INTERNATIONAL | SPRING, MARCH 2017

EXPECT FOCUS®

LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS

BRIDGING THE GAP: OPPORTUNITY AND REGULATION

The tightening trend continues

- Post-Election Update on Cuba
- China Tightens Regulations on Investing Insurance Funds
- Leasing Retail Stores in New York City
- Tightening the Tax Screws on International IP Structures

CARLTON FIELDS

Contents

3 Rules of the (International) Road

5 Post-Election Update on Cuba

8 China Tightens Regulations on Investing Insurance Funds in Shares of Listed Companies

10 Leasing Retail Stores in New York City

12 Tightening the Tax Screws on International IP Structures

14 Considerations for Foreign Travelers to the U.S. Under the New Administration

EXPECTFOCUS® INTERNATIONAL, SPRING, MARCH 2017

EXPECTFOCUS® International is a quarterly review of legal issues and developments related to international business, provided on a complimentary basis to clients and friends of Carlton Fields.

The content of EXPECTFOCUS® is for informational purposes only and is not legal advice or opinion. EXPECTFOCUS® does not create an attorney-client relationship with Carlton Fields or any of its lawyers.

EXECUTIVE EDITOR
Andrew J. (Josh) Markus

EDITOR
Barry Leigh Weissman

PRODUCTION EDITOR
Christina Calhoun

COPY EDITOR
Adriana Gardella

LAYOUT
Frances Liebold

CONTRIBUTORS
Frank J. Cerza
Larry R. Kemm
Jin Liu
Maria Mejia-Opaciuch
Jorge Pérez Santiago

SUBSCRIPTIONS

Changes in address or requests for subscription information should be submitted to: **Peggy Bourque, pbourque@carltonfields.com**.

Copyright © 2017 Carlton Fields. All rights reserved. No part of this publication may be reproduced by any means, electronic or mechanical, including photocopying, imaging, facsimile transmission, recording, or through any information storage and retrieval system, without permission in writing from Carlton Fields. EXPECTFOCUS® is a registered trademark of Carlton Fields Jorden Burt, P.A.

Rules of the (International) Road

BY ANDREW J. (JOSH) MARKUS

An Overview

Going international is a complicated undertaking. Your specific situation and concerns will determine the steps required. The following outlines, very generally, some issues you must consider as you contemplate international operations.

Bilateral Investment Treaties

Whenever possible, choose projects in countries that have a bilateral investment treaty (BIT) with the United States. BITs protect you if you are discriminated against in procurement. They also provide an arbitration mechanism if you enter into a contract with a government entity or enterprise and have a dispute.

Corruption

Transparency International (TI), a non-profit, non-governmental organization dedicated to fighting corruption, provides a corruption perceptions index that measures perceived corruption in countries around the world. The Securities and Exchange Commission uses TI's index as one indicator that a country should be treated with extreme caution. You too should use the index to investigate the places in which you plan to do business — and approach each accordingly.

Anti-Bribery Compliance Programs

If you plan to bid on government contracts, develop an anti-bribery compliance program from the start. The United States has strict rules against corruption in the procurement or retention of business. The Foreign Corrupt Practices Act (FCPA) governs you and everyone who works for you, whether they are employees, agents, or partners. The FCPA prohibits giving anything of value to a governmental official or anyone else who might give something to government officials to influence them to award, or allow you to retain, business. You are also required to maintain accurate books and records under the FCPA, which also guards against improper expenditures. A proper compliance program requires training for everyone in your business plus regular compliance checks. If, in hindsight, you are deemed to have ignored warning signs, you can be guilty of violating the FCPA. Violations bring substantial fines as well as possible jail time.

Entity Structure

When creating an entity to carry out local projects, structure it with your protection in mind. If possible, your people should control the entity's financial aspects. You must remain involved, vigilant, and aware of contracts with entities related to your local partner. Ensure you do not overpay for goods or services. If overpaid funds wind up in the pockets of government officials, you will face problems.

If possible, control the local entity from outside the foreign country. For example, have a U.S. entity that you control own the local entity, and have the local partner own a part of the U.S. entity. Placing control in the United States (or elsewhere with predictable law) may keep you out of foreign court if there's a dispute over shareholder's rights and prerogatives under the shareholder or operating agreement.

Funding

Structure the funding of your project in the foreign location. If there will be central bank requirements for registering your investment, ensure you comply. That way, you will be able to repatriate your invested funds. Unofficial investments can cause repatriation of capital problems.

Determine how your banks will fund your foreign operations. They may be unable to fund projects in countries they deem risky. If you need the financing, you may not be unable to proceed.

Check out U.S. government sources of loans for your project as well as U.S. government insurance protections. The Overseas Private Investment Corporation (OPIC), the Inter-American Investment Corporation, and the International Finance Corporation have lending capabilities. OPIC also provides insurance against expropriation and inconvertibility of currency.

Tax Considerations

Structure your operations efficiently from the start from a U.S. tax perspective. Withholding taxes on distributions can be as high as 30 percent unless you take advantage of reduced withholding under double tax treaty regimes. Moving money between locations takes planning.

Local Agents

If you plan to work with a local agent, you will need a written understanding with that person that addresses their compensation and the conditions under

which it is received, requirements that they comply with the FCPA and other laws, and termination provisions. Agents often receive severance payments under local laws. That is a matter of the public policy of their place of operation, so choosing Florida law, for instance, will not avoid the obligation. You will also want to determine whether the agent can bind you to contracts.

Employment Law

Employment law generally protects employees, so be cautious when hiring. It may be costly to terminate underperforming employees.

Intellectual Property

Protect your intellectual property before you venture abroad by registering trademarks and logos. In many countries it does not matter who used a trademark or logo first, it matters who registered it first. Many big U.S. businesses have paid to liberate their trademarks from others who registered them first. Regarding trade secrets and know-how, you will need written protection effective under the law of the place in which you will operate.

Legal Assistance

Use U.S. lawyers familiar with conducting business internationally. It is important that they, in turn, use local counsel who have the required understanding of local law, language, and customs.

Post-Election Update on Cuba

BY JORGE PÉREZ SANTIAGO

Federal Policy

New Administration's Cuba Policy Plans

Prior to President Trump's inauguration, and in an effort to continue normalizing U.S.-Cuba relations, President Obama ended the "wet-foot, dry-foot" policy which since 1995 has granted Cubans who touch American soil the right to stay and get on a faster track to U.S. citizenship. It is unclear what effect this policy change will have on commercial opportunities in Cuba. However, in the short run we expect little impact.

