COZEN O'CONNOR

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BUSINESS LAW OBSERVER

NEWS ON CONTEMPORARY ISSUES

MESSAGE FROM THE CHAIR

TO THE FRIENDS OF COZEN O'CONNOR:

The Spring edition addresses many issues raised by the unprecedented economic troubles. Our articles touch upon banking relations, the American Recovery and Reinvestment Act of 2009, opportunities for businesses and non-profits created by the Act, and other important topics. While merger activity has slowed considerably, nevertheless, as our economy recovers, we offer a primer on compliance with FTC rules as merger transactions increase. The ubiquitous Blackberry and other electronic communications devices raise employment issues which we address, and which we suspect have been generally overlooked. We urge you to read the contents of this issue closely, and invite your inquiries concerning any of the topics in our Observer, or any concerns you may have relating to operating your business.

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DEALING WITH YOUR LENDER IN TROUBLED TIMES

Companies with financing arrangements often think that the best way to get through a difficult time is to slip below the radar screen and hope that their lender won't notice. Generally, denial is not the best strategy. Rather, consider a proactive approach.

1. *Understand Your Loan Agreement.* Often people think they know what the loan agreement says, but in reality, it was often negotiated a few years earlier and what one thinks it says, may not be entirely correct. Therefore, carefully review your loan agreement, especially if you are confronted by potential financial troubles, so you know what you are allowed to do and what prohibitions exist. You should understand your financial covenants, including the definitions of key terms in those covenants. If you have a revolving loan, you should understand the borrowing base, the advance rate and which components of the borrowing base may become ineligible. You should also make sure that you understand the circumstances that trigger a default and the reports that must be given to your lender and when.
2. *Understand The Current Trends In Your Business.* Examine whether your business is going through a temporary problem or whether the issues are more systemic. For instance, are one or more customers or suppliers having a problem which may lead to your company having a problem? You should also try to examine whether your company is performing similarly to other companies in your industry or whether it is performing better or worse than other businesses which are similarly situated.
3. *Devise A Plan To Deal With The Issues.* Develop projections based on a realistic set of assumptions. Then, second guess those assumptions as your lender will. Once you are comfortable with the realistic set of projections, discount them to a worse case scenario. Based on your projections, determine your cash needs and determine covenant compliance. Depending on the type of business, you should consider changes to your business such as asset dispositions, curtailing a line of business, or changing marketing efforts (such as tapping into "green" efforts or buying local campaigns).
4. *Schedule A Meeting With Your Lender.* Lenders do not like to be surprised. That is especially true in the current environment. Once you understand that there may be a problem and you have a plan to address the problem, meeting with your lender to discuss the situation and the plan is often the most productive course. Generally, a well thought out plan will be more positively received than either an ultimatum or an announcement of a problem without a proposed solution. If you have not met with your lender recently, you may want to consider role playing with your advisors prior to the meeting.
5. *Understand The Lender's Circumstances.* In the past the lender considered whether the loan was over-secured or under-secured; how long would it take for the lender to realize on the collateral; and how expensive would it be for the lender to liquidate the collateral? Now, however, there are lender-centric issues, such as to what extent must the lender improve its balance sheet; can the lender "afford" to realize a loss because it purchased credit default insurance or would it be better off working with the borrower; and is the lender subject to public scrutiny?
6. *Know What You Want From Your Lender.* Ask the lender for what you want, whether it is modifying certain covenants, modifying payment terms, changing advance rates or requesting out of formula advances. Be prepared for what the lender may want, such as requiring owners to contribute capital, adding guarantors, receiving additional fees, increasing the interest rate, and/or insisting on a short-term forbearance, rather than an amendment in order to be able to take action if the plan is not working as projected.

During these challenging times, maintaining good lender relationships is of utmost importance. Many lenders have consolidated, gone out of business or limited the types of borrowers to which they will lend and obtaining take-out financing has become very difficult. Planning and preparation are keys to obtaining and improving the relationship with your current lender and getting your business through this challenging economic time.

