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September 2010 e-Bulletin

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Hosted by Skrine

October 16-19, 2010

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BAKER BOTTS ENHANCES INTERNATIONAL ARBITRATION, WHITE COLLAR INVESTIGATION CAPABILITIES

New Co-Chair of IADR Group Jay Alexander, Litigation Partner Casey Cooper Join Firm's London Office

LONDON, September 7, 2010 -- International arbitration and investigation capabilities were enhanced this week at Baker Botts L.L.P. with the move of litigation partners Jay Alexander and Casey Cooper to the firm's London office.

This expansion of the firm's London team increases the capacity of Baker Botts in its key practice areas of litigation, arbitration and international investigations where client demand for legal services continues to grow.

"With the addition of Jay and Casey to our London office, we continue to enhance the reach of our litigation team," said Baker Botts Managing Partner Walt Smith, "These moves will provide our international clients more direct access to our highly-regarded arbitration and dispute resolution, white collar criminal defense and international investigation practice groups."

Alexander, who was recently named co-chair of the firm's International Arbitration and Dispute Resolution (IADR) group, has more than 20 years of experience in the dispute resolution field. He will work with IADR co-chair Michael Goldberg to manage client representations in this growing practice area.

"With Jay based in London, we are well-positioned to support increased client demand for arbitration and dispute resolution services with a team of top-tier international lawyers who are recognized by the legal industry as being among the best in the field," Goldberg said.

Cooper's practice focuses on white collar criminal defense and corporate investigations. His move to London comes as the U.S. Department of Justice has increased joint investigations with its European counterparts who are increasing their focus on anti-corruption efforts.

"Casey brings more than 15 years of white collar and international investigation experience to the London office," said Tony Higginson, partner in charge of the firm's London office. "With international enforcement activity by U.S. and European authorities on the rise, Casey's move to London is very timely."

###

About Baker Botts L.L.P.
Baker Botts L.L.P., dating from 1840, is a leading international law firm with offices in Abu Dhabi, Austin, Beijing, Dallas, Dubai, Hong Kong, Houston, London, Moscow, New York, Palo Alto, Riyadh and Washington. With approximately 750 lawyers, Baker Botts provides a full range of legal services to international, national and regional clients.

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

CLAYTON UTZ CLE TV SETS CLIENT SERVICE BENCHMARK

Sydney, **19 August 2010:** Clayton Utz has set a new benchmark in Continuing Legal Education (CLE) with the development of CU CLE TV.

CU CLE TV provides Clayton Utz's clients' legal teams with access to high-quality, online CLE presentations. They are available on demand, 24 hours a day and can be accessed from anywhere in the world. Presentations cover a broad range of areas and are constantly reviewed to ensure the currency of information presented.

Commenting on the practical application of the break-through, Clayton Utz Chief Operating Officer Stuart Clark said:

"CU CLE TV is the most innovative, flexible and convenient tool currently available to our clients' lawyers to earn CLE points. The program makes obtaining mandatory CLE points easy, while at the same time providing our clients' lawyers with access to cutting-edge presentations on topical legal issues. No other CLE program is as flexible or convenient as CU CLE TV."

CU CLE TV was created through Clayton Utz's Client Relationship Management program to meet the needs of Clayton Utz clients. Mr Clark said: "Our clients told us they needed a convenient, cost-effective and reliable solution to meet their CLE targets. They needed a program where they could take control of their CLE schedule rather than the schedule controlling them. We listened to their needs and used their feedback to tailor the most innovative and creative value-add: CU CLE TV."

"A number of Clayton Utz clients have already trialled the innovative program and we are very pleased by the feedback we have received," said Mr. Clark.

Each CU CLE TV presentation is eligible for CLE points as per the guidelines provided by the law society in each state.

For additional information visit www.claytonutz.com

FRASER MILNER CASGRAIN REVEALS NEW IDENTITY

September 13 2010 - *Toronto Transition to new FMC brand demonstrates consummate focus on service, value and teamwork*

Fraser Milner Casgrain LLP, one of Canada's leading business and litigation law firms, is proud to introduce its new brand identity – FMC. Evolving with the times, the firm showcases its commitment and dedication to its people and clients. FMC reflects the firm's distinctive culture, vision and values that have earned it a place of prominence on the Canadian legal landscape.

"The launch of our new brand is about much more than a new logo," says Chris Pinnington, Chief Executive Officer. "It's a transformational story of who we are, where we are going, how we service our clients, and why we are unique as a national law firm. The FMC brand captures our evolution as a dynamic, forward-looking organization focused on our people and our clients and consistently delivering superior business solutions through excellence in service, value and teamwork."

Building on the firm's rich heritage, its long history of accomplishment and its core values, FMC is committed to providing unparalleled service to its clients, both nationally and internationally, and serving the needs of its firm members and communities. A centrepiece of the firm's business model is the creativity and innovation unleashed by its people's diverse backgrounds and perspectives and channelled towards a common purpose.

The FMC compass – a key visual element of the FMC corporate identity, is a symbolical guide for differing views and values coming together to offer inspired and educated guidance.

The FMC brand is part of the dynamic positive changes taking place throughout the firm. To support its focus on its clients, FMC is adding value through the role of the Chief Client Officer and is implementing a number of programs to attract and retain top talent, integrate best practices in service delivery and legal practice, and continue building a culture of excellence.

In addition, FMC's Toronto and Vancouver offices will both be moving to new office space before the end of 2010 to strategically position them for further success. "Our expertise extends beyond law," says John Rider, FMC's Chief Client Officer. "We develop great teams that are constantly looking for new ways to deliver exceptional value. Our clients want us on their team because we love what we do and because we listen to them and execute what we hear, based on a deep understanding of their business and their industry. "

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

KING & WOOD INTERNATIONAL ARBITRATION PARTNER JOINS FIRM

Beijing, China, September 1, 2010,

Ms. Meg Utterback joins King & Wood's Shanghai office as senior member in their International Arbitration practice. Ms. Utterback was previously a key partner in the Pillsbury Winthrop Shaw Pittman LLP (Pillsbury) China Practice, resident in the Shanghai office, and co-chair of the firm's International Arbitration Practice.

"With over 19 years of dispute resolution and international arbitration experience, mostly in construction and energy", Handel Lee, senior partner at King & Wood states, "we believe Meg's addition will strengthen the firm's competitiveness in a strategic growth area for our firm."

Utterback has handled over 40 jury and bench trials in the US and has represented clients in complex arbitrations before tribunals around the world including the ICC, CIETAC, SIAC and the Indian Council of Arbitration. She regularly counsels clients on international construction and commercial disputes in China and abroad.

In 1985, Utterback was a student at Renmin University, returning to Shanghai 5 years ago, expanding her practice in China-specific compliance and inbound investment work, while continuing to grow her dispute and construction practice. She is also designated by Shanghai MOFCOM/ SAIETC as a foreign law expert in international construction law, and the expatriate representative for the ICC/USCIB in China. She is a frequent speaker and author on China legal matters and also an active member of the American Chamber of Commerce.

For additional information visit www.kingandwood.com

NAUTADUTILH TOP REAL ESTATE PARTNER JOINS FIRM

Top real-estate expert David van Dijk joins NautaDutilh

1 September - NautaDutilh has appointed D.A.W. (David) van Dijk MRE MRICS as a partner. For NautaDutilh, the arrival of David van Dijk represents a further strengthening of its position in the commercial real-estate practice. In the real-estate sector, Van Dijk is known as one of the top legal experts in the Netherlands. Born in 1971, he has been a lawyer since 1996 and a partner at Boekel de Nerée since 2002, where he has headed the Real-Estate practice group in recent years.

"We are very satisfied with David joining NautaDutilh"" says Michaëla Ulrici, chairwoman of the Board of NautaDutilh. "His experience, particularly in the areas of real-estate transactions, project and area development and investment funds, exactly matches NautaDutilh's extensive experience in areas such as financing, banking and securities, tax, M&A and the existing real-estate practice."

Despite the fact that the real-estate market has been hard hit by the credit crunch, NautaDutilh expects this market will recover in the near future and will require new solutions. Examples of this could be developments in tendering procedures, an expected increase in public-private partnerships (PPP projects) and restructuring of real-estate portfolios. Municipalities will be faced with major challenges in area development in the longer term. It is also expected that real-estate funds will once again increase in number and volume. This does not apply to Dutch funds only but also, more particularly, internationally to Luxembourg funds, which matches the NautaDutilh's Benelux orientation.

David van Dijk studied private law in Leiden and then obtained a Master of Real Estate (MRE) degree in Amsterdam. He is a member of the international network of the Royal Institution of Chartered Surveyors(RICS). Van Dijk has also written columns for Het Financieele Dagblad and is on the editorial board of Vastgoedrechten Vastgoed Fiscaal & Civiel among other publications. He regularly writes articles on his areas of expertise.

For more information visit us at www.nautadutilh.com

HOGAN LOVELLS FORMER CHIEF TRIAL COUNSEL FOR FTC BUREAU OF COMPETITION JOINS FIRM

WASHINGTON, D.C., 7 September 2010 – Hogan Lovells announced today that J. Robert "Robby" Robertson, former Chief Trial Counsel for the Federal Trade Commission Bureau of Competition (FTC), has joined Hogan Lovells US LLP as a partner.

Robertson, one of the leading antitrust trial lawyers in the country, will be a member of the Antitrust, Competition and Economic Regulation practice group, which is comprised of 45 partners and 130 antitrust lawyers in more than 15 offices worldwide. He will be resident in the Washington, D.C. office.

During the past eight years, Robertson has tried numerous cases for the FTC. Most recently, he was the lead trial counsel in the FTC's monopolization and unfair competition case against Intel Corporation, which was settled in August 2010. Robertson also recently led the litigation team in *FTC v. CCC Holdings, Inc.*, in which the United States District Court granted a preliminary injunction enjoining CCC's $1.4 billion merger with Mitchell International Inc. The parties subsequently abandoned the merger. This was the first merger challenge that the FTC had won at trial in federal court in many years. He also tried successfully the cases against Unocal, Chicago Bridge, and Polypore.

Robertson was a litigation partner at Kirkland & Ellis LLP from 1996 to 2008, with the exception of his service with the FTC. In private practice, Robertson represented numerous clients in antitrust, competition, merger, and distribution law matters. In addition to his extensive experience with antitrust litigation, Robertson has tried a broad range of cases in other areas, including intellectual property, employment, and franchise.

According to Susan Bright and Jan McDavid, Co-heads of the Antitrust, Competition and Economic Regulation practice, "Robby is a first-rate trial lawyer who has a vast amount of antitrust litigation experience. He is one of only a handful of lawyers who can lead antitrust litigation for any client, whether it involves defending a merger or practice against an agency challenge or defending a client in private litigation. He is also very well-regarded by his peers and others in the antitrust agencies."

Commenting on his decision to join Hogan Lovells, Robertson said, "I am excited to become a part of one of the largest global antitrust and competition practices in the world. Hogan Lovells provides me with the ideal opportunity to use the experience I have gained at the FTC, along with my considerable trial experience from private practice, to build on strong corporate, IP, and international platforms. I am eager to develop my antitrust litigation practice on a global level together with many lawyers with whom I have worked over the years."

Most recently, Robertson received the Federal Trade Commission's Distinguished Service Award.

Robertson is currently the Co-Editorial Chair of the *Antitrust Law Journal* and is a member of the Council of the Antitrust Section of the American Bar Association. He has also been recognized as a leading antitrust lawyer by *Chambers*, *Who's Who Legal*, *PLC*, *Legal 500*, *Global Competition Review*, *Illinois Super Lawyers*, and the *Best Lawyers in America*.

Robertson received his law degree from the University of Chicago Law School (cum laude and Order of the Coif), where he was the Topics & Comments Editor for the Law Review. He received his bachelor's degree from the Virginia Military Institute. He also served as a law clerk for the Honorable Judge Milton I. Shadur in the U.S. District Court, Northern District of Illinois. Robertson served more than 10 years as an officer in the U.S. Marine Corps.

For additional information visit www.hoganlovells.com

KOCHHAR & CO. EXPANDS INTO MIDDLE EAST

We are pleased to share with you Kochhar & Co.'s historic achievement of being the first Indian law firm to expand into the Middle East by establishing a presence in the United Arab Emirates (UAE) and the Kingdom of Saudi Arabia (KSA). This significant development was commemorated this month at a grand ceremony in New Delhi by the Chief Guest Mr. Salman Khurshid, the Honourable Minister of State (I/C) for Corporate and Minority Affairs, Government of India, and the Special Guests - His Excellency Faisal Al-Trad, Ambassador of Saudi Arabia, His Excellency Larbi Moukhariq, Ambassador of Morocco and Dean of all Arab Missions in India and His Excellency Ahmed Salem Saleh Al Wahishi, Ambassador heading the Arab League in India.

Seen in the picture is our National Chairman & Managing Partner, Mr. Rohit Kochhar with the Hon'ble Minister, Mr. Salman Khurshid, Dr. Khalid Al-nowaiser, Mr. Mohammad Issa Odeh, Mr. Pramod Karkal, Managing Director-Johnson Controls India and Mr. Manishi Pathak, Senior Partner, Kochhar & Co.

Kochhar & Co.'s UAE offices have been established in collaboration with the law offices of Mohammad Issa Odeh (MIO), one of the leading and largest law firms in the UAE, located in Abu Dhabi and Dubai. In Saudi Arabia, Kochhar & Co. has commenced operations in Jeddah and Riyadh in partnership with the Law Firm of Dr. Khalid Alnowaiser which is KSA's most dynamic and progressive legal enterprise.

With this initiative, Kochhar & Co. is now in a position to provide full service legal support to leading Indian and multinational companies doing business in the Middle East. India is the largest trading partner of the Middle East and Indo - UAE & Saudi trade is now valued at US$ 50 billion. Kochhar & Co. hopes to play a significant role in supporting this robust economic partnership between India and the Middle East. The collaboration will cover the entire length and breadth of legal representation in areas such as commercial transactions, infrastructure projects, banking and finance, arbitration and Islamic finance.

Brief introduction of our Middle East Partners - MIO Lawyers and legal consultants (MIO), established in 1985, is a leading local law firm in Abu Dhabi with a branch office located in Dubai. MIO provides full service legal support to clients in the areas of establishment of companies, commercial contracts & agreements and litigation & arbitration. MIO represents a wide range of corporations including banks, financial institutions, contracting companies, engineering establishments, insurance, real estate companies, international business groups, hospitals and hotels.

The Law Firm of Dr. Khalid Alnowaiser (LFKAN) was founded in 1996 and provides full service corporate, litigation and arbitration services that are designed to meet the critical legal needs of multinational corporations and private investors with investments and business operations in the Kingdom of Saudi Arabia. The firm has offices in Jeddah and Riyadh and is staffed by resident Saudi Arabian and international attorneys qualified in international law, Islamic Sharia and the Middle East legal system.

