

GLOBAL ACTION

A Newsletter of the **International Law Section** of the Cleveland Metropolitan Bar Association

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Robert M. Spira

Benesch, Friedlander,
Coplan & Aronoff LLP
Phone: (216) 363-4413
Email: rspira@bfca.com

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McDonald Hopkins LLC
Phone: (216) 348-5746
Email:
akonkoly@mcdonalddhopkins.com

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EDITOR'S NOTES

Mark J. Sundahl

On May 12th, the International Law Section is hosting its premier event – a full-day seminar on Going Global Today. Please register and attend! For more information, see the following message from our Chair as well as the announcement at the end of the newsletter.

As always, this issue of Global Action includes two fine articles on recent developments in international law. The first article, by Jordane Fura of Yormick & Associates, examines some current issues regarding the European REACH regime. The second article features a discussion of new regulations that apply to financial intermediaries who are involved with offshore gambling operations.

You are invited to submit a short article for future issues of Global Action. Please email your submission directly to me at the address below. Submissions should be brief pieces (500-800 words) on a topic of interest to members of our section. If you would like to view previous issues of Global Action, a link to previous newsletters can be found on the International Law Section home page.

Mark J. Sundahl, Editor,
Cleveland-Marshall College of Law
Contact: mark.sundahl@law.csuohio.edu

Reginald Russell, Assistant Editor,
Cleveland-Marshall College of Law
Contact: reginald.russell@law.csuohio.edu

A MESSAGE FROM THE CHAIR

Robert M. Spira

We are all looking forward to what we call the "May 12 Event." The May 12 Event is a full-day seminar titled Going Global Today. The seminar is co-sponsored by the Cleveland Metropolitan Bar Association and the International Trade Assistance Center (ITAC). The seminar will take place at the Embassy Suites on Rockside Road in Independence.

Topics to be covered by our Section in the seminar will include (1) expanding export sales, (2) establishing foreign business operations, (3) international trademark issues and (4) U.S. export controls. ITAC speakers will address an equally interesting array of topics.

Our luncheon speaker will be Ambassador Tom McDonald from Baker & Hostetler, who will speak on Obama Administration trade policy.

Registration includes breakfast and lunch. We hope you will stay for the networking session (cash bar) following the program. CLE's are available. For further details, please contact Samantha Pringle at the CMBA offices at (216) 539-3716 or ITAC at (866) 253-4358.

Robert M. Spira,
Benesch, Friedlander, Coplan & Aronoff LLP
Contact: rspira@bfca.com

AN UPDATE ON REACH: NEW ISSUES AFTER THE PRE-REGISTRATION DEADLINE

When Regulation 2006/1907/EC concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) was adopted by the European Union in 2006 lawyers in Europe and throughout the world were stunned by its length and complexity. Few practitioners knew where to start in deciphering it. To date, the most pressing issue under REACH was to

pre-register substances that clients were importing into the EU. However, now that the December 1, 2008 pre-registration deadline has passed, new issues and concerns are arising. Even if your clients are based in the United States and have not registered under the regulation, they must still be concerned with compliance.

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REACH provides that if no data regarding the substances that enter the EU market are provided to the European Chemicals Agency (ECHA), the product is banned from being imported into the EU. Companies had until December 1, 2008 to pre-register their substances with the ECHA to benefit from the transitory period for registration, thus allowing for the continued importation of their substances into the EU. However, for those companies that failed to pre-register through their import intermediary or "only representative" (an EU-based entity designated to fulfill the importer's obligations under the regulation), the consequence is burdensome. The importer, distributor or only representative is not allowed to import the substance until a complete registration file has been submitted to the ECHA. Thus, an interruption in the supply chain can be expected which could lead to consequential damages. In order to implement the ban, the Regulation requires that the EU member states impose penalties for non-compliance. The member states had until December 1, 2008 to provide their list of sanctions to take against EU companies that import or distribute substances which were not pre-registered. For example, the French Minister of Ecology declared that the sanctions under French law could include a two-year jail term and a fine up to 75,000 Euros. Due to this risk of non-compliance, more insurance carriers have been excluding from coverage any losses resulting from a failure to pre-register substances under REACH.

Your clients should also consider joining a Substance Information Exchange Fora (or SIEF), which allows for registrants of the same chemical to share information in order to facilitate compliance and avoid duplicative work. The Regulation does not prescribe a legal form of a SIEF, thus allowing

for companies to choose the format that works best for them. Also, U.S. manufacturers can participate in the SIEF, since participation is not strictly confined to the EU registrants.