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A SUMMARY OF 2008 TAX CHANGES

The unifying theme of tax legislation in 2008 was expedience, i.e., what would work to stimulate the economy, rescue or bail out financial institutions, assist homeowners facing foreclosure, and flood a severely weakening economy with cash.

Probably the most important piece of legislation of the year was the Emergency Economic Stabilization Act of 2008 (the "Act"), better known as the "Bailout Bill" because it contained within it the creation of the $750 Billion Troubled Assets Relief Program ("TARP").

This article summarizes the business and investor related tax provisions of the Act and certain tax aspects of other important laws enacted and rulings and notices issued in 2008.

THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008

The Act includes the following provisions impacting businesses:

Small Business Expenses: The expensing provision of Section 179 of the Internal Revenue Code (the "Code") for small businesses was increased from $128,000 to $250,000 for 2008 with the investment limitation in qualifying property, above which the expensing provision phases out, increasing from $510,000 to $800,000.

Depreciation: 50% bonus depreciation is permitted for certain MACRS property placed in service in 2008. This extends through 2009 for transportation property, aircraft and certain other property with a recovery period of ten or more years.

Improvements: A 15-year cost recovery treatment is permitted for qualifying restaurant improvements and leasehold improvements in 2008 and 2009.

Tax Incentives: A number of energy efficiency and energy property tax incentives are extended through 2008.

Undisclosed Tax Return Positions: The controversial "more likely than not" standard for undisclosed tax return positions has been replaced with a "substantial authority" test, retroactive to the effective date of the 2007 Small Business Tax Act. Tax shelters and reportable transactions must still meet the "more likely than not" test.

Deferred Compensation: The largest single revenue increase is expected to result from a new provision (Section 457A of the Code) which taxes non-qualified deferred compensation amounts under plans of foreign corporations, partnerships and similar U.S. tax-exempt parties. This provision is largely aimed at offshore hedge funds and private equity firms.

IRS AND TREASURY DEPARTMENT ACTIONS

Loans from Corporate Subsidiaries: The Internal Revenue Service ("IRS") relaxed the rules which permit U.S. corporations to borrow amounts for short periods from their foreign subsidiaries without incurring a tax.

Net Operating Losses and Government Ownership: Notices 2008-84 and 2008-100 preserve NOLs for loss corporations in which the U.S. becomes a more than 50% owner and/or ceases to be a more than 50% owner.

Net Operating Losses and Ownership Changes: Notice 2008-78 sets forth the IRS' intention to write rules that liberalize the tax treatment of capital contributions to loss corporations within two years of an ownership change, a relaxation of the normal "anti-stuffing" rules dealing with contributions of appreciated property to loss corporations.

What is most extraordinary about these and similar actions by the IRS and the Treasury Department is that Congress was not notified before these changes were made nor was Congress asked for legislation to make these fixes. Some commentators have expressed doubt as to whether the Treasury Department had the authority to take these steps.

INFLATIONARY INCREASES IN 2008

Inflation early in 2008 gave rise to fairly substantial increases in a variety of tax items which are adjusted for inflation. These included increases to the Social Security wage base, an increase in the limitation on itemized deductions and an increase in the optional mileage deduction for business use.

SUMMARY OF OTHER IMPORTANT TAX DEVELOPMENTS

Wash-Sale Rules: The loss from the sale of a security will be disallowed if a substantially identical security is purchased within 30 days before or after the sale. If the taxpayer's IRA,

rather than the taxpayer, buys the substantially identical security, then according to Rev. Rul. 2008-5, the wash-sale rule still applies. It is unclear, however, if the result would be the same if the security were purchased in a §401(k) plan.

Investment Advisory Fees: In *Knight v. Commissioner,* the U.S. Supreme Court ruled that investment advisory fees paid by a trust or estate are subject to the 2% floor on miscellaneous itemized deductions. The exception to the 2% floor for trusts and estates in Section 67(e) of the Code applies, said the Court, only to those costs which would uncommonly or unlikely be incurred by individuals. The decision should end 20 years of controversy over this issue.

