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GLOBAL CONNECTION

May 2011

A Letter From the Editor

By Brett W. Johnson

Dear Friend of Snell & Wilmer:

Snell & Wilmer was pleased to see so many friends of the firm from around the world at our first In-House Global Symposium. The well-attended event highlighted the increased focus by business and the various governmental agencies on the importance of global trade. We would like to thank the presenters and attendees for making the Symposium such a great success and we look forward to future events continuing the important conversation of how to handle cultural, political and legal issues in the global marketplace.

A major issue addressed at the Symposium related to compliance of international trade regulations. We have regularly discussed foreign corruption in the *Global Connection*. The issue is here to stay due to the increase in global laws and the significant amount of resources dedicated to investigating alleged violations. In this month's edition, we again address the importance of addressing corruption – actual or perceived – from both a United States and United Kingdom perspective.

During the Symposium, we also heard from leaders on international corporate transactions. We follow up on this topic with an article on reverse-mergers and the related international implications to global operations.

Supply-chain management is a significant concern for global businesses. If a shipment of goods is not able to be transferred seamlessly and efficiently, then valuable time is lost and possible unnecessary consequences (and damages) result. The free trade agreements, including the North American Free Trade Agreement (NAFTA), were meant to assist the supply-chain by breaking down unnecessary barriers to trade. We present an article on cross-border trucking issues and the continued barriers to NAFTA implementation.

Finally, as the discussions at the Symposium highlighted, there are significant cultural issues that continue to impact cross-border transactions. Without an appreciation for the foreign culture, a business entering a market for the first time may not fully appreciate a country's laws that are based on a cultural and societal perspective. We present an article on cross-border communications and the importance of cultural understanding.

Please feel free to contact me if you have any questions regarding information provided in *Global Connection* or if you would like to be included in future international events hosted by the Firm.

Best regards,

Brett W. Johnson
Editor

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The Reverse Merger: Easy Way in or Illegitimate Access to U.S. Capital Markets?

By Marshall P. Horowitz and Brandon Batt

On April 4, 2011, Commissioner Luis A. Aguilar of the Securities and Exchange Commission (SEC) presented a captivating speech in which he argued that "real capital formation" is only created when investors have access to accurate and adequate information to invest in a particular company and the company then uses that capital investment to foster real, organic growth. He argued that reverse mergers are often not being used for legitimate purposes and therefore hurt our economy's ability to generate real capital formation. This theory is one of the foundations of both the 2010 Dodd-Frank Wall Street Reform and the Consumer Protection Act, in which Congress responded to the public market's need for increased disclosure and expanded investor protections.

The reverse merger of a private company into a public shell company has received negative attention from the SEC due to the ease in which foreign companies are gaining access to U.S. public markets. Reverse mergers have been problematic for investors and regulators alike because they may allow an unsophisticated (and sometimes fraudulent) company to sell securities to the public without undergoing extensive diligence by underwriters or providing adequate disclosures to investors. Since 2006, more than 600 private companies have executed a reverse merger, and more than 150 of them have involved Chinese or China-based companies. This article is intended to discuss this trend, generally explain the SEC's concerns, and provide some general advice for foreign and domestic companies to utilize the reverse merger in a positive way that avoids any undue scrutiny or investigation from the SEC or other regulators.

How Do Private Companies Gain Access to Public Capital?

Companies commonly access capital in the public markets in one of three ways: (1) the traditional initial public offering, or IPO, (2) through a registration of securities pursuant to the Securities Exchange Act of 1934 or (3) through a reverse merger into a public company. The first two options are preferred by investors and the SEC because both options require a robust disclosure on behalf of the company of its operations, financials and other otherwise private details. Additionally, the SEC must give its approval of the disclosures before the company is able to sell securities in the public market.

A reverse merger, on the other hand, does not require any significant prior disclosure by the company, diligence by investors or underwriters or approval by the SEC before the newly merged-into company is able to sell its securities to the public. Often, the only disclosure required by the company is to file a Form 8-K under Item 1.01, which discloses to the SEC and the public that the company has entered into a material agreement.

