COZEN O'CONNOR

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IN THIS ISSUE

MESSAGE FROM THE CHAIR

To the friends of Cozen O'Connor:

Recent corporate events have prompted our Fall 2011 newsletter to contain pertinent information relevant to those events. Criminal activity perpetrated in a company must be addressed with crisis management speed. Our first piece provides step by step guidance to minimizing damage both as to financial loss and business reputation in the event criminal activity is uncovered. Joint ventures and merger activity have increased, and consideration of the legal impediments to such business activities is critical. We provide general guidance on the Sherman Antitrust Act and how to navigate the Act's requirements. While many mergers are friendly, an increase in hostile take-overs has seen the renewal of "poison pill" provisions adopted by corporate boards as defense mechanisms to unwanted buyout offers. We provide a refresher course on those provisions.

Also in the news is the topic of illegal immigration. Notwithstanding inaction by Congress , there are many ways to legally hire skilled foreign nationals who are essential to a business's growth. Our article summarizes the law and how to conform to it. Lastly, the Dodd-Frank Act contains a multitude of provisions touching on virtually every area of finance, both consumer and commercial. One of its most complex sections deals with asset-based securities or securitizations. We cover those areas in anticipation of the regulations the SEC may promulgate, and how they affect the issuance of these securities.

We welcome your inquiries on these topics and any other questions you may have, and trust that we can provide you with the counsel you need to steer clear of the impediments to successfully running your business.

Best Regards,

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UTILITY OF INTERNAL INVESTIGATIONS

Credible reports of criminal violations within a company may cause management's stomach to sink. Once the initial shock wears off, however, the company must seize the opportunity to go on the offensive by conducting a comprehensive, internal investigation of the alleged violations to avail itself of a variety of courses of corrective and remedial actions, many of which would be undermined or lost should the alleged violations remain largely unaddressed.

The immediate priority is to stop the ongoing violations to limit any further criminal exposure of the company and its representatives. Such action requires not only a full understanding of *what* happened, but also an understanding of *who* participated in the violations and *how* they did it. Until all participants and the extent and nature of their respective involvement are identified, a company cannot feel confident that it has stopped the bleeding.

In an internal investigation, company representatives should work closely with outside counsel who bring specialized investigative expertise and an independent, unfettered perspective to assess the situation. Although each investigation is unique, investigations all share a number of common elements and steps:

"The immediate priority is to stop the ongoing violations to limit any further criminal exposure of the company and its representatives."

- Understanding the Underlying Business – No effective and meaningful investigation can or should be conducted "cold turkey." Investigative counsel need to understand the context in which certain alleged actions or comments were made so as to identify all potential avenues of liability.
- Reviewing Internal Documentary Evidence – This can include a review of internal emails, text messages, documents saved on the company's computer servers, credit card statements, phone records, timesheets, etc. In some cases, it may also include a review of GPS data from an employee's car or mobile phone.
- Reviewing External Documents – In addition to the review of the internal documentation, some investigations may require a thorough analysis of publicly available documents pertaining to the company, its business and/or alleged misconduct. As an example, in an insider-trading investigation, counsel would need to review records of the date/time/amounts of key transactions.
- Conducting Interviews – This is often the final and most crucial aspect of an internal investigation. Company personnel can be confronted with important evidence discovered in the investigation, and their credibility can be evaluated by counsel with experience in assessing body language and other indicators of dishonesty. Keep in mind that individual employees may need separate counsel.
- Completing the Final Report – Most internal investigations conclude with a report setting forth the facts, an assessment of criminal and/or civil exposure and a recommendation of the corrective actions and remedies to be implemented. Remedies might include disciplining employees, terminating relationships with independent contractors or foreign partners, improving the company's compliance program/internal controls, filing a claim under the company's employee-misconduct insurance policy, etc.

Once a company has effectively utilized an internal investigation to terminate its *continuing* liability, the company can avail itself of opportunities to mitigate its *past* liability. Some of those opportunities include filing an insurance claim or commencing civil litigation. Self-reporting the violations to law enforcement officials is another opportunity. More specifically, this includes an opportunity for a company to demonstrate to prosecutors its commitment to compliance. This is an invaluable asset that often means the difference between onerous criminal punishment and more lenient charging decisions by prosecutors (including a decision not to prosecute at all). Prosecutors can often be convinced that a company with effective internal policies does not warrant or require criminal punishment to enforce corporate compliance.