Abandoned Mergers: The IRS ruled in PLR 200823012 that a fee received by a target taxpayer in connection with an abandoned merger is treated as ordinary income, not capital gain.

Tax Exempt Bonds: In an important decision for the municipal bond market, the U.S. Supreme Court reversed a Kentucky court decision and upheld Kentucky's tax regime which exempts from tax the interest paid on bonds issued by Kentucky and its municipalities while taxing interest paid on the obligations of other states.

LLC Profits: The IRS issued a private letter ruling that it can levy on an owner's share of the profits of his LLC, notwithstanding a state law that bars creditors from attaching the assets of an LLC to satisfy the debts of its owner. This is a controversial ruling, and the courts may not agree.

Trading Losses: Unlike investors, those who are able to qualify as securities traders can deduct trading losses as ordinary losses and investment related costs as business expenses, not miscellaneous itemized deductions.

The changes summarized in this article clearly indicate a desire by Congress, the IRS and the Treasury Department to respond to and help stimulate a weak economy. In 2009, President Obama is expected to continue to work toward turning several significant changes to the tax system into legislation. Indeed, several important tax relief provisions were adopted in the recently enacted American Recovery and Reinvestment Act of 2009, and further changes to the Code are likely.

In particular, President Obama has indicated that corporate tax rates might be lowered but that the corporate tax base be broadened and loopholes closed, and that the tax rate on dividends and, perhaps, capital gains, should be allowed to increase in the future. The President has also proposed that tax provisions be added or adjusted to penalize businesses which move jobs offshore, that carried interests should be taxed at ordinary income rates, and that offshore tax havens should be attacked as a means of raising tax revenue.

The details of how President Obama expects to accomplish these broad tax goals continue to be negotiated and developed. Faced with a huge budget deficit as a result of both a weak economy and massive monetary rescue packages, it remains unclear how and in what form many of President Obama's proposed changes will actually move forward as legislation in 2009. Please look for updates from Cozen O'Connor on important future developments.

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AMERICAN RECOVERY AND REINVESTMENT ACT: BANK QUALIFIED BONDS EXPANDED

For many 501c3 non-profits, the bank qualified (BQ) provisions will be the most important tax-exempt bond changes contained in the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"). These changes will enable many non-profits to potentially lower the borrowing rate on their new bonds or to privately place debt with banks in tax-exempt financings of up to $30,000,000.

Section 265 of the Internal Revenue Code (the "Code") was amended in the 1986 Tax Act to make it disadvantageous for banks to purchase and hold tax-exempt bonds. Basically, the bank loses its deduction for its interest expense on its own borrowings in an amount proportional to the amount of interest it receives on its tax-exempt bonds. The economic result is that banks are not able to take advantage of tax-exempt bond interest.

Section 265 of the Code contains an exception to this rule for governmental bonds or 501c3 non-profit bonds known as the "small issuer exception." If the issuer (together with certain subordinate entities of the issuer) issues not more than $10,000,000 of such tax-exempt bonds in a given calendar year, then the issuer can designate the bonds for special treatment under Section 265. Under this special tax treatment, a bank can receive 80% of the benefit of the tax-exempt interest on the BQ bonds. This treatment makes BQ bonds attractive to banks.

The Recovery Act (Section 1502) amends the BQ "small issuer exception" in three important respects for bonds issued in 2009 or 2010. First, it increases the maximum dollar amount under the exception from $10,000,000 to $30,000,000. This will allow many more bond issues to obtain BQ status. For example, a college that wants to build a new academic building for $18,000,000 now has the ability to finance it through one bond issue that receives BQ treatment.

Second, with respect to 501c3 bond issues, the Recovery Act permits the $30,000,000 limit to be applied at the level of the 501c3 borrower rather than at the level of the conduit issuer. For example, under prior law, a health or education authority wanting to meet the BQ "small issuer exception" could only issue up to $10,000,000 in total bonds a year for the benefit of 501c3 entities. This meant that a state or county authority that issues bonds for many health systems or colleges could never use the BQ "small issuer exception." Now such authorities can issue many such bonds on a BQ basis since the $30,000,000 test is applied at the level of the borrowing health system or college.

