Pacific Rim Advisory Council

September 2015 e-Bulletin

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  September 26—29, 2015

- **PRAC @ IBA Vienna**
  October 5, 2015

- **59th International PRAC Conference Barcelona**
  Hosted by Rousaud Costas Duran SLP
  May 21—24, 2016

- **60th International PRAC Conference Manila**
  Hosted by SyCip Salazar Hernandez & Gatmaitan
  September 24— 27, 2016

Visit www.prac.org for these and other event details

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BENNETT JONES BERMUDA OFFICE ESTABLISHED

Bennett Jones (Bermuda) Ltd., is pleased to announce the establishment of its full service commercial law practice in Bermuda through a close association with the prestigious Canadian-based law firm of the same name, Bennett Jones LLP, as part of the firm's ongoing international commitment to clients.

"We are excited to add the Bermuda office to our platform through our association with Bennett Jones (Bermuda) Ltd.," says Bennett Jones LLP's Chairman and CEO, Hugh MacKinnon. "Bermuda is of rapidly growing interest to our international clients who wish to operate in, and through, a highly sophisticated commercial and legal environment. Bermuda is the premier jurisdiction for those investments."

With a 90-year history that began with former Canadian Prime Minister R.B. Bennett who was later elevated to the House of Lords, Bennett Jones now has more than 380 lawyers and business advisors based out of nine offices around the world providing a full range of specialized legal services.

The Managing Principal of the new local law firm, Bermudian Duncan Card, a former Appleby Legal Scholar, was a senior commercial partner at Bennett Jones in Canada before establishing Bennett Jones (Bermuda) Ltd. a few months ago. Mr. Card has longstanding ties in the Bermuda business and legal communities, including his corporate directorship with the former Capital G Bank for 12 years, (where he chaired that Board's Governance Committee). In addition to several large commercial mandates (including the recent sale of the Bermuda Telephone Company) that brought Mr. Card home to establish Bennett Jones (Bermuda) Ltd., he was also retained by the Cabinet Office to serve as legal counsel to Bermuda's successful America's Cup 2017 Bid Committee. Mr. Card is also the exclusive Bermuda representative on the Advisory Board of the Association of Caribbean Corporate Counsel, and he was recently appointed to Bermuda's Electronic Commerce Advisory Board.

"Bennett Jones' investment in Bermuda is an exceptional opportunity for my firm to deliver world-class legal expertise and commercial experience across many specialized fields," said Mr. Card, who has returned to the Island with his family as full-time residents of Bermuda. Notably, Mr. Card is cited in many independent ranking services as one of the leading commercial lawyers in Canada (including the 2014/2015 "Canada's Best Lawyers," Lexpert Magazine and American Lawyer Media's "Top 500 Canadian Lawyers," Law Day's "Leading North American Lawyers" and "Lexpert's 2015 Guide To The Leading U.S./Canada Cross-Border Lawyers"). "My firm is committed to bringing international clients and investment capital to Bermuda, and to growing our domestic legal practice to provide tier-one North American quality legal services in Bermuda and into the Caribbean," he said.

In addition to Bennett Jones being highly regarded global expertise in corporate and commercial transactions, and as being recognized for its support to General Counsel on overflow assignments, the firm is particularly well known for its exceptional leadership in several highly specialized legal fields, such as: corporate governance best practices; cyber security, risk management and insurance; information technology procurement and contracts; Sharia law financing and insurance; labour relations; public-private sector partnerships and outsourcing transactions; critical infrastructure development and revitalization; gaming law and regulation; anti-money laundering laws and compliance best practices; consulting and advisory service transactions; privacy and data protection law; all aspects of telecommunications law and regulation (terrestrial and satellite); banking law and regulation reform; public-sector pension administration and reform; healthcare law and governance; and all forms commercial contract drafting and negotiation.

Key Contact:
Duncan Card, B.A., LL.B., LL.M., ICD.D
Managing Principal. Bennett Jones (Bermuda) Ltd.
T: 441.292.4229
E: cardd@bennettjones.com

Bennett Jones (Bermuda) Ltd.
Hamilton House
10 Queen Street
P.O. Box HM 1154
Hamilton HM EX
Bermuda

For additional information visit www.bennettjones.com

DAVIS WRIGHT TREMAINE ADDS HIGHLY EXPERIENCED LAWYERS TO IP TEAM IN LOS ANGELES AND EMERGING COMPANY LAWYER IN SAN FRANCISCO

SAN FRANCISCO, 24 August 2015: Stephen Knute Gregg, an experienced emerging company lawyer, has joined the San Francisco office of Davis Wright Tremaine LLP as a partner. Gregg brings to the firm over 15 years of experience in venture financing, M&A, securities, and general corporate work for emerging growth companies in a range of industries, inside and outside the technology sector. He focuses on M&A and private placement financings, both debt and equity.

