

OFFICE OF ADMINISTRATIVE LAW

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Susan Lapsley
Director



May 27, 2010

Mr. Steve Poizner, Insurance Commissioner
300 Capitol Mall, 17th Floor
Sacramento, California 95814

Mr. William Gausewitz
Michelman & Robinson, LLP
915 L Street, Ste. 1110
Sacramento, California 95814

Re: CTU2010-0329-02

Dear Commissioner Poizner and Mr. Gausewitz:

On March 29, 2010, the Office of Administrative Law (OAL) received the petition submitted by Mr. Gausewitz on behalf of the American Council of Life Insurers, the American Insurance Association, the Association of California Insurance Companies, the Association of California Life and Health Insurance Companies, and the Personal Insurance Federation of California, alleging that the Department of Insurance (Department) has issued, used, enforced, or attempted to enforce underground regulations.

Government Code section 11340.5, subdivision (a), provides that:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

Government Code section 11340.5, subdivision (b), further states:

If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of

general application, or other rule, is a regulation as defined in Section 11342.600.

There are three specific alleged underground regulations. They are:

- A. A statement in a letter dated February 10, 2010, which states: “Accordingly, effective March 31, 2010, the Department will treat all investments by insurers holding a certificate of authority to transact insurance in California in companies on the List and affiliates owned 50% or more by companies on the List as non-admitted on the insurer’s financial statements. For all financial statements filed with the Department for periods ending on or after March 31, 2010, each insurer must report all of its investment holdings on the List as not admitted assets.” The February 10, 2010, letter is attached hereto as Exhibit A.
- B. A determination in the Department’s letter of February 10, 2010, that companies on the List referenced in A, above, are “subject to financial risk as a result of doing business with the Iranian oil and natural gas, nuclear, and defense sectors.”
- C. A document titled “Response Form” that requires insurers to agree or not to agree by March 12, 2010, that they will refrain from investing in companies on the List or affiliates owned 50% or more by companies on the List until either (a) Iran is removed from the United States State Department’s list of state sponsors of terrorism or (b) the company and its affiliates cease to do business with Iran’s oil and natural gas, nuclear, and defense sectors and is removed from the List. The Response Form is attached hereto as Exhibit B.

OAL takes note that the Insurance Commissioner (Commissioner) requests that “OAL decline to consider the Petition” pursuant to OAL’s discretionary authority in 1 CCR 270(c).¹ After reviewing the petition and the accompanying documentation, we accept the petition for consideration. Please note, in accepting this matter for review, OAL will render an opinion solely as to whether the alleged challenged rules are “regulations” as defined in Government Code section 11342.600, which should have been, but were not adopted pursuant to the Administrative Procedure Act. Nothing in this review or analysis will evaluate the ethical allegations raised by the Commissioner with respect to Mr. Gausewitz or the law firm of Michelman & Robinson, LLP.²

¹ The Commissioner alleges that Mr. Gausewitz, along with the law firm of Michelman & Robinson, LLP, “have a fatal conflict of interest” and “are in violation of the California Rules of Professional Conduct in filing the Petition.”

² OAL is not a Trier-of-fact. OAL does not possess the technical expertise to evaluate the underlying ethical issues raised by the Commissioner. Any attorney who is alleged to have violated a professional rule of conduct “shall be given fair, adequate, and reasonable notice and have a fair, adequate, and reasonable opportunity” to defend himself and produce evidence and examine witnesses and have the rights as guaranteed by the California and U.S. Constitutions. (Bus. & Prof. Code, sec. 6085). Such matters are within the purview of the State Bar and the courts.

Pursuant to Title 1, California Code of Regulations, section 270, please note the following time table:

Publication of Petition in California Regulatory Notice Register: June 11, 2010
Deadline for Public Comment: July 12, 2010
Deadline for Agency Response: July 26, 2010
Deadline for Petitioner Rebuttal: No later than 15 days after receipt of the agency's response
Deadline for OAL Decision: October 11, 2010

Once the petition has been published in the California Regulatory Notice Register and the public comment period has ended, the Department has the option of submitting a response to the petition. When responding to a petition, please identify any exemptions from the APA that may apply to the challenged rules and address the following issues, as articulated in *Tidewater Marine Western Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, section 11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, section 11342.600).