How is a Reverse Merger Executed?

A reverse merger between two U.S. companies is relatively simple. A private company will usually merge with and into a public company that is not conducting any active operations (i.e., a shell company), and in exchange, the private company will receive an equity interest in the public company. The amount of equity paid will typically be enough to make the private company the majority and controlling stockholder of the existing public company.

Foreign companies, on the other hand, often face several hurdles before entering U.S. public markets that domestic companies do not encounter. Many countries' laws have certain requirements that must be met before a company may accept a foreign capital investment. For example, Chinese companies must comply with various regulatory and legal restrictions established by the People's Republic of China (PRC) before accepting foreign investment or entering U.S. markets. The PRC's laws stem in part from the desire to control the flow of money coming into or going out of China. Although these "hurdles" can often be overcome without much difficulty, the delay caused by governmental agencies and other third parties can be very frustrating. Due to the difficulty of becoming a public company, the attempts to gain access to public markets (in China, the U.S. or otherwise) by many foreign companies often result in failure. Foreign companies, therefore, have to be aware of both foreign and domestic requirements, and factor in the time, expense and compliance requirements that will be needed to complete the transaction. For some companies, becoming a public company may not make practical sense.

Recent Criticisms of Reverse Mergers

Notwithstanding the more stringent rules promulgated by the SEC a few years ago, Commissioner Aguilar of the SEC declared that the SEC has noticed "increasing problems" with companies involved in these transactions. Over the past few years, the SEC has investigated many instances of fraud on the markets perpetrated by companies that entered the market through a reverse merger. The lack of substantive disclosures required by an IPO or other securities registration provides an opportunity for dishonest or fundamentally weak companies to gain access to public markets that they otherwise would not have had. In his speech, Commissioner Aguilar pointed out that, "two companies that were numbers one and two on the Investor's Business Daily 100 have now been shown to have significant issues." The Commissioner stated that there were two trading suspensions imposed on Chinese companies in March 2011 alone. Another extreme example involved a CEO of a company that had gone public through a reverse merger who was later discovered to be a fictitious person. Additionally, several Chinese companies that have gone public in the U.S. through reverse mergers have been the focus of class action lawsuits alleging securities fraud. The amount of the losses claimed in these lawsuits is in the billions of dollars.

Investors in these companies are at a higher risk of trading securities based on fraud and other irregularities. Investors should be cautious that a company's financials may not be sound or audited under U.S. GAAP standards. Commissioner Aguilar stated that "systematic concerns with the quality of the auditing and financial reporting" currently exist with Chinese reporting companies in the U.S. markets. Although each public company must have a U.S. independent accounting audit of its financials, occasionally the U.S. auditor will simply certify its audit based on the audit conducted by the foreign accounting firm without "conducting any of its own work," said Commission Aguilar. This "shortcut" of a company's accounting disclosures violates Public Company Accounting Oversight Board standards and has the potential to mislead an unsophisticated investor into believing the company's audit was actually performed by a U.S. auditor pursuant to U.S. GAAP standards. Although the SEC's acceptance of the International Financial Reporting Standards has increased over the past few years, the standards in the U.S. continue to be governed by U.S. GAAP.

The SEC reports that it is continuing to increase its efforts to combat violations stemming from reverse mergers through its investigations of suspicious foreign companies that became public through a reverse merger. Unfortunately, enforcement and prosecution have proven to be very difficult because most information, assets and people connected with these schemes are outside of the information, assets and people connected with these schemes are outside of the power of the SEC to bring actions against these companies. Critics can differ as to the true magnitude of these fraudulent activities, but it is generally agreed that the reverse merger has increased the opportunity for fraudulent behavior. The SEC expects that this problem will only grow as the reported market capitalization of these foreign companies is in the tens of billions of dollars.

Why Should My Company Consider a Reverse Merger?