Although the Trump administration has not yet acted with respect to federal law on Cuba sanctions, action appears imminent. Secretary of State Rex Tillerson said all of President Obama's executive orders on Cuba will be reviewed. On February 3, 2017, the status of U.S. relations with Cuba was drawn into question due to Cuba's increased commercial relationship with Iran and its support of Iran's nuclear development program. Indeed, White House Press Secretary Sean Spicer recently indicated that the Trump administration was conducting a full review of all U.S. policies toward Cuba, with a focus on human rights policies.

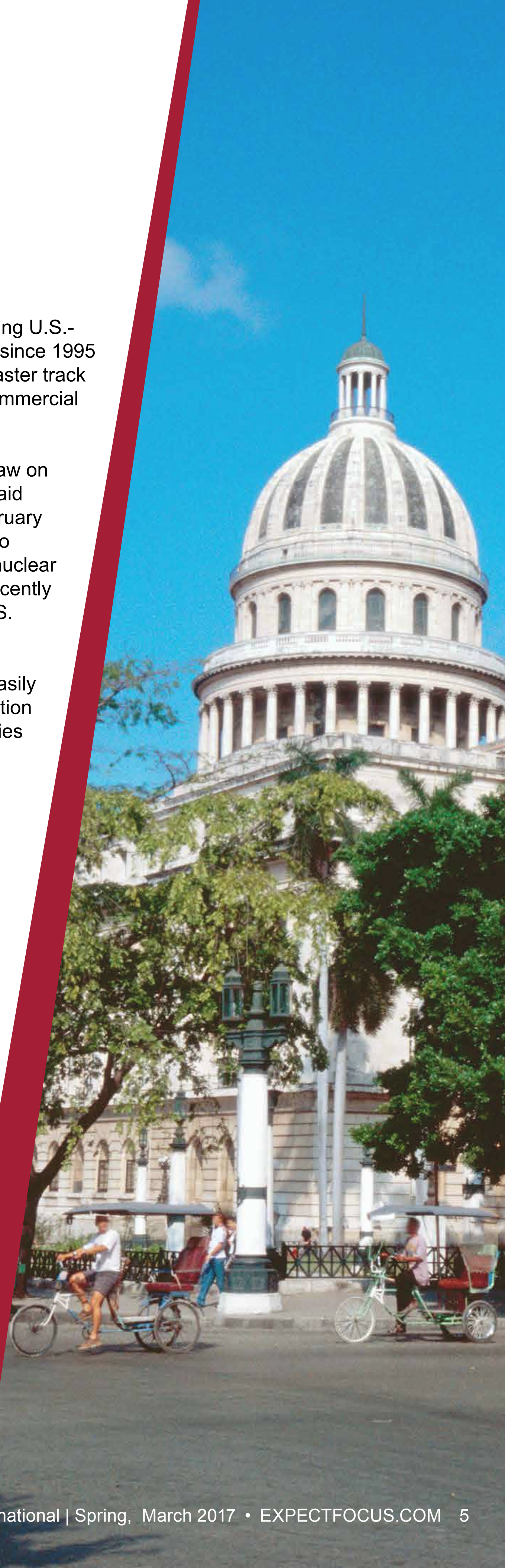
If President Trump were to reverse the easing of sanctions, he could do so easily and quickly, as President Obama's steps were all taken through executive action and could be undone in the same fashion. However, numerous U.S. companies have begun legally operating on the island, including major U.S. hotel chains and airlines. Thus, President Trump would risk a likely business backlash with minimal political gain if all of President Obama's policies were undone. Nevertheless, eased economic restrictions and sanctions will not likely occur as rapidly under this administration.

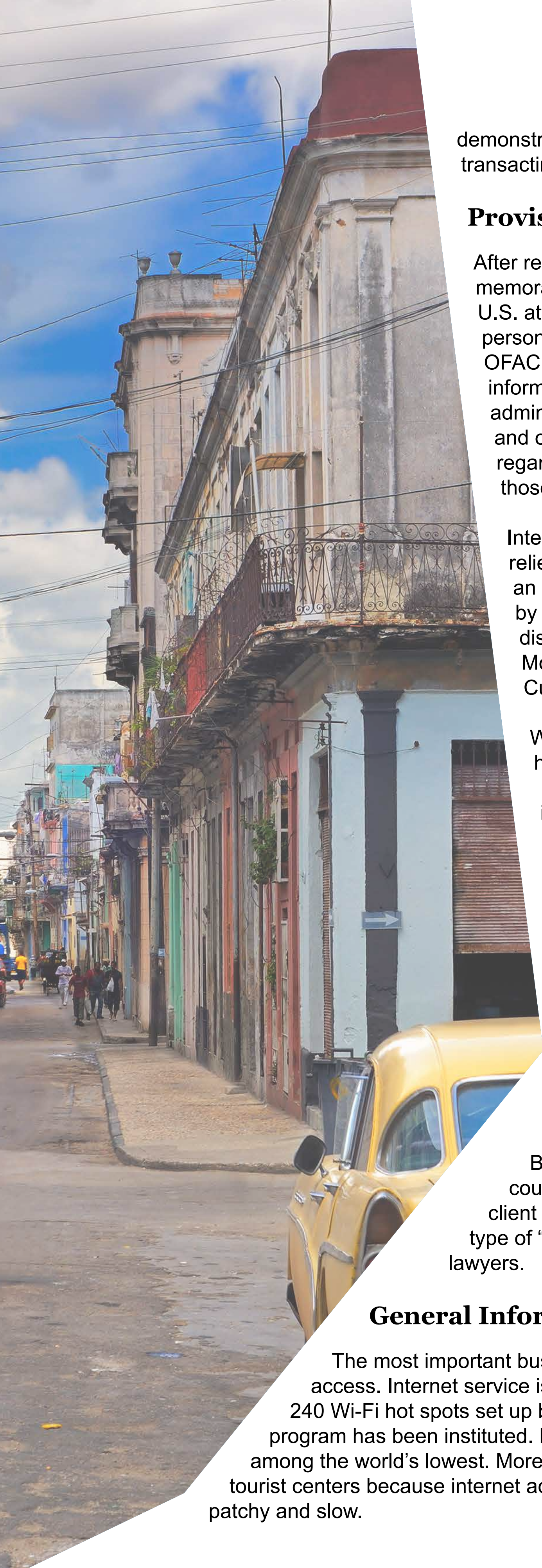
The U.S. Department of the Treasury's Office of Foreign Assets Control Continues Enforcing Violations of U.S. Sanctions Against Cuba

Recently, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) announced a $516,000 settlement with a Canadian bank for several violations of U.S. sanctions against Iran and Cuba. These included the maintenance of bank accounts in Canada for Cuban nationals.