The decision to self-report violations is understandably complicated. On the one hand, a company can use self-reporting effectively to demonstrate its commitment to compliance and to mitigate any criminal sanctions to which it or its representatives may otherwise be exposed. The truth is that many companies believe strongly in the notion of good corporate citizenship, and self-reporting violations is an effective way to evidence such commitment. There is also an internal deterrence value to self-reporting misconduct to law enforcement officials such that it will put employees on notice that wrong-doing will not be tolerated.

Alternatively, internal investigations can be truly internal, if a company so chooses, provided certain steps are taken. If handled properly, internal investigations can be protected by the attorney-client privilege as legal advice to the company. Internal investigations also give companies the opportunity to clean up their own messes quietly without the negative "public relations" impact and without an admission of criminal liability that would necessitate a waiver of the attorney-client privilege. Some corporate executives may not feel comfortable waiving privilege and forfeiting all of the company's negotiating leverage with prosecutors, while simultaneously inviting a slew of civil lawsuits against the company, in return for only the hope of mercy from prosecutors. Internal investigations are essential to preserving this option. Absent quick containment of the problem and remedial action, violations are much more likely to become known by the outside world through disgruntled employees, competitors, opportunistic whistleblowers, divorcing spouses, civil litigation, or countless other ways outside of the company's control.

There is no "one size fits all" approach to handling reports of criminal violations within a company. Each situation demands its own careful consultation with outside counsel and the company's management, and difficult choices will need to be made. There can be no doubt, however, that without commencing an internal investigation, companies forever give up several useful options to address the potential problem.

Cozen O'Connor attorneys regularly provide advice, counsel and assistance to businesses, large and small, on conducting internal investigations. If you have any questions or would like additional information on the information presented above, please contact Stephen Miller at 215.665.4736, or via email at samiller@cozen.com.

WHAT EVERY BUSINESS SHOULD KNOW ABOUT THE SHERMAN ANTITRUST ACT

PRACTICAL TIPS AND PITFALLS TO AVOID ANTITRUST PROBLEMS

The U.S. antitrust laws are designed to preserve and promote free competition. In a competitive marketplace, there are strong incentives for rival businesses to operate efficiently, keep prices down, and boost their product and service quality. Businesses continue to find innovative ways to achieve these goals, including through efforts that may raise antitrust concerns but are ordinarily lawful — like joint ventures, exclusive arrangements, and benchmarking exercises with competitors.

But the antitrust laws are intricate, and the line between pro-competitive and illegal conduct under these laws is highly dependent on the details. This often makes it difficult for many businesses to know whether certain practices violate antitrust laws. Moreover, even inadvertent violations can result in substantial penalties. As a result, it is essential for companies to understand the basic scope of the antitrust laws and guard against potential missteps.

As a general guide, below is a brief overview of the Sherman Antitrust Act and a discussion of some of the more common antitrust issues encountered by businesses under this law.

UNREASONABLE RESTRAINTS: THE "PER SE" VIOLATIONS

Section 1 of the Sherman Act prohibits any agreement among competitors that unreasonably restrains competition. The Supreme Court uses two types of analyses to determine the lawfulness of activities under the Sherman Antitrust Act: *per se* and Rule of Reason. *Per se* agreements are so likely to harm competition and to have no significant

pro-competitive effect that they are presumed to be illegal without consideration of any evidence that the agreement might have a legitimate business purpose. Types of agreements held to be *per se* illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, or territories.

Per se agreements are the most likely to result in substantial antitrust penalties. To avoid *per se* violations, businesses should adhere to the following basic guidelines:

- Do not agree on, and avoid even discussing, commercially sensitive topics with competitors, such as prices, pricing procedures, costs, customer lists, discounts, profits, credit terms, or production levels.
- Do not agree with any competitors to refuse to sell to certain customers, serve only some areas, or buy from only certain suppliers.
- Note that an "agreement" is the essence of a Section 1 violation. But an agreement does not have to be written or specifically stated. It can also be oral or inferred from conduct, surrounding circumstances and documents such as notes, minutes and memoranda.
- Do not notify other companies prior to reducing prices, establish or agree on uniform price increases or discounts, or agree to maintain floor prices.
- For all contracts that require competitive bidding, limit the number of people in your company who are familiar with the bid terms. The fewer people in your company who know the bid terms, the less likely sensitive information will be disclosed to a competitor.

