

CGF POINT OF LAW

E-NEWSLETTER OF CLARKE GITTENS FARMER, ATTORNEYS-AT-LAW

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ABOUT



Clarke Gittens Farmer is one of the principal law firms in Barbados. The firm is a commercial law firm, providing legal services for both domestic and international corporate and private clients. The firm strives to provide high quality work in banking, corporate, commercial, business law and commercial litigation. The firm also advises clients on the purchase and sale of residential and commercial property in Barbados and maintains a significant trademark and patent registration practice.

INTRODUCTION

In this issue, our first article looks at the laws applicable to merger transactions in Barbados. In particular, this article focuses on the defining characteristics of a merger and the circumstances where an enterprise will cease to be distinct thereby invoking merger control laws. It also addresses the penalties for participating in a merger transaction without the permission of the relevant authorities.

In the second article we examine the benefits of "going green" from a tax perspective. This article discusses the various tax incentives available to investors, businesses and individuals which are aimed at encouraging investment in the generation of electricity from renewable energy sources and the use of renewable energy systems and energy efficient products.

In our third and final article we seek to dispel some of the myths surrounding powers of attorney. This article discusses the general nature and purpose of a power of attorney, the means by which a power of attorney may be terminated and the liability which attaches to a third party acting under a terminated power of attorney.

We hope you enjoy!

The e-Newsletter Committee



Miss Olivia N. D. Cadogan

✦ A General Guide to the Merger Control Laws in Barbados ✦

By Miss Olivia N. D. Cadogan, Associate

Introduction

The merger control regime in Barbados is not well-known. It will benefit international and local corporate clients, however, to have a general understanding of the position in Barbados so they may order their affairs accordingly. This article seeks to give a general overview of the merger control laws in Barbados. Please note that this article is the first in a two-part series focusing on the merger control regime in Barbados and will be followed by an article in our next issue dealing more specifically with the application process for mergers in Barbados.

The Legislation

The *Fair Competition Act*, Cap. 326C of the laws of Barbados (the "**Act**") governs mergers in Barbados.

Section 2 of the Act defines a "merger" as:

- (a) *"the cessation of two or more enterprises from being distinct, whether by amalgamation, by one or more enterprises acquiring control over another or otherwise; or*
- (b) *the engagement in a joint venture between enterprises¹ which results in two or more enterprises ceasing to be distinct entities".*

The Act is silent on what constitutes a cessation of two (2) or more enterprises from being distinct. The *Fair Trading Commission Merger Guidelines* (the "**Guidelines**"), however, provide two (2) ways in which businesses can cease to be distinct i.e. where (i) they are brought under common ownership, control or influence; or (ii) there is a transaction between the persons carrying on the businesses such that one (1) of the businesses will cease to be carried on. The Guidelines also provide that the Fair Trading Commission (the "**Commission**") considers two (2) companies to have ceased to be distinct if:

- (i) Company A obtains a controlling interest in Company B²;

- (ii) Company A obtains a shareholding sufficient to control the policy of Company B; or

- (iii) Company A acquires a shareholding sufficient to materially influence³ the policy of Company B.

The Guidelines also state that the Commission will rarely consider less than fifteen percent (15%) shareholding to be sufficient to cause two (2) enterprises to cease being distinct.

Merger Threshold

Section 20(1) of the Act, states that:

"all mergers by an enterprise that (a) by itself controls, or (b) together with any other enterprise with which it intends to effect the merger is likely to control not less than 40 per cent of any market ... are prohibited unless permitted by the Commission."

The Guidelines provide that mergers having an effect on a market for goods or services in Barbados will potentially be subject to the Act. Where the market share of merging parties (foreign or local) is greater than forty percent (40%) (the "**Threshold**") the Commission will be interested in the matter and an enterprise who desires to effect that merger is required to notify and apply to the Commission for permission to do so.

Parties should approach the Commission once a proposed acquisition, possibly subject to the Act, is

¹Section 2 of the Act defines "enterprise" as "an individual, partnership or body (corporate or incorporate) engaged in business but does not include any employee or officer of a partnership or body".

²A controlling interest means a shareholding carrying more than 50 percent of the voting rights in the company.

³The ability of a company to "materially influence" the policy of another company has to do with the first company's ability to influence the policy, behaviour, strategy, direction and commercial objectives of the second company in the market.

By Miss Oliva N. D. Cadogan, Associate

By Miss Oliva N. D. Cadogan, Associate

The Commission is required to review the application and, pursuant to Section 20(5) of the Act, determine whether to grant or refuse permission within three (3) months after the receipt of an application or as soon as practicable thereafter. If three (3) months expire without an objection by the Commission, the parties should seek the Commission's direction rather than assume they can proceed with the merger.

The Act stipulates a number of offences. For example:

- Additionally, the Court may (if satisfied on an application by the Commission) grant an injunction restraining a person from engaging in conduct that contravenes provisions relating to mergers in the Act.⁶ 🌐



⁶Section 37 (1) of the Act.



Miss Sabrina L. Maynard

✿ Going Green and the Benefits for You - A Tax Perspective ✿

By Miss Sabrina L. Maynard, Associate

Introduction

A significant portion of Barbados' foreign reserves are spent annually on the purchase of fuel for electricity generation purposes. In an attempt to reduce the country's dependence on fossil fuels, counteract the rising cost of energy and encourage the use of available natural resources, the Government of Barbados embarked on a fiscal programme aimed at encouraging investment in "green energy"¹ and the use of renewable energy systems².

In this article I will explore the tax benefits available to investors, businesses and individuals in Barbados who are interested or involved in the production of energy from renewable energy sources.

Incentives under the Income Tax Act

With effect from income year 2012, and pursuant to the provisions of the *Income Tax (Amendment) Act 2013-17* ("ITAA") the Government of Barbados extended a range of incentives to eligible businesses³ with respect to the supply of renewable energy systems and energy efficient products⁴ (together "**renewable energy systems**"). The details of those incentives are outlined below.

Tax holiday

An entity which is a developer, manufacturer and installer⁵ of renewable energy systems and energy efficient products may be granted a ten (10) year tax holiday.

As a condition for the receipt of the tax holiday, the relevant entity will have to satisfy the Minister responsible for Energy ("ME") that it is indeed a developer, manufacturer and installer of renewable energy products. Thereafter, the ME will present the entity with the requisite certificate to that effect. The certificate must be submitted to the Revenue Commissioner with the entity's tax return for the relevant income year.

Deduction for interest on loan payments

A person carrying on an eligible business may be entitled to have one hundred and fifty percent (150%) of the amount of interest paid on a loan deducted when calculating the person's taxable income where the loan is in respect of:

- (i) the construction of a new facility or the upgrading of an existing property to enable the generation, supply and sale of electricity from a renewable energy source; or
- (ii) the construction of a new facility to be used exclusively for the installation or supply of renewable energy systems.

Deduction for training expenditure

For a period of ten (10) years a person carrying on an eligible business may be entitled to have one hundred and fifty percent (150%) of the amount actually expended on the training of staff deducted when calculating the taxable income of the person for an income year.

¹ "Green energy" refers to energy produced from natural sources such as sunlight, wind, geothermal activity, etc.

² A "renewable energy system" means a system that is made up of the several different components listed in Part I of the Seventh Schedule to the *Income Tax (Amendment) Act 2013-17*.

³ "Eligible business" is defined in the ITAA as: "a business generating and distributing electricity from a renewable energy source or a business producing, distributing and installing renewable energy systems for electricity generation and energy efficient products that meet the requirements set out in subsection (2) [of the ITAA]".

⁴ "Energy efficient products" include window tint, compact fluorescent bulbs, LED lights, insulation, power and energy monitoring devices, energy efficient cookers (induction cookers) and products that improve the conversion efficiency of a primary resource into a form of energy suitable to perform a given task and reduce the energy required to perform a specific task.

⁵ The terms "developer", "manufacturer" and "installer" are defined in the ITAA.

✚ Going Green and the Benefits for You - A Tax Perspective Cont'd ✚

By Miss Sabrina L. Maynard, Associate

Deduction for marketing of products and services

A person carrying on an eligible business is entitled to have a deduction of one hundred and fifty percent (150%) of the amount actually expended on marketing of renewable energy products deducted when calculating the person's taxable income.

Deduction for product development and research

A person is entitled to have one hundred and fifty percent (150%) of the amount the person spends on product development and research deducted when calculating the person's assessable income where the amount relates directly to the generation and sale of electricity from a renewable energy source.

In all cases where an entity wishes to benefit from the deductions available under the ITAA, and outlined above, the entity must be able to satisfy the ME that the following requirements have been met:

- (i) the amount expended concerns the generation, marketing and/or sale, as the case may be, of electricity from a renewable energy source or the installation, and servicing of renewable energy systems;
- (ii) the business has delivered to the Revenue Commissioner its tax return in respect of the relevant income year; and
- (iii) the business is current in the payment of income tax, value added tax, land tax and national insurance contributions ("**Taxes**"); or
- (iv) the business, though not current, in respect of the payment of its Taxes has entered into an agreement with the relevant authority to settle the outstanding arrears and remains compliant with the conditions of that agreement.

Venture capital funding

Where venture capital funds⁶ are invested by a company in the renewable energy sector, with effect from income year 2012, the funds may be exempt from

the payment of corporation tax for a period of ten (10) years.

Contributions by a person to venture capital funds in respect of investments in the renewable energy sector and energy efficient sector are also deductible when calculating the person's assessable income.

Exemption for withholding tax on dividends

With effect from income year 2012, shareholders of companies engaged solely in the installation or supply of renewable energy systems are exempt from withholding tax on dividends earned for a period of ten (10) years.

Deductions for energy audits and retrofitting of premises

The Income Tax (Amendment) (No.2) Act, 2011- 26 provides that with effect from income year 2011, a person is entitled to have deducted, when calculating the person's taxable income, amounts expended equal to one hundred and fifty percent (150%) of the actual expenditure (up to a maximum of \$10,000.00 in respect of an individual and \$25,000.00 in respect of a registered business) where the person is carrying on a registered business, for each year for five (5) consecutive years (and in any event one hundred and fifty percent (150%) of the actual expenditure over a five year period) in respect of:

- (i) energy audits⁷; and
- (ii) fifty percent (50%) of the cost of retrofitting premises or installing systems to produce fuel from non-fossil fuel sources.

⁶ A "venture capital fund" is defined in the ITAA as a fund from which equity financing is provided to business ventures specified by the Minister of Finance and on such conditions as the Minister of Finance approves

⁷ An "energy audit" is defined in the *Income Tax (Amendment) (No.2) Act, 2011-26* as an evaluation by an authorized energy auditor of the energy consumption in a residential or non-commercial property to determine the ways in which energy can be conserved.

➤ Going Green and the Benefits for You - A Tax Perspective Cont'd ➤

By Miss Sabrina L. Maynard, Associate

In order to obtain the benefit, a business must: (i) be up to date with respect to filing of its tax returns; (ii) be current in the payment of its Taxes; or (iii) if the business is not current in the payment of its Taxes, an arrangement has been entered into with the relevant authority with respect to the settlement thereof.

Waiver of taxes on Renewable Energy Systems

Goods imported into Barbados are usually subject to import duties, excise duty and value added tax ("VAT").

Materials and equipment to be used exclusively for the purpose of generating renewable energy and renewable energy systems⁸ are exempt from import duties and excise duty. VAT is levied on renewable energy systems at the rate of zero percent (0%). Consequently, renewable energy systems may be imported into Barbados free of all duties and taxes. The tax savings are passed on to consumers who are permitted to purchase renewable energy systems tax free.

Land Tax Deduction for the Production of Solar Energy

The land tax payable by a person engaged in the production of solar energy or the manufacture of goods to be used in the production of solar energy is calculated at fifty percent (50%) of the rate of tax otherwise applicable to the person under the *Land Tax Act*, Cap. 72A of the laws of Barbados. In order to benefit from this concessionary rate of tax the following conditions must be satisfied:

- (i) the land tax for the relevant income year must be paid within the prescribed period;
- (ii) the ME has certified that the person is indeed engaged in the production of solar energy or the manufacture of goods to be used in the production of solar energy; and

- (iii) the Comptroller of Customs and the Revenue Commissioner have each issued a certificate to the effect that there is no tax outstanding by the person in respect of relevant taxes.

Conclusion

If you are interested in investing in the renewable energy sector or you are generally looking for tax planning opportunities, attractive tax incentives and/or options for the production of energy from renewable energy sources are available for you to consider. ➤



⁸ For the purposes of the Customs Tariff (Amendment) No.9 Order, 2009 of the Customs Act, Cap. 66 of the Laws of Barbados, "renewable energy systems" include: (i) wind turbine systems; (ii) solar photovoltaic systems (iii) bio-fuel systems; (iv) hydropower systems; (v) solar thermal systems (solar dryers, solar cookers, solar air conditioners etc.); (vi) wave of tidal power systems; (vii) fuel cell systems; and (viii) geothermal heat pump systems.



Mr. Creig R. D. Kinch

✦ The Termination of a Power of Attorney ✦

By Mr Creig R. D. Kinch, Associate

Introduction

Over the years the power of attorney has become a very misunderstood and abused document. Many people are under the mistaken belief that a power of attorney endures forever. This is far from the truth.

This article hopes to dispel these myths. In so doing it will explain what a power of attorney is and explore the authority of a donee acting under a power of attorney. It will also discuss when a power of attorney is terminated and explain when a third party is liable for acting on a terminated power of attorney.

The discussion in this article does not extend to irrevocable powers of attorney which in Barbados are only valid if contained in security documents like mortgages.

What is a Power of Attorney?

The *Property Act*, Cap 236 of the Laws of Barbados defines a power of attorney as a written document by which a donor grants to a donee the power to execute documents or conduct business on the donor's behalf as specifically or generally allowed in the document granting the power.

The relationship between the donor of the power and the donee is one of agency. The donee is the agent of the donor and takes directions from the donor.

A power of attorney can either be specific or general.

Specific Power of Attorney

This grants a specific power to act concerning a specific transaction, a series of specific transactions or a specific type of transaction or transactions.

General Power of Attorney

This grants a general power to manage all the affairs of the donor.

The Authority of the Donee

The authority of the donee to act on behalf of the donor is confined to the powers granted by the power of attorney document. This authority will extend not only to acts expressly authorised but also subordinate acts which are necessary or ordinarily incidental to the exercise of the expressed authority. It also extends to acts within the donee's apparent authority, i.e. acts which are authorised by the terms of the power and which are assumed to have been done on the instructions of the donor (whether or not the donee was so instructed). In no case, however, can the authority of the donee exceed the power of the donor to act on his own behalf.

Termination of a Power of Attorney

A power of attorney can be terminated either by an act of the donor or the donee or both or on the operation of law.

The following acts by the donor or donee will bring a power of attorney to an end:

- (i) mutual agreement between donor and donee to end the power of attorney;
- (ii) the donor giving notice to the donee of the termination of his authority; or
- (iii) the donee renouncing his authority.

Outside of an act of the donor or donee a power of attorney is terminated on the operation of law where:

- (i) the document granting the power states that the power is to be valid for a specific time and that time has passed;
- (ii) the document granting the power is for the performance of a specific task and that task has been completed or it is impossible to complete that task;

✿ The Termination of A Power of Attorney ✿

By Mr Creig R. D. Kinch, Associate

- (iii) the power of attorney was granted in respect of the donor's business and that business has been terminated;
- (iv) the donor has died or become of unsound mind;
- (v) the donee has died or become of unsound mind;
- (vi) the donor has become bankrupt; or
- (vii) the donee has become bankrupt.

Liability of a Third Party Acting on a Terminated Power of Attorney

Where a third party makes any payment or does any act in accordance with or in pursuance of or in reliance on a power which has been terminated, that third party is not liable for their actions if they did not know of the event that led to termination.

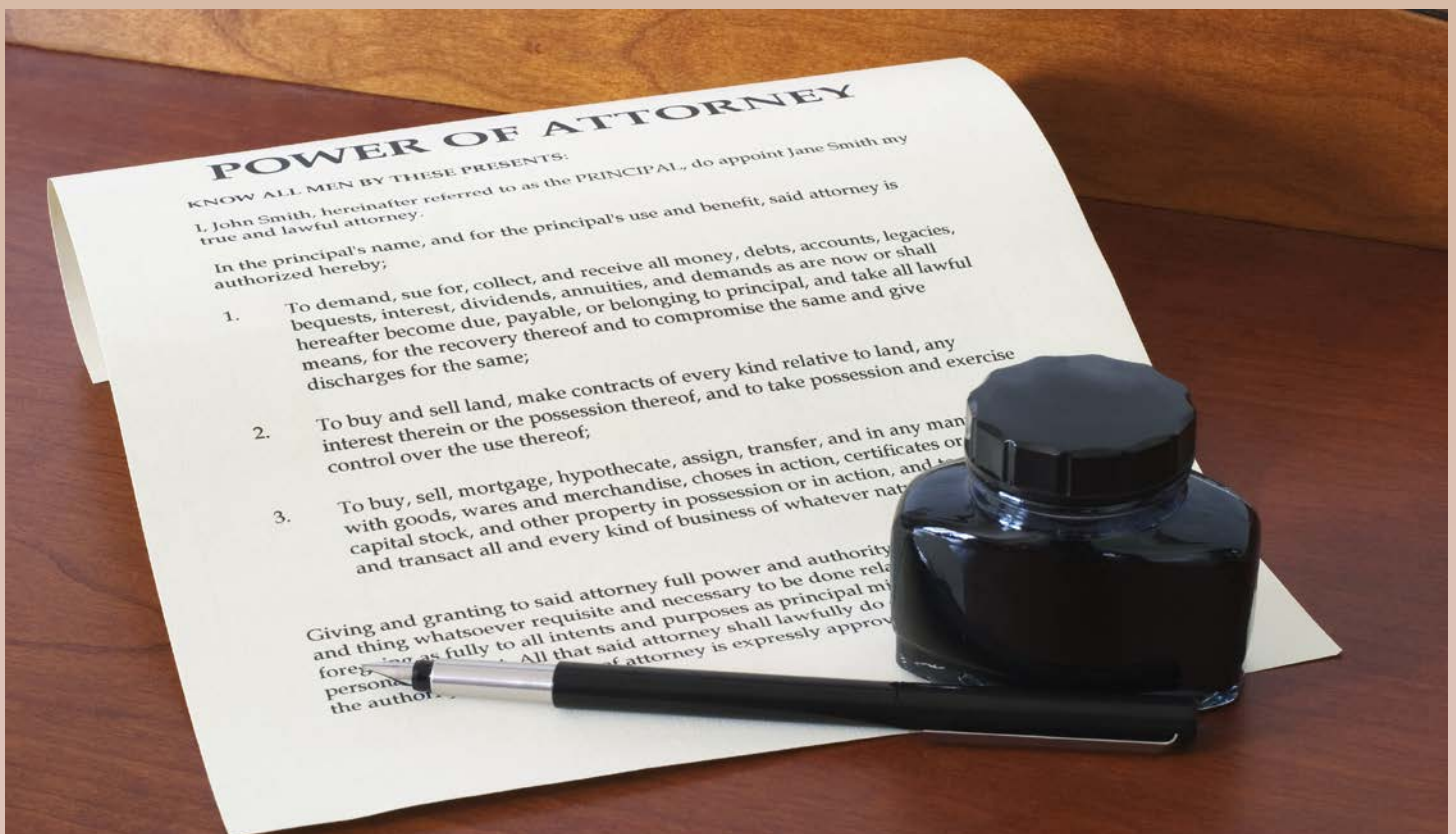
Where the third party either:

- (i) has notice of the event that led to the termination; or
- (ii) should have reasonably known,

that third party will be liable for acting on the power of attorney.

Final Thoughts

A power of attorney does not last forever. It can be terminated by an act of the donor or donee or by the operation of law. Where you have notice of an event that terminates the power of attorney or you should have reasonably known of the event (e.g. in the case where it is clear the donor is of unsound mind) and you act on that power of attorney you may be liable for your actions. Where you suspect that a power of attorney has been revoked, you should do the necessary due diligence to confirm the validity of the power of attorney before you act on it. ✿



✦ ATTORNEY PROFILE ✦

In this issue we continue our series of profiles on the firm's attorneys-at-law. This issue profiles Ms. Gillian M. H. Clarke.



Ms. Gillian M. H. Clarke

Gillian heads the Corporate Department and specializes in the area of international business. Consequently, she works closely with many international law firms, accounting firms and a diverse range of clients, including high net worth individuals,

who wish to use a Barbados corporate vehicle for the purpose of corporate structuring or re-structuring or for estate planning. Gillian also provides advice to clients on a range of commercial matters including structured financing, international financing arrangements, securities law, immigration matters and taxation.

In addition to being a member of the Barbados Bar Association, Gillian is a member of the Society of Trust and Estate Practitioners.

Outside of work Gillian maintains a keen interest in the visual arts and is an avid art collector. She is a member of the board of the National Art Gallery. ✦

✦ CGF NEWS ✦

Caribbean Commercial Law Workshop

From August 10-12, 2014, legal practitioners, academics and other professionals from across the region, the United States of America, Canada and Spain gathered at the Hyatt Regency, Port of Spain, Trinidad for the 13th Annual Caribbean Commercial Law Workshop (the "**Workshop**"). The Workshop was held under the auspices of the Faculty of Law of the University of the West Indies, Cave Hill Campus.

The theme for the Workshop was "Re-building the Region - The Role of Caribbean Commercial Law". The over ninety (90) professionals in attendance at the Workshop benefited from presentations that focused on the legal and economic framework in the Caribbean and its relevance to the economic recovery of the region. In particular, focus was placed on the role of

commercial law in stimulating regional growth and development in the aftermath of the global economic crisis. Clarke Gittens Farmer was represented at the Workshop by Ms. Debbie Fraser, Partner and Head of the Commercial Department, Mrs. Nicola Berry, fellow partner in the Commercial Department and Miss Olivia Cadogan, an associate in the Commercial Department.

Nicola presented a paper on "Negotiating Renewable Energy Power Purchase Agreements - Keys to Drafting and Allocating Risks" while Debbie moderated a panel discussion on the topic "Corporate Financing and Corporate Re-Organisation as Mechanisms for Growth".

Further information on the workshop can be obtained by visiting its webpage at:

<http://www.cavehill.uwi.edu/Law/cclw/home.aspx>

✿ CGF NEWS Cont'd ✿

CARILEC Renewable Energy and Regulatory Conference and Forum

Stakeholders in the energy business from throughout the Caribbean region and North America converged at Maria by the Sea in Tortola, British Virgin Islands, from September 21 - 23, 2014 for the Caribbean Electric Utility Service Corporation's ("CARILEC") 2014 Renewable Energy and Regulatory Conference and Forum. The theme of this year's conference was "From Grid Lock to Grid Tied".



The firm was represented at the conference by Mrs. Nicola Berry, partner in the Commercial Department, who delivered a paper on "The Legal Aspects of Risk Allocation in the Preparation of Power Purchase Agreements".✿

Walk For The Cure 5k Walk and Run

On Sunday, October 5, 2014 the staff and friends of Clarke Gittens Farmer joined thousands of Barbadians and persons from across the region as they showed support for the Barbados Cancer Society Breast Screening Programme by participating in the annual 5k Walk and Run. The event is held each year in the month of October as part of the Barbados Cancer Society's activities for Breast Cancer Awareness Month. The theme of this year's event was "Walk for the Cure".

Pictured below are three of the members of the Clarke Gittens Farmer team who participated in the 5k Walk and Run. ✿



From left: Ms. Jaina Colucci, Mrs. Karen Carrington-Maynard and Ms. Latoya Kinch.

✿ **CGF POINT OF LAW** published by Clarke Gittens Farmer is an e-Newsletter for clients, colleagues and friends of the firm. This e-Newsletter provides an overview of notable news and legal developments.

Contact: Website: www.clarkes.com.bb; Address: [Clarke Gittens Farmer](#), 'Parker House', Wildey Business Park, Wildey Road, St. Michael, Barbados. Telephone: (246) 436-6287; Telefax: (246) 436-9812

Partners: **Managing Partner:** Mr. T. David Gittens, Q.C. **Partners:** Mr. Stephen W. Farmer, Q.C., Miss Gillian M. H. Clarke, Mr. Ramon O. Alleyne, Mrs. Savitri C. B. C. St. John, Ms. Debbie A. P. Fraser, Mrs. Rosalind K. Smith Millar, Mr. Kevin J. Boyce and Mrs. Nicola A. Berry.

Team: **Supervising Partner:** Mrs. Nicola A. Berry. **E-Newsletter Committee:** Miss Annette Y. Linton (Chair), Miss Sabrina L. Maynard, Mrs. Lisa R. Toppin-Corbin, Mr. Michael J. Koeiman and Miss Olivia N. D. Cadogan. **Technical and Administrative Support:** Mr. Creig R. D. Kinch, Miss Stephanie V. Blenman, Mr. John B. Newton and Ms. Erith S. Small.

Disclaimer: IMPORTANT NOTICE: This e-Newsletter does not constitute and should not be construed as legal advice. Should further analysis or explanation of the subjects contained in this e-Newsletter be required, please contact us. Always consult a suitably qualified lawyer on any legal problem or issue.

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