On November 14, 2016, OFAC also announced it had reached a settlement with National Oilwell Varco, Inc., a U.S.-based oil and gas company, and two of its Canadian subsidiaries, Dreco Energy Services, Ltd. and NOV Elmar (collectively, "NOV") for, among other things, alleged violations of the Cuban Assets Control Regulations. Almost all the sales to Cuba and other countries subject to U.S. sanctions and regulations occurred outside the United States. Nonetheless, NOV faced an enforcement action in part because the company's Canadian subsidiaries exported non-U.S.-origin goods to Cuba.

These resolutions are reminders that OFAC's enforcement reaches violations of varying proportions – even those beyond the U.S. border. Moreover, the penalties imposed by OFAC





demonstrate that entities must comply with U.S. sanctions regulations when transacting with, or in, the United States.

Provision of Legal Services Regarding Cuba

After receiving recent inquiries from foreign companies, OFAC released a memorandum of “interpretive guidance” as to whether U.S. persons, including U.S. attorneys and compliance personnel, may provide certain services to covered persons regarding the requirements of U.S. sanctions laws. In the memorandum, OFAC clarified that U.S. attorneys and compliance personnel may provide information or guidance regarding the requirements of U.S. sanctions laws administered by OFAC, including statutes, regulations, and executive orders; and opine on the legality of specific transactions under U.S. sanctions laws regardless of whether it would be prohibited for a U.S. person to engage in those transactions.

International businesses, especially those based in the United States, have relied on attorneys to counsel and negotiate enforceable contracts in Cuba to an extreme degree. Simply put, and notwithstanding contrary representations by certain U.S. lawyers, foreign counsel cannot practice in Cuba, and finding a disinterested attorney who can represent non-Cuban interests is a challenge. Moreover, U.S. attorneys are generally restricted in facilitating transactions in Cuba due to OFAC’s general prohibition against doing business there.

We have found the two following alternatives available, though neither is highly desirable or particularly efficient:

i. directly engaging a “bufete,” i.e., law office, in Cuba. Privately-owned law firms are not permitted in Cuba. These “bufetes” are subsidiaries or affiliates of government-owned and operated entities. For example, we have previously contacted Bufete Internacional, a subsidiary of a Cuban tourism-related company. It is very difficult to communicate directly with these “bufetes” and to obtain any useful information from them on a timely basis.

or

ii. engaging a foreign (non-U.S.) law firm or lawyer with experience and contacts in Cuba. Based on our discussions with several foreign lawyers with experience in Cuba, this seems the most viable alternative. These lawyers are familiar with and have worked with “bufetes” in Cuba. Based on the project’s subject matter, they engage the most suitable local counsel (i.e., one of the “bufetes”) and serve as the liaison between the U.S. client and Cuban counsel. Based on the information we have gathered, using this type of “liaison” seems to be the customary way of doing business with local Cuban lawyers.

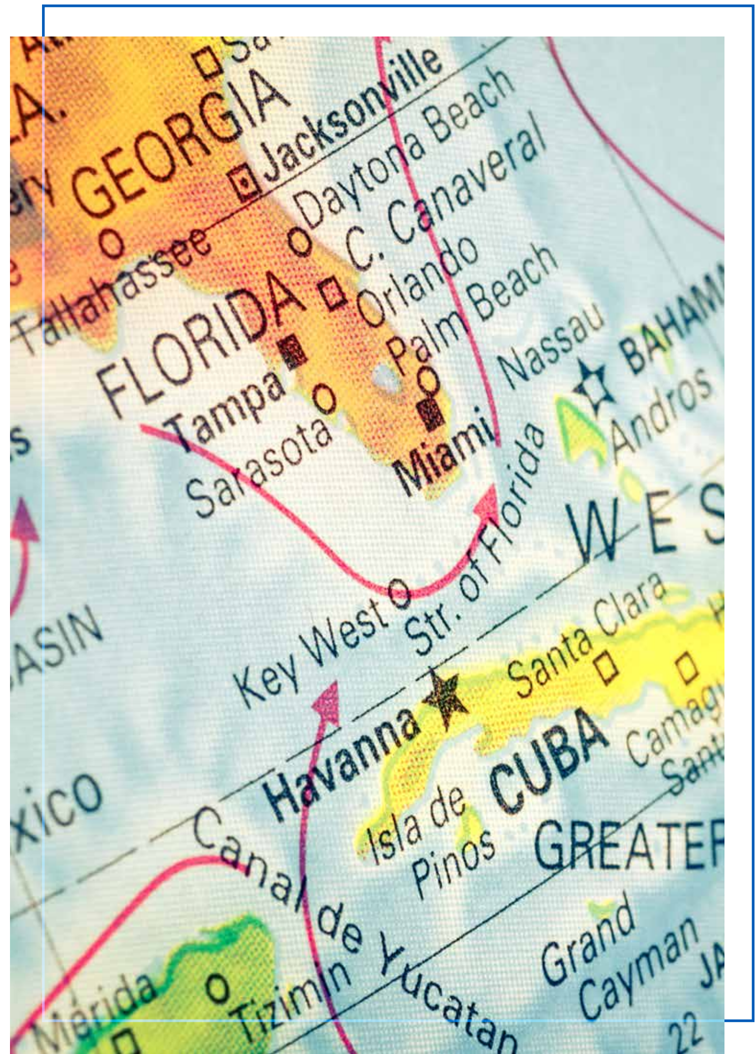
General Information Regarding Doing Business in Cuba

The most important business developments have been limited to the areas of telecom and internet access. Internet service is now being provided in Cuba, albeit on a limited basis, with approximately 240 Wi-Fi hot spots set up by the government throughout the island. Also, a limited home internet pilot program has been instituted. Even so, it is important to note that Cuba’s level of internet connectivity is among the world’s lowest. More than half of those who access the internet in Cuba do so from hotels and tourist centers because internet access is prohibitively expensive for most citizens and connections can be patchy and slow.

Google recently struck a deal with the Cuban government to improve Cuba's technology and internet access. However, many Cuban citizens and dissidents refer to this partnership as a "Trojan Horse" that will help the Cuban government monitor its citizens' internet use, providing the regime with detailed reports of users' searches and profiles.

This builds on prior telecommunications agreements between AT&T, Verizon, Sprint, T-Mobile, and the Cuban government to offer roaming services to U.S. travelers.

