quo. Moreover, the AIFMD gives discretion to individual EU member states to impose stricter regimes than those provided for in the AIFMD. Even where NPPRs were available pre-AIFMD, some jurisdictions are changing or abolishing their NPPRs and managers relying on these regimes need to keep the position in each relevant jurisdiction under ongoing review.

Moreover, NPPRs are due to prove only a temporary reprieve from AIFMD for managers marketing to EU investors, as in 2018 the European Commission may bring the NPPRs to an end (subject to ESMA's opinion on the functioning of the marketing passport regime). This will mean only AIF managed by fully AIFMD-compliant AIFM may be marketed in the EU, irrespective of where those AIFs or AIFMs are located.

Strategic considerations

The impact of AIFMD will depend on what managers do to react to its requirements, bearing in mind the need to respond as efficiently and commercially as possible. Individual managers are taking different approaches to AIFMD, reflecting a diverse sector that encompasses everything from retail non-UCITS to offshore hedge funds, private equity funds and real estate funds. The (EU or non-EU) locations of managers, funds and investors are principal factors determining how the AIFMD rules apply to a given business and what strategic options are available.

Positioning

While an AIF can have only one AIFM, some (typically larger) managers may have more than one entity which could potentially fulfil the AIFM role (while needing to bear in mind that any delegation of risk management and/or portfolio management requires great care in order that avoid the delegate, as opposed to the AIFM, being regarded by regulators as the ‘true’ AIFM).

Such managers may benefit from a choice of an AIFM domiciled outside the EU (mitigating the initial impact of the AIFMD) or inside the EU (subject to full AIFMD compliance from the outset). However, for many EU managers the AIFM will most likely be an existing EU MiFID investment manager.

For some managers, full AIFMD compliance from the outset in 2013 offers a first mover advantage which outweighs the higher compliance costs. At the other end of the spectrum, if managers have few or no EU funds or EU investors they are likely to remove themselves from AIFMD’s requirements.

Ultimately, there will be a trade-off for managers as to whether they want to remain in the EU or move offshore altogether, continue with private placement for as long as possible or operate fully under the EU passport to ensure access to EU investors.

Management passport

The AIFMD enables EU managers to use a management company passport to set up and manage AIFs in other EU Member States. This can be carried out by establishing a branch in another EU member state or by providing cross-border services. The AIFMD management passport thus provides a strategic opportunity to consolidate operations throughout the EU along the lines of that available for UCITS management companies under UCITS IV[3]. Indeed, the AIFMD enables a UCITS management company to manage AIFs by permitting it to obtain dual authorisation under both the UCITS and AIFMD regimes.

Whether management company centralisation is worth considering in practice will depend largely on a manager’s organisational structure, activities and cross-border operations. Some AIFMs, often being smaller and more simply organised than traditional UCITS management companies, may simply not have the need to rationalise operations across jurisdictions. Also, and as with the UCITS IV management company passport, cross-border tax issues will need careful consideration.

AIFM and UCITS as alternative options

The AIFMD will enable, for the first time, a range of non-UCITS funds to be managed and marketed to professional investors on a cross-border basis. Some managers of UCITS, or at least those UCITS with hedge fund-like strategies, may therefore ask whether they should switch to AIFs, as potentially AIFMD will provide managers with greater flexibility than UCITS while allowing them to continue to enjoy passporting benefits. A switch may become more appealing if regulation of “complex” UCITS becomes more restrictive (as raised in the contexts of both the European Commission's proposal to replace MiFID[4] with a new regulation and directive and also in its July 2012 consultation, known as UCITS VI, proposing improvements to the UCITS regime).

However, marketing to retail investors is not covered by the AIFMD and will remain subject to individual EU member states' regimes for non-UCITS retail funds (providing no prospect for a standardised non-UCITS retail product). The AIFMD marketing passport can only be used to market to professional investors, a smaller market than retail.

Ultimately, it is investors who will decide whether AIFMD gains status as a global brand along the lines of UCITS and, while the AIFMD provides potential for this, there is a long way for AIFs to go before comparable status in the eyes of investors is achieved. However, AIFMD compliance may potentially be a means to enhance investor confidence. With thousands of non-UCITS funds falling within scope, the potential force of AIFMD should not be underestimated.

Market perspectives

Some (typically larger) EU managers are able to treat AIFMD as a business opportunity, allowing them to distribute their (EU and, from 2015 non-EU) non-UCITS funds and consolidate their businesses through the new EU marketing and management passports. They may consider re-domiciling funds onshore. Larger managers will be better placed to absorb these costs and are more likely to view operational realignment as a less daunting challenge. Scale will be a clear advantage when it comes to addressing the challenges and exploiting the opportunities of AIFMD.

Meanwhile, smaller managers have fewer internal resources to deal with the initial and ongoing compliance responsibilities. They may have a more limited desire and/or capacity to take advantage of EU passporting. This may result in fewer non-EU managers choosing to operate in Europe, placing remaining, larger, EU managers at a competitive advantage.

Conclusion

The marketing and other strategic choices which need to be made by managers will define their strategy and competitiveness in the new AIFMD era. Each manager will have to make their own determination based on their business and distribution strategy and the nature of their investor base.

Please do not hesitate to contact us if you would like to discuss any of the matters raised.

1. 2011/61/EU.
2. In summary, EU AIFMs managing non-EU AIFs will have to comply with the AIFMD, except for the full depositary provisions. Non-EU AIFM managing EU AIF or non-EU AIF will have to comply with the AIFMD transparency requirements; appropriate co-operation arrangements must be in place between the relevant EU and non-EU competent authorities; and the country of the non-EU AIFM or the non-EU AIF must not be listed as a Non-Cooperative Country or Territory by FATF.
3. Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009.
4. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004.

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NEWS DETAIL

11/10/2013

REGULATION OF THE MINISTER OF ENERGY AND MINERAL RESOURCES REGARDING SOLAR ENERGY

The Minister of Energy and Mineral Resources (“MEMR”) has issued MEMR Regulation No. 17 of 2013 regarding Purchase of Electricity Power by PT Perusahaan Listrik Negara (Persero) (“PLN”) from Photovoltaic (Fotovoltaik) Solar Power Plant (“Solar Energy Regulation”). The regulation is meant to promote greater use of solar energy for electricity power generation.