Despite the concerns noted above, a reverse merger remains a viable option for fundamentally strong private companies drawn to the relative ease and the reduction in costs when compared to a traditional IPO. For instance, the total costs of an IPO typically range between five and 10 percent of the offering, whereas a simple reverse merger may cost significantly less. Once public, a company's stock enjoys greater liquidity and allows its original investors to "cash in" on their ownership interests. Whereas an IPO can take six months to a year to complete, a reverse merger can be completed in a few weeks to a few months. This reduction in time is partly due to the fact that a reverse merger allows a company to go public without the need to provide substantive disclosure or raise any capital. Generally, reverse mergers incur less dilution to the company's equity, thereby allowing the company's founders and prior investors to retain more ownership in the now-public company. Public companies enjoy a greater array of options related to mergers and acquisitions and financing terms. For foreign companies, breaking into the U.S. public markets (as opposed to in their home country) is a popular alternative to avoid regulations for raising capital in the public markets of their home countries.

Before going public, private companies should carefully consider the decision to go public. A company should consider whether its business fundamentals (for example, financial stability and management) are strong enough to attract outside investors and coverage from Wall Street that will in turn bring additional investors to the company. Management must be prepared for additional regulatory and compliance requirements, which can be significant, expensive and often suffocating to an under-performing company. Commentators have argued that many companies (both U.S. and foreign) are simply not sophisticated enough to take their companies public in the U.S., and often the desire for quick cash trumps the lack of a fundamental understanding of securities regulations. For example, many companies are ill-informed and unprepared to comply with the Sarbanes-Oxley Act of 2002 (SOX) and other applicable SEC requirements. A 2009 study by the SEC reported that assessment of internal controls compliance can alone average a cost of approximately $690,000 for companies with a market capitalization of $75 million or less. Foreign companies should also be aware of the recent stigma attached to reverse mergers and the aversion some investors may have towards the company once in the market. This aversion by the market may affect investment in the company, which in turn could make SOX and SEC compliance even more burdensome for an inexperienced company.

Once a decision to go public has been made, the company should have a known strategy for success that should permeate every aspect of its business, from its public disclosures to corporate culture. A company should be cautious from the beginning to make sound business decisions and to "act" like a public company in furtherance of its objective to build an image of responsibility and dependability. If the company's management and current advisors are not familiar with the responsibilities of "going public," proper advisors should be engaged. Engaging the help of a respectable law firm practicing in this area and a recognized national independent accounting firm will help the company assure investors that legal and accounting tasks and issues are properly addressed and resolved. Investors likely will be more comfortable with a "newcomer" to the market that is surrounded by experienced legal counsel and independent auditors.

Some Thoughts Moving Forward

While Commissioner Aguilar raised many valid concerns in his recent speech, reverse mergers remain an attractive option for companies to obtain public company status more easily than via an IPO. When fraudulently used, the reverse merger can carry the potential for abuse and improper behavior, and the threat to investors is substantial. Those instances will continue to be prosecuted by the SEC, and investors should be cautious of these dangers as the reverse merger is not likely to disappear. As long as companies are aware of the increased responsibilities and costs, the reverse merger will likely continue to benefit fundamentally sound companies that operate in a respectable manner. In other words, stay out of the kitchen if you can't stand the heat.

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Cross-Cultural Communication: Guidance for the American Negotiator

By Lindsey E. Martínez

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In today's increasingly global marketplace, the need for effective cross-cultural communication is greater than ever. Attorneys need to meet this demand for cross-cultural negotiation skills in order to best serve their clients, both at home and abroad. Unfortunately, American negotiators are not always well versed in the delicate art of cross-cultural communication. Ineffective and inexperienced communication across cultures can be, in the best cases, drawn out and embarrassing. In the worst case scenario, a wrong word or gesture could cost an attorney existing or future business.

Cultural differences among countries influence perceptual processes between negotiators. The specifics of each situation determine the approach to resolving cross-cultural disputes. Thus, negotiating parties must first recognize the inherent challenges brought about by such disputes.