THE RULE OF REASON: JOINT VENTURES, INFORMATION EXCHANGES, AND VERTICAL RESTRAINTS

All other agreements under Section 1 of the Sherman Antitrust Act are evaluated under the "Rule of Reason," involving a factual inquiry into an agreement's overall competitive effect. Examples of agreements that are typically evaluated under the Rule of Reason analysis are joint ventures and information exchanges.

One of the most perplexing areas of antitrust law – for practitioners and non-lawyers alike – is joint ventures. Even the term "joint venture" lacks a precise meaning under the antitrust laws. A joint venture typically refers to any form of collaboration, short of a formal merger, by which companies agree to work together to engage in some economic activity or to pursue a common goal. In today's marketplace, competitors often look to pool their resources to expand into foreign markets, produce new brands or innovative products, lower their production costs, and share legal risks.

Federal antitrust agencies have acknowledged that joint ventures are often pro-competitive, allowing companies to combine their expertise to make better use of their assets. Where companies lack the resources to handle projects on their own, joint ventures can increase competition by allowing small and regional firms to compete with larger companies. On the other hand, joint ventures can also create the opportunity for collusion, enhance market power, or eliminate potential competition in the marketplace. Below are a few tips for keeping joint ventures lawful:

- Evaluate the potential anticompetitive harms of the agreement. Does it reduce the parties' ability or incentive to compete independently, create barriers for other competitors to compete, or increase the parties' ability to raise prices or reduce production, service quality, or technical innovation?
- Be prepared to provide a business justification for any joint venture. Does the agreement allow the parties to serve more customers, bring services to customers faster or cheaper, or combine assets or use them more efficiently?
- Avoid oral or informal joint ventures. Consider using letters of intent to define the scope of the joint venture, as well as each party's specific responsibilities.
- Consider the term of the proposed joint venture. The shorter the duration, the more likely the parties will compete against each other in the future.

Information exchange agreements are also judged under the Rule of Reason standard because these agreements have the potential to assist companies in reducing operational costs, making informed purchasing decisions, and competing more effectively. But any agreement or understanding among competitors to disclose or exchange certain data or information can still present antitrust issues, depending on the specific data exchanged and the method of disclosure. Some guidance on keeping information exchanges lawful include:

- Parties should never enter into an agreement *based on* the information exchanged. This could constitute a *per se* violation of Section 1 of the Sherman Act.
- The exchange of data and information that is publicly available is generally permissible.
- Rather than competitors directly exchanging information among themselves, the exchange should be managed by an independent third-party, and the data should be sufficiently aggregated so that the parties cannot identify individual companies' information.
- All commercial information exchanged should be at least three months old. Never exchange any data regarding future pricing, discounts, marketing approaches, or costs.
- Limit oral discussions relating to the data exchanged. Do not impose any monitoring or tracking mechanisms to see how each party individually uses the information and data obtained in the exchange.

Finally, antitrust analysis distinguishes between economic relationships among competitors on the same level of distribution (horizontal relationships), and relationships on different distributional levels (vertical relationships). Vertical agreements include those between manufacturers and wholesalers, or wholesalers and retailers. Because these agreements are not between direct competitors, they are generally treated less severely than horizontal agreements. Most vertical constraints, such as exclusive selling arrangements, resale price maintenance agreements and most tying arrangements (where sellers with more than one product combine the sale of one product to that of another), are judged under the Rule of Reason analysis and condemned only when they are determined to be unreasonable based on the totality of the economic circumstances.

MONOPOLIZATION

Section 2 of the Sherman Antitrust Act prohibits monopolization or any attempted monopolization of any market for a product or service. Unlike Section 1, no agreement or second party is necessary for a violation to occur. Illegal monopolization involves the abuse of economic power, or any activities perceived to lead to monopolistic pricing or other restraints. The focus of attempted monopolization is the attempt to gain economic power through anticompetitive behavior. Economic power can either result from a firm having a large market share or engaging in a number of restrictive agreements.

A company has market power when it is able to set supra-competitive prices or exclude competitors from the market. Under Section 2, the mere possession of market power is not illegal; a violation only occurs if a company acquires, maintains, or expands its market power through anticompetitive means. Activities that can give rise to liability under Section 2, due to the effect of excluding competition, include: exclusive dealing arrangements with customers or suppliers, product tying, bundling or loyalty discounts, most favored nations provisions, refusals to deal with certain customers or suppliers, and predatory pricing schemes under which a company lowers its short-term price in order to eliminate a competitor.

