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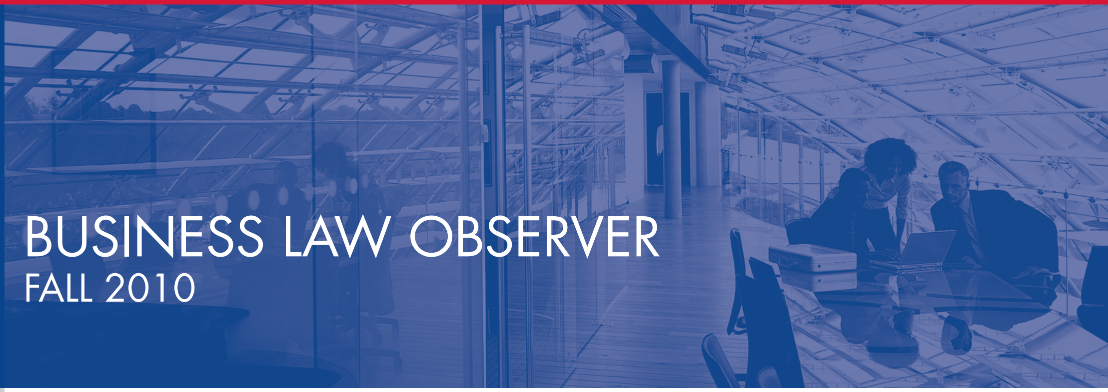

BUSINESS LAW OBSERVER
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IN THIS ISSUE

MESSAGE FROM THE CHAIR

To the friends of Cozen O'Connor:

Since our Spring 2010 Observer was published, significant new legislation has been enacted by Congress, affecting tax planning and securities transactions, among other areas. We have summarized two of the new acts, in addition to a review of existing legislation as it affects doing business abroad. Imbedded in the Health Care Act is a new provision in the Internal Revenue Code, codifying the "economic substance doctrine." Our article is a must-read for businesses and individuals alike as they consider tax planning for 2010. The other new legislation on which we comment, is the Dodd-Frank Wall Street Reform and Consumer Protection Act, specifically its impact on securitization transactions, tightening the regulation of securitizers who effectuate these complex transactions. We also offer a review of the Foreign Corrupt Practices Act, mainly as it applies to doing business in China. A fine line exists between legal and illegal practices in many foreign markets, and close attention must be paid to avoid any criminal activity overseas. Our summary, particularly as it relates to China, should be read carefully.

As government grows, the opportunity to do business with it also grows, and our article on this topic is informative for those of you who want to acquire the government as a customer. Finally, an article about secured transactions and the avoidance of pitfalls in proper filings is vital to protecting your priority as a secured creditor. If you would like to discuss further any of the topics we have covered or any other matter on which we can be of assistance, please call me at any time.

Best Regards,

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CODIFICATION OF THE "ECONOMIC SUBSTANCE" DOCTRINE AND ITS EFFECT ON YEAR-END TAX PLANNING

The Health Care and Education Affordability Reconciliation Act of 2010 (the "Act") added a new provision to the Internal Revenue Code (the "Code"), commonly referred to as the "codification" of the "economic substance doctrine." In addition to restating the common law economic substance rule, the Act establishes new operating rules for application of the economic substance doctrine and a new, strict liability penalty scheme for transactions that lack economic substance. The new Code provision applies to transactions entered into after March 30, 2010, meaning that the economic substance doctrine applies to tax planning transactions undertaken at year-end to anticipate increases in individual tax rates resulting from the expiration of the Bush-era tax cuts. In the past, when significant tax rate increases were scheduled to occur at December 31, some taxpayers took steps to accelerate income into the pre-increase taxable period to obtain the benefit of the lower federal tax rates. A very common transaction involves selling an asset before year-end where the taxpayer expected to dispose of the asset sometime in the succeeding taxable year. Where the property is sold in an arms-length transaction to a third-party, the fact that the taxpayer transferred the economic incidents of ownership, and irrevocably changed its economic position, should mean that the sale will be sustained for tax purposes, regardless of the taxpayer's intent. Many of these taxpayers were unwilling to accept any material risk as to the amount of income that would be recognized and were likewise unwilling to give up potential appreciation in the asset between year-end and the time the asset would otherwise be sold. Those parties often attempted to accelerate the income by selling the asset to a related or subordinated taxpayer who would complete the sale in the next year. Similarly, taxpayers might attempt to accelerate the income by selling the right to receive ordinary income, e.g., a sale commission, to a related or subordinated taxpayer with the goal of accelerating the ordinary income into the lower-tax period. Where the transactions do not involve third parties acting at arms-length, however, the codification of the economic substance doctrine, particularly the strict liability penalty provisions, may render such tax planning among related parties more challenging than in the past.