An issue regarding competition law has also arisen in the wake of the enactment of REACH. When providing data to satisfy the REACH regulation, companies should be careful not to provide information that might violate EU competition law – such as information that would be interpreted as inviting or promoting collusion. Article 25 of the Regulation addresses this concern by requiring that companies "refrain from exchanging information concerning their market behaviour, in particular as regards production capacities, production or sales volumes, import volumes or market shares." Non-EU companies should also be aware of this prohibition since U.S. parent companies can be found to have violated EU competition law by virtue of their subsidiaries' improper disclosures – since in recent cases of the Court of First Instance, U.S. companies have been held liable for being implicated in the cartel activities of their European subsidiaries. Therefore, U.S. companies should not themselves comply with EU competition law (if they decide as manufacturers to be part of the SIEF), but they should also implement an effective policy to prevent their European subsidiary, distributor, importer, or only-representative from sharing information in their REACH disclosures that might violate EU competition law.

Jordane-Christine Fura

Yormick & Associates

Contact: jfura@yormicklaw.com

NEW DUE DILIGENCE REQUIREMENTS FOR FINANCIAL INTERMEDIARIES UNDER UIGEA

In order to curb the spread of offshore Internet gambling sites that attract U.S. customers, Congress enacted The Unlawful Internet Gambling Enforcement Act (UIGEA or the Act) in 2007. The final regulations implementing the UIGEA were promulgated by the Department of the Treasury and the Board of Governors of the Federal Reserve on November 18, 2008 and took effect on January 19, 2009. The approach taken by the Act is to prevent the transfer of funds for the purposes of participating in illegal Internet gambling by imposing new regulations on the financial intermediaries that facilitate the money transfers.

The primary thrust of the Act is to ensure that financial intermediaries adopt policies and implement procedures to detect and avoid making payments related to illegal Internet gambling. Under the Act, Internet gambling is defined as "placing, receiving, or otherwise knowingly transmitting a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State

Law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 12 C.F.R. § 233.2. Specifically, the new regulations require that covered financial intermediaries "establish and implement written policies and procedures reasonably designed to identify and block; or otherwise prohibit, restricted transactions." 12 C.F.R. Part § 233.5(a). The transactions that covered entities must make efforts to detect include a broad variety of payment methods that may arise from Internet gambling, including debit and credit cards, checks, money orders, and wire transfers.

Financial intermediaries need not monitor the transactions of individual customers under the new regulations, but are only required to monitor transactions of commercial customers. In drafting the Act, Congress recognized that the surveillance of all transactions entered into by private individuals would place an undue burden on financial institutions. As explained in the comments to the final rule, financial intermediaries are

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www.zimmerdesign.net

LINKS

Become a section member:

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World Trade Center Cleveland:

www.wtc.cleveland.org

American Society of International Lawyers: www.asil.org

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www.law.csuohio.edu

Case Western Reserve University School of Law

www.law.case.edu

Greater Cleveland International Lawyers Group: GCIL@parker.com

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required to "conduct risk-based due diligence of commercial customers at account opening, and when it has actual knowledge that a commercial customer is engaged in an Internet gambling business, to determine the risk the commercial customer presents of engaging in restricted transactions." 73 Fed. Reg. 69389. These regulations only provide a vague outline as to what is considered best practices, thus leaving it to practitioners to determine the extent to which their clients must go to monitor their clients' transactions.

Historically, the United States government has aggressively regulated gambling as a social ill. However, over the years the U.S. government has eased its stance and has allowed states and Indian territories to permit gambling. The approach taken in the UIGEA renews the traditionally aggressive attitude of Congress by placing the onus on the financial intermediaries to develop and enforce robust due diligence procedures. This approach is diametrically opposed to that adopted in other countries, most of which permit the operation of casinos, whether online or at physical locations. Congress' approach is

to allow the states to regulate their in-state casinos, while simply banning all online gambling (with very few exceptions). This policy difference raises international jurisdictional issues, which may potentially run afoul of foreign economic interests. For example, the country of Antigua has claimed that the United States is violating the GATT by making Internet gambling illegal and has filed a complaint with the WTO. Certain media outlets have reported that a settlement has been reached, but the terms have not been disclosed due to national security concerns.

Tim Woods, Esq.

Director, Navigant Consulting

Chief Compliance Officer, Navigant Capital Advisors LLC

Kevin Garewal, Esq.

Cleveland-Marshall College of Law

UPCOMING EVENTS

May 12, 2009: The 2009 International Law Section/ITAC Seminar: Going Global Today

This premiere International Law Section event will be a full-day seminar on legal and business issues relating to Going Global Today. CLEs for the event are available. The agenda and registration information can be viewed online at: <http://www.clemetrobar.org/EventDetail.aspx?Event=S09INTLAW>" <http://www.clemetrobar.org/EventDetail.aspx?Event=S09INTLAW>.

Monthly Meetings: The International Law Section holds meetings on the second Monday of every month.

To join the section, to be placed on our mailing list, or to make inquiries regarding section activities please contact Samantha Pringle, Director of CLE & Sections, at springle@clemetrobar.org or Jessica Paine, Asst. Director of Sections & Community Programs, at jpaine@clemetrobar.org.

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