CONCLUSION

Because application of the antitrust laws is fact-specific, no one set of guidelines can answer every antitrust question that might arise. Further, in addition to the Sherman Antitrust Act, businesses must be aware of and comply with state and other federal antitrust laws. The discussion above, however, attempts to identify a few of the more common business activities that are likely to raise antitrust concerns. To avoid legal missteps the most important tip for businesses is to consult antitrust counsel before engaging in any activity that has the potential to raise prices or reduce supply in a market or before entering into any type of cooperative activity with another company, particularly a competitor.

Cozen O'Connor attorneys routinely provide advice and counsel on antitrust matters. If you have any questions or would like additional information on the information presented above, please contact Jonathan Grossman at 202.912.4866, or via email at jgrossman@cozen.com or Robert Magovern at 202.463.2539 or via email at rmagovern@cozen.com.

POISON PILLS ARE BACK IN THE NEWS: WHAT YOU NEED TO KNOW

Shareholder rights plans, commonly known as poison pills, are used by companies to defend against hostile takeovers. A poison pill creates an incentive for a hostile bidder to negotiate with the target company and, in certain cases, deter an unwanted offer completely. Poison pills first became popular in the 1980s and, by 2002, 60 percent of the S&P 500 companies had a poison pill in place. Fast-forward to 2008 and only 28 percent of the S&P 500 companies had poison pills in place. This decline was due in part to the booming economy and in part to a shareholder activism movement.

> *" There are two principal types of poison pills, flip-in and flip-over plans."*

Recently, however, with the resurgence of takeovers, poison pills are back in the news. For example, in *Air Products and Chemicals, Inc., v. Airgas, Inc.*, the Delaware Supreme Court held that a board of directors was not obligated to "pull" a pill even after two years of takeover offers and requests from shareholders to negotiate with the bidder. Also, in *Versata Enterprises, Inc. and Trilogy, Inc. v. Selectica, Inc.*, the same court upheld the board of directors' decision to trigger a pill and issue additional shares, thereby diluting the hostile bidder's interest and preventing a takeover. In light of the renewed interest in poison pills, this article provides a quick refresher.

Poison pills provide a mechanism by which an unwanted bidder suffers an extreme dilution of its equity position if it crosses a specified ownership threshold (usually 15 percent) by having additional equity issued in exchange for "rights" granted to the company's shareholders other than the unwanted bidder. There are two principal types of poison pills — flip-in and flip-over plans. The flip-in plan, the most frequently used type, gives the target company's shareholders (other than the shareholder that has triggered the pill) the right to purchase additional shares of the company at a discounted price. The flip-over plan gives the target company's shareholders the right to purchase the shares purchased by the hostile bidder at a discounted price. A poison pill is implemented through the adoption of a shareholder rights plan by a company's board of directors. As long as there are sufficient authorized shares to cover the shares issuable upon the exercise of the poison pill rights, no shareholder action will be required. Recently, however, more companies are giving shareholders a say on poison pills.

Poison pills can also be adopted to protect the net operating losses of a company (NOL pill). An NOL pill, or a 382 poison pill, is a variation on the general poison pill and is used to protect a company's net operating losses that can be used to shelter future income (or, generally speaking, income over the prior two years) from taxation. Under section 382 of the Internal Revenue Code, a company which experiences an ownership change (as described in the next sentence) in a three-year period is prevented from using any net operating losses occurring before that ownership change. Generally, an ownership change occurs for this purpose when more than 50 percent of a company's share ownership changes; however, only those shareholders holding a 5 percent or greater block of the company's outstanding shares are considered in calculating this change.

> *" Poison pills are among the most important anti-takeover defenses that public companies should consider. "*

Several studies have analyzed the effect of poison pills on shareholder value. Some studies indicate that companies with poison pills in place receive higher takeover premiums. However, other studies have concluded that poison pills decrease shareholder value.