"… the codification of the economic substance doctrine, particularly the strict liability provisions, may render … tax planning … more challenging than in the past …"

Pursuant to the newly-codified economic substance doctrine, a transaction is treated as having economic substance only if the transaction changes in a "meaningful way (apart from federal income tax effects) the taxpayer's economic position" and the taxpayer has a substantial purpose (other than federal income tax effects) for entering into the transaction. Thus, there must be an inquiry regarding the objective effects of the transaction on the taxpayer's economic position as well as an inquiry regarding the taxpayer's subjective motives for engaging in the transaction. The profit potential of the transaction is generally considered in connection with the taxpayer's subjective intent for entering into the transaction. The new Code provision further clarifies that: (a) the profit potential of a transaction taken into account in determining whether the transaction meets the economic substance test must be measured by comparing the net present value of the reasonably expected pre-tax profit from the transaction with the present value of the expected income tax benefits that would be allowed if the transaction were respected; (b) any state or local income tax effects that are related to a federal income tax effect are treated in the same way as the federal income tax effect, i.e., the state or local income tax effect is not taken into account as a meaningful change in the taxpayer's economic position; and (c) achieving a financial accounting benefit is not taken into account as a purpose for entering into a transaction if the origin of the financial accounting benefit is a reduction of federal income taxes.

A transaction intended to accelerate taxable income into 2010 without meaningfully changing the taxpayer's economic benefits and burdens of the ownership of the property or receipt of the income would, almost by definition, fail the economic substance doctrine as articulated in the statute. For example, a transaction in which a capital asset were sold to a partnership in which the taxpayer or a closely related person, e.g., a spouse or a trust for minor children, owned substantially all of the economic interests in exchange for a note, combined with an election out of installment reporting, would be at risk of challenge under this rule if the acquirer did not have meaningful downside exposure for the repayment of the note or the seller retained a significant participation in the upside of the asset. Thus, the expression of the economic substance doctrine in new Code section 7701(o) raises meaningful hurdles to accomplishing a related party transaction intended to accelerate income into 2010 without a material change in the financial position of the taxpayer.

If a transaction is determined to lack economic substance, the taxpayer will be subject to one of two new penalties for noneconomic substance transactions. There is a 20% accuracy-related penalty to the portion of any underpayment attributable to the disallowance of claimed tax benefits by reason of a transaction lacking economic substance within the meaning of Code section 7701(o) or failing to meet the requirements of any similar rule of law. Alternatively, there is a 40% penalty (in lieu of the 20% accuracy-related penalty) where the transaction was "not adequately disclosed in the return or in a statement attached to the return." Both of these penalties are "strict liability" penalties. A prior disclosure must have been made by the taxpayer on a tax return, an amended return or a supplement to a return in order to avoid the 40% penalty. No exceptions to the penalty (including the "reasonable cause" exception to penalties) are available. Thus, under the provision, outside opinions or in-house analysis would not protect a taxpayer from imposition of a penalty.