Purchase of Electricity Power

The Solar Energy Regulation imposes on PLN the obligation to purchase the electricity produced by the solar power plant owned by the business entity which has been declared as the winner of the capacity quota tender (the “Tender”). The purchase price is stipulated to be a maximum of US$ 25 cents/kwh, but if the solar power plant uses photovoltaic modules with a local content of at least 40%, the price may be increased to a maximum of US$ 30 cents/kwh. The purchase price is inclusive of the interconnection cost from the solar power plant to the interconnection point in PLN’s transmission line.

Offering of Capacity Quota and Tender Procedures

The capacity quota, defined as the maximum solar power plant capacity that can be interconnected to a system/sub system of PLN’s electricity network, will first be determined together by the Directorate General of New Renewable Energy and Energy Conservation (“DGRE”) and PLN before being offered by using the tender mechanism. For the offering purposes the DGRE will form a tender committee which consists of representatives of the Directorate General of Electricity (“DGE”), the DGRE and PLN.

The Tender committee manages the Tender, prepares the Tender documents, evaluates the offers and proposes the Tender winner (“Winner”). The determination of the Winner is in the hands of the DGRE.

Some of the Tender rules:

- Only business entities which fulfill the administrative, technical and financial requirements may participate in the Tender;
- In a Tender, one business entity may only participate in one consortium;
- Instruction to PLN to Purchase Electricity Power

After being declared as Winner, the Winner is required to submit the evidence of its remittance of 20% of the total construction cost of the solar power plant to an escrow account in the name of both the DGRE and the Winner in a state owned bank or a prime bank in Jakarta, not later than 15 (fifteen) days as of the date of the Winner declaration.

Upon receiving the evidence of the bank remittance, the DGRE will submit the Winner declaration to the MEMR c.q. the DGE. The MEMR will then issue to PLN, the instruction to purchase the electricity generated by the Winner’s solar power plant. The instruction letter serves as the MEMR’s approval of the purchase price, which is determined based on the final result of the tender.

The approved purchase price must be stated in the power purchase agreement ("PPA") between PLN and Solar Power Plant. The PPA is valid for 20 (twenty) years and is extendable. The PPA must be signed within 60 (sixty) days as of PLN's receipt of the instruction to purchase the electricity produced by the Winner's solar power plant.

Obligations of the Winner

The Winner is obliged to:

- close the financial deal within 3 (three) months as of the signing of the PPA;
- commence the construction of the solar power plant within 3 (three) months as of the financial closing;
- ensure that the solar power plant's commercial operation date ("COD") is at the latest 18 (eighteen) months as from the signing of the PPA. If necessary the period may be extended for a maximum of 12 (twelve) months, but for that there is a sanction in the form of reduction of the purchase price. If at the end of the 12 (twelve) months extension the COD is still not achieved, PLN's obligation to purchase the electricity power ceases to be in effect and the PPA is revoked.

The Solar Energy Regulation came into effect on 12 June 2013.

LEGAL UPDATE

August 23, 2013

The Presidential Energy Reform

On Monday August 12, 2013 President Enrique Peña Nieto presented the Energy Reform Initiative for Articles 27 and 28 of the Constitution of the United Mexican States (Reform Initiative) to be sent to the Senate for discussion.

This Reform Initiative aims to restore the original text of the reforms of former President, Lázaro Cárdenas, to the Mexican Constitution back in 1938 during the oil expropriation, in order to further develop the oil industry, under government regulation and to promote the development of the National electricity system based on technical and economic efficiency.

A. Objectives of the Reform Initiative

This Reform Initiative is intended to achieve, among others, the following objectives:

1. Improving the economy of Mexican families by reducing the costs of electricity and gas, which also implies the possibility of producing lower-cost food.

2. Increase investment and jobs through new businesses and the reduction of tariffs in order to guarantee enough energy supply at competitive costs.

3. Strengthening of Petróleos Mexicanos (Pemex) and the Federal Electricity Commission (CFE) and providing said entities with more power and independence regarding decision making processes, which will derive in its modernization, as well as optimizing results.

4. Strengthening the Nation's authority as owner of the oil and gas as well as head of the oil industry in order to improve the management of oil resources.

5. Transparency in the oil industry in order to ensure access to all information regarding the management of Mexico's energy sector.

6. Provide environmental protection and promote sustainability in order to reduce the negative impact derived from the production and consumption of fossil fuels by increasing the availability of clean energy sources.

B. Oil and Gas

In terms of oil and gas, the Reform Initiative proposes the following:

1. The recovery of the original text of President Cardenas reform in 1938, based on the Nation's exclusive ownership of subsoil resources and reservoirs.

2. The strengthening of Pemex by integrating its four subsidiaries (Pemex Exploration and Production, Pemex Refinery, Pemex Gas and Basic Petrochemicals and Pemex Petrochemicals) in two divisions: (a) Exploration and Production, focused on the extraction of hydrocarbons, and (b) Industrial Transformation, with the task of processing gas and oil into fuel, petroleum products, and chemicals. This integration will eliminate duplication, creating areas of Procurement and Logistics and maintaining the financial and operational control of all central activities. The Management, Finance, Operations, Legal and Technology Information, and Business Processes areas will remain as to date.

3. The granting, by the Government, of shared profit contracts for Pemex and private companies to extract oil and gas, as well as refining, petrochemical, oil, gas and petroleum product transportation and storage permits.

4. The establishment of a national policy to promote purchases to domestic suppliers of hydrocarbons, thus developing the industry and generating added value.

C. Electricity

The Reform Initiative proposes the following:

1. The amendment of Article 27 of the Mexican Constitution in order for individuals to be allowed to participate in the generation of electricity, thereby increasing the supply of electricity and lowering its cost for Mexicans.

2. The State will preserve, exclusively, all control of the National Electricity System as well as the public service of transmission and distribution lines, thus ensuring the lowest costs in power purchases.

3. Strengthening the CFE turning it into a more flexible and organized company, reducing costs and making it more competitive in order to get back significant users and higher electricity consumers, and to reduce energy losses, theft and payment defaults.

4. The strengthening of planning authority and management areas of the Ministry of Energy and the Energy Regulatory Commission.

5. Promoting green energy projects in order to encourage investment in developing new technologies and the adoption of cleaner and lower cost energy sources including renewable sources.