Poison pills are among the most important anti-takeover defenses that public companies should consider. The following are factors to be considered in determining whether a public company should implement a poison pill:

- The other anti-takeover devices that a company has in place should be considered. For example, if a company has a staggered board or supermajority voting requirements for certain actions, certain combinations of anti-takeover devices may create a preclusive effect.
- When implementing a poison pill, companies should undertake a thorough investigation process and engage outside experts as appropriate.
- Poison pills often include automatic "sunset" provisions after a specified period (typically 10 years). Moreover, some poison pills include a requirement that an independent director review the poison pill every three years and decide whether it is in the best interests of the shareholders. While the independent director's finding is not binding on the board, it would be difficult for a board to ignore it completely.
- Implementation of an NOL pill should be considered by any company with substantial operating losses.
- Institutional investors generally remain hostile to poison pills and, with respect to NOL pills, the Institutional Shareholder Services, a leading provider of corporate governance services, recommends NOL pills have a term that is the shorter of three years or the remaining life of the company's net operating losses.

Cozen O'Connor attorneys regularly provide advice and counsel to companies' board of directors and shareholders on corporate governance topics, including avoiding takeovers. If you have any questions or would like additional information on the information presented above, please contact Jason Shargel at 215.665.6914, or via email at jshargel@cozen.com or Jessica Monaco at 215.665.2137 or via email at jmonaco@cozen.com.

BUSINESS IMMIGRATION BASICS: HIRING FOREIGN NATIONALS

Foreign nationals who are not citizens, permanent residents or refugees/asylees of the U.S. must first obtain authorization to work in the United States pursuant to non-immigrant (temporary) or immigrant visas. Non-immigrant visas confer temporary work authorization; while immigrant visas grant permanent residency status.

TYPES OF NON-IMMIGRANT (TEMPORARY) VISAS

There are numerous types of non-immigrant visas, designated by letter/number sequences. The appropriate visa depends on a number factors, such as nationality, intended activities while in the U.S., and length of stay. The following is a brief description of the more commonly held business-related temporary visas.

B-1 BUSINESS VISITOR

The B-1 visa may be appropriate for a foreign national who is coming to the U.S. for limited business activities – not employment. No petition needs to be filed with the U.S. Citizen and Immigration Services (USCIS) and the foreign national may apply for the visa at a U.S. embassy abroad. However, a B-1 business visitor is permitted to stay in the U.S. for only brief periods of time (typically less than six months).

"The appropriate visa depends on a number factors, such as nationality, intended activities while in the U.S., and length of stay. "

VISA WAIVER PROGRAM (VWP)

Certain nationals do not need a visitor's visa to enter the U.S., so instead of applying for the B-1 visa at a U.S. embassy, visa waiver nationals may travel directly to the U.S. as business visitors. These VWP business visitors can stay in the country for up to 90 days. However, VWP entrants may not be granted extensions or change of status; they must leave before the end of their lawful period of stay. A list of VWP countries can be found online.

H-1B SPECIALTY OCCUPATION WORKER

Except in narrow circumstances, most business activities in the U.S. are considered employment, and pretravel application must be made with the USCIS. The H-1B visa is the most commonly held visa for professional workers. The H-1B classification applies to "specialty occupations" – at minimum, the job position must require a theoretical and practical application of a body of highly specialized knowledge (i.e., bachelor's degree). Employers sponsoring a job candidate requiring a new H-1B will have to contend with the annual cap on such visas. Currently, the annual cap on the H-1B category is 65,000 per year.

TN-1 NAFTA PROFESSIONAL

In order to avoid the H-1B cap limits, the feasibility of alternative non-immigrant visas should be determined. TN-1 classification is advantageous in that there is no cap and no prior application need be made with the USCIS. However, the TN-1 status is only granted to Canadian or Mexican professionals, pursuant to the North American Free Trade Agreement (NAFTA). In order to apply for the TN-1, the Canadian or Mexican citizen must have the degree, experience, or licensing requirements designated for each eligible profession.

> *"An added benefit of the L-1 visa is that spouses of these visa holders may also work in the U.S."*

L-1 INTRACOMPANY TRANSFEREE

If the candidate is already working for a foreign affiliate of the U.S. sponsoring company, the L-1 visa may be an option. Like the TN-1, the L-1 visas are not subject to a cap. The L-1 classification is for intracompany transferees who, within three years prior to filing, were employed abroad for at least one year by an affiliate, subsidiary, parent or branch of the U.S. company in a managerial, executive or specialized knowledge position. An added benefit of the L-1 visa is that spouses of these visa holders may also work in the U.S.