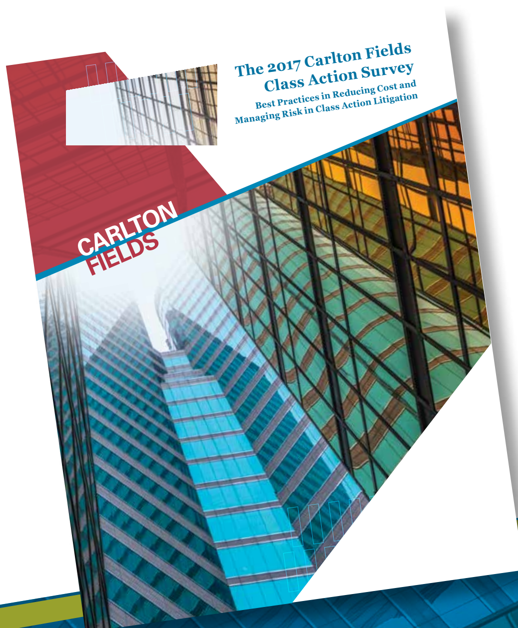
Overall, however, we see these limited efforts as further indication of Cuba's lack of critical infrastructure, which limits potentially profitable business opportunities.



State of Florida Policy

On January 25, 2017, Florida Governor Rick Scott announced that he would ask state lawmakers to pass legislation restricting financial support for ports that "enter into any agreement with the Cuban dictatorship" citing "[s]erious security/human rights concerns." This came a day after the first legal cargo from Cuba in more than half a century arrived in Fort Lauderdale's Port Everglades. Days later, Governor Scott added language to his proposed budget which states that no money will be "allocated to infrastructure projects that result in the expansion of trade with the Cuban dictatorship because of their continued human rights abuses." It is unclear whether this will have any effect on trade in services, such as cruises or ferry service to the island.

The port authorities previously indicated that these agreements could lead to joint marketing studies and training. Port Tampa Bay, on the other hand, indicated that it would not reach any agreements with the Cuban government citing "ambiguity" in Cuba policy right now.



The 2017 Carlton Fields Class Action Survey

Best Practices for Reducing Cost and Managing Risk in Class Action Litigation

Available on March 6 at
www.ClassActionSurvey.com

China Tightens Regulations on Investing Insurance Funds in Shares of Listed Companies

BY JIN LIU & BARRY LEIGH WEISSMAN

Introduction

The entire Chinese economy, including its insurance industry, has experienced rapid growth in recent years. Speculative investments have become an inevitable byproduct of this growth. One of the most well-known examples of a risky insurance company investment was the bitter takeover battle by Evergrande and Baoneng for control of China Vanke Co. Ltd. (Vanke), China's biggest real property company (by sales). Since 2015, Baoneng has used its majority-owned insurance arm Foresea Life, and other of its units, to amass a 25 percent stake in Vanke. Baoneng is now the company's largest shareholder. Evergrande units have accumulated 14 percent in Vanke according to its November 2016 regulatory disclosure. Vanke's shares dropped 16 percent in 2016.

Given these activities, many industry experts believe the China Insurance Regulatory Commission's (CIRC) recent imposition of restrictions on stock investments by insurance institutions is an attempt to curtail speculative and risky investments. It is interesting to note that the circular "Further Strengthening the Regulation of Investment in Stocks in Insurance Funds" (the 2017 Circular) not only regulates future stock investment, but also does not seem to give any grandfather rights to insurance companies' existing investments. Instead, it requires them to adjust their investment proportions within two years or the time limit prescribed by the relevant regulatory body until the regulatory requirements are met.

The 2017 Circular

On January 24, the CIRC issued the 2017 Circular. One of its effects was to nullify the section of a 2014 circular titled "Strengthening and Improving the Supervision and Administration of the Use of Insurance Funds" (the 2014 Circular).

The 2014 Circular discussed insurance company investments in listed company shares. This included the right to participate in the listed company's financial and operating policy decisions, or the ability to control the listed company. The 2014 Circular stated that this is subject to equity investment management and must comply with relevant regulations on equity investment with insurance funds.

In replacing those 2014 provisions, the 2017 Circular specifies additional requirements and restrictions on investing insurance funds in the stock of a listed company.

The 2017 Circular puts the investment in the shares of a listed company into three categories: (i) general stock investment; (ii) major stock investment; and (iii) listed company acquisition. It also establishes a comprehensive solvency adequacy ratio before an insurance company can invest in a listed company's stock. The categories are differentiated based on: (1) whether the stock investment in a listed company meets or exceeds 20 percent of the listed company's overall stock capital; and (2) whether such stock investment results in control or actual control over the listed company.

The term “ordinary stock investment” refers to a stock investment in a listed company by an insurance institution or by an insurance institution and a non-insurance person acting in concert, in which the stock investment is: (i) less than 20 percent of the total stock capital of the listed company; and (ii) the investment does not result in control of the listed company.

The term “significant stock investment” refers to a stock investment in a listed company by an insurance institution or by an insurance institution and a non-insurance person acting in concert in which the stock investment is: (i) equal to or more than 20 percent of the total stock capital of the listed company; and (ii) the investment does not result in control of the listed company.

The “acquisition of a listed company” includes becoming the controlling shareholder.

The insurance institution’s solvency ratio at the end of the previous quarter shall not be less than 100 percent when the insurance institution undertakes a general stock investment. When carrying out a major stock investment and acquisition of a listed company, the insurance institution’s solvency ratio at the end of the previous quarter shall not be lower than 150 percent, and the insurance institution must have completed filing of its stock investment management capability and must be in line with the internal control regulatory requirements for insurance fund use.

The 2017 Circular also provides that the insurance institution must use its own funds to acquire listed companies and that an insurance institution may not pledge the listed company’s stock that it is purchasing to finance such purchase.

Other restrictions include that an insurance institution shall apply to the CIRC for prior approval when it intends to purchase shares in a listed company. It also limits the industries in which an insurance institution may purchase shares in a listed company, insurance companies, non-insurance financial enterprises and industries related to insurance business. The key to any of these types of investments is that the company in which the insurance entity chooses to invest has stable cash flow return expectations.

As a general capital rule, the book balance of all equity investments of an insurance company shall not exceed 30 percent of the total assets of such company at the end of the immediately prior quarter.

The book value of a single stock investment by an insurance institution shall not exceed 5 percent of the total assets of the insurance institution at the end of the immediately prior quarter, except as otherwise provided for in the acquisition of listed companies or investment in stocks of commercial banks listed on the Stock Exchange. For insurance institutions that have already increased their blue-chip stock holdings pursuant to relevant policies, the proportion of investment should be adjusted within two years or within the time limit prescribed by the relevant regulatory body until the regulatory requirements are met.