If you have any questions or need any additional information, please contact Elizabeth Heidig at (916)323-6800.

Sincerely,



SUSAN LAPSLEY
Director

cc: Peter Conlin, Counsel to the Commissioner
Adam Cole, General Counsel
Darrel Woo, Staff Counsel

Exhibit A

DEPARTMENT OF INSURANCE**Legal Division, Office of the Commissioner**45 Fremont Street, 23rd Floor
San Francisco, CA 94105

February 10, 2010

VIA ELECTRONIC AND U.S. MAIL

[COMPANY NAME]

SUBJECT: Identification of Companies Doing Business in Specified Iranian Economic Sectors; Treatment of Investments in Such Companies on Insurers' Financial Statements; Request for Moratorium on Future Iran-Related Investments

Dear [Name of CEO/Pres.]:

The Department of Insurance ("Department") received your company's response to Commissioner Poizner's July 2, 2009 data call ("Data Call") seeking information about investments in companies doing business with the Iranian oil and natural gas, nuclear, and defense sectors. Thank you for your response. The Department also independently reviewed your company's investments based on its financial statements on file with the Department.

I. List of Companies Doing Business in Specified Iranian Economic Sectors

Following extensive research, analysis and consultation, the Department has developed a list of companies doing business with the Iranian oil and natural gas, nuclear, and defense sectors ("List"). The List is attached. The Department developed the List based on:

- Insurers' responses to the Data Call;
- Consultation with independent research firms KLD Research and Analytics, Inc. and Conflict Securities Advisory Group, Inc.;
- Consultation with reputational/financial risk experts at RWR Advisory Group; and
- Review of the lists of the California, Florida, and New York public pension funds.

The Department may in the future revise the List by adding companies found to be doing business with the Iranian oil and natural gas, nuclear, and defense sectors; removing companies that cease doing business with those sectors; or making changes based on other risk-related considerations. In addition, the List currently does not include banks. Based on subsequent research, analysis and consultation, the Department may supplement the List to include banks doing business with the Iranian oil and natural gas, nuclear, and defense sectors.

II. Treatment of Specified Iran-Related Investments on Insurers' Financial Statements

The Commissioner has determined that companies on the List are subject to financial risk as a result of doing business with the Iranian oil and natural gas, nuclear, and defense sectors. Iran is economically and politically unstable. It faces wide-ranging international sanctions in response to its efforts to develop nuclear weapons and its sponsorship of terrorism. Companies doing

business with the Iranian oil and natural gas, nuclear, and defense sectors are subject to asymmetric reputational harm, and, accordingly, financial or market risk, stemming from the nature of their business activities in Iran.

Based on financial soundness considerations, the Department considers investments in companies on the List to be at risk.

Accordingly, effective March 31, 2010, the Department will treat all investments by insurers holding a certificate of authority to transact insurance in California in companies on the List and affiliates owned 50% or more by companies on the List as non-admitted on the insurer's financial statements. For all financial statements filed with the Department for periods ending on or after March 31, 2010, each insurer must report all of its investment holdings on the List as not admitted assets.

III. Request for Moratorium on Specified Future Iran-Related Investments

In recognition of the financial risk presented by investments in companies on the List, the Commissioner requests that your company agree not to invest in the future in any of those companies or in any affiliates owned 50% or more by those companies until either (a) Iran is removed from the United States State Department's list of state sponsors of terrorism or (b) the company and its affiliates cease to do business with Iran's oil and natural gas, nuclear, and defense sectors and is removed from the List.

Attached to this letter is a form for your company's response to this request. **Your company must respond by March 12, 2010.** Please mail the response to the Department at the following address:

California Department of Insurance
Field Examination Division - 9th floor
300 S. Spring Street
Los Angeles, CA 90013
Attention: Al Bottalico, Division Chief

If your company does not respond to or declines the Department's request for a moratorium on future investments in companies on the List and affiliates owned 50% or more by those companies, the Department may publish your company's name on the Department's website.

Thank you for your attention to this matter.