E-1/E-2 TREATY TRADERS AND INVESTORS

Another type of non-immigrant category that permits employment is the E-1/E-2 treaty trader or investor classification. The E-1 treaty trader may engage in international trade based in the U.S. The E-2 treaty investor can enter the U.S. for the purpose of actively investing a substantial amount in an enterprise. The trader or investor must have the nationality of a treaty country, and at least 50 percent of the U.S. entity created for trade/investment must be owned by non-U.S. resident nationals of a treaty country. Employees of E-1/E-2 holders who are executives, supervisors or "essential workers" may also obtain E-1/E-2 visas. These employees must have the same nationality as the employer. Spouses of E-1/E-2 visa holders are also eligible to apply for employment authorization.

O-1 ALIENS WITH EXTRAORDINARY ABILITY

Foreign nationals who are highly regarded and recognized in their field may qualify for the O-1 visa. The O-1 is for individuals with extraordinary ability in the sciences, arts, education, business or athletics, as demonstrated by sustained national or international acclaim. Unless the candidate has won a highly recognized award such as a Nobel Prize, extraordinary ability must be documented with evidence of lesser awards, published material in major media, and the like.

PREFERENCE CATEGORIES FOR EMPLOYMENT-BASED IMMIGRANT VISAS (PERMANENT RESIDENCY)

A job candidate, or an employee who may already have temporary visa status, can be sponsored for permanent residency (immigrant visa) by an employer. There are different types, or "preferences," of petitions for immigrant visas. The three most common in the employment context is the First Preference (EB-1), Second Preference (EB-2), and Third Preference (EB-3). The EB-5 category is reserved for investors. Due to the per country and per preference quotas (designated by "priority dates"), nationals of certain countries applying for EB-2 or EB-3 classification may have to wait years for final processing of their permanent residency.

EMPLOYMENT FIRST PREFERENCE (EB-1)

EB-1, the highest preference, is designated for the following types of workers: 1) Extraordinary Ability Workers; 2) Outstanding Researchers and Professors; and 3) Multinational Managers/Executives. These types of professionals, irrespective of nationality, have historically enjoyed faster priority dates.

EMPLOYMENT SECOND PREFERENCE (EB-2)

There are two subcategories of the EB-2 Second Preference: (1) workers who are members of a profession holding advanced degrees or equivalent; and (2) workers who, because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural, educational interests or welfare of the U.S. Unless a national interest waiver is granted by USCIS, the applicant must have a job offer and labor certification from the Department of Labor. The certification is based on the employer's attestations that (1) there is not a sufficient number of U.S. workers who are available and qualified for the position that the foreign worker seeks to fill; and (2) the employment of the foreign worker will not adversely impact the wages and working conditions of U.S. workers.

EMPLOYMENT THIRD PREFERENCE (EB-3)

The third preference category of immigrant filing also requires a job offer from a sponsoring employer and labor certification from the Department of Labor. There are three subgroups within this category: (1) professionals with a bachelor's degree for positions requiring at least a bachelor's degree; (2) skilled workers for positions that require at least two years' experience; and (3) other workers for positions that require less than two years' experience.

EMPLOYMENT FIFTH PREFERENCE (EB-5)

The EB-5 is for foreign investors who wish to live and work in the U.S. The minimum dollar amount to invest is $1 million dollars ($500,000 if the investment is in an area of high unemployment). The investor must also create 10 full-time jobs for U.S. workers, and the investment must be in a new enterprise that benefits the U.S. The EB-5 investor is initially given conditional permanent residency status for two years. Prior to the two year anniversary of obtaining residency, a petition must be filed showing the investment was made and jobs were created.

There are myriad ways foreign nationals can work in the U.S., both as temporary or permanent workers. While finding the right visa or immigrant preference may be daunting, a creative exploration of all lawful options should lead to the successful and prompt placement of the candidate in the U.S.

Cozen O'Connor attorneys regularly provide advice and counsel to businesses, large and small, on immigration matters, including obtaining authorization to work for non-U.S. citizens. If you have any questions or would like additional information on the information presented above, please contact Elena Park at 610.941.2359, or via email at epark@cozen.com.