To know more about our Middle East operations please reach us by email at ksa@kochharlfkan.com (KSA offices) & uae@kochharmio.com (UAE offices).

SIMPSON GRIERSON WELCOMES NEW ADDITIONS

Simpson Grierson Adds to local government & environment employment law groups

Kathryn McLean comes from the public law team of another large national law firm. She is experienced in advising local and central government clients on decision-making, policy development and the legislative process.

Charlotte Bates joins the firm from ANZ National Bank Limited where she was an employment relations consultant. Charlotte advises on all aspects of employment law and has extensive experience in corporate restructures, disciplinary matters, personal grievances, Holidays Act issues, employment agreements and union issues.

Associate Stephanie van der Wel joins the firm's Auckland employment law group. Stephanie also comes to Simpson Grierson from another large national law firm and advises on all areas of employment law, including dismissal and performance management, redundancy processes, collective bargaining issues, discrimination, privacy, restraints of trade, and employment agreements.

The firm's Christchurch office is further strengthened by the addition of senior associate Lillian Sewell to the local government and environment group. Lillian joins Simpson Grierson from another leading New Zealand law firm and specialises in resource management law, with a particular focus on environmental, consenting, and regional and district planning matters.

For additional information visit www.simpsongrierson.com

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Register online at www.prac.org

PRAC 48th International Conference
Kuala Lumpur Oct 16—19, 2010

SKRINE

CLAYTON UTZ

ADVISES ON NOBLE GROUP ACQUISITION $58.8MILLION STAKE IN ASTON RESOURCES

Sydney, 18 August 2010: Clayton Utz is advising Hong Kong based Noble Group in relation to its acquisition of a A$58.8 million stake in Aston Resources and the long term coal off-take agreement from Aston's Maules Creek mine.

The Clayton Utz team acting for Noble on the acquisition includes Energy & Resources partners Stuart MacGregor and Rory Moriarty, and Equity Capital Markets practice head Stuart Byrne.

Clayton Utz is also representing Noble Group on the sale of its interest in the Middlemount Joint Venture to Gloucester Coal Limited, as well as representing Noble in relation to its takeover bid for Gloucester.

Aston Resources' listing is expected to raise approximately A$400 million.

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE

CLIENT OPENS BOUTIQUE HOTEL DEVELOPMENT

DWT Client Starts One of the Nation's Few New Hotel Developments

08.03.10

Davis Wright Tremaine is proud to announce its successful representation of the developer of a new boutique hotel, Inn at the 5th, in Eugene, Ore., the construction of which will begin later this month.

Our representation spanned all aspects of the transaction, including the structure and returns of the equity investors, private placement memorandum, long-term ground lease, hotel management contract, and review of all financing documents, including obtaining a critical subordination agreement from the existing lender on the fee land.

This is one of the few new hotel developments now proceeding in the nation.

For additional information visit www.dwt.com

FRASER MILNER CASGRAIN

AUSTRALIAN COPPER DEVELOPMENT COMPANY MORENGO COMPLETES KEY $20MILLION CAPITAL RAISING

On August 11, 2010, Australian international copper development company, Marengo Mining Limited (ASX/TSX:MGO) completed its offering of 240,000,000 units of the Company at a price of $0.084 per unit for gross proceeds to the Company of $20.16 million. Each Unit consists of one ordinary share of the Company and a free attaching one-quarter of one ordinary share purchase warrant. Each Warrant is exercisable to acquire one ordinary share of the Company at a price of $0.116 until August 11, 2013. The Offering was led by Paradigm Capital Inc., with a syndicate including Fraser Mackenzie Limited.

Marengo was represented by Fraser Milner Casgrain LLP with a team led by Sander Grieve which included Linda Misetich, Eric Foster, Zahra Nurmohamed and Matt Peters.

For additional information visit www.fmc-law.com

GIDE LOYRETTE NOUEL

ADVISES SOCIETE GENERALE SUBSIDIARY ON AUTO FINANCE JOINT VENTURE FOR THE CHINESE MARKET

Gide Loyrette Nouel (GLN) has advised auto finance company Compagnie Générale de Locations d'Equipement (CGL), a subsidiary of Société Générale Consumer Finance, on a joint venture with BYD Company Limited, one of China's fastest growing automotive manufacturers.

The newly created company, to be known as BYD Auto Finance Company Limited (BYD Auto Finance), is expected to start operations in early 2011 and will provide auto financing for mainland China's burgeoning car market, including customer loans for new vehicles.

Shares in BYD Auto Finance will be 20% owned by CGL and 80% owned by BYD Company Limited. The establishment of BYD Auto Finance is subject to the approval of the Chinese authorities and, in particular, the China Banking Regulation Commission.

GLN advised CGL in the negotiations and incorporation of the joint venture with BYD Company Limited, including the preparation of all relevant legal documentation.

The GLN team was led by partner Guillaume Rougier-Brierre, with assistance from Jiang Chuan and Cécilia Della Berta.

For additional information visit www.gide.com

HOGAN LOVELLS

FIRST TURKISH SUKUK - ADVISES CITI AND LIQUIDITY HOUSE

DUBAI, 25 August 2010 - International law firm Hogan Lovells has acted as international counsel to Citigroup Global Markets Limited and Liquidity Management House for Investment Company KSCC on the inaugural US$100m sukuk for Kuveyt Türk Katılım Bankası A.Ş. ("Kuveyt Türk")

Kuveyt Türk's US$100m Sukuk due 2013 is the first sukuk ever issued out of Turkey. The transaction was oversubscribed and has attracted a lot of global interest, including from the Turkish Government. Mehmet Şimşek, Turkish Finance Minister, recently described the transaction as "a turning point" and expressed his hope that sukuk as an alternative financial tool "will make important contributions to the development of the country".

The Hogan Lovells team was led by Hogan Lovells' Global Head of Islamic Finance, Rahail Ali, who was assisted by Senior Associate Roger Fankhauser and Associates Sema Kandemir and Mark Brighouse. Speaking today Rahail Ali said:

"It's really pleasing to advise Citi and Liquidity House on such a landmark sukuk not only for Kuveyt Türk but also for Turkey. Structuring the sukuk was challenging - the parties had to reconcile requirements under the Turkish civil law, English common law and Sharia principles. Turkey has always been a favoured destination for Islamic financial institutions. This sukuk promises to open up a whole new market."

Background to Hogan Lovells' Islamic finance experience

Hogan Lovells' Islamic finance team has been at the forefront of cutting-edge developments in the Islamic finance market, having previously advised on the first Islamic reserve based financing, the first Sharia compliant tier 2 capital facility and a number of landmark sukuk including the first international musharaka, mudarabah, convertible and exchangeable sukuk offerings and the first sukuk "buy-back".

Amongst other awards and accreditations the Islamic finance group has received:

- Islamic Finance Asia - Top 10 Groundbreakers of 2009 - PETRONAS Global Sukuk;
- Asia-Counsel Deal of the Year 2009 - Deal of the Year - PETRONAS Global Sukuk Deal;
- IFLR Middle East Awards 2009 - Debt and Equity-linked Deal of the Year - Nakheel securitization;
- Islamic Finance News - multiple awards won; and
- Finance Monthly Magazine Law Awards for Achievement 2010 - Category Winner Islamic Finance Law Firm of the Year Middle East.

For further information, please visit www.hoganlovells.com

NAUTADUTILH

ASSIST POLYGONE INTERNATIONAL WITH ITS IPO ON ALTERNEXT

NautaDutilh assisted Polygone International, a Brussels-based communications agency, with its IPO on Alternext Brussels and Paris.

Polygone is officially listed on Alternext since 10 September 2010. This is the first IPO of the year on Euronext Brussels.

This listing follows a private placement of 4 million euros, with a view to a listing on Alternext Brussels and Paris.

NautaDutilh's team is headed by Benoît Feron, with the assistance of Philippinne De Wolf, Maxime Berlingin and Dorothée Vanderhofstadt.

For additional information visit www.nautadutilh.com

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

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

Invitation is open to all PRAC Member Firms
Member Firms are encouraged to forward this email to interested parties within your firm.

RSVP reply email by September 15 to:
events@prac.org

KING & WOOD

ADVISES ON CHINA ORIENTAL GROUP'S $550MILLION BOND ISSUE

August 27, 2010

In August 2010, King & Wood advised China Oriental Group, a leading domestic steel producer, on its bond issuance. The USD 550 million issuance was managed by Deustche Bank and ING.

The King & Wood legal team was led by Zhang Yongliang.

For additional information visit www.kingandwood.com

LUCE FORWARD

OBTAINS DEFENSE VERDICT FOR DEERBROOK INSURANCE

Jury Returns Unanimous Defense Verdict After 28 Minutes
08 | 23 | 2010 Case Study

Luce Forward announced today that partners Peter Klee and Charles Danaher recently obtained a complete defense verdict for Deerbrook Insurance Company in a "bad faith failure to settle" case filed by plaintiff Yan Fang Du.

Du sued Deerbrook based on the allegation that Deerbrook had unreasonably failed to settle a personal injury claim against its insured. Du alleged that Deerbrook was given an opportunity to settle the claim for the policy's $100,000 limit, but refused to do so. Because Deerbrook did not settle, the claim against its insured went to trial, resulting in a $5 million judgment against the insured. Du, who received an assignment of the insured's rights against Deerbrook, sued Deerbrook for bad faith, claiming that Deerbrook should be held liable for the full amount of the $5 million judgment.

Deerbrook denied those allegations and claimed that it did not have a reasonable opportunity to settle Du's claims for the policy limits and that it was not responsible for the $5 million judgment that was rendered against its insured. After a six-day trial, the jury returned a unanimous defense verdict in favor of Deerbook after just 28 minutes.

"Usually, insurance companies are not willing to take a 'failure to settle' case to trial," said Kurt Kicklighter, Luce Forward's managing partner. "A defense verdict in this type of case is unusual so we are thrilled with the result."

Klee and Danaher are partners in Luce Forward's Insurance Litigation practice group. The group, which has been recognized by Chambers USA as one of the leading Insurance Litigation practices in California, has an unparalleled track record in court. It has defended more than 1,500 lawsuits and obtained defense verdicts on the merits in more than 500 cases, including 50 cases in the past year alone. In addition, the group has handled dozens of jury trials in litigation arising out of natural catastrophes and obtained defense verdicts in 100 percent of those trials.

For additional information visit us at www.luce.com

TOZZINIFREIRE

ASSISTS PATRIA INVESTIMENTOS ON ACQUISITION OF 50% BIORITMO

TozziniFreire Assisted Pátria Investimentos on the acquisition of 50% of BioRitmo Academias S.A. ("BioRitmo"), by one of the client's private equity's vehicles. The transaction is completed and was announced on August 5th, 2010.

Partner Mauro Guizeline (mguizeline@tozzinifreire.com.br) and associates Francisco Eumene Machado de Oliveira Neto (fmoliveira@tozzinifreire.com.br) and Thiago José da Silva (tjsilva@tozzinifreire.com.br) acted in the transaction.

For additional information visit www.tozzinifreire.com.br

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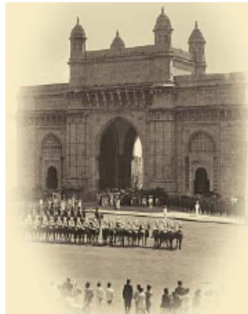
BRIGARD & URRUTIA

Mulla & Mulla
& Craigie Blunt & Caroe
Advocates, Solicitors and Notaries

Mumbai, India
November 15-18, 2008



SANTAMARINA Y STETA

SEOUL 2007
October 20-24

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Member Firms are encouraged to contribute
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The Argentine Government revokes Cablevisión´s acquisition of Multicanal and a Court challenges the decision.

The Minister of Economy and Finance ratified the decision taken by the Secretary of Domestic Trade (the "Secretary") whereby it has decided to overturn the *Cablevisión-Multicanal* transaction, which received antitrust clearance in December 2007. The Minister of Economy, who intervened because of a Court decision removing the Secretary from the case, and also rejected a nullity claim filed by the parties and imposed the parties a six month deadline to unwind their businesses. The parties have appealed the mentioned decision.

Back in December 2007, the Secretary –based on a non-binding report issued by the National Commission for Defense of Competition ("CNDC")- unconditionally approved the merger of *Cablevisión* and *Multicanal*, the two main cable TV operators in Argentina. Although the transaction created several horizontal and vertical relationships that might raise concerns from an antitrust perspective, especially in the market of pay-per-view TV where the resulting market share in some locations reached a 95% concentration, the Secretary cleared the operation arguing that, albeit the high levels of concentration, it would create enough efficiencies to benefit consumers and would have a positive net social value. Notwithstanding the unconditional approval, the parties voluntarily assumed several commitments, mainly, to make investments enabling more customers to enjoy better image quality, more variety of contents and services, and to inform every 3 months on the implementation of the investment plan.

According to the Secretary, the parties have failed to comply with the agreed investment plan and since the CNDC has argued that the commitments assumed by the parties were essential to the approval of the transaction, it has decided to revoke the approval.

This is an unprecedented measure in local antitrust history since it is the first time the Secretary reverses a transaction that has already been approved.

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02 September 2010

Baxter fine a warning for those who bundle products or services

The Federal Court's decision to fine Baxter Healthcare Pty Ltd $4.9 million for breaches of the misuse of market power and exclusive dealing provisions of the Trade Practices Act 1974 is a warning to any company which bundles products or services together (Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd [2010] FCA 929).

Companies with a **significant market share** need to be careful when bundling the supply of their products, where the reason for the bundling is to seek an advantage over their competitors, and competitors are **known to be** unable to match the offer by a competitive competing bundle.

Baxter's offer to bundle products

The breaches arose when Baxter responded to requests for tender by State Purchasing Authorities, acting on behalf of state hospitals and health facilities, for the supply of two different products, sterile fluids and peritoneal dialysis fluids (**PD products**). Both sterile fluids (used for re-hydration and cleaning wounds) and PD products (used to treat chronic renal failure) are essential for hospitals and health facilities.

Baxter offered to supply sterile fluids and PD products on an item-by-item basis at high prices. As an alternative, it would supply the products at discounted prices, as long as the Authority acquired all or most of its requirements from Baxter for a long-term period, an offer which each Authority accepted.

At the time of offering to bundle its products, Baxter was the sole Australian manufacturer of sterile fluids and faced very limited competition from imports. It was also the main manufacturer of PD products in Australia, although it faced import competition.

This, said the Australian Competition and Consumer Commission, was a deal structured to remove any realistic prospect of competition. It launched proceedings, alleging that Baxter had breached both sections 46 and 47 by taking advantage of its substantial market power in the national market for sterile fluids to secure long-term, exclusive contracts with the Authorities.

In 2008, the Full Federal Court found that Baxter had breached sections 46 and 47 of the Trade Practices Act.