The prospect of a 40% penalty applied to the undeunderstatement of tax makes implementation of an income acceleration strategy by related parties most problematic. Assuming that a taxpayer could shift $10 million from 2011 to 2010, thereby subjecting the income to tax at a 35% rate rather than a 39.6% tax rate, the expected tax savings would be approximately $360,000. If the IRS successfully asserted that the transaction lacked economic substance, and the taxpayer failed to adequately disclose the transaction, the penalty in 2010 would be approximately $1.6 million, or almost 450% of the expected tax savings. The presence of the 40% penalty for undisclosed noneconomic transactions presents a significant barrier to trying to accelerate taxable income into 2010 without changing the taxpayer's position in a meaningful way. Moreover, the potential penalty must be considered as a factor even in those transactions more clearly undertaken at arms-length prices. With the powerful 40% penalty weapon in its arsenal, the risk that the IRS might assert the penalty in due course to income accelerations it finds inappropriate cannot be ignored. Income acceleration strategies not involving arms-length transactions with unrelated persons are likely to be scrutinized by the IRS with a view to imposition of the new penalty scheme, particularly transactions in which the taxpayer failed to make the appropriate disclosures.

Cozen O'Connor's tax attorneys provide a broad and sophisticated range of services, and have a demonstrated record of designing and implementing creative and effective tax strategies suitable for each client's specific situation. If you have any questions or would like additional information on the information presented above, please contact Thomas Gallagher at 215.665.4656, or via e-mail at thomasgallagher@cozen.com.

AVOIDING FCPA RISKS WHILE DOING BUSINESS IN CHINA

Many companies are doing business, or contemplating doing business, in the People's Republic of China (the "PRC"). For the past ten or so years, the Chinese markets have been the top emerging markets for foreign direct investment. However, according to many international organizations, including Transparency International, a corruption watchdog worldwide, China represents a high corruption risk and, therefore, doing business in China also presents significant regulatory and legal risks, one of which is the risk of violating the Foreign Corrupt Practices Act of 1977 (the "FCPA").

The FCPA is a cornerstone of anti-bribery legislation in the United States, and increasingly around the world, as prosecutors in the U.S. try to extend the scope of the law. Generally, the FCPA prohibits U.S. citizens and permanent residents, both public and private U.S. companies, and certain non-U.S. individuals and entities from bribing foreign government officials to obtain a business advantage. In addition, portions of the FCPA apply to public companies, such as those that deal with books and records and internal controls.

There are two key aspects to the FCPA: (1) anti-bribery provisions, enforced by the U.S. Department of Justice (the "DOJ") and the Securities and Exchange Commission (the "SEC") and (2) accounting provisions, enforced by the SEC and, if criminal, by the DOJ. The FCPA applies not only to payments made to win business, but also questionable payments in connection with regulatory interactions, such as obtaining licenses, visas, favorable tax treatments, etc., the so-called "grease" payments in foreign jurisdictions.

Affirmative defenses available under the FCPA are: (i) the payment was lawful under the written laws of the applicable foreign country and (ii) the payment was a reasonable and bona fide expenditure related to the promotion of a product or performance of a contractual obligation. An FCPA defendant has the burden of demonstrating that the payment in question meets these affirmative defense requirements, so qualifying expenses should be properly authorized and documented. Violations of the FCPA can be very costly and include criminal sanctions for corporate entities and individuals, civil penalties, other governmental action (e.g., suspension or ineligibility to receive export licenses, etc.), and private causes of action under various federal and state laws. The recent FCPA enforcement actions by the DOJ and the SEC point to the following trends in the overall enforcement process:

- greater international cooperation and increased resources committed by regulators to prosecute these cases;
- higher fines and settlements designed to send a message to the business community; and
- regulators targeting more individual prosecutions.

China is proving to be a particularly challenging part of the world for FCPA compliance. Legal and regulatory compliance issues in China have a direct correlation to, and often are in conflict with, traditional concepts of conducting business. For instance, consider the *guanxi* concept, a critical element of the Chinese culture in general, and business culture in particular. The term refers to "relationships" and, in practice, boils down to exchanging business and related favors, which are expected to be done regularly and voluntarily. As the realities of doing business in China set in, the interplay of the public and private sectors in the PRC is becoming intensely pronounced. Many large Chinese companies are, in fact, owned by the government, and, consequently, many executive management members are Communist Party members. This, in turn, may well mean that the person with whom you negotiate your next deal might be considered a foreign official under the FCPA. And, although "wining and dining" of business prospects is certainly not objectionable per se, U.S. executives need to make sure that a night out to build a business relationship doesn't start to look more like an attempt to influence the executive with food, drink and entertainment.