In some cultures, for example, competitive or aggressive negotiation behaviors are more acceptable than in other cultures. Another factor to consider is the concept of time. Time has different meanings of importance in various cultures. The European-American concept of "time is money" has no such value in Asia, Latin America and Africa. This difference can affect the pace of negotiations and the punctuality of meetings. The concept of bargaining also differs among cultures. Negotiators from individualist cultures (like the United States) tend to look to the "top person" on the other side to convince, while negotiators from collectivist cultures (such as Asia) strive to convince the entire group.

The concern for relationship building in Latin American countries includes networking to initiate business negotiations, exchanging gifts and other tokens of appreciation, accommodating schedules for associates and trusting negotiations to verbal rather than detailed written agreements. In that same vein, when a negotiation reaches an impasse in Latin American cultures, the friendship of the parties, rather than a written contract or hardball tactics, generally provides for a resolution. Honor and "saving face" are key concepts in such relationship-based cultures. On the other hand, the individualist nature of American culture provides for more competitive bargaining and negotiation, rather than relationship building.

In Brazil, finding ways around the bureaucratic red tape often involves the use of one's extended social network, such as friends and family employed in organizational bureaucracies. This phenomenon is so common place that it has its own Portuguese nomenclature, *jeitinho*, which means, in this situation, to cut through red tape by utilizing one's social network. By contrast, North American negotiators are accustomed to using official channels in their business negotiations, and may be suspect of using a Brazilian negotiator's family friend to achieve a business end.

Negotiators should begin by identifying cultural differences in order to become better equipped to focus on the possibility that cultural misunderstanding, bias and stereotyping may occur. Similarly, negotiators should highlight cultural likenesses and leverage them strategically. By critically thinking about what traits are shared, and those that are distinct, a negotiator goes into a negotiation well-equipped to handle a variety of cross-cultural pitfalls. This analysis also helps explain why focus on a particular cultural aspect of a dispute may reign supreme even though that specific issue is not legally critical to the success of a case. This practice invites attorneys to look for multiple interpretations, especially when the parties reach an impasse in negotiation, which encourages creative thinking about behaviors, instead of proceeding on insufficient information. It also allows negotiators to ask questions such as "I wonder if there is another piece of information that, if I had it, would help me interpret what is going on?" Susan Bryant, ["*The Five Habits: Building Cross-Cultural Competence in Lawyers*,"] 8 Clinical L. Rev. 33, 72 (2001-02).

Culturally sensitive exchanges with the other side are crucial. The introduction ritual is an important ingredient in any cross-cultural exchange. Negotiators must pay special attention to cultural sensitivities regarding greetings, as these trust-building exchanges build rapport and encourage conversation. Negotiators are advised to consult translators, if applicable, and to pay special attention to cues from the other side in the opening stages of the negotiation.

By looking for cues from the other side, negotiators are able to plan for "red flags." Such problem areas can include indications that the other side is disengaged, angry or actively uncomfortable. This alerts attorneys of the need to attempt a different approach.

People are more likely to be influenced by stereotypes when they are under stress and are unable to monitor for bias. An attorney who proactively addresses some of the factors that negatively influence a relationship may prevent a problematic negotiation from reaching an insurmountable impasse.

The greatest weapon against communication pitfalls and to avoid a potential faux pas is preparation. While it is unrealistic to anticipate every possible scenario, a basic understanding of a given cultural background is the key to effective communication. Research and preparation can include a number of sources, including country and regional guides from the U.S. State Department (www.state.gov). A simple place to start, if possible, is to discuss cultural sensitivities with a person experienced with the culture, such as a colleague with experience in a given region or the interpreter working the meeting.