Determining the right penalty for breaching misuse of market power and exclusive dealing provisions

The ACCC sought a penalty of $27.3 million. Justice Mansfield imposed the much lower penalty for a variety of reasons.

Against Baxter, he considered:

- the need to send a “significant signal to the community” that this conduct attracts “significant pecuniary penalties”;
- the conduct was deliberate, ongoing and significant; and
- Baxter's ignorance that its conduct was in breach of the Trade Practices Act was no excuse;

In Baxter's favour, Justice Mansfield noted:

- the Authorities had decided upon the form of tenders and had included an opportunity for bundling;
- the conduct was unlikely to occur again, because of the Authorities' increased awareness and Baxter's steps since 2007 to reinforce its trade practices compliance program; and
- the conduct occurred at a time when the former maximum penalty of $10 million per contravention applied.

Justice Mansfield concluded that $4.9 million was an appropriate penalty, although as he also ordered Baxter to pay the ACCC's costs of the proceedings at first instance and on appeal to the Full Court, the ultimate cost to Baxter will be significantly higher.

Conclusion

Significantly, this is the first case in which bundling conduct was been found to contravene the Trade Practices Act and confirms that bundling conduct is unlikely to be a problem **unless** the bundle is particularly attractive to customers, or the supplier of the bundle is the **only person** who can supply it (or supply at that price).

Companies with a **significant market share** need to be careful when bundling the supply of their products, where the reason for the bundling is to seek an advantage over their competitors, and competitors are **known to be** unable to match the offer by a competitive competing bundle.

The penalty in this case is considerable and, while less than other penalties that have been imposed for a section 46 breach, it indicates that the courts will look to impose penalties which send a “significant signal to the community” about engaging in breaches of Part IV of the Act.

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AUGUST 2010

UPDATE ON FOREIGN INVESTMENT IN CANADA

BY SANDY WALKER

Over the past year Canada has witnessed a number of significant developments in its foreign investment review process. In particular:

- the monetary threshold for review of foreign investments under the *Investment Canada Act* (the "ICA") will be significantly increased;
- the Canadian Government established a regime to screen foreign investments based on national security concerns;
- several acquisitions by foreign state-owned investors were approved pursuant to guidelines applicable to such investors; and
- the Canadian Government filed its first lawsuit against a foreign investor for an alleged failure to comply with undertakings.

NEW THRESHOLD FOR REVIEW

Under the ICA, Canada's federal Industry Minister is required to review and approve acquisitions of control of Canadian businesses that meet certain monetary thresholds if they are of "net benefit to Canada." The new review threshold for direct acquisitions[1] of Canadian businesses not engaged in cultural activities[2] will be increased from CDN$299 million in book value of the assets of the target Canadian business, to CDN$600 million in its "enterprise value" ("EV"), once implementing regulations are in force. (If the regulations are implemented in 2010, the threshold will climb to CDN$800 million in 2012 and then to CDN$1 billion in 2014.) Draft regulations issued by the Government in 2009 define EV, but are still under internal review following a public consultation period.

If the draft regulations are finalized as currently drafted, the review threshold would almost double for private company acquisitions and asset acquisitions, and would more than triple in four years. For investments in Canadian publicly traded entities, the revised review threshold is anticipated to capture fewer such transactions than previously.

NATIONAL SECURITY REVIEW PROCESS

Under the new national security regime, the federal Cabinet may prohibit or attach conditions to a foreign investment in an existing Canadian business or the establishment of a new Canadian business, if such investment would be "injurious" to Canada's "national security." If the investment has already been completed, Cabinet may order a divestiture.

Uncertain Scope of "National Security" Review

Foreign investors may be surprised to learn that the scope of "national security" is not defined nor are there plans to provide guidance. Without any criteria, Cabinet has wide discretion to determine the relevant risk factors. If guidance issued in respect of the U.S. national security review process (undertaken by the Committee on Foreign Investment in the U.S. ("CFIUS")) is followed in Canada, targets in sectors such as critical infrastructure, critical technology and energy would merit closer scrutiny, as would investments by foreign government entities.

In addition, national security review applies to a much broader scope of transactions than the general "net benefit" review process. For example, there is no safe harbour for transactions that fall below the review threshold noted above, and minority investments are subject to review whether or not they constitute an acquisition of "control."

[1] A "direct acquisition" involves the direct acquisition of a Canadian entity (a corporation, trust, joint venture or partnership) or substantially all the assets of a Canadian business.

[2] A "cultural business" includes the publication, distribution or sale of books, magazines, newspapers, and the production, exhibition, distribution or sale of film and music recordings.

Foreign investors into Canada may be concerned that there is no formal mechanism to obtain pre-clearance of these transactions on national security grounds. However, early submission of a filing (either an application for review or a notification) required under the general ICA provisions (*i.e.*, not related to national security) will trigger a 45-day period during which the Minister must give notice of a national security review or possible review. The only exception is minority investments that do not represent an acquisition of control, in which case the Minister has 45 days from closing to give notice. If a national security review is invoked, investors can expect potentially significant delays, adding as much as 130 days (and possibly more) if the maximum prescribed periods are fully utilized.

An Assessment to Date

The national security review process has generated some anxiety among foreign investors but, in fact, the Government has not yet prohibited a transaction on national security grounds. It seems likely that the current Government's interpretation of "national security" will be more circumscribed than the broad range of industries potentially subject to review by CFIUS. Over the past year, the Government considered acquisitions in various Canadian sectors that could, in theory, have fallen within sensitive U.S. categories, including the acquisition of Canadian technology icon, Nortel, and energy (including oil sands) companies, without apparently requiring any mitigating measures by the acquirer. Moreover, there is little evidence that prior to the establishment of the national security regime, the Government had a frustrated desire to challenge numerous transactions. For example, Dubai Ports World's proposed acquisition of P&O's port services business in 2006 ignited a highly political debate in the U.S., but was quietly approved in Canada. Although national security review did not exist in 2006, the absence of specific statutory authority to block transactions on this basis did not prevent the Government from prohibiting ATK's proposed acquisition of MacDonald, Dettwiler and Associates Ltd. in 2008, for reasons that could be characterized as "national security" (among other rationales reported in the media, the protection of Canadian sovereignty in the Arctic) under the "net benefit" test.

With that said, Canadian politicians of all political stripes have, over the past few years, become more aware of the potential to use the ICA to political advantage. As a result, we may yet see "national security" concerns used to justify a review of a transaction that is unpopular and not otherwise reviewable under the "net benefit" approval process. Moreover, it should be noted that Industry Canada may have intervened on national security grounds in a proposed transaction in 2009 involving the purchase by a Belgian company of a Canadian company, Forsys Metals Corp., whose only asset was a uranium project in Namibia. While there has been no public confirmation that national security was invoked, the parties were advised by Industry Canada not to close, pending further notice, despite the fact that the target appeared to fall below the review threshold under the ICA's "net benefit" review process. The parties ultimately abandoned the transaction and it is unclear whether a national security review was ever initiated.

In summary, given the potentially expansive boundaries of "national security," foreign investors contemplating investments in a sector potentially linked to national security should consult with legal counsel to consider early confidential discussions with the Canadian Government to assess and address any potential concerns.

ACQUISITIONS BY STATE-OWNED ENTERPRISES ("SOEs")

Industry Canada reviewed and approved a number of transactions in the past year where the investors were state-owned. These included: the acquisition of Nova Chemicals by International Petroleum Investment Company (owned by the Abu Dhabi government); Korea National Oil Corp.'s acquisition of Harvest Energy; PetroChina's acquisition of interests in two oil sands projects owned by Alberta Oil Sands Corp.; and Sinopec's acquisition of a company holding a 9% interest in oil sands producer, Syncrude Canada Ltd.

The minority (17%) investment by China Investment Corp. in Teck Resources in July 2009 was not subject to "net benefit" review because it did not constitute an acquisition of control.

The Ministerial approvals noted above confirm that the Government is not inherently hostile to state-owned acquirers. In addition, it is clear that the Government does not automatically presume that SOE investments raise national security concerns. Both of these developments should comfort SOEs wishing to invest in Canada.

SOE Guidelines

Reviewable transactions by state-owned investors are subject to Industry Canada's guidelines on the application of the "net benefit" test to SOEs (the "SOE Guidelines"). An SOE is defined as an enterprise "that is owned or controlled directly or indirectly by a foreign

government." In addition to the general criteria (*e.g.*, the impact of the investment on employment in Canada, on Canadian participation in senior management and on the level of capital expenditures in Canada), the SOE Guidelines outline two broad considerations the Government will consider in reviewing SOE investments: the SOE's governance and commercial orientation. In particular, the Government will scrutinize whether the SOE adheres to Canadian standards of corporate governance, including the level of transparency and the presence of independent members of the board of directors and audit committees. With respect to the commercial orientation criterion, the Government will evaluate whether the SOE will operate the target Canadian business according to free market principles. It is highly likely that the Government will seek binding commitments or "undertakings" from the SOE acquirer in respect of corporate governance and commercial orientation.

COMPLIANCE WITH UNDERTAKINGS

For the first time in the history of the ICA, in July 2009, the Industry Minister sued an investor to enforce undertakings given in respect of a foreign investment. The Canadian Government applied for an order against U.S. Steel mandating compliance with "undertakings" made in respect of U.S. Steel's acquisition of Stelco in 2007. The Government alleges that U.S. Steel failed to comply with its commitments relating to employment and production at its Canadian facilities. The Canadian Government has also requested that the court impose a fine of $10,000 per day for the alleged breach of the undertakings. In response, U.S. Steel has taken the position that it has not breached its undertakings and that its inability to meet the undertakings was a result of factors beyond its control – a type of "force majeure" that Industry Canada has frequently accepted in the past to excuse non-compliance with undertakings.

While a significant development, there are reasons to believe that the facts in this case are extraordinary, and that such a response by the Canadian Government will remain exceptional. Nevertheless, the U.S. Steel case serves as a reminder to foreign investors that the Canadian Government takes undertakings very seriously and monitors compliance.

CONTACT US

If you would like further information on any of the above issues, please contact Sandy Walker of our National Competition | Antitrust Group.

Chilean Congress Approves Bill on Net Neutrality:

Chile becomes the first country to integrate net neutrality principles into its legislation

After a three year long discussion on the Congress, last August 26th 2010 a law on net neutrality was published on Chile's Official Gazette, amending the Telecommunications Act and making Chile the first country to integrate this principle in their legislation.

I. The Legislative Process

The project was filed for discussion before the House of Representatives on March 2007, and consisted of a few articles which were originally intended to be inserted in and to modify the Consumer Protection Act, considering the effectiveness and flexibility of the consumers' actions from that law. Later on, the Commission of Science and Technology of the House of Representatives modified the project to include it on the Telecommunication Act, considering the characteristics of the Internet as a support for a variety of distance communications, as well as of other services or applications. In addition to that, it was argued that the regulatory authority vested on the Under Secretariat of Telecommunications would be an adequate venue to interpret the regulation of the users' rights, providing the flexibility that is necessary for a subject matter like the Internet and its changing uses and applications.

The bill was finally approved by the House of Representatives on July 13th, 2010; and published on the Official Gazette on August 26th 2010, following its enactment on August 18th.

II. The Bill on Net Neutrality: Main Obligations and Prohibitions

The law project inserts three new articles on the Telecommunications Act.

Internet access providers ("IAP") are defined as those who provide commercial services of connectivity between users or their networks and the Internet. The Bill sets forth obligations and prohibitions for both IAPs and the concessionaires of public services of telecommunications who provide services to an IAP (hereinafter collectively referred to as "ISP").

The main legal obligations and prohibitions for ISPs are:

- **Net neutrality.** ISPs cannot arbitrarily block, interfere, discriminate, hinder nor restrict the right of any internet user to use, send, receive or offer any legal content, application or service through the internet, as well as any activity or legitimate use conducted through the Internet. The service cannot arbitrarily distinguish contents, applications or services based on the source or property of said contents. ISPs are allowed, however, to take measures and actions that are necessary for the management of traffic and networks, as long as they are not intended to or may affect free competition.

- **Block of access upon user's request.** ISPs are authorized to block access to certain contents, applications or services only upon the users' request, and at the user's cost. Under no circumstances such block will arbitrarily affect the online service and application providers.

- **Free use of peripherals.** ISPs cannot limit the right of a user to incorporate or use any kind of instruments, devices or appliance on the net; as long as these devices are legal and don't damage the net or the quality of the service.

- **Information and publicity obligations.** ISPs must publish on their websites all information related to the characteristics of the internet access they offer, its speed, quality of national and international connections, and the nature and guarantees of the service.

The establishment of the minimal conditions to be met by the ISPs in regards to their information and publicity obligations is left for a special regulation to be issued by the Telecommunications Under Secretariat. This regulation will set forth the activities that may be considered restrictive to the freedom to use online available content, applications or services.

The Under Secretariat of Telecommunications will also sanction any legal or regulatory infringements associated with the implementation of the principle of net neutrality that may prevent or hinder the rights that derive from it.

III. Comments to the Project on Net Neutrality

With the enactment and publication of this law, Chile has become the first country to legalize the principle of net neutrality.

It has been argued that the consecration of this principle is far from absolute[1] since the user's rights are subject to several limitations and exceptions, the main one being the use of the word "arbitrary" when stating that the service cannot arbitrarily distinguish contents, applications or services. Although there is no legal definition of the word arbitrary, jurisprudence has been fairly consistent in understanding that an arbitrary act is an act derived from irrationality or whim, or that lacks a justification. Therefore, some critics to the law project point out that if the prohibition for ISPs only refers to making "arbitrary" differences on the management of traffic or access on their networks, then any other action which distinguishes contents, applications or services based on their source or on their property, may be legally permitted.

Another area of potential conflict is the interpretation of the word "legal" when prohibiting ISPs from blocking, interfering or hindering the right of internet consumers to use any legal content, application or service online. In a similar way, it has been argued that an unwanted outcome of this wording would be that ISPs may feel authorized to take measures against the principle of net neutrality, by arguing that the content is illegal; which would in turn may also be unlawful, since it is only the law or the Courts who are authorized to assert on the legality of an action.

Nevertheless, the regulatory powers vested on the telecommunications authority may diminish the risk of this law from being interpreted in ways that oppose the principle of net neutrality. Under this scenario, the Under Secretariat of Telecommunications will face a challenging task when defining and interpreting the limits of this future law's obligations and restrictions.

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[1] Lara J Carlos, "Las Dudas Sobre el Proyecto de Ley Sobre Neutralidad en la Red", available in **http://www.derechosdigitales.org/2010/07/27/las-dudas-de-la-ley-sobre-neutralidad-en-la-red/** ;
Instituto Libertad y Desarrollo, "Principio de Neutralidad en Internet. Boletín 4915-19", available in **http://www.lyd.com/lyd/centro_doc/documents/rl-844-4915-19-principio%20de%20neutralidad%20en%20internet.pdf**

New Circular to Change Business Model of Bank-Trust Cooperation | August 2010

As a source of steady income, trust companies had been taking loans off the books of banks and repackaging them up as trust products. China Banking Regulatory Commission ("**CBRC**") became alarmed when the volumes grew too big and in early July, CBRC abruptly closed down the entire business by ordering trusts to halt all cooperation with banks.