Third, the Recovery Act benefits conduit issuers who issue "pool bonds" or "composite bonds" at one time for multiple borrowers. If the borrowers are all either governmental entities or 501c3 entities, the $30,000,000 BQ limit will be tested at the level of the individual borrower.

In addition, the Recovery Act added a separate "safe harbor" exception (Section 1501) to Section 265 which allows a bank to receive the 80% benefit for tax-exempt bonds issued in 2009 and 2010, without regard to whether the bonds are bank qualified, to the extent the bank's holdings of tax-exempt bonds do not exceed 2% of the bank's assets.

501c3 non-profits should consult with their financial advisors on the economic benefits of BQ status. In a normal market (which this is certainly not), because of the extra demand supplied by the banks, BQ bonds should sell at lower yields than non-BQ bonds. The BQ changes also enable governments and non-profits to privately place debt with an individual bank on much larger projects. For example, a non-profit with a $20,000,000 project that is not able to go into the current public market at favorable rates may be able to negotiate a tax-exempt financing with a bank. Perhaps that financing will have a 3 to 5 year term which will take the non-profit to the (hopefully) sunnier days ahead.

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AMERICAN RECOVERY AND REINVESTMENT ACT: SMALL ISSUE IDBs EXPANDED

Section 144(a) of the Internal Revenue Code allows the issuance of tax-exempt industrial development bonds (generally known as "small issue IDBs") to finance privately-owned manufacturing facilities. These bonds are issued by public authorities for the benefit of private companies.

Small issue IDBs have three restrictions which limit them to fairly small projects. First, they are generally limited to $10,000,000 in principal amount. Second, there is a restriction on capital expenditures by the company: the sum of (i) the principal amount of the bonds and (ii) other capital expenditures made by the company (and related parties) in the same municipality or county within 3 years (both forward and back) of the date the bonds are issued may not exceed $20,000,000. Third, in order to prevent the company from doing too many small issue IDBs across the country, there is a national $40,000,000 aggregate limitation per borrower.

Section 1301 of the American Recovery and Reinvestment Act of 2009 (the "Recovery Act") increases the types of facilities for which such small issue IDBs may be issued. This liberalization applies to small issue IDBs issued during the remainder of 2009 and in 2010. There are two important changes contained in the Recovery Act.

First, traditionally only the construction of a facility for the manufacturing or production of "tangible" personal property was financeable. The Recovery Act now permits the financing of a facility used in the creation or production of "intangible" property (which would include any "patent, copyright, formula, process, design, pattern, knowhow, format, or other similar item"). The intention is to include, among other activities, the creation of computer software and the intellectual property associated with bio-tech and pharmaceuticals.

Second, prior law limited the amount of directly related and ancillary facilities which could be financed with proceeds of the bonds to 25% of the net proceeds of the bonds. The Recovery Act provides that facilities which are functionally related and subordinate to a manufacturing facility and located on the same site may be financed with an unlimited amount of the proceeds.

Note that small issue IDBs are subject to a number of other restrictions, including those which generally apply to private activity bonds, and require volume cap allocation.

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WAGE AND HOUR ISSUES IN THE BLACKBERRY ERA

Many employers routinely provide their employees with Blackberries, cell phones, laptops and other electronic devices with little thought to potential legal liability created by the use of such technology. Given the rise of class action lawsuits brought under the Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.*, ("FLSA"), employers should be mindful of the pitfalls created by a digital workforce and take the appropriate precautions.