Pemex and CFE remain as public companies entirely owned by the Nation. However, the Reform Initiative also states the need to promote oil extraction projects from deep and ultra-deepwater basins. The Reform Initiative presents the possibility to allow the participation of private entities, together with Pemex to obtain technology, investment, and experience, sharing both the risk and the investment with Pemex, in order to carry out the exploration and extraction of hydrocarbons in Mexican deepwaters.

Contracts for the exploitation and extraction of oil and gas will allow Pemex to decide when to extract oil and gas and who will be responsible for it, thus allowing greater benefits for the country. Another important point is the participation of private companies in refining, petrochemical, oil, gas and petroleum product storage and transportation.

The Reform Initiative aims to confront problems such as high electricity tariffs, restrictions on production of electricity, the lack of an impartial arbitrator to decide on the sale of electricity (currently, CFE is forced to act as judge and jury when it comes to choosing between electricity generated by their own plants and electricity generated by private parties, even when the latter may be less expensive), the use of cleaner energy and current limitations to the development of renewable energy such as wind, solar and hydraulic.

This reform aims to achieve the development of the oil and electric industries removing the dimness in the management of governmental administration and their decentralized entities, as well as to increase competitiveness and collaboration, and take advantage of the experience and technology from international private players.

For further information in connection with this matter please contact the partner in charge of your matters or one of the attorneys mentioned as follows:

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Corporate Advisory

27 Sep 2013

Crowd funding and person-to-person lending

FYI

This note is a summary of upcoming developments in New Zealand securities law relating to“crowd funding” and “person-to-person lending” (also known as “peer to peer lending”).

Both forms of finance are restricted by the prohibitive cost and regulatory burden imposed by current securities laws. However these restrictions will be lifted by the Financial Markets Conduct Act 2013 (Act). This change introduces an important new source of finance for growth stage companies and, potentially, a source of strong returns for investors.

The Act is relevant to you if you are:

- involved in an early stage company which is seeking to access capital but does not want the cost and regulation associated with a full disclosure exercise;
- an investor interested in the growth stage of the market; or
- an intermediary considering offering services to growth stage companies or investors in New Zealand.

These services can begin to operate from April 2014.

Financial Markets Conduct Act and Crowd Funding

The Act has created a new category of "licensed intermediary" for financial products. By acting through a "licensed intermediary", companies and individuals will be able to access equity (crowd funding) and debt (person-to-person lending) without rigorous disclosure obligations.

The detailed requirements to operate/use services are to be set out in regulations (**Regulations**). The Regulations are yet to be drafted, but Cabinet papers on the topic indicate what will be required. Set out below is a summary of the likely requirements. This will be updated when the Regulations are drafted, due in October this year.

What is Crowd Funding?

Traditional crowd funding is the pooling of a large number of small contributions to fund a business or project, usually through an internet-based platform.

Individual contributors generally receive no direct financial reward or interest for their contributions. Instead they receive rewards like a signed copy of the CD which was produced using crowd funding contributions. Under existing law, because there are no financial returns to investors, this activity is not regulated.

A more recent development has been the use of electronic platforms for raising funds where investors receive company shares or other financial returns that depend on the success of the business. Under the current law, the use of this type of crowd funding would be subject to disclosure requirements, likely outweighing the benefits of getting the funds in this way.

The Act overcomes this disclosure obstacle through its prescribed intermediary services exemption, which enables:

- providers of crowd funding platforms to obtain a licence; and
- subject to certain additional requirements (described below), companies to offer shares through the crowd funding platform without substantive disclosure requirements.

What is Person-to-Person Lending?

Person-to-person lending services facilitate loans by matching potential borrowers to one or more lenders, usually through an internet-based platform.

There are a number of major overseas person-to-person lending services, such as Prosper and Lending Club in the United States and Zopa in the United Kingdom. However, as with crowd funding platforms, such services have not been able to operate in New Zealand as applicable securities laws result in disproportionate expense.

As with crowd funding, the Act permits person-to-person lending through its new category of prescribed intermediary services. Person-to-person lending arranged through a licensed intermediary is exempt from many of the Act's requirements.

Eligibility Criteria

Before a platform can begin to provide these services in New Zealand, it will need to satisfy a number of criteria. Some criteria will need to be met on setting up the platform and others will need to be met before a particular company raises finance or an individual invests.

The detail will be in the Regulations. However, we set out below the likely criteria. We refer, first, to those criteria which are common to crowd funding and person-to-person lending services and, second, to certain specific requirements for each different type of service.

General Requirements

There are a number of overarching requirements applicable to both crowd funding and person-to-person lending services

- ***Investment caps:*** It seems likely that there will be an overall cap on the amount that can be raised by an issuer through crowd funding platforms and person-to-person services. Cabinet has proposed that this cap be set at $2 million in total over 12 months. In addition to this overall cap, Cabinet has put forward four additional proposals for further restrictions on crowd funding:

  – no additional caps;

  – a fixed per-issuer cap of $15,000;

  – a fixed per-investor cap of $50,000 each 12 months; or

  – a per-investor cap that varies with income and net worth.

  These options are subject to further consultation and are currently ambiguous.

- ***Open and neutral platforms:*** It is a key principle that the platform acts as neutral broker between issuer and investor. In practice, this means that services should not recommend particular borrowers/issuers as good investments.

- ***Key processes:*** Key processes (including those for access to the service, the matching of issuers and investors and, where applicable, the handling of funds) will be required to be fair, orderly and transparent.

- ***General requirements for licensees:*** Both services will be subject to certain requirements in areas such as insurance, reporting to Financial Markets Authority, subcontracting and the maintenance of "fit and proper" management.

- ***Service disclosure statements:*** Both services will be required to provide "service disclosure statements" to potential investors. The Regulations will specify the content of the statements. The statement will likely include:

  – how the credit-worthiness of borrowers will be assessed;

  – how investor funds are handled by the service provider;

  – the fees and charges that apply; and

  – how investors and borrowers can make complaints.

  For person-to-person lending platforms, information will also be provided about how the borrowing and lending processes work, how loan contracts are concluded, how loans are serviced and the process for the recovery of late payments.

- ***Written client agreements:*** Written agreements with investors will be required. These agreements are likely to document much the same issues as are dealt with in the service disclosure statement.