Leasing Retail Stores in New York City

BY FRANK J. CERZA

Introduction

New York City is a fascinating and dynamic retail market. It is also one of the most competitive and challenging, requiring a careful and methodical approach to leasing to avoid potential commercial and legal pitfalls. This article addresses some salient commercial and legal considerations for retailers leasing stores in New York City.

Retail Team

At the outset of each lease transaction a retailer should select a team of professionals, including a real estate broker, attorney, architect, engineer, general contractor, and other consultants to assist with successful lease negotiations. To avoid potential commercial and legal problems, it is important to work with only one real estate broker when searching for the right store location. The selected broker should execute a letter agreement to look solely and exclusively to the landlord for the payment of any commission. Landlords generally pay one real estate brokerage commission, which is split between the landlord's broker and the tenant's broker. Engaging more than one broker to act on behalf of a retailer can destroy a retail store transaction because if multiple brokers submit lease offers to the same landlord on behalf of the retailer, a dispute may arise as to which is the procuring broker entitled to payment of a brokerage commission by the landlord.

Once a retail location is selected, it is advisable to have the tenant's professional consultants conduct inspections (including an asbestos inspection test) and due diligence on the premises to verify use, condition, and feasibility of establishing a retail store. Depending on the results of the due diligence assessments and any special tenant circumstances (e.g., electrical, HVAC, etc.), it may be necessary to negotiate additional concessions such as the landlord agreeing to perform certain construction and renovations to ready the premises for tenant's occupancy. Conducting these due diligence investigations upfront will avoid potential problems and misunderstandings when the parties proceed to negotiate a comprehensive lease agreement.

Lease Negotiations

Typically, a lease term sheet is used to memorialize the basic financial and commercial terms of the lease transaction negotiated between the parties. The lease terms are then incorporated into the actual lease agreement typically prepared by landlord's counsel. Below is a discussion of several key lease points that require special attention during lease negotiations:

- **Term**: Most retail leases in New York City are for a five- or 10-year term. If possible, it is advantageous to negotiate a renewal option, which provides for an agreed-upon rent during the renewal term, as part of the initial lease agreement.

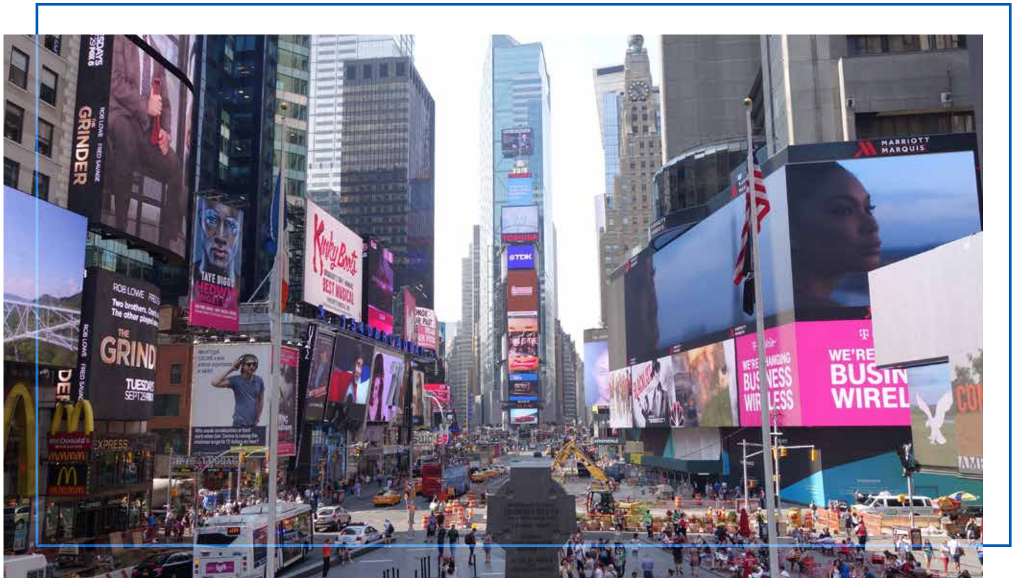
- **Demised Space**: New York City landlords generally use the term "rentable square feet" in setting the amount of space a tenant is leasing. However, the landlord's determination of rentable square footage can be arbitrary and may include space that is neither usable nor includable in the demised premises such as columns, a portion of the elevator banks, janitor's closets, lobbies, stairways etc. Rentable square footage in most instances is not the same as "usable square footage" which is the actual floor or carpetable square footage

of the premises. The difference between a premise's rentable and usable square footage is referred to as the "loss factor." Typically, New York City retail leases may have loss factors of between 15 and 25 percent. In other words, 2,000 rentable square feet may actually be only 1,700 or 1,500 usable or carpetable square feet. Retailers must be cognizant of this distinction when entering into lease negotiations since the loss factor can have an adverse effect on the retail store's actual size, selling area, and profitability.

- **Rent**: The rent payable under a lease normally consists of fixed rent and additional rent. Fixed rent is payable monthly and frequently calculated based on a certain dollar amount per "rentable square foot" of the store premises. Fixed rent may also include electrical charges. In certain instances, it may be advantageous for a retailer to submeter the electricity and pay charges directly to the local utility. Additional rent typically includes tenant's proportionate share (e.g., the ratio that the rentable square footage of the premises bears to the total rentable square footage of the building) of yearly increases in real estate taxes and building operating expenses over an agreed-upon base year.

  - <u>Free Rent/ Rent Abatement:</u> The amount of any free rent is completely negotiable between the parties. However, the free rent period should commence from the date the landlord completes its work and delivers possession of the premises to the tenant. In some instances, landlords agree to reimburse tenants for the costs of the tenant's buildout of the premises instead of granting the tenant free rent under the lease.

  - <u>Security Deposit</u>: Depending on the prospective tenant's financial security, the amount of any security deposit may be six months or more of fixed rent to



be secured by a letter of credit. In some instances, landlords will require both a security deposit and a corporate guaranty of the lease.

  - <u>Commercial Rent Tax</u>: Certain areas of Manhattan currently require retailers to pay commercial rent tax to the City of New York at the effective rate of 3.9 percent of their yearly rent if the annualized rent paid by the retailer is $250,000 or more, subject to applicable deductions and tax credits.

- **Use**: When negotiating the use clause in a lease it is important to verify, in advance, the permissible uses under local zoning ordinances and the Certificate of Occupancy for the building where the store is located. Special care should be taken to draft as broad a use clause as possible to cover all of the retailer's intended retail store uses. For example, a use clause that covers the retail sale of clothing and accessories may not cover the sale of perfume, cologne, or jewelry.

