

# International Executive Liability Advisor

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## Spanning the Globe Changes in Laws Affecting Executives

### AUSTRALIA

#### It's a Quagmire

Australian companies have long criticized the quagmire of over 700 laws (federal, state and territorial) that inflict personal liability on directors and officers for their board service.

The Australian Institute of Company Directors issued its annual report again criticizing the onerous liability laws and need for change. In a recent press release the Institute stated that the "process of reform of Australia's onerous director liability legislation needs to be completely 're-booted' after the evident breakdown of the current approach. This is vital as the existing plethora of liability laws are stifling business, investment and job creation. They are anti-business and a drag on Australia's prosperity now and in the future."

Taking heed, the legislators in South Australia have put forth *Statutes Amendment (Directors' Liability) Bill 2011*. The Bill proposes to amend 25 laws that currently impose personal liability on directors and officers in the State. The Laws to be amended include: *Aboriginal Heritage Act 1988, the Air Transport (Route Licensing—Passenger Services) Act 2002, the Animal Welfare Act 1985, the ANZAC Day Commemoration Act 2005, the Architectural Practice Act 2009, the Authorised Betting Operations Act 2000, the Controlled Substances Act 1984, the Employment Agents Registration Act 1993, the Gaming Machines Act 1992, the Health Care Act 2008, the Misrepresentation Act 1972, the Opal Mining Act 1995, the Petroleum Products Regulation Act 1995, the Prohibition of Human Cloning for Reproduction Act 2003, the Racing (Proprietary Business Licensing) Act 2000, the Research*

*Involving Human Embryos Act 2003, the Retirement Villages Act 1987, the Second-hand Vehicle Dealers Act 1995, the Security and Investigation Agents Act 1995, the Supported Residential Facilities Act 1992, the Survey Act 1992, the Taxation Administration Act 1996, the Tobacco Products Regulation Act 1997, the Travel Agents Act 1986; and the Veterinary Practice Act 2003.*

A copy of the Bill can be found at:

[www.legislation.sa.gov.au/LZ/B/CURRENT/STATUTES%20AMENDMENT%20\(DIRECTORS%20LIABILITY\)%20BILL%202011.aspx](http://www.legislation.sa.gov.au/LZ/B/CURRENT/STATUTES%20AMENDMENT%20(DIRECTORS%20LIABILITY)%20BILL%202011.aspx).

Additionally, the government of New South Wales introduced legislation (*Miscellaneous Acts Amendment (Directors' Liability) Bill 2011*) that, if passed, would amend more than 35 laws that currently impose liability on directors and officers. A copy of that Bill can be found at:

[www.parliament.nsw.gov.au/prod/parlament/nswbills.nsf/1d436d3c74a9e047ca256e690001d75b/1dbf88c3f4679039ca25788600001fb2?](http://www.parliament.nsw.gov.au/prod/parlament/nswbills.nsf/1d436d3c74a9e047ca256e690001d75b/1dbf88c3f4679039ca25788600001fb2?)

### Executive Remuneration Bill Passed

Portions of the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* took effect on July 1, 2011. The remaining provisions will take effect on August 1, 2011.

The purpose of the new law is to strengthen the remuneration process for public companies; to hold directors accountable for their decisions on executive remuneration; and to increase transparency and accountability in executive remuneration matters.

The key measures described in the Law's General Outline include:

- strengthening the non-binding vote on the remuneration report by requiring a vote

- for directors to stand for re-election if they do not adequately address shareholder concerns on remuneration issues over two consecutive years
- increasing transparency and accountability with respect to the use of remuneration consultants
- addressing conflicts of interests that exist with directors and executives voting their shares on remuneration resolutions
- ensuring that remuneration remains linked to performance by prohibiting hedging of incentive remuneration
- requiring shareholder approval for declarations of no vacancy at an annual general meeting
- prohibiting proxy holders from 'cherry picking' the proxies they exercise, by requiring that any directed proxies that are not voted default to the Chair, who is required to vote the proxies as directed
- reducing the complexity of the remuneration report by confining disclosures in the report to the key management personnel.