- ***Systems for background checks:*** Crowd funding platforms will be required to check whether company directors, senior managers or controlling owners of a company seeking funding are of good character and reputation. Similarly, person-to-person lending services must have adequate mechanisms for establishing the identity and creditworthiness of borrowers and communicating information about a borrower's creditworthiness to investors.

Specific Requirements for Crowd Funding

There are a number of additional requirements which relate specifically to crowd funding.

- ***Issuer disclosure and mechanisms for investment decisions:*** Issuers using crowd funding platforms will not need to prepare a disclosure statement. However, there will be some disclosure requirements. These will be set out in the Regulations. Alongside more typical disclosure methods, current proposals include:

  – open question and answer forums;

  – visibility as to the funding currently pledged against the issuer's fund raising goals; and

  – due diligence/assessment by the crowd funding platform.

Disclosure requirements will be key to determining the utility of the service.

- ***Mechanisms for transfer of information:*** Crowd funding platforms need to be designed to facilitate investor access to information so they can make informed decisions. Disclosure mechanisms for each platform will be approved by FMA as part of obtaining a licence. Disclosure requirements will be proportionate to the amount of money being raised by issuers, and will form part of the platform's conditions of licence.

- ***Investor confirmation:*** Investors must confirm that they understand the risks involved, and that they have considered whether they could bear a loss associated with the investment

Specific Requirements for Person-to-Person Lending

The Regulations will set out obligations specific to person-to-person lending services. For example, providers must ensure the orderly administration of its customers' contracts in the event that the service ceases to operate.

It is unclear how the contractual relationships will work, but obviously it will be important to ensure that lenders have recourse to underlying borrowers.

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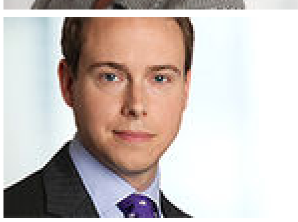

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Security provisions in LRA amendments

By Jacques van Wyk, director and Danté Nel, candidate attorney

LEGAL BRIEF | OCTOBER 2013

The Labour Relations Act 66 of 1995 ("LRA") will soon be amended by the promulgation of the Labour Relations Amendment Bill ("the Bill")[1]. One of the significant changes the Bill will introduce relates to the review of arbitration awards in the Labour Court.[2]

Introduction

Parties wishing to review arbitration awards may be required to provide the Labour Court with sufficient monetary security if they wish to suspend the operation of the arbitration award under review pending the outcome of the review application. In addition, review applications will have to be enrolled by the applicant within six months of the application being launched.

These amendments seem to be aimed at curtailing spurious review applications as well as reducing the time taken for such applications to be concluded. Currently the LRA does not contain any provisions requiring parties to furnish security before an arbitration award is taken on review. It merely states that review applications must be brought within six weeks of the date on which the award was served on the applicant.

Current provisions of the LRA

Currently, the LRA provides that an arbitration award under review remains enforceable unless the Labour Court stays its enforcement pending the outcome of the review. In practice, applicants frequently apply to stay the enforcement of arbitration awards pending the completion of the review proceedings. The Bill provides that if an applicant furnishes security to the satisfaction of the Labour Court, the arbitration award's enforceability is stayed. The Bill therefore provides a mechanism for avoiding the need for the aforementioned applications to stay the arbitration award. However, the introduction of these provisions may give rise to a proliferation of applications to reduce the amount required for security.

In this regard, the Bill not only provides the Labour Court with discretion to decide on the quantum of the security required but also whether any security is required at all. The Bill provides that "unless the Labour Court directs otherwise"[3], security will have to be provided.

1 The Labour Relations Amendment Bill B16B–2012 was passed by the National Assembly on 20 August 2013 and was transmitted to the NCOP for concurrence.

2 s 22 of the Bill adds six clauses to s 145 of the LRA.

3 s 22(8) of the Bill.

This means that the Labour Court may, of its own accord, direct whether security is to be tendered and the amount thereof. This in turn suggests that it may be possible to bring an application to condone a lesser amount of security; or none at all.

Categories of arbitration award reviews

The Bill's security provisions relate to two categories of arbitration award reviews. The first category includes orders for reinstatement or re-employment. The second category of award relates to arbitration awards ordering compensation. A review of any other type of arbitration award would not require security.

In the case of reviews of an arbitration award ordering reinstatement or re-employment, security must be equivalent to 24 months of the employee's remuneration. The review of an arbitration award ordering compensation requires security equivalent to the amount of compensation awarded. The reason for requiring such significant security seems to be because the retrospective effect of a reinstatement award is not subject to any maximum period as is the case with a compensation award - which is capped at either 24 months' compensation for automatically unfair dismissals, or 12 months' compensation for other forms of substantively unfair dismissals.

It is not clear why so much security is required in the case of an arbitration award ordering re-employment which is generally not of retrospective effect. Whilst it might be argued that the reason for the lengthy period used to calculate security is the time it takes for review applications to be finalised, this would seem to be catered for by the Bill's requirement that the review application must be enrolled within six months of the application being delivered as well as the requirement that judgment must be handed down within a reasonable time.

The amount of security required is determined with reference to each employee involved. In each circumstance, the amount of security required will increase in the event that several employees have been dismissed and reinstated or re-employed, or awarded compensation.

> "It is not clear why so much security is required in the case of an arbitration award ordering re-employment which is generally not of retrospective effect."

Although the Bill refers to "the applicant" and the LRA refers to "any party to a dispute", in effect the security provisions will only apply to employers. No provision is made for employees to furnish security for the legal costs an employer incurs when opposing a review application brought by an employee. Likewise, no security is required of an employee who wishes to review an award in favour of the employer.

> "The amount of security required is determined with reference to each employee involved."

It would appear that the Bill's security provisions are designed to dissuade applicants from bringing frivolous review applications. Unfortunately these provisions may also result in legitimate review applications not being brought, simply because to do so would be too expensive.

Infringement of certain constitutional rights?