"We are very excited to further expand our capacity to serve corporate clients in the fast-growing Bay Area economy," said Joe Addiego, partner-in-charge at Davis Wright Tremaine's San Francisco office.

Earlier this year, the firm also added Jim Topinka, an experienced corporate finance lawyer from Winston & Strawn, to its San Francisco team.

Gregg frequently acts as outside general counsel to emerging company clients, advising them on matters such as formation, corporate governance, joint ventures, third-party tender offers, and other controlled liquidity programs. He has also represented a number of venture funds and strategic investors in connection with their respective investments in a variety of industries.

Gregg comes to the firm from the Palo Alto office of Morrison & Foerster LLP, where he practiced for over a decade. Prior to that, he was at K&L Gates LLP. He received his J.D. from Lewis & Clark Law School and his B.A. from Connecticut College.

LOS ANGELES, 26 August 2015: David Quinto and Scott Commerson, two highly experienced IP lawyers with particular knowledge of the entertainment arena, have joined the Los Angeles office of Davis Wright Tremaine LLP.

Quinto, who focuses on copyright, trademark, trade secret, and Internet-related claims, was a founding lawyer at the Quinn Emanuel firm, where he practiced for almost three decades. Commerson is a veteran of Quinn Emanuel as well, and practiced complex litigation there for more than a decade.

"Our firm's strategic plan calls for building increased strength in our areas of excellence," said Alexandra Nicholson, chair of Davis Wright Tremaine's intellectual property practice. "David and Scott's outstanding skills perfectly complement this firm's breadth of nationally renowned IP services."

For 27 years, Quinto was principally responsible for protecting the rights of the Academy of Motion Picture Arts and Sciences in the OSCAR® and ACADEMY AWARDS® marks. He also helped safeguard the intellectual property of many other leading organizations in industries as varied as aerospace, packaging, professional sports, and consumer products.

Quinto serves as a World Intellectual Property Organization (WIPO) domain name dispute resolution panelist. He is co-author of the book, Trade Secrets: Law and Practice, published by LexisNexis and now in its third edition. In 2010, he was named to the Hollywood Reporter's "Power 100" list of top entertainment lawyers. He is listed by Martindale-Hubbell™ as an AV Preeminent® Rated Lawyer.

Commerson has experience litigating all types of business cases, with particular skills in the areas of soft intellectual property, media and entertainment, employment, and class action defense. He has disposed of numerous cases through motion practice and has litigated cases through trial, arbitration, and appeal in federal and state court around the country.

Commerson received his B.A. from the University of North Carolina - Chapel Hill and his J.D. from the University of Virginia. Quinto received his B.A. from Amherst College and his J.D. from Harvard Law School.

Quinto and Commerson join Davis Wright Tremaine from Kupferstein Manuel & Quinto, a boutique they founded with other Quinn Emanuel alums last year.

For more information, visit www.dwt.com

GIDE BEIJING OFFICE RELOCATES

BEIJING, 31 August 2015: As of 31 August 2015, Gide's Beijing office will relocate from Floor 9 to Floor 15 of Tower B, Parkview Green Tower.

Please note our new Beijing address:

Unit 01-02, Floor 15, Tower B, Parkview Green Tower

No. 9 Dong Da Qiao Road, Chaoyang District - Beijing 100020 - China

Our phone and fax numbers remain unchanged.

Parkview Green is a mixed-use development comprising office space, a six-star hotel and retail facilities. It has been built with a focus on sustainability and includes a number of green features. These include systems to reduce the consumption of energy used for cooling and heating; grey and storm water recycling systems to aid water conservation; use of recycled materials and the presence of native plants and trees.

For further information visit www.gide.com

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HOGAN LOVELLS ADDS LEADING UNMANNED SYSTEMS AND ROBOTICS INDUSTRY ADVOCATE

WASHINGTON, D.C., 8 September 2015 – Bolstering its position as the premier global law firm representing the unmanned aircraft systems (UAS) industry, Hogan Lovells announced today that Gretchen West has joined the firm's Government Regulatory practice as Senior Advisor for Innovation and Technology in the Silicon Valley office.

