PACIFIC RIM ADVISORY COUNCIL

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Pacific Rim Advisory Council

July 2023 e-Bulletin

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CONFERENCES & EVENTS

PRAC Let's Talk!

Virtual meeting - TBA

Conferences

New Delhi - October 7 - 10, 2023
Hosted by KOCHHAR & Co.

Paris May 25 - 28, 2024
Hosted by GIDE

PRAC 2023 Event Connect

Let us know your plans to attend upcoming industry events
Prior to event start we will put you in touch with other attending PRAC Delegates.

Get on the List! events@prac.org

ABA Denver August 3 – 8 IBA Annual, Paris - Oct 29—Nov 3

Full Details
www.prac.org/events

Visit us online for the latest up-to-date, country specific information
www.prac.org/member_publications.php

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BENNETT JONES ADDS TO EDMONTON OFFICE

Jonathan Hillson Joins Bennett Jones as Partner in Edmonton

EDMONTON, 18 July 2023: Jonathan Hillson has joined Bennett Jones as a partner in Edmonton. He specializes in litigation and dispute resolution with an emphasis on construction law. He brings a wealth of experience and outstanding advocacy skills to clients in construction, contractual, and insurance law dispute resolution.

Renowned for his strategic, tailored approach in conflict resolution, Jonathan has advocated for clients in construction law cases, builder's lien claims, contractual disputes and insurance coverage disagreements, and bodily injury claims.

He has a proven track record of success in high-stakes trials and arbitrations—representing confidential clients in multi-million dollar negligence claims, construction law disputes, shareholder disputes, and infrastructure arbitrations. He acts for clients at all levels of court in Canada.

Numerous legal directories rank Jonathan as a leading lawyer in both construction and infrastructure law. He is an active member of the legal profession with the Canadian Bar Association and Law Society of Alberta. Jonathan contributes his time and expertise to various not-for-profit groups and community causes, including the Sir Winston Churchill Society, the Edmonton Scottish United Soccer Club, English Heritage, and the National Trust.

For additional information visit www.bennettjones.com

GOODSILL WELCOMES REAL ESTATE ASSOCIATE

HONOLULU, June 2023: Ariel McKenzie has joined Goodsill Anderson Quinn & Stifel as an Associate who concentrates her practice in commercial real estate.

Ariel assists clients in areas such as commercial and residential developments, sales and acquisitions of real property, commercial leasing, and other real estate and business matters.

Ariel received her Juris Doctor, summa cum laude, from the University of Hawai'i William S. Richardson School of Law. During law school, Ariel served as Secretary and 1L coordinator for the Student Animal Legal Defense Fund, was a Teaching Assistant for Constitutional Law, and externed for the Honorable Ariel was born and raised in Hawaiʻi. In her free time, she enjoys kayaking, swimming, going to the beach, and spending time with her two rescue cats.

Goodsill has over 50 attorneys representing local, national and international clients. Goodsill lawyers handle a wide range of business and legal matters, extending personalized legal services with cutting-edge resources.

For additional information visit www.goodsill.com

BRIGARD URRUTIA PROMOTES FOUR TO PARTNERSHIP

BOGOTA, 27 June 2023: Colombian Elite firm Brigard Urrutia has strengthened its litigation, tax, corporate and M&A and insurance practices by promoting four lawyers to its partnership.

Brigard Urrutia announced María Victoria Munévar, Daniel Duque, Johann Schomberger and Lucas Fajardo have been appointed to the senior rank of the firm, which now has a total of 27 partners.

Maria Victoria Munévar specialises in litigation, arbitration and insolvency matters. She has advised national and international companies in a number of cases, including matters relating to corporate disputes, unfair competition and consumer protection, among others. Munévar first joined Brigard Urrutia in 2005, before leaving the firm in 2016 to join Covington & Burling LL. She returned to the outfit in 2018 as a senior associate.

Daniel Duque joined Brigard Urrutia in 2018. He focuses his legal work on tax-related matters and has worked with local and international clients on a variety of cases, including corporate restructurings and mergers. He has also advised on other tax matters related to payroll, stock options and retirement plans. Prior to joining Brigard Urrutia, Duque gained experience as an international tax service manager for professional services group PricewaterhouseCoopers. He also spent two years at full-service firm Cuberos Córtes Gutiérrez (CCG), which merged with Holland & Knight (Colombia) earlier this year.

Johann Schomberger, who is part of the commercial and corporate law team at Brigard Urrutia, works with companies on matters concerning contractual, consumer and transportation law, among others. He also helps start-ups navigate complex financial regulation, along with assisting them in other legal challenges those new companies typically encounter after they launch. Schomberger joined the firm in 2012, and counts previous experience as an attorney at the Colombian subsidiary of Mexican cement maker Cemex. The partner has also previously worked as a legal adviser for Colombia's Ministry of Trade, Industry and Tourism.

Lucas Fajardo forms part of the insurance and reinsurance team. Since his arrival in 2012, he has advised clients in insurance law matters and has represented companies in the drafting of commercial agreements and schemes for insurance policies, among other things. Up until last month, Fajardo spent three years on the board of directors for Insuralex, a network comprised of independent law firms that focus on insurance and reinsurance matters. Between 2022 and 2023, he chaired the board.

Managing partner Carlos Fradique-Méndez says that the team sees the appointments as a testament to the hard work undertaken by the lawyers, as well as their commitment to the firm's clients. "Maria Victoria, Daniel, Lucas, and Johann are recognized for their exceptional skills, knowledge and leadership in the legal community, and we are confident that they will contribute to the consolidation of the firm," he comments.

For additional information visit www.bu.com.co

GIDE ELECTS MANAGEMENT COMMITTEE

Gide re-elects Frédéric Nouel and Jean-François Levraud to the helm, on a promise of stepping up the firm's development

PARIS, 06 July 2023: The Gide partners have voted in their new Management Committee, with Frédéric Nouel, Senior Partner, and Jean-François Levraud, Managing Partner, both having been re-elected for a second term. They are joined on the Committee by three other partners, likewise elected by their peers at the firm: Franck Audran, Jean-Gabriel Flandrois and Laetitia Lemercier. Frédérique Misk-Malher, the firm's Secretary-General, also sits on the Management Committee.

Gide is the undisputed leader in a wide range of fields in business law. Our exceptional teams cultivate and serve the unique and loyal client base we have built up over the more than 100 years since the firm's foundation.

It is thanks to these teams and the recognition they have earned not only from our clients but also from their peers and others within the French and international legal spheres that Gide was recently crowned "France Law Firm of the Year" by Chambers Europe 2023. It is the second time the firm has held this prestigious title. We also regularly top a number of other French and international rankings, such as the Mergermarket Global & Regional M&A Rankings, in which our M&A team ranked first in France for H1 2023 in terms of both value and deal count.

Frédéric Nouel, Senior Partner, said: "I am honoured to be re-elected and to have the opportunity, together with Jean-François Levraud and the rest of the Committee, to take our firm to the next level. With the unique blend of expertise our 117 partners bring to the table, we offer our clients a service that is second to none."

Jean-François Levraud, Managing Partner, added: "The firm can always rely on its partners to put their heads together and come up with solutions to even the most complex legal issues, offering our clients exceptional added value. Our strategy focuses on leveraging these synergies and building on the already considerable skills available within the firm."

Frédéric Nouel has been Senior Partner since 2021. He specialises mainly in M&A, real-estate and financing transactions for investment funds and listed operators on the European hotel and real-estate markets. Consistently ranked in Band 1/Tier 1 and as a Leading Individual by Chambers Europe and Legal 500 (Hall of Fame), Frédéric also featured among the Forbes Top 40 Lawyers advising CAC 40 companies in 2022 and has been named a Thought Leader in real estate by Who's Who Legal. He was voted "Lawyer of the Year: Real Estate" by Best Lawyers in France in 2017 and again in 2020.

Jean-François Levraud has been Managing Partner since 2021. Within the firm's Real-Estate Transactions & Financing practice group in Paris, he advises primarily on real-estate transactions, especially construction and development transactions, in France and abroad. He headed up Gide's Casablanca office from 2014 to 2018. International legal directories such as Chambers Global, Legal 500, IFLR1000 and Best Lawyers recognise Jean-François as a leading expert in real-estate law in both France and Morocco.

Franck Audran, newly elected Member of the Committee, joined the firm in 2007 and made partner in 2019. He specialises in French and EU competition law, assisting the firm's clients on merger control aspects of complex acquisitions and restructuring projects, some of which require commitments to and/or an in-depth investigation by the French competition authority, the EU Commission or other national competition authorities. He also acts for the firm's clients in investigations, inspections and seizures, as well as in litigation proceedings before the competition authorities and the courts (on charges relating to cartels, vertical restraints or abuses of dominant position and in private enforcement suits). Franck regularly features in the main international rankings (Chambers and Legal 500) as well as in the Best Lawyers peer review guide.

Jean-Gabriel Flandrois, newly elected Member of the Committee, joined the firm in 1999 and made partner within the M&A/Corporate practice group in 2009. He also heads up the firm's Restructuring practice. He has gained extensive experience in the acquisition and restructuring of banks and other financial institutions, as well as in distressed M&A transactions, and regularly coordinates cross-border operations involving multiple jurisdictions. Jean-Gabriel is recommended as a Leading Individual in M&A in the Legal 500 guide and ranked by IFLR1000 and Best Lawyers in both M&A and Insolvency.

Laetitia Lemercier, newly elected Member of the Committee, joined the firm in 2001 and made partner in 2016. She specialises in structured finance and has significant experience in real-estate and project financing and refinancing – including development, acquisition, corporate and green financing. Her expertise also extends to debt restructuring. She regularly advises financial institutions, funds, borrowers, issuers and investors on complex and innovative financing transactions, from the initial structuring through to completion. Laetitia is recommended by Legal 500 EMEA and Best Lawyers in the categories of Banking and Finance, Real-Estate Finance and Project Finance, as well as by Chambers Europe for Projects and Energy Domestic Finan

Frédérique Misk-Malher, Gide's Secretary-General since 2015, oversees all of the firm's support functions. She supports the Committee in defining and implementing its development plan and in leading strategic projects both in France and abroad. She also heads up projects that cut across the firm's various different departments. Frédérique previously held positions as Financial Auditor, Chief Financial Officer and Secretary-General/Director-General for a number of companies before pursuing her career within law firms as from 2011.

For additional information visit www.gide.com

HAN KUN WELCOMES RETURN OF INVESTMENTS AND CAPITAL MARKETS DUO

Han Kun welcomes Mr. Sheldon Chen and Mr. Clarence Chung in rejoining the firm

BEIJING/SHANGHAI, 21 July, 2023: Han Kun is pleased to announce that Mr. Sheldon Chen and Mr. Clarence Chung have recently rejoined the firm, further enhancing the firm's service capabilities.

Mr. Chen focuses on private equity/venture capital investments, mergers and acquisitions, equity incentives, and general corporate matters. He has participated in and been in charge of a significant number of investment, restructuring, and M&A projects in a wide variety of industries, including hard technology, advanced manufacturing, healthcare, and consumer & retail, etc. Mr. Chen has accumulated extensive experience in more than ten years of practice. Based on his understanding of transactions and business, Mr. Chen is able to quickly identify legal risks and provide creative solutions for clients in complex transactions. Mr. Chen graduated from Fudan University with an LL.B. degree and later from the Chinese University of Hong Kong with an LL.M. degree. Before joining Han Kun, Mr. Chen practiced with two other prestigious law firms in China.

Mr. Chung focuses on private equity/venture capital investments, capital markets, and foreign direct investment across a broad range of industries, including new energy, logistics, semi-conductors and digital economy, etc. He has represented numerous high-profile investment institutions and fast-growing enterprises. Mr. Chung has accumulated extensive experience in the areas of fund-raising, investment, management, and withdrawal. He excels at assisting financial and strategic investors to realize their business objectives while controlling legal risks. He is also familiar with the various stages of development of startups and their potential legal issues to provide practical solutions. Mr. Chung graduated from Peking University with a bachelor's degree in law. Before joining Han Kun, Mr. Chung served in well-known law firms and one of the top internet companies in China. He has been highly recognized by authoritative legal directories such as CLECSS and Legalband.

Owing to Mr. Chen's and Mr. Chung's extensive experience in investments and capital markets, their rejoining Han Kun will further enhance the firm's service capabilities in related fields.

For additional information visit www.hankunlaw.com

ARIFA

FIRST PUBLIC ISSUANCE OF GREEN COMMERCIAL PAPER

PANAMA CITY, 07 July 20223: The First Public issuance of green commercial paper in Panama's history made by BG Metal Trade Inc., were offered and placed through the Latin American Stock Exchange in Panama.

Arias, Fabrega and Fabrega acted as counsel to AV Securities Inc. in connection with the first public issuance of green commercial paper in Panama's history made by BG Metal Trade Inc. The commercial papers were offered and placed through the Latin American Stock Exchange in Panama.

This transaction included an opinion from Pacific Corporate Sustainability (PCS) in order for the issuance to be qualified as a green issuance.

The issuance, according to various sources, constitutes the first ever public offering of registered securities made by a recycling company in the Latin American Region.

BG Metal Trade Inc., is an urban mining company based in Colon province, Panama, that recycles telephone and other electronic equipment from all over Latin America and resell its components and minerals to companies located all over the world.

ARIFA's legal team was led by Estif Aparicio and Javier Yap Endara with the valuable assistance of associate Daniel Abad.

For additional information visit www.arifa.com

GIDE

ADVISES HITACHI VANTARA ON THE SALE OF OXYA SAS AND ITS SUBSIDIARIES TO MONTEFIORE INVESTMENT

PARIS - 12 July 2023: Gide has advised Hitachi Vantara, the modern infrastructure, data management and digital solutions subsidiary of Hitachi, Ltd. on the sale of oXya SAS, a premier France-based SAP infrastructure solution provider it acquired in 2015, to Montefiore Investment, a well-respected French investment firm that specializes in high-potential small- and medium-sized service companies.

The Gide team was composed by partners David-James Sebag and Paul Jourdan-Nayrac, and associates Sarah Doray and Josephine Remoussenard, on the corporate aspects; partner Emmanuel Reille, and associate Martin Roger, on the competition aspects; partner Paul de France, and associate Charles Ghuysen, on tax law aspects; partner Foulques de Rostolan, and associate Bénédicte Perrier, on employment law aspects; and partner Julien Guinot-Deléry, on IP aspects.

For additional information visit www.gide.com

HAN KUN

ADVISES ZHEJIANG DOER BIOLOGICS CO., LTD. ON ITS GLOBAL LICENSE OUT DEAL WITH BIONTECH SE

BEIJING, 11 July 2023: On July 11, 2023, Zhejiang Doer Biologics Co., Ltd. ("Doer") announced that it had entered into a license agreement with BioNTech SE (NASDAQ: BNTX, "BioNTech"), a German biotechnology unicorn company. Pursuant to the agreement, Doer will grant BioNTech a worldwide license for an innovative discovery, allowing BioNTech to research, develop, manufacture, and commercialize innovative biotherapeutics against an unnamed therapeutic target by utilizing this innovative discovery, and Doer is entitled to receive an upfront payment and will be eligible for potential development, regulatory, and commercial milestone payments. This license-out transaction involves various innovative patents, technologies, and other kinds of intellectual property at multiple levels and different dimensions, indicating Doer's excellent research and development capabilities in innovative biotherapeutics, as well as the great commercial value and prospects for Doer's products and technologies in the world. In short, this transaction is strategically important for Doer's continuous R&D and vigorous future development.

Han Kun Law Offices, acting as Doer's sole legal counsel in this global licensing transaction, provided legal advice and legal services for the entire process, including design of transaction structure, drafting, negotiation, revising, and finalizing the legal documents.

Zhejiang Doer Biologics Co., Ltd., a subsidiary of Huadong Medicine Co., Ltd. (SZ.000963), is a clinical stage biopharmaceutical company that focuses on the discovery and development of multi-domain based multi-specific biotherapeutics to address unmet medical need in the field of metabolic diseases and cancers. Doer was recognized as a National High-Tech Enterprise in 2018 and passed the review in 2021. It was accredited as one of the High-Tech Enterprise Research and Development Centers in Zhejiang Province in 2020 and was honored as a Hangzhou Quasi-Unicorn Companies from 2021 to 2022.

For more information visit www.hankunlaw.com

HOGAN LOVELLS

COUNSELS BIORETEC IN FIRST EVER DE NOVO GRANT FOR BIORESORBABLE METAL TRAUMA SCREW

WASHINGTON, D.C., 26 July 2023: Global law firm Hogan Lovells advised Bioretec Ltd., a pioneer in bioresorbable orthopedic implants, in securing Food and Drug Administration (FDA) De Novo premarket authorization for Bioretec's RemeOs™ trauma screw in the U.S. The screw is the first and currently only bioresorbable metal implant approved by the FDA. Read more about the approval here. https://bioretec.com/company/news/insider-information-fda-approves-bioretec-s-remeos-trauma-screw-as-the-first-bioresorbable-metal-implant-in-the-u-s-market-d3ed83cae2331a60

The FDA premarket authorization, which was granted 30 March, was based on clinical trials conducted in the ankle. Bioretec will launch the RemeOs™ trauma screws in the U.S. in collaboration with clinical professionals specialized in ankle fractures, which are one of the most frequently occurring fracture types among the adult patient population.

The RemeOs™ trauma screw had previously been granted the FDA's Breakthrough Device Designation for use in skeletally mature adults, as bioresorbable metals combine the surgical techniques of traditional metal implants and the patient-friendly care and benefits of last-generation bioresorbable polymer implants.

The Hogan Lovells team for Bioretec included Medical Device regulatory partners Jonathan Kahan and Randy Prebula, in addition to Director of Regulatory Affairs Jemin Jay Dedania and Senior Director of Regulatory Strategy Michael Kasser, all based in Washington, D.C.

For more information from FDA, please see here. https://www.fda.gov/news-events/press-announcements/fda-roundup-march-31-2023

For additional information visit www.hoganlovells.com

NAUTADUTILH

ASSISTS FOUNDING SHAREHOLDERS OF ROUTE MOBILE IN SELLING MAJORITY STAKE TO PROXIMUS

BRUSSELS, 18 July 2023: NautaDutilh assisted the founding shareholders of Route Mobile, an Indian cloud communications platform as a service (CPaaS) company, sell a majority stake in the company. Route Mobile is listed on NSE and BSE in India with a market capitalization of EUR 1.1 billion.

As a part of the agreement, some of the founding shareholders of Route Mobile will reinvest in a minority stake in Proximus Opal, a subsidiary of Belgium's digital services and communication provider Proximus Group, and the holding company of Telesign, Proximus' US-based affiliate. The combined group will have significantly expanded customer reach and would become the world's third largest player (based on messaging volume). Proximus' CPaaS portfolio will be significantly enhanced by the addition of Route Mobile's capabilities, particularly in the area of omnichannel. This will help to capture value from the current generative AI-driven transformation in customer engagement. Upon closing of the transaction, the CPaaS activities of the combined group will be led by Rajdip Gupta, CEO of Route Mobile, who will continue in his current role.

Geographically, Route Mobile's presence in the Indian sub-continent, Africa, Asia-Pacific and Latin America perfectly complements Telesign's presence in Europe and North America, giving the combined group global customer coverage in over 200 countries and territories and exposure to high growth markets.

NautaDutilh acted as Belgian counsel. The NautaDutilh core team consisted of Nicolas de Crombrugghe, Olivier Van Wouwe, Don Baudewyns, Hussein Dagher (Corporate & Finance), Vincent Wellens, Sigrid Heirbrant (GDPR, IP & Tech), Ken Lioen, Aurélien Lenaerts (Tax), Mauricette Schaufeli, Evi Mattioli, Jurriaan Bos (FDI & Competition), Philippe François and Frédérique Czanik (Employment).

"We are glad we can contribute to the partnership between Proximus' Telesign and Route Mobile, which will create a leading global communications platform (CPaaS)." says lead partner Nicolas de Crombrugghe.

For additional information visit www.nautadutilh.com

PRAC EVENTS
BULLETIN BOARD

Like millions around the globe, the COVID-19 pandemic has impacted our members and how we work.
Our industry follows others with a mix of restart and pause.
We meet in person where and when we can
while continuing to also meet and talk virtually face to face
Across the miles, oceans and regions
In varying places and at all hours of the day and night.
It isn't the same. We can all admit to that.
We pivot. We adapt.
What remains the same is our commitment to continue forming new bonds
and strengthening our long-standing ties with our friends and colleagues around the world.

Together, we will see it through.

PRAC Events — Stay Connected

As we reboot our own in-person conferences in line with other industry related events ,
PRAC delegates can ***STAY CONNECTED!***
Let us know your plans to attend upcoming industry events and we will put you in touch
with other attending PRAC Delegates prior to event start
Get on the List! Register for upcoming Event Connect: events@prac.org

PRAC Let's Talk!

Join us in 2023 for our live one-hour virtual meetings
PRAC - Let's Talk! events are open to PRAC Member Firms only
Register : events@prac.org

Visit www.prac.org for full event details

SKRINE

ASSISTS MITSUI & CO. IN STATS UK SHARE ACQUISITION

KUALA LUMPUR , 24 July 2023: We are pleased to share that Skrine acted as Malaysian legal counsel to Mitsui & Co., Ltd. ("Mitsui"), one of the world's largest trading and investment corporations, in respect of its share acquisition in STATS (UK) Ltd. ("STATS"). STATS is a global market leader in the field of pipeline repair equipment manufacturing and engineering services.

Skrine provided regulatory advice in respect of the acquisition, including advising on regulatory and environmental regime from a Malaysian law perspective and advised Mitsui on any potential implications where the operation of STATS is active in Malaysia.

This acquisition is part of Mitsui's strategy to integrate STATS' industry-leading pipeline equipment and technical engineering services which will strengthen Mitsui's business processes and provide new opportunities for growth in the areas of Carbon Capture and Storage (CCS) and hydrogen. STATS' expertise in the field of pipeline manufacturing and engineering services and Mitsui's global network will offer unlimited growth potential globally and accelerate the market for sustainable infrastructure maintenance.

The Skrine team was led by Senior Partner, To' Puan Janet Looi, Senior Associate, Wei Xian Tan, supported by Associate Samson Kong.

Media Release of this transaction can be accessed at:
https://lnkd.in/giv9vr32
https://lnkd.in/gE3f_zAj
https://lnkd.in/gfPqMuXf
https://lnkd.in/eg2KfjiR

For additional information visit www.skrine.com

SYCIP

HYDROPOWER BOOST: CHINA BANK IN IPO OF REPOWER ENERGY

MANILA, 25 July 2023: SyCipLaw was legal counsel to China Bank Capital Corporation in the Initial Public Offering (IPO) of Repower Energy Development Corporation (REDC), the hydropower arm of Pure Energy Holdings Corporation (PEHC). The IPO involved 200 million primary common shares, with an over-allotment option of up to 30 million secondary common shares, with an offer price of PhP5 per share. China Bank is the IPO's Sole Issue Manager, Lead Underwriter and Sole Bookrunner.

The IPO proceeds of Php1 billion (less taxes, costs and expenses) from the sale of the primary common shares are intended to partially fund REDC's existing hydropower projects, the development and acquisition of other renewable energy projects, and operating and capital requirements.

In a statement, REDC president and chief executive Eric Peter Roxas said, "[A] public listing is a key milestone for REDC, with majority of the use of proceeds allocated for the completion of two of its ongoing projects. This will lead towards fulfilling our goal of uplifting Filipinos' living standards through clean, accessible, and affordable energy consistent with the United Nations' Sustainable Development Goals."

Apart from hydropower, the PEHC group has member-companies involved in bulk water and distribution, solar and geothermal energy.

The SyCipLaw team included Melyjane G. Bertillo-Ancheta (lead partner), together with Hiyasmin H. Lapitan (partner), and Javierose M. Ramirez (senior associate).

Here are other articles on the IPO:

"Repower Energy Development Corp. joins the ranks of publicly-listed companies." The Philippine Stock Exchange, Inc. July 24, 2023 https://www.pse.com.ph/repower-energy-development-corp-joins-the-ranks-of-publicly-listed-companies/

"Repower Energy shares gain in P1.15 billion IPO." Business World Online, July 25, 2023 https://www.bworldonline.com/corporate/2023/07/25/535755/repower-energy-shares-gain-in-p1-15-billion-ipo/

"Tiu-led Repower gains on stock trading debut." Inquirer Business, July 25, 2023 https://www.philstar.com/business/2023/07/25/2283460/repower-market-debut

"Repower up in market debut." Philippine Star Business, July 25, 2023 https://www.philstar.com/business/2023/07/25/2283460/repower-market-debut

"Repower bucks PSEi dip, gains on market debut." The Manila Times, July 25, 2023 https://www.manilatimes.net/2023/07/25/business/top-business/repower-bucks-psei-dip-gains-on-market-debut/1902234

For additional information visit www.syciplaw.com

SANTAMARINA STETA

ADVISES SAMSONITE GLOBAL CREDIT RESTRUCTURING

MEXICO CITY, 14 July 2023: Samsonite International S.A., the leading global company in the lifestyle bag industry and renowned as the largest and most recognized travel luggage brand, has successfully concluded a substantial global credit restructuring valued at a total amount of $2,500’000,000.00 (two billion five hundred million dollars 00/100, legal currency of the United States of America).

By implementing this restructuring plan, Samsonite is well-positioned to navigate its financial commitments with reliability.

The legal counsel entrusted with carrying out this operation on behalf of Samsonite in Mexico was Santamarina y Steta, led by Jorge León-Orantes B., Ilse Bolaños A., and Mauricio Garibaldi B. These legal experts provided invaluable guidance and representation to the Mexican subsidiaries to guarantee the obligations of Samsonite International S.A. under the second amended and restated credit and guaranty agreement entered into on June 21, 2023.

For more information visit www.santamarinasteta.mx

PRAC 68th International Conference

October 7-10

New Delhi

Hosted by Kochhar & Co.

For more info visit www.prac.org/events.php

Event exclusive to member firms

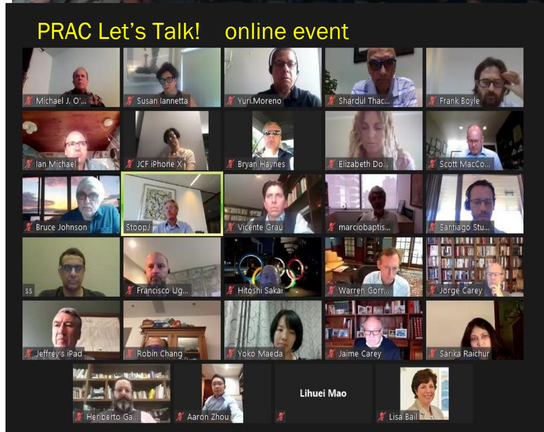
PRAC LET'S TALK!

PRAC @ NEW DELHI MICRO-CONFERENCE HOSTED BY KOCHHAR & CO.

NEW DELHI - November, 2022 PRACites around the globe gathered online for PRAC @ New Delhi micro-conference hosted by member firm KOCHHAR & CO. Congratulations to the entire Kochhar Team for a successful e-hosting!

Agenda
Opening Remarks - Jaap Stoop, PRAC Chair; Marcio Baptista, PRAC Vice Chair; Jeff Lowe, PRAC Corp Secretary
Greetings & Welcome - Rohit Kochhar, Chairperson and Managing Partner
Country Update - India - Pradeep Ratnam
Visual Presentation - Essense of India!
Kochhar Practice Update - M&A - Chandrasekhar Tampi
Kochhar Practice Update - Banking & Finance - Pradeep Ratnam
Firm update - Rohit Kochhar
Panel Discussion on "Regulation of Content on Social Media" - Moderator, Stephen Mathias, Kochhar & Co (Bangalore); Mark Brennan, Hogan Lovells (Washington); Mauricette Schaufeli, NautaDutilh (Amsterdam)

PRAC EVENTS



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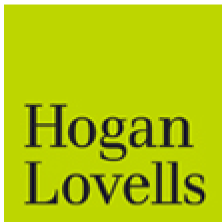

Government launches new agricultural dollar for certain regional economy products

Lawyers:

Carlos M. Melhem, Jorge I. Mayora, Esteban Gómez Moretto

By means of Decree No. 378/2023 ("Decree 378") published on July 24, 2023, the National Executive Branch established a new exceptional and transitory countervalue until August 31, 2023 for the conversion into Argentine pesos of foreign exchange for the collection of exports of products related to agriculture, livestock and fishing (the "Products"), contemplated in Chapter II relative to "Regional Economies" of Decree No. 194/2023, for those parties included in the Programa de IncrementoExportador para Economías Regionales (the "Programme"), mainly highlighting the following considerations:

Subject to the regulation of the Argentine Central Bank ("Central Bank"), a preferential exchange rate of AR$ 340 per U.S. dollar is established for the sale of the Products. Likewise, Decree 378 states that the Central Bank will implement the necessary mechanisms so that the settlement of foreign currencies under the Programme is made, at the exporter's choice (i) by crediting them to a special account whose remuneration is determined based on the evolution of the reference exchange rate of Central Bank Communiqué "A" 3500; or (ii) by applying the reference exchange rate of Central Bank Communiqué "A" 3500 to the subscription of Central Bank's internal Bills in U.S. dollars that may be converted into Argentine pesos.

The provisions of Decree 378 shall also apply to export of goods that require Sworn Affidavits of Sale Abroad.

Finally, Decree 378 authorizes the Ministry of Economy, until the end of the current calendar year, to issue 10-year U.S. dollar Bills, which will accrue an interest rate equal to that accrued by the Central Bank's international reserves for the same period and whose interest will be paid semiannually for the equity difference generated to the Central Bank by the performance of the transactions included in Decree 378.

This report cannot be considered as legal advice, or of any other kind, by Allende & Brea.

Tozzini Freire.
ADVOGADOS

Brazilian Patent and Trademark Office publishes new regulations on technology agreements

July 19, 2023

On July 11th, the Brazilian Patent and Trademarks Office (BPTO) published new regulations on the registration of technology agreements: Ordinances Nos. 26 and 27 of 2023. They make the formal and technical aspects of the registration process more flexible by incorporating the rules discussed by the BPTO's Board of Directors at the end of last year. Moreover, the main purpose of the new rules is to simplify the process for registering technology agreements by adapting it to the demands of the technology market.

After the Minutes of the Meeting convened by the presidency in December 2022 were published, the BPTO stated that the deliberations from this meeting would still need to be incorporated into the BPTO rules and the petitioning system itself.

Thus, with the publication of these ordinances, we will certainly have more security in relation to the application of the new BPTO guidelines for the registration of agreements:

- **Ordinance No. 26/2023:** establishes the administrative procedure for registering licensing and assignment of industrial property rights, technology transfer and franchise agreements.
- **Ordinance No. 27/2023:** implements new examination guidelines for registering the technology agreements mentioned above.

These ordinances revoke BPTO's prior rules for registration of technology agreements - Normative Instructions No. 16/2013, No. 39/2015 and No. 70/2017 and INPI/PR Resolution No. 199/2017.

The main modifications brought by these Ordinances for the registration procedure are:

- **Digital signatures:** in cases involving digital signatures by foreign parties, notarization and apostille/legalization are no longer required and digital signatures that do not meet the ICP-Brazil (Brazilian Public Key Infrastructure -PKI) standard are now admitted.
- **Initials:** initialing is no longer required on all pages of the agreements and their exhibits.
- **Signature by witnesses:** the signature of two witnesses is no longer required.
- **Corporate documents of the Requesting Party:** the presentation of the corporate documents of the assignee, franchisee, or licensee, located or based in Brazil (e.g., bylaws, articles of incorporation, etc.) and the Registration Form are no longer required.
- **Licensing of non-patentable technology:** the adoption of the non-patented technology licensing modality (know-how licensing) is recognized, according to the best international practices.
- **Payment of royalties for patent, industrial design, and trademark applications:** the payment of royalties under agreements concerning patent, industrial design and trademark applications will not be hindered, provided that these applications are filed before the BPTO. Thus, the BPTO recognizes that these assets, even if still pending applications, are subject to legal protection and have proprietary value.

With the publication of Ordinances No. 26 and 27 of 2023, which came into force on their publication date, the processes for registering and recording technology agreements become less bureaucratic, more straightforward, and faster – essential characteristics for business involving technologies protected by intellectual property.

The new rules are beneficial not only for registering new agreements, but also for fulfilling office actions and renewing agreements previously registered with the BPTO and their respective registration certificates.

The new regulations, as well as the position that the BPTO has been adopting in recent years, certainly reflect on the development and research of new products and technology, boosting innovation and the economy. The initiative meets the demand of the technology market, including attracting foreign investment to the country by streamlining the process for registering technology agreements.

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Posted on: July 17, 2023

SHAREHOLDERS' AGREEMENT IN A FAMILY OPERATED BUSINESS

By: Max S. J. Shilletto and Tommy M. Chan

Like families, no two family operated businesses are alike. However, many families strive to achieve harmony and prosperity for current and future generations. Family shareholders' agreements are an excellent opportunity to safeguard against risk, conflict, and the associated costs.

While some clients generally contemplate and implement shareholders' agreements at the start of their family business, you should consider reviewing your agreement on a periodic basis to determine whether your shareholders' agreement effectively addresses the evolving dynamics and concerns of your individual family circumstances.

For example, you should consider:

Death and Disability

When a key individual of the company suddenly dies or becomes disabled and is no longer able to perform their duties, insurance can provide a useful solution.

In the case of death, life insurance proceeds provide liquidity to the company for repayment of shareholder's loans to the deceased, payment of taxes, or to enable a buy out of the beneficiaries of the deceased's estate.

However, the value of the life insurance proceeds from the initial policy may no longer accurately reflect the cash flow needed in the event of a death (e.g., for payment of taxes). As a result, it is important to consider what other options may exist if additional life insurance is not available or is cost-ineffective.

In the case of incapacity, long time disability insurance is also useful in providing liquidity, for the disabled individual, their family and the company.

However, you should further consider whether or not an Enduring Power of Attorney specifically for your corporate affairs is appropriate (for example, appointing your business partner), which would be separate from your general Enduring Power of Attorney for the rest of you financial affairs (for example, appointing

your spouse).

Careful disability planning can minimize disruption to business operations, avoid deadlocks in decision-making, and set out adequate compensation for those assuming the incapacitated individual's role.

Direction

In the context of a lone family operated business, some clients may have a child who will continue to operate the business, while the other children do not to participate. Planning may be easier if the direction for each child is clear, but directions may change.

Where two or more unrelated business partners operate a single business, the family of a retiring, incapable, or deceased shareholder may not want to continue participating in the company, or the families of the immediate shareholders may want the business to continue, but do not want to work with each other.

While shareholders' agreement may include buyout ("shotgun") clause or other exit provisions, you should still consider whether the timing of the exit provisions are appropriate in your present circumstances. There should be a definitive, realistic timeline so the parties can plan their affairs accordingly.

Exasperation and frustration often mount simply because parties have differing expectations on the speed at which the other party operates or matters are addressed.

Expectations and Side Letters

You should also consider the nature of your business and its assets (and liabilities), and the expectations of your heirs and successors. While many clients strive to act fairly towards their family, it is more difficult to reach equality if assets are not easy to divide.

A shareholders' agreement may be able to ensure relatively equal value between shareholders at the time of separation. However, such value may not necessarily reflect equal opportunity in growth.

If the separation requires a significant amount of time to complete, and the growth of each asset is different, then the value of the assets each party receives may fail to line up at the end of the day. This may result in conflict among the family members regarding the equality and fairness.

In order to avoid this issue, you may also consider the use of side letters in conjunction with a shareholders' agreement to address these concerns.

For example, it may be helpful to explain to your children your view of fairness. You may be compelled to

assist a child who is less capable or has been less fortunate by providing that child with more. A careful explanation may curb the assumptions and expectations of another child who believes all siblings should be treated equally, and give pause to that child before they proceed with any legal action.

Culture and Values

Your company may have a personality, culture, or core values that you wish to preserve.

While companies can evolve and take on new businesses, you should consider whether there are any types of business that your family should be restricted from entering into, no matter how profitable.

It is possible to impose restrictions in a shareholders' agreement, but a side letter may also prove to be useful.

Conclusion

It is important to review your existing shareholders' agreement to ensure it continues to be effective as part of your overall business and estate planning.

The value of an existing shareholders' agreement may decrease if the agreement is not updated to meet the individual circumstances of your family business.

If you do not have a shareholders' agreement for your company, these are also important factors to consider in whether or not to have one in place.

A well-crafted shareholders' agreement will minimize the risk of litigation, and the associated cost, time, and stress.

To learn more about this topic, contact Max Shilleto, Arielle Lavender, Rutsu Shikano or any other member of the Estate & Wealth Advisory and Business Services Groups.

/Carey

News Alerts

SERNAC initiates technical consultation on consumer rights protection compliance standards

July 21, 2023

The National Consumer Service ("SERNAC") initiated a technical consultation to obtain the opinion of companies, experts and stakeholders on the standards, tools, and incentives for compliance on the protection of consumer rights.

The form mainly includes questions about the value assigned to the adoption of compliance plans, the incentives that suppliers have to implement them in their organizations, the role of the Certification Entities, the perception of the INN/ET1:2019 technical specification and possible actions that SERNAC can implement to facilitate the adoption of compliance plans.

The information gathered could drive future actions by SERNAC to strengthen and encourage the use of compliance tools.

The consultation will be available until August 11 at the following web site.

Our Consumer Law and Advertising team has an area specialized in compliance. If you require further advice on compliance standards applicable to consumer protection, do not hesitate to contact us.

***AUTHORS:* Guillermo Carey, Eduardo Reveco, Kureusa Hara.**

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Legal Commentary

July 18, 2023

New Private Funds Regulation - Higher Level and Higher Quality

Authors: Yin GE | Krystal HE

Overview

On July 9, 2023, the State Council of the People's Republic of China[1] promulgated the *Regulations on Supervision and Administration of Private Investment Funds* ("**Regulations**"), which will take effect from September 1st, 2023. According to the Q&A regarding the Regulations published by the China Securities Regulatory Commission ("**CSRC**") and the Ministry of Justice ("**Q&A**"), the Regulations are primarily intended to ensure financial security through controlling risk sources and to enhance the functioning of private funds to support the real economy. In addition, the Regulations aim to define the bottom line of regulatory supervision, strengthen interim and ex post supervision, and adopt a differentiated regulatory approach for regulating various types of private funds, especially venture capital funds.

Prior to the promulgation of the Regulations, the *Interim Measures on Supervision and Administration of Private Investment Funds* issued by CSRC in 2014 (the "**Interim Measures**") used to be the overarching rule to set the foundation for regulating the private funds market. But the Interim Measures have become insufficient over the years given its lower legislative level (as departmental rules issued by the industry regulator, compared to the Regulations issued by the State Council) and the rapid developments of the industry in the past decade. This has made the Regulations necessary to refine the legislative system for private funds and promote the high-quality development of the industry.

Highlights of the regulations

I. Differentiated treatments for different types of managers and funds

The Regulations provide the principle of differentiated treatment that CSRC will (i) conduct differentiated supervision and administration according to certain key factors such as business types, AUM, ongoing compliance status, risk control situations and (ii) adopt classified supervision and administration on various types of private funds, including private equity funds, venture capital funds and securities investment funds, etc.

[1] For the purpose of this newsletter, references to the PRC are exclusive of Hong Kong, Macau and Taiwan.

II. Enhanced supervision of relevant principals

The Regulations enhance requirements on private fund managers, their shareholders, actual controllers, senior management personnel and employees by summarizing and prohibiting activities that damage the interests of investors and disrupt the financial order and emphasizing duties and registration/filing matters of private fund managers.

III. Stricter and clearer penalties

Compared with currently effective rules, the Regulations provide stricter and clearer administrative measures for various non-compliance issues of private fund managers. The regulator intends to decrease the number of non-compliance cases by increasing the cost of violations by private fund managers.

IV. Implementing principles with flexibility

The Regulations intend to strike a balance between sticking to bottom line principles and providing for appropriate flexibility. For example, while the Regulations confirm that private funds must comply with regulatory requirements on the limit of investment layers (e.g., the Super Guidance), there is an exception that certain recognized types of funds (including any master funds, venture capital funds and government funds, which primarily invest in other private funds) will not be counted into such investment layers.

V. Foreign-invested fund managers and cross-border fundraising

The Regulations provide that the administrative measures for foreign-invested private fund managers will be separately formulated by CSRC and the relevant departments of the State Council in accordance with rules relating to foreign investment and the Regulations. This indicates that there may be new rules specifically applicable to foreign-invested private fund managers such as QDLP, QFLP and PFM WFOEs and JVs. We think it may be a positive development to have a separate rule taking into account such foreign-invested managers' unique features while at the same time providing a more unified regulation applicable to such managers.

The Regulations further provide that offshore institutions may not directly raise money from onshore investors to establish private funds and private fund managers must comply with the PRC rules to engage in business activities offshore. While there remains uncertainty on how to interpret the scope and definition of "direct onshore fundraising" by offshore institutions, our current general view is that this is consistent with the existing regulatory spirit applicable to onshore marketing/offering of offshore funds. From a literal reading, the legitimate practice of overseas asset managers establishing a WFOE or JV manager (such as QDLP or QFLP manager) to launch onshore funds should not be impacted by this provision.

Given the above provisions are very high-level, it is worth continuously monitoring the further developments and revisiting relevant risk analysis as necessary.

Outlook

For market players, it is important to have a reasonable expectation on the upcoming regulatory efforts. According to the Q&A, CSRC will, in accordance with the Regulations, amend the Interim Measures with respect to matters of fundraising, investment operation, information disclosure and implement differentiated supervision per business types, AUM, ongoing compliance status, risk control circumstances and the ability to serve investors; CSRC will also lead Asset Management Association of China to refine self-discipline rules on registration and filing, fund contract guidance and regulatory reporting as appropriate.

It is anticipated that implementing rules will be further formulated to support the Regulations and the market will benefit from the higher-quality administrative supervision. We will monitor these developments and provide updates as they occur.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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Edmond
Schlumberger

Implementation of the Company Mobility Directive: effects on cross-border and domestic transactions

6 July 2023

The transposition of the Company Mobility Directive of 27 November 2019 was eagerly awaited. The resulting Ordonnance and Decree not only implement the various requirements of this directive in a cross-border context, but also make some welcome changes to purely domestic operations.

It should be remembered that, in the wake of the liberal case law of the Court of Justice of the European Union, most recently in its *Polbud* judgment (see *CJEU, 25 Oct. 2017, C-106/16, Polbud-Wyskonawstwo sp. z.o.o.*), the European Commission undertook to relaunch the construction of a harmonised framework concerning so-called cross-border mobility transactions within the EU. Although this framework had already been set up for mergers (see *Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies*), albeit imperfectly, it was sorely lacking for divisions and, above all, cross-border conversions, the new term used by the Commission to designate the cross-border transfer of registered offices, an operation which until then had only been permitted for European companies.

The result was the adoption of a directive dated 27 November 2019 (*Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border transformations, mergers and divisions, OJEU L 321, 12 December 2019*), providing in particular for measures (i) to control abuse and (ii) to protect stakeholders in view of the change in *lex societatis* brought about by these transactions, and which had to be transposed by the Member States by 31 January 2023 at the latest.

Following the example of a number of Member States, France transposed the directive a few months late, having been given the legislative authority to legislate - as has become customary for this purpose - by executive order (*ordonnance*) under Law no. 2023-171 of 9 March 2023 containing various provisions for adapting to European Union law. However, the authorisation was broader than expected, in that Article 13 of the aforementioned law authorised the government, in addition to the actual transposition, to "*simplify, complete and modernise the rules governing mergers, divisions, partial transfers of assets and transfers of registered offices of commercial companies as provided for in Chapter VI of Title III of Book II of the Commercial Code*".

It was therefore to be expected that the text finally published by the government would not simply transpose the directive by dealing solely with cross-border mobility transactions, but would also make a more general adjustment to the regime for internal restructuring transactions. On the whole, these expectations have not been disappointed on reading *Ordonnance* 2023-393 of 24 May 2023, supplemented a few days later by its implementing Decree 2023-430 of 2 June 2023.

In addition to setting out a comprehensive framework for cross-border mobility transactions (I), these new texts make a number of changes, some of them significant, to domestic operations (II).

The regime for cross-border reorganizations

The provisions concerning these transactions are now grouped together in a single section of the Commercial Code (see art. L. 236-31 to L. 236-53 for the legislative part, and R. 236-20 to R. 236-40 for the regulatory part), on the understanding that the rules laid down for internal transactions in the three previous sections also apply to them on a subsidiary basis.

While the provisions of the Commercial Code resulting from the aforementioned *Ordonnance* and Decree deal successively with cross-border mergers, demergers, partial transfers of assets and conversions, those relating to mergers actually serve as a common core for the other three types of transaction.

The result is that for each of them:

- A unified procedure: in particular, a joint draft of the transaction, a written report from the directors of each participating company and an independent expert opinion on the financial terms of the transaction must be drawn up successively;
- Approval of the operation by the shareholders by a qualified majority: since the Directive requires that this majority be at least 2/3 and at most 90% of the votes, the *Ordonnance* transposes this requirement to the articles of association of SARLs and SASs, which cannot therefore provide for a majority below this floor or above this ceiling for the adoption of the operation, but remain free to set the cursor as they wish between these two limits;
- A compliance check carried out exclusively by the registrar of the commercial court within whose jurisdiction the participating company was initially registered: this check becomes more substantial, with the registrar being responsible for ensuring that the transaction is not carried out for abusive, fraudulent or criminal purposes. This leads to a significant lengthening of the timetable for the transaction, since the primary investigation period is set at 3 months from approval of the transaction, but may be extended several times for a total of up to 8 months;
- A right of withdrawal for shareholders who (i) would be exposed to a change in the *lex societatis* and (ii) have opposed the transaction, including holders of securities without voting rights and shareholders temporarily deprived of their voting rights: this right of withdrawal must be exercised by each shareholder within 10 days of approval of the draft terms of transaction by the shareholders' meeting and applies to all the shares held on the date of the request, and the company must, within the following 10 days, make an offer to buy back the shares, although the price offered may be challenged in court;
- Protection for employees and other creditors of participating companies: for the former, their opinion within the framework of the employee representative bodies must always precede publication of the proposed transaction and communication of the directors' report, and their right to participate in the management bodies must be preserved after the transaction; as for the latter, they will have a period of 3 months - compared with 30 days in an internal transaction - from publication of the transaction to claim for adequate safeguards.

Changes to the regime for domestic operations

In addition to a more readable layout that finally gives partial transfers of assets the specific place they deserve in the texts, there are two points of particular interest here:

- On the one hand, welcome corrections have been made to past blunders on the part of the legislator: we might mention in particular (i) the extension of the "quasi-simplified" merger regime to transactions involving an *SARL*, (ii) the restoration of the simplified partial transfer of assets in the presence of a parent or subsidiary in the form of *SARL*, or (iii) the reinstatement of the simplified merger regime for demergers between joint stock companies where the recipient companies hold the entire capital of the demerged company.
- Secondly, there is a genuine innovation resulting from the introduction into the Commercial Code of the partial division : in accordance with what Article 115 2° of the CGI allowed in order to make the operation tax-neutral, it is now possible to allocate directly to the shareholders of the transferring company the securities issued by the receiving company in consideration for the contribution. In addition, the legislation allows the shares given to the shareholders of the transferring company to be, in whole or in part, those of the transferring company, and not exclusively those of the transferee company, according to an allocation that must be specified in the proposed transaction, and which might not be made in proportion to the shareholding of the shareholders of the transferring company, a point that is bound to give rise to discussion.

Hogan Lovells

Updates on Mainland China and Hong Kong MOU to Promote Cross-Border Data Flow within GBA

10 July 2023

On June 29, 2023, the Cyberspace Administration of China ("CAC") and the Innovation, Technology and Industry Bureau of the Hong Kong Special Administrative Region ("Hong Kong") Government ("HKITIB") signed the Memorandum of Understanding to Facilitating Cross-boundary Data Flow Within the Guangdong-Hong Kong-Macau Greater Bay Area ("GBA") ("MOU").

On June 29, 2023, the Cyberspace Administration of China ("**CAC**") and the Innovation, Technology and Industry Bureau of the Hong Kong Special Administrative Region ("**Hong Kong**") Government ("**HKITIB**") signed the Memorandum of Understanding to Facilitating Cross-boundary Data Flow Within the Guangdong-Hong Kong-Macau Greater Bay Area ("**GBA**") ("**MOU**").

While the details of the MOU are yet to be published, the Secretary for HKITIB noted in his speech on June 30, 2023 (see here) that the CAC and the HKITIB will introduce a set of implementing rules under the MOU aimed at reducing the significant challenges of managing cross-boundary transfers of personal data from mainland China to Hong Kong. Whether this means a streamlined application of the CAC's security assessment procedure [please see our client briefing here], the introduction of specific data handling standards for Hong Kong or some other measure remains to be seen.

The MOU will only address Guangdong-Hong Kong transfers, with the aim of supporting efforts to develop the GBA as a tech-finance hub. It is noteworthy that while Mainland China has developed a complex regulatory regime for international transfers of personal data, there has been very little progress on long-promised legislative reforms to Hong Kong's Personal Data (Privacy) Ordinance (the "**PDPO**"). Section 33 of the PDPO, which would regulate transfers of personal data, has not yet come into force.

The output from the MOU will be closely watched, not the least because the approach taken may offer a pathway to relieve the significant challenges multinational organizations have been facing these past months seeking to comply with the CAC's security assessment procedure and more recently the personal information privacy impact assessment report requirements introduced as part of the standard contractual clauses filing applicable to data transfers falling below the thresholds for security assessment [please see our client briefing here].

Authored by Mark Parsons, Tommy Liu, Flora Feng and Kiki Dong.

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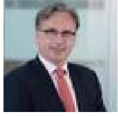

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SEBI issues a notification introducing the 'Securities and Exchange Board of India (Alternative Investment Funds) (Second Amendment) Regulations, 2023'.

The Securities and Exchange Board of India (SEBI) issued a notification on June 15, 2023, vide notification no. SEBI/LAD-NRO/GN/2023/132 (**Notification**). This Notification introduced the SEBI (Alternative Investment Funds) (Second Amendment) Regulation, 2023 (**Amendment Regulation**), which brings forth substantial modifications to the current framework under the SEBI (Alternative Investment Fund) Regulation 2012 (**SEBI Regulation**). These include revisions to the norms pertaining to addition of a new category of Alternative Investment Funds (AIFs), the introduction of the requirement for issuing units in dematerialized (demat) form, the mandatory appointment of a compliance officer, and valuation.

Overview of the Notification

Addition of a new category of AIF called Specified Alternative Investment Fund.

The addition of the new category of AIF i.e., Specified Alternative Investment Fund expands the existing three categories of AIFs, namely Category I AIF, Category II AIF, and Category III AIF, as outlined in Regulation 3(4) of the SEBI Regulation. The introduction of the Specified AIF category provides further diversification and opportunities for investment within the alternative investment landscape, subject to the criteria and guidelines set by SEBI.

Introduction of 'Corporate Debt Market Development Fund' (CDMF)

CDMDF is an AIF specifically established to make investments in accordance with the provisions outlined in Chapter III-C of the SEBI

Regulation. The amendments with regards to CDMDF have been detailed below:

- **Registration of CDMDF:** The CDMDF shall be structured as a trust, and its establishment requires the execution of a registered deed in accordance with the provisions of the Indian Registration Act of 1908. The CDMDF shall operate as a close-ended fund, meaning that it has a predetermined duration of 15 years from the date of its initial closing. The CDMDF are made available for investment to Asset Management Companies (AMCs) and specified debt-oriented schemes of mutual funds.

- **Eligibility criteria:** For purchase of CDMDF during market dislocation the eligibility criteria are outlined as follows:
  - The corporate debt securities must undergo listing and hold an investment-grade rating.
  - The maturity period for these securities in residential terms should not exceed 5 years from the purchase date.
  - Securities that possess no potential for default or negative credit-related information or opinions.

- **Disclosure Norms:** The portfolio of the CDMDF will be made available to the unitholders on a fortnightly basis. Additionally, the net asset value (NAV) of the CDMDF will be disclosed to the unitholders on a daily basis. These regular

disclosures ensure transparency and provide timely information to the unitholders regarding the fund's holdings and NAV.

- **Compliance with governance mechanism:** The CDMDF will select and appoint a trustee company. The appointment of both the board of directors of the trustee company and the manager of the CDMDF necessitates prior approval from SEBI.

  The trustee company is authorized to engage solely in activities where it acts as the trustee of the CDMDF, unless prior written consent is obtained from SEBI. In terms of composition, two-thirds of the members on the board of the trustee company must be independent directors who do not have any affiliation with the sponsor or manager.

  The appointment of any individual as a director of the trustee company is subject to the prior approval of SEBI. Furthermore, an audit committee must be established within the trustee company to oversee and assess compliance with the provisions outlined in the placement memorandum.

Issuance of units in dematerialized form by AIFs.

This amendment inserted a new clause into Regulation 10 of SEBI Regulation, mandating every AIF to issue units in dematerialized form, subject to conditions specified by the Board. The objective behind this amendment is multi-fold:

- Enhanced monitoring and transparency.
- Mitigation of operational and fraud risks.
- Ease of transfer and transmission.
- Administrative efficiency.

Appointment of Compliance Officer.

In accordance with the Amendment Regulation, each AIF is mandated to appoint a compliance officer who holds the responsibility of overseeing adherence to the provisions of the act, rules, regulations, notifications, circulars, guidelines, and any other directives issued by SEBI. The compliance officer must fulfill the eligibility criteria specified by SEBI.

Modification in valuation procedure.

In accordance with the Amendment Regulation, the manager of an AIF bears the responsibility of ensuring that the AIF appoints an independent valuer who meets the criteria specified by the SEBI on a periodic basis.

Conclusion

The Amendment Regulations have introduced significant revisions to the SEBI Regulations. These changes provide enhanced flexibility in addressing the challenges posed by illiquid investments during the liquidation or winding-up process. The amendments are aimed at improving regulatory efficiency by aligning them with market conditions and rectifying any inconsistencies. Additionally, the amendment pertaining to the CDMDF will play a pivotal role in boosting confidence in the corporate bond market and fostering greater investor participation.

For further information, please contact Ms. Sharmil Bhushan info@kochhar.com

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CITY-YUWA PARTNERS

Will Establishment of the Green Guidelines under the Antimonopoly Act Open the Way to Resolve "2024 Issue" of Transportation Industry?

-From "Defensive" Compliance for Preventing Cartel to Efficiency Creating "Offensive" Business Alliance-
2023.7.12

1. Expansion of Business Alliances to Resolve the "2024 Issue" of Transport Industry and the Antimonopoly Act as an Obstacle

On June 19, 2023, Japan Post Group and Yamato Group jointly announced a business alliance ("Business Alliance") for a mail delivery business under the heading "Basic Agreement on Promotion of Sustainable Logistics Services," whereby mails collected by Yamato Group will be delivered by post office. Looking back on the history of Yamato Group's investment and passion for the mail delivery business, the Business Alliance seems to be a tough decision for Yamato Group.

As a background to the Yamato Group's decision, it is reported that application of Act on the Arrangement of Related Acts to Promote Work Style Reform to the transportation industry, which had been suspended, will become effective on April 1, 2024, and the upper limit of overtime work for truck drivers of 960 hours a year will be enforced with a criminal penalty, thereby enhancing the restriction of working hours per driver. This is known as "2024 issue." The danger of not being able to transport cargo is approaching near, and transportation industry is not in a situation in which the industry has options to provide sustainable logistics services.

However, how will the Business Alliance be evaluated under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade ("Antimonopoly Act")? Since delivery is a core part of the mail delivery business, business alliance that integrates delivery is similar to a business transfer. In the mail delivery business, Yamato Group, which provides services ranging from collection service to delivery service, seems to have been the largest and virtually sole competitor of Japan Post Group in the nationwide market of Japan and therefore, its impact on competition is not expected to be small[1]. I would infer that both companies certainly consulted with the Japan Fair Trade Commission ("JFTC") in advance and/or has taken other methods to make sure that they would not violate the Antimonopoly Act. However, in light of the current practice under the Antimonopoly Act, if the Business Alliance had an effect of restricting competition, the purpose of improving the driver's work environment would not have been a sufficient justification.

2. Establishment of Green Guidelines and Close-Up of View of Cooperative Logistics

Japan Post Group and Yamato Group announced that contributions to alleviate the 2024 issue (e.g., lack of truck drivers) and contributions to tackling environmental issues (e.g., carbon neutral) are the main purposes of the Business Alliance. In addition, on March 31, 2023, JFTC published the "Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act[2]," which is also known as the Green Guidelines. Is the overlap of timings of these two events a coincidence? The argument that enhancement of efficiency by eliminating redundancy in delivery will contribute to greenhouse gas reductions may be difficult to demonstrate quantitatively, but there may be an argument for it qualitatively at least.

The Green Guidelines are attracting attention not only as guidelines under the Antimonopoly Act in efforts to reduce greenhouse gas, but also as the first guideline to present JFTC's views on business alliances in general. The Green Guidelines also set forth in the "Basic Concept" that in many cases, the activities of enterprises toward the realization of green society will not pose problems under the Antimonopoly Act. Such wording can be read that JFTC actively supports companies in their efforts to reduce greenhouse gas.

The Green Guidelines also divide the acts into three categories, which are acts with no anti-competitive effect ("First Category"), acts with only anti-competitive effect ("Second Category"), and acts with both anti-competitive effect and pro-competitive effect ("Third Category"), and made overall consideration of the anti-competitive effect

1 The author does not have more information than what has been published about the Business Alliance. Therefore, the author has no opinion on whether or not the Business Alliance has any impact on restricting competition.
2 https://www.jftc.go.jp/en/pressreleases/yearly-2023/March/230331.html

and pro-competitive effect on the lawfulness of the Third Category, by taking into account the reasonableness of purposes and appropriateness of means. Furthermore, the Third Category is broadly divided into establishment of voluntary standards and business alliances, and cooperative logistics are cited as one example of business alliance. The Green Guidelines contemplate the cooperative logistics of shippers.[3]

Cooperative logistics by shippers have appeared a couple of times in JFTC's Consultations Case Reports[4]. The Green Guidelines, however, can be read that JFTC is actively promoting cooperative logistics due to the addition of the wording "Cooperative logistics are not only expected to streamline logistics, but also able to reduce greenhouse gas emissions thereby, depending on cases. In such cases, it can be considered that cooperative logistics can contribute to the realization of green society." (Part 1, Section 3(2) B (E)) as well as the examples of reduction of greenhouse gas, which refocus on cooperative logistics.

3. Factors to be Considered in Determining the Lawfulness of Cooperative Logistics by Shippers in the Green Guidelines

The factors to consider under the Antimonopoly Act concerning cooperative logistics listed in the Green Guidelines are as follows (Part 1, Section 3(2)B(E)), which are not anything new:
- It is only incidental to the main business of purchasers of the logistics service (shippers), and it has little impact on price of product. Therefore, competition is unlikely to be substantially restrained compared with joint production or joint sales.
- However, when the total share of purchasers of the logistics service (shippers) participating in cooperative logistics in the procurement market for logistics services is high, competition in the procurement market may be substantially restricted.
- In addition, a high proportion of cost of products sold by shippers may encourage coordinated conducts among shippers and substantially restrict competition for the product.
- Agreement on price or quantity of product substantially restrains competition. Therefore, in the case that prices and quantities of products sold are shared among competitors through cooperative logistics and the competitors agree on price increases, it will be regarded as a cartel.

The lawful case (Example 30) is a joint delivery of three retailers, but it is obviously a lawful case with factors which are as follows: (a) the three retailers take necessary measures to block the transfer of information on price, quantity, etc. of the goods; (b) the ratio of cooperative logistics cost to the selling cost of the goods is extremely small; and (c) there are various enterprises in the procurement market for the delivery service, and the total market share of the three retailers is about 10%. On the other hand, unlawful case (Example 31) is a mere case of price cartel. Neither of these cases are helpful. In particular, (c) above means that there are numerous other shippers and therefore, (c) is often satisfied.

Many cooperative logistics cases that improve efficiency appear to be somewhere between clearly lawful and clearly unlawful. In such cases, the interpretation of issues that cannot be fully understood from the Green Guidelines and the Consultation Case Reports as explained below becomes an issue.

4. Issues that Cannot be Fully Understood from the Green Guidelines and the Consultation Case Reports

(1) Is it possible to stop competition in terms of quality of logistics services?

One of the reasons why joint delivery between competing enterprises did not necessarily progress is that delivery was one of the services in competition. If shippers compete for delivery, joint delivery will reduce costs, but will halt competition for some of the services. If delivery bases and routes are consolidated thereby, some service outages may become irrecoverable. Furthermore, reduced costs may not pass on to the shippers, who are the customers, and solely be used to improve the driver's work environment.

Thus, if there is deterioration in the quality of services due to reduction in costs, then there will be Third Category

[3] Therefore, the Business Alliance mentioned above between Japan Post Group and Yamato Group is not directly related to the items of cooperative logistics provided in the Green Guidelines. Case No. 8 of the FY2018 Consultation Case Report discusses cooperative transportation among competing carriers in the main transportation routes and provides improvement of drivers' work conditions as a reason for cooperative transportation. However, the size of joint business provided in Case No. 8 is small.
[4] For example, in Case No. 6 of the FY2020 Consultation Case Report published on June 9, 2021, there was a case where "15 manufacturers of office equipment set up delivery bases in various places and jointly deliver office equipment from the delivery bases to the designated delivery locations of the customers."

issue in which it is determined that there are both anti-competitive effect and pro-competitive effect on competition. However, it is not necessarily clear how JFTC thinks about this issue.

There might be many cases in which excessive competition in delivery services returns to an appropriate level However, the Antimonopoly Act does not necessarily justify an agreement between competitors to restore excessive competition to an appropriate level. According to the description in the Green Guidelines, JFTC is perhaps only looking at the impact on product prices.

(2) Are measures to block the transfer of information at minimum necessary level?

Joint delivery by shippers may become more efficient if it is made between competitors (i.e., delivery of same type of goods to a common customer), and since the aggregation of goods among a few number of same type of certain shippers will be carried out repeatedly, there is a potential to significantly improve efficiency through AI which will learn the delivery statuses.

However, in many cases, information on to which customers products are sold, when the products are sold, and what products are sold is important sales information. If joint delivery is made, there is a possibility that such sales information will leak among shippers making joint delivery. Moreover, the response to rivals' actions will vary from shipper to shipper and may facilitate competition by making it easier for shipper to sell goods to rivals' customers. However, this may also lead to a coordinated actions among shippers in which natural segregation of areas will occur, in which each of the shippers decides not (i) to get involved in area of business which multiple shippers are good at and focus on or (ii) to deal with rivals' customers. That is why the measures to block the transfer of information were expected in cooperative logistics among shippers up to now[5].

However, the measures to block the transfer of information, which had been proposed as a matter of course in the past may hinder the analysis of optimal delivery patterns, etc., and may hinder the improvement of efficiency. In addition, the measures to block the transfer of information within a company group can become a major problem in personnel allocation, and this in and of itself can become a reason for companies to hesitate to form a business alliance. For example, if it becomes necessary to take actions, such as making it impossible for employees, who engage in work involving other companies' information, to return to their original departments, it will become difficult to internally allocate personnel. However, if such work is completely conducted by someone outside the company, corporate governance will no longer work.

As explained above, with respect to business alliances to achieve a fundamental pro-competitive effect, it is not necessarily clear how JFTC thinks about the necessity and degree of strength of measures to block the transfer of information if it is unavoidable for business alliances to include acts that are considered to have an anti-competitive effect including exchange of business information. The measures to block the transfer of information that are not at minimum necessary level may also make the business alliance meaningless.

In Case No. 2 of Consultation Case Reports of the FY2022 released by JFTC on June 30, 2023, Carrier X has a real-time tracking service system for packages and a shipper asked Carrier X to track packages of Carrier X's competitors with this system and therefore, Carrier X requested its major competitors to participate in the joint tracking service. The points of this case are that (a) operation of joint tracking service is entrusted to Company P, which has no capital ties with Carrier X, (b) Carrier X and each carrier cannot check information other than their own transportation status, (c) each shipper cannot check information other than the transportation status of package requested by such shipper, and (d) information such as fares is not entered into the system, in order to prevent the backflow of sensitive information. JFTC concluded that there is no problem under the Antimonopoly Act. This case can be deemed as a case in which the measures to block the transfer of information was taken at a minimum necessary level. This case shows that the measure, in which shipper's or carrier's proposal of innovations to improve efficiency, outsourcing of their operation to a third party with no capital ties, and aggregation of information at such third party, is one of the measures to block the transfer of information.

5. Is JFTC trying to change the way law enforcement should be?

Joint delivery by shippers could have been useful means to solve the 2024 issue, but as mentioned in 4 above, there were still factors that caused the shippers to hesitate. JFTC's past published cases were also obvious lawful cases in which the shared costs were low and information sharing was blocked. It could therefore be understood from these published cases that it was necessary to pile up the elements of legality which might be deemed as excessive, in order to avoid violating the Antimonopoly Act and therefore, cooperative logistics must be considered in the context of "defensive" compliance.

However, returning to the case of the Business Alliance between Japan Post Group and Yamato Group, the Business Alliance was a substantial integration in the delivery market (in which one of them withdrew), and the impact on competition was not considered to be small. Is it possible to explain the lawfulness of the Business Alliance under the existing concepts of the Antimonopoly Act?

JFTC explained that the Green Guidelines were compiled by collecting and organizing the guidelines and case studies published to date, and not by establishing new standards. On the other hand, there is an impression that JFTC may take a more tolerant stance toward the realization of green society.[6] JFTC has clearly indicated its willingness to actively provide consultations to business enterprises on individual cases.

In addition to reducing greenhouse gas, the Green Guidelines also state that "It is highly possible that the analysis framework and other matters indicated in the Guidelines can also be applied to the activities of enterprises, etc. toward the achievement of the Sustainable Development Goals ("SDGs") implemented similarly for socially and publicly desirable objectives, considering the characteristics of acts conducted as such activities." (Introduction-2). The heading of the Business Alliance between Japan Post Group and Yamato Group was "Basic Agreement on Promotion of Sustainable Logistics Services," and the resolution of 2024 issue was precisely a head-on challenge to the sustainability of transportation industry.

For this reason, the Antimonopoly Act to date was only "defensive" compliance in preventing the exchange of information and business alliances among competitors from falling under cartel, and now it seems to be an opportunity for JFTC to turn "offensive" in which enterprises can actively propose and consult with JFTC on an audacious business alliance that has not existed before. In particular, although there was a hesitation up to now to discuss the minimum necessary level of measures to block the transfer of information, it might now become possible to have a head-on discussion on the need to have a certain amount of information exchange for reduction of greenhouse gas and to have sustainable logistics. This could be a significant turning point in transportation industry which is facing the 2024 issue.

6. Remaining theoretical issue – time lag in efficiency

Improving the competition in transport industry benefits all shippers, carriers, drivers and consignees and therefore, agreements, including those among competitors and business counterparties, which cover up to rectification of certain excessive competition, may be beneficial in the long term, including shippers and consignees, even if they are temporarily anti-competitive. In particular, avoiding the fatal situation in which the cargo cannot be transported due to the 2024 issue will greatly benefit both shippers and consignees.

[5] In addition to the case mentioned Footnote No.4 above, there are Case No. 4 in 2004, Case No. 6 in 2015, Case No. 7 in 2016 and Case No.4 in 2021 of Consultation Case Reports.

[6] Yusuke Takamiya "Some Considerations from the Characteristics and Practical Perspectives of the Green Guidelines" (Fair Trade, No. 872 (2023), p. 22)

According to the conventional theory of the Antimonopoly Act, it was considered that a wide range of benefit of efficiency, which will occur later, would not justify the substantial restraint of competition. However, the reduction of greenhouse gas will inevitably result in the spread of benefits to non-participants of transportation industry, and there will be a time lag in the occurrence of benefits. Therefore, the Green Guidelines may be deemed as having opened the door to study theoretical questions about acts which cause a wide range of efficiency after going through a time lag such as the time lag mentioned above.

End

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High Court reinstates Remand Authority of the Malaysian Anti-Corruption Commission

18 JULY 2023

On 7 June 2023, we issued the alert titled "High Court curtails Remand Authority of the Malaysian Anti-Corruption Commission". In the alert we discussed the ground-breaking decision of the Termerloh High Court in ***Public Prosecutor v Sathivel a/l Subramaniam & 5 Others*** (Criminal Application No. CB-43(A)-1-05/2023) where the learned Judicial Commissioner Roslan Mat Nor held that the Malaysian Anti-Corruption Commission ("**MACC**") cannot rely on the Criminal Procedure Code ("**CPC**") to remand individuals for investigations conducted under the Malaysian Anti-Corruption Commission Act 2009 ("**MACC Act**"). Perhaps not surprisingly, the MACC has appealed the decision to the Court of Appeal[1] and the matter is set for hearing on 20 July 2023.

In the recent news article dated 13 July 2023 by ***The Star*** titled "MACC can get remand under CPC", it has been reported that Judge Abu Bakar Katar of the Johor Bahru High Court held that the MACC can obtain a remand application under Section 117 of the CPC. His Lordship stated that the MACC, upon making an arrest has the power to choose whether to apply for a remand under Section 117 of the CPC or bail in accordance with Section 49(2) of the MACC Act. There is no compulsion for the MACC to rely only on Section 49(2) of the MACC Act contrary to the Termerloh High Court decision.

Judge Abu Bakar Katar further stated that "Parliament enacted the MACC Act to tackle corruption and that needed to be given priority. The provisions of Section 49 of the MACC Act cannot be read rigidly to the point that they affect the commission's investigation powers. The court also feels that the provisions of Section 49 of the Act need to be read with Section 29(3) during its investigation, which allows for remand applications under Section 117 of the CPC."

This decision poses an interesting situation, as there are currently two conflicting High Court decisions on the powers of remand of the MACC i.e. whether the MACC may rely on the remand procedure under Section 117 of the CPC. Due to this, it would be imperative to follow the proceedings in the Court of Appeal closely, to obtain a better understanding on the legal position that will ultimately be adopted in this country.

Case note by Lim Koon Huan (Partner), Manshan Singh (Partner) and Ho Pui Yan (Associate) of the White-Collar Crimes Practice of Skrine.

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[1] See ***Suruhanjaya Pencegahan Rasuah Malaysia v Muhammad Haizatt Fitri Bin Wahab & 5 Others*** (Criminal Appeal No.: C-06A-7-05/2023).

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Santamarina + Steta

S+S UPDATES

CRE PUBLISHES A REGULATION THAT INVALIDATES THE PREVIOUS REGULATIONS RELATED TO THE SUSPENSION OF DEADLINES AND LEGAL TERMS DUE TO THE COVID-19 PANDEMIC

JULY 2023

EXECUTIVE SUMMARY:

- On July 13, 2023, the Energy Regulatory Commission published the Regulation of the Energy Regulatory Commission, invalidating the Regulations A/001/2021 and A/004/2023.
- This Regulation invalidates the previous regulations related to the suspension of deadlines and legal terms at the CRE due to the COVID-19 pandemic.
- This Regulation shall take effect upon its publication in the Federal Official Gazette.

On July 13, 2023, the Energy Regulatory Commission ("CRE") published on the National Commission for Regulatory Improvement's ("CONAMER") portal the *Regulation of the Energy Regulatory Commission invalidating the Regulations "A/001/2021 establishing the suspension of deadlines and legal terms at the Energy Regulatory Commission as a preventive measure to combat the spread of the Coronavirus COVID-19" and "A/004/2023 of the Energy Regulatory Commission resuming deadlines and legal terms in an orderly and gradual manner, modifying the previous A/001/2021 which established the suspension of deadlines and legal terms as a preventive measure to combat the spread of the Coronavirus COVID-19" (the "Regulation").*

This Regulation invalidates the previous regulations related to the suspension of deadlines and legal terms at the CRE due to the COVID-19 pandemic.

With the end of the health emergency, the CRE will now observe deadlines and legal terms in accordance with laws and regulations and will invalidate the phased resumption of deadlines, as well as processes requiring the obtaining of folios.

KEY ASPECTS

This Regulation invalidates the two previous regulations implemented by the CRE in response to the COVID-19 pandemic. The first invalidated regulation is "A/001/2021," which established the original suspension of deadlines and legal terms within the CRE. The second invalidated regulation is "A/004/2023," which modified the first regulation and provided for the orderly and phased resumption of deadlines and terms with processes requiring the obtaining of folios.

The World Health Organization announced the end of the global health emergency due to COVID-19. Following this, the Federal Government issued a decree terminating the extraordinary measures related to general health. As global emergency-related activity has decreased and the situation in Mexico is under control, the reasons requiring immediate attention have diminished.

As a result, the CRE has determined that the emergency situation that led to the issuance of the aforementioned regulations has concluded. Consequently, these regulations and all actions taken to comply with them are considered unnecessary.

The CRE will now observe deadlines and legal terms according to the provisions stipulated by the law. This will prioritize the order of precedence, serve the public interest, and be implemented to the best of the CRE's capabilities.

This Regulation shall take effect upon its publication in the Federal Official Gazette, providing clarity and guidance for the CRE's future operations in line with the new circumstances brought about by the conclusion of the COVID-19 emergency situation.

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Consultation links:
https://cofemersimir.gob.mx/portales/resumen/55498

Digital General Meeting of Legal Entities under Private Law Act

Corporate law 07-07-2023

Meetings of management and supervisory boards can be conducted entirely in a digital manner, subject to any conditions specified in the articles of association or regulations, with the understanding that certain restrictions may apply from a tax perspective. Pursuant to the Temporary Covid-19 Justice and Security Act (url: https://wetten.overheid.nl/BWBR0043413/2020-12-17), legal entities were formally permitted to conduct completely digital general meetings. However, the respective provision ceased to be effective on 1 February 2023. At present, general meetings are restricted to physical attendance or, if allowed by the articles of association, in a hybrid format that involves remote participation through electronic communication methods.

On 7 December 2022, a consultation was published for a draft bill proposing the implementation of fully digital general meetings of a public limited company ('naamloze vennootschap' or 'nv'), private limited companies ('besloten vennootschap' or 'bv'), association (including the association of owners ('Vereniging van Eigenaars', or 'VvE'), cooperative, mutual insurance association, European Public Limited Company (SE) and European Cooperative Society (SCE). The draft bill introduces additional requirements for both fully digital and hybrid general meetings. In addition, it aims to simplify and modernise the digital convocation process. The consultation period

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→ Listed Companies (url: /en/our-expertise/industries/listed-companies)

concluded on 6 February 2023.

Requirements for fully digital and hybrid meetings
Similar to the hybrid meetings, fully digital general meetings will be optional. The draft bill outlines the following conditions for fully digital or hybrid general meetings:

- The articles of association of public limited companies, private limited companies, cooperatives and mutual insurance associations must explicitly include provisions for conducting fully digital or hybrid general meetings. Hence, any nv, bv, cooperative, mutual society, SE or SCE aiming to have the option of fully digital general meetings should amend its articles of association.
- The general meeting of members of associations and VVEs must authorise the board for conducting hybrid as well as fully digital general meetings of its members.
- The participant (shareholder or member) can be identified. The choice of identification method is left at the discretion of the legal entity.
- Participants have the opportunity to exercise their voting right in real time. The articles of association may incorporate a provision on digital voting,
- Participants can actively engage in the meeting by both listening to the proceedings ('hearing') and taking part in the deliberations ('speaking') through a two-way audio-visual means of communication (i.e., with visuals and sound).

Digital convening notice simplified and modernised
The draft bill introduces a set of revised several requirements for digital convening notices:

- The prerequisite for the party to whom the convening notice is sent by electronic means to have consented to receiving convening notices by electronic means will no longer be applicable.
- The obligation for a non-listed public limited company to announce the convening notice in a national daily newspaper will be lifted. The meeting may be convened by means of a digital public announcement which is directly and permanently accessible until the

commencement of the general meeting (e.g., by posting it on the website).

If the general meeting is conducted in a hybrid or fully digital form, the convening notices of all legal entities must include the procedure for participating in the general meeting and exercising the voting rights through electronic communication channels.

Transitional law

Four transitional provisions are proposed:

1. A convening notice sent before the Act takes effect will continue to be valid once it enters into force, provided that it complied with the statutory requirements applicable at that time.
2. Until one year after the date of entry into force of the Act, a general meeting may also be conducted electronically in accordance with the law and the articles of association of the legal entity as they read before the Act entered into force. Accordingly, legal entities have one year after entry into force to amend their articles of association.
3. A provision in the articles of association that refers to a statutory provision or reflects its content prior to the Act's enactment will be deemed to refer to the new statutory provision after the Act entered into force, unless such interpretation contradicts the intended meaning of the provision.
4. Any provision in the articles of association of an association or a VvE that pertains to the exercise of voting rights through electronic means or participation of a person entitled to vote via electronic means of communication will also be considered applicable in the case of a fully digital general meeting after the Act comes into effect. This principle remains valid unless such interpretation directly conflicts with the intended meaning of the provision.

Follow-up steps

The bill is expected to be forwarded to the Advisory Division of the Council of State for its opinion in 2023. The timing of the submission to the Dutch parliament is currently unknown. Amendments could be made to the

draft bill, both prior to submission to parliament and during the legislative process. We will update this blog as soon as any new developments arise.

Arias

NICARAGUA

LAW TO AMEND THE ORGANIC LAW OF TELCOR

July 2023 | Nicaragua

On June 30, 2023, Law No. 1156 entered into force with its publication in La Gaceta, Diario Oficial No. 117, which amends Decree-Law No. 1053 "Organic Law of the Nicaraguan Institute of Telecommunications and Postal Services (TELCOR)".

The reform incorporates the following fundamental aspects:

The Customer Service Centers (CAP) and administrative delegations in the national territory are introduced, thus changing the figure of agencies and concessionaires.

Establishes objects and functions corresponding to the internal organization and attributions of a decentralized telecommunications sectoral regulatory entity.

Authorizes TELCOR to propose public policies regarding the access and availability of audiovisual and postal telecommunications services.

Implementation of experimental "Sandbox" regulation to allow operators to provide currently unregulated services for a period of time and in a specific geographic area, to experiment with new business models controlled and supervised by TELCOR.

If you require advice regarding this matter, please do not hesitate to contact us through any of our official communication channels.

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The new section 10L – A seismic shift to Singapore's foreign-sourced income exemption regime?

DENTONS RODYK

July 12, 2023

I. Introduction:

Changes to Singapore's Foreign-Sourced Income Exemption Regime (**FSIE**) in the form of a new s10L of the Income Tax Act 1947 (**ITA**) were recently proposed by the Ministry of Finance (**MOF**). These changes formed part of the draft Income Tax (Amendment) Bill 2023 that was open for public consultation from 6 June to 30 June 2023.

S10L, if enacted in its proposed form, will allow Singapore to tax gains from the sale of foreign assets that are received in Singapore under certain circumstances. In this client alert, we will first explore the reasons driving the introduction of s10L, before providing an overview of its key features. We then provide our views on the impact s10L will have on taxpayers.

II. Reasons for Introducing Section 10L

MOF stated that s10L was proposed to align the treatment of gains from the sale of foreign assets to the EU Code of Conduct Group Guidance.

For context, the EU Code of Conduct (Business Taxation) is an EU instrument that was created to promote fair tax competition. The EU Code of Conduct Group (**COCG**), which is composed of member states of the EU and the European Commission, was established to assess tax measures that fall within the ambit of the Code of Conduct. In 2022, the COCG published an updated guidance on FSIE regimes.

Under the updated guidance, the COCG observed that FSIEs that are broad enough to exclude from taxation passive income (including dividends, interest, royalties and capital gains) without any conditions, can result in ring-fencing and a lack of substance. It noted that the exemption of passive income without clear conditions such as an explicit link to some real activity in the jurisdiction would contravene the principles underlying the EU Code of Conduct. It therefore went on to stipulate that in relation to foreign sourced income, jurisdictions should either introduce taxation of passive income; or if they exclude from taxation certain types of passive income, (1) implement adequate substance requirements, (2) have robust anti-abuse rules in place; and (3) remove administrative discretion in determining the income to be excluded from taxation.

Whilst this guidance originated from the COCG, such pieces of guidance do factor into the decisions of jurisdictions around the world in formulating tax legislation. This is because the COCG publishes an EU list of non-cooperative jurisdictions for tax purposes that is constantly reviewed, to encourage change in tax legislation and practices outside of the EU.

Hong Kong, for instance, had been included in the EU's grey list in 2021, and has effective 1 January 2023

implemented a revised foreign-sourced income exemption regime which has been accepted by the EU as being compliant with the EU's earlier guidance on FSIE regimes. However, in response to the updated guidance on FSIE regimes published by the Code of Conduct Group, Hong Kong is further considering what appropriate revisions should be made to its FSIE regime to bring it in line with the updated FSIE Guidance, with the focus being on foreign-sourced disposal gains, in a bid to prevent Hong Kong from being blacklisted by the EU. Please refer to the client alert published by our Dentons Hong Kong Office for more information on the changes to the FSIE regime in Hong Kong.

Singapore, similarly, is seeking to align the treatment of gains from the sale of foreign assets to the COCG's guidance, via its proposed s10L.

III. Overview of the Proposed Section 10L

Scope of Taxation

Under the proposed s10L(1) of the ITA, gains from the sale or disposal of a foreign asset by a relevant entity that are received in Singapore from outside Singapore, on or after 1 January 2024, will be treated as income chargeable to tax.

Further, the same deemed receipt rules under current tax laws for foreign-sourced income would apply. Gains from the sale or disposal of foreign assets will be deemed as received in Singapore from outside Singapore if:

a. These gains are remitted to Singapore
b. These gains are applied to satisfy any debt incurred in respect of a trade or business carried on in Singapore; and
c. These gains are applied to the purchase of any movable property which is brought into Singapore.

There are also rules that determine when an asset is treated as a foreign asset. Immovable property situated overseas, shares in or securities issued by a foreign incorporated company and intellectual property rights owned by a non-resident are regarded as foreign assets under such rules.

Who s10L(1) applies to

A relevant entity is defined as a member of a consolidated group of entities where at least one member of the group has a place of business outside Singapore, and the entity's accounts are included in the consolidated financial statements prepared by the parent entity of the group. s10L(1) therefore only applies to entities of multinational groups, and does not target single standalone entities, or an individual.

S10L does not apply to financial institutions as well as entities that enjoy one of the specified tax incentives, such as incentive schemes enacted for the shipping, aircraft and insurance industries, the Finance and Treasury Centre incentive, as well as Pioneer, Pioneer Service and Development and Expansion incentives (pursuant to S10L(6)). This makes sense given that such incentives are generally granted only if the entity has a sufficient level of economic substance in Singapore.

If the relevant entity is not such an entity, it would have to meet the prescribed economic substance requirements in order to qualify as an excluded entity that is not taxed under s10L. The requirements are prescribed depending on whether the entity is a pure equity-holding entity, which refers to an entity whose primary function is to hold shares or equity interest in other entities and which have no income other than dividends or similar payments, gains on the sale or disposal of share or equity interests, or income incidental to its activities of holding shares or equity interests in other entities.

Type of	Economic Substance Requirements

Entity	
Pure equity-holding entities	Comply with obligations to submit regular returns, statements or accounts and whose operations are managed and performed in Singapore.
Other entities	i. Carry on a trade, business or profession in Singapore; ii. Manage and perform operations in Singapore; and iii. Have reasonable economic substance in Singapore, taking into account the number of employees of the entity in Singapore, the qualifications and experience of such employees in Singapore, the amount of business expenditure incurred by the entity in Singapore and outside Singapore relative to the amount of the entity's income, as well as whether key business decisions of the entity are made by persons in Singapore.

IV. Reflections on the Impact of Proposed S10L

Capital Gains Tax – A Fundamental Shift

As mentioned, COGC's guidance specifically targets tax regimes that do not tax what COGC views as foreign-sourced passive income, which includes not just dividends, interest and royalties, but also capital gains.

As of today, Singapore tax system provides for foreign-sourced income to be taxed in Singapore if it is received or deemed received in Singapore (unless any exemptions apply) – but this applies only to income that is revenue in nature, such as dividends, interest and royalties. It has been a cornerstone of Singapore's tax system that it does not tax capital gains.

With the enactment of S10L, this will effectively introduce capital gains tax into Singapore, which is a fundamental change to Singapore's tax system. This outcome is clearly intentional to align Singapore's tax position with COGC's guidance which requires jurisdictions to pass laws to tax foreign-sourced passive income including capital gains.

Impact on Taxpayers

Currently, foreign businesses that are not operating in or from Singapore can remit their foreign income to Singapore without being taxed on the income, pursuant to IRAS' administrative concession. This is to encourage the use of Singapore banking system. In defining relevant entities that are subject to the operation of S10L, the proposed S10L does not exclude entities that do not have any nexus with Singapore apart from the remittance of funds into Singapore. There is therefore still a question of whether IRAS' administrative concession will extend to preclude foreign businesses from being taxed under S10L.

We also note that the exceptions which apply to tax incentivised companies do not extend to incentives targeting the wealth management sector, such as the various trust incentive schemes and fund incentive schemes. However, it is possible that companies qualifying for these incentives may already meet economic substance requirements under s10L to be considered an excluded entity, such that s10L does not apply. Still, entities who enjoy these incentives and who form part of a group with consolidated accounts should keep an eye on s10L in this regard.

Ultimately, Singapore as a choice of holding jurisdiction may not be significantly affected by the introduction of s10L. This is because pure equity holding entities have a lower level of economic substance requirements to meet under the proposed s10L, as mentioned above. In any case, as of today, IRAS already requires companies to demonstrate a certain level of economic substance to qualify for a Certificate of Residence to prevent treaty shopping. We would still

advise taxpayers to keep a close watch on s10L.

Moving forward, we expect that IRAS will provide further guidance on the implementation of s10L.

V. Conclusion

Taxpayers should keep an eye on the developments surrounding s10L and the FSIE regime in Singapore. It is important for taxpayers to seek advice on the impact of s10L on their transactions and holding structure. That said, based on the proposed S10L, we are of the view that with proper planning, it will not have a significant adverse impact on Singapore's attractiveness as a jurisdiction to conduct business in or to use as a holding jurisdiction.

Should you have any questions on the above or have concerns relating to the taxation of your foreign sourced income, please feel free to get in touch with any of our key contacts.

Dentons Rodyk thanks and acknowledges Practice Trainee Zachary Goh for his contributions to this article.

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Promulgation by the President of Amendments to the Securities and Exchange Act

06/30/2023

In order to strengthen the supervisory function of the audit committee, to safeguard the rights and interests of minority shareholders, and to stabilize the business operations, the Executive Yuan, on April 20, 2023, proposed the draft amendments to the Securities and Exchange Act ("Amendments"), which have been passed by the Legislative Yuan on May 30, 2023 and promulgated by the President on June 28, 2023. The Amendments will take effect on July 1, 2023 and the key provisions of the Amendments are as follows:

1. Initiating a lawsuit against the director, convening a shareholders' meeting and representing the company in director's self-dealing matter shall be resolved by the meeting of the audit committee thorough resolutions adopted therein (Paragraph 4, Article 14-4 of the Amendments).

2. If the meeting of the audit committee cannot be convened due to justifiable reasons, matters to be resolved by the audit committee shall be approved by at least two-thirds of all board members. Nonetheless, the financial reports shall still be referred to the independent directors for seeking concurring opinion (Paragraph 3, Article 14-5 of the Amendments).

3. Violation of Paragraph 3, Article 14-5 of the Amended SEA will be subject to an administrative fine ranging from NT$240,000 to NT$4.8 million and an order to correct within a designated time period; the fine can be imposed consecutively if the violation is not corrected within the designated time period (Subparagraph 2, Paragraph 1, Article 178 of the Amendments).

The Amendments effectively change the manner and procedure on how the audit committee should exercise certain power vested to it, which would have a significant impact on public companies. Lee and Li's “Corporate and Investment” practice group offers structuring and consultation services on corporate governance, business operations, and legal compliance. If you have any questions on the Amendments, please do not hesitate to contact us at any time.

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Davis Wright Tremaine LLP

BLOG POST / GOVERNMENT CONTRACTS INSIDER

Words Matter – an Implied Warranty Case Before Washington's Court of Appeals Is a Reminder

By Traeger Machetanz

07.25.23

There is a reason why contractors need to review their contracts closely and the Washington Court of Appeals' decision in *King County v Walsh Construction Company II LLC,* No. 83787-7-1 (Wash. App. Ct. 2023) ("*Walsh*") highlights the importance of close contractual scrutiny. In *Walsh,* the Court held that the contractor could maintain its implied warranty defense to a claim that the contractor had an obligation to correct a failed pipeline. The implied warranty, also known as the Spearin Doctrine, holds that where a

contractor is required to build in accordance with plans and specifications furnished by the owner, the owner implied guarantees that the plans are workable and sufficient.

However, where the construction contract provides an express warranty that the materials and equipment installed by the contractor will "operate satisfactorily under the plans and specifications of the owner" that express warranty will displace the implied warranty of design adequacy. In the *Walsh* contract, there was no such express warranty. In contrast, in the *Walsh* contract, the contractor disclaimed any obligations to provide design services or to maintain the pipeline in perfect condition for a specified period of time.

The bottom line is that in any warranty provision the contractor should consider the presence or absence of a warranty that the work will "operate satisfactorily under the plans and specifications of the owner." This is frequently expressed as a warranty that the materials are suitable for their intended purpose. When the owner's designer specifies the materials, the contractor should seek to have the warranty of suitability of materials eliminated and the owner should bear the responsibility for its designer's selection of materials.

GOODSILL

It's High Time for Hawaii Employers to Update their Reasonable Accommodation Practices with Respect to Medical Marijuana

by christinelau | Jul 26, 2023 | Labor And Employment Law

Employers who deny or terminate employment for medical marijuana users who test positive for Tetrahydrocannabinol (THC) may soon run afoul of Hawaii Civil Rights Commission (HCRC) regulations.

Two points to emphasize first: (i) this does not impact Department of Transportation (DOT) required drug testing; and (ii) this is a proposed rule change – it has not yet gone into effect.

The HCRC proposes to add to its regulations on disability discrimination language which would make it potentially unlawful to deny a reasonable accommodation to a disabled employee with a 329 card, also informally known as a medical marijuana license, who tests positive for THC, unless they were using or under the influence on work premises or during working time.

The full text of the proposed new rule can be found on the HCRC website here. https://labor.hawaii.gov/hcrc/accepting-public-comments-on-the-proposed-amendments-to-the-hawaii-administrative-rules-title-12-chapter-46-rules-regarding-the-civil-rights-commission/

What should Hawaii employers who conduct non-DOT drug testing for THC do?

First, if you have opinions about this possible rule change, you can let the HCRC know by e-mailing the HCRC's chief counsel at robin.wurtzel@hawaii.gov (include "HCRC Proposed Rule Amendments" in the subject line of the email). The public comment period has passed, but they are continuing to accept comments via email.

Second, you could just throw up your hands. Many Hawaii employers have already given up on testing for THC. A positive test does not indicate current impairment. And the use of marijuana, whether for medical reasons or still-unlawful-in-Hawaii-for-now recreational reasons, has become sufficiently common that, in combination with a tight labor market, it is simply no longer making sense to many employers to rule out otherwise qualified candidates for this.

Third, for those employers who do and will continue to test for THC, it will be necessary to consider a reasonable accommodation when an applicant or employee tests positive for THC and produces a 329 card. Obtaining a 329 card is supposed to require a debilitating medical condition. So if properly issued, it is very likely that the card itself is indicative of a "disability."

That said, employers may be entitled to request medical information to verify a disability if that is not obvious. And employers should request medical information verifying that the employee's use of marijuana for medical reasons does not and will not result in impairment at work or during work hours. With that information, an employer will likely be obligated to bend its drug testing policies by not taking action on a positive test result for THC when the employee or applicant has a 329 card. Because employers need not tolerate use or impairment at or during work, supervisors and managers should be trained on observing and documenting signs of impairment. Employees who meet the criteria can be sent for reasonable suspicion testing under applicable policies, and could be subject to discipline if the employer reasonably concludes that the employee was impaired at or during work.

Finally, the proposed rule says that employers may deny an accommodation if that would create an "undue hardship on the operation of its business." But if the employer has received medical documentation verifying the employee can make use of medical cannabis without being high at or during work, how would you establish hardship? Demonstrating "undue hardship" is a difficult and uncertain burden under any circumstances. As a defense in this situation, this option is likely no more than a mirage. Don't count on it. If you believe your circumstances warrant denying an accommodation based on undue hardship, talk to an employment lawyer before taking action.

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FTC and DOJ publish long-awaited draft of proposed merger guidelines

24 July 2023

On July 19, 2023 the Federal Trade Commission (FTC) and Department of Justice (DOJ) ("the agencies") released their 2023 Draft Merger Guidelines (the "2023 draft guidelines" or the "revised guidelines"). The publication of the revised guidelines—currently available for public comment until September 18—marks the end of an 18-month process to memorialize the agencies' increased focus on structural presumptions and the promotion of expansive and novel theories of merger enforcement that have recently faced significant pushback in court.

If adopted, the 2023 draft guidelines would lead to enhanced scrutiny by the antitrust agencies of mergers across the board, including those that: negatively affect the labor markets; could eliminate potential or perceived new entrants into the relevant market; involve merging parties that are engaged in "serial acquisitions" deemed part of a "pattern or strategy of multiple acquisitions"; and involve multi-sided platforms connecting buyers and sellers. The revised guidelines should be considered in conjunction with the proposed changes to the Hart-Scott-Rodino (HSR) notification requirements issued by the FTC and DOJ in June 2023. These changes—currently subject to a 60-day public comment period which ends on August 28, 2023— could provide the agencies with additional information about proposed mergers that they may use to support the theories enumerated in the 2023 draft guidelines.

Agencies outline new theories of merger enforcement

The 2023 draft guidelines do not distinguish between horizontal and vertical mergers—a break from past practice when the agencies published separate guidance addressing horizontal and vertical transactions individually. The agencies also note that the concerns raised in the guidelines can also arise in mergers that are neither strictly horizontal or vertical.

The revised guidelines make clear that the agencies see their mandate for merger review as moving away from "predict[ing] the future or the precise effects of a merger with certainty" and instead towards "assess[ing] the risk that the merger may lessen competition substantially or tend to create a monopoly based on the totality of the evidence available at the time of the investigation."[1]The revised guidelines hew closely to the agencies' interpretation of Section 7 of the Clayton Act[2] as an "interpretative statute" that reflects the "mandate of Congress that tendencies towards concentration in industry are to be curbed in their incipiency."[3] The revised guidelines cite extensively to case law, though many of the cases cited are decades

old.[4] These citations are in line with the agencies' pronouncement that one of their "core goals" in publishing the revised guidelines— perhaps in an attempt to improve their outcomes in court— is to "cit[e] cases in order to clarify the connection between the law and the analytic frameworks described."

Discussion

Rather than following the prior guidelines' approach of laying out the agencies' analytical process and approach to assessing mergers (e.g., defining markets, measuring concentration, assessing likely anticompetitive effects, and explaining offsetting considerations, such as efficiencies) the 2023 draft guidelines are organized around 13 high-level principles (e.g. "Mergers Should Not Eliminate Substantial Competition between Firms"). The revised guidelines advocate the agencies' new positions on these 13 principles and address the agencies' skepticism of offsetting considerations such as efficiencies or failing firms. The thirteen guidelines enumerated in the agencies' updated draft are listed below:

- Mergers should not significantly increase concentration in highly concentrated markets.
- Mergers should not eliminate substantial competition between firms.
- Mergers should not increase the risk of coordination.
- Mergers should not eliminate a potential entrant in a concentrated market.
- Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.
- Vertical mergers should not create market structures that foreclose competition.
- Mergers should not entrench or extend a dominant position.
- Mergers should not further a trend toward concentration.
- When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.
- When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.
- When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.
- When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.
- Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

Below we highlight some of the significant changes to merger policy inherent in these revised guidelines that set them apart from previous iterations.

Revised guidelines lower threshold for what will be considered a "highly concentrated market"

The 2023 draft guidelines state that the agencies will adopt a structural presumption that mergers resulting in a market Herfindahl-Hirschmann Index (HHI)[5] of greater than 1,800 *and* a change in HHI greater than 100 points will cause undue concentration and may substantially lessen competition or tend to create a monopoly. This structural presumption will extend to a significantly more expansive set of mergers than the presumption in the 2010 Horizontal Merger Guidelines, which applied to mergers that resulted in an increase in HHI above 200 points and considered a "highly concentrated market" to have an HHI above 2500.[6]

	2010 Guidelines	**2023 Draft Guidelines**
Highly Concentrated Market	HHI > 2,500 after the merger	HHI > 1,800 after the merger

Increase in HHI as a Result of the Merger	Increase in HHI > 200	Increase in HHI >100

In addition, the 2023 revised guidelines cite to the 1963 Supreme Court case *U.S. v. Philadelphia National Bank* to support the presumption that "a merger that significantly increases concentration and creates a firm with a share over thirty percent presents an impermissible threat of undue concentration regardless of the overall level of market concentration."[7] This is also a significant departure from the 2010 Guidelines, which appreciated that market shares may "not fully reflect the competitive significance of firms in the market or the impact of the merger," and directed the agencies to use evidence of market share only "in conjunction with other evidence of competitive effects."[8]

Merger of two potential market entrants will be assessed in the same way as a merger between an incumbent and a potential entrant

The revised guidelines consider a merger between two potential market entrants—even if they do not have a commercialized product in the market or an existing presence in the relevant geographic market—the same way it will consider a merger between an established incumbent and a potential market entrant: as potentially resulting in a substantial lessening of competition.

In addition, the revised guidelines state that even mergers involving a party that is *perceived* as a potential entrant may substantially lessen competition, even absent any plans or consideration of any plans to enter. According to the revised guidelines, an acquisition of a "perceived potential entrant" may substantially lessen competition, where a current market participant could reasonably consider a firm to be a "potential entrant" to the relevant market and that potential entrant has a "likely influence on existing competition." "Concentrated markets often lack robust competition, and so the loss of even a secondary source of competition, like perceived potential entrants, may substantially lessen competition."[9]

Agencies will consider whether merger may entrench or extend a firm's dominant position in new markets

In addition to considering whether a merger involving an already-dominant firm (defined in the revised guidelines as a firm with a market share as low as 30 percent) will serve to entrench that firm's dominant position, the 2023 draft guidelines also address whether the merger will extend the dominant position of one of the merging firms into another market. The agencies will consider the following factors relevant to their analysis of whether a merger may entrench the dominant position of a merging firm in the relevant market:

- Will the merger increase barriers to entry by requiring rivals to incur additional entry costs?
- Will the merger increase switching costs associated with changing suppliers, making it more difficult for customers to switch away from the dominant firm's products or services?
- Will the merger interfere with the use of competitive alternatives, such as services that allow customers to work with multiple providers of similar or overlapping bundles of products and services?
- Will the merger deprive rivals of scale economies or network effects that can limit the ability of rivals to improve their own products and compete more effectively?
- Will the merger eliminate a nascent threat to the dominant firm that could grow into a significant rival?[10]

The revised guidelines state that the agencies will look at whether the acquired firm is a nascent competitive threat in assessing

whether the merger also violates Section 2 of the Sherman Act[11] (which prohibits monopolization).

The revised guidelines also state that the agencies will look at whether a merger could "enable the merged firm to extend a dominant position from one market into a related market, thereby substantially lessening competition in the related market."[12] Though reflective of recent enforcement efforts, this would be a significant extension beyond the scope of past guidelines, with regulators considering the competitive effects a merged firm's tying, bundling, conditioning, or otherwise linking sales of two products would have in a related market that is not the focus of the merger review.

Vertical mergers can be evaluated on whether a firm has the ability *or* the incentive to foreclose competition

The revised guidelines state that, with respect to analyzing vertical mergers, the agencies can consider whether the merger gives the parties the ability *or* the incentive to foreclose competitors from a segment of the market otherwise open to them. This theory was recently rejected by the Northern District of California, holding that the FTC must show that the combined firm had the ability *and* the incentive to foreclose, and that competition would probably be substantially lessened as a result of the withholding.[13]

Mergers that contribute "to a trend toward concentration" may have the effect of substantially lessening competition

The revised guidelines memorialize the agencies' view—rooted in Supreme Court case law from the 1960s and 1970s—that if a merger is found to further a trend toward concentration, the Government can "rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing."[14] The revised guidelines lay out a two-factor test that the agencies will use to determine if a merger would further a trend towards concentration sufficiently that it may substantially lessen competition: (1) would the merger occur in a market or industry sector where there is a significant tendency toward concentration (vertical or horizontal) that would result in the "foreclosure of independent manufacturers from markets otherwise open to them";[15] and (2) will the merger increase the existing level of concentration or the pace of that trend.

While the guidelines state that a "significant tendency toward concentration" can be established by a "steadily increasing HHI" that exceeds 1,000 and rises towards 1,800, the guidelines do not indicate over what period of time this rise will be calculated. In addition, in determining what will be considered an increase in the "existing level of concentration or the pace of that trend," the revised guidelines state that, in addition to evidence that there has been a change in HHI greater than 200, "other facts showing the merger would increase the pace of concentration" may be considered by the agencies. Examples of potentially relevant facts are not provided.

A merger may be examined as part of a series of multiple acquisitions rather than on its own merits

The revised guidelines advise that "a firm that engages in an anticompetitive pattern of strategy of multiple small acquisitions in the same or related business lines" may be illegal, even if "no single acquisition on its own would risk substantially lessening competition or tending to create a monopoly."[16] The revised guidelines give the agencies carte blanche to evaluate the series of acquisitions as part of an industry trend, or evaluate the overall pattern or strategy of serial acquisitions by the acquiring firm. Citing again to the 1962 Supreme Court decision in *U.S. v. Brown Shoe*, the revised guidelines attempt to justify analyzing "individual acquisitions in light of the cumulative effect of related patterns or business strategies."[17]

The 2023 draft guidelines advise that the agencies will consider both historical evidence of actual and attempted acquisitions in both the markets at issue and other markets "to reveal any overall strategic approach to serial acquisitions." In a July 19, 2023 interview with NPR discussing the publication of the revised draft guidelines, FTC Chair Lina Khan stressed that the guidelines are intended to address "strategies where firms are doing roll ups of entire industries through serial acquisitions and buying up small businesses."[18]

Guidelines address multi-sided platforms that do not fall into "horizontal" or "vertical" merger categories

The revised guidelines include specific metrics for evaluating mergers involving multi-sided platforms[19] that considers "competition *between* platforms, competition *on* a platform, and competition to *displace* the platform."[20] Such platforms are described in the revised guidelines as employing a platform operator that provides core services enabling the platform to connect participants groups across multiple sides, and having platform participants who use the platform to find other participants, resulting in network effects whereby platform participants contribute to the value of the platform for other participants and the operator.

The revised guidelines cite the Clayton Act's protection of competition "in any line of commerce" as sufficient authority for the agencies to "seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants." This may include (1) mergers involving two platform operators that eliminate the competition between them; (2) a platform operator's acquisition of a platform participant which can entrench the operator's dominant position; (3) acquisitions of firms that provide services that facilitate participation on multiple platforms and can deprive rivals of platform participants; and (4) mergers involving firms that provide other important inputs to platform services that can enable the platform operator to deny rivals the benefits of those inputs.[21]

Revised guidelines memorialize agencies' increased focus on a merger's effect on labor market competition

FTC Chair Khan and DOJ Antitrust Division Assistant Attorney General Jonathan Kanter have been vocal about their intention to incorporate labor considerations into their respective agencies' merger review investigations.[22] The revised guidelines make this position an official policy of the agencies, categorizing labor markets as "important buyer markets" that are subject to the "same general concerns as in other markets . . . where employers are the buyers of labor and workers are the sellers."[23] The 2023 draft guidelines state that the agencies will consider whether a merger substantially lessens the competition for workers so that the reduction in labor market competition may lower wages or slow wage growth, or worsen benefits or working conditions. The agencies will consider "one or more of these effects" in determining whether merging firms compete for labor.

The revised guidelines explicitly reject potential efficiency arguments with respect to a merger reducing the costs of labor, stating that "if the merger may substantially lessen competition or tend to create a monopoly in upstream markets, that loss of competition is not offset by purported benefits in a separate downstream market. Because the Clayton Act [is applicable to] any line of commerce and in any section of the country, a merger's harm to competition among buyers is not saved by benefits to competition among sellers."[24]

Acquisitions resulting in partial control may raise antitrust concerns

With respect to partial acquisitions, the revised guidelines state that the agencies may assess the post-acquisition relationship between the parties and the independent incentives of the parties outside of the acquisition to determine whether a partial acquisition may substantially lessen competition. Factors the agencies may consider include: (1) does the partial acquisition give

the partial owner the ability to influence the competitive conduct of the target firm through a voting interest or specific governance rights; (2) does the partial acquisition reduce the incentive of the acquiring firm to compete because it may profit through dividend or other revenue sharing even when it loses business to the rival; and (3) does the partial acquisition give the acquiring firm access to non-public, competitively sensitive information from the target firm that can enhance the ability of the target and partial owner to coordinate their behavior and make other accommodating responses faster and more targeted.[25]

Looking Ahead

The draft guidelines are open for public comment until September 18, 2023. If they are finalized with minimal substantive changes, the result will be increased deal uncertainty for parties, as a much broader set of mergers could face close scrutiny by the agencies. Moreover, it remains unclear if incorporating the agencies' new theories of merger enforcement into formal guidelines will improve the agencies' record in merger litigation. Recent losses for the agencies suggest that may be unlikely.

Authored by Chuck Loughlin, Justin Bernick, Lauren Battaglia, Ashley Howlett, Ken Field, Ilana Kattan, and Jill Ottenberg.

References

1 See U.S. Department of Justice and Federal Trade Commission, Draft Merger Guidelines (19 July 2023) (2023 Draft Merger Guidelines) at 2.

2 15 U.S.C. §18.

3 See 2023 Draft Merger Guidelines (citing Brown Shoe v. United States, 370 U.S. 294, 346 (1962)).

4 A Fact Sheet released by the agencies alongside the updated guidelines notes that the 2023 draft guidelines are "the first merger guidelines to cite case precedents" and "draw[] extensively on Supreme Court and appellate cases to ensure it is rooted in the law."

5 "The HHI is defined in the revised guidelines as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm." 2023 Draft Merger Guidelines at 6.

6 See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (Aug. 19, 2010) at 19.

7 See 2023 Draft Merger Guidelines at 7 (citing United States v. Phila. Nat'l Bank, 374 U.S. 321, 364-65 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentrate, we are clear that 30% presents that threat.")).

8 See 2010 Horizontal Merger Guidelines at 18.

9 See 2023 Draft Merger Guidelines at 12-13.

10 The revised guidelines also note that the agencies are not limited to these considerations, and can assess whether the merger entrenches a dominant position "in any other way based on the market realities specific to the merger." See 2023 Draft Merger Guidelines at 20.

11 15 U.S.C. § 2.

12 See 2023 Draft Merger Guidelines at 21.

13 See FTC v. Microsoft Corporation, Preliminary Injunction Opinion, 23-cv-02880 (N.D. Cal. July 23, 2023).

14 See 2023 Draft Merger Guidelines at 21 (citing U.S. v. Gen. Dynamics, 415 U.S. 486, 498 (1974) (quoting Brown Shoe, 370 U.S. at 321-22)).

15 See id. at 22 (citing Brown Shoe, 370 U.S. at 332).

16 See 2023 Draft Merger Guidelines at 22.

17 See id. (citing Brown Shoe, 370 U.S. at 334).

18 NPR, The FTC's rules for mergers and acquisitions just got tougher (July 19, 2023) available here.

19 Such platforms are described in the revised guidelines as defined by the use of a platform operator that provides core services enabling the platform to connect participants groups across multiple sides; having platform participants who use the platform to find other participants, resulting in network effects whereby platform participants contribute to the value of the platform for other participants and the operator.

20 See 2023 Revised Merger Guidelines at 23.

21 See id. at 24-25.

22 See e.g. Department of Justice press release, Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines (Jan. 18, 2022) available here; and Federal Trade Commission, Keynote Remarks of Lina M. Khan, International Competition Network, Berlin, Germany(May 6, 2022) available here.

23 See 2023 Draft Merger Guidelines at 26.

24 See id.

25 See id. at 27-28.

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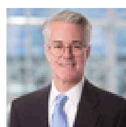

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