Whether the Bill's provisions infringe on the employer's constitutionally-enshrined right of access to court[4] remains to be seen. The discretion afforded to the Labour Court to exempt a party from paying security or to reduce the amount of security required may save this aspect of the Bill from constitutional challenge. Our courts have reiterated the sentiment that ultimately, it is the Court that can best protect the interests of both parties fairly by determining the amount of security. This issue was dealt with in the High Court. The previous rule governing the furnishing of security for the High Court was held to be unconstitutional because the Court was not given discretion to exempt an appellant from having to provide security or interfere with the amount fixed by the Registrar.[5] Though the Bill does afford the Labour Court such discretion, it also stipulates statutory default amounts. It is likely that many employers will find these amounts to be excessive and will have to request reductions, thereby incurring further legal costs. From an administrative point of view, the Bill also omits any mention of the process for paying security. The Bill also does not state what process a party should follow in order to reclaim monies paid as security. It is not clear whether such amounts paid as security will garner interest. No doubt these issues will be addressed in due course.

Conclusion

The Bill's provisions regarding the furnishing of security may be onerous, particularly for employers. The combined effect of the large amounts of security required and the fact that review proceedings do not suspend the operation of arbitration awards will probably result in additional legal costs or fewer arbitration awards, being taken on review by employers.

4 s 34 Constitution of the Republic of South Africa, 1996.
5 *Shepherd v O'Niell* 2000 (2) SA 1066 (N). This judgment was referred to with approval by the Constitutional Court in *Dormehl v Minister Of Justice And Others* 2000 (2) SA 987 (CC).

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Intentional or Negligent Acts Should be Subject to Different Punishments

◎Josephine Peng/Leo Tsai

With respect to a taxpayer's violation of any regulation resulting in any underpaid tax, tax laws do not individually differentiate the punishment under a taxpayer's intentional act or negligent act. However, according to paragraph 1, article 18 of the Administrative Penalty Act, when imposing a penalty, the tax authorities should not only consider the benefits gained by a taxpayer from an act which is in violation of tax laws, but also consider the culpability of the taxpayer for such act. A taxpayer may violate regulations intentionally or negligently, and the culpability between intention and negligence should be different. Therefore, the tax authorities should consider whether the taxpayer violated the regulation intentionally or negligently, and impose different punishment accordingly.

In addition, according to note 4 of the Reference Table for Fines and Multiples of Punishments ("Reference Table"), if the fines and multiples of punishments regulated in the Reference Table are within the maximum or minimum punishments under tax laws, the tax authorities may increase the punishments to the said maximum or reduce punishments to the said minimum; provided that the tax authorities should state the reasons for the adjustment in the examination report. It is apparent that the Ministry of Finance issue the Reference Table for the tax authorities' reference only and does not prohibit the use of their discretion for imposition of punishments on taxpayers. Nevertheless, in practice, the tax authorities seldom consider the culpability of taxpayers but invariably impose the fines and multiples of punishments as stated in the Reference Table, which is against the spirit of paragraph 1, article 18 of the Administrative Penalty Act and note 4 of the Reference Table.

In some cases in which statutory withholders violated Article 88 of the Income Tax Act ("ITA") and under-withheld taxes over NT$200,000 (approximately US$7,000), but subsequently paid up such under-withheld taxes within the prescribed time limit, the tax authorities invariably referred to punishments under Paragraph 1, Article 114 of the ITA as stated in the Reference Table, and imposed maximum punishments of one time of the under-withheld taxes on taxpayers. The resolution which was made on the second meeting of the Supreme Administrative Court Judge Committee in March 2013 (the "SAC Resolution") corrected the tax authorities' current practice. The SAC Resolution states that while the tax authorities impose punishment on taxpayers who negligently under-withheld taxes over NT$200,000 (approximately US$7,000), the culpability of such negligent acts should be lower than that of intentional acts; the tax authorities can lower the punishment in accordance with Paragraph 1, Article 18 of the Administrative Penalty Act and note 4 of the Reference Table. If the tax authorities imposed maximum punishment of one time of under-withheld taxes on taxpayers without considering the culpability of an act, the tax authorities should be deemed to have failed to execute their discretionary power set forth by tax laws which will therefore constitute an unlawful act of failing to exercise discretion.

The SAC Resolution, which cites Paragraph 1, Article 18 of the Administrative Penalty Act and note 4 of the Reference Table to interpret the tax authorities' principle of discretion on imposing penalties on taxpayers, should apply to all of the penalty cases. Consequently, for each un-finalized penalty case, the tax authorities should re-examine the taxpayer's culpability (i.e., intention or negligence) and impose appropriate punishments on a case by case basis. Moreover, the tax authorities should not just state that "the taxpayer acted either intentionally or negligently"; instead, they should specifically state the reasons why the taxpayer's act constitutes an intentional act or negligent act. For taxpayers who negligently violated the law and suffered punishments, should, before the punishments are finalized, voluntarily initiate negotiations with the competent tax authority to reduce the fines or the multiples of punishments, so as to protect their own rights.

IRS CLARIFIES GUIDANCE FOR DETERMINING WHEN CONSTRUCTION HAS BEGUN FOR THE PRODUCTION TAX CREDIT AND INVESTMENT TAX CREDIT

On September 20, 2013, the IRS released Notice 2013-60 (the "Notice"), clarifying the requirements that must be satisfied in order for certain renewable energy facilities to qualify for the Production Tax Credit ("PTC") and the 30-percent Investment Tax Credit in lieu of the PTC ("ITC").

Clarification of the Commencement of Construction Test

As part of the resolution of the fiscal cliff crisis at the end of 2012, Congress passed the American Taxpayer Relief Act of 2012 (the "ATRA"), which extended and modified the PTC and ITC. Under prior law, renewable energy facilities must have been "placed in service" before the applicable expiration date, which effectively required these facilities to have achieved commercial operation prior to that date. The ATRA modified these rules so that these facilities would be eligible for the PTC or ITC without regard to when the projects were placed in service so long as construction had begun before the end of 2013. However, the ATRA did not provide guidance for determining when construction begins.

On April 15, 2013, the IRS released Notice 2013-29, which was intended to clarify when construction begins. The guidance provided by Notice 2013-29 was the subject of a prior client update we issued on April 17, 2013, which can be found here.