"A U.S. public company is well advised to put in place an effective FCPA compliance program that contains clearly articulated policies and guidelines for employees to follow …"

Broadly speaking, there are several common "red flag" themes and risks that have emerged over the past several years for U.S. companies engaging in business in the PRC:

- ***Interaction with government or quasi-government officials.*** A great deal of companies in China's leading industries are state-controlled or state-owned enterprises. U.S. enforcement agencies consider employees of these companies (regardless of title, rank or position) to be "foreign officials" and interaction with such personnel will be governed by the anti-bribery provisions of the FCPA.

- ***Cash only payments, abuses of petty cash***
- ***Payments to shell companies***, i.e., payments that lack any justifiable business purpose
- ***Payments to third parties***, e.g., relatives of officials or donations to "charities"
- ***Excessive gifts***, ***entertainment or unrelated travel***

A U.S. public company is well advised to put in place an effective FCPA compliance program that contains clearly articulated policies and guidelines for employees to follow and should address the following:

- ***Due diligence supported by sound recordkeeping and documentation.*** Regulators and enforcement agencies expect to see good faith efforts to comply with the law and to detect and remedy incidents of non-compliance as they occur.
- ***Employee training and education, especially, training of the company employees "on the ground."*** It is critical to explain the rules, the reasons they exist, as well as specific legal consequences for violating such rules.
- ***For payments to Chinese business partners, a system needs to be created where a third party, such as a compliance officer or a lawyer, reviews and authorizes any spending that could potentially violate the FCPA.***
- ***Include specific coverage of key topics, including, among others, procedures dealing with (i) permissible foreign payments, (ii) foreign officials, (iii) foreign representatives and partners and (iv) investigating alleged violations.***

In sum, whether you are soliciting new business or already conducting business in China, you must be particularly alert since China presents a unique set of FCPA compliance risks. This, in turn, requires higher due diligence and compliance costs, especially, in the current, highly charged regulatory and compliance environment.

Cozen O'Connor's business law attorneys work regularly with local counsel in China to guide clients through the regulatory environment and to assist with ongoing audit and compliance monitoring. If you are currently doing business in China, or are planning to do so in the future, and have questions about compliance with the FCPA, please contact Alec F. Orudjev at 202.912.4842, or via e-mail at aorudjev@cozen.com.

HOW TO WIN GOVERNMENT CONTRACTS

In a struggling economy, businesses are looking for reliable customers who pay their bills. Companies that in the past steered clear of government contracts today are looking to federal contracts as a lifeline or a solid source of economic growth. The U.S. government distributes a staggering half a trillion dollars each year in contracts to those who know where to look. Opportunities abound, even as economic stimulus dollars dry up. But how can you access this money that you can't afford to ignore?

The contracting process is highly structured with vast volumes of regulations setting forth the who, what, when and how of the federal contracting process. Commercial contracts these are not. But while the process can be daunting, there is plenty of opportunity to market your products or services to the federal government. The time to do so is before the government has initiated a formal request for proposal while agencies are still willing and able to talk, something they can't do once the formal process has begun.

Begin by identifying the agencies that are most likely to be interested in your product or service offering. Understand the agency with whom you want to do business. What is the agency's mission? How is the agency structured? How political is the agency? Learn as much as you can about the agency's specific needs. Many agencies now publish their contracts and those that are not published can be accessed through the Freedom of Information Act. This research will help you to market your services, and it can make a significant difference when the time comes to submit a formal proposal.

"The U.S. government distributes a staggering half a trillion dollars each year in contracts to those who know where to look."

Arrange a face-to-face meeting. Even in the structured world of U.S. government contracts, old fashioned networking can work wonders. Show up at conferences. Sometimes it's as simple as taking the "front door" approach – cold call and ask for a meeting. Other times, it helps to hire a government relations firm to help navigate the process. However you find your way in, let the agency know what you can offer and why they should do business with you and your company. Put your company on the radar so the agency will think to call you when an opportunity presents itself.