SEC SPEAKS ON SECURITIZATIONS

On January 20, 2011, the Securities and Exchange Commission (SEC) adopted several final rules applicable to asset backed securities (ABS), which were mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Wall Street Reform Act) as codified in revisions to the Securities Act of 1933, as amended (the Securities Act) and the Securities Exchange of 1934, as amended (the Exchange Act). The final rules will have a significant impact on both public and private securitizations and it is hoped that they will help revitalize securitization markets by requiring more and more timely disclosure.

Rule 193 and Items 1111 (a) (7) and (8) of Regulation AB require issuers (sponsors or depositors) of registered ABS to conduct a review of the assets underlying the ABS offering and disclose the nature, findings and conclusions of the review in the prospectus relating to the offering, including matters relating to assets that deviate from the underwriting criteria for the asset pool. Under Rule 193, the review may be conducted in whole or in part by the ABS issuer or one or more third parties engaged for this purpose. If the review is conducted by third parties and the findings and conclusions of the review described in the prospectus are attributed to such third parties, then those third parties must be named in the prospectus along with other experts (typically legal counsel and accountants) and consent to being treated as experts in accordance with Rule 436 of the Securities Act.

Because the types of assets in ABS offerings vary widely (e.g., residential mortgages, commercial mortgages, student loans, auto loans, credit card receivables, trade receivables and life insurance policies, etc.), the SEC did not enumerate specific measures that issuers must undertake or specify methodologies that must be used in connection with the mandated issuer review of the asset pool. However, new

Rule 193 does include a minimum, albeit general, review standard. Specifically, the review must be "designed and effected to provide reasonable assurance" that the disclosure in the prospectus regarding the pool assets is accurate in all material respects.

Amendments to Item 1111(a) of Regulation AB require issuers to disclose in the prospectus "how the review related" to the disclosure regarding the assets in the prospectus. This requirement appears to require disclosure of the methodology employed in the review. Thus, the instructions to Item 1111(a) provide that if a review is based upon a sampling of assets underlying the ABS, the appropriate prospectus disclosure would include the size of the sample and the criteria used to select the sample.

In addition, amendments to Item 1111(a) of Regulation AB require disclosures relating to assets that deviate from the disclosed underwriting criteria. Specifically, Regulation AB now requires prospectus disclosure of (i) how assets in the pool deviate from the underwriting criteria disclosed in the prospectus, (ii) the amount and characteristics of deviant assets and (iii) the identity of the entity (e.g., sponsor, originator, underwriter) which determined that deviant assets should be included in the asset pool and the factors used to make the determination to include deviant assets in the pool.

On January 21, 2011, the SEC adopted new Rules 15Ga-1 and 17g-7 under the Exchange Act and new Form ABS-15G and amendments to Regulation AB implementing Section 943 of the Wall Street Reform Act. Section 943 of the Wall Street Reform Act required the SEC to prescribe regulations on the use and effectiveness of representations and warranties in the market for ABS. Section 943 provides that such regulations must require "securitizers" to disclose fulfilled and unfulfilled repurchase requests across all trusts aggregated by the securitizer. The regulations also must require each nationally recognized statistical rating organization (NRSROs) to include in any report accompanying a credit rating a description of the representations, warranties and enforcement mechanisms available to investors in the rated securities and how these differ from the representations, warranties and enforcement mechanisms for similar securities. Section 943 of the Wall Street Reform Act reflected Congress' belief that the ABS issuer's right, in a typical ABS asset purchase agreement, to require the originator or sponsor of assets underlying ABS to repurchase assets if they do not conform to the originator's or sponsor's representations and warranties, was largely illusory, and that periodic disclosure of the fulfilled and unfulfilled repurchase requests across all trusts aggregated by securitizers would enable ABS purchasers to identify asset originators or sponsors with clear underwriting deficiencies.