Notice 2013-29 adopted a structure very similar to that used in connection with the grant program established as part of the Troubled Asset Relief Program in 2008 (the "1603 Grant Program"), which also had a "commencement of construction" requirement. The 1603 Grant Program adopted two alternative methods an applicant for the grant could use to satisfy the commencement of construction test: (i) an applicant could show that physical work of a significant nature had begun (the "Physical Work Test") or (ii) an applicant could pay or incur 5% or more of the total cost of the specified energy project before the deadline (the "5% Safe Harbor").

Treasury guidance implementing the 1603 Grant Program imposed on the Physical Work Test a requirement that, once physical work of a significant nature had begun, the applicant had to maintain a continuous program of construction. Because this requirement was a facts and circumstances test, and no such requirement was imposed in connection with the 5% Safe Harbor, many project sponsors found that tax equity investors much preferred the bright line test of the 5% Safe Harbor. As a result, most projects relied on the 5% Safe Harbor in order to qualify for the 1603 Grant Program prior to its expiration.

In Notice 2013-29, the IRS imposed a similar continuous construction requirement on the Physical Work Test for purposes of qualifying for the PTC or ITC. In addition, and unlike the 1603 Grant Program, *Notice 2013- 29 also imposed on the 5% Safe Harbor a requirement that the taxpayer maintain continuous efforts to complete the project*. This was presumably intended to limit the ability of taxpayers to grandfather projects on a long-term basis by satisfying the 5% Safe Harbor in 2013 (e.g., by buying up wind turbines) but not constructing such projects until a later time period – a concern that did not exist under the 1603 Grant Program since that program had a specified deadline by which a project much have been placed in service, regardless of whether the applicant used the Physical Work Test or the 5% Safe Harbor. The imposition of the continuous efforts requirement on the 5% Safe Harbor by Notice 2013-29 generated a good deal of commentary, as it appeared to eviscerate the benefits of the safe harbor.

Resolving concerns raised by this commentary, Notice 2013-60 provides that, if a project satisfies either the Physical Work Test or the 5% Safe Harbor prior to January 1, 2014, such project will be deemed to satisfy the applicable continuous construction/continuous efforts test set forth in

Notice 2013-29 if such project is placed in service prior to January 1, 2016. This change significantly liberalizes the requirements for qualifying for the ITC or PTC, especially since the construction horizon for most projects is considerably shorter than two years.

We expect these changes to ease the financing process for many project sponsors, since they will no longer be subject in all cases to the uncertainty of a "facts and circumstances" determination by the IRS, but instead should be able to rely upon the much clearer "placed in service" test.

Use of Master Contracts to Satisfy the 5% Safe Harbor

In Notice 2013-29, the IRS provided guidance that the use of a master contract in connection with the development of a project was permitted to be counted for purposes of satisfying the Physical Work Test. For example, a developer could enter into a master contract for the purchase of wind turbines and subsequently assign the rights to certain wind turbines under the master contract to a project-specific special purpose vehicle. The work performed under the master contract prior to such assignment could count towards satisfaction of the Physical Work Test for the applicable project. In Notice 2013-60, the IRS has clarified that the foregoing analysis also works for purposes of satisfying the 5% Safe Harbor.

Transferability of Facilities

In Notice 2013-60, the IRS has also clarified that the transfer of facilities after the commencement of construction and prior to the time they are actually placed in service does not affect the ability to qualify for the ITC or PTC. This is a change from the 1603 Grant Program, in which the IRS placed various limits on the ability of taxpayers to transfer facilities without disqualifying them from the ITC or PTC.

This Tax and Alternative Energy update is intended only to provide a general summary of certain tax provisions and the Notice. If you have any questions about any of these tax provisions or the Notice, please contact any Baker Botts tax or alternative energy lawyer, including the authors of this update listed above.

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

FMLA Rights Extended to Same-Sex Spouses Based on Law of State Where Employee Resides

10.07.13

By Christine C. Hawkins and Mary E. Drobka

The Department of Labor (DOL) recently updated Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act. For purposes of the Family and Medical Leave Act (FMLA), the term "spouse" includes a same-sex spouse if the marriage is recognized under the laws of the state in which the employee resides. This guidance is based on the current definition of "spouse" in the FMLA regulations, but it is inconsistent with the DOL and Internal Revenue Service (IRS) position with respect to *employee benefit plans*, where the "state of celebration" controls the marital status. This inconsistency may potentially cause administrative and employee relations challenges for employers with employees in more than one state or whose same-sex married employees move to a new state.

Background

Since 1996, Section 3 of the Defense of Marriage Act (DOMA) has barred same-sex marriages from being recognized for all federal purposes, including the right to take FMLA leave to care for a same-sex spouse with a serious health condition. On June 26, 2013, the U.S. Supreme Court invalidated Section 3 of DOMA in *United States v. Windsor*, holding that same-sex marriages valid under state law are recognized for federal purposes. Refer to our previous advisory for a description of *Windsor* and its impact on employee benefit plans.

State of residence v. state of celebration

Following the *Windsor* decision, it was unclear whether the DOL and the IRS would recognize same-sex marriages based on the state in which the couple was married (the "state of celebration") or based on the state in which the couple resides (the "state of residence").

Employee benefit plans

As reported in our recent advisory, the IRS stated in Revenue Ruling 2013-17 that legally married same-sex couples will be treated as married for purposes of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code based on the "state of celebration," regardless of where the couple resides. The DOL followed this position in DOL Technical Release 2013-04, confirming that for employee benefit plan purposes, same-sex marriages will be recognized based on the "state of celebration."

FMLA

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The DOL's updated fact sheet points out, however, that for FMLA purposes the "state of residence" controls the marital status because the current FMLA regulations (29 CFR Section 825.102) provide that "Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." The result is that the definition of spouse for FMLA purposes is inconsistent with the treatment of same-sex spouses for purposes of employee benefit plans.

A new factor in the FMLA eligibility determination

As clarified by the DOL's updated Fact Sheet, under the current FMLA regulations, an employee is not entitled to FMLA leave to care for a same-sex spouse with a serious health condition unless that employee resides in a state that recognizes same-sex marriage. Although some employers may be inclined to offer FMLA leave to all employees regardless of where they reside, this approach can have unintended consequences to the employer.[1] As a result, unless and until the DOL revises its regulation to follow the "state of celebration rule," employers should consider the same-sex marriage laws of the state where an employee resides when making a determination regarding eligibility for FMLA leave.