While it is impossible to memorize every cultural rule that exists, it is helpful to bear in mind some of the following tips:

1. In Southeast Asian cultures, never touch or pass something over a person's head because the head is considered sacred.
2. The Japanese emphasize ceremony when giving and receiving business cards. When receiving another's card, hold the card with both hands and read it carefully, making comments about the other person's title. Never write on the business card as this is considered disrespectful.
3. In East Asia, avoid waving or pointing chopsticks, putting them vertically into food or tapping them on the bowl. These actions are considered extremely rude. A negotiator should use the chopstick holders provided.
4. When conducting business in France, remain calm, polite and courteous during business meetings. Appearing overly friendly and asking personal questions of the other side may be construed as suspicious.
5. Avoid giving gifts made from leather in India, as cows are considered sacred

there. Additionally, winking is considered a sexual gesture.

6. If visiting a business associate's home in Mexico, do not bring up business unless the associate does. Doing otherwise is considered presumptuous and rude.

While some cultural blunders may be inevitable, by understanding the other side's culture and paying close attention to cues, American negotiators will be able to better avoid impasse and achieve successful results in any cross-cultural negotiation.

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Cross-Border Mexican Trucking

By Jerry Morales

The North American Free Trade Agreement (NAFTA) called for cross-border trucking to be phased in beginning in 1995. Congress has blocked the various attempts to implement this provision by denying funding in spending bills. One of the principal arguments against cross-border Mexican trucking has been that Mexican trucks on American roads would be unsafe.

In March 2009, Mexico expressed its displeasure with the failure of the U.S. to comply with its NAFTA obligation to phase-in cross-border trucking by imposing retaliatory tariffs. Mexico's retaliatory tariff list consists of more than 99 items, which include some of America's largest exports to Mexico. This has meant significant tariffs on billions of dollars worth of U.S. exports.

The International Brotherhood of Teamsters (Teamsters) and the Owner-Operator Independent Drivers Association (OOIDA) have been at the forefront of the opposition to the implementation of Mexican cross-border trucking. Although their arguments have been largely based on alleged safety concerns, they are also motivated by the belief that the implementation of cross-border Mexican trucking would threaten the jobs of U.S. truck drivers and warehouse workers.

On the other hand, the U.S. Chamber of Commerce, the National Foreign Trade Council, the National Association of Manufacturers and the American Trucking Association have favored compliance with NAFTA's cross-border trucking provisions, arguing that the retaliatory tariffs imposed by Mexico have reduced exports. This reduction, arguably, has resulted in the loss of more U.S. jobs than would be caused by the implementation of cross-border trucking.

Last March 3rd, Presidents Obama and Calderon announced an agreement for a phase-in program with the highest safety standards, which would authorize both Mexico and U.S. long-haul carriers to engage in cross-border operations as envisioned in NAFTA. In the next few weeks we can expect to hear a great deal of debate from both sides on the pros and cons of this new attempt to implement the cross-border trucking obligations.

Irrespective of the highest safety standards required in the new agreement, the Teamsters will continue to vehemently oppose cross-border Mexican trucking. One wonders if the Teamsters have considered the opportunities for union organizing that cross-border Mexican trucking could provide. Would drivers and helpers, authorized to work within the U.S. pursuant to this NAFTA program, be receptive to union organizing efforts under the provisions of the National Labor Relations Act (NLRA)? This is a question worth considering, since there is nothing in the NLRA that precludes its application to employees performing work within the United States, simply because their long-haul trips may have originated in Mexico or because their final destination may be outside U.S. borders.

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Largest Indictment for an FCPA Case Gets Ready for Trial in D.C.

The Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78dd-1, et seq., makes it illegal to make payments to foreign government officials to assist in obtaining or retaining business. The FCPA specifically prohibits a person or company from making a bribe to a foreign official to influence that official to violate his or her lawful duties or to secure an improper advantage in obtaining or retaining business. The FCPA applies to all U.S. persons and businesses as well as foreign persons or businesses that cause an act related to a bribe to occur in the U.S. or its territories.