THE FAIR LABOR STANDARDS ACT

The FLSA requires covered employers to compensate employees for all hours worked. Nonexempt employees (often referred to as hourly employees) are entitled to overtime compensation at the rate of one and a half times the employee's regular rate of pay for hours worked over forty in a workweek. Employers must compensate nonexempt employees for all time spent performing work that is for the benefit of the employer. It does not matter that the employer did not specifically request that the employee work after hours; if the employee worked for the benefit of

the employer, then the employer must compensate the employee. For example, if a nonexempt secretary comes in to work ten minutes early once a week to catch up on paperwork, she must be compensated for that time, even if she was not told to come in early to complete her paperwork. An employer may discipline an employee for working before or after hours without authorization, but an employer cannot refuse to compensate an employee for time worked for the benefit of the employer.

THE WAGE AND HOUR RISKS POSED BY ELECTRONIC DEVICES

While employers are usually well versed in accounting for hours worked by employees, employees' use of Blackberries and other electronic devices pose particular problems. If a nonexempt employee chooses to review and respond to work emails prior to arriving at work in the morning or at night, before bed, regardless of whether the employer required the employee to do so, then that time may well be considered time worked for the purposes of the FLSA. The ease of checking emails on Blackberries or other similar electronic devices makes it convenient for employees to remotely check their email whenever they have a few minutes – even from the train while traveling home from work. However, unless the employee informs his employer that s/he spent that time checking email, then the employer may not record that time as part of the employee's hours. Therefore, the employer may not properly compensate the employee. Even an extra 5 minutes of checking emails two times a day, multiplied by ten or twenty employees, can add up quickly.

AVOIDING LIABILITY

In light of the above risks, employers should carefully review their policies and plan their response now, before being hit with a wage and hour lawsuit.

First, employers may want to review their policies and strictly prohibit nonexempt employees from checking or responding to email or performing other work-related tasks remotely outside of normal working hours or without express authorization. Note, however, that an employee's failure to secure proper authorization prior to working after hours does not excuse an employer from compensating an employee for that time. Instead, an employer's recourse is to discipline the employee – perhaps, by cutting off the employee's remote access. This may not be feasible for all companies or for all nonexempt employees but it is one method of reducing risk.

Second, employers should ensure that their policies clearly state that employees must report all working time spent on portable electronic devices. For example, employees would be informed that they must report all time spent reviewing and/or responding to emails outside of normal working hours, in order to ensure that they are properly compensated for all working time.

Finally, employers may want to consider limiting a nonexempt employee's access to company provided email and/or portable electronic devices before and after working hours. In such cases, only exempt employees would be issued Blackberries and other portable electronic devices. This approach, while drastic for some companies, virtually ensures that a company is able to accurately track all working hours by nonexempt employees.

"While employers are usually well versed in accounting for hours worked by employees, employees' use of Blackberries and other electronic devices pose particular problems."

Given the recent rise of wage and hour class action lawsuits, employers would be wise to review their employee policies and modify their policies when necessary to ensure compliance with the FLSA and other applicable federal, state and local laws.

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HSR PRIMER

Federal antitrust laws provide that large transactions involving the merger or acquisition of large companies with or by other large companies are subject to review by the U.S. Federal Trade Commission ("FTC") and the U.S. Justice Department for potential anti-competitive effects. However, given how the relevant laws and regulations define large, a merger or acquisition that doesn't seem all that large and doesn't seem like it would have any impact on competition can still be subject to federal government review.

The law that created the government review process, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"), provides for a notification of the FTC and the Justice Department of any pending merger or acquisition transaction where the parties meet the "size-of-person" test and the transaction itself meets the "size of transaction" test. Prior to recent amendments, if one of the parties, either the buyer or the seller, had annual net sales or total assets of more than $100 million, and the other party had annual net sales or total assets of more than $10 million and the transaction was valued at more than $50 million, then the transaction was reportable, and both parties were required to file the HSR Premerger Notification and Report Form with the FTC and the Justice Department. If a transaction was valued at more than $200 million, then it was reportable regardless of the size of the parties.

