insights

SHUMAKER
Shumaker, Loop & Kendrick, LLP

A Newsletter from Shumaker, Loop & Kendrick, LLP | Spring 2010

ITAR: A four letter word

Overview

Recognizing and navigating a pathway through the mine field of *International Traffic in Arms Regulations*, or more commonly referred to as "ITAR," is a difficult task for both clients and lawyers alike. Failure to vigilantly monitor ITAR related issues may result in hefty civil fines as well as criminal prosecution. Worse yet, depending on the violation(s), your client could lose its future capacity to export ITAR covered goods and services which, in-turn, may result in serious financial hardship.

By Eric Rogers

ITAR was created in 1976 and is essentially a product of the Cold War. It is intended to provide some measure of national security and serves other foreign policy objectives as well. Strictly speaking, ITAR regulates and controls the export of defense-related goods and services as identified on the United States Munitions List ("USML"). These regulations operate to enforce the provisions created by the *Arms Export Control Act* ("AECA") and are cited in Title 22, Chapter I, Sub Chapter M of the Code of Federal Regulations ("CFR"). ITAR is enforced and interpreted by the U.S. Department of State.

ITAR does not apply to general scientific or engineering principles or other information commonly available in the public domain. Likewise, products that qualify as those having a "dual usage" in terms of a legitimate use within the commercial markets are also excluded under ITAR.

Given the realities of today's global markets set against the backdrop of international terrorism and nuclear proliferation, the U.S. Department of State is more determined than ever to prosecute ITAR violations. This leads to one important observation – those parties who wish to engage in sales of technology deemed to have a military application should secure counsel early in the process. Regulatory compliance cannot be treated as an afterthought.

There are essentially two common ITAR scenarios which may be occasionally encountered in the practice of law. The first scenario generally involves the sale/purchase of goods or commodities covered under the USML. The second involves establishing an ITAR compliant program for a company engaged in the defense industry.

continued on next page >

Qualified Bonds for Tax-Exempt Issuers: Recovery Act provisions end December 31, 2010

Through December 31, 2010, the Recovery Act presents an expanded incentive for banks to purchase tax-exempt bonds issued for 501(c)(3) organizations. In general, a financial institution is not permitted to take a deduction for the portion of interest expense that is allocable to its investments in tax-exempt municipal bonds, except for bonds issued by qualified small issuers. Before the Recovery Act, a qualified small issuer was defined as any issuer that reasonably anticipated that the amount of its tax-exempt obligations (other than certain private activity bonds) would not exceed $10 million in any calendar year. Through December 31, 2010, the Recovery Act increased the small issuer exception threshold to $30 million and instead of bonds issued by the governmental issuer counting toward the $30 million, only bonds issued for the benefit of the 501(c)(3) organization and certain related parties in 2010 count toward the $30 million. This, and certain other revisions make it attractive for a bank to purchase tax-exempt bonds (including bonds refinancing bonds already issued) for its own account. Additionally, the HIRE Act signed into law on March 18, 2010 expands the usefulness of certain other tax-exempt bonds, such as those supporting renewable energy and school construction.

For additional information, please contact Aleta Bonini at abonini@slk-law.com, or Regina Joseph at rjoseph@slk-law.com.

ITAR, continued

ITAR Governed Transactions

All U.S. manufacturers, exporters, and brokers of defense articles, services, and related technical data, as defined by the USML, are required to register with the U.S. Department of State[1]. Registration is intended to provide a mechanism by which the Federal Government can monitor and control the export of defense related goods and information. Registration is the first step in the process and does not, in and of itself, confer the right to export. A "U.S. Person," as defined by Title 22, can only export USML goods, services, or data to a "Foreign Person" after having first obtained authorization from the U.S. Department of State[2]. This authorization usually takes place in the form of an export permit. Other forms of export authorizations exist, but are less common and typically deal with foreign military sales by the U.S. Government to a foreign government or as part of a multi-nation program like the F-35 Joint-Strike Fighter ("JSF").

Among other things, a "U.S. Person" is defined as a corporation, business, or group that is incorporated under U.S. law[3]. A "Foreign Person" is similarly defined under ITAR, but also includes any person who is not a U.S. citizen or permanent resident of the U.S..[4] The term "Export" is misleading because it implies certain geographic connotations, when in-fact the term really means "transfer." Accordingly, an "export" under ITAR of USML covered goods, services, or data can occur between U.S. and foreign persons within the U.S. borders.[5] The conceptual framework of ITAR is designed to control and monitor military technology. Although it would seem counterintuitive to classify the sale of a USML item *within* the U.S. as an "export," this is in-fact the posture taken by the U.S. Department of State.

The subject of foreign persons holding dual citizenships can also present particularly perplexing ITAR considerations. If the dual citizenship is with a NATO country, the EU, Switzerland, Japan, New Zealand, or Australia, then issuance of an export permit is generally granted.[6] If, however, the individual holds dual citizenship in an "off limits" country like Cuba, Iran, Syria, Sudan, North Korea, Vietnam, or the Peoples Republic of China ("PRC"), then it is unlikely that an export permit will be granted.[7] This issue requires that vigilant consultation take place between buyer and seller before authorized access to USML items can occur.

As an example, in 2004 General Dynamics Land Systems was fined $20M for access to USML items by dual nationals from countries including the People's Republic of China ("PRC") and Syria.[8] In 2007, ITT was fined $100M for providing night vision technology to individuals with PRC citizenship.[9]

With this in mind, the term "access" takes on an important role within the context of preparing quotes, agreements, and letters of intent. If any of these instruments unwittingly disclose USML covered technical data to a foreign person, then an ITAR violation may have occurred. Likewise, companies which allow foreign nationals to physically access manufacturing facilities may unknowingly violate the export restrictions created by ITAR.

Although outside the scope of a buyer and seller relationship, Dr. J. Reece Roth was prosecuted in 2008 under ITAR and the AECA for providing access to USML items (plasma technology for USAF UAVs) to a PRC graduate student in a University of Tennessee research laboratory. U.S.[10]

ITAR also operates to restrict the "retransfer" of items covered by the USML by foreign persons unless specifically authorized. The critical consideration is one of "end use" and it forms an important cornerstone to any ITAR analysis. In effect, a retransfer or re-export takes place when the authorized foreign person then re-directs the USML goods, services, or data to an unauthorized third person or country.[11] In instances where the authorized foreign person is not the true end user then the export permit must be re-approved by the U.S. Department of State.[12]

To this end, it is important to understand the true nature of the transaction. This means that an initial determination must be made as follows: (1) Is the item covered by the USML? (2) Where is the ultimate end use to take place? (3) Assuming that the transfer does fall within ITAR, is the transferor registered with the U.S. Department of State and is the export subject to an exemption?

Depending on the product and its application, the answer to the first issue isn't always straightforward. The question becomes more convoluted if it relates to a component item used in the production of a larger ITAR covered defense article. Case in point: an integrated circuit board adhesive originally intended for commercial use may, on its face, not appear to be a USML covered item. If, however, the same item is slightly modified and serves as a critical component for the fire control system of an Apache Helicopter then the analysis begins to fall into a grey area.

The guiding principal in this part of the analysis really turns on "intent." Was the product designed and intended for the commercial market, and then later applied to a military program? If so, then the product likely qualifies as a "dual-use" item and falls outside of ITAR. If, however, the product was specifically modified for military use then it may well be considered a USML controlled item.

The regulations are constantly evolving along with the technologies themselves. When in doubt on the issue of USML covered items, seek guidance from the Department of Defense Trade Controls ("DDTC") in the form of a "Commodity Jurisdiction" request.[10]

The key to this process is to make certain that the information submitted is complete and accurate. Failure to correctly identify the commodity may result in a future ITAR violation. In sharp contrast, a carefully executed request typically serves to insulate the client from future civil and criminal liability. In sum, companies should place the burden of making such jurisdictional judgment calls on the DDTC.