Rule 15Ga-1 requires securitizers (issuers, sponsors and depositors) of *registered and unregistered* ABS to disclose on new Form ABS-15G, to be filed with the SEC on EDGAR, all fulfilled and unfulfilled requests for asset repurchases or replacements based on breach of representations and warranties concerning the asset pool for all assets securitized by such securitizer during the three-year period ending December 31, 2011 and quarterly thereafter. The required disclosure must be made in tabular form (supplemented by footnotes and a narrative, as necessary), grouped by asset class, issuer and originator, and must include: (i) disclosure by originator of the total assets securitized, (ii) the principal amount of assets subject to requests for repurchase or replacement for breach of representations and warranties, (iii) the principal amount of assets that were repurchased or replaced, (iv) the principal amount of assets pending repurchase or replacement and (v) the principal amount of assets subject to repurchase or replacement requests that are in dispute, have been withdrawn and have been rejected. All requests for asset repurchase or replacement must be disclosed on Form ABS 15G, regardless of the merit of the request and regardless of whether the request was made by the ABS's trustee on its own initiative or at the request of investors. Recognizing that securitizers may not be able to provide complete historical information concerning investor prompted requests, Rule 15Ga-1 permits a securitizer to omit information that is unknown or not reasonably available to the securitizer without unreasonable effort or expense, provided that the they include a statement describing why unreasonable effort or expense would be involved in obtaining the omitted information. In addition, in order to give securitizers sufficient time to set up systems to track the required data, any securitizer that issued ABS during the three-year period ending December 31, 2011 that includes a covenant to repurchase or replace an underlying asset for a breach of a representation or warrant will have until February 14, 2012 to file its initial Form ABS-15G. Thereafter, quarterly filings on Form ABS-15G must be made by securitizers that issue ABS during the applicable quarter or had outstanding ABS held by non-affiliates during the applicable quarter.

As indicated above, disclosure on Form ABS-15G is required of securitizers of privately placed, as well as registered, ABS. However, as one would expect, the SEC adopted comparable requirements for prospectus disclosure in registered ABS transactions. Thus, the SEC adopted new Item 1104(e) of Regulation AB requiring issuers of registered ABS, which include the right to require the repurchase or replacement of underlying assets for breach of a representation or warranty, to include in the ABS prospectus the repurchase and replacement data specified in Rule 15G-1 for the prior three-year period for all assets securitized by the sponsor *of the same asset class* as the registered securities that are the subject of the offering. Any registered offering of ABS commencing with an initial bona fide offer on or after February 14, 2012 must comply with the information requirements of new Item 1104(e) of Regulation AB. However, recognizing that securitizers may not have been collecting and tracking the required replacement/repurchase data, the prospectus look back period is being phased in. So a prospectus filed after February 14, 2012 but before February 14, 2013 need only include one year of such data, and a prospectus filed on or after February 14, 2013 and before February 14, 2014 must include two prior years of such data.

In addition, the SEC adopted new Item 1121(c) requiring the replacement and repurchase information required by Rule 15Ga-1(a) to be included in all reports on Form 10-Ds filed after December 31, 2011.

Implementing Section 943(1) of the Wall Street Reform Act, the SEC adopted Rule 17g-7 under the Exchange Act. Rule 17g-7 requires all NRSROs to include in any report accompanying an ABS credit rating a description of the representations, warranties and enforcement mechanisms available to investors and how they differ from the representations, warranties and enforcement mechanisms in issuances of "similar securities." The new rule applies to both registered and unregistered ABS transactions, whether or not they are offered in the U.S. The required disclosure must be included in both final ratings and preliminary or expected ratings, including sales reports. One of the more obvious challenges to compliance with Rule 17g-7 is determining which issuances are "similar" to the one being rated: the new rule does not include definitions or interpretive rules. The SEC expects an NRSRO to draw upon its knowledge of industry standards as well as its expertise with previously rated deals and knowledge of the market generally.

MORE TO COME

The securitization market still awaits final SEC rules in several other key areas. For example, the market awaits adoption of final rules relating to the "skin in the game" requirement of Section 941(b) of the Wall Street Reform Act that requires the SEC, and, in the case of the securitization of residential mortgage assets, the Housing and Urban Development and Federal Housing Finance Agency, to prescribe regulations that (i) require securitizers of both registered and privately placed ABS to retain not less than 5 percent of the credit risk of any asset that the securitizer through the issuance of ABS transfers, sells or conveys to a third party and (ii) prohibit such securitizers from directly or indirectly hedging the retained credit risk. On March 30, 2011, the SEC issued proposed "skin in the game" rules and is currently considering comments on the proposed rules.

Cozen O'Connor attorneys regularly provide advice and guidance to businesses, large and small, on compliance with SEC regulations. This can be tricky considering all of the recent rule changes. That is why if you have any questions or would like additional information on the information presented above, please contact Martha Flanders at 212.883.4915, or via email at mflanders@cozen.com or Albert Pinzon at 212.883.4946, or via email at apinzon@cozen.com.

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