Very truly yours,



Adam M. Cole
General Counsel

Attachments

CALIFORNIA DEPARTMENT OF INSURANCE
LIST OF COMPANIES DOING BUSINESS WITH THE IRANIAN PETROLEUM/NATURAL GAS, NUCLEAR,
AND DEFENSE SECTORS
(AS OF FEBRUARY 9, 2010)

1. ABB Ltd. [Switzerland]	26. Linde AG [Germany]
2. ACS, Actividades de Construccion Y Servicios, S.A. [Spain]	27. Lukoil OAO [Russia]
3. Alstom [France]	28. Oil & Natural Gas Corp. (ONGC) [India]
4. Ashok Leyland, Ltd. [India]	29. OMV [Austria]
5. Aker Solutions [Norway]	30. PetroChina Company Limited [China]
6. China National Petroleum Corp. [China]	31. Petrofac Limited [United Kingdom]
7. China Petroleum & Chemical Corp. [China]	32. Petroliam Nasional Bhd (Petronas) [Malaysia]
8. CNOOC Ltd. [China]	33. Petronas Gas Bhd [Malaysia]
9. CNPC (Hong Kong) Limited [Hong Kong]	34. PT Citra Tubindo Tbk [Indonesia]
10. Daelim Industrial Co., Ltd. [South Korea]	35. PTT Exploration & Production PCL (PTTEP) [Thailand]
11. Dragon Oil PLC [Ireland]	36. PTT Public Company Limited [Thailand]
12. Edison Spa [Italy]	37. RANHILL Bhd [Malaysia]
13. Eni S.p.A. [Italy]	38. Repsol YPF [Spain]
14. Everest Kanto Cylinder Ltd. [India]	39. Royal Dutch Shell Plc [United Kingdom]
15. Finmeccanica SPA [Italy]	40. Sasol Limited [South Africa]
16. GAIL (India) Limited [India]	41. Siemens AG [Germany]
17. Gas Natural SDG [Spain]	42. StatoilHydro ASA [Norway]
18. Gazprom Neft [Russia]	43. Tatneft [Russia]
19. Gazprom OAO [Russia]	44. Technip S.A. [France]
20. GS E&C (Engineering & Construction) [South Korea]	45. Trevi-Finanziaria Industriale S.p.A. (Trevi Group) [Italy]
21. GS Holdings Corp. [South Korea]	46. Total S.A. [France]
22. Hyundai E&C (Engineering and Construction) Co., Ltd. [South Korea]	47. Welspun-Gujarat Stahl Rohren Limited [India]
23. Hyundai Heavy Industries [South Korea]	48. Worley Parsons Ltd. [Australia]
24. Ina-Industrija Nafte DD [Croatia]	49. Ulan-Ude Aviation Plant JSC [Russia]
25. Indian Oil Corporation, Ltd. [India]	50. ZiO-Podol'sk OAO [Russia]

Exhibit B

DEPARTMENT OF INSURANCE

Legal Division, Office of the Commissioner

45 Fremont Street, 23rd Floor
San Francisco, CA 94105



RESPONSE FORM

INSURER AGREEMENT NOT TO INVEST IN COMPANIES DOING BUSINESS WITH THE IRANIAN OIL AND NATURAL GAS, NUCLEAR, AND DEFENSE SECTORS

(MUST BE COMPLETED AND RETURNED TO THE DEPARTMENT OF INSURANCE ON OR BEFORE MARCH 12, 2010)

In your capacity as an executive officer and on behalf of your Company, please mark an "X" in the appropriate category below.

CATEGORY A:

My company has reviewed the list of companies determined by the California Department of Insurance ("Department") to be at risk for doing business with the Iranian oil and natural gas, nuclear, and defense sectors (list circulated **February 10, 2010**) ("List"). My company agrees not to invest in the future in any companies on the List or in any affiliates owned **50%** or more by companies on the List until either (a) Iran is removed from the United States State Department's list of state sponsors of terrorism or (b) the company and its affiliates cease to do business with Iran's oil and natural gas, nuclear, and defense sectors and is removed from the List.

CATEGORY B:

My company does not agree to refrain from investing in the future in companies on the List or in affiliates owned **50%** or more by companies on the List.

(Signature of Executive Officer)

(Printed Name of Officer)

Dated: _____ at _____
(Location City and State)

On behalf of:

(Company Name)

(NAIC No.)

(NAIC Group No.)