Recently, CBRC has issued a new circular (the "**Circular**") to allow resume of bank-trust cooperation business on certain conditions. In short, we believe the Circular will bring about changes to the current business model of the bank-trust cooperation.The Circular boasts several worth-noting points:

1. The Circular focuses on the bank-trust wealth management business whereby commercial banks on one hand collect funds from clients through issuing wealth management products and on the other, entrust such funds to trust companies for management ("**Model A**"). The banks' clients have no direct dealing with the trust companies in Model A. Trust products engaging a bank only as a distributor to promote the products ("**Model B**") are not targeted in this Circular.

2. Model A is further categorized as "financing category" and "investment category". A trust company's outstanding balance in the financing category shall be kept at 30% or less of the total wealth management fund under Model A. And in principle, the investment category is barred from private equity investment (with possible flexibility in emerging industries such as new energy remaining to be seen).

3. The direct impact of the Circular is the volume of bank-trust products used as bank loans or debt-like investment (including typical equity investment attached with a put option) will have to be reduced to below 30%. This means banks and trust companies will have to maximize their profits through the remaining 70% investment category products. However, with the explicit ban in the Circular on private equity investment which trust companies have an edge over other peers, there does not seem to be much room for the profit maximizing:

> ·Due to the lack of expertise and various restrictions on trust companies participating in the secondary securities market, it is unlikely that majority funds in the investment category will be channeled into the secondary securities market; and
>
> ·Trust companies may turn to participate in the national interbank bond market to invest in fixed income products, thus increasing the whole asset base.This would definitely reduce the total return profile and may in turn affect the distribution of wealth management products.

To maximize profits through the 70% investment products and in light of trust companies leading position and experiences in private equity investment, trust companies may find leeway to get around the ban on private equity investment, which may include: (i) using a limited partnership to act as the investment vehicle to channel the funds (the general partner could be a joint venture between trust companies and banks); and (ii) investing in equity-linked products which can be contractual arrangements only without equity ownership. Of course, the feasibility of these structures is subject to CBRC's interpretation of the Circular.

4. An alternative is to be more engaged in Model B as it is not targeted in the Circular. The downside, however, is banks' client profile will be largely downsized as only qualified investors (for instance, investors with more than RMB 1,000,000) can take part in trust plans. Further, banks' profits in this business model are likely to be revealed to the clients.

5. For the bank-trust wealth management products launched prior to the Circular, banks are required to reflect them on their balance sheet by the end of 2011.The provisioning and capital adequacy requirements similar to bank loans shall be applied.The Circular says the balance sheet restructuring should be carried out according to certain "requirements" but fails to specify what such requirements are.The Circular is silent on the new products launched following the Circular in this respect but we doubt they could be treated differently.

6. The Circular requires that all trust products must have a tenor of more than 1 year and stops "financing category" trust products from being structured as open-ended modes.Many bank-trust cooperation products used to finance long-term projects, with several short-term financing to form an "asset pool" in satisfaction with long-term funding needs.Now, for a 3-year project, trust companies may split a 3-year-term trust product into three 1-year-term products to ensure continuous injection of funds into the project, like a relay race.The risk stands where the distribution of the follow-up wealth management products fails to be secured on time.

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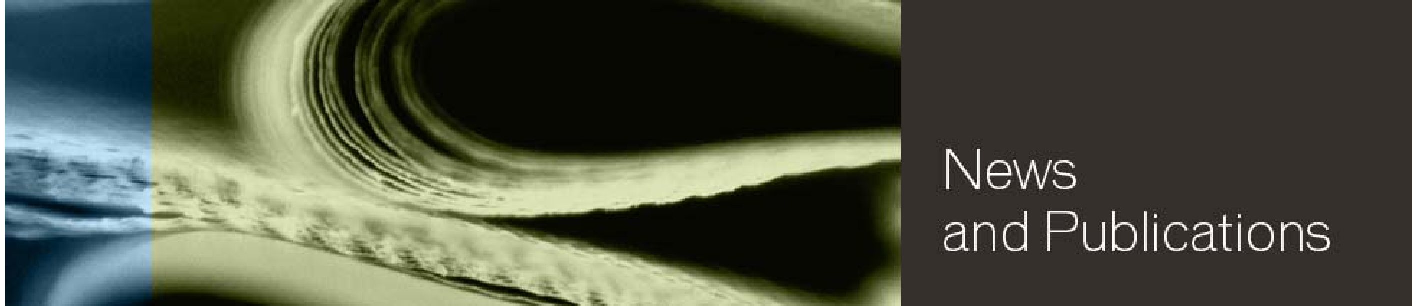


31/08/2010

COMMERCIAL BANKS TO APPLY PRUDENTIAL PRINCIPLES IN THEIR ACTIVITIES AS AGENT FOR OVERSEAS FINANCIAL PRODUCTS

A number of regulations have been issued by Bank Indonesia (the Central Bank, "BI") as part of its 16 June 2010 monetary policy package, one of which being Regulation No. 12/9/PBI/2010 regarding Commercial Banks' Obligation to Apply the Prudential Principles in their Activities as Agent for Overseas Financial Products ("Prudential Regulation" or "BI Regulation"). BI's considerations for issuing this regulation includes the increasing complexities of financial instruments and therefore the need for better information transparency quality, and the current financial market crisis that has affected most developed countries.

Prudential Regulation attempts to cover a wider range of financial instruments, including those instruments that are also regulated under different institutions such as the Capital and Financial Institutions Supervisory Agency ("Bapepam-LK"). However, it misses the commodities based financial instruments, which are regulated by another institution.

The term "overseas financial products" is defined in this regulation as "investment instruments issued by foreign issuers overseas, covering securities based foreign investment instruments as well as foreign investment instruments other than securities based". The latter is further defined as foreign investment instruments in the form of structured products. These structured products were regulated by a separate regulation issued by BI in 2009.

This BI Regulation also broadens the scope of what it considers agency activities in foreign financial products to include the following activities that may be conducted by a commercial bank either directly or indirectly:

following up of customers' request for foreign financial products;

Offering (or solicitation) of foreign financial products to customers either directly or otherwise, including providing information on the foreign financial market and products;

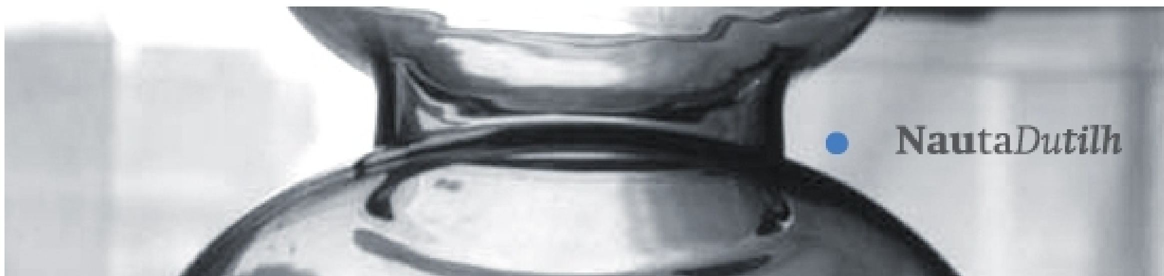
Engaging as referral agent for foreign financial products in the widest term.

The above agency activities are now subject to BI's prior approval as well as the approval of other related agencies such as Bapepam-LK if the bank concerned acts as agent for securities based foreign investment instruments.

Like BI's regulation of 2009 regarding structured products, this Prudential Regulation also categorizes banks' customers into "retail" and "non retail" customers, indicating their sophistication in understanding the products and the risks associated with the products.

Other features of the Prudential Regulation include risk management application, risk assessment, and customer protection (which includesprocedures for the application of the know-your-customers principles and product suitability). Prudential Regulation was issued and became effective on 29 June 2010. (by: Hamud M. Balfas).

Newsflash
Intellectual Property



Entertainment industry now targets network operators **30 August 2010**

This newsletter is sent from NautaDutilh

In its European filesharing wars, the entertainment industry now targets network operators. A Dutch Court has rejected claims for a generic blockade of The Pirate Bay website.

For several years, the entertainment industry has been combating filesharing via peer to peer networks such as the very popular web site and service "The Pirate Bay". In doing so, it uses special litigation vehicles, such as the BREIN foundation in the Netherlands. Until recently, BREIN's litigation efforts were aimed directly at those responsible for operating or hosting file sharing networks. Now the entertainment industry has turned to network operators and internet access providers to implement blockades of the file sharing web sites.

By his decision rendered on 19 July 2010, the Presiding judge of the court of The Hague rejected the claims of BREIN, which were brought in preliminary injunction proceedings (the well known Dutch "kort geding" proceedings). At the core of the decision is the finding that pursuant to the Enforcement Directive (European Directive 2004/48/EC) an injunction can indeed be obtained against "innocent" third parties such as network and internet access providers, if their services are used in the course of an infringement of intellectual property rights. However, the Court held that this applies in specific and individualised cases of infringement and not as a generic measure to block access to filesharing (e.g. bittorrent) websites for all of Ziggo's 1.5 million internet subscribers.

Background

BREIN started the preliminary injunction proceedings against Ziggo in connection with the website The Pirate Bay. BREIN demanded that Ziggo block the access for all of its subscribers to all websites of The Pirate Bay via which people can, inter alia, exchange music, films and games by way of torrents (peer-2-peer file sharing). BREIN had already succeeded in obtaining a court order against The Pirate Bay to have them remove any unlawful torrents, but the service remained very active and enforcement efforts had no result.

Arguing that it had no other options, BREIN demanded that the largest Dutch broadband internet provider Ziggo implement blockades in its network (on the basis of a list of IP addresses and domain names), to prevent 1,5 million Ziggo subscribers from having access to the web site The Pirate Bay.

Ziggo's defence

In it's defence, Ziggo stressed its position as a "mere conduit" access provider, having no contractual relationship with the Pirate Bay web site.

It argued that the case concerned the alleged infringement of intellectual property rights by Ziggo's subscribers. Ziggo argued that in this case, the possibility of an injunction against it as a party providing "intermediate servcies" is not available. Ziggo took the position that the relevant legal provisions, implemented pursuant to the Enforcement Directive, would only apply in specific and individualised cases of infringement. Conversely, the possibility to order intermediate services providers to cease their services would not be available as a generic measure, where it is clear that the large majority of Ziggo subscribers are not involved in file sharing (and it also cannot be

said that the only purpose of a visit to The Pirate Bay is to engage in illegal activity).

Ziggo also argued that the requested measures would not be effective as these could easily be circumvented and that also for this reason, the requested blockade was disproportionate.

Court's decision

BREIN based its claims on Article 26d of the Dutch Copyright Act ("DCA") and Article 15e of the Neighbouring Rights Act ("NRA") and in the alternative, on the grounds that Ziggo committed an act of tort by not blocking access to the file sharing website. The relevant provisions in the DCA and NRA are based on Article 11 of the Enforcement Directive and provide that a rights owner can bring a separate action against an intermediary, if his services are used in the course of an infringement of intellectual property rights.

The interim relief judge found that such a separate action against an internet service provider could indeed be possible in a case like this, notwithstanding the liability regime for ISP's as laid down in the Dutch Civil Code (article 6:169c DCC, i.e. the implementation of the E-commerce Directive). However, the judge also held that it is necessary for the granting of an injunction as requested by BREIN, that it is established that the third party in question has indeed infringed the rights concerned by making use of Ziggo's services. According to the judge, the Articles 26d and 15e, interpreted in light of the Enforcement Directive, should only be used to end specific and identifiable infringements. It is only in those cases that it may be determined with the required degree of certainty that there is indeed an infringement and that the requested injunction is proportionate. Since for the vast majority of Ziggo's subscribers this could not be established, BREIN's claims, which regarded all of Ziggo's describers, were denied.

Another reason the judge gave for denying BREIN's claims was that granting these would be contrary to the requirement of subsidiarity. According to the judge, the fact that BREIN could have instigated actions against individual subscribers means that there were other, less far-reaching possibilities to act against the alleged infringement.

Comments

It is the first case in the Netherlands in which a court was asked to decide on a rights owners' request to categorically block access to a web site for all the subscribers of a 'mere conduit' access provider.

Several courts in EU countries have already issued decisions in cases between national representatives of rights owners and ISP's via whose networks subscribers can access The Pirate Bay's websites. There is a wide variety in the outcome of these cases, which is, for instance, due to differences in legislation or in the type of proceedings (e.g. criminal law rather than civil law).

The case on the merits is now pending and it will take approximately one year to find out whether the Court follows the approach of the judge in the preliminary injunction proceedings.

NautaDutilh assists Ziggo in this litigation.

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Simpson Grierson

Infrastructure Investment

01 Sep 2010

Is There a Change in the Wind?

The National led government has put infrastructure at the top of its economic agenda. Of the six policy drivers forming the core of its economic programme, "investing in productive infrastructure" is one.

No question here that the focus is on investment, not merely expenditure. This means infrastructure that will produce a positive economic return in terms of increases in productivity for every dollar spent.

But how is this investment going to be delivered?

The traditional model favoured by the previous Labour led Government was based on utilising public sector finance, with separate contracts with private sector contractors for the design, construction and maintenance. Under this model the operation may be contracted out (eg roads, wastewater treatment plants) or be kept in the public sector (eg prisons, hospitals, schools).

The more recently evolved "Public Private Partnership" or "PPP" model involves private sector finance, often incorporated into a single agreement between the public and private sector covering not only the provision of finance but also the design, construction, maintenance and operation.

This PPP model was squarely out of favour with the previous Government, which introduced legislation to tightly control, or even prohibit, PPPs. Good examples are in the areas of water and wastewater, roads, and prisons.

The Local Government Act 2002 included restrictions on contracts for the operation of water and wastewater infrastructure including limitations on the duration of contracts for such

operations to an uneconomic (in PPP terms) 15 years. These provisions were stated at the time they were introduced to be intended to reduce the scope for private sector involvement in the operation of water or wastewater infrastructure.

The Land Transport Management Act 2003 introduced a means of obtaining authority to toll roads, but also introduced a complex and ultimately discretionary process requiring ministerial approval for PPP agreements. Prior to the LTMA 2003 no such restrictions on contracts between the public and private sector had existed. Only public toll roads have been built since the LTMA 2003 was introduced.

The Corrections Act 2005 expressly precluded contracts for the management of prisons by any persons other than the Crown, which were expressly allowed under the previous legislation.

The National led Government, with infrastructure now at the top of the agenda, seems to have a more open mind.