Determining whether an individual is a "spouse" based on the marriage laws of the state where the employee resides requires that employers become familiar with multiple state laws (its own state, neighboring states, and all states where its employees reside):

- For example, an employer located in Oregon (a state that does not recognize same-sex marriage), should be aware that an employee who resides in California or Washington is entitled to take FMLA leave to care for a same-sex spouse's serious health condition even though the state where the employer is located does not recognize same-sex marriage.
- If an employee moves from Washington to Idaho while taking FMLA leave to care for a same-sex spouse, the employee would no longer be eligible for FMLA to care for the seriously ill spouse under the current FMLA regulations.

Although DOL Fact Sheet #28F does not expressly address whether a marriage "recognized under state law" is limited to states that have legalized same-sex marriage,[2] or if an employer is required to offer FMLA rights to an employee who resides in a state that "recognizes" a same-sex marriage validly formed in another state, the plain language of the regulation suggests that employees who reside in states that "recognize" same-sex marriage, whether lawfully entered into in that state or another state, are eligible for FMLA leave to care for a spouse. For example, although Illinois marriage law does not allow same-sex marriage, it explicitly recognizes the validity of same-sex marriages legally entered into in other jurisdictions. If an employee entered into a legal same-sex marriage in Iowa and moves to Illinois, the employee should be entitled to FMLA leave to care for a same-sex spouse with a serious medical condition.

Non-FMLA leave

If an employer determines that an employee is not eligible for FMLA leave to care for a same-sex spouse or partner due to the laws of the state where the employee resides, the employer may still offer that employee a non-FMLA leave of absence to care for a same-sex spouse or partner. To avoid employee relations issues or to support employees in same-sex marriages, this is likely the approach most employers will take.

However, when offering non-FMLA leave, it will be important to not count such time off (whether paid or unpaid) against an otherwise FMLA-eligible employee's FMLA entitlement. And, if the employee is classified as exempt from overtime, and taking an unpaid non-FMLA leave of absence, it will be important to remember those circumstances when partial-day deductions from an exempt employee's salary are prohibited under the Fair Labor Standards Act (FLSA).

DOL Technical Release 2013-04 and other statements made by DOL representatives indicate that the DOL may revise its FMLA regulations in the future to extend FMLA rights to all same-sex spouses regardless of residence. If the DOL revises the FMLA regulations, employers may offer FMLA to employees legally married to same-sex spouses regardless of where the employee resides. However, in the interim, employers will need to consider where an employee resides for all FMLA requests made with respect to same-sex spouses.

If you have specific questions about the FMLA or the FLSA, please contact your Davis Wright Tremaine employment lawyer before determining whether an employee is entitled to FMLA leave. If you want more information on the repeal of DOMA and its impact on your employee benefit programs, please contact your usual Davis Wright Tremaine benefits lawyer.

FOOTNOTES

1If an employee is not entitled to FMLA leave under the FMLA, the employee is still entitled to his or her full FMLA for other qualified absences. Additionally, the employer could potentially lose its overtime exemption under the Fair Labor Standards Act (FLSA) if the leave is not FMLA leave.

2 As of Oct. 1, 2013, California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, and Washington D.C. all have legalized same-sex marriage.

Disclaimer

Energy Alert
October 10, 2013

See note below about Hogan Lovells

Energy agencies face different fates in government shutdown

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On October 1, 2013, after the U.S. Congress failed to reach agreement on a Continuing Resolution (CR) to extend appropriations for most U.S. discretionary programs beyond September 30, 2013, the U.S. Government was forced to partially shut down, resulting in the closing of many U.S. Government offices, parks, and programs, and the furlough of approximately 800,000 federal employees. Many government contractors have also been forced to furlough employees as a result.

In addition, the U.S. Treasury Department has indicated that it will reach the $16.7 trillion limit of its statutory authority to borrow money to fund U.S. Government obligations — the federal debt ceiling — by October 17, 2013.

While we expect Congress to reach at least a short-term agreement to extend the debt ceiling by October 17, opposing factions in Congress and the White House continue to be a long way from resolving the debt ceiling and CR impasse. And while Republican congressional leaders have indicated that they would like to see a debt ceiling increase combined with a CR, we believe it is possible we could see:

1. short-term extensions of both, requiring Congress to address these issues yet again, perhaps in less than two months; or
2. a debt ceiling increase without a CR, resulting in a continued government shutdown. Also very possible is a “sidecar” of provisions — more likely added to a CR and/or debt ceiling increase after short-term extensions — that could include a process and schedule for tax and entitlement reform, and relief from sequestration spending cuts, among other items.

In the meantime, more individuals and businesses operating in the U.S. are likely to experience the far-reaching effects. Although some U.S. Government programs, such as those funded by user fees and those with mandatory funding, continue, most have been negatively affected in some way by the shutdown. And many other government offices and programs have been shut down completely.

For the energy regulatory agencies, the effects of the shutdown have been mixed to date, but they will become more pronounced if the impasse lasts much longer.

Department of Energy (DOE)

The DOE receives what is known as “no-year” money. Such funds do not have to be expended in the year they are appropriated, but rather can be carried forward to be used as needed. Like other agencies, however, the DOE’s funding is appropriated by program, and the DOE may not move money from one program for which it has received an appropriation to another without congressional assent.

The DOE weathered the 21-day government shutdown in 1995-96 without any furloughs; and, thus far, it has avoided furloughing employees or closing any programs in this shutdown. It appears, however, that some support service and other contract services are being curtailed. The DOE has not issued a schedule indicating when funding will run out, but it seems clear that some programs have far more limited “carryover” funding from prior year appropriations than others.

The offices that are near the end of their funds (and their contractors) could face furloughs shortly. However, even the work of those who have sufficient funding to outlast a lengthy shutdown are finding their missions impaired. For example, in many of its programs, the DOE depends upon consultation and collaboration with agencies that were immediately affected by the shutdown. Such work is grinding to a halt.

Regardless of whether the DOE runs out of money, the DOE and its contractors will continue to perform those functions necessary to avoid imminent threats to the safety of human life or the protection of property. The nuclear weapons stockpile will not go unguarded, but companies awaiting word on a permit or the award of a grant for advanced energy technology development will be forced to wait if the shutdown continues much longer, and the vast array of energy supply data that the Energy Information Administration routinely provides for the benefit of markets and industry may be a casualty of the shutdown as well.