In late 2009 and early 2010, a District of Columbia grand jury indicted 22 defendants, charging them with, among other things, violations of the FCPA and conspiracy to violate the FCPA. The indictments all related to a purported deal to sell $15 million in military and law enforcement products to the Ministry of Defense for Gabon. The case is often referred to as the "Shot Show Case" because the vast majority of defendants were arrested at a shooting and hunting convention in Las Vegas in January 2010. Originally the grand jury issued 16 indictments against the 22 defendants, but the grand jury later issued a Superseding Indictment in April 2010 that consolidated all 22 defendants into one case, the largest ever for an FCPA case.

The government alleges that the defendants all engaged in the Gabon deal, which was an undercover operation involving FBI agents and an informant who himself was charged with conspiracy to bribe foreign officials. According to the government, the informant worked with the FBI to identify individuals in the military and law enforcement products industry who were involved in paying bribes to foreign government officials. The informant then worked with FBI undercover agents posing as ministry officials with Gabon to ask the defendants to participate in the Gabon deal. According to the government, the purported deal consisted of two phases: a small test order and a larger order that would follow if the bribe was paid to the Gabon foreign minister. The defendants argue, among other things, that the government entrapped the defendants; that is, the government induced the defendants to commit an offense that they would otherwise have been unlikely to commit.

Because of the sheer number of defendants, the government, acting through the Department of Justice Criminal Fraud Section and the U.S. Attorney for D.C., recommended setting a trial schedule in four groups. The trial for the first group of defendants is scheduled to begin in May 2011. The other groups are scheduled for trial in July 2011, September 2011 and November 2011 respectively. At least one defendant, and perhaps more, has entered into a plea agreement with the government. As this case progresses, Snell & Wilmer will keep you apprised of the events.

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Snell & Wilmer Hosts In-House Counsel Global Symposium With Lawyers From Around the World

Snell & Wilmer, along with Lex Mundi, a global affiliation of 160 law firm's in 100 countries, and the Association of Corporate Counsel - Arizona Chapter, hosted a two-day symposium in March designed to address the needs of in-house counsel involved with international operations.

The symposium, which was held at Snell & Wilmer's Phoenix office, featured a series of topics including global economic trends, the foreclosure crisis, lawyers making a difference on a global basis and doing business with Canada and Mexico and various evolving countries.

The event featured leading lawyers from around the world, including Barbados, Belgium, Brazil, British Virgin Islands, Canada, China, France, Germany, Ireland, Japan, Mexico, Russia, United Arab Emirates, United Kingdom and the Southwestern United States. It also included representatives from some of the largest businesses in Arizona and certain state representatives such as the Honorable Roslyn Silver, the new Chief Judge of the U.S. District Court in Arizona.

Dr. Angel Cabrera, president of the Thunderbird School of Global Management, presented a compelling speech at the event that focused on the importance of understanding economic trends for thought leaders in emerging markets.

Dr. Cabrera stated, "The economic landscape of the world has been turned upside down. Supply chains have been chopped up and distributed throughout the world. Global trade and investments have helped push economic action from the rich West and North to the populous East and South. Global flows of merchandise, services, capital, technologies and ideas have created an unprecedented level of interdependence among national economies. The winners in this scenario will be those who can best develop what we call at Thunderbird a 'Global Mindset': the ability to understand differences and trends across national boundaries and to build productive partnerships with individuals and organizations from different cultural backgrounds."

Snell & Wilmer partner Barb Dawson, who co-chairs the firm's commercial litigation practice group and is Chair Emeritus of Lex Mundi, spearheaded this event. Her goal was to bring leading attorneys from around the world to Arizona for the benefit of our business community and also to help drive international business to Arizona.

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Lex Mundi Welcomes Five Senior In-House Counsel to the Lex Mundi Client Advisory Council

Lex Mundi has welcomed five new members to its Client Advisory Council. The addition of these new members brings the current group of Client Advisory Council members to 12. This distinguished group of senior in-house counsel from some of the world's leading companies provides advice and guidance in a variety of areas that enhance Lex Mundi member firms' ability to serve their clients better and to meet the needs of in-house counsel.