The Minister of Infrastructure, Bill English stated at that the New Zealand Council of Infrastructure Development Conference last year that:

> *"The Government will enter into PPPs only if they work and deliver value for tax payers. Our interest is increasing the performance of public assets across the board... but let me clear – this is not about ideology: Private Sector involvement will happen where it makes sense."*

So, some qualified support, but behind the scenes a lot of work is being done to open the way for PPPs.

The legislative road blocks above are being removed. The Corrections Act has now been amended to expressly allow contracts with the private sector for management of prisons. Under the current Local Government Act Amendment Bill before Parliament, the 15 year period for contracts with the private sector relating to the provision of water and wastewater services has been extended to 35 years. This is a much more realistic period to allow a private sector operator to generate an economic return on a PPP project. The LTMA has yet to be amended to provide for a more certain process for the delivery of PPP roads, but there has been a lot of talk around identifying suitable candidates from the list of major roading projects in the Government's infrastructure plan.

The newly established National Infrastructure Unit formed within Treasury has also produced

model guidelines and standard form documentation for PPP projects, which will be able to be used by all Government departments, and local government, wishing to consider the PPP model for infrastructure delivery.

PPP projects are actually happening too. The operation of Mt Eden Prison is to be contracted out to the private sector, and the next major prison on the Government's agenda, Wiri Prison in South Auckland, is going to be delivered under a PPP model based on the new guidelines and documentation produced by the National Infrastructure Unit.

Many of the detractors of the PPP model question whether this model can truly deliver greater value. Many simply cannot get past the difference in cost of debt to the public sector compared to the private sector (which has only increased in recent years). These detractors find it difficult to accept that this increase in the cost of funding can be offset by other efficiencies and value drivers inherent in the PPP model.

However, there are many pieces to the value jigsaw when it comes to infrastructure delivery. Risk and time are two big pieces. The bundling together of all of the obligations from finance and design through to construction and operation under the PPP model allows the maximum allocation of risk to the private sector as well. Utilising the PPP model will also allow many projects to be brought forward and delivered sooner. Remember the Government is talking about investment in productive infrastructure. That of course means infrastructure that will deliver an economic return by boosting productivity. The benefit of bringing forward these productivity increases needs to be factored into the value equation.

Also, in the future the higher cost of finance to the private sector may not continue to be the given that it has been to date. A case on point is the recent interest shown by China Road and Bridge Corporation to be involved in consortia with New Zealand contractors to deliver some of the Government's largest road infrastructure projects. That organisation may be able to obtain funds at a cost comparable to or even lower than the cost of public sector finance in New Zealand.

The Government's cautious approach to PPPs, providing support, qualified by the requirement that PPPs "deliver value" seems to be the right approach. But will PPPs prevail in this environment? The old adage that the "proof of the pudding is in the eating" comes to mind. The Government is providing qualified support, and has removed many of the legislative blockages. If the PPP model does not prove it can deliver value, the traditional models for infrastructure investment will remain at the fore. If it does, the PPP model will survive and probably prosper and will supplant the traditional model in some areas.

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The Latest Amendments to the Securities and Exchange Act

◎Ching-hua Lu/Charlotte Liu

Revisions to seven articles in the Securities and Exchange Act ("SEA") were promulgated per Presidential Order on 2 June 2010. The important changes are highlighted as below.

- Enhancing cross-border supervision (Article 21-1)

  Article 21-1 of the SEA provided that "the government and agencies (or institutions) authorized by it may, based on the principle of reciprocity, enter into a cooperative treaty or agreement with a foreign government or agency (institution), or with an international organization, to facilitate matters such as information exchange, technical cooperation, and investigation assistance." The amendment further authorizes the competent authority to require, pursuant to the aforementioned cooperative treaty or agreement, agencies or institutions, legal persons, groups, or natural persons to provide information to foreign governments, agencies or institutions, or international organizations. The competent authority has authority to enforce this provision through administrative penalties. This revision will help Taiwan's securities regulation authorities to better cooperate with their counterparts in other countries, as well as international organizations.

- Changing disclosure deadlines (Article 36, Items 1-4)

  Beginning on January 1, 2012 (i.e. fiscal year-end 2011), public companies will be required to disclose and register their annual financial reports with the competent authority within three months after the end of their respective fiscal years.

- Improving shareholder meeting procedures (Article 36, Items 6 and 7)

  Amended Article 36, Item 6 requires all companies whose stocks are listed on a stock exchange or traded on the OTC market to hold their regular meetings of shareholders within six months after the end of their fiscal years. No delays will be excused.

  If a company whose stocks are listed on a stock exchange or traded on the OTC market fails to hold a regular meeting of shareholders to elect directors and supervisors in the year that their term of office expires, amended Article 36, Item 7 allows the competent authority to impose a deadline for the election. If the company still fails to comply within the deadline, all of its directors and supervisors shall be automatically discharged on the date that prescribed period expires.

- Improving insider trading regulations (Article 157-1)

1. The blackout period for the disclosure of material information is extended to 18 hours.

   The SEA previously prohibited insiders from trading within 12 hours after the public disclosure of material information. This blackout period is now extended to 18 hours. This revision to Article 157-1 accounts for the fact that companies may release material information at night and investors will not have enough time to properly absorb the information before the market opens the next day.

2. Insider trading regulations now cover trading of corporate bonds

   The SEA previously covered only stocks or other equity-type securities. However, the trading of corporate bonds based on insider information that is material to a company's ability to pay its debts also impairs the fairness of the market. The amendment to Article 157-1 expands the insider trading regulations to cover the trading of corporate bonds.

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INTELLECTUAL PROPERTY REPORT

Articles

Antitrust Causation In Standard Setting Organizations

Johnson Kuncheria

Introduction

While Standard Setting Organizations ("SSOs") and the technical standards they promulgate for various industries are essential to the operation of the competitive marketplace, they give rise to unique circumstances that can raise significant competitive concerns. SSOs are associations of industry participants who agree to adopt common standards to cover various (usually technically-oriented) aspects of their business. Although SSO agreements might on their face seem inconsistent with wide-open competition between different standards or formats (as with the historic battle between Betamax and VHS video recording standards), common standards can provide significant procompetitive benefits such as interoperability and increased connectivity.

Despite a number of pro-consumer justifications, the standard-setting process has the potential to pose significant anticompetitive concerns if abused by one or more SSO participants. For example, a patentee seeking approval of a standard in an SSO may misrepresent its willingness to license its patents on reasonable and nondiscriminatory terms. Then, once the standard covering the patented invention is adopted, the patentee may enforce those patent interests against or exact supracompetitive royalties from those competitors now committed to the standard.[1]

The anticompetitive implications of such a series of events are readily apparent: as a proximate result of the patentee's manipulation of the standard-setting process, the patentee is anointed with enhanced market power beyond what it could wield in the absence of standardization. In turn, the enhanced market power illegitimately equips the patentee with far greater leverage than it would otherwise possess in an arm's length patent negotiation. As a direct result of these deceptive actions, competition is restrained by substantially increased costs to implement the standard, in the form of unreasonable or discriminatory royalties, or litigation costs to defend against later patent infringement lawsuits. Particularly when patent rights are involved, this destructive ability to hold captive the entire product market subscribing to the standard is commonly called "patent hold-up" or "patent ambush."[2]

Antitrust Causation For Anticompetitive Standard-Setting Activity

In a case originally filed by the FTC against Rambus, Rambus, a computer memory designer, was accused of anticompetitive conduct before the Joint Electron Devices Engineering Council ("JEDEC"), a computer memory standard-setting body.[3] In that case, the FTC alleged that Rambus deceptively failed to disclose to JEDEC its patent interests in four technologies related to computer memory, which ultimately were adopted as part of the standard.[4] Rambus's patent interests related to these technologies included issued patents, pending patent applications and plans to amend patent applications.[5]

The Commission found that under JEDEC's patent disclosure policy, participating members of JEDEC expected others to disclose patent interests relevant to the technology being standardized.[6] The Commission ultimately held Rambus liable for unlawful monopolization, finding that "'but for Rambus's deceptive course of conduct, JEDEC either would have excluded Rambus's patented technologies from the JEDEC DRAM standards, or would have demanded RAND assurances [that is, undertakings to license to all interested industry parties on "reasonable and nondiscriminatory" terms], with an opportunity for *ex ante* licensing negotiations.'"[7] It is this quoted language that the United States Court of Appeals for the D.C. Circuit made the focal point of its arguably surprising decision to set aside the Commission's determination.

On appeal, the D.C. Circuit reversed the Commission, finding that there was insufficient evidence to establish injury to the competitive process.[8] In arriving at this conclusion, the court first assumed the Commission's determination that one of two possibilities was equally likely in a reconstructed standard-setting environment free from Rambus's alleged deceptive conduct: (1) Rambus's technology would not have been selected or incorporated into the standard; or (2) JEDEC would have demanded

RAND licensing assurances from Rambus.[9]

Focusing on the latter possibility, the court relied on Supreme Court precedent[10] to hold that JEDEC's lost opportunity to secure a RAND commitment from Rambus for its other members did not harm competition because "an otherwise lawful monopolist's end-run around price constraints, even when deceptive or fraudulent, does not alone present harm to competition in the monopolized market."[11] Thus, the D.C. Circuit concluded that the FTC had failed to prove anticompetitive effect because an inability to secure RAND commitments was not a competitive injury redressable under the antitrust laws.

The *Rambus* decision may not be entirely consistent with the treatment of a similar case by the United States Court of Appeals for the Third Circuit.[12] There, Broadcom claimed that Qualcomm misrepresented its commitment to provide fair, reasonable and nondiscriminatory ("FRAND") licensing related to its proprietary technology in mobile wireless telephony covering wideband code division multiple access ("WCDMA").[13] Broadcom alleged that Qualcomm made the licensing commitments as part of the intellectual property rights policies of the European Telecommunications Institute ("ETSI") and other SSOs to which Qualcomm was allegedly a signatory.[14]

Qualcomm's proprietary WCDMA technology was essential to practicing the Universal Mobile Telecommunications Systems ("UTMS") standard used in Global System for Mobility ("GSM") cellular networks.[15] Broadcom alleged that Qualcomm disregarded its FRAND licensing commitment; instead choosing to demand discriminatorily higher royalties from industry participants not using Qualcomm chipsets, including Broadcom.[16]

The Third Circuit reversed the district court's dismissal of the Section 2 complaint, holding that "[d]eceptive FRAND commitments . . . may result in [anticompetitive] harm" because they "obscur[e] the costs of including proprietary technology in a standard and increas[e] the likelihood that patent rights will confer monopoly power on the patent holder."[17] Additionally, the court found that the complaint sufficiently alleged a Section 2 injury to competition, reasoning that "even if Qualcomm's WCDMA was the only candidate for inclusion in the standard, it still would not have been selected by the relevant [SSOs] absent a FRAND commitment," thereby eliminating the possibility that the inclusion of WCDMA in the standard was unavoidable.[18] Thus, the Third Circuit's decision seems significantly different in its reasoning than the decision reached by the D.C. Circuit, which found that the inability to secure FRAND licensing does not by itself amount to an injury to the competitive process.[19]

Implications For Future Standard-Setting Activity

The apparent split in decisions between the D.C. Circuit in *Rambus Inc. v. Federal Trade Commission* and the Third Circuit in *Broadcom Corp. v. Qualcomm Inc.* leaves open the question of the level of anticompetitive conduct in an SSO setting necessary to establish antitrust causation through injury to competitive process. Interestingly, the D.C. Circuit, which was responsible for establishing flexible standards for reviewing anticompetitive conduct in *United States v. Microsoft Corp.*,[20] embraced a seemingly rigid "but-for" antitrust causation analysis in *Rambus Inc. v. Federal Trade Commission* in evaluating suspect conduct by a patentee in the SSO setting. In contrast, in 2001, the *en banc* D.C. Circuit in *Microsoft* adopted a flexible standard that would find conduct that "reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power" sufficient to establish competitive injury for a Section 2 monopolization claim.[21] The D.C. Circuit, however, arguably jettisoned this flexible antitrust causation standard that it called "edentulous"[22] in *Microsoft* in favor of a fairly rigid "but-for" approach in *Rambus*.[23]

Given the uncertain landscape for antitrust causation, entities that wish to engage in standard-setting activity should have competent legal counsel review the intellectual property rights policies of respective SSOs and their associated membership agreements and undertakings to determine whether the entity may be exposed to future antitrust liability. This is especially important in cases in which the standard-setting activity involves the selection of one among many mutually-exclusive technologies as the *de facto* standard. As often is the case, participation in SSOs may involve employees who do not act in an executive or managerial capacity, or have high levels of awareness as to potential legal implications of such participation. Instead, these individuals are often scientists, engineers or experts in their field. In light of this fact, it is advisable that companies implement policies requiring employees who are typically disconnected from company decision-makers to report standard-setting activity affecting the entity's business to the appropriate legal officers within the company so that the entity can evaluate its obligations under the SSO and assess its potential exposure to antitrust or other adverse legal liability.

While the courts work to resolve their somewhat-conflicting views of the level of activity required to establish antitrust causation, standard-setting participants should generally avoid activity that could be seen as even contributing to injuring the competitive process, and should regularly consult with counsel regarding any apparent policies associated with SSO activity or membership.

[1] *See*, *e.g.*, *Broadcom v. Qualcomm*, 501 F.3d 297 (3d Cir. 2007).
[2] *See* Joseph Farrell et al., *Standard Setting, Patents, and Hold-up*, 74 ANTITRUST L.J. 603, 603-04 (2007) (explaining that "hold-up arises when a gap between economic commitments and subsequent commercial negotiations enables one party to capture part of the fruits of another's investments, broadly construed").
[3] *See Rambus Inc. v. Fed. Trade Comm'n*, 522 F.3d 456, 459-62 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (Feb. 23, 2009); *see also In re Rambus, Inc.*, Docket No. 9302 (F.T.C. Aug. 2, 2006) (providing a lengthy liability opinion by the Commission), *available at* 2006 WL 2330117; *Rambus v. Infineon Techs. AG*, 318 F.3d 1081, 1084-86 (Fed. Cir. 2003) (involving a fraud counterclaim in a patent infringement suit but one that provides a good summary of the facts that have led to a number of cases challenging Rambus's conduct under various legal theories including antitrust).
[4] *Rambus*, 522 F.3d at 459.
[5] *Id.*
[6] *Id.* at 461.
[7] *Id.* (citing *In re Rambus, Inc.*, Docket No. 9302, at 74 (F.T.C. Aug. 2, 2006), *available at* 2006 WL 2330117).
[8] *Id.* at 463, 466-67.
[9] *Id.* at 463-64.
[10] *Id.* at 464-67 (relying on *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998))). The D.C. Circuit read *NYNEX* as demonstrating that "an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus diminish competition." *See id.* at 464.
[11] *Id.* at 466-67 (further analogizing this case to *NYNEX*).
[12] *Compare id.* at 464-67 (finding no Sherman Act Section 2 violation by reasoning that deception alone cannot not amount to competitive injury when standardization absent such deception could merely have resulted in more favorable licensing terms), *with Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007) (holding that under Section 2, a deceptive FRAND commitment may result in anticompetitive harm because "deception in consensus-driven private standard-setting environment harms the competitive process.").
[13] *Id.* at 303-04.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 304.
[17] *Id.* at 314.
[18] *Id.* at 316.
[19] *Compare id.*, *with Rambus Inc. v. Fed. Trade Comm'n*, 522 F.3d 456, 464-67 (D.C. Cir. 2008) (explaining that "an otherwise lawful monopolist's end-run around price constraints, even when deceptive or fraudulent, does not alone present a harm to competition in the monopolized market"), *cert. denied*, 129 S. Ct. 1318 (Feb. 23, 2009).
[20] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (*en banc*).
[21] *Microsoft*, 253 F.3d at 78-80.
[22] Although the word "edentulous" literally means "toothless" and typically carries a pejorative connotation, the *en banc* D.C. Circuit used it to characterize the diluted antitrust causation standard that it announced in *Microsoft*. *See id*; *see also* Merriam-Webster Online Dictionary, "edentulous," http://www.merriam-webster.com/dictionary/edentulous (last visited June 28, 2010).
[23] *Compare Rambus*, 522 F.3d at 463-67, *with Microsoft*, 253 F.3d at 78-80.