After serving the unmanned systems and drone industry for over a decade, West is recognized as a leading advocate for commercial drones and robotics. She will enhance the firm's ability to serve not only clients in the UAS industry, but also in related industries such as automated driving and consumer robotics, plus sectors such as energy and agriculture that are poised to become heavy users of unmanned systems. West will provide clients in the commercial and consumer unmanned systems and robotics industries with emerging technology guidance and support them in acquisitions, understanding market potential, and creating end-user business cases. She will also bring extensive experience and knowledge in cultivating coalitions that advance common interests in evolving industries.

"As a true pioneer in this field, Gretchen shares our commitment to remaining on the leading edge of a transformative and emerging industry," said Lisa Ellman, co-chair of the firm's Unmanned Aircraft Systems (UAS) Group. "Her unparalleled strategic, business development and regulatory experience will also be critical to helping us grow and serve our clients better. We welcome her to the firm."

West joins Hogan Lovells from San Francisco start-up DroneDeploy, a commercial drone software provider, where she was Vice President of Business Development and Regulatory Affairs. Previously, she served for more than a decade as xecutive Vice President of the Association for Unmanned Vehicle Systems International (AUVSI), the world's largest non-profit organization devoted exclusively to advancing the unmanned systems and robotics community. In this role, she was responsible for overseeing AUVSI's global business development, international growth strategy, marketing, government relations, and advocacy efforts. West and her team at AUVSI were at the forefront of advocating for the safe, timely and responsible integration of unmanned systems into the National Airspace System. She also served as the AUVSI member on the International Civil Aviation Organization (ICAO) UAS Study Group, which was tasked with creating a roadmap for the global integration of UAS.

"With more than ten years of experience in the global unmanned systems market, Gretchen's network is vast and deep and will serve as a great asset to the firm," said Cole Finegan, the Regional Managing Partner of the Americas for Hogan Lovells. "Her policy skills are a tremendous complement to our deep and innovative legal bench in Silicon Valley, and her expertise will be instrumental in counseling our clients as they continue to navigate the uncertain UAS regulatory terrain."

West is currently the National Advisory Board Chairperson for UAVUS (uavus.org) and serves on the Advisory Boards for Skyward, Nightingale Intelligent Systems, Aerobo (formerly AeroCine) and the Drone World Expo. She was formerly a member of Women in Aerospace (WIA) and the Association for Women Executives and Entrepreneurs (AWE).

West earned her B.A. in Leadership Studies and Sociology from the University of Richmond, and her MBA in Marketing from the George Washington University.

For more information, visit www.hoganlovells.com

RICHARDS BUELL SUTTON SET TO HOST PACFICI RIM ADVISORY COUNCIL 58TH INTERNATIONAL CONFERENCE

VANCOUVER, 10 September 2015: Pacific Rim Advisory Council ("PRAC") founding member firm Richards Buell Sutton LLP ("RBS") will host the 58th International PRAC Conference in Vancouver, September 26-29. Member firm delegates from around the globe will be gathering in Vancouver to attend the four day business conference featuring topical professional development programs and business development opportunities.

Among the business sessions on tap for Vancouver:

- **Business Session #1** | Country Briefing presented by Richards Buell Sutton
- **Business Session #2** | Regional Reporting on significant changes impacting industries and jurisdictions
- **Business Session #3** | Business Development Meetings - a series of business development discussions among firms and Member Firm Spotlight – Santamarina y Steta - Mexico
- **Business Session #4** | Special Guest Presentation: *LNG – British Columbia's Opportunity*
  The Honorable Rich Coleman, Minister of Natural Resources and Deputy Premier of British Columbia
- **Business Sessions #5-7** | PRACtice Management – Tim Leishman, Guest Facilitator
  Succession Planning: What's Required To Do It Right?
  Developing the Next Generation of Business Developers
  Improving Referrals Amongst PRAC Member Firms
- **Business Session #8** | PRACtice Development - *Trends, Challenges and Opportunities in the Legal Profession*
  panel review of current trends, opportunities and challenges in their respective jurisdictions
- **Business Session #9** | PRACtice Area Spotlight - *Cross-border Litigation*
  How Companies are Managing the Globalization of Disputes and Regulation

Event is exclusive to PRAC Member Firms. For event details visit http://www.prac.org/events.php

About Richards Buell Sutton

Our Philosophy Passion, dedication and a commitment to our clients are a few of the qualities responsible for our longevity in this profession. 140 years have been put into understanding the legal profession for real people. We have grown to become leaders in our community, in turn staying in touch with what really matters to our clients. We are committed to delivering the highest standard of service to our clients. Our first priority is to develop an in-depth understanding of your situation or your business. We then draw upon our legal expertise to develop innovative and cost-effective solutions to help you achieve your strategic objectives. Whether we are acting as counsel for a corporation, a partnership, a family trust, or an individual, we are dedicated to developing strong and lasting relationships.