Assuming that ITAR does have application, then the second phase of the analysis must center on the ultimate end use of the product. This isn't always easy to trace, however, if uncertain then particular care must be taken prior to any export. Once again, ITAR is not a static set of regulations. Its focus is ever-evolving depending on the prevailing national security interests of the time. Indeed, the severity of the fine tends to be affected by the identity of the end user. For example, USML transfers to "off limits" countries generally call for a $250,000 fine per violation and often result in collateral criminal prosecution as well.[14]

In fact, the DDTC operates an end use monitoring program referred to as "Blue Lantern" pursuant to Section 38 of the AECA. Blue Lantern is intended to identify and scrutinize transactions which it deems at risk for diversion or misuse. Historically, the government will penalize U.S. companies for ITAR breaches by a foreign subsidiary and will treat ITAR violations as a strict liability offense even as to the successor of a company responsible for the original breach.[15]

Accordingly, absolute certainty is required in the second phase of the analysis and the export permits must identify true end use destination. In the event that the transaction changes mid-stream or is otherwise modified as to the end use destination then new export permits must first be obtained prior to export. If a potential violation occurs, Title 22 imposes a duty upon the breaching party to self report the violation.[16] Failure to do so generally results in a significant increase in the penalty.

continued on next page >

ITAR, continued

With respect to the third consideration, the need for proper registration and licensure has been discussed. With regard to the registration, it serves as a prerequisite to any ITAR governed transaction. There are very few ITAR exemptions. Most notably, Canada is exempt as of 2001, but that is the only example.[17] To date, virtually every other nation is subject to ITAR restrictions with the *possible* exception of the UK. Even this "exemption" is in flux and, if it exists at all, it is strictly limited to the F-35 JSF program.

Compliance

Designing military products and selling products that might be deemed to have a defense related application is becoming more and more common because of the relative fiscal security associated with the industry as a whole. The recent recession has highlighted this shift in focus for many companies. Accordingly, corporations intending to participate in this industry will require the creation of an export compliance program.

Failure to establish such a program is a common mistake for both new and existing defense contractors alike. Similarly, a company may have a program which is largely ignored or out-dated because it often times interferes with sales. In such instances, ITAR violations are a virtual certainty.

The key elements for an export compliance program are: (1) registration with the U.S. Department of State and keeping the registration current; (2) development of a written managerial set of guidelines which stress the importance of compliance and the consequences of non-compliance; (3) establishment of a managerial structure which should also include the appointment of an internal compliance person; (4) classification of all products and services in order to establish what products fall within ITAR jurisdiction and which ones do not; (5) establishment of a system that insures that ITAR controlled items cannot be exported without a license; (6) establishment of a system which identifies ITAR controlled technical data and a plan for controlling it; (7) identify and obtain proper licensure for any foreign nationals prior to providing access to USML covered items; and, (8) establish method for employee training and record keeping.[18]

While not addressing each of the above points, the sixth and seventh elements require expanded discussion.

Information technology creates serious practical problems as to the issue of controlling USML covered items. It is commonplace for most employees to have laptops and Blackberries. Proliferation and transfer of technical data can amount to an ITAR breach. Corporate policies intended to monitor and enforce this aspect of an export program must be vigilantly observed and this is especially true if the data is "classified." Methodology for such security measures is beyond the scope of this article but clients are well advised to make the necessary investment to safeguard this aspect of the program.

An area of constant confusion for companies involves "where" and "when" foreign nationals are allowed to be involved in defense technology development and trafficking. As a general rule, if the individual becomes a U.S. citizen or a permanent resident then licensure for non-classified items is typically granted.[19] If, however, the individual holds citizenship in one of the "off limits" proscribed countries then a license request will almost always be denied.[20]

Accordingly, companies engaged in the defense industry must specifically designate the teams or groups of employees intended to participate in a USML covered project and, if need be, segregate those groups so that access by a foreign national can be strictly controlled.

Conclusion

The defense industry is expanding exponentially due in large measure to advancing technologies. Accordingly, ITAR considerations are also likely to increase with greater frequency. The key to navigating ITAR's minefield is to recognize its potential involvement and then to encourage the client to take an early proactive approach.

Footnotes are found on the back page of this newsletter.

For additional information, contact Eric Rogers at erogers@slk-law.com.

Going Private or Going Dark? That is the Question

The full text of the following article, which was published in The Practical Lawyer (Feb. 2010, pp. 39-53) can be found at slk-law.com/publications and www.ali-aba.org.

Since it is possible to maintain some level of liquidity and public interest through trading on the "Pink Sheets" in the over-the-counter market, companies sometimes consider "going dark," eliminating the public reporting requirements of the Securities Exchange Act of 1934 (the Exchange Act) while not shedding all of the company's "public" shareholders. The following are key considerations in "going dark":

By Greg Yadley

By Will Blair

• A company can take action to avoid the time, expense, and other burdens of public reporting under Section 15(d) of the Exchange Act if it has no more than 300 shareholders of record (or 500 if the company's total assets have not exceeded $10 million for the last three fiscal years) by filing a Form 15 with the SEC.

• In normal trading and transfers, the number of record shareholders may creep upward toward 300 and the company faces the possibility of the resumption of public reporting requirements. In these instances, a company may consider "going darker." The traditional methods for reducing the number of shareholders are a tender offer, open market share purchases, a cash-out merger, and a reverse stock split.

• Going darker through a tender offer contemplates the purchase of shares by a company from shareholders owning fewer than some specific number of shares. Usually, the offer is made to all shareholders who hold less than 100 shares (or some other threshold) to purchase their shares for a specific price. The advantages are that no shareholder meeting or approval is required, there are no appraisal rights for shareholders, and the litigation risk is lower because each shareholder has a choice of whether to sell or retain his or her shares. The disadvantages are that it requires extensive disclosures, has unpredictable results, and shareholders may tender less than all shares they own, which will not reduce the number of record holders.

• The open market method of going darker contemplates the purchase of shares on the open market by the company or by the company in conjunction with its affiliates. The advantages are that no shareholder meeting or approval is required, there are no appraisal rights for shareholders, and the litigation risk is lower because each shareholder has a choice of whether to sell or retain his or her shares. The disadvantages are that extensive disclosures are required, results are unpredictable, there is no ability to acquire sufficient shares, and pricing is unfavorable.

• A cash-out merger to reduce the number of record shareholders involves a merger of the company into a newly formed corporation organized by management or a friendly third party, typically a financing partner. The advantage is that this can eliminate all minority shareholders. The disadvantages are that extensive disclosures are required, dissenting shareholders have appraisal rights, getting shareholder approval can be expensive and time-consuming, and there is a risk of failure if the majority of shareholders do not vote for approval.

• In a reverse stock split, the company files an amendment to its articles of incorporation to effect a reverse stock split of the company's stock at a specified ratio designed to ensure a smaller number of shareholders, with all shareholders that own less than a whole share after the reverse split given the right to receive a cash payment in lieu of the fractional share created in the transaction. The advantages are that it can be utilized to cash out fewer than all of the minority shareholders, it provides minority shareholders the choice to remain a shareholder by purchasing additional shares in the open market, and permits minority shareholders to sell shares in the open market to cause their remaining shares to be cashed out. The disadvantages are the need for extensive disclosures, that dissenting shareholders have appraisal rights, and that shareholder approval can be expensive and time-consuming.

For additional information, contact Gregory C. Yadley at gyadley@slk-law.com or Willard A. Blair at wblair@slk-law.com.

Environmental Litigation Update

Climate Change, Greenhouse Gases & Clean Air Act Permitting

Are your company s greenhouse gas emissions regulated by EPA? Do you need to obtain a permit for those emissions before you start construction on your next big capital project? Who will decide, Congress, EPA, or the courts?