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Davis Wright Tremaine LLP

How to Make the Most of Your Nonprofit Hospital Merger or Acquisition

09.08.10

By Robert L. Schuchard

Merger and acquisition activity in the health care sector is on an upswing, as predicted in January by Moody's Investors Service's 2010 Outlook. However, whether these acquisitions will realize their intended benefits may depend on how well the parties involved have considered, and executed, their key objectives.

Moody's Outlook cited two primary deal motivators that are particularly acute for stand-alone nonprofit hospitals: limited access to capital at a time when capital needs are increasing, and a need for economies of scale. Nonprofit health care systems, like their for-profit counterparts, are seeing opportunities to acquire distressed facilities hard hit by the economic recession.

Many commentators also believe the recent federal health care reform legislation (the Patient Protection and Affordable Care Act) will encourage further consolidation within the industry, including among hospitals, as hospital providers seek expanded breadth of services and economies of scale in devising newly structured health care delivery ventures.

Certain success factors will help both nonprofit buyers and sellers achieve success, whether the transaction takes the form of a merger, affiliation, or other corporate combination. Seven of those factors are discussed in this advisory.

1. **Know and remember your rationale**

Whether buying or selling a hospital, the parties' rationales for the transaction must be clearly articulated and understood. For buyers, this is particularly important, since the buyer's board and management will need to keep this rationale front and center as they undertake negotiations and due diligence. Buyer rationales might include accessing a new market, or service line, obtaining greater market share, or expanding services to a greater segment of the population.

In today's environment, most buyers also need to justify a return on investment, so a careful pro forma projection of income and expenses, with clearly stated and valid assumptions, will be key. The negotiators should have these assumptions in mind when negotiating some of the finer points of the transaction. These key assumptions will also inform the due diligence review and help establish materiality thresholds.

For sellers, the sale must be viewed in the context of the organization's strategic initiatives—whether as basic as survival or, in the context of securing necessary resources or commitments, to guarantee future services or expansion.

A failure to focus early and often on the rationales may lead to a transaction that closes but fails to deliver.

2. Know your limits

Knowing your limits (or constraints) is as important as knowing the rationales. Hospital boards and management cannot afford to put time, energy, and resources into a transaction that fails because of a deal breaker that emerges late in the negotiations. Accordingly, hospitals should invest time at the outset internally investigating and clearly spelling out "deal breakers." For sellers these might include requiring a certain dollar threshold to clear all existing financial obligations, certain post-closing commitments to maintain facilities or services, or prohibitions on religious control or use of the facilities. Similarly, if the prospective seller has requirements for potential buyers—access to capital, a strong seller balance sheet or credit rating, expertise in a particular service line, reputation for excellence in care, or presence in a useful geographic area—these should be understood.

For buyers, their requirements might include certain due diligence thresholds (e.g., no history of or ongoing investigations by the Office of Inspector General or the Internal Revenue Service), fully funded pension obligations, no services that contravene the strictures of faith-based organizations (e.g., euthanasia or abortions), no interference with the eligibility to continue to receive certain governmental funding (or no requirement that the entity would have to pay back such funding as a result of the transaction, such as with certain grants from the Federal Emergency Management Agency), or a pro forma financial projection that shows the requisite return on investment.

3. Know your hurdles

Apart from the parties' negotiations, the major hurdles will be provisions in third-party contracts and charter documents, and certain regulatory approvals.

Some third-party contracts may include provisions allowing or requiring termination upon the change of control of the seller. If a key payor contract is terminable on a change of control, the parties should consider approaching the payor to explore its willingness to work with a new buyer. In addition, charter documents may contain religious operations issues or other requirements.

Regulatory hurdles principally surface in two areas: antitrust and so-called "conversion" statutes applicable to transactions involving the sale or change of control of a nonprofit hospital. A thorough analysis of the market and the potential effect of a transaction on pricing and competition should be evaluated before due diligence is commenced and significant resources or time are expended on a potential transaction.

If the parties anticipate that there may be antitrust resistance, then safeguards around the negotiations and due diligence must be put in place, in case there is a successful assault on the transaction or the transaction fails to close. Similarly, the requirements of the conversion statutes need to be evaluated to ensure that all requirements can and will be met. For instance, some conversion statutes in effect require a Request for Proposals (RFP) process so that the regulators (generally the attorney general for the state) can conclude that the price and terms reflect market value. In some states, an appraisal must be submitted, and, in others, conflicts of interest rules prohibit those who might accept employment with the buyer from participating in the negotiation. These requirements must be considered in advance. In addition, closing conditions should be negotiated to protect the buyer from undue governmental conditions or requirements.

4. Control your message

The parties will undoubtedly enter into nondisclosure agreements which will prohibit each party from sharing confidential information with third parties and generally require that any public comments about the transaction be approved in advance by both parties. Early on in the process, the seller will want to communicate with its employees, medical staff, and constituents to keep them apprised of the status of the deal and give, if possible, assurances around services to be continued and the status of employees vis-à-vis the buyer. Additionally, both parties should be able to express a common vision for the future after the transaction closes.

The parties' messages should be accurate and consistent, use a similar vocabulary, and be organized and complementary. Governmental agencies monitor press releases, sometimes attend town hall meetings or forums convened by the parties, and rely on or replicate the disseminated information during the course of their investigations and approvals. Most conversion statutes also require the seller to convene a public hearing on the transaction, and it is again important that the testimony be consistent with the parties' messages. A communications consultant can be helpful.

5. Follow an orderly board process

Board members have fiduciary duties of care and loyalty. The duty of care requires the board to engage in a thoughtful and thorough review of options and proposals. In some instances, because of the inevitable governmental investigations, a heightened sensitivity to the duty of care of the seller's board may be required. The duty of loyalty requires confidentiality and the absence of conflicting interests on the part of board members and management involved in the decision-making and/or negotiations.

To effectively fulfill these duties, the seller's board could:

Hire a consultant to work with the board and management to evaluate the options available to the hospital—these options could be changing service lines, joint venturing, affiliation, or sale.
If a sale or joint venture is suggested, conduct an evaluation to determine the fair market value of the hospital.
Clearly articulate the rationale for the transaction, any hurdles, and any deal breakers.
Conduct an RFP or approach the likely buyer candidates to explore their respective interest in engaging in the contemplated transaction.
Require any board members (or executive officers) with financial or other relationships with any of the potential buyers to disclose such relationships in writing. The executive committee (or other appropriate committee) can determine appropriate conflict of interest procedures with the assistance of counsel. Often these disclosures are made in response to a questionnaire prepared for this purpose.
Evaluate in comparative terms the proposals received. Investment bankers generally help with this process and often each governing board member is asked to rate each proposal based on a number of predetermined criteria. If only one potential buyer emerges, the proposal must be evaluated in the context of the previously established rationale, desired benefits, and rationale for the deal.
Move to confidential discussions with one or more of the potential buyers.
Conduct some preliminary due diligence on the preferred potential buyers.
Agree upon a letter of intent with the selected potential buyer following board evaluation and approval.

Although not generally subject to the same review by governmental agencies, a process for the buyer's board might proceed as follows:

If a sale or joint venture is suggested, conduct an evaluation to determine the fair market value of the hospital to be acquired as well as the strategic value to this particular buyer.
Clearly articulate the rationale for the transaction, any hurdles, and any deal breakers (including due diligence thresholds).
Require any board members (or executive officers) with financial or other relationships with any of the sellers to disclose such relationships in writing. The executive committee (or other appropriate committee) can determine appropriate conflict of interest procedures with the assistance of counsel.
Conduct some preliminary due diligence on the seller around material items (generally around those items that directly impact value—material contracts, for instance).
Agree upon a letter of intent with the selected potential buyer following board evaluation and approval.

6. Do not neglect a well-developed letter of intent

Some parties overlook the importance of the letter of intent. Before time and money is devoted to moving a deal forward, carefully consider whether there is enough "common ground" on key terms to make the deal work.

Whether a Memorandum of Understanding (MOU), a term sheet, or a letter of intent is used, a signed, written agreement should be prepared reflecting the basic business terms, including purchase price; the CEO to serve post-closing; what commitments, if any, are made with respect to the continuation of services or facilities; commitments made with respect to capital expenditures; other financial commitments; and commitments with respect to governance or management.

7. Move quickly to close

Once the deal is agreed upon, move as quickly as possible to closure—understanding that there is generally little an entity can do to speed up the governmental reviews that might be required. The deal will be a large distraction to management, employees, and the medical staff. After a certain period, people get "tired" of the deal and may change their minds or raise new issues or objections. Provided an entity has completed due diligence and obtained all necessary third-party and governmental approvals, expediting closure is in both parties' interests.

Disclaimer

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

The Day After *Hanif/Nishihama* Is Overruled

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Since *Hanif v. Housing Authority*, 200 Cal.App.3d 635 (1988) and *Nishihama v. City and County of San Francisco*, 93 Cal. App. 4th 298 (2001) were decided, defendants in personal injury actions have been allowed to reduce the plaintiff's claimed medical expenses by any amounts that were written off by the medical providers. These write-offs typically occurred as a result of agreements between the medical providers and the plaintiff's health insurers that limited amounts paid for medical services. The viability of the *Hanif/Nishihama* rule is now in question because the California Supreme Court has granted review in *Howell v. Hamilton Meats & Provisions, Inc.*, 179 Cal. App. 4th 686 (2009). So virtually every liability insurance carrier doing business in California is asking: "Are there any options if the California Supreme Court overrules the *Hanif/Nishihama* line of cases?" The simple answer is: "Yes, but you will need to be proactive."

First, you should understand what is *not* before the California Supreme Court. The attack on *Hanif/Nishihama* is based on the collateral source rule. The collateral source rule does not apply to breach of contract cases. *Bramalea v. Reliable Interiors*, 119 Cal.App.4th 468, 472-73 (2004). Therefore, the *Hanif/Nishihama* rule should continue to apply to claims brought under a policy's Medpay coverage.

The concern, of course, is third-party liability claims. Liability insurers are required to pay for "reasonable" medical expenses incurred by the injured party. The question, therefore, is what constitutes a "reasonable" medical expense? No matter how the Supreme Court rules, it is important to understand that the amount charged by the medical provider is not necessarily "reasonable." *Graf v. Marvin Engine Truck Co.*, 207 Cal.App.2d 550, 555 (1962); *Gimbel v. Laramie*, 181 Cal.App.2d 77, 81 (1960); Dimmick v. Alvarez, 196 Cal. App. 2d 211, 216 (1961); Guerra v. Alestrieri, 127 Cal.App.2d 511, 520 (1954).

The primary effect of overruling the *Hanif/Nishihama* rule will be to shift the burden of proof to the defendant. In a post-*Hanif/Nishihama* world, liability insurers will now have the burden to show that the amount charged by the medical provider is not reasonable - rather than simply asking the court to deduct the amount written off by the provider. There are at least two options that a defendant may consider pursuing to meet this burden.

First, the defendant should consider retaining an expert who specializes in the economics of health care. It is well-known that medical providers are paid their full billed amounts by only a small fraction of their patients. *Vencor Inc. v. Nat'l States Ins. Co.*, 303 F.3d 1024, 1029 n. 9 (9th Cir. 2002) ("It is worth noting that in a world in which patients are covered by Medicare and various other kinds of medical insurance schemes that negotiate rates with providers, providers' supposed ordinary or standard rates may be paid by a small minority of patients"); *Stanley v. Walker*, 906 N.E.2d 852, 857 (Ind. 2009) ("[I]nsurers generally pay about forty cents on the dollar of billed charges and . . . hospitals accept such amounts in full satisfaction of the billed charges"); David Stahl, *The Role of Courts in Protecting the Uninsured from Being Overcharged For Emergency Medical Services*, 33 Nova L. Rev. 269, 277 (2008) ("[A]ccording to one expert witness, some hospitals receive their full published charges in only one to three percent of their cases"); Keith T. Peters, *What Have we Here? The Need for Transparent Pricing and Quality Information In Health Care*, 10 J. Health Care L & Pol'y 363, 366 (2007) ("[I]n 2004, hospitals in the United States were paid about thirty-eight percent of their list prices by patients or their insurers"); George A. Nation,

Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing, 94 KY. L.J. 101, 104 (2005) ("The labels for these charges, 'regular,' 'full," or 'list,' are misleading, because in fact they are actually paid by less than five percent of patients nationally"); Margaret J. Davino, *The Class Action Against Hospitals for Collecting Payments*, New York Law Journal (Sept. 9, 2004) ("All together, a small percentage of patients pay charges").

We are currently working with some of our clients to retain a health care economist, who will be available to testify as to what medical providers customarily receive for similar treatment. *Corsini v. United Healthcare Serv. Inc.*, 145 F.Supp.2d 184, 190 (D.R.I. 2001) ("reasonable and customary charges" are determined based on amounts providers actually receive as payments rather than amounts providers bill); *Temple University Hosp. v. Healthcare Management Assoc.*, 832 A.2d 501, 508-10 (Pa. Super. 2003) (holding that "reasonable fee" for health provider's services must be based on amounts received, not amounts billed by providers); *Labomard v. Samaritan Health Sys.*, 991 P.2d 246, 254-55 (Ariz. App. 2000) (interpreting "customary charges" to mean amount actually paid to providers for their services, not the amount they billed); see *Baycare Health Sys. v. AHCA*, 940 So.2d 31 (Fla. App. 2006) (affirming agency order interpreting "usual and customary charges" to be based on amounts actually paid, not amounts billed); *Feiler v. New Jersey Dental Assoc.* 467 A.2d 276, 282 (N.J. Super. 1983) (holding that dentist committed fraud by representing to insurers that he was submitting bills for "usual and customary charges" when he actually received payment for those charges from only a small percentage of his patients); Harry Chamberlin, 49 Orange County Lawyer 26, 40 (Dec. 2007) ("Virtually all jurisdictions to address the issue reject the notion that 'reasonable and customary' means any amount billed by the provider . . . .").