Just as it is important that government employees with purchasing authority know your company and its capabilities, your representatives on Capitol Hill should understand who you are, what you do, and how you can help the Federal Government meet its needs. In Washington, the most precious commodity -- the one thing most important to any member of Congress -- is jobs back home. And your representatives in Congress need to understand who they represent and where potential jobs lie. A congressional connection is not going to lead to a contract award, but like any other reference, used in appropriate circumstances, it can bolster a potential contractor's credibility with decision makers.

The formal contracting process typically begins with a request for proposals (RFP). The government-run website, www.FedBizOpps.gov, identifies and posts all contract opportunities over $25,000. Agencies also typically post their contracting needs on their individual websites and there are several additional commercial databases that also track government procurement opportunities.

Once a formal request for proposal is issued, how do you maximize chances for success? For almost every contract, you must submit a written proposal. Your written proposal is your chance to communicate to the selection committee that your firm is right for the job. There are three elements that typically enter into a selection: technical ability, price and past performance. Historically, government contractors that submitted the lowest bid had a significant advantage in competing for contract awards, and price still remains an important factor. Today, however, the concept of "best value," which seeks to balance price with performance capability, has become the standard in a significant number of federal procurements.

Pricing strategies remain, nonetheless, very important. Contractors sometimes underbid as a loss leader, in the hope of getting future government work. But underbidding skews the incentive for you to do the best job possible, and this can have negative consequences for contract performance.

"… think strategically and creatively about how to connect your experience to the agency's needs. "

On the technical side, you need to convince the government that you're the best qualified firm for the job. Your technical proposal can make or break you. That's the portion of the proposal in which you persuade the agency that you understand the requirements of the job and how you'll meet the agency's needs. This is where many potential contractors fall short. Tailor the technical proposal to the task at hand. Keep it as brief as possible. And think strategically and creatively about how to connect your experience to the agency's needs. Just as importantly, convince the government that you will manage the contract effectively. Beyond persuading the government that you have the ability to perform, bidders give themselves a real advantage if the government believes the contractor will execute and make good on its offer.

If you get the job, make sure you understand how the contract will work. The Federal Acquisition Regulation (the "FAR") sets forth the rules by which the government both acquires goods and services and then interfaces with contractors. The FAR spells out in painstaking detail how government agencies must go about soliciting, negotiating, awarding and administering contracts. And the devil truly lurks in the details. The FAR, for example, gives agencies broad authority to terminate a contract due to their own needs changing, or the failure of a business to deliver on time. With all that purchasing power comes the ability to dictate terms. So seller beware.

If you aren't selected, but you think you should have been, request a de-briefing on the selection. This is an opportunity to learn why the agency chose the winning bidder. And if you are convinced that the government made the wrong decision, then consider a "bid protest." The bid protest process is a standardized litigation regime for government contract disputes. It often does not result in overturning a contract award, but it can, and may reveal that the government made mistakes in executing the procurement process that can result in the need to set aside a contract award and re-compete. Sometimes even the threat of a bid protest can push an agency to the bargaining table.

Again, there is tremendous opportunity in government contracts if you can position your firm to compete. Do your research, market your capabilities, write a strong proposal and perform effectively. All of this can add up to a very significant addition to your bottom line.

The lawyers and government relations professionals at Cozen O'Connor Public Strategies are prepared to provide guidance on all stages of procuring government contracts. Please contact Howard Schweitzer in our Washington, D.C., office at (202) 912-4855, or via email at hschweitzer@cozen.com, should you have any questions regarding the issues in this article or government relations issues generally.

SECURITIZATION AND THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

The securitization provisions contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), which was signed into law on July 21, 2010, are significant and will affect the securitization markets for years to come. With securitization under greater scrutiny as a major contributing factor to the recent financial crisis, legislators took the view that market participants must have "skin in the game" and make greater disclosures to investors. In addition, certain market participants are prohibited for a time period from engaging in certain securitization transactions that involve a material conflict of interest. Set forth below is a brief overview of some of the provisions of the Act that will impact securitization deals.