The United States Supreme Court's 2007 decision in *Massachusetts v. EPA*[1] intensified an already heated policy debate over the regulation of greenhouse gases ("GHGs") from mobile[2] and stationary sources[3] of air pollution. Since the *Massachusetts* decision, EPA has issued guidance declaring that GHGs are not currently regulated by the Clean Air Act,[4] finalized regulations that require certain sources of GHGs to monitor and report their emissions,[5] declared that GHG emissions from new motor vehicles cause or contribute to air pollution that endangers public health and welfare,[6] and proposed rules that, if finalized, could result in the regulation of GHGs emitted from mobile and major stationary sources of air pollution under the Clean Air Act as early as this Spring.[7] Not surprisingly, EPA's regulatory proposals would have significant impacts on the owners and operators of large industrial facilities. However, the scope of the regulations is still in flux, and they could require you to obtain a permit from EPA before you break ground on your next apartment complex, expand your nursing home or modify the production line at your small manufacturing facility.

By Mike Snyder

As this edition of ***insights*** was going to press, several bills were introduced in Congress to thwart or substantially delay EPA's efforts to use the Clean Air Act to regulate GHG emissions.[8] In response, the Administrator of EPA revealed that EPA may revise many of its current regulatory proposals in a manner that is likely to delay the regulation of GHGs until 2011 or 2012 and may exempt some activities from regulation that would have been directly impacted by earlier proposals.[9]

While Congress and EPA continue to struggle to enact legislation or promulgate regulations that will shape the national policy, the nation's courts and administrative tribunals have been left to decide, on a case by case or permit by permit basis, whether corporations are required to account for GHG emissions when they obtain Clean Air Act permits that authorize the construction and operation of new facilities or the modification of existing facilities. To date, courts have refused to impose GHG permitting requirements in the absence of EPA regulations or legislation amending the Clean Air Act. Most recently, on March 4, 2010, the Wyoming Supreme Court issued a decision holding that GHG emissions from stationary sources like factories, refineries and power plants are not "regulated" under the Clean Air Act and do not need to be accounted for when corporations seek permits to build new facilities or modify existing facilities.[10]

The Administrator of EPA has reached the same conclusion when responding to petitions from environmental groups that seek to overturn Clean Air Act operating permits that fail to account for GHG emissions.[11]

Footnotes are found on the back page of this newsletter.

For additional information, contact Mike Snyder at msnyder@slk-law.com

Annual Air and Waste Management Conference

Shumaker s Columbus office has, for years, sponsored the Annual Air and Waste Management Association Conference which is attended by members from all over Ohio. In December, two representatives, Julie Wagner and Bob McCullough, from Environmental Quality Management in Cincinnati, presented a plaque to Shumaker in appreciation of the firm s efforts in organizing and sponsoring the Conference. Mike Born and Marty Di-Noto are pictured with the representatives.

Mercy for the Vanquished:

Federal regulators announce new policy statement on Prudent Commercial Real Estate Loan Workouts

It is said that Pittacus, a revered Philosopher General and reputed to be one of the Seven Greek Sages from ancient times, when presented with a key enemy in shackles released him saying, "Forgiveness is better than revenge." The Federal Banking Regulators, including, among others, the Federal Deposit Insurance Corporation, the Federal Reserve, the Office of Thrift Supervision and the Office of the Comptroller of the Currency (hereafter the "Regulators") seem to have taken a similar policy approach with respect to the failed lending policies that culminated in the massive commercial real estate bubble that has now burst. With lending banks (hereafter "Lenders") brought to their knees by plummeting collateral values and impaired repayment ability, the Regulators in their recent October 30, 2009, policy statement, titled "Policy Statement on Prudent Commercial Real Estate Loan Workouts" (the "Policy Statement") have taken the position that being "forgiving" in the sense of allowing Lenders greater latitude to work out commercial real estate (CRE) loans is preferable to forcing Lenders to liquidate CRE loans.

By Moses Luski

The key takeaway from the Policy Statement may be found in the first two paragraphs of the Policy Statement.

> "The financial regulators recognize that financial institutions face significant challenges when working with commercial real estate (CRE) borrowers that are experiencing diminished operating cash flows, depreciated collateral values, or prolonged sales and rental absorption periods. While CRE borrowers may experience deterioration in their financial condition, many continue to be creditworthy customers who have the willingness and capacity to repay their debts. In such cases, financial institutions and borrowers may find it mutually beneficial to work constructively together."
>
> "The regulators have found that prudent CRE loan workouts are often in the best interest of the financial institution and the borrower. Examiners are expected to take a balanced approach in assessing the adequacy of an institution's risk management practices for loan workout activity. Financial institutions that implement prudent CRE loan workout arrangements after performing a comprehensive review of a borrower's financial condition will not be subject to criticism for engaging in these efforts even if the restructured loans have weaknesses that result in adverse credit classification. In addition, renewed or restructured loans to borrowers who have the ability to repay their debts according to reasonable modified terms will not be subject to adverse classification solely because the value of the underlying collateral has declined to an amount that is less than the loan balance."

In the Policy Statement the Regulators make the following key points related to the workout of CRE loans:

The fact that the "underlying collateral has declined to an amount less than the loan balance" will not in and of itself require adverse classification of a loan.

• A Lender seeking a favorable review of a restructured loan must demonstrate that it is utilizing the best current information to determine existing collateral value and repayment ability. Essentially, this means the Lender must obtain new appraisals of the collateral as well as new financial statements from the borrower and any guarantor.

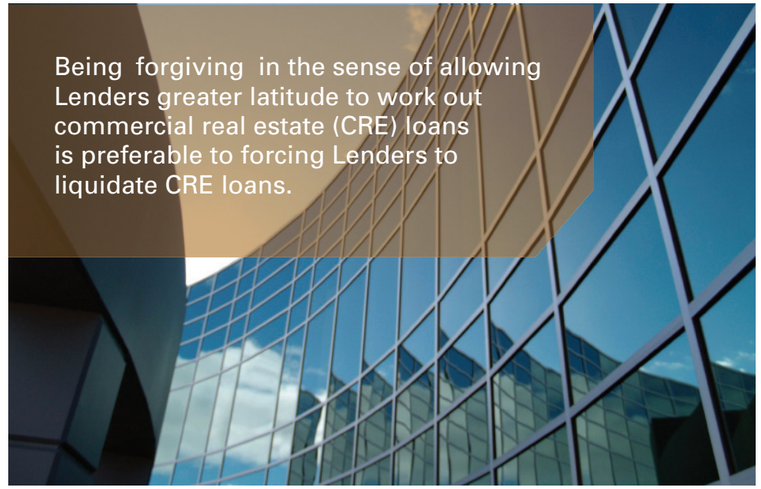
• A favorable review of a restructured loan may be obtained where supported by the "current sound worth and debt service capacity of the borrower, guarantor or the underlying collateral." Thus, even though collateral values and/or debt service ratios have decreased, a loan may avoid adverse classifications where debt servicing capacity is sufficient to service loan payments.

• The fact that the loan is in an industry that is experiencing financial difficulties does not alone merit classification.

• The Regulators may permit loan to value ratios to be based on "stabilized" value as apposed to "as is" value.

• A loan requires classification where a restructure is not supported by adequate analysis and documentation or where the Regulator concludes that the Lender is otherwise administratively inefficient.

• Where global analysis of sources of payment indicates a lack of debt servicing capacity, then a loan restructure will not be looked upon favorably.