Second, in cases involving large medical bills, it may also be advisable to conduct discovery into the amounts the plaintiff's health providers typically receive for similar medical procedures/treatment. For example, the defendant can notice the deposition of the "person most knowledgeable" at the hospital or other provider regarding such information.

The bottom line is this: there is no reason insurers must accept the amounts billed by medical providers as "reasonable" even if the Supreme Court overrules *Hanif/Nishihama*. Through the use of proper expert testimony and additional discovery, medical bills can be challenged based on essentially the same rationale that led to the *Hanif/Nishihama* rule.

Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

WSGR ALERT

SEPTEMBER 2010

THE ADVENT OF PROXY ACCESS: IMPLICATIONS FOR PUBLIC COMPANIES AND BOARDS

On August 25, 2010, the Securities and Exchange Commission (SEC) issued its long-anticipated final rules giving public company shareholders the right, under certain circumstances, to require the company to include in its proxy statement, and on its proxy card, shareholder nominees for a portion of the seats on the board of directors. At the same time, the SEC amended Securities Exchange Act Rule 14a-8(i)(8) to permit shareholders to submit shareholder proposals seeking adoption of broader proxy access rights. The new rules become effective 60 days after publication in the Federal Register. The complete text of the new rules is available at http://www.sec.gov/rules/final/2010/33-9136.pdf.

The advent of "proxy access" had appeared inevitable for some time. Proposed rules were issued by the SEC in June 2009,[1] and the comment period was re-opened for an additional 30-day period in December 2009,[2] signaling the seriousness of the current Administration's efforts finally to implement a system of proxy access. The specific authorization of proxy access in the Dodd-Frank Wall Street Reform and Consumer Protection Act[3] removed any remaining drama from the SEC's August 25 Release.

Summary of the New Rules

A summary of the new rules is included as Appendix A. We discuss below certain key differences between the final and the proposed rules, and provide our thoughts on the implications of the new rules for public companies and boards.

Key Differences between Final and Proposed Rules

The final rule contains a number of modifications to the rule proposals contained in the proposing release, but the basic structure and content of the new proxy access rule has not changed.

Among the more significant changes in the final rule are the following:

Minimum Ownership and Holding Period

To be eligible to utilize the proxy access mechanism, the nominating shareholder or group must have held not less than 3 percent of the voting power of the issuer's securities entitled to be voted at the meeting, and to have held that amount of securities continuously for at least three years (the proposing release included a sliding 1-3-5 percent scale based on market capitalization and required a one-year holding period).

Effect of Securities Lending and Short Sales

The nominating shareholder or group must hold both investment and voting power with respect to the securities used to demonstrate satisfaction of the 3 percent ownership requirement. In calculating the ownership percentage held, under certain conditions a nominating shareholder or group member would be able to include securities loaned to a third party in the calculation of ownership.

In determining the total voting power held by the nominating shareholder or any group member, securities sold short (as well as securities borrowed that are not otherwise excludable) must be deducted from the amount of securities that may be counted towards the required ownership threshold and holding period requirement.

Rule of Priority in Case of Multiple Nominations

Where there are multiple eligible nominating shareholders or groups who propose nominees and the number of nominees proposed exceeds the permissible number of shareholder nominees, the nominating shareholder or group with the highest percentage of the company's voting power will have its nominees included in the company's proxy materials, rather than the nominating shareholder or group that is first to submit a notice, as previously proposed.

Companies Will Be Able to Settle with Nominating Shareholders

The prior proposals discouraged the issuer from settling with the proponent, since any settlement did not count against the cap on shareholder nominees of the greater of one director or 25 percent of the entire board of directors. Under the final rule, any nominees of the nominating shareholder or group that a

[1] As described in this WSGR Alert: http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert_schumer.htm.

[2] As described in this WSGR Alert: http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert_proxy_disclosure_enhancements.htm.

[3] As described in this WSGR Alert: http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert_dodd_frank2.htm.

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company agrees to include as company nominees after the filing of the notice will count toward the 25 percent.

Change to Advance Notice Requirements

The nominating shareholder or group must provide notice to the company no earlier than 150 days prior to the anniversary of the mailing of the prior year's proxy statement and no later than 120 days prior to this date. The proposed rule would have required the nominating shareholder or group to provide notice no later than 120 days prior to the anniversary of the mailing of the prior year's proxy statement or in accordance with the company's advance notice provision, if applicable.

Delayed Effectiveness for Small Reporting Companies

The new rule will not apply to small reporting companies (generally, those with a public float of less than $75 million as of the last business day of their most recent second fiscal quarter) until three years after the rule becomes effective for other issuers.

Implications of the New Rules

Heightened Sensitivity in the Board Room

Proxy access adds one more concern to the growing list of issues that impact dynamics and decision making in the board room. "Check the box" governance principles, the ever-increasing influence of proxy advisory firms with rigid proxy voting guidelines and withhold vote policies, the advent of majority voting, the elimination of broker discretionary voting in uncontested director elections, say-on-pay and other compensation issues, the decline of structural protections such as the classified board, and the ascendancy of the short-term investor, all have increased the challenges for boards of directors seeking to perform their basic function: setting and overseeing the long-term strategy of the company. The specter of Rule 14a-11 campaigns underscores the importance of cohesion and transparency in the board room, prompt action to address issues of performance or governance, regular evaluation of board composition and performance, and detailed knowledge of investors' perspectives and concerns regarding the company.

More, and Different, Election Contests

There can be no doubt that the new rules will lead to an increase in the number of election contests. The SEC's estimate that the new rules will result in an additional 45 election contests per year appears optimistic, although the revised minimum ownership and holding period requirements in the final rule impose a greater burden on investors seeking to submit nominations or to form a nominating group than the requirements in the proposed rule. As the SEC acknowledges in the release, the ability to include nominees in the company's proxy statement and on its proxy card eliminates only a small portion of the expense associated with seeking board representation; serious efforts to elect shareholder nominees will require an active solicitation campaign, involving public relations, legal and other advisory fees and costs, and a substantial time commitment by the nominating shareholder or group.

As discussed below, although significant limitations are inherent in the rule, we believe that Rule 14a-11 has substantial tactical value to financial activists, and we expect them to avail themselves of this new tool.

In addition, two types of contests that currently are infrequent likely will become more common: single-nominee campaigns targeting replacement of a specific board member, and concurrent campaigns by multiple shareholders at the same company. The increase in majority withhold votes against individual directors in recent years suggests that individual directors may in some cases be vulnerable to single-nominee campaigns, and we expect to see a number of these contests in 2011. In addition, Rule 14a-11 specifically permits multiple shareholders or groups to submit nominations, subject to the overall cap on shareholder nominees and the order of priority set forth in the rule, and the SEC acknowledges in the release that companies may be confronted with both Rule 14a-11 campaigns and a traditional proxy contest at the same annual meeting. Since nominees elected pursuant to a traditional proxy contest do not count against the Rule 14a-11 cap, the combination of a Rule 14a-11 campaign and a traditional proxy fight could result in the loss of significantly more than 25 percent of the seats on the board to dissident shareholders.

The new rule also will likely give rise to a number of campaigns designed to draw attention to specific causes or special-interest concerns, although the risk of mere "nuisance" campaigns is somewhat mitigated by the revised ownership and holding period thresholds.

Will Financial Activists Use the Proxy Access Mechanism?

We fully expect unions, state pension funds, and governance activists, which currently account for a significant majority of shareholder proposals, to form nominating groups to submit alternative nominees for director. A number of governance activists have been preparing for Rule 14a-11, with CalPERS establishing a "director database" of potential candidates. But will financial activists, such as activist hedge funds, use the Rule 14a-11 mechanism?

On the one hand, the rule seems designed to favor larger institutional and pension fund investors holding shares for the long term, rather than financial activists, who typically do not hold an investment continuously for a three-year period. Financial activists generally will need to form alliances with shareholders who satisfy the ownership and holding period requirements in order to use Rule 14a-11, will not be eligible to participate in a nominating

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group unless they can certify that they do not have a control intent,[4] will be limited to a maximum of 25 percent of the board, will be ineligible if they engage in any solicitation activity outside Rule 14a-11, and will not be able to disseminate or obtain forms of proxy. However, the rule gives financial activists a new means of agitation: the mere filing of new Schedule 14N disclosing the commencement of efforts to form a nominating group will put pressure on the target company, and activists will be able to submit nominations 150 days prior to the anniversary of the prior year's annual meeting, increasing the time period during which the board is confronted with the threat of a contest. In addition, activists will be able to test the waters through their Schedule 14N filings and discussions with potential nominating group members, and they still will retain flexibility to switch from a Rule 14a-11 campaign to a traditional proxy contest at any time before the shareholder nomination window closes pursuant to the target company's bylaws. Activists also may benefit from the split-ballot phenomenon we address below.

Furthermore, Rule 14a-11 may act as a catalyst for new activist campaigns and activist proxy contests. Activists certainly will monitor Schedule 14N filings, and as a result may determine to target companies not previously on their radar screens. Given that shareholders seeking to form a nominating group will make Schedule 14N filings in connection with their efforts prior to submitting nominations, and since the nomination period under Rule 14a-11 generally will close before the nomination period under the target company's bylaws, activists will have ample time to initiate a campaign while the window for a traditional proxy contest remains open. Financial activists also are likely to evaluate companies that experienced a Rule 14a-11 campaign the previous year as potential targets.

Which Companies Will Be Targeted?

Prominent companies that are frequent targets for the latest shareholder proposals by unions, pension funds, and governance activists likely will be at significant risk for Rule 14a-11 campaigns. So, too, are companies on the annual CalPERS list, those being monitored by the Council of Institutional Investors due to shareholders having approved a shareholder proposal at the preceding annual meeting or having received a majority withhold vote for one or more directors, and companies with low ratings under other governance group or proxy advisory ranking systems. Companies with highly publicized recent governance or performance issues, and those with hedge fund activist investors, are also at higher risk.

More Power for Proxy Advisory Firms

The proxy advisory firms, in particular RiskMetrics Group, wield enormous power in contested elections of directors, and the recommendations of RiskMetrics are strongly correlated with proxy contest outcomes. RiskMetrics has an established framework for evaluating the respective slates in a proxy contest for board representation (as opposed to control): (1) is change warranted and, if so, (2) whose nominees are most appropriate to oversee the actions needed to effect change? Proxy access creates new challenges for RiskMetrics and other advisory firms, and gives them even more power in corporate governance. Although RiskMetrics and other proxy advisory firms realistically will have limited information to evaluate the relative merits of individual board candidates, they nonetheless will make these choices. This dynamic will create yet more uncertainty for directors already concerned by the plethora of "check the box" voting guidelines and withhold vote triggers embedded in RiskMetrics' corporate governance policies.

Split Ballots

Under the traditional proxy contest system, investors face a choice between submitting the company's proxy card or the insurgent's. In a short-slate campaign (a campaign for less than all seats up for election), the insurgent can oppose specific directors, but any vote on management's proxy card is a vote solely for the management nominees and forecloses voting for any of the insurgent's nominees. Sophisticated institutions understand that they can submit a ballot at the meeting cherry-picking from both the company's and the insurgent's nominees, but this is quite rare. The new proxy card required in a Rule 14a-11 solicitation will not permit the company to request authority for its nominees as a group, but instead will require the company to provide the proxy giver a means to indicate which of management's and the nominating shareholder or group's nominees it supports. As a result, shareholders will have ready means to split their ballot between the company's and the nominating holder or group's nominees. This will meaningfully increase the risk for those company nominees being targeted for replacement.

Litigation and No-Action Relief

As has long been the case under Rule 14a-8 for shareholder proposals to be included in a company's proxy statement, Rule 14a-11 will engender a spate of no-action requests from companies, challenging nominating shareholders' and groups' eligibility to submit nominations and challenging the eligibility of specific nominees. Companies will need to act promptly after receipt of Rule 14a-11 nominations, particularly because certain obvious areas of challenge, such as whether a nominating shareholder or group in fact satisfies the complex 3 percent/three-year continuous holding period requirement, may require meticulous research.

[4] It should be noted that the test for what constitutes a control intent under Rule 14a-11 is different from that under Rule 13d-1(c), and persons who have acquired securities for the purpose of influencing—as opposed to changing—control of the issuer are not precluded from participating in a Rule 14a-11 campaign.

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In addition, it can be expected that a number of issues are likely to give rise to litigation, including: whether nominating groups that hold 5 percent or more of a class of securities are required to file a Schedule 13D rather than being able to rely on Schedule 13G; whether all group members have been properly disclosed; and whether the solicitation has the purpose or effect of causing a change in control. The frequency of Rule 14a-9 litigation relating to false and misleading disclosure is also likely to increase.

The Director Nominee Pool

In recent years some hedge fund activists have been able to attract relatively qualified candidates to serve on insurgent slates. But it remains somewhat difficult to recruit these candidates, due to the reluctance of many potential nominees to align themselves with dissidents, to participate in a contested election and to subject themselves to individual scrutiny, criticism, and, at times, personal attacks. Highly qualified individuals will be no less circumspect about participating in a Rule 14a-11 campaign, unless satisfied with regard to the members of the nominating group and assured of a vigorous solicitation effort. It is unclear to what extent individuals with strong business or financial expertise, as opposed to governance credentials, will consent to participate in Rule 14a-11 campaigns.

Negotiation and Settlement

Many companies have adopted a practice of constructive engagement with proponents of shareholder proposals, in order to resolve potential issues that otherwise would give rise to a shareholder proposal. Since the new rule permits post-nomination negotiation and settlement with the nominating shareholder or group, companies also will have opportunities to resolve shareholder nominations via settlement, which in some cases may be preferable for all parties.

Review of Nomination Bylaws

Companies should review their nomination bylaws in light of Rule 14a-11 to determine whether any changes are necessary or advisable. As noted, companies run the risk of being subject to both Rule 14a-11 and traditional proxy campaigns, and should ensure that their bylaws operate appropriately in light of the different timing and disclosure requirements of the two nomination schemes.

More Proxy Access Proposals

The adoption of Rule 14a-11 merely sets a floor for proxy access. Revised Rule 14a-8(i)(8) permits shareholders to propose precatory or binding bylaw amendments to expand the scope of proxy access beyond the limitations in Rule 14a-11. It is not clear that governance activists will be satisfied with the right of proxy access under Rule 14a-11, and they may use newly expanded Rule 14a-8(i)(8) to agitate for rights beyond those provided under Rule 14a-11.