"SKIN IN THE GAME" REQUIREMENT (SECTIONS 941 AND 944)

The Act directs federal bank regulators and the Securities and Exchange Commission (the "SEC") jointly to impose rules requiring securitizers of asset-backed securities to maintain a 5 percent economic interest ("skin in the game") in the credit risk of any asset transferred, sold or conveyed to a third party through the issuance of asset-backed securities. This 5 percent economic interest can be less than 5 percent if underwriting/diligence meets very high underwriting standards specific to the class of the securitized assets. The economic interest may not be hedged or transferred to a third party. The Act defines an asset-backed security as "fixed-income or other security collateralized by any type of self-liquidating financial asset, including a loan, a lease, a mortgage, a secured or unsecured receivable that allows the holder of the security to receive payments that depend primarily on cash flow from the asset." The Act makes the definition broad enough to cover collateralized debt obligations, collateralized bond obligations, and any security the SEC determined to be an asset-backed security.

A "securitizer" is defined as "(A) an issuer of an asset-backed security; or (B) a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer."

An "originator" is defined as "a person who (A) through the extention of credit or otherwise, creates a financial asset that collateralizes an asset-backed security; and (B) sells an asset to a securitizer."

> *"Most likely, the category will include a large portion of those loans originated by Fannie Mae and Freddie Mac. "*

Exceptions to the 5 percent risk-retention rule are as follows: securitizers will not be required to retain any portion of the credit risk for an asset that is transferred, sold or conveyed if all the assets that collateralize the asset-backed security are "qualified residential mortgages." Congress directed federal bank regulators and the SEC, together with other federal regulators, jointly to define the category of "qualified residential mortgages" after considering certain product and underwriting features that have historically been associated with lower default risks. Most likely, the category will include a large portion of those loans originated by Fannie Mae and Freddie Mac.

The Act also contemplates the establishment of total or partial exemptions from the risk-retention rule for the following:

1. any loan or other financial asset made, insured, guaranteed or purchased by any institution that is subject to the Farm Credit Administration;
2. any securitization of an asset issued or guaranteed by the United States or a U.S. agency (except Fannie Mae and Freddie Mac); and
3. certain state and municipal securitizations of assets.

The required risk-retention amount may also be allocated between an originator and a securitizer, as deemed appropriate by the regulators.

"Congress seeks to ensure that investors will be provided with sufficient disclosures to make an informed decision …"

ADDITIONAL DISCLOSURE REQUIREMENTS (SECTIONS 942 – 946)

In addition to the risk-retention requirement, the Act requires more disclosure in the securitization process. Congress has directed the SEC to adopt regulations requiring issuers to disclose – for each tranche or class of security – information regarding the specific assets backing that security. To enable investors to compare data across securities in similar types of asset classes, the SEC is required to establish standardized disclosure formats. At a minimum, the SEC rules must require issuers to disclose asset-level or loan-level data necessary for investors independently to perform due diligence, including: (i) the identity of the loan broker or originator; (ii) the extent and nature of the broker's or originator's compensation; and (iii) the amount of risk retained by the securitizer and the originator.

The Act instructs the SEC to promulgate regulations regarding the use of representations and warranties in the market to require any securitizer to disclose fulfilled and unfulfilled repurchase requests across all the securitizer's securitizations, such that investors may be able to identify originators with underwriting deficiencies. Finally, the SEC is required to issue rules relating to the registration statement that issuers are required to file, which will require the issuer to perform a due diligence analysis of the assets underlying the asset-backed security and disclose the nature of that analysis to potential investors. With these provisions, Congress seeks to ensure that investors will be provided with sufficient disclosures to make an informed decision regarding a securitization investment. The regulations issued under this part of the legislation are to become effective with respect to residential mortgage asset-backed securities one year after final rules are published and with respect to all other asset-backed securities two years after final rules are published.

PROHIBITIONS ON CONFLICTS OF INTEREST FOR ONE YEAR FOLLOWING FIRST SALE (SECTION 621)

The Act prohibits an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of such entity, of an asset-backed security from engaging in any transaction for one year after the first closing of the sale of the asset-backed security that would involve or result in any material conflict of interest with respect to any investor in transactions arising out of such activity. This prohibition does not apply to risk mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase or sponsorship of an asset-backed security in certain circumstances. The SEC is required to issue rules for purposes of implementing the conflict of interest prohibition within nine months after the date of enactment of the Act. This conflicts of interest prohibition will take effect on the date of issuance of final rules by the SEC.