In the Policy Statement the Regulators have opted to encourage loan restructures where the ability to service debt can be documented, notwithstanding declines in collateral values or debt service coverage ratios. The net effect of this policy should be to permit an orderly disposal of the CRE collateral in question at higher prices than would be achieved through distress sales. This orderly liquidation should in turn maximize the availability of bank capital for new lending. Lurking in the shadows in all this is the danger of moral hazard. The Regulators must be wary that the cure being administered in the form of the Policy Statement does not end up killing the weakened patient by introducing moral hazard to the system.

You can access the Policy Statement on the SLK website: www.slk-law.com

Outside of SLK follow web link to: http://www.federalreserve.gov/newsevents/press/bcreg/20091030a.htm and select referenced "Attachment 147 KB PDF"

For additional information, contact Moses Luski at mluski @slk-law.com.

legalupdate

New IRS Disclosure Schedule for Uncertain Tax Positions Stuns Tax Practitioners

The IRS recently stunned the tax community by announcing the creation of a new schedule required to be attached to the income tax returns of certain business taxpayers that discloses and describes "uncertain tax positions." The requirement will be imposed on business taxpayers with total assets in excess of $10 million and the IRS intends for it to apply to returns filed in 2011.

Under financial accounting rules, many business taxpayers are required to identify, quantify and reserve against the potential liability for uncertain tax positions taken on their tax returns. United States businesses are generally required to do so under Financial Accounting Standards Board Interpretation Number 48 ("FIN 48"). However, even if not subject to FIN 48, businesses may be required to account for uncertain tax positions under other accounting methods and standards. The International Financial Reporting Standards and country-specific standards, for example, may impose such requirements.

Under the new IRS reporting requirement, business taxpayers required to reserve against uncertain tax positions for financial accounting purposes will also be required to provide certain information regarding those positions on a schedule attached to their tax returns. At a minimum, the following information will need to be disclosed:

1. The Internal Revenue Code Sections potentially implicated by the position;

2. The taxable year or years to which the position relates;

3. Whether the position involves an item of income, gain, loss deduction or credit against tax;

4. Whether the position involves a permanent inclusion or exclusion of an item or the timing of inclusion or exclusion, or both;

5. Whether the position involves a determination of the value of any property or right; and

6. Whether the position involves a computation of basis.

The schedule will also require a business taxpayer to specify the entire amount of federal income tax that would be due if the position were disallowed on audit.

In addition to uncertain tax positions covered by FIN 48 or similar standards, the schedule will require the same disclosure for positions not reserved for under accounting rules because (1) the taxpayer intends to litigate the issue or (2) the taxpayer has determined the IRS in practice does not examine the position on audit.

The new schedule will fundamentally change the way in which the IRS selects returns for audit and the manner in which audits are conducted. It will also impact identification of and reserving for uncertain tax positions for financial accounting purposes. As mentioned above, the IRS is moving quickly to develop the schedule and implement it, and has publicly stated that it will be required for returns filed in 2011 for the 2010 tax year.

For additional information contact Tom Cotter at tcotter@slk-law.com.

IRS Payroll Tax Audits

Recently, the IRS announced it will initiate an estimated 2,000 audits per year for three years related to payroll and employment tax compliance beginning in early 2010. The IRS has indicated that both large and small corporations, partnerships, sole proprietors, governmental entities and non-profits will be part of this new initiative. The initiative will focus on tax year 2008. The audits will focus on the following items: (1) worker classification (employee versus independent contractor); (2) payroll tax withholding; (3) fringe benefit reporting; and (4) nonqualified deferred compensation. Furthermore, the IRS will focus special attention on executive compensation and the tax rules of Code Section 409A as it relates to information reporting and tax withholding.

For additional information, contact Tom Cotter, tcotter@slk-law.com, Mike McGowan, mmcgowan@slk-law.com, or John Staler, jstaler@slk-law.com.

Michigan Sales Tax Proposal

Michigan Gov. Jennifer Granholm has proposed that the state sales tax be extended to consumer services and the rate dropped from 6 percent to 5.5 percent. The roughly $550 million raised by the change initially would go to maintain the current level of spending for public education. Under Governor Granholm's proposal, the sales tax wouldn't apply to health care and social assistance, education, new construction, real estate and insurance commissions, and services directly connected to business operations. However, the sales tax would be expanded to include 168 services currently exempt from taxation including, but not limited to legal services, tickets to entertainment events, and automobile and home repairs. An amendment has been submitted in the Michigan legislature, however, to exempt legal services from the tax.

For additional information, contact John Staler at jstaler@slk-law.com.

EEOC is Soliciting Comments on its Proposed Rule Concerning the ADEA Defense of Reasonable Factors Other than Age

Under the Age Discrimination in Employment Act (ADEA), an employer is prohibited from discriminating against a person because of her age. The ADEA applies to any term, condition, or privilege of employment, including hiring, firing, promotions, layoffs, compensation, benefits, and training.

The ADEA provides a "reasonable factors other than age" (RFOA) defense for disparate impact claims, in which an employer can defend a facially neutral employment policy or practice that has a negative impact on older workers by explaining the reasons for the policy that are unrelated to age. The Equal Employment Opportunity Commission ("EEOC") recently proposed a rule, published in the Federal Register, to aid employers in determining whether a practice is objectively "reasonable," in the view of a reasonable employer under similar circumstances, and is based on factors "other than age." In determining whether the RFOA defense is based on an objectively reasonable practice, courts should use a case-by-case approach and consider the following non-exhaustive factors:

- whether the employment practice and the manner of its implementation are common business practices;
- the extent to which the factor is related to the employer's stated business goal;
- the extent to which the employer took steps to define and apply the factor fairly and accurately (e.g., training, guidance, instruction of managers);
- the extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
- the severity of the harm to individuals within the protected age group, considering both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and
- whether other options were available and the reasons the employer selected the chosen option.

In determining if the practice is based on factors other than age, the employer should be able to demonstrate that it provided guidance on how to make employment decisions objectively, instead of providing supervisors with unchecked authority to engage in subjective decision-making. Relevant factors to demonstrate a practice is based on factors other than age include:

- the extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;
- the extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and
- the extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

Under these new regulations, in order to preserve the right to rely on the RFOA defense, Ohio employers should take steps to ensure their employment practices and policies achieve stated business goals, in reliance on objective facts that are consistently applied. In addition, Ohio employers should assess the impact of such practices on older workers in order to reduce or eliminate any negative effects. Finally, Ohio employers should establish objective performance criteria for supervisory assessment of employees and provide training and guidance to supervisors on how to apply the objective criteria and avoid discrimination.

Updated EEOC Posters

- The EEOC recently revised its "Equal Employment Opportunity is the Law" poster, which describes prohibited employment discrimination practices.
- Effective November 21, 2009, employers are required to either:
  - Post a supplement alongside the September 2002 version of the poster, or
  - Post the November 2009 version.
- The poster and supplement are available at http://www1.eeoc.gov/employers/poster.cfm.

For additional information, please contact one of Shumaker's Employment and Labor attorneys.

continued on next page >

Supreme Court of Ohio Upholds Employer Intentional Tort Statute

Nearly twenty-five years after the first employer intentional-tort statute was enacted, the Supreme Court of Ohio has finally held such a statute to be constitutional. In *Kaminski v. Metal & Wire Products Co.* and its companion case, *Stetter v. R.J. Corman Derailment Services*, the Supreme Court of Ohio upheld the currently effective employer intentional-tort statute, R.C. § 2745.01, significantly limiting an employee's right to sue his employer for an intentional tort.