- **Tenant's Alterations**: Most retail leases provide that the tenant will accept the store premises in its current "as is" condition. Consequently, unless there is a special agreement with the landlord as part of the lease negotiations, most landlords will not do any work to ready the premises for a retailer's occupancy. Consider preparing and submitting to the landlord full construction plans and drawings, including signage and storefront designs, for prior approval and incorporation into the lease. This will eliminate uncertainty at a later date as to whether the landlord will approve the tenant's storefront design and plans for the retail store's construction.

- **Sublet and Assignment**: Landlords generally will not permit tenants to assign or sublet their store premises without the landlord's prior written consent and approval. Retailers should try to obtain a lease provision whereby the landlord will not unreasonably withhold, delay, or condition its consent to any subletting or assignment. Absent the foregoing language, the landlord can arbitrarily withhold or delay its consent to any proposed subletting or assignment.

Conclusion

The foregoing describes some pitfalls and issues to consider when negotiating and entering into retail store leases in New York City. Careful attention to these and other lease issues will help avoid costly and time-consuming errors and insure your retail store's successful operation.

Tightening the Tax Screws on International IP Structures

BY LARRY R. KEMM

For many years prudent international tax planning for multinational enterprises has included structures designed to minimize global taxes by developing or holding intangible property (IP) in foreign subsidiaries located in low-tax jurisdictions. As the IP is exploited, royalty revenue recognized by the owner of the IP (either directly or embedded within products sold) results in little or no income tax due to special tax regimes or low statutory tax rates in the country where the IP is held. This allows for low-taxed earnings to be accumulated and redeployed for further growth of the business. Now, a confluence of pressures threatens to diminish or eliminate the attractive tax implications of such IP holding structures. These include recently finalized U.S. tax regulations, standards adopted under Organisation for Economic Co-operation and Development (OECD) global initiatives, and the prospects of significant international tax reform.

Final Regulations Modify Active Royalties Exception

For U.S. multinationals, recently finalized regulations strengthened certain anti-deferral provisions relevant to cross-border licensing structures. In particular, The U.S. Treasury and the IRS modified the active royalties exception under the so-called Subpart F rules of the U.S. Tax Code (*see* Treasury Decision 9792). Under Subpart F, certain types of passive income classified as "foreign personal holding company income" (including royalties) that are received by a controlled foreign corporation (CFC) are taxable to the direct or indirect U.S. shareholders of the CFC without regard to whether the income is distributed by the CFC.

As an exception to foreign personal holding company income, however, royalties derived in the active conduct of a trade or business and which are received from an unrelated person will not be taxed currently under the Subpart F rules. This exception can be satisfied either through an active development test or an active marketing test. Falling within the exception can be crucial for U.S. tax planning because IP held in a low-tax CFC subsidiary is tax beneficial only if the U.S. shareholder can defer the recognition of U.S. income with respect to royalties received by the CFC.

The recently finalized regulations modify the definition of foreign personal holding company income under Treas. Reg. § 1.954-2 so that a CFC must perform the relevant activities required to satisfy the active development test through its own officers or staff of employees. Thus, taxpayers can no longer rely on non-employee agents or contract service providers to develop or add substantial value to IP under this test (the active marketing test already required that qualifying activities be performed through the CFC's own officers or staff of employees). Further, the final regulations clarify that payments made by a CFC licensor under a cost sharing arrangement will not cause the CFC's officers and employees to be treated as undertaking the activities of the cost sharing participant to which the payments are made.

Structuring operations to fall within the active royalties exception to Subpart F income remains a viable tax planning strategy. However, it may be necessary to strengthen the substantive activities occurring within the foreign entity that holds the IP.

OECD BEPS Project Targets Tax-Advantaged IP Holding Structures

Certain efforts of the OECD under its Base Erosion and Profit Shifting project (BEPS) are targeted at artificial profit shifting under regimes that provide preferential tax treatment for income arising from IP without regard to whether the IP owner conducts corresponding substantive activities within the jurisdiction (often referred to as "IP boxes" or "patent boxes").

Pursuant to Action 5 of the final BEPS report, it was agreed that OECD member states will require a minimum substance level with regard to preferential tax regimes applicable to income generated from IP. Under a "nexus approach" adopted by consensus of participating members, a licensor is allowed to benefit from an IP regime only to the extent the licensor has borne its own R&D costs during the development of the licensed IP, and engaged in substantial activities relative to such development.

Moreover, new country-by-country (CbC) reporting required by Action 13 of the BEPS project imposes annual disclosure obligations on large multinational enterprises that will highlight the existence of IP royalty structures to governmental taxing authorities around the world. Under CbC reporting regulations adopted in the United States (issued in June 2016) the ultimate parent of a U.S. multinational group must file a form with its U.S. federal tax return disclosing multiple items for each "constituent entity" of the multinational group, including the identities of such constituent entities, the amount of revenues and income tax paid by such entities as well as the number of employees and other details relevant to the activities carried out in the country where the constituent entity is organized or is resident for tax purposes. Such details could directly highlight or expose facts that may lead tax administrations to investigate whether companies have engaged in practices that have the effect of artificially shifting substantial amounts of income into tax-advantaged environments.

Notwithstanding that a company's existing IP structure may be compliant and ultimately withstand scrutiny, the additional burdens imposed by BEPS and the mere threat of potential examination by taxing authorities might cause companies to rethink their existing IP structures.