Cozen O'Connor's business law group can assist in all securitization matters. If you have questions about this article, or about the Dodd-Frank Wall Street Reform and Consumer Protection Act in general, contact Asaf Hahami in our firm's New York office at (212) 883-4918, or via email at ahahami@cozen.com.

PREPARATION AND FILING OF FINANCING STATEMENTS/LET THE SECURED PARTY BEWARE!

A creditor that takes a security interest in assets of a debtor to secure the debtor's obligations will, for most types of assets, "perfect" the security interest by filing one or more financing statements in the appropriate filing office. Under the Uniform Commercial Code (the "UCC"), the financing statement is required to contain the names and addresses of the debtor and secured party, a description of the collateral and, in certain cases, other information. If the security interest is not perfected, then it would not be enforceable against a trustee in bankruptcy for the debtor, and would be subordinate to the security interests of any other secured parties of the debtor which have perfected their security interests.

A court may determine that a security interest has not been properly perfected because of mistakes made by the secured party in preparing or filing a financing statement. Recent court decisions serve as reminders that there are many traps for the unwary which can adversely impact a secured party attempting to properly perfect its security interest.

This article describes some of these traps and gives practical advice which can help a secured party avoid them.

1. Use of Correct Name of Debtor. The financing statement must contain the correct name of the debtor, nothing more and nothing less. In one recent case, the debtor's name in the financing statement included a "doing business as" name, as well as the debtor's correct name. The financing statement was filed in Nebraska. In finding that the incorrect name of debtor was included in the financing statement, the court based its decision upon the fact that the Nebraska Secretary of State's search engine, using Nebraska's standard search logic, did not reveal the financing statement filed by the creditor. This is a common test used by courts in determining whether a financing statement was deficient for failing to include the correct name of the debtor. Search logics vary, but if the correct name of the debtor (nothing more and nothing less) is shown in the debtor's name section of the financing statement, all search logics should identify the name; therefore, this is how the debtor's name should be set forth. Entities such as corporations, limited liability companies, limited partnerships, and, in some states, business trusts are formed by the filing of a certificate or other charter documents with the applicable state office (usually the secretary of state). This certificate, together with any amendments thereto which have changed the name, should show the correct name of the debtor. Creditors should review recently filed certified copies of the debtor's charter documents and all amendments to make sure the correct name is being used, rather than relying on documents generated by the debtor showing its name. This practice is especially advisable because debtors often use "doing business as" names in their agreements.

"Creditors should review recently filed certified copies of the debtor's charter documents and all amendments to make sure the correct [debtor] name is being used."

2. Place to File. Secured parties are often held not to have perfected their security interests because the financing statement was filed in the wrong place. Under Sections 9-301 and 9-501 of the UCC, a financing statement should be filed in the appropriate filing office in the state where a debtor is "located," except that financing statements filed to perfect security interests in fixtures, timbers or minerals should be filed with the local filing office where a mortgage on the related real property would be filed. Section 9-307 of the UCC provides that, with certain limited exceptions, the "location" of a "registered

organization" (e.g., corporations, limited liability companies, limited partnerships, and, in some states, business trusts) is the state under whose laws it was organized. So, for example, a corporation incorporated in Pennsylvania is deemed to be located in Pennsylvania. A debtor who is an individual is deemed located in the state of the individual's principal residence. A debtor that is an organization (but not a registered organization) and has only one place of business is deemed located at its place of business, and if it has more than one place of business, is deemed located at its chief executive office. Once you determine the location of a debtor, you then need to determine the office in which you actually file your financing statement. In most states, the filing office for collateral other than fixtures, timber or minerals will be the secretary of state's office, but this is not always the case. For example, in Maryland, the filing office is the Maryland Department of Assessments and Taxation, and in Georgia financing statements are filed with the superior courts of the various counties.