• ***How Does Workers' Compensation Law Fit In?***
Under Ohio's workers' compensation law, as established in Article II, sections 34 and 35 of the Ohio Constitution, an employee's sole remedy for an injury arising out of and in the course of the employee's employment was to bring a workers' compensation claim. In 1959, the General Assembly codified this exclusivity rule into R.C. § 4123.74, holding that complying employers were immune from civil liability for those injuries arising out of the course and scope of an employee's employment. However, an exception to this exclusivity rule arose in 1981, when the Ohio Supreme Court decided *Blankenship v. Cincinnati Milacron Chems.* and held that, if an injury results from an employer's intentional act, the injury no longer occurs in the course and scope of employment. *Blankenship* thereby allowed employees to sue their employers for civil damages for such injuries under the theory of an employer intentional tort.

• ***What is an Employer Intentional Tort?***
In cases following *Blankenship*, the Ohio Supreme Court defined a common law employer intentional tort to include both an employer's intentional acts causing injury, as well as those acts that the employer was substantially certain to cause injury. The "substantially certain" language often resulted in prolonged litigation involving fact-specific inquiries into the existence of prior accidents, the employee's training and employee safety complaints, among other things. While the Ohio General Assembly attempted several times to enact statutes that would limit employer intentional torts, the Supreme Court of Ohio repeatedly struck down those statutes as unconstitutional.

• ***How Does the New Statute Change Employer Intentional Torts?***
R.C. § 2745.01, which became effective April 7, 2005, now limits employer intentional torts to only those occasions when the employer acted with "deliberate intent" to cause an injury, disease, condition or death. The statute also provides that when an employer deliberately removes an equipment safety guard or deliberately misrepresents the nature of a toxic or hazardous substance, and that action directly causes an injury or occupational disease, there is a rebuttable presumption that the employer had the requisite intent to injure the employee.

• ***Why Was This Version of the Statute Upheld When Others Were Previously Struck Down?***
As noted in *Kaminski*, in addressing prior versions of the statute, the Ohio Supreme Court had held "with little analysis and no citation of any authority that the statute was 'totally repugnant to" Section 34, Article II [of the Ohio Constitution] in that "[a] legislative enactment that attempts to remove a right to a remedy under common law that would otherwise benefit the employee cannot be held to be a law that furthers the '. . . comfort, health, safety and general welfare of all employees.'" For similar reasons, the prior court decisions viewed the statute as circumventing the provisions of Article 35 (which establishes Ohio's workers' compensation system) by protecting employers from liability, rather than providing compensation to injured employees.

In contrast, in deciding *Kaminski*, the Ohio Supreme Court held that Articles 34 and 35 do not prohibit the General Assembly from enacting legislation that limits the recovery of employees in intentional tort lawsuits, since such actions are outside the workers' compensation system established in Article 35 (therefore rendering Article 35 irrelevant to the inquiry) and Article 34 is not a mandate requiring the General Assembly to *only* pass legislation that benefits employees (as demonstrated in more recent decisions). Further, the new statute differs from prior versions in that it merely limits the employer intentional tort, which is permissible, rather than providing so many obstacles so as to, in effect, abolish the cause of action altogether.

Similarly, in deciding *Stetter*, in addition to adopting the above analysis in *Kaminski*, the Court addressed other constitutional challenges to the new statute, holding that the new statute, unlike the prior versions, does not violate the Ohio Constitution's trial-by-jury provision (Section 5, Article I), the right-to-a-remedy and open-courts provisions (Section 16, Article I), the due-course-of-law provision (Section 16, Article I), the equal protection provision (Section 2, Article I), or the separation-of-powers doctrine, and is therefore constitutional on its face.

• ***What Do These Decisions Mean for Ohio Employers?***
As a result of these companion cases, Ohio employers will be faced with far fewer employer intentional tort lawsuits, and injured workers will instead have to rely upon the relief afforded by the Ohio workers' compensation laws for the vast majority of workplace injuries. Recovery for employer intentional torts will be limited to those cases in which the employee can demonstrate the employer's deliberate intent to injure, most often by virtue of removing a safety guard or deliberately misrepresenting the nature of a hazardous substance. In short, Ohio's workplace injury laws have now reverted back to recognizing the employer immunity from civil liability originally intended when Ohio's workers' compensation system was implemented, with an exception *only* in those cases where the employer deliberately intended for the employee to be injured.

For additional information, please contact one of Shumaker's Employment and Labor attorneys.

Securities and Exchange Commission s New Proxy Rules

On December 16, 2009, the Securities and Exchange Commission (the "SEC") published new rules mandating increased disclosure about a public company's compensation, corporate governance and risk policies and practices. Below is a summary of some of the new rules:

Board Leadership Structure
The new rules require a company to disclose whether and why it has chosen to combine or to separate the principal executive officer (i.e., CEO) and the board chairman positions, and why it believes its chosen structure is the most appropriate structure for the company at the time of the filing. If the two roles are combined, the company is required to disclose whether and why the company has a lead independent director, and the specific role the lead independent director plays in the leadership of the company.

Director and Nominee Qualifications
The new rules require a company to disclose the qualifications of each director or nominee, including information regarding such director or nominee's specific experience, areas of expertise, skills or attributes, and why his or her service on the board would benefit the company. A company must also disclose any public company directorships held by each director or nominee in the previous five years, even if the director or nominee no longer serves on that board as well as any identified legal proceedings involving the director or nominee over the past ten years.

Risk Oversight
The new rules require a company to assess whether its compensation policies and practices for employees presents risks that are reasonably likely to have a material adverse effect on the company. If a company determines that a compensation policy or practice presents such a risk, then the company will need to provide a disclosure regarding that policy or practice and its effect on the company and its risk profile.

Compensation Consultants
The new rules require a company to disclose the fees paid to a compensation consultant if (1) the consultant provides executive or director compensation consulting services to the board or the compensation committee and (2) the consultant provides other services to the company, if the fees for such other services exceeds $120,000. If disclosure is required, a company must disclose (1) the aggregate fees paid for the other services and the aggregate fees for the executive and director compensation consulting services, (2) whether the decision to engage the consultant for services not related to executive compensation was made or recommended by management and (3) whether the board or the compensation committee approved the additional services.

Diversity
A company must disclose (1) whether the board or nominating committee has a policy of considering diversity when evaluating director candidates, (2) an assessment of how that policy has been implemented and (3) how the board or nominating committee assesses the effectiveness of its policy.

Climate Change Disclosure Requirements
On February 8, 2010, the Securities and Exchange Commission (the "SEC") published an interpretive release to provide guidance to public companies regarding the SEC's existing climate change disclosure requirements. In this release, the SEC summarized various SEC rules and regulations that may

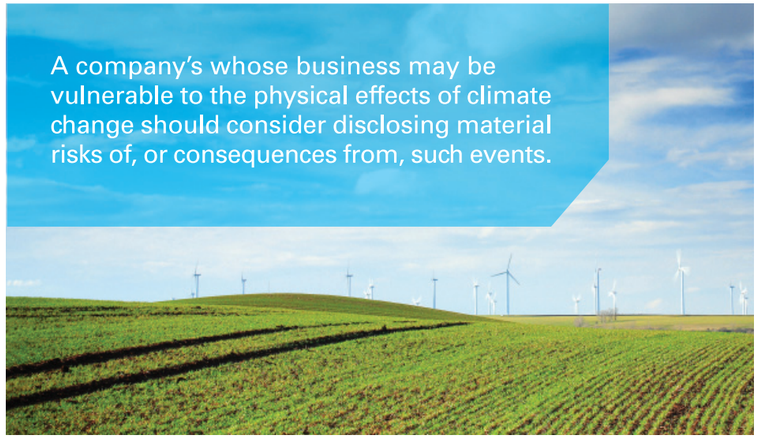
continued on next page >

require climate change disclosure. Below is a summary of a few topics related to climate change identified by the SEC as potentially requiring disclosure:

• Climate change developments in federal and state legislation and regulation may trigger disclosure requirements under SEC rules and regulations. Such rules and regulations require a company (1) to disclose the cost of complying with environmental laws, (2) to assess whether any enacted climate change legislation or regulation is reasonably likely to have a material effect on the company's financial condition or operating performance and (3) to provide, where appropriate, a risk-factor disclosure regarding existing or pending climate change legislation or regulation.