The new members of the Lex Mundi Client Advisory Council are:

- Frauke Ahnefeld, Vice President, Corporate Legal Services, Robert Bosch GmbH
- Stanton Dodge, Executive Vice President, General Counsel and Secretary, DISH Network
- Kenneth Thompson, Senior Vice President and Global Chief Legal Officer, LexisNexis Group
- Richard Thurston, Senior Vice President and General Counsel, Taiwan Semiconductor Manufacturing Corporation
- Debra Valentine, Group Executive, Legal and External Affairs, Rio Tinto

These new Client Advisory Council Members join an outstanding group of existing Client Advisory Council members:

- Cathie Armour, Executive Director, Macquarie Group Limited
- George Freeman, Vice President and Assistant General Counsel, The New York Times
- John Davidson, General Counsel and Group Secretary, SABMiller plc
- Joia M. Johnson, Executive Vice President, General Counsel and Secretary, Hanesbrands Inc.
- Alexandre D'Ambrosio, General Counsel and Executive Director,

- Alexandre D'Ambrosio, General Counsel and Executive Director, Votorantim Industrial
- Ernst Wessel, Vice President, International Business Law and Franchise Development, Office Depot
- Beat Hess, Former Legal Director and Member of the Group Executive Committee, Royal Dutch Shell plc

Carl Anduri, President of Lex Mundi, comments, "Our Client Advisory Council is an extremely valuable resource for Lex Mundi and its member firms. With these new members, we add to the experience and expertise available through the Council to help guide our association in finding the best ways for in-house counsel and outside counsel to work together."

Complete information on the members and activities of Lex Mundi's Client Advisory Council can be found on the Lex Mundi web site at: http://www.lexmundi.com/lexmundi/Client_Advisory_Council.asp.

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The United Kingdom's Bribery Act: A New Threshold For Foreign Transaction Policies

By Brett W. Johnson

On July 1, 2011, the United Kingdom's Bribery Act 2010 will go into effect. It is perceived that the Act goes further than any other country's foreign corrupt practices law. However, when the laws of the United States and the various states, to include applicable case law interpreting the various statutes and regulations, are combined, United States law is still almost on par with the United Kingdom's Bribery Act ("Act"). Regardless, the Act's enactment should be considered another wake-up call for companies of all sizes who take advantage of the privilege to engage in foreign transactions.

Similar to the United States' Foreign Corrupt Practices Act ("FCPA"), the Act will have wide jurisdictional application. Simply, any company that has a United Kingdom office, employs United Kingdom citizens or provides services to United Kingdom organizations are subject to the law. Therefore, even if a United States company engages with independent contractors, commercial agents, distributors, or has other relationships, the United States company will likely be subject to the Act.

There are several differences between the Act and the FCPA that make the Act more ambitious. First, under the FCPA, the United States must prove intent and knowledge (or reckless disregard) as to the alleged violations. Under the Act, a company is held "strictly liable." Reliance on a "rogue employee" was never a great defense under the FCPA – now, under the Act, it is no defense at all.

Second, the Act prohibits commercial bribery between two companies. The FCPA, on the other hand, is only concerned with governmental (or public) corruption. However, many individual states have anti-bribery laws that prohibit commercial bribery and the United States has the U.S. Travel Act, which prohibits racketeering and unlawful business enterprises. Therefore, U.S. companies should already be cognizant of the consequences of commercial bribery.

Third, the FCPA recognizes that "graft" is sometimes necessary in various parts of the world. But, there is a fine line. The Act prohibits "graft." For example, if there are only two export licenses and a company provides a unlawful payment to obtain one of the licenses, a violation of the FCPA and the Act has occurred. However, if there are unlimited licenses and a company pays an amount to expedite the process, the FCPA may not be violated. However, a violation of the Act has occurred.