In 2000, HSR was amended to provide for annual increases to these notification thresholds based upon the annual change in the gross national product. In February 2009, the thresholds were increased so that the parties had to exceed $130.3 million and $13 million for the size-of-person test, and the transaction had to be valued at more than $65.2 million for it to be reportable; or if the transaction exceeded $260.7 million it was reportable regardless of the size of the parties. If the parties and/or the transaction exceed the thresholds, then the transaction is reportable even if there are no obvious anti-competitive effects; i.e., a financial buyer is acquiring a company in a line of business in which it has no other interest.

There is a filing fee for the premerger notification, usually paid by the buyer, that starts at $45,000, increases to $125,000 for transactions valued over $130.3 million and is higher for larger transactions.

When a premerger notification filing is made, the FTC has 30 days to decide if it wants to investigate further. If the 30-day waiting period expires without the FTC seeking additional information, that is the end of the process. If the FTC seeks additional information, it means that the FTC is concerned about the potential effects of the transaction on competition and the inquiry is, in essence, just the beginning.

For transactions in which there clearly are no anti-competitive effects, the parties can seek an early termination of the 30-day waiting period which the FTC often grants within two weeks.

There are substantial penalties for failing to file the premerger notification form; currently $11,000 per day and increasing to $16,000 per day for each day after a transaction occurs for which the notice is not filed.

"There are substantial penalties for failing to file the premerger notification form; currently $11,000 per day and increasing to $16,000 per day for each day after a transaction occurs for which the notice is not filed."

With merger or acquisition transactions often having debt assumption, stock, earnouts or other contingent payments as part of the overall purchase price, determining whether an HSR Premerger Notification and Report Form needs to be filed may require a thorough analysis of the transaction. Such an analysis should be done soon after the business deal is finalized so, if necessary, the government review process can be accomplished without delaying the completion of the transaction.

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OPENING THE FLOODGATES: NEW GENERIC TOP LEVEL DOMAINS ROLLING OUT SOON

In June 2008, the Internet Corporation for Assigned Names and Numbers ("ICANN") approved the recommendation for the introduction of an indefinite number of new generic top level domain names ("gTLDs") to the 21 existing gTLDs (such as .com, .org, .net) and the over 250 existing country code top-level domain names (such as .us, .mx, and .uk). This new wave of gTLDs could include so-called "vanity" gTLDs such as GOOGLE applying for .google or Cozen O'Connor applying for .cozen. The new gTLDs could begin appearing online by the end of 2009, with current estimates ranging from 50-1000 new gTLDs. To take advantage of these new opportunities, and to best protect trademark rights, preparation must now be taken by trademark owners and those parties interested in securing domain names in these new gTLDs.

ICANN is still processing many of the applications for new gTLDs, though trademark owners will be particularly interested to take note of any mechanisms that they can utilize to secure domain names based upon existing trademark registrations. Each new gTLD must include a proposed "Rights Mechanism Protection" for the associated domain names to be registered. The "Rights Mechanism Protection" is a policy providing procedures for each proposed new gTLD to protect trademark rights, human rights, and freedom of expression.

Based on the prior introduction of new gTLDs, a multi-phase registration period is likely. During a multi-phase registration period there would be (1) a sunrise period that allows trademark owners to register domain names in which they have rights; (2) a subsequent "landrush" period where anyone can apply for a domain name; and (3) an auction period which is held between multiple applicants seeking to register the identical domain name.

LIST OF RECOMMENDED ACTIONS

- Determine which gTLDs are the most valuable based on consumer expectations, and likelihood of value.
- To maximize cost-savings and the ability to register valuable domain names, participate in sunrise periods for all desired gTLDs, when available.
- Analyze marketing plans and current domain name policies.
- Set up a monitoring system for tracking new gTLD applications and watching competitors' activities.
- Consider focused enforcement strategies based on core or house marks, with consideration for actual and potential value in the marketplace.

CONCLUSION

Each trademark portfolio is unique, and each business will face novel challenges and opportunities deriving from the introduction of new gTLDs. Undoubtedly, those who prepare to face this new reality will be best-positioned to secure and protect their intellectual property in the future.

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