• International accords and treaties relating to climate change may also trigger disclosure requirements under the SEC rules and regulations for the same reasons listed above.

• Legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for a company. These developments may change demand for products or increase competition. As a result, a company may be required to disclose these business trends or risks under SEC rules if such trends or risks are reasonably likely to have a material effect on the company's financial condition or operating performance. In the release, the SEC specifically identified as a potential risk factor the reputational impact of the public's perception regarding a company's greenhouse gas emissions. Such reputational damage, according to the SEC, should be disclosed.



• Significant physical effects of climate change, including effects on the weather, sea levels, farmland arability and water availability, may affect a company's operations and results. A company's whose business may be vulnerable to these physical effects of climate change should consider disclosing material risks of, or consequences from, such events.

For additional information about how these new rules and release may affect you, please contact Shumaker's Corporate Department.

Corporate Law Update

The Delaware Court of Chancery upheld the use of a shareholder rights plan (the "Plan") designed to protect a corporation's sizable net operating loss carryforwards ("NOL"). NOLs are tax losses realized and accumulated by a corporation that can be used to shelter future or immediate past income from taxation. An NOL is limited, even lost, however, following an ownership change meeting the tests set forth in the Internal Revenue Code. In *Selectica, Inc. v. Versata Enterprises, Inc., Del.Ch. C.A. No. 4241-VCN (Feb. 26, 2010),* the Court approved the reasonableness of the Board of Directors' actions seeking to preserve a corporate asset that it deemed to be valuable. Under the plan, when potential acquirers Versata Enterprises and Trilogy Inc. ("Buyers") made open market purchases of Selectica common stock that reached a threshold of 4.99%, the plan triggered the issuance of common stock to Selectica's other shareholders, which diluted Buyers' stock. In reaching its decision, the Court relied heavily upon the extensive procedures used by the Board in evaluating whether to adopt the Plan. An appeal was filed April 7, 2010.

For additional information, please contact Regina Joseph at rjoseph@slk-law.com.

2010 Patent Law Reform Update

It has been over three years since the Patent Reform Act of 2007 was introduced. The Act passed the House of Representatives in 2008, but then stalled in the Senate. The most substantive changes embodied in the currently-amended 2009 legislation, which were reported in the Senate Judiciary Committee's recent Manager's Amendment, are discussed below.

The Act credits invention to the first applicant to file an application instead of construing "invention" as the amalgamation of conception and reduction to practice of the invention, which is more difficult to determine. This provision would eliminate the one-year grace period in most cases. This provision obviously hurts inventors who delay in filing patent applications. Another interesting change is that the requirement of the oath of inventor is relaxed to more easily allow rights-holders such as companies to file patent applications on behalf of the inventor.
Re-examination proceedings are expanded under the Act. Re-examinations could be requested based on published prior art or evidence of prior public use or sale in the U.S. Presently, re-examination must be based solely upon a prior patent or printed publication. Under the new approach, Inter Partes Review would replace the current re-examination procedure, at least as it relates to *inter partes* re-examination—that is, re-examinations involving more than one party—and would be more along the lines of a court proceeding heard by administrative patent judges. According to the press release summarizing the Manager's Amendment, the threshold for triggering re-examination would be changed from presenting a substantial new question of patentability to a "reasonable likelihood" that the challenger can invalidate at least one claim of the patent. The press release also indicated that additional safeguards are added to prevent harassment of patent owners. Not previously in the bill either is an estoppel provision intended to prevent challengers from raising subsequent issues that could have been raised in the initial IPR.

Some changes address the enforcement of patent rights. Damages for infringement, for example, would be determined by the invention's "specific contribution over the prior art." One provision states that a reasonable royalty may be calculated as to the price of licensing a "similar non-infringing substitute in the relevant market." If the non-infringing substitute is in the public domain, this could have the effect of precluding damages. The provision also raises the bar for treble damages, limiting them to instances where a judge finds an infringer recklessly continued to infringe after receiving written notice and without relying on reasonable advice of counsel. This could make clearance or so-called right-to-use opinions of counsel especially prudent before launching a new product. The Act also provides that patent lawsuits are to be filed in court districts where the plaintiff or defendant is located.

Typically, once issued, a U.S. patent is presumed valid and may be challenged via re-examination proceedings before the Patent Office or in federal district court when an alleged infringer claims the patent to be invalid and unenforceable in response to charges of infringement. The Act, however, would permit a third party to file a cancellation petition based on any ground of invalidity (rather than simply prior art). The recent Manager's Amendment shortened the originally drafted twelve-month time period following issuance to challenge the patent. The new time period is nine months. The standard was also raised to "more likely than not" that at least one claim is unpatentable from "an interesting question," which was previously in the bill. The post-grant reviews would also be conducted by an administrative patent judge.

At present, the examination of a U.S. application is between the applicant and the U.S. Patent Office. Under the Act, though, third parties would be able to submit prior art, including a statement regarding its relevance, during examination of the patent. The prior art has to be submitted (i) six months after publication or (ii) before the first office action on the merits, whichever is the latest.

The Act also calls for reorganization within the Patent Office. The board of patent appeals and interferences would become the Patent Trial Appeal Board (PTAB). The U.S. Patent and Trademark Office is also given the power to set its fees.

The 2010 Patent Reform Act will most likely pass in a further amended form, which will reinforce the continuing trend toward a patent system like every other country's. When it will pass, however, is unknown. Financial reform, the economy, and an election year compete for the Senate's attention.

For additional information, contact Mick Myers at mmyers@slk-law.com.

congratulations

2010 North Carolina Super Lawyers

David H. Conaway, Scott M. Stevenson, William H. Sturges and Steele B. Windle, III

2010 North Carolina Rising Stars

Ryan L. Beaver, Steven A. Meckler, Joseph J. (Jack) Santaniello, Stacy H. Stevenson and Frederick M. (Derick) Thurman, Jr.

2010 Ohio Super Lawyers

John H. Burson, Thomas P. Dillon, Jack G. Fynes, William H. Gosline, Douglas G. Haynam, John W. Hilbert, II, Timothy C. McCarthy, H. Buswell Roberts, Jr., Gregory S. Shumaker, Peter R. Silverman, Louis E. Tosi, Barton L. Wagenman and Dennis P. Witherell

2010 Ohio Rising Stars

Chad R. Baker, Stefanie E. Deller, Sharon M. Fulop, Nathan A. Hall, W. Reed Hauptman, David J. Mack, Scott D. Newsom, James H. O'Doherty, Gregory J. Shope, Michael A. Snyder, Mark D. Wagoner, Jr. and Mechelle Zarou

The following Shumaker attorneys were listed in *Super Lawyers, Corporate Counsel Edition*

November 2009

Timothy C. McCarthy
Employment and Labor

William H. Sturges
Employment and Labor

January/February 2010

Douglas G. Haynam
Environmental Litigation

Steele B. Windle, III
Construction Litigation

March/April 2010

C. Philip Campbell, Jr.
Business Litigation

Steven J. Chase
Business Litigation

James D. Colner
Business Litigation

Thomas P. Dillon
Business Litigation

Stephen A. Rothschild
Business Litigation

welcome

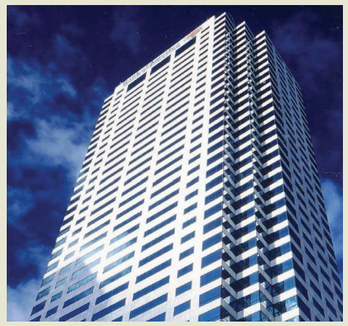
Liben Amedie, Tampa
Associate
Litigation

Scott A. La Porta, Sarasota
Associate
Litigation; Employment and Labor

Malinda R. Lugo, Tampa
Associate
Litigation; Health Law

SHUMAKER CELEBRATES

25 Years in Tampa



The firm, which was founded in 1925, opened its Tampa office in January 1985, with two lawyers: Bruce Gordon and John Inglis. Both Mr. Gordon and Mr. Inglis continue to be partners in the Tampa office.