Federal Energy Regulatory Commission (FERC)

Like the DOE, as of October 9, 2013, FERC continues normal business operations because it can use carryover funds from previous years’ appropriations. Recent reports indicate, however, that a FERC shutdown could come as soon as next week.

FERC’s shutdown plan describes six activities it intends to continue in the absence of additional appropriations:

1. action by the five commission members;
2. inspection of hydroelectric and liquefied natural gas projects;
3. monitoring of electric reliability and jurisdictional infrastructure;
4. market monitoring;
5. legal and enforcement matters; and
6. maintenance of commission infrastructure. With the exception of these activities, FERC will cease operations until the appropriations hiatus is over if and when carryover funds are depleted. All but approximately 3.3% of employees will be furloughed should FERC need to implement its shutdown plan.

Nuclear Regulatory Commission (NRC)

The NRC has also been using “no-year” funds to continue normal operations since October 1. As of October 9, 2013, the NRC ran out of funds to continue normal operations. Accordingly, the NRC began operating at a reduced level. The NRC will operate in a “minimal maintenance and monitoring mode” going forward where it will furlough all but roughly 300 of its 3,900 employees that are necessary for essential health and safety operations. About half of the retained employees are resident inspectors assigned to a reactor or fuel facility.

The NRC will not furlough staff responsible for responding to emergencies, reviewing security threats, and processing emergency licensing actions. Certain public affairs staff necessary to inform the public about potential emergencies, legal advisors, and liaisons with states, Congress, and foreign governments will also continue working. The NRC will continue to perform the following functions during the shutdown:

1. receipt and processing of pre-shipment notifications and receipt and assessment of licensee event notifications through the Headquarters Operations Center;
2. review and analysis of potential security threats;
3. response to emergencies and assembling of teams for incident response;
4. oversight at nuclear power plants and fuel cycle facilities by resident inspectors;

5. processing and approval of enforcement orders;
6. receipt, assessment, and response to safety or security allegations, and initiation of investigations;
7. processing of emergency licensing actions; and
8. international liaison including with other U.S. Government agencies and/or foreign nations to address export and import, international safeguards, and other matters.

The NRC also clarified that it will continue processing fingerprint checks necessary for Access Authorization during the shutdown. Licensees are obligated to continue making all required NRC notifications during the shutdown through the NRC Headquarters Operations Center.

Commodity Futures Trading Commission (CFTC)

The CFTC is hard hit by the government shutdown. Without access to "no-year" money, the CFTC has been forced to furlough all but approximately 4% of staff. The shutdown comes at a particularly sensitive time at the CFTC. Newly implemented Dodd-Frank Act rules governing the swaps market were scheduled to commence in early October. The shutdown has forced the CFTC to toll compliance dates and leave the swaps market with minimal oversight.

Like the other agencies, the CFTC is required to continue operations that protect life and property during a lapse in appropriations. Thus, the remaining staff is tasked with conducting a minimum level of surveillance of futures markets, clearing houses, and intermediaries. Enforcement functions have largely ceased, as have rulemakings and entity registrations. In light of the shutdown's severe impact on the CFTC, certain commissioners have promoted funding the agency with settlement money rather than appropriations. However, such proposals are rarely favored by either Congress or the regulated community because it sharply reduces oversight of agency performance. For the present, derivatives market participants — including energy commodity end users — remain uncertain about key aspects of new market regulations. As long as the government is shutdown, no regulatory guidance from the CFTC will be forthcoming.

For further information regarding developments in the U.S. debt ceiling and CR negotiations, or ramifications of the government shutdown with respect to the DOE, FERC, the NRC, the CFTC, or any other agency or branch of the U.S. Government, please feel free to contact us.

McKenna Long & Aldridge LLP

They Shot, But Did We Score With 2013's CEQA Reform Bill?

New Law Offers Potential Benefits to Transit Oriented Infill Developments and Protections for the Sacramento Kings Basketball Arena.

October 14, 2013

By Brian C. Fish and Jennifer La Fond Chavez

With little time left on the legislative shot clock, the legislature and governor took a final shot at the California Environmental Quality Act (CEQA) reform game for 2013. Whether the recently signed Senate Bill (SB) 743 qualifies as an air ball or a victorious shot depends on your expectations and how the State implements the legislation. Regardless, those in the real estate business should know about the new law's provisions relating to transit oriented infill developments and traffic analysis.

Originally intended to benefit only the Sacramento Kings' new downtown arena, SB 743 changed late in the legislative game. All basketball analogies aside, SB 743 should benefit infill development projects located within one-half mile of certain existing or proposed major transit stops. For qualifying residential, mixed-use and commercial developments, the bill eliminates the consideration of parking and aesthetics as CEQA issues. Those issues will still require review under most local agency discretionary permits, but removing aesthetics and parking from the world of CEQA reduces entitlement risk by eliminating two fertile grounds for project opposition.

SB 743 also requires the State to develop new CEQA guidelines for evaluating traffic impacts. By the middle to end of 2014, these new traffic thresholds could prohibit the use of traffic congestion formulas based on criteria like level of service. The new traffic rules will instead focus on the reduction of greenhouse gas emissions, development of multimodal transportation networks and a diversity of land uses. We will all have to wait and see if SB 743 establishes a broader and more meaningful method of evaluating traffic impacts. Further, while the law gives the state the discretion to apply the standard more broadly, the rules may only apply to projects in areas around qualifying transit stops.

Finally, SB 743 establishes a new CEQA exemption. In jurisdictions with adopted Sustainable Community Strategies or Alternative Planning Strategies as required by SB 375 (the Sustainable Communities and Climate Protection Act of 2008), the new law offers a more readily achievable path to a CEQA exemption. Specifically, this exemption could become a valuable tool for

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communities to fast track infill development projects located within qualifying Specific Plans.

Anyone interested in real estate development, particularly of the infill variety, should take a close look at SB 743 and its implementing measures. Although some reason for optimism exists, we will not know for a while whether the CEQA reform shot the legislature took with SB 743 is a game loser or a game changer.

Please feel free to contact Brian Fish, Jennifer Chavez or any member of the McKenna Long & Aldridge LLP Land Use, Entitlements and CEQA Professionals team with questions about SB 743 and other land use matters.

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