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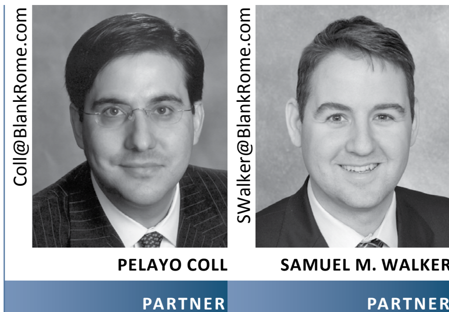
A Note from the Chairs

BY PELAYO COLL AND SAMUEL M. WALKER



PELAYO COLL
PARTNER
SAMUEL M. WALKER
PARTNER

As we now find ourselves in the midst of Q4 with the holiday season rapidly approaching, it is safe to say that 2015 was a rather dynamic year across the board. The real estate market being no exception, we expect great challenges and opportunities alike in 2016. As always, our attorneys will continue to stay on top of what is happening and how it affects our clients as well as all of our relationships.

We are happy to include in this newsletter edition a variety of informative articles on topics such as the EB-5 Program, commercial lease guarantees, and cybersecurity. Our "EB-5 Regional Center Program Temporarily Extended; Changes Expected" article discusses the current status of the EB-5 Program extension, and how EB-5 investments have helped finance a number of high-profile projects in various key markets. In our "The Commercial Lease Guarantee" article, readers will be provided with a comprehensive overview of key issues for landlords and tenants, including whether or not a guarantee is even warranted, among others. Lastly, our cybersecurity article, "Energy Sector Beware," will address concerns over cybersecurity being the number one worldwide security threat, especially for our critical energy production and delivery infrastructure.

Additionally, this edition will feature our recent "Noteworthy Deals" and transactions as well as highlight Blank Rome's attorney accomplishments, including notable bylined articles written for various industry publications.

We thank you for sharing this edition of *Foundation,* and hope you find it informative. We look forward to publishing more editions that cover issues affecting your business and industry in the coming year. ◘

Blank Rome's Real Estate Practice Ranked Top-Tier in *U.S. News – Best Lawyers®* 2016 "Best Law Firms"

Blank Rome LLP is pleased to announce that the Firm's real estate practice ranked tier one in the national *U.S. News – Best Lawyers®* 2016 "Best Law Firms" rankings, and received numerous regional top-tier rankings throughout the Firm's U.S. offices. To view Blank Rome's full 2016 rankings, please click here.

Blank Rome's industries and services recognized in this year's survey include:

INDUSTRIES

- Financial Services
- Gaming
- Healthcare
- Insurance
- Maritime
- Real Estate
- Zoning & Land Use

SERVICES

- Alternative Dispute Resolution
- Business Restructuring & Bankruptcy
- Commercial and Corporate Litigation
- Copyright
- Employment Litigation
- Environmental
- Equipment Leasing and Finance
- Finance
- Intellectual Property
- IP Litigation
- Labor and Employment
- Litigation
- Maritime
- Matrimonial
- Mergers & Acquisitions
- Patent
- Securities
- Securities Litigation
- Tax
- Trademark
- Trusts & Estates
- White Collar Defense & Investigations

The *U.S. News & World Report – Best Lawyers®* survey rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer reviews from leading attorneys in their field, and a review of additional information provided by law firms as part of the formal submission process. For more information, please visit http://bestlawfirms.usnews.com. ◻

EB-5 Regional Center Program Temporarily Extended; Changes Expected

BY JEFFREY W. PITTS

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The continuing resolution that President Obama signed into law on September 30, 2015, that averted the federal shutdown included a critical extension of the EB-5 Regional Center Program.

The extension for the Regional Center Program permits immigrant investors to continue to file EB-5 petitions through a Regional Center under the current investment threshold. In addition to extending the current program to December 11, 2015, this temporary reprieve provides additional time for Congress to consider a long-term reauthorization bill that would include reforms to the current eligibility requirements. Prior to the sun-setting of the program, there was much debate in Congress over changes that are believed needed to strengthen federal oversight and the integrity of the program. Although most practitioners in the EB-5 arena believe a permanent reauthorization is likely, it is also believed there will be changes that will impact both individual investors as well as developers and Regional Centers.

The next two months leading up to December 11, 2015, will surely see a continued push for action on reauthorizing and reforming the Regional Center Program. The changes will be hotly debated in Congress as well as in public forums. But it is hard to see any permanent reauthorization without several areas of the program receiving significant changes.

What Is the EB-5 Immigrant Investor Program?

Congress initially created the EB-5 immigrant investor program in the Immigration Act of 1990 in the hopes of attracting foreign capital to the U.S., creating jobs for American workers in the process. In 1993, Congress amended the program by allowing for "regional centers" located in a Targeted Employment Area ("TEA") to promote "economic growth" through the creation of jobs and "increasing domestic capital investment." Often termed "Economic Citizenship," the EB-5 program provides a mechanism for foreign nationals to invest in the U.S., create jobs, and ultimately receive U.S. lawful permanent residence (a green card). The United States is one of many nations that have created a regulatory scheme that used immigration as a way to infuse capital into its economy.

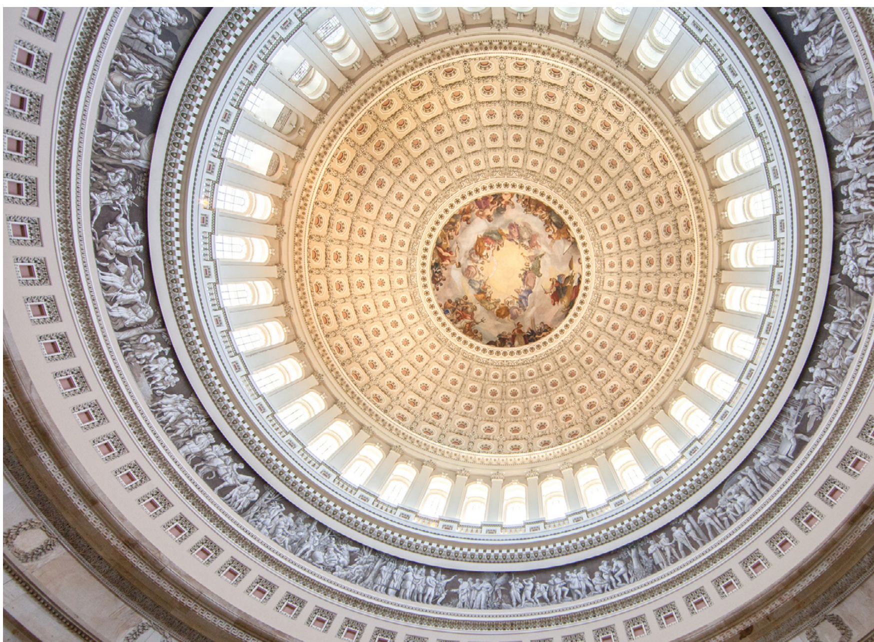
There are two methods to pursue permanent residence through the EB-5 Program. Under the first, a foreign investor must invest one million dollars into a new commercial enterprise that will hire at least 10 U.S. workers. The second method allows the investor to invest in Regional Center projects located in a TEA (high unemployment or rural areas), reduces the investment threshold from one million to $500,000, and allows for indirect and induced jobs to count towards the job creation requirements.

The EB-5 Program was not being widely utilized until approximately six years ago, when United States Citizenship and Immigration Services ("USCIS") changed its interpretation on how construction jobs could count toward the job creation requirements. Once the interpretation of construction jobs changed, real estate developers started to aggressively use the program to secure investment capital. Regional Center projects have been used extensively by developers over the past several years, and the foreign capital attracted has been a major source of funding for some of the largest development projects across the United States. EB-5 Regional Center investments have helped finance the construction of a New York sports arena, the Philadelphia Convention Center, and a Vermont ski resort and waterpark; helped provide financing for a Hollywood movie studio; and even financed the construction of the FBI office building in San Diego. The impact to the U.S. economy has been dramatic. A report by U.S. Policy Metrics and Hamilton Place Strategies indicates that between 2005 and 2013, the EB-5 Program generated a minimum of $5.2 billion in private investment. Estimates on the amount of jobs created through EB-5 investments reach upwards of 131,000.

Criticism of the EB-5 Program

Last year, ABC news reporter Brian Ross ran a series of investigative articles concerning the EB-5 Program. Mr. Ross focused on what he deemed to be weaknesses in the program's vetting of the individual investors and whether permitting foreign investors into the United States posed national security concerns. In addition, a recent Government Accountability Office ("GAO") report was critical of the EB-5 Program. The report, "Immigrant Investor Program: Additional Actions needed to Better Assess Fraud Risks and Report Economic Benefits," resulted in Senator Charles Grassley (R-IA), Chair of the Senate Judiciary Committee, saying, with respect to the Regional Center Program, that the status quo was not acceptable and legislation to reform the program was needed. The negative coverage of the EB-5 Program and the overall polarization of immigration in general started to culminate right as the Regional Center Program was coming to a sunset. As September 30, 2015, approached, there were several proposed bills being discussed that would make significant changes to the program. One bill, the EB-5 Reauthorization and Reform Bill, was introduced by Grassley and Judiciary Committee Ranking Member Patrick Leahy (D-VT). The House reauthorization bill was introduced by Representatives Mark Amodei (R-NV) and Jared Polis (D-CO).

Program proponents have argued that any increase in capital investment requirements will result in fewer investors being attracted to the program, and thus less money being injected into the economy to spur development and create jobs. Others argue that the raise in capital investment requirements will only make the U.S.'s program more competitive with other countries that have an "Economic Citizenship" program, like the U.K. (which requires two million British Pounds—or approximately three million U.S. dollars), and Canada (requires two million Canadian dollars or approximately $1.5 million U.S. dollars).



The next two months leading up to December 11, 2015, will surely see a continued push for action on reauthorizing and reforming the Regional Center Program. The changes will be hotly debated in Congress as well as in public forums. But it is hard to see any permanent reauthorization without several areas of the program receiving significant changes.[1]

Raising the Investment Thresholds

A lot of the debate regarding the EB-5 Program has centered on the amount of investment required in order to use the program. As stated above, the current regulations require a foreign investment of either one million dollars, or $500,000 if going into a TEA. Several of the proposals for reforming the program have suggested increases in the threshold investments—taking the one million up to $1.2 million, and the $500,000 for TEAs to $800,000.

Defining What Constitutes TEAs

Another area that has received focus by Congress and detractors is the use of the TEAs in order to qualify for the lower investment threshold. When Congress created the program, it was intended to help high unemployment areas, as well as to spur development and investment in rural areas that do not often receive a major influx of international investment. Under the current regulations, each state is able to make TEA determinations and have different criteria on establishing that a given EB-5 project is within the TEA. As many of the well-known and large-scale EB-5 projects have been in Manhattan, Los Angeles, and Miami, regulators are questioning whether to continue to let states make this determination. Many believe Congress will "federalize" the TEA standards and/or include additional efforts to have the funds placed in rural investments.

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EB-5 Regional Center Program Temporarily Extended; Changes Expected (continued from page 4)

Others point to the fact that foreign investors are more inclined to invest in well-publicized projects in major cities, which they may have visited or are otherwise more familiar to them than other cities.

Increased Financial Disclosure and Source of Funds Scrutiny

Developers and projects seeking EB-5 funding will likely be required to disclose much more information about how the EB-5 investment capital is being utilized. There have also been suggestions that the program should include provisions prohibiting the use of EB-5 funds by developers and others with criminal backgrounds. Investors also will likely be subjected to more scrutiny, including even more disclosure and evidence as to their "source of funds," to ensure they were obtained lawfully. One congressional proposal would even limit the sources of funds—like eliminating monetary gifts from a friend.

Proponents of these changes have argued that they will only strengthen the program by eliminating opportunities for fraud or misuse of the investment funds, and ensuring that foreign investors are not using the program to launder illicit money and do not have ties to unsavory organizations.

Conclusion

Over the next two months we will certainly witness a debate, at times vitriolic, regarding the weaknesses and benefits of the EB-5 Program. Many are hopeful that a Regional Center reauthorization and reform bill will be passed prior to the end of the extension, December 11, 2015. If that does not occur, the future of the program is unclear and tied up in whether Congress can reach an agreement on spending priorities and pass an Omnibus appropriations bill in December, or another Continuing Resolution to avoid a government shutdown later this year. Whenever Congress does reauthorize the EB-5 Program, the hope is that it will be a permanent reauthorization, and one in which the reforms do not limit or impede the huge economic impact the program has generated for the U.S. economy. ◻ –©BLANK ROME LLP

1. On November 6, 2015, Senators Charles Grassley, Chairman of the Committee on the Judiciary, Bob Corker, Chairman of the Committee on Foreign Relations, and Ron Johnson, Chairman of the Committee on Homeland Security and Government Affairs, sent a letter to Senate Majority Leader Mitch McConnell and Minority Leader Harry Reid opposing a straight reauthorization of the EB-5 Regional Center Program.

The Commercial Lease Guarantee: An Overview for Landlords and Tenants

BY HENRI CHALOUH

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ASSOCIATE

Gone are the days of corporate impunity—in the context of a lease agreement, that is. There was once a time when a commercial tenant could sign a lease and hide behind the corporate protections of its signatory entity, which often was nothing more than a shell company. As soon as its business began to tank, it would drag its feet—holding onto possession of the leased space for as long as possible and continuing to conduct business rent-free—until it was finally evicted, sometimes months after its initial failure to pay rent.

To make matters more difficult for its landlord, no real justice ever followed. Not only would the landlord never see a penny of any future rent due during the remainder of the leased term, but it also would likely lose out on all unpaid rent already incurred and inevitably be forced to absorb legal and other fees in evicting the tenant, to boot. Such consequences were a natural product of doing business with judgment-proof shell entity tenants; even a money judgment issued in favor of the landlord would be near worthless, for there would be no money to collect.

In an effort to protect themselves from these maneuvers, landlords have grown more accustomed to demanding some form of personal (or corporate) guarantee covering the tenant obligations contained in the underlying lease. In light of these developments, all commercial landlords and tenants should be well-versed in lease guarantee principles; familiarity with the topics and tips covered below may help a party confidently navigate lease and guarantee negotiations and have a clearer picture of precisely what is included within the bounds of its guarantee and what is not.

Is It Necessary for This Deal?

The first issue to be addressed in guarantee negotiations—even if implicitly—is whether a guarantee is warranted altogether for purposes of protecting the respective interests of the parties to the lease. If a tenant plans to execute the lease in his or her *individual* capacity and personally possesses sufficient assets to answer for the tenant's obligations under the lease, it may be unnecessary to

require a guarantee. Similarly, if a tenant agrees to submit a cash security deposit or letter of credit large enough to safeguard its landlord from undue potential loss, a tenant may be able to get away with not having to execute a guarantee.

In determining whether a guarantee is warranted for any given transaction, as well as the circumstances under which a security deposit would weaken the need for a guarantee, landlords should keep an accounting of all the costs they incur in completing the transaction and to which they should be entitled if a tenant reneges, including the unamortized value of (i) the costs of marketing the space and any broker's commissions; and (ii) any build-out costs associated with preparing the subject premises for the tenant's use. Moreover, landlords should be aware of present and anticipated market conditions and estimate the amount of time potentially required to find a replacement tenant, if a new tenant were to default or abandon the premises, or the landlord is forced to evict an existing tenant.

By no means is "full" coverage a standard requirement of a commercial lease; every deal contains unique circumstances that may call for varying degrees of guarantee coverage.

In scenarios where a tenant intends to execute a lease in his or her individual capacity or where a personal (as opposed to corporate) guarantee is a component of the deal, another factor that landlords must consider is the nature of title the tenant (or personal guarantor) has over his or her assets and whether he or she has a spouse. Some jurisdictions recognize a type of ownership known as a tenancy by the entirety, where a married couple will each own an undivided interest in the entirety of the assets in question. In such instances, a creditor of only one spouse cannot pursue assets owned under a tenancy by the entirety; only a creditor of the couple as a unit will be granted access to these assets for the satisfaction of a judgment or debt. For landlords' purposes in such jurisdictions, this means that ascertaining the specific assets owned solely by the spouse who is the tenant/guarantor is key to determining how best to proceed with the deal. In cases where the substantial worth of assets is owned under a tenancy by the entirety, landlords have the option of insisting that both spouses sign as co-tenants under the lease or, alternatively, as co-guarantors.

Full Guarantee vs. Limited Guarantee

The traditional version of the lease guarantee is a "full" guarantee whereby the subject guarantor pledges to perform all of the tenant's obligations under the lease for the entire term of the lease and potentially any renewals and modifications of the lease. Providing for such wide coverage has proven to be most pertinent for landlords who intend to lease a larger/retail space, expend sizable sums of money preparing the space for a tenant's use, possibly charge below market rents, and/or require a relatively smaller security deposit, in an effort to incentivize tenant acceptance of their offer. In these scenarios, landlords will likely expose themselves to substantial costs with little in the way of security; the presence of a "full" guarantor provides an extra source of funds for potential recoupment of these costs, if the tenant should default under the lease. By no means is "full" coverage a standard requirement of a commercial lease; every deal contains unique circumstances that may call for varying degrees of guarantee coverage, placing the scope and extent of the guarantee up for negotiation and introducing the possibility of a "limited" guarantee.

LIMITATIONS ON GUARANTEE COVERAGE

A limited guarantee falls short of guaranteeing *all* of the underlying tenant's obligations under the lease. Assuming the parties have agreed that a limited guarantee is appropriate for their transaction, the next step is deciding precisely how to limit the guarantee's coverage. This can be achieved in a number of ways, each of which can be utilized in its own right or combined with another one or more guarantee limitations, some of which are outlined as follows: (i) limiting the *types* of tenant obligations covered by the guarantee; (ii) limiting the temporal extent to which a guarantor is liable for a tenant's lease obligations; (iii) fixing the dollar amount of maximum guarantor liability possible under the guarantee; (iv) providing for a full guarantee during some initial portion of the term after which, in the absence of a tenant default during such initial period, full coverage is limited in some way thereafter; and (v) providing for a "Good Guy" guarantee.

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The Commercial Lease Guarantee: An Overview for Landlords and Tenants (continued from page 6)

Within the Scope or Without: Which Tenant Obligations Make the Cut?

Parties to a lease can specify the tenant obligations for which a guarantor will be responsible under the terms of the guarantee. A landlord may propose that performance of all monetary as well as non-monetary tenant obligations should fall within the scope of the guarantee. This will include: (i) all fixed rent payments; (ii) all recurring additional rent due under the lease—including payment for utility bills, common area maintenance costs, real estate taxes, and insurance premiums—and other non-recurring fees that are also commonly classified as additional rent, such as late charges, landlord review fees, professional and attorneys' fees incurred in enforcing the lease and/or guarantee, as well as indemnity protections, among other payments; and (iii) all other charges the tenant is required to pay under the lease.

Perhaps most importantly, such a broad guarantee will also require a guarantor to physically perform any non-monetary tenant lease obligations, such as completion of any improvements or alterations at the premises for which the tenant is responsible, covenants that require the tenant to open for business by a specific date and to continuously operate, and end of term removal and restoration obligations, to name a few. To the extent possible, guarantors are strongly advised to negotiate performance of non-monetary obligations out of the scope of the guarantee. At the very least, if a landlord persists, perhaps the guarantee can provide that upon a tenant default, the landlord—and not the guarantor—is to perform these obligations where possible, but that the latter will be liable for the cost of such performance. Moreover, if additional rent is to be guaranteed, guarantors should do their absolute best to limit such coverage to *recurring* additional rent payments under the lease and eliminate any reference to "all other charges." Doing so will ensure that a guarantor will not be committing to open-ended and potentially limitless liability.

In any event, it is always advisable for guarantors to spell out precisely which payments are to fall within the scope of the guarantee and, to the extent the parties can agree on fixing a dollar amount as the maximum liability under the guarantee, inclusion of the fixed amount will add clarity to the document. Otherwise, failing to provide a hard numerical cap on liability may allow for the possibility that a court will later incorrectly interpret the amount of liability under the guarantee.

To encourage tenants to sign leases, landlords commonly grant a rent-free period in the early stages of the term of the lease, offer a rent abatement for certain months throughout the term during which a tenant is exempt from making rent payments, and provide a tenant improvement allowance for the preparation and build-out of the leased space. Perhaps just as commonly, landlords will also attach a conditional limitation to these concessions, providing for their immediate rescission in the event of a tenant default. To that end, landlords should consider including such conditional limitations within the scope of the guarantee, ensuring that the guarantor will be responsible for these concessions upon a default by the tenant. Moreover, for deals involving substantial tenant improvements, landlords should attempt to provide for a guarantor obligation to carry out lien-free completion of these improvements. This may help to prevent a tenant from defaulting under its lease after the tenant commences construction and accrues debt to contractors who may file a lien against the landlord's property, leaving the landlord with an unfinished project and an unpaid tab.

Landlords regularly provide that a guarantor will also be on the hook for any costs incurred in enforcing the terms of the lease and/or guarantee, including reasonable

attorneys' fees. Guarantors should insist that their liability for such costs should extend only to those incurred in disputes where the landlord is found to be the prevailing party. After all, why should a guarantor be required to sponsor a landlord's misguided attempts to enforce its rights?

Limited Guarantee Periods: Rolling or Stationary?

Determining the scope of liability is a qualitative analysis—it explores the *kinds* of tenant obligations for which a guarantor is responsible. An additional or alternative limitation of liability available to a guarantor is one based on time; it is a quantitative determination as to the *extent* of guarantor liability. For example, the parties to a lease whose term spans ten years may agree that the tenant's principal is to guarantee five years' worth (extent) of fixed rent (scope) payable under the lease. Without further clarification, the extent of liability can be construed in two drastically different ways: (i) the guarantor is committing to pay every fixed rent payment due during the *first* five years of the term that the tenant fails to tender, in which event the extent of liability under the guarantee ceases at the end of the fifth year of the term and, even if the tenant subsequently defaults in payment of fixed rent, the guarantor will have already stepped out of the picture; or (ii) the guarantor is agreeing to pay every fixed rent payment payable during a *rolling* five-year period, in which event the extent of liability applies to the first five years' worth of *defaulted fixed rent payments;* in other words, liability under the guarantee will not cease until the tenant has actually defaulted on five years' worth of fixed rent payments for which the guarantor is responsible, or the term has expired.

Using our example, if the tenant timely pays every fixed rent payment for the first five years of the term and suddenly defaults on every subsequent payment for the remaining five years, the difference between a *stationary* and *rolling* guarantee can mean a world of difference for the guarantor; the former would leave him free and clear of any liability and the latter would be accompanied by a bill for five years' worth of fixed rent. In cases of a stationary guarantee, it is crucial for a guarantor to demand language that explicitly calls for a reduction as to the extent of liability with every passing payment made by tenant. As applied to our example, perhaps such language would read as follows: "Guarantor shall be liable for the first sixty (60) monthly payments of fixed rent payable under the Lease, as and when the same shall become due, it being understood, however, that (i) Guarantor's aggregate liability hereunder shall reduce with each passing monthly payment of fixed rent made by Tenant under the Lease such that, upon Tenant's submission of sixty (60) monthly fixed rent payments, Guarantor's liability will equal zero; and (ii) Guarantor shall have no liability for any fixed rent payments that shall become due under the Lease following the initial sixty (60) month period.

COMMUTED SENTENCE ON ACCOUNT OF GOOD BEHAVIOR

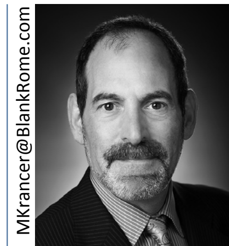
Another creative way parties can abbreviate a guarantor's liability is to condition such abbreviation on the tenant's good behavior. One approach is as follows: a landlord and tenant agree that the guarantor is to be fully responsible for the performance of all tenant obligations and payment of all charges due under the lease for the entire term; if, however, the tenant does not default under any of the terms of the lease during some initial portion of the term—say, the first four years—the full guarantee is to transform into a rolling 12-month guarantee of fixed rent and recurring additional rent payments only. This arrangement is beneficial for both parties because it incentivizes the tenant to be on its best behavior during the most difficult portion of the term—preparing the leased space for occupancy, opening for business, and staying afloat—in exchange for more favorable guarantor treatment later in the term, when the tenant has presumably developed its business, has more to lose, and is less likely to default. If such a deal is reached, the guarantor should take extra care to provide that only a tenant default that persists *beyond all applicable notice and cure periods* would disqualify the guarantor from the potential abbreviation of liability under the guarantee. Doing so increases the likelihood of the guarantor's eligibility for commuted liability and precludes the possibility that an inadvertent default—perhaps a rent check lost in the mail—will undo potentially years of good behavior. ◻ –©BLANK ROME LLP

Failing to provide a hard numerical cap on liability may allow for the possibility that a court will later incorrectly interpret the amount of liability under the guarantee.

Stay tuned for Part II of this series coming soon, which will focus on the Good Guy Guarantee and related concepts.

Energy Sector Beware: Cybersecurity Now Top Security Threat

BY MICHAEL L. KRANCER, MARGARET ANNE HILL, THOMAS M. DUNCAN, AND FRANK L. TAMULONIS



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What is the number one worldwide security threat? The answer is cybersecurity. This is especially so for our critical energy production and delivery infrastructure.

This issue has even taken hold in mainstream entertainment. Earlier this year, Hollywood released the hacker movie *Blackhat,* which Wired.com called "the best hacker movie ever made." The movie centers around a cyber-attack on a nuclear power plant in Hong Kong that results in the collapse of a cooling tower and places the plant on the verge of a meltdown. The movie was inspired by Stuxnet, a computer worm developed during the George W. Bush administration, which destroyed nearly one-fifth of Iran's nuclear centrifuges.

But this is not Hollywood; it's very real, very dangerous, and very eschatological. A cyber-attack presents the risk of unfathomable asymmetrical physical damage to life and property, as well as the potential for flat-lining the enterprise value of any targeted company. A Congressional Commission has estimated that in a prolonged nationwide blackout (this in the context of an Electromagnetic Pulse ("EMP") attack), about 90 percent of the U.S. population would be dead from disease, lack of food and resources, and societal breakdown. That 90 percent won't care whether the nation was struck by an EMP attack or a cyber-attack.

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According to the U.S. Department of Homeland Security ("DHS"), over the past several years the energy sector has incurred the greatest number of cybersecurity incidents. Pennsylvania Public Utility Commissioner Pamela Witmer summed it up at the PUC's recent, one of a kind, multi-agency summit on cybersecurity: "According to the U.S. Director of National Intelligence, cybersecurity is the number one security threat worldwide, ranking higher than terrorism, espionage, and weapons of mass destruction."

Commissioner Witmer made this statement at the October 1, 2015, press conference kicking-off the PUC's cybersecurity summit, which was intentionally timed with National Cybersecurity Awareness Month. The PUC, to its credit, gathered in one room the DHS, as well as state and local agencies including the Office of Administration, the Pennsylvania Emergency Management Agency, the Pennsylvania State Police, and the Pennsylvania Office of Homeland Security, and several large utilities, including UGI Utilities, Pennsylvania American Water, Verizon Pennsylvania, and PPL Electric Utilities, to vet this problem and talk about preparedness, prevention, and solutions.

So far, so good in Pennsylvania in getting the job done to protect critical energy infrastructure from cyber-attacks. But, the summit stressed that the danger is not going away

and that we must constantly work together to stay vigilant. Indeed we must. According to a *Wall Street Journal* report, a survey of 625 IT executives in the United States, U.K., France, and Germany found that 48 percent said they think it is likely there will be a cyber-attack on critical infrastructure, including energy infrastructure, in the next three years that will result in the loss of life. The costs of cybersecurity are also increasing at an alarming rate. For example, JPMorgan Chase's annual cybersecurity expenditures are expected to double to $500 million within the next five years.

What are the threats, you ask? They are too numerous to list in this article, but here are a few: the Havex Trojan targets industrial control systems after it is mistakenly downloaded by customers; malware called BlackEnergy has targeted systems used in nuclear power plants; and an Iranian hacking campaign is underway that the FBI believes may be targeting the energy and defense industries. The Chinese, Russians, and North Koreans can be added to the list of "usual suspects" as cyber-crime, cyber-espionage, and cyber-sabotage have increasingly become their weapons of choice lately—and recent events show they are good and getting better at it. ISIS is also considered a dire threat in this regard.

In fact, nationalized cyber-weaponization has become the norm for our enemies. According to National Intelligence Director James Clapper, Russia's Ministry of Defense is establishing its own cyber command, which is expected to conduct offensive cyber activities such as inserting malware into enemy command and control systems. In May 2014, the U.S. Department of Justice indicted five officers from China's Peoples' Liberation Army on charges of hacking U.S. companies. U.S. officials have also linked an Office of Personnel breach to China, which compromised the personal information of more than 21 million people, although officials have not publicly stated whether they believe the Chinese government was responsible.

The highly interconnected nature of the national power grid and the increasing pressure placed on grid reliability by federal and state policies, including the EPA's recently issued Clean Power Plan and states' renewable portfolio standards, could exacerbate the impacts of a cyber-attack on energy infrastructure and potentially lead to "cascading blackouts." Former FERC Chairman Jon Wellinghoff is among those who believe that the solution to preventing cascading blackouts is to move to a system of "microgrids" that operate independently from one another. The U.S. military is already moving in that direction.

Power generation and delivery are not alone, of course. The oil and gas sectors are inviting targets as well. Some experts say that particular vulnerabilities exist at "single-point" assets such as refineries, storage terminals, and other buildings, as well as "networked features" such as pipelines and cyber systems. Enemies may focus on a large-scale attack with the goal of temporarily halting the supply of oil and gas or even to create an environmental disaster.

Reminiscent of the time after World War One in which the world's powers were sucked up in the vortex of a naval arms race and in came the Washington Naval Treaty of 1922, today's superpowers are now doing something similar. President Obama appeared with Chinese President Xi Jinping on September 25 to announce that

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Energy Sector Beware: Cybersecurity Now Top Security Threat
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the United States and China had reached an agreement on a number of issues related to cybersecurity. This U.S.-China agreement comes on the heels of China's May 2015 cybersecurity agreement with Russia, and China's recent attempt to enact laws requiring foreign firms operating in China to use China-approved encryption and reveal all source code for inspection, in addition to the OPM breach and DOJ indictments mentioned above. In the agreement, the United States and China agreed to cooperate "with requests to investigate cybercrimes, collect electronic evidence, and mitigate malicious cyber activity emanating from their territory" and "to provide updates on the status and results of those investigations." To review the timeliness and quality of responses to these requests, both countries have agreed "to establish a high-level joint dialogue mechanism on fighting cybercrime and related issues," which will include high-ranking Chinese officials, the DHS Secretary, and the U.S. Attorney General, along with participation from other agencies. The first dialogue will be held by the end of 2015 and will occur twice per year thereafter.

The highly interconnected nature of the national power grid and the increasing pressure placed on grid reliability by federal and state policies, including the EPA's recently issued Clean Power Plan and states' renewable portfolio standards, could exacerbate the impacts of a cyber-attack on energy infrastructure and potentially lead to "cascading blackouts."

In addition to this recent agreement, the United States and China are believed to have a framework in place for a cyber-warfare agreement that would prohibit either country from launching an initial cyber-attack on the other's critical infrastructure during peacetime. One hopes for, but experience shows cannot count on, better success now on cybersecurity than with the Washington Naval Conference.

Additional American domestic efforts to improve national cybersecurity are coming from both the executive and legislative branches. Executive Order 13636 requires the National Institute of Standards and Technology, part of the Commerce Department, to create a framework to reduce cybersecurity risk for organizations within critical infrastructure sectors, including the energy sector. The framework, released in February 2014 and updated in December 2014, is based on existing standards, guidelines, and practices Compliance with the framework, however, is voluntary.

The Department of Energy's Office of Electricity Delivery & Energy Reliability also focuses on cybersecurity and works with the DHS, industry, and other agencies to reduce the risk of energy disruptions from cyber-attacks. The Office designed the Cybersecurity for Energy Delivery Systems ("CEDS") program to assist the energy sector asset owners (electric, oil, and gas) by developing cybersecurity solutions for energy delivery systems through integrated planning and a focused research and development effort. CEDS co-funds projects with industry partners to make advances in cybersecurity capabilities for energy delivery systems.

The Department of Energy's Oil and Natural Gas Subsector Cybersecurity Capability Maturity Model (ONG-C2M2), developed in partnership with the DHS, is an 83-page document that helps improve cybersecurity capabilities and includes reference material and implementation guidance specifically tailored for the oil and natural gas segments of the energy sector. The model can be used to strengthen cybersecurity capabilities in the ONG subsector; enable ONG organizations to effectively and consistently evaluate and benchmark cybersecurity capabilities; share knowledge, best practices, and relevant references within the subsector as a means to improve cybersecurity capabilities; and enable ONG organizations to prioritize actions and investments to improve cybersecurity. The ONG-C2M2 is designed for use with a self-evaluation methodology and toolkit.

Before the Senate now is a bill sponsored by Senate Intelligence Chairman Richard Burr (R-N.C.), S. 754, the "Cybersecurity Information Sharing Act" ("CISA"), which requires the Director of National Intelligence, the DHS Secretary, the Secretary of Defense, and the U.S. Attorney General to create a system to promote the sharing of a

broad range of cybersecurity information. CISA is similar to two House bills that passed last April, the "Protecting Cyber Networks Act" (H.R. 1560) and the "National Cybersecurity Protection Advancement Act" (H.R. 1731).

CISA would give private entities, including oil and gas companies, greater liability protection for sharing personal data related to certain cybersecurity information. CISA has faced strong opposition, mainly due to concerns that it may impinge on individuals' Fourth Amendment right to privacy. If agencies are to store personal information, they must maintain highly sophisticated cybersecurity systems. CISA, however, does not include any requirements or funds to promote these systems. Twenty-two amendments are on the Senate floor, many of which limit the events that provide legal immunity and reduce the ability for agencies to share information with one another. The DHS has expressed concern because the bill allows other agencies to collect this information, potentially reducing the DHS's current role in this space.

Others have criticized CISA for not going far enough. CISA only creates a framework for information-sharing intended to allow agencies to identify how best to protect against future cyber-attacks. What some expect, or hope, to follow CISA is ultimately the enactment of minimum standards for corporate cybersecurity systems. A vote on the bill is expected soon. A number of Senate and House committees and subcommittees have held hearings on cybersecurity in recent weeks and are expected to hold further meetings throughout the month. In a statement made before a House committee last month, National Intelligence Director James Clapper stated that the absence of universally accepted and enforceable norms of behavior in cyberspace has allowed cyber-attacks to go undeterred.

Pennsylvania is acting as well, with the PUC in particular showing exemplary leadership. Public utilities are required to develop and maintain a written cybersecurity plan under 52 Pa. Code §§ 101.1-101.7. The PUC took the occasion of its October cybersecurity summit to release its second edition of the *PUC Cybersecurity Best Practices for Small and Medium Pennsylvania Utilities.* The PUC's "Cyber Team," created in 2012, compiled the *Best Practices* document, which is available on the PUC's website (see http://goo.gl/oMPaae). The document is a *magnum opus* loaded with information, including ways to prevent identity or property theft; how to manage vendors and contractors who may have access to a company's data; what to know about anti-virus software, firewalls, and network infrastructure; how to protect physical assets, such as a computer in a remote location or a misplaced employee device; how to respond to a cyber-attack and preserve forensic information after the fact; how to report incidents; the potential benefits of engaging a law firm in advance of a breach; and a list of federal cyber incident resources.

Pennsylvania also boasts one of the nation's top cybersecurity innovators, Eric Avakian, Pennsylvania's Chief Information Security Officer, who was named a 2015 Top 10 "Influencer" by GovInfoSecurity in recognition of his efforts toward improving government IT security policy. Others on the list include members of Congress, leaders of federal agencies, and White House staff.

In light of the enormous asymmetrical physical and financial damage that cyber-attacks can inflict, as well as our apparent vulnerability to those attacks, one thing is clear: a good defense (and perhaps even offense) against such mischief is going to require not only continued efforts, but also an ever-increasing amount of attention, teamwork, effort, and human and financial capital investment going forward. ◘ —©BLANK ROME LLP

This article was first published in *The Legal Intelligencer* on October 16, 2015.

Blank Rome Points of Interest

New Hires

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DAVID S. HOUSTON

PARTNER

Blank Rome welcomed **David Houston** to the Firm's Washington, D.C., office as a Partner in the Real Estate group. A recognized real estate attorney in the Washington, D.C., metropolitan area, Mr. Houston focuses his practice on commercial leasing, land use, zoning, and development. He joins Blank Rome from Reed Smith LLP, where he was a partner. Please click here to learn more.

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SCOTT P. DEMARTINO

PARTNER

Blank Rome welcomed **Scott DeMartino** to the Firm's Washington, D.C., office as a Partner in the Tax group. Mr. DeMartino focuses his practice on real estate and renewable investments using renewable energy tax credits, historic rehabilitation tax credits, and new markets tax credits. He joins Blank Rome from Bryan Cave LLP, where he was counsel. Please click here to learn more.

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J. DADE THORNTON

ASSOCIATE

Blank Rome welcomed **J. Dade Thornton** to the Firm's Philadelphia office as an Associate in the Real Estate group. Mr. Thornton concentrates his practice on general real estate matters, with a particular focus on commercial loan transactions, as well as acquisitions, dispositions, leasing, condominiums, subdivisions, and rights-of-way. Please click here to learn more.

Publications

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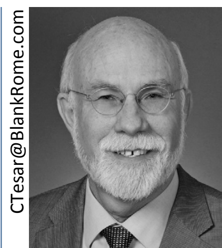
MICHAEL A. SCHEFFLER

PARTNER

Blank Rome Partner **Michael A. Scheffler** authored the article, Warranty/Guaranty Provisions in Construction Contracts, in the Summer 2015 edition of the *Real Estate Finance Journal,* a publication of Thomson Reuters. In his article, Mr. Scheffler explains the important distinctions between the concepts of "warranty" and "guaranty," and describes how to effectively administer and enforce warranty and guaranty provisions in construction contracts.



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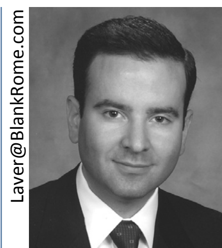
CHRISTOPHER TESAR

COUNSEL

Blank Rome Counsel **Christopher Tesar** also authored an article in the Summer 2015 edition of the *Real Estate Finance Journal,* Who Owns the "Fixtures" When the Lease Expires? In his article, Mr. Tesar offers a few practical measures that landlords and tenants, and their advisors, can take to minimize the risk of protracted, and expensive, disputes over who owns what fixtures at critical stages of the landlord-tenant relationship.

Speaking Engagements



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ADAM E. LAVER

PARTNER

Blank Rome Partner **Adam E. Laver** will be leading the CLE panel, "Fundamentals of Real Estate Tax Assessment Appeals and Minimization Strategies in Philadelphia," at the Pennsylvania Bar Institute's ("PBI") 19th Annual Real Estate Institute, on Thursday, December 10, 2015, at 1:00 p.m. This one-day program is co-sponsored by PBI and the Pennsylvania Bar Association's Real Property, Probate and Trust Law Section, and will be held at the Pennsylvania Convention Center in Philadelphia. Please click here to learn more.

PRESS RELEASE

Blank Rome Earns Top Marks in 2016 Corporate Equality Index

Firm Receives 100% on Human Rights Campaign Foundation's 14th Annual Scorecard on LGBT Workplace Equality

Blank Rome LLP is pleased to announce that it has received a perfect score of 100 percent on the 2016 Corporate Equality Index ("CEI"), a national benchmarking survey and report on corporate policies and practices related to LGBT workplace equality, administered by the Human Rights Campaign ("HRC") Foundation. With this score, Blank Rome has been designated as a "Best Place to Work for LGBT Equality" by the HRC, and joins the ranks of 391 major U.S. businesses that also earned top marks this year.

"We are honored to receive a perfect score on the 2016 CEI," said Alan J. Hoffman, Chairman and Managing Partner at Blank Rome. "For 70 years, Blank Rome has been committed to fostering an inclusive and diverse work environment. We continue to advance our efforts through our formal Diversity Committee and are proud to support all of our colleagues by promoting workplace equality each and every day."

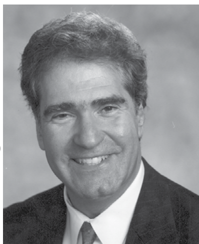
The 2016 CEI rated 1,024 businesses in the report, which evaluates LGBT-related policies and practices including non-discrimination workplace protections, domestic partner benefits, transgender-inclusive health care benefits, competency programs, and public engagement with the LGBT community. For more information on the 2016 Corporate Equality Index, or to download a free copy of the report, visit www.hrc.org/cei.

The Human Rights Campaign is America's largest civil rights organization working to achieve lesbian, gay, bisexual, and transgender equality. By inspiring and engaging all Americans, the HRC strives to end discrimination against LGBT citizens and realize a nation that achieves fundamental fairness and equality for all. ◻

Noteworthy Real Estate Deals

Blank Rome LLP represented:

- A client in the leasing of a full floor from Hartz Mountain Industries at their trophy building at 667 Madison Avenue in New York City.
- A client in connection with PFG's full floor lease at 400 Park Avenue in New York City.
- A client in the restructuring of its lease to The TJX Companies, Inc., at 5 Bryant Park, making TJX the largest tenant in that building.
- **Simon Properties** in its $115M sale of a "lifestyle" shopping mall in Miami, FL.
- **Pineville Properties** in its $11M sale of a Walgreens and PNC tenanted property in Paoli, PA.
- A client in TIC restructure transactions involving 15 properties in Philadelphia in connection with a $60M refinance.



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ASSOCIATE

Blank Rome LLP represented CTL Capital LLC in the structuring and placement of an $83 million lease-based mortgage loan, relating to the Washington, D.C., headquarters of a major international financing institution (the "Financial Institution"). The transaction was rated by DBRS, Inc., a credit rating agency, and sold by CTL Capital to three institutional investors in a private placement.

The surrounding facts of the transaction were unique and required creative structuring by CTL Capital, with assistance from Blank Rome. The borrower, a family-controlled limited liability company, owns a 75% tenancy-in-common interest in a 60% portion of the land on which the Financial Institution's headquarters is located, and the tenancy-in-common leases the property it owns to the Financial Institution. The remaining 40% of the land is owned by the Financial Institution.

Adding complexity to the picture, the 75%-25% owners formed their tenancy-in-common in 1983 "on a handshake" and have no tenancy-in-common agreement (thus relying on the lease contract and common law to define their relationship). Despite the factual complexities, CTL and Blank Rome structured the documentation to persuade the rating agency and investors that the rent underlying the debt service payments would flow unimpeded for the term of the transaction.

Blank Rome Partner **Michael Feinman** led the Blank Rome team, with assistance from real estate associate **Mitesh Patel** and real estate paralegal Cristina Gomez. □

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For more information on Blank Rome's real estate group and capabilities, please visit **www.blankrome.com/realestate**.

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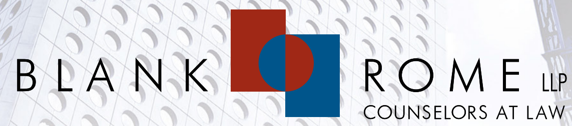

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