The Tampa office has attracted many talented attorneys with diverse practices and a broad base of clients and has grown into a full service office with 60 attorneys occupying three floors of the Bank of America building in downtown Tampa.

The success of the Tampa office led to the opening of other Shumaker offices in Ohio, North Carolina and, in August 2009, Sarasota, Florida. The firm now has 90 attorneys on the Gulf Coast of Florida and 215 attorneys firm-wide.

We are proud of our growth, said Ernie Marquart, Managing Partner of the Tampa office. It has never been growth for growth's sake but the result of an unwavering commitment to the needs of our clients and the hard work of our attorneys and staff. We look forward to serving our clients in the Tampa Bay area, throughout Florida and around the country long into the future.

slknews

Tony Abate was elected to the Board of Directors of the Boys and Girls Clubs of Sarasota County.

Erin Aebel has been recertified as a Health Law Specialist by The Florida Bar. Certification is the highest level of recognition by The Florida Bar of the competency and experience of attorneys in the area of Health Law. Erin spoke to dentists at Patterson Dental in Tampa in January and discussed legal issues for dental practice start-ups.

Erin Aebel, Mark Connolly, and Ed McGinty spoke to the University of South Florida medical school residents in December.

Chad Baker co-hosted the first meeting of the Probate and Estate Planning group of the Toledo Estate Planning Council in February.

Brad deBeaubien and Jenay Iurato were named 2009 *Up & Comers* by the *Tampa Bay Business Journal*.

Neema Bell was selected by the YWCA of Greater Toledo as an honoree of the 2010 *YWCA Milestones: A Tribute to Women* award. The YWCA Milestones Award recognizes women of Northwest Ohio who have demonstrated outstanding leadership qualities and who, through their efforts and accomplishments, opened doors for other women to achieve milestones of their own.

Steve Berman served as a panelist at the San Diego Bankruptcy Forum's Auto Mega Case Program in October. The panel discussion focused on issues relating to the auto industry bankruptcy cases. Steve was elected to the Board of Directors of the American Board of Certification. Additionally, Steve was elected President of the San Diego Bankruptcy Bar Forum and was appointed to the Advisory Board of the American Bankruptcy Institute. Steve spoke at the 34th Annual Judge Alexander L. Paskay Seminar on Bankruptcy Law and Practice held in Tampa.

Tom Blank spoke at the Trust Forum of the Conference of State Bank Supervisors in March regarding trust company and banking law issues.

Mike Briley has been appointed to the Antitrust Council for a three year term. The Antitrust Council is the governing entity of the Antitrust Law Section of the American Bar Association.

Doug Cherry was recently appointed to the Small Business Support Strategic Team in association with Sarasota County's new five-year economic development plan developed by the Economic Development Corporation of Sarasota County. Doug's article "It's All in the Name: Legal Issues in Branding" appeared in the February 2010 edition of Sarasota's *Biz941* magazine.

Ron Christaldi was appointed General Counsel of the Greater Tampa Chamber of Commerce. Ron was also re-elected to the Board of Directors of Tampa Bay Businesses for Culture and the Arts.

Jennifer Compton was appointed to the Board of Directors of the Greater Sarasota Chamber of Commerce and has joined the Advisory Board to the Southwest Florida Chapter of the American Red Cross.

Jennifer Compton, Jason Collier, Mary Li Creasy, and Jan Pietruszka were presenters at an Employment Law seminar presented in October.

Will Cox recently received the Premier Volunteer Award from the Greater Sarasota Chamber of Commerce. Will spoke to the Public Utility Research Center as a Panel Moderator at the University of Florida.

Mary Li Creasy spoke at the November meeting of National Association of Women in Construction, Tampa Chapter. Mary Li was invited to teach Employment Law again at Stetson University College of Law for the 2010 Spring Semester.

Did you know?

In 2009:

- Shumaker attorneys served on more than 400 Non-Profit Boards of Directors
- Shumaker contributed more than $800,000 to community charities and events, in addition to individual contributions to United Way and other charities.

continued on next page >

slknews, continued

Duane Daiker's Appellate Law Questionnaire recently appeared on *Law360*.

Tammy Giroux and Robert Warchola spoke at the Northeast Surety & Fidelity Claims Conference held in Atlantic City in September.

Bonnie Keith Green was appointed Chair of the NCBA Construction Law Section – United Minority Contractors Joint Committee.

Ben Hanan moderated a panel discussion on "Training Grants – Economic Development Corporation of Sarasota County." Ben also addressed 600+ members at the Annual Membership meeting and luncheon of the Greater Sarasota Chamber of Commerce in October.

Michele Leo Hintson was asked to serve on the Stetson Lawyers Advisory Council.

Karen Hockstad was selected to Chair the Ohio State Bar Association's Corporate Counsel Section Council for 2009-2010. She will also serve as the moderator at the Corporate Counsel Section CLE at the OSBA Annual Convention in Dayton in May. The topic is "Representing the Family-owned Business."

Jenay Iurato was elected Vice-President of the Tampa Bay Hispanic Bar Association. Jenay spoke at the Hillsborough County Bar Association's Leadership Institute.

Richard Loudermilk spoke at the "Law at the Library" presentation at Selby Library in January and addressed the Fair Debt Collection Practices Act.

Malinda Lugo was appointed Chair of the 13th Judicial Circuit Grievance Committee "E."

Nick Malone was selected to participate in the Ohio State Bar Association's (OSBA) first class of its Leadership Academy. The OSBA's Leadership Academy is designed to identify future leaders in the legal community and provide them with support and training.

Mike McGowan made a presentation to the Construction Financial Management Association (CFMA) on business succession planning at the 2009 CFMA Buckeye Conference.

Steve Meckler was selected as a "2009 Charlotte Mover & Shaker" by *Business Leader* magazine. Steve was appointed Secretary Elect of the Charlotte Rotary for 2010-2011. Additionally Steve is a 2009 graduate of the FBI Citizen's Academy.

Mick Myers participated on a Stetson Law Speaker Panel in October at Stetson University College of Law regarding copyright and trademark law and how it relates to sports and entertainment.

Scott Newsom spoke at the International Foundation of Employee Benefit Plans' 55th Annual Employee Benefits Conference in Orlando in November.

Jim O'Doherty and Terry Davis successfully represented a local hospital in an action against its former Emergency Room physicians. The Hospital had terminated the ER group and the parties brought various tort and contract claims against each other. The case went to trial on the Hospital's counterclaim and, following a week-long trial, the jury rendered a six-figure verdict in the Hospital's favor.

Malcolm Pitchford will present "Commercial Loan Defaults (Avoiding the Pitfalls and Improving the Outcome)" at the Florida Bankers Association Annual Meeting to be held in Naples in June.

Maria del Carmen Ramos was selected to participate in the Tampa Connection Class of 2010. The Tampa Connection helps guide executives into key leadership roles while helping meet Tampa's growing social, health and education needs.

Mindi Richter joined the Development Committee of the Humane Society of Tampa Bay. Mindi spoke at the First Amendment Foundation's 2009 Sunshine Seminar in October in St. Petersburg and discussed the recent Florida Supreme Court *Jews for Jesus, Inc., v. Rapp* decision and what it means for media law in Florida. Additionally, Mindi was elected to the Board of Directors of The First Tee of Tampa Bay and was reappointed to the Florida Bar Media & Communications Law Committee.