If a company violates the Act, it (and its involved personnel or uninvolved senior management) could be subject to unlimited criminal and civil penalties and, most importantly, a prison sentence up to ten years. Based on the amount of penalties (*e.g.,* billions) that the United States has obtained over the past few years, the British now have an opportunity to also obtain significant revenue without the need for taxation. And, the general public is never known to complain when a company of any size is penalized for apparent or alleged violations of the law.

Companies should also fully appreciate the close cooperation between the United Kingdom, the United States, and other countries in regard to foreign corruption. The 2008 Siemens investigation between the United States and Germany is a perfect example. After Siemens' employees were caught providing bribes around the world, the company settled cases in both countries for a combined $1.34 billion. Due to the fact that the United Kingdom is the United States' closest ally, it is expected that the resource sharing to investigate global companies will increase significantly.

The United Kingdom's government published guidance for prosecutors on when to bring criminal cases under the Act. This guidance is very similar to that provided in regard to the FCPA by United States authorities. Mainly, the prosecutors will review, among others, (1) company history, (2) existence and effectiveness of a compliance program, (3) accounting standards, (4) senior management involvement, (5) control of third party associates or agents and (6) the existence of warning signs that were ignored. The guidance also provides several case studies for which companies must be aware. If a company commits an act that is similar to a case study example, the company will be hard pressed for a defense – especially in light of the strict liability standard.

A company should take this opportunity to review its foreign transaction policy, whether or not it actually believes that the Act will apply to it because of a lack of business interests in the United Kingdom. A company should also review its international agreements to ensure proper standards of conduct and governmental investigation clauses are inserted to shift the risk as much as possible to those individuals and companies that actually engage in illegal activities.

In addition to a strong policy and effective procedures, senior managements needs to be involved in the compliance and regular training of all employees. A company should engage in regular audits and have a plan in place for an external investigation to be started immediately upon information that the FCPA, the Act or other laws have possibly been violated. When appropriate, assistance from knowledgeable legal counsel who understands the statutory and regulatory environment of foreign transactions can also help avoid unnecessary potential violations.

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Legal Alert - "BIS" Issues Final Rule Amending Export Control List

By Richard C. Katz and Brett W. Johnson

The US Commerce Department's Bureau of Industry & Security ("BIS") maintains, as part of the agency's Export Administration Regulations ("EAR"), the Commerce Control List ("CCL"), which identifies items subject to Department of Commerce export controls. On May 20, 2011, BIS published a final rule in the *Federal Register* amending the CCL, including changes in export control requirements for a substantial number of items subject to export restrictions. Exporters who ship items subject to BIS export controls (generally high tech and "dual use" products and technology) should review the CCL amendments, which might affect their export licensing obligations. **Note**: Penalties for failure to strictly comply with BIS regulations can be substantial.

Additional Note: As of June 10, 2011, exporters using the “SNAP-R” system are required to appoint an “account administrator” for the system, or BIS will suspend that exporter’s use of the SNAP-R system.

The final rule revising the CCL was made to implement changes made to the Wassenaar Arrangement’s List of Dual-Use Goods and Technologies (“Wassenaar Arrangement” or “WA”) at the WA Plenary meeting held in December 2010. The Wassenaar Arrangement is an international body that administers effective export controls on strategic items with the objective of improving regional and international security and stability. The final rule adopted by BIS on May 20, 2011, harmonizes the United States CCL with the international Wassenaar list.

It is important to note that significant changes to the CCL occur in 53 separate Export Control Classification Numbers (ECCN) included in Categories 1-9. Exporters shipping goods or exporting technology under a specific ECCN (whether currently requiring a license or not) should review the CCL changes to determine their current legal responsibilities. The new rule also revises reporting requirements for exporters and adds and amends definitions in the Export Administration Regulations. Specifics concerning the affected regulatory changes are set forth at 76 *Federal Register* 29609-29632, May 20, 2011.

Civil penalties for export control violations can be as high as $250,000 per occurrence in addition to reputational damage to the violator. Companies guilty of export violations may also be barred from lucrative government contracts and/or export privileges. Criminal penalties can reach $1,000,000 per violation and 20 years imprisonment.

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