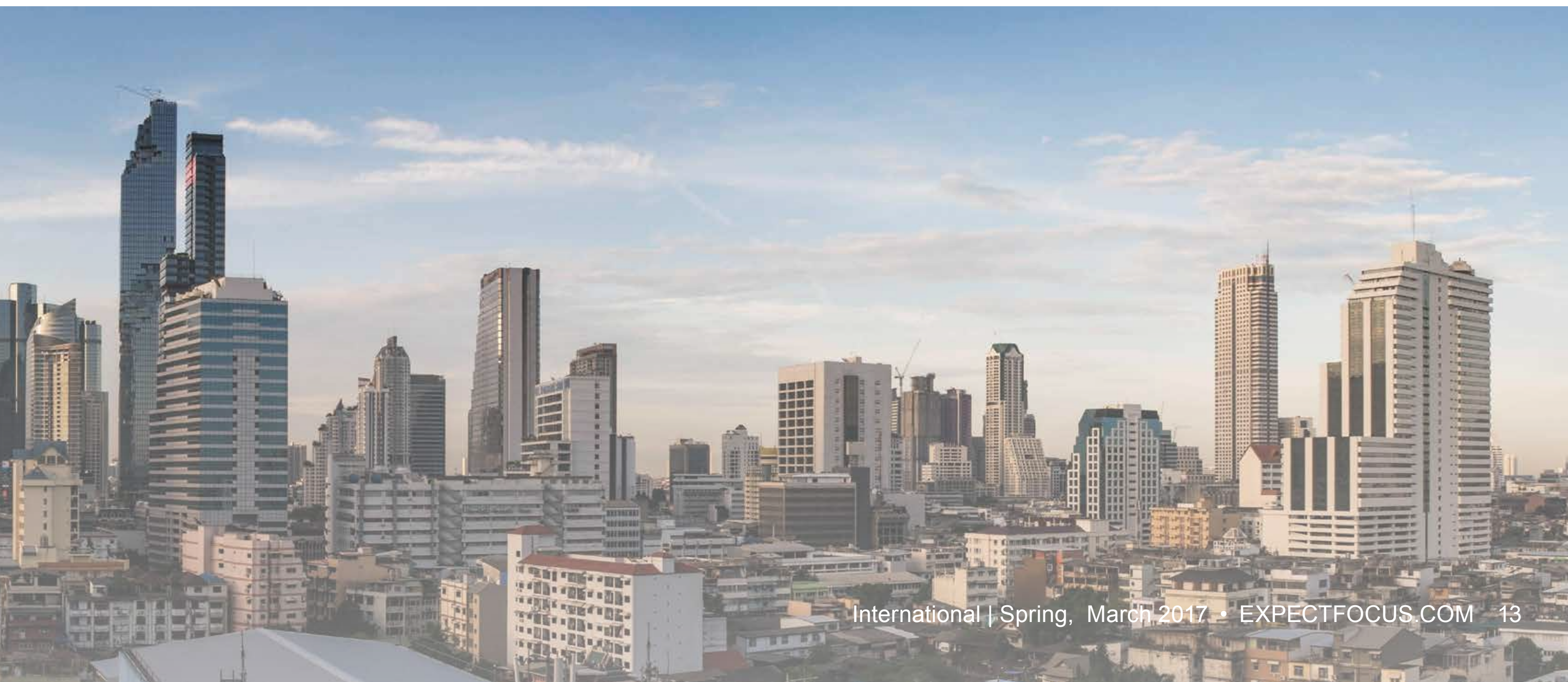
International Tax Reform May Alter Landscape for Cross-Border IP Tax Planning

Potentially game-changing international tax reform may be on the horizon. For several years U.S. legislators have sought to bring about international tax reform, introducing a large number of bills with international tax proposals. However, due to partisan gridlock in Congress and the ever-present threat of presidential veto, such efforts went nowhere. With the new presidential administration and a Republican-controlled Congress, prospects of international tax reform have increased significantly.

Even before President Trump won the election, a GOP Tax Reform Task Force tackled the challenges of tax reform and in June 2016 released its "Blueprint" to legislative change. Among the recommendations reached, the Blueprint would replace existing U.S. tax rules with a territorial approach imposing a destination-based cash flow tax that depends on location of consumption rather than location of production. Although details were not provided, such a tax system would purportedly eliminate the incentives of moving IP to locations outside the United States.

Ultimately, significant international tax reform likely still faces many hurdles before enactment. Nevertheless, prospects of reform represent a further pressure on the future effectiveness or benefit of existing IP royalty structures.

Although these developments are pressuring IP royalty structures, rather than abandon existing IP structures multinationals should closely monitor further developments and modify their international structure as necessary to conform with changes.



Considerations for Foreign Travelers to the U.S. Under the New Administration

BY MARIA MEJIA-OPACIUCH

Travel to the United States, with its new immigration enforcement-minded administration, will require foreign travelers to be even more aware of the rules governing border protection, and take advantage of the travel programs still available to ease the inspections when entering the United States. This article discusses two mandatory programs that still operate and are not subject to the suspended January 27 executive order (EO) titled, "Protecting the Nation from Foreign Terrorist Entry into the United States."

Electronic Visa Update System (EVUS)

This online system is solely for nationals of China who hold a 10-year B-1/B-2, B1 (business), or B-2 (tourist) visa in a People's Republic of China-issued passport. They must now enroll in EVUS to travel to the United States and be admitted. This program took effect November 29, 2016. Travelers subject to the EVUS requirements who lack the valid enrollment will be unable to obtain a boarding pass or enter through a land port of entry.

EVUS enrollment is *not* required of travelers using travel documents other than a People's Republic of China-issued passport. Travelers using a Hong Kong SAR, Macau SAR, or Taiwan passport may continue to travel to the United States without an EVUS enrollment.

Employers should advise future business visitors from China that EVUS enrollment is mandatory. Employers can add this advisory to their internal website or human resources pages on EVUS. Attorneys with clients from China should advise them of the EVUS enrollment requirement in all correspondence.

Enrolling

To enroll, travelers will need their People's Republic of China passport with a maximum validity (10-year) B-1/B-2, B-1, or B-2 visa, and internet access. The enrollment questions are basic and request biographical, employment, emergency contact, and traveler eligibility information. There is no photo or biometrics requirement, and all travelers regardless of age must complete the EVUS enrollment. The enrollment questions are in English or Mandarin, and the enrollment can be done by a third party on behalf of the traveler as long as the responses, which must be in English, are truthful and accurate. The enrollment can be completed within minutes after submission but some responses can take up to 72 hours.

The traveler cannot make corrections on the enrollment form and should just begin a new enrollment to correct any error. Updates of job or address information can be made on the EVUS system without a new enrollment. It is worth noting that, as of November 29, 2016, airlines receive EVUS information through their internal networks and will *not* provide a boarding pass to a traveler who has a maximum validity (10-year) B-1/B-2, B-1, or B-2 visa in a People's Republic of China-issued passport who does *not* have a valid EVUS enrollment recorded in their system.

Furthermore, travelers with People's Republic of China-issued passports residing outside China but traveling to the United States, will need to enroll in EVUS prior to travel to the United States. Thus, travelers from Canada using People's Republic of China-issued passports must enroll in EVUS when traveling into the United States, even if driving into the country.

It is prudent to enroll well in advance of any travel plans and certainly at least one week before departing to the United States. EVUS enrollment is free and valid for two years or until the traveler's visa or passport expires, whichever comes first. When enrollment expires, travelers must update their information before traveling to the United States again.

Resources

- For more information, and to enroll, travelers can visit https://www.cbp.gov/evus. The platform is mobile friendly.
- An EVUS call center (1-202-325-0180) staffed with Mandarin speakers is available 24 hours a day, seven days a week, but closed on U.S. federal holidays.
- Questions can also be addressed to evus@cbp.dhs.gov. This is not a U.S. Department of State system and as such, U.S. consulates cannot resolve enrollment issues or delays.
- The U.S. Customs and Border Protection (CBP) is the U.S. government agency responsible for EVUS and can assist with enrollment questions.