Our professional team provides a variety of legal services. We work across the boundaries of traditional thinking to supply our clients with effective and innovative legal solutions for the issues that arise in business and personal life.

We also offer our services in Mandarin, Cantonese, Spanish, French, Japanese and Russian.

What We Do Our Professional Team Provides a variety of legal services. We work across the boundaries of traditional thinking to supply our clients with effective and innovative legal solutions for the issues, transactions and disputes that arise in business and personal life. The Areas of Service which we have listed provide only a general background of our services.

Asia Pacific Services | Advanced Education and Research | Business Transactions | Commercial Real Estate Development, Leasing, Lending | Construction | Craft Breweries and Distilleries | Employment | Family | Immigration | Insolvency | Insurance | Intellectual Property | International Legal Access | Litigation and Dispute Resolutions | Personal Injury | Privacy Law | Securities and Corporate Finance | Tech Start-Ups | Wealth Preservation - Estate & Trust Administration, Personal Estate Planning, Succession Planning for Privately Owned Businesses, Estate Litigation | Mediation and Arbitration | Corporate Services | Trademark Services |

For more information visit us at www.rbs.ca

ALLENDE & BREA

ASSISTS ARGENTINE INSURANCE COMPANY LA CAJA ACQUISITION OF AUSTRALIAN QBE

BUENOS AIRES, 17 August 2015: Allende & Brea Abogados advised QBE for the sale, which closed for an undisclosed sum on 11 August.

La Caja is part of the Werthein Group, a family-owned company that controls a portfolio of agribusiness, telecoms and banking concerns.

Allende & Brea Partners Pablo Louge, Jorge Mayora, Nicolás Grandi and Laura Santanatoglia and associates Laura Kurlat, Lucas Tamagno, Fernanda Mizraji and Melisa Corres assisted on the deal.

For additional information visit www.allendebrea.com.ar

BAKER BOTTS

REPRESENTS SCHLUMBERGER IN $14.8 BILLION ACQUISITION OF CAMERON

HOUSTON, 26 August 2015: Schlumberger Limited (NYSE: SLB) and Cameron International Corporation (NYSE: CAM) today jointly announced a definitive merger agreement in which the companies will combine in a stock and cash transaction valued at approximately $14.8 billion as of August 25, 2015. Under the terms of the agreement, Cameron shareholders will receive 0.716 shares of Schlumberger together with a cash payment of $14.44 in exchange for each Cameron share.

The transaction is subject to the approval of Cameron stockholders, regulatory approvals and other customary closing conditions. It is anticipated that the closing of the transaction will occur in the first quarter of 2016.

Baker Botts is representing Schlumberger in the transaction. Baker Botts Lawyers/Office Involved: Corporate: J. David Kirkland, Jr. (Partner, Houston); Tull R. Florey (Partner, Houston); A.J. Ericksen (Partner, Houston); Travis J. Wofford (Senior Associate, Houston); Daniel J. Gottschalk (Associate, Houston); Christopher Marshall (Associate, Houston); Tax: Derek Green (Partner, Houston); Jon Lobb (Senior Associate, Houston); Employee Benefits: Rob Fowler (Partner, Houston); Environmental: Derek McDonald (Partner, Austin).

For more information visit www.bakerbotts.com

ARIFA

ADVISES IN FINANCING OF SECOND LINE OF THE PANAMA CITY METRO

PANAMA, 03 September 2015: ARIAS, FABREGA & FABREGA is advising The Bank of Tokyo-Mitsubishi UFJ, Ltd., as lender, in the financing for the design and construction of the second line of the Panama City Metro. ARIFA played an active role in the financing of the first line of the Panama City Metro; its expansion, and now in the financing of the second line.

Line 1 design, construction and equipment: In order to finance the design, construction and equipment of the Line 1 of the Panama City Metro Project the Republic of Panama entered into, among others, three credit facilities. ARIFA represented the Arrangers in these facilities.