The law can be found at:

<http://www.comlaw.gov.au/Details/C2011A00042>

## CAYMANS

### **Companies Law Amendment – First of Many**

The *Companies Law (Amendment) 2011* came into force on April 27th, 2011. It amends the *Companies Law (2010 Revision)*. The updated law was drafted with the intent of making the Caymans a more attractive destination for businesses. "This is the first round of critical changes to the *Companies Law* that are needed to improve the competitiveness of our jurisdiction and address difficulties with the present law" the Hon. McKeever Bush, OBE, JP, Cayman Islands premier and minister of finance stated.

The *Companies Law (Amendment)* specifically addresses segregated portfolio companies: portfolio names, director's liability, segregation of assets, and termination of SPC's. It also clarifies requirements to approve a merger or consolidation; provides for the maintenance of branch registers; and makes other miscellaneous changes.

The entirety of the *Amendment* can be found at:

[http://www.legislativeassembly.ky/pls/portal/docs/PAGE/LGLHOME/BUSINESS/PAPERS/ARCHIVE/20102011/2010201104/GOVERNMENT/COMPANIES%20\(AMENDMENT\)%20BILL%202011.PDF](http://www.legislativeassembly.ky/pls/portal/docs/PAGE/LGLHOME/BUSINESS/PAPERS/ARCHIVE/20102011/2010201104/GOVERNMENT/COMPANIES%20(AMENDMENT)%20BILL%202011.PDF)

## CHINA

### **Fewer Executives Will Face Death Sentence**

As noted in an earlier edition of this publication, China holds the notorious honor of being the world's most prolific executioner of both violent and non-violent offenders. This reputation includes the death sentence being imposed on several corporate executives who have committed non-violent economic crimes. So, in what can only be considered good news for non-violent offenders (including corporate executives), the Standing Committee of the National People's Congress passed an amendment to its *Criminal Law* reducing the number of crimes punishable by death from 68 to 55. The 13 crimes for which the death penalty will no longer be applied are economic-related non-violent offences. They include, in part, tax fraud and "fraudulent" activities involving financial bills and letters of credit. With that said, the revised *Criminal Law* now imposes more stringent punishment (including death) on the producers and sellers of tainted food. The new law took effect May 1, 2011.

### **Cash Before Cover**

As a reminder, many of the provinces and cities in China are now requiring 'Cash before Cover' (CBC) when purchasing insurance. CBC means that prior to an insurance policy inception the designated premium must have been received by the insurance company issuing the policy.

To date the following cities and provinces have implemented the CBC regulation:

Cities: Dalian, Suzhou, Xiamen, Shenzhen, Chongqing, Zhengzhou, Qingdao and Yantai.

Provinces: Zhejiang, Guangdong, Sichuan and Jiangsu.

Expect other cities and provinces to join these lists.

Pursuant to Aon's Global Client Network, insurers generally use the place of policy issuance, as opposed to where the insured is located, in determining whether CBC will be applied.

#### **Shanghai to Open its Exchange**

In its bid to become a global financial hub, the Shanghai Stock Exchange is expected to announce the establishment of an international board before year's end. The formation of the board will open the door to a select group of foreign multi-national companies wishing to float shares in mainland China. Shares will be traded either by way of initial public offerings or China Depository Receipts. According to reports, manufactures will likely have priority.

#### **Incorporate or Stop Profit Making**

On March 1, 2011 the *Regulations on Administration of Registration of Resident Representative Offices of Foreign Enterprises (Regulations)* came into effect. The new *Regulations* are intent on preventing foreign companies from using representative offices as profit making centers. The new regulation makes it clear that companies wishing to conduct a profit-making business in China should incorporate. Failure to comply with the new *Regulations* will include fines up to RMB 500,000 (approx. USD 75,000; EUR 55,000) and suspension or revocation of registration.

The *Regulations* can be found at:

[http://www.fdi.gov.cn/pub/FDI\\_EN/Laws/GeneralLawsandRegulations/AdministrativeRegulations/P020101207341167342639.pdf](http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/AdministrativeRegulations/P020101207341167342639.pdf)

#### **Bribery of Foreign Government Officials and International Public Organizations**

There have been 6,500 cases of commercial bribery, involving 1.1B Yuan (approx. EUR 111M / USD 160M) in the last five years, according to the Ministry of Public Security. More than 5,000 perpetrators were penalized.