Secured parties should also keep in mind that there is certain collateral in which a lien is perfected other than by filing a financing statement under the UCC. This includes, for example, certain ships and aircraft, motor vehicles that do not constitute inventory, and copyrights. There is also collateral which can only be perfected under the UCC by means other than by filing, such as deposit accounts, which are perfected by taking "control" of such accounts under Section 9-104 of the UCC.

> *"… the UCC provides that a description would reasonably identify the collateral if it identifies the collateral by specific listing, category, quantity, computational or allocational formula or procedure, … "*

3. Description of Collateral. Collateral must be described in a financing statement in a way which reasonably identifies the collateral. Section 9-108(b) of the UCC provides that a description would reasonably identify the collateral if it identifies the collateral by specific listing, category, quantity, computational or allocational formula or procedure, or any other method if the identity of the collateral is "objectively determinable." Consequently, it is important to be as specific as possible. For example, for a security interest covering only certain pieces of equipment, such pieces should be specifically identified with, among other things, the serial number of each piece of equipment if there is any. Often a security interest is granted in all of certain types of collateral such as accounts (the term used in the UCC to refer to accounts receivable) and inventory. If that is the case, then the description could be "all now owned and hereafter acquired accounts, accounts receivable and inventory, of the debtor." Sometimes all or substantially all of the assets of the debtor are pledged. Although Section 9-504 of the UCC permits a supergeneric description in the financing statement such as "all assets of the debtor" or "all of the debtor's personal property," such a description is not, according to Section 9-108(c) of the UCC, sufficient if used in a security agreement. Consequently, a specific description should be used in the security agreement, but the "all assets" or "all personal property" type of description could be used in the financing statement. In any case, a secured party will be deemed to have a security interest in the lesser of the collateral described in a financing statement or that described in the security agreement so, except as mentioned in the preceding sentence, the descriptions in both the financing statements and the security agreement should be the same. There are a few types of assets, such as commercial tort claims, which must be identified specifically, even if the collateral includes all commercial tort claims.

4. Obtaining Authorization to File. Financing statements are not signed, and normally the secured party files the financing statement. However, in order to make a valid filing, the secured party must have authorization to file from the debtor. This is typically done by including such an authorization in a document signed by the debtor, such as the loan agreement or security agreement.

5. Timely Filing. Under the Federal Bankruptcy Code, if a filing is not made to perfect a security interest within 30 days after the security interest is granted, it may be set aside as a preferential transfer by the debtor's trustee in

bankruptcy if the bankruptcy takes place within a year after the security interest is obtained. Consequently, it is important to have the financing statement filed within such 30-day period.

6. Continuation of Perfected Status. Section 9-507 of the UCC provides that if a debtor changes its name, then unless an amendment to the financing statement with the new name is filed within four months, the original financing statement is ineffective to perfect a security interest in any assets acquired by the debtor after the end of such four-month period. Section 9-316(a) of the UCC provides that if the debtor changes its location to another jurisdiction, a new financing statement will have to be filed in the appropriate office of the new jurisdiction within four months after the change in order to continue the perfected status of the original security interest. If not timely filed, any collateral acquired by the debtor after the end of such four-month period will not be perfected by the original financing statement. Since the UCC contemplates that a registered organization's location can't change, this would apply if the debtor is an individual who changed his or her principal residence to another state, or if the debtor were an organization (but not a registered organization), and moved its place of business (if it only has one) or moved its chief executive office (if it has more than one place of business) to another state. In addition, a financing statement will become ineffective unless a continuation statement relating thereto is filed within the six-month period (not before, and not after) before each fifth anniversary of the original filing. Consequently, if any of the secured obligations are unsatisfied during that time, a continuation statement should be filed within such six-month period. A financing statement filed before the period beginning six months prior to the fifth anniversary will not be effective, and some secured parties make the mistake of filing too early.

If you need assistance "perfecting" a security interest in assets of a debtor to secure the debtor's obligation or have any other questions about filing financing statements or security agreements contact Michael Sherman in the firm's Philadelphia office at (215) 665-2155, or via email at msherman@cozen.com.

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