Electronic System for Travel Authorization (ESTA)

This automated system determines the eligibility of travelers to the United States under the Visa Waiver Program (VWP). The VWP allows travelers from 38 participating countries (for list, see

https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html) to travel to the United States for business or pleasure for 90 days or less without a visa stamp when arriving by plane or cruise ship. To use ESTA, travelers must have an e-Passport (an enhanced secure passport with an embedded electronic chip).

ESTA adds a layer of security that allows the U.S. Department of Homeland Security (DHS) to determine in advance of travel, whether an individual is eligible to travel to the United States under the VWP and whether such travel poses a law enforcement or security risk. Thus, answering the ESTA questions accurately and truthfully is critical. Travelers simply planning to transit through the United States en route to another country must complete an authorization via ESTA.

Employers/attorneys should identify their employees/clients who hold dual nationality with one of the 38 ESTA countries and one of the seven countries specified in the suspended EO (Iran, Iraq, Libya, Somalia, Sudan, Syria). Employers/attorneys should provide advisories on travel into the United States on a valid passport from a non-barred country and a participating ESTA country. Further, there are currently no ESTA requirements at U.S. land border ports of entry, but the CBP does require completion of a paper I-94W and a $6 processing fee.

ESTA authorization does *not* guarantee entry into the United States. The CBP officers at airport inspections or at land ports of entry determine whether a traveler can be admitted into the United States.

If the ESTA application is denied, the traveler may need to apply for a B-1 (business) or B-2 (tourist) visa, or B-1/B-2 visa from the U.S. Consulate in their native or home country prior to travel to the United States. For this reason, the ESTA application should be completed well before travel plans are made and tickets purchased.

A new travel authorization through ESTA is required when: the traveler is issued a new passport, changes his or her name, or changes his or her gender; the traveler's country of citizenship changes; or the circumstances underlying the traveler's previous responses to any of the ESTA application questions requiring a "yes" or "no" response have changed.

Nationals of the 38 VWP eligible countries who have been in Iraq, Syria, Libya, Somalia, Yemen, Iran, or Sudan (the countries listed in the suspended EO) at any time on or after March 1, 2011 are no longer eligible to use the VWP to enter the United States regardless of whether their ESTA applications are still valid. They must now apply for a B visa stamp to travel to the United States. These restrictions do not apply to VWP travelers whose presence in Iraq, Syria, Iran, Sudan, Libya, Somalia, or Yemen was to perform military service in the armed forces of a program country, or to carry out official duties as a full-time employee of the government of a program country. It is recommended that such travelers who have traveled to the seven countries listed above for military or official purposes bring with them appropriate documentation when traveling through a U.S. port of entry on the VWP program.

Applying

The ESTA online application collects biographical VWP eligibility information. To ensure successful processing, ESTA applications should be submitted when travel is planned, and even before airline tickets are purchased.

ESTA is accessible at http://esta.cbp.dhs.gov. Third parties can complete the ESTA application on behalf of the traveler, and up to 50 travelers at a time. The ESTA application includes questions regarding communicable diseases, arrests and convictions for certain crimes, and past history of visa revocations or deportations. Positive answers to these questions will render the traveler ineligible to use the VWP to enter the United States, and will require the traveler to apply for a B visa stamp from a U.S. Consulate.

ESTA will typically respond within minutes of submission with one of three possible responses: 1) *Authorization Approved*; 2) *Travel Not Authorized* requiring the traveler to apply for the B visa; or 3) *Authorization Pending* requiring the traveler to check within 72 hours for a final response. The ESTA system provides no email notifications. Note that there is a total $14 ESTA fee comprised of the $4 processing charge and a $10 authorization charge when the application is approved. Payment is by credit or debit card only. The name on the card need not match the name of the traveler on the ESTA application.

Conclusion

It is always prudent to consult with an immigration attorney before choosing and enrolling in a program to use to travel to the United States, or if you experience any difficulties or rejections during the enrollment process. Because additional executive orders may be issued in the near future, seeking to curb travel into the United States, it is especially wise to consult with an immigration attorney and review the CBP website for guidance.

There are additional voluntary "trusted traveler" programs designed to ease foreign travel to the United States, while ensuring national security and safety at the land and sea ports of entry. Information on these programs, including Global Entry, NEXUS, and Secure Electronic Network for Travelers Rapid Inspection (SENTRI), can be found on the CBP website.

CARLTON FIELDS

CARLTON FIELDS serves business clients in key industries across the country and around the globe. Through our core practices, we help our clients grow their businesses and protect their vital interests. The firm serves clients in nine key industries:

- Insurance
- Health Care
- Technology
- Consumer Finance
- Construction
- Telecommunications
- Securities
- Real Estate
- Manufacturing and Raw Materials

For more information, visit our website at www.carltonfields.com.

Atlanta
One Atlantic Center
1201 W. Peachtree Street | Suite 3000
Atlanta, Georgia 30309-3455
404.815.3400 | fax 404.815.3415

Hartford
One State Street | Suite 1800
Hartford, Connecticut 06103-3102
860.392.5000 | fax 860.392.5058

Los Angeles
2000 Avenue of the Stars
Suite 530, North Tower
Los Angeles, California 90067-4707
310.843.6300 | fax 310.843.6301

Miami
Miami Tower
100 S.E. Second Street | Suite 4200
Miami, Florida 33131-2113
305.530.0050 | fax 305.530.0055

New York
Chrysler Building
405 Lexington Avenue | 36th Floor
New York, New York 10174-0002
212.785.2577 | fax 212.785.5203

Orlando
450 S. Orange Avenue | Suite 500
Orlando, Florida 32801-3370
407.849.0300 | fax 407.648.9099

Tallahassee
215 S. Monroe Street | Suite 500
Tallahassee, Florida 32301-1866
850.224.1585 | fax 850.222.0398

Tampa
Corporate Center Three at International Plaza
4221 W. Boy Scout Boulevard | Suite 1000
Tampa, Florida 33607-5780
813.223.7000 | fax 813.229.4133

Washington, DC
1025 Thomas Jefferson Street, NW
Suite 400 West
Washington, DC 20007-5208
202.965.8100 | fax 202.965.8104

West Palm Beach
CityPlace Tower
525 Okeechobee Boulevard | Suite 1200
West Palm Beach, Florida 33401-6350
561.659.7070 | fax 561.659.7368

Carlton Fields practices law in California through Carlton Fields Jorden Burt, LLP.