Conclusion: The Critical Importance of Director Engagement

The most important consequence of proxy access is clear. Boards and management will have to spend additional time on corporate governance issues, especially board evaluation and nomination processes, and on shareholder relations activities related to those issues. Companies will need to ensure that—in addition to issues of strategy and financial performance—key investors have an appropriate understanding of the company's board-nomination and evaluation processes and the qualifications and contributions of individual directors. Chairmen and nominating committee chairmen may need to play an expanded role in shareholder relations, and individual directors generally may need to be more visible so that investors have greater familiarity with their value to the company.

In addition, public companies will need to expand their dialogue with key investors about potential director candidates. Many companies now engage proactively in dialogue with key investors when seeking new board members, and the practice of soliciting investor input should continue to grow under the proxy access regime in order to maximize the likelihood of support in the event of a Rule 14a-11 solicitation.

For any questions or more information on these or any related matters, please contact Warren de Wied, David Berger, Larry Chu, Katie Martin, Mike Ringler, Richard Cameron Blake, your regular Wilson Sonsini Goodrich & Rosati contact, or any member of the firm's corporate and securities practice.

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Appendix A
Summary of the New Proxy Access Rules

Companies Subject to the Rule

New Rule 14a-11 will apply to companies that are subject to the Securities Exchange Act (Exchange Act) proxy rules, including investment companies registered under Section 8 of the Investment Company Act of 1940. The rule also will apply to controlled companies and those companies that choose to voluntarily register a class of securities under Section 12(g). Companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act and foreign private issuers will be exempt. A company to which the rule would otherwise apply will not be subject to Rule 14a-11 if applicable state (or, in the case of foreign issuers, foreign) law or the company's governing documents prohibit shareholders from nominating candidates for the board of directors. However, companies will not be permitted to "opt out" of Rule 14a-11 and it is not apparent that any U.S. public company would fall within the state-law or governing-document exception, other than companies with non-voting common stock.

Who Can Use the New Rule

A company will be required to include a shareholder nominee or nominees in its proxy statement if the nominating shareholder or group:

- holds, as of the date of the shareholder notice on Schedule 14N, either individually or in the aggregate, at least 3 percent of the voting power (calculated as required under the rule) of the company's securities that are entitled to be voted on the election of directors at the annual meeting;
- has held the qualifying amount of securities used to satisfy the minimum ownership threshold continuously for at least three years as of the date of the shareholder notice on new Schedule 14N;
- continues to hold the required amount of securities through the date of the shareholder meeting;
- is not holding any of the company's securities with the purpose—or the effect—of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a-11;
- does not have an agreement with the company regarding the nomination;
- provides a notice to the company on Schedule 14N, and files the notice with the SEC of the nominating shareholder's or group's intent to require that the company include that nominating shareholder's or group's nominee in the company's proxy materials no earlier than 150 calendar days and no later than 120 calendar days before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting; and
- includes the certifications required by the rule in its Schedule 14N.

In determining whether the shareholder or group meets the ownership requirements, securities that have been loaned by or on behalf of the nominating shareholder or any member of the group may be counted toward the ownership requirement only if the nominating shareholder or group member has the right to recall the loaned securities and will recall the loaned securities upon being notified that any of the nominees will be included in the company's proxy materials.

In determining the total voting power of the company's securities held by or on behalf of the nominating shareholder or any member of the nominating shareholder group, the voting power will be reduced by the voting power of any of the company's securities that the nominating shareholder or any member of a nominating shareholder group has sold in a short sale during the relevant periods. In addition, the rule excludes borrowed shares.

Nominee Eligibility Requirements

Under Rule 14a-11, a nominee will not be eligible to be included in a company's proxy materials if his or her candidacy—or, if elected, board membership—will violate federal law, state law, or applicable exchange requirements, if any, other than those related to independence standards, and such violation could not be cured within 14 days following receipt of a notice of ineligibility from the company. In addition, board candidates must meet the objective independence standards of the relevant securities exchange, but are not required to meet the subjective independence criteria of the securities exchange or the company.

Number of Shareholder Nominees

Rule 14a-11(d) will not require a company to include more than one shareholder nominee or the number of nominees that represents 25 percent of the company's board of directors (rounded down to the nearest whole number), whichever is greater. Where a company has a director (or directors) currently serving on its board who was elected as a shareholder nominee pursuant to Rule 14a-11, and the term of that director extends past the date of the shareholder meeting for which the company is soliciting proxies for the election of directors, the company will not be required to include in its proxy materials more shareholder nominees than could result in the total number of directors serving on the board that were elected as shareholder nominees being greater than one shareholder nominee or 25 percent of the company's board of directors, whichever is greater.

In the case of a staggered board, the rule provides that the 25 percent limit will be calculated based on the total number of board seats, not the lesser number that is being voted on.

Under the final rule, where a company negotiates with the nominating shareholder

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or group that has filed a Schedule 14N before beginning any discussion with the company about the nomination and that otherwise would be eligible to have its nominees included in the company's proxy materials, and the company agrees to include the nominating shareholder's or group's nominees on the company's proxy card as company nominees, those nominees will count toward the 25 percent maximum set forth in the rule.

Priority of Nominees

A company will be required to include in its proxy statement and on its proxy card the nominee or nominees of the nominating shareholder or group with the highest qualifying voting-power percentage in the company's securities as of the date of filing the Schedule 14N, up to and including the total number of shareholder nominees required to be included by the company. Where the nominating shareholder or group with the highest qualifying voting-power percentage that is otherwise eligible to use the rule and that filed a timely notice does not nominate the maximum number of directors allowed under the rule, the nominee or nominees of the nominating shareholder or group with the next highest qualifying voting-power percentage that is otherwise eligible to use the rule and that filed a timely notice of intent to nominate a director pursuant to the rule will be included in the company's proxy materials, up to and including the total number of shareholder nominees required to be included by the company. This process continues until the company includes the maximum number of nominees it is required to include in its proxy statement and on its proxy card or the company exhausts the list of eligible nominees.

Shareholder Notice on Schedule 14N

In order to submit a nominee for inclusion in the company's proxy statement and form of proxy, Rule 14a-11 requires that the nominating shareholder or group provide a notice on Schedule 14N to the company of its intent to require that the company include that shareholder's or group's nominee or nominees in the company's proxy materials. The shareholder notice on Schedule 14N is required to be filed with the SEC on the date it is first sent to the company.

The Schedule 14N is required to include, among other things, detailed information about the nominating shareholder or group; its security holdings (and accompanying evidence of ownership); relationships with the issuer; the nominees; disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A, as applicable, in connection with a contested proxy solicitation; and, if desired, a supporting statement in favor of the nominating shareholder's or group's nominees, not to exceed 500 words for each nominee. Schedule 14N also must include certifications by the nominating shareholder or group as to their eligibility to submit Rule 14a-11 nominations, the eligibility of the nominees under Rule 14a-11, the absence of any control purpose or intent, and the accuracy and completeness of the information contained in the filing.

Schedule 14N must be amended promptly for any material change to the disclosure and certifications provided in the originally filed Schedule 14N. The nominating shareholder or group also will be required to file a final amendment to the Schedule 14N disclosing the nominating shareholder's or group's intention with regard to continued ownership of its shares within 10 days of the final results of the election being announced by the company.

Responding to Schedule 14N

If a company determines that it will include a nominee in its proxy statement, the company must give the nominating shareholder or group notice in writing, postmarked or transmitted electronically no later than 30 calendar days before the company files its definitive proxy statement and form of proxy with the SEC.

If a company objects to a nomination, its notification must be postmarked or transmitted electronically no later than 14 calendar days after the close of the window period for submission of nominations pursuant to Rule 14a-11. A nominating shareholder's or group's response to the company's notice must be postmarked or transmitted electronically no later than 14 calendar days after receipt of the company's notification.

Bases for Excluding a Nominee

Under new Rule 14a-11(g), a company may exclude a shareholder nominee because:

- Rule 14a-11 is not applicable to the company;
- the nominating shareholder or group or nominee failed to satisfy the eligibility requirements in Rule 14a-11(b); or
- including the nominee or nominees would result in the company exceeding the maximum number of nominees it is required to include in its proxy statement and form of proxy.

In addition, a company will be permitted to exclude a statement in support of a nominee or nominees if the statement exceeds 500 words for each nominee. In such cases, a company will be required to include the nominee or nominees, provided the eligibility requirements were satisfied, but will be permitted to exclude the statement in support.

The company must provide notice of its intent to exclude the nominating shareholder's or group's nominee or nominees and the basis for its determination to the SEC. If desired, the company may seek a no-action letter from the staff with regard to its determination no later than 80 calendar days prior to filing its definitive proxy statement with the SEC. If a company anticipates that it will seek a no-action letter from the staff with respect to its decision to exclude any Rule 14a-11 nominee or nominees, it should seek a no-action letter with regard to all nominees whom it wishes

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to exclude at the outset and should assert all available bases for exclusion at that time.

The Company's Proxy Statement and Proxy Card

A company that is including a shareholder director nominee in its proxy statement and form of proxy pursuant to Rule 14a-11 must include certain disclosure about the nominating shareholder or group and the nominee. This disclosure will be provided by the nominating shareholder or group in its notice on Schedule 14N. In addition, the company must include in its proxy statement the nominating shareholder's or group's statement in support of the shareholder nominee or nominees, if the nominating shareholder or group elects to have such statement included in the company's proxy materials and the statement does not exceed the 500-word-per-nominee limit and otherwise complies with the new rules.

To the extent that the company is opposing the shareholder nominees, it will be permitted to include its own statement in opposition, which will not be limited in length, and must include the disclosures required under current Rule 14a-12 for contested solicitations.

The company will not be responsible for disclosure provided by a nominating shareholder or group; rather, the nominating shareholder or group will have liability for any materially false or misleading statements contained in the information provided to the company.

Under revised Rule 14a-4, the company's proxy card will not be permitted to provide a means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group if the form of proxy includes one or more shareholder nominees in accordance with Rule 14a-11. Accordingly, shareholders will not be given a choice to vote for management's nominees en bloc and instead will be required to pick and choose among the pool of company and shareholder nominees.

Companies will not be required to file a preliminary proxy statement in connection with a nomination made pursuant to Rule 14a-11, an applicable state or foreign law provision, or a company's governing documents.

Exemptions from the Proxy Rules

Exemption for Certain Activities Related to Formation of a Nominating Group. New Rule 14a-2(b)(7) provides an exemption from the generally applicable disclosure, filing, and other requirements of the proxy rules for solicitations by or on behalf of any shareholder in connection with the formation of a nominating shareholder group, provided that the shareholder is not holding the company's securities with the purpose—or the effect—of changing control of the company or gaining a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a-11.

Any written communication may include no more than:

- a statement of the shareholder's intent to form a nominating shareholder group in order to nominate a director under Rule 14a-11;
- identification of, and a brief statement regarding, the potential nominee or nominees or, where no nominee or nominees have been identified, the characteristics of the nominee or nominees that the shareholder intends to nominate, if any;
- the percentage of voting power of the company's securities that are entitled to be voted on the election of directors that each soliciting shareholder holds or the aggregate percentage held by any group to which the shareholder belongs; and
- the means by which shareholders may contact the soliciting party.

Any written soliciting material published, sent, or given to shareholders in accordance with the terms of this provision must be filed with the SEC by the nominating shareholder or group on Schedule 14N no later than the date the material is first published, sent, or given to shareholders.

Exemption for Solicitation Activities by a Nominating Shareholder or Group. Rule 14a-2(b)(8) provides an exemption from the generally applicable disclosure, filing, and other requirements of the proxy rules for solicitations by or on behalf of a nominating shareholder or group, provided that:

- the soliciting party does not, at any time during such solicitation, seek directly or indirectly the power to act as a proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent, or authorization; and
- each written communication includes: the identity of the nominating shareholder or group and a description of his or her direct or indirect interests, by security holdings or otherwise, and a prominent legend in clear, plain language advising shareholders that a shareholder nominee is or will be included in the company's proxy statement and that they should read the company's proxy statement when available because it includes important information.

Any soliciting material published, sent, or given to shareholders in accordance with this exemption must be filed by the nominating shareholder or group with the SEC on Schedule 14N no later than the date the material is first published, sent, or given to shareholders.

Transition Rule

Rule 14a-11 contains a window period for submission of shareholder nominees for inclusion in company proxy materials of no earlier than 150 calendar days and no later than 120 calendar days before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting. Shareholders seeking to use new Rule 14a-11 will be able to do so if the

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window period for submitting nominees for a particular company is open after the effective date of the rules. For some companies, the window period may open and close before the effective date of the new rules. In those cases, shareholders will not be permitted to submit nominees pursuant to Rule 14a-11 for inclusion in the company's proxy materials for the 2011 proxy season. For other companies, the window period may open before the effective date of the rules, but close after the effective date. In those cases, shareholders will be able to submit a nominee between the effective date and the close of the window period.

Beneficial Ownership Reporting Requirements

In connection with the adoption of Rule 14a-11, the SEC is amending Exchange Act Rule 13d-1 and Schedule 13G to provide an exception from the requirement to file a Schedule 13D (and permit filing on Schedule 13G) for activities undertaken solely in connection with a nomination under Rule 14a-11.

However, according to the final release, any activity other than those provided for under Rule 14a-11 will make the exception inapplicable. For example, approaching a company's board and urging them to consider strategic alternatives (such as a sale of non-core assets or a leveraged recapitalization) will constitute activities outside of the Rule 14a-11 nomination, and any nominating shareholder or group engaging in such activities most likely will be ineligible to file on Schedule 13G.

Rule 14a-18

New Rule 14a-18 applies to any submission of nominees for inclusion in the company's proxy materials pursuant to a procedure under state or foreign law or a procedure under the company's governing documents that differs from the Rule 14a-11 procedure. To have a nominee included in the company's proxy materials pursuant to a procedure set forth under applicable state or foreign law, or the company's governing documents addressing the inclusion of shareholder director nominees in the company's proxy materials, the nominating shareholder or group must provide notice to the company of its intent to do so on a Schedule 14N. The time periods and required disclosures under Rule 14a-18 are similar to those for Rule 14a-11 solicitations.

Amendments to Rule 14a-8(i)(8)

As amended, Rule 14a-8(i)(8) will enable shareholders, under certain circumstances, to require companies to include in their proxy materials shareholder proposals that would amend, or request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with Rule 14a-11.

Companies will be permitted to exclude a shareholder proposal pursuant to Rule 14a-8(i)(8) if it:

- would disqualify a nominee who is standing for election;
- would remove a director from office before his or her term expired;
- questions the competence, business judgment, or character of one or more nominees or directors;
- seeks to include a specific individual in the company's proxy materials for election to the board of directors; or
- otherwise could affect the outcome of the upcoming election of directors.

Wilson Sonsini Goodrich & Rosati
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