Steve Rothschild was recognized as one of Northwest Ohio's 2009 Outstanding Community Volunteers by the Northwest Ohio Chapter of the Association of Fundraising Professionals at their National Philanthropy Day Luncheon. Steve was also named an Ohio Bar Foundation Fellow.

Jack Santaniello was appointed to the Advisory Board of the National Hispanic Entrepreneurs' Organization.

Jenifer Schembri joined the Board of Directors of the Sarasota Manatee Association for Riding Therapy. SMART has been in existence since 1987 and is a member of the American Riding for the Handicapped Association. Jenifer was appointed to the Greater Sarasota Chamber of Commerce Small Business Council (SBC) and was named Chair of the Programming Committee for the SBC. Jenifer gave a presentation to dentists at Patterson Dental in Orlando in January and discussed legal issues for dental practice start-ups.

Shumaker has been ranked #196 among the 250 largest law firms in the United States, based upon *The National Law Journal's* 2009 ranking of the 250 largest American law firms by size.

Peter Silverman was a workshop leader at a CLE Seminar sponsored by the Cincinnati Bar Association and the American Arbitration Association in September. Peter was appointed to the American Arbitration Association fixed panel in the termination arbitration between GM and Chrysler and their terminated dealers. He also won a 6-figure award in an arbitration for one of our banking clients.

Leadership Shumaker

The firm has a long history of community support through its Leadership Shumaker program whose stated purpose is to enable and encourage attorneys, staff and firm involvement in various local public, private and not-for profit organizations that promote the general improvement of our neighborhoods and communities, benefit our most economically disadvantaged citizens, and promote the arts and other sources of economic development. We hope to make a positive difference in the communities in which we work and live.˚

The program is managed by the associate attorneys who coordinate various fundraising efforts involving firm attorneys˚and staff members.˚ Over the years, events have included firm breakfasts and luncheons, silent auctions, chili cook-offs, ice-cream socials, and various team-building events.˚

Since its inception, Leadership Shumaker has raised over $70,000 for numerous local charities.˚

Ted Taub was a faculty member and presenter at the 25th Annual ALI-ABA Land Use Institute held in San Diego on "The ABCs of PPPs: How to Structure Public-Private Partnerships for Real Estate Development Projects."

Derick Thurman was a speaker at the 25th Annual North Carolina/South Carolina Labor and Employment Law Update and Annual Meeting held in Charleston in October.

Todd Timmerman has been appointed Chair of the Tampa Bay Partnership's CEO Direct program.

Lou Tosi was a speaker at the AHC Group's 20th Annual Corporate Affiliates Workshop Series held in Phoenix in January and spoke about "Climate Change: Legislative, Regulatory, and Economic Forces at Work."

Greg Yadley moderated a working group discussion for the Securities and Exchange Commission's Government-Business Forum on Small Business Capital Formation held in November in Washington, D.C. and also moderated the Plenary Session to develop final recommendations for presentation to the SEC. Greg Co-Chaired and was a faculty member at the 28th Annual Federal Securities Institute in Coral Gables in February and he was also invited to sit on the West Professional Development Corporate and Securities Advisory Panel.

insights

A Newsletter from Shumaker, Loop & Kendrick, LLP

1000 Jackson Street
Toledo, Ohio 43604-5573

TOLEDO
1000 Jackson Street
Toledo, Ohio 43604
419.241.9000

TAMPA
Bank of America Plaza
101 East Kennedy Boulevard
Suite 2800
Tampa, Florida 33602
813.229.7600

CHARLOTTE
First Citizens Bank Plaza
128 South Tryon Street
Suite 1800
Charlotte, North Carolina 28202
704.375.0057

COLUMBUS
Huntington Center
41 South High Street
Suite 2400
Columbus, Ohio 43215
614.463.9441

SARASOTA
240 South Pineapple Avenue
Sarasota, Florida 34236
941.366.6660

Footnotes
ITAR: A four letter word

1. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 122.1(a).

2. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 120.14.

3. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 120.15.

4. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 120.16.

5. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 120.17(4)(5).

6. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Parts 120.31, 120.32, and 124.16.

7. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 126.1.

8. Department of Defense Trade Control www.pmddtc.state.gov\compliance\consent_agreements\generaldynamicslandsystems

9. Department of Defense Trade Control www.pmddtc.state.gov\compliance\consent_agreements\ITTCorp

10. Department of Justice www.usdoj.gov\opa\pr\2008\may\08

11. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 120.19.

12. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 126.7.

13. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 120.4.

14. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 127.3

15. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 127.1.

16. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 127.12.

17. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 126.5.

18. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Parts 120 – 130.

19. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter M, International Traffic and Arms Regulations Part 120.16.

20. International Traffic and Arms Regulations (ITAR) Title 22 Foreign Relations Chapter 1, Department of State Subchapter , International Traffic and Arms Regulations Parts 120.16, 126.7, and 126.8. Also, www.pmddtc.stategov\faqs\documents\FAQs_licensing_foreignpersons

Footnotes
Environmental Litigation Update

1. 549 U.S. 497 (2007) (Directing EPA to determine whether emissions of GHGs from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision).

2. Mobile sources of air pollution include, primarily, motor vehicles, aircraft and nonroad vehicles and engines.

3. Common examples of stationary sources include factories, power plants, refineries, and chemical plants.

4. December 18, 2008, EPA Memorandum authored by Administrator Stephen Johnson, EPA's Interpretation of Regulations That Determine Pollutants Covered by Federal Prevention of Significant Deterioration Program. See also, Prevention of Significant Deterioration:

Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Federal Prevention of Significant Deterioration Program, 74 Fed. Reg. 51,535 (October 7, 2009).

5. Mandatory Reporting of Greenhouse Gases; Final Rule, 74 Fed. Reg. 56,260 (October 30, 2009).

6. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed Reg. 66,496 (December 15, 2009).

7. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, 74 Fed. Reg. 55,292 (October 27, 2009), Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (September 28, 2009).

8. For example, Senator Rockefeller introduced the Stationary Source Regulation Delay Act on March 4, 2010.

9. February 22, 2010, Letter from Lisa Jackson, Administrator of EPA, to Senator Jay D. Rockefeller IV.

10. Powder River Basin Resource Council v. Wyoming Department of Environmental Quality, 2010 WY 25 (March 5, 2010); see also Utah Chapter of The Sierra Club v. Air Quality Board, 2009 UT 76 (December 4, 2009); NRDC v. Korleski, Ohio Environmental Review Appeals Commission, Case No. 996158-996161 (July 9, 2009); In the matter of PSD Air Quality Permit Application of Hyperion Energy Center-Hyperion Refining, LLC, South Dakota Board of Minerals and Environment (August 20, 2009); Connecticut v. American Electric Power Co., 582 F.3d 309, 381 (2nd Cir. 2009). A Georgia trial court issued a decision holding that state environmental regulators erred when they issued a Clean Air Act permit authorizing the construction of a new power plant and failed to require the permit applicant to account for GHG emissions from the new plant. However, the trial court was promptly reversed by an appellate court and the state supreme court declined environmental groups requests to review the appellate court's decision. See Longleaf Energy Associates, LLC v. Friends of The Chattahoochee, Inc., 298 Ga. App. 753; 681 S.E.2d 203 (July 7, 2009); 2009 Ga. LEXIS 809 (Sept. 28, 2009).

11. In the Matter of BP Products North America, Inc. Whiting Business Unit, Order Responding to Petitioners' Request That The Administrator Object to The Issuance of State Operating Permit (October 16, 2009); In the Matter of American Electric Power Service Corporation, Southwest Electric Power Co., John W. Turk Plant, Order Responding to Petitioners' Request That The Administrator Object to The Issuance of State Operating Permit (December 15, 2009)