In an effort to comply with the United Nations Convention Against Corruption, curb the behavior, and address cross-border bribery, the People's Republic of China adopted *Amendment No. 8* of the PRC *Criminal Law*. *Amendment No. 8* criminalizes bribery of foreign government officials and 'international public organizations' to secure illegitimate business benefits. The *Amendment* went into effect on May 1, 2011 and states in part:

Whoever, for the purpose of seeking illegitimate commercial benefit, gives property to any public foreign official or official of an international public organization, shall be punished....

Penalties include up to ten years in prison and fines of up to approx. EUR 21,100 / USD 30,500.

#### **DOMINICAN REPUBLIC**

##### **New Companies Law**

The Dominican Republic recently modified its *Law on Commercial Corporations and Sole Proprietorship Companies with Limited Liability*. The amendment is intended to resolve inconsistencies and ambiguities identified in the law, simplify the transfer of shares in limited liability companies and introduce a new type of company. As for foreign entities, Article 11 of the amendment:

- grants greater regulatory control over the establishment of foreign entities and determining a local domicile
- clarifies when tax I.D.s must be applied and when an entity must be registered with the Merchantile Registry
- clarifies that foreign companies are governed by the jurisdiction in which

they are incorporated. However, the operations and activities that occur in the Dominican Republic will be subject to Dominican law.

The amendment to the law can be found at:

<http://translate.google.com/translate?hl=en&sl=es&u=http://www.drlawyer.com/publications/ley-sociedades-comerciales.html&ei=lr7aTdG00Obe0QHBT8Aw&sa=X&oi=translate&ct=result&resnum=6&ved=0CEQ7gEwBQ&prev=/search%3Fq%3Dlaw%2BNo.%2B31-11%2BLaw%2BNo.479-08%2BDominican%26hl%3Den%26sa%3DX%26biw%3D1420%26bih%3D656%26prmd%3Divns>

## EUROPE

### **Anti-Bribery Survey Results**

The 2011 European fraud survey conducted by Ernst and Young found that “[m]ore than one third of employees at large European companies are prepared to offer cash or lavish gifts and entertainment to win business as the economic downturn prompts firms to cut corners to stay ahead.” The survey results noted that this behavior was more prominent in Greece and Russia. France and Norway seemed the least likely to participate in this behavior. A copy of the survey results can be found at:

[http://www.ey.com/Publication/vwLUAssets/EURpean\\_fraud\\_survey\\_2011/\\$FILE/EY%20EUROPEAN%20FRAUD%20SURVEY%202011%20FINAL%20PDF%20050611.pdf](http://www.ey.com/Publication/vwLUAssets/EURpean_fraud_survey_2011/$FILE/EY%20EUROPEAN%20FRAUD%20SURVEY%202011%20FINAL%20PDF%20050611.pdf)

## GREECE

### **New Governance Code for Public Companies**

Greece has issued a new *Corporate Governance Code for Public Companies*. As stated by the *Hellenic Federation of Enterprises* the purpose of *Code* is to, “promote the continuous enhancement of the Greek corporate institutional framework and broader business environment as well as the improvement of the competitiveness of its members and of the Greek economy as a whole.”

Prior to issuance of the *Code*, Greece did not have a recognized “comply or explain” corporate governance code. The English

translation of the *Code* can be found at:

[http://www.sev.org.gr/Uploads/pdf/SEV\\_CGC\\_ENG\\_2011\\_FINAL%20\\_MARCH\\_2011.pdf](http://www.sev.org.gr/Uploads/pdf/SEV_CGC_ENG_2011_FINAL%20_MARCH_2011.pdf)

## HONG KONG

### **What to Do When You Can't Get Jurisdiction**

To date, the Securities and Futures Commission has been unable to criminally pursue Tiger Asia and its management for their alleged insider trading. Both the entity and the management are in New York, beyond the reach of the Hong Kong regulator. As an alternative, the regulator petitioned the high court to ban the New York hedge fund (Tiger Asia) from trading securities and derivatives in Hong Kong. However, the court concluded that it does not have jurisdiction to rule whether Tiger Asian Management and the Defendant executives breached rules on insider trading. As such, the Court determined it did not have jurisdiction to rule on the issues presented. The decision can be found at:

[http://legalref.judiciary.gov.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=76969&QS=%28tiger%2Basia%29&TP=JU](http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=76969&QS=%28tiger%2Basia%29&TP=JU)

## ISRAEL

### **Enforcement Alternatives**

Israel has passed the *Law for Efficient Enforcement Process in the Securities Authority 2011* (Legislation Amendment 5771). The legislation is intended to provide the regulator with enforcement alternatives, including the imposition of fines on public companies, their senior office holders and their employees for acts or omissions set forth in the law (i.e., insider trading; deceitful or false representation of information for the promotion of deals on the capital market; performance of coordinated deal actions to influence stock market prices; and misuse of fund assets).

In the case of a mutual fund, the new law allows the regulator to impose monetary sanctions and penalties on the entity as well as individual mutual fund managers; investment advisers; portfolio managers; CEOs; and financial officers.

The maximum monetary penalty that can be levied against an individual is NIS 1M (approx. EUR 204,000 / USD 293,000) for individuals. The maximum penalty against a corporation is NIS 5m (approx. EUR 1.04M / USD 1.5M). Additionally, an entity may face loss of license for up to one year or face other restrictions.

It should be noted that the law does not permit an entity to purchase insurance to cover the cost of a financial penalty levied against it. Additionally, in the event of a breach by an individual, an entity is not permitted to indemnify that individual for a fine levied against them. However, if set forth in the company's articles of association, indemnification and advancement of defense costs are permitted.

## ITALY

### **CEO Gets 16½ Year Prison Sentence for Health and Safety Violation**

On April 15, 2011 the CEO of ThyssenKrupp, Italy, Harald Espenhahn, in his capacity as director of health and safety in the workplace, was convicted of willful murder for failure to institute necessary health and safety measures to protect workers and third parties. The conviction was the result of a fire in December 2007 which killed seven employees. He was sentenced by the Labour Court in Turin, Italy to 16½ years in prison. Five other company officials were convicted on manslaughter charges. Marco Pucci, Gerald Pregnitz, Giuseppe Salerno and Cosimo Cafueri all received prison sentences of 13½ years, while Daniele Moroni received a sentence of 10 years and 10 months in prison.

This ruling is the first of its kind in Italy whereby a senior executive was charged with and convicted of murder as the result of a health and safety violation resulting in death.

Additionally, the company received the following sentence:

- a fine of EUR 1M (approx. USD 1.5M)
- it will not be permitted to benefit from Italian state subsidies for six months

- the company will not be permitted to advertise in Italy for six months.

## NETHERLANDS

### **It's a First-Fine Imposed on Executive**

In July 2009, the Dutch Parliament amended the *General Administrative Law* and the *Penalty Scheme in Financial Amendment Act*. The *General Administrative Law* permits the financial regulator to hold management of financial entities or public companies personally liable in the event the individual was directly or indirectly involved in the perpetration of wrongdoing and impose substantial fines on the individual. Although not specifically defined, it is believed that the term 'company management' would include the supervisory and management boards, and in some situations- department managers.

The laws have been in force for almost two years, but it was not until recently that the regulator first utilized the laws to hold company management personally liable, based on the three set forth below. In the referenced matter, the CFO of O&B Finance Nederland B.V. was found to have had knowledge of company wrongdoing and failed to act. This resulted in a finding of personal liability against the director. He was fined EUR 30,000 (approx. USD 43,000). The company was fined EUR 50,000 (approx. USD 72,000).

The criteria under which management can be held personally liable under the *General Administrative Law* include:

- the individual must have had the authority at the time of the wrongdoing to have prevented it
- the individual in question failed to take action to prevent the wrongdoing, when a reasonable person in the same position would have taken action
- the individual must have understood that failure to act would possibly result in the commission of a wrongful act.

The *Penalty Scheme in Financial Act* allows fines against individual management who violate finance laws up to EUR 4M (approx. USD 5.7M) depending on the financial means of the offender.

#### **No Objection Here**

Dutch companies wishing to incorporate or amend articles of incorporation have been required to provide a statement of “no objection.” The intent of this requirement was to counter misrepresentation and abuse. However, the requirement has proven ineffective in addressing these concerns. Therefore, as of July 1, 2011 Dutch companies wishing to incorporate or amend articles of incorporation will no longer be burdened with this requirement. Instead, the Ministry of Justice intends on using electronic monitoring to track corporate actions and prevent misuse of corporate structures.

## **RUSSIA**

### **Anti-Bribery Law**

Russian President Medvedev has long been a proponent of strong anti-corruption laws. As a sign of his continued drive to curb the endemic corruption in Russia he signed *Federal Law No. 97-FZ* which amends Art. 46 and 290 of the *Criminal Code*. The new law substantially increases penalties against companies and individuals for commercial bribery in Russia and criminalizes bribes made to government official, foreign government officials or an official of a public international organization.

The law makes no exception for foreign companies doing business in Russia. As such, if a foreign entity or its representative engages in commercial bribery in Russia or attempts to bribe a foreign government official, the wrongdoer will be subject to fines and imprisonment.

Under the law the penalty imposed on a government official for accepting a bribe in exchange for commercial gain is dependant on the size of the bribe. Bribes are now categorized into four classifications:

- **Simple:** Bribes up to 25 thousand rubles (approx. EUR 635 / USD 900). Violation can result in a fine of 25-50xs

the amount of the bribe. Additionally, an individual can be imprisoned for up to three years and in which the fine would be 20xs the amount of the bribe.

- **Great:** Bribes from 25 to 150 thousand rubles (approx. EUR 635 / USD 900 to EUR 3,750 / USD 5,360). Violation can result in a fine of 30-60xs the amount of the bribe. Additionally, an individual can be imprisoned for up to six years, in which case the fine would be 30xs the amount of the bribe.
- **Large:** Bribes from 150 thousand rubles to 1 million rubles (approx. EUR 3,750 / USD 5,360 to EUR 25,000 / USD 35,750). Violation can result in a fine of 70-90xs the amount of the bribe. Additionally, an individual can be imprisoned for seven to twelve years, in which case the fine would be 60xs the amount of the bribe.
- **Very Large:** Bribes more than 1M rubles (approx. EUR 25,000 / USD 35,750). Violation can result in a fine of 80-100xs the amount of the bribe. Additionally, an individual can be imprisoned for eight to fifteen years, in which case the fine would be 70xs the amount of the bribe.

In the case of a government official in Russia accepting a bribe they are also subject to loss of office.

The same types of penalties will be imposed on the party offering the bribe.

Combined, the maximum fine for bribery is now 100xs the amount of the bribe not to exceed 500 million rubles. (approx. EUR 12.4M / USD 17.8M) and twelve years in prison.

Within three weeks of Russia's president signing the anti-bribery law, the country received the long sought after invitation to join the Organization for Economic Co-operation and Development (OECD) Working Group on Bribery and to accede to the OECD's Anti-Bribery Convention.

## SINGAPORE

### ***Independent Director Gets Prison***

On March 3, 2011, an independent director of a Singapore listed company was sentenced to four months in prison and fined \$120,000 for his role in failing to disclose material information. This is the first time an independent director has been charged, found guilty and sentenced to prison for this type of breach.

The events leading up to the arrest and conviction began in September 2005. AirOcean's CEO was detained by the Corrupt Practices Investigation Bureau for questioning. The COO of the company proceeded to notify one of the company's independent directors (Madhavan) who was an attorney by trade. Madhavan recommended that the company retain outside counsel to determine whether it was necessary for the company to publicly disclose the situation. The company proceeded to retain counsel who advised that public disclosure of the matter was not required. The local media however did disclose the matter to the public. Once the press made the matter public AirOcean reconsidered its stance on disclosure. In anticipation of making a public disclosure, Madhavan drafted the notice for review by outside counsel. Outside counsel found the Madhavan disclosure to be ambiguous and less than forthcoming. Counsel amended the document and returned it to Madhavan who made additional revisions. Upon final approval by the board the notice was made public. The public notice alerted the Singapore Exchange (SGX) of the situation, who in turn had questions for the board. Only after three attempts did the company fully answer SGX's questions.

The following year the CEO was charged with and convicted of consenting to the company's failure to disclose material information which he knew or should have known could materially impact the company's share price. The independent director was similarly charged for his active participation and just recently found guilty and sentenced.

## ***Fraud Survey 2011***

KPMG just released its *Singapore Fraud Survey 2011*. The survey asked directors of private and public companies in Singapore about their internal experience with fraud; what controls were in place to prevent financial reporting fraud; and the growing risks posed by electronic crime. The questions spanned the period of time between the onset of the global financial crisis in 2008 through the first quarter of 2011. Key findings from the survey include:

- fraud strikes more than one in five Singaporean companies
- the fraud incidents range from financial reporting crimes, to bribery, to employee and vendor related scams
- the average number of incidents reported by victims more than doubled between 2008 and 2011)
- the cost of the incidents increased from SD 5.3M (approx. EUR 2.9M - USD 4.3M) to SD 6.5M (approx. EUR 3.6M - USD 5.3M)
- failure of management to enact preventative measures is a major cause of the fraud incidents
- there was an obvious lack of knowledge regarding anti-bribery laws by management

The results of the survey can be found at:

[https://www.kpmg.com/SG/en/IssuesAndInsights/ArticlesPublications/Documents/FAS\\_KPMGSingaporeFraudSurveyReport2011.pdf](https://www.kpmg.com/SG/en/IssuesAndInsights/ArticlesPublications/Documents/FAS_KPMGSingaporeFraudSurveyReport2011.pdf)

## U.K.

### ***Sometimes it Takes a Threat***

In August 2010, Lord Davies was commissioned by the U.K. Secretary of Business to develop a strategy to increase the number of women on the boards of listed companies in the UK.

In February 2011, Lord Davies issued his report *Women on Boards*. The Executive Summary of

the report notes that, "In 2010 women made up only 12.5% of the members of the corporate boards of FTSE 100 companies. This was up from 9.4% in 2004. But the rate of increase is too slow." The report recommends that by 2015, 25% of all non-executive board positions be held by women. If these quotas are not met, the report suggests that laws be enacted to force compliance. The report found broad support in the government. Home Secretary and Minister for Women and Equality Theresa May said, "Inclusive and diverse boards benefit from fresh perspectives, new ideas and broad experience. A company with a board that reflects the people it serves is better able to understand its customers, and there is growing evidence that companies with more women on their boards outperform their male-dominated rivals. Women make up more than half of the population, but account for just 12.5% of FTSE 100 directors. Lord Davies' report is an important step forward in understanding why this is and what can be done about it, and I shall be considering his findings very carefully."

Sometimes all it takes is a threat. Since the report was published in February, the rate at which women have been hired as non-executive directors to FTSE 100 companies has nearly doubled and the number of FTSE 100 companies with no women on the board has fallen from 21 to 17.

A copy of the report can be found at:  
<http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf>

### ***First Verdict - Corporate Manslaughter and Corporate Homicide Act***

Cotswold Geotechnical Holdings Ltd (CGH) became the first company to be convicted of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007 (the Act). On February 15, 2011, the jury returned a verdict against the company finding it guilty of gross breach of duty. The Court fined the company GBP 385,000 (approx. EUR 442,000 / USD 685,000).

It should be noted that the Act does not impose personal liability on individuals. Nonetheless,

under U.K. law, company management can be held personally liable under the Health and Safety at Work Act 1974 (HSWA). Under §37(1) of the HSWA, a director, manager, secretary or other similar officer can be held personally liable if, based on their consent or connivance of, or any neglect on their part, the entity violated the Act. Those found in violation can be fined and face imprisonment.

Directors can also face personal liability for common law manslaughter by gross negligence resulting in death. This offense is proven when individual officers of a company (directors or business owners) by their own grossly negligent behavior caused the death of a third party. The maximum punishment is life imprisonment.

In addition, under the Company Directors Disqualification Act 1986, §2 (1), the court may disqualify a director convicted of a health and safety offense.

In the CGH case, the sole director of the company was, in fact, charged with manslaughter by gross negligence, as well as a health and safety offence under § 37(1) of the Health and Safety at Work Act 1974. However, charges against him were permanently stayed due to his poor health.

## Aon

Financial Services Group  
200 E. Randolph St.  
Chicago, IL 60601  
[www.aon.com](http://www.aon.com)

## Lee Lindsay

Managing Director  
Aon Financial Services Group  
tel: +1.303.639.4131

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