ARIFA advised Citigroup Global Markets Inc. and Bank of Tokyo-Mitsubishi UFJ as Joint Global Coordinators and Lead Arrangers in a USD$250 million MIGA Guaranteed Facility granted to the Republic of Panama to finance construction of the Panama City Metro.

This facility is guaranteed by the Multilateral Investment Guarantee Agency (MIGA), the World Bank's political risk insurance arm.

ARIFA represented Citibank, N.A. London Branch and other financial institutions, as COFACE Mandated Lead Arrangers in connection with a USD$298 million COFACE Guaranteed Facility granted to the Republic of Panama to finance, among other things, the acquisition of the rolling stocks and other goods of French origin for Panama City Metro Project

Line 1 expansion: ARIFA advised The Bank of Tokyo-Mitsubishi UFJ, Ltd., and Sumitomo Mitsui Banking Corporation, in connection with a USD$212 million Receivables Purchase Agreement USD$212 million expansion of the first line of the Panama City Metro

ARIFA attorneys acting on the matter included Estif Aparicio, partner, Cedric Kinschots, international associate and María Cristina Guardia, international associate.

For additional information visit www.arifa.com

CAREY

ADVISES TECK RESOURCES' RELINCHO MINE IN US$3.5 BILLION JOINT VENTURE WITH CANADIAN MINER GOLDCORP

SANTIAGO, September 2015: Canadian miner Goldcorp has upped its stake in fellow Canadian miner New Gold's Chilean El Morro mine, giving it full control of the project, which it will combine with Teck Resources' Relincho mine in a US$3.5 billion joint venture. The two announced the joint venture, which will temporarily be called Project Corridor, on 27 August.

The transaction required Goldcorp purchase remaining shares in the El Morro mine it did not own from New Gold before entering a joint venture with Teck.

Goldcorp and Teck each have a 50 per cent stake in Project Corridor. The companies intend to build a conveyor to transport copper and gold ore from El Morro to the Relincho mine, where there is an existing crushing line mill, to break down and process the ore. Both mines are in the central northern province of Huasco and are located 40 kilometres away from each other. In a joint press release, the two miners said the joint venture will cut costs and reduce their environmental footprint.

Project Corridor is one of the largest undeveloped copper, gold and molybdenum mines in the Americas. Proven and probable reserves in the project total 16.6 billion pounds of copper, 8.9 million ounces of gold and 464 million pounds of molybdenum. Teck and Goldcorp project production of 190,000 tonnes of copper and 315,000 ounces of gold each year for the first decade of the project, and a mine lifespan of at least 32 years.

Teck Resources' Chilean subsidiary Teck CDA signed a US$525 million offtake agreement with US precious metals company Royal Gold in July. The Chilean company agreed to sell and deliver 100 per cent of the gold it produces to Royal Gold over a 40-year period. Carey advised Teck CDA on the agreement.

Counsel to Teck were Carey Partners Rafael Vergara, Cristián Eyzaguirre and associate Francisco Guzmán in Santiago.

For additional information visit www.carey.cl

CLAYTON UTZ

NEW MYER TURNS TO CLAYTON UTZ FOR $221 MILLION CAPITAL RAISING

MELBOURNE, 03 September 2015: A Clayton Utz team has acted for iconic Australian retailer Myer on its $221 million capital raising launched on 1 September. The raising is part of the 'New Myer' Strategy announced to the market this week, on which Clayton Utz is also advising.

Corporate partner Brendan Groves led the core Clayton Utz team comprising senior associate Warrick Louey and lawyers Kate Allison and Craig McDermaid.

The raising comprises a fully underwritten entitlement offer to Myer shareholders, which aims to raise around $221 million at 94c per share. Proceeds from the raising will be used to pay down debt, providing balance sheet flexibility to implement the five-year, $600 million New Myer strategy.

Brendan said the Clayton Utz team enjoyed the opportunity to work with Myer as it embarks on a new business strategy. "This is a strategically significant capital raising for Myer and we're proud to have been a part of it."

For additional information visit www.claytonutz.com

GIDE

MYFERRYLINK/SCOP SEAFRANCE: GIDE COUNSEL TO DFDS ON CRISIS EXIT PROTOCOL BROKERED BY THE FRENCH SECRETARY OF STATE FOR TRANSPORT

PARIS, 04 September 2015: Gide has advised DFDS, the Danish leader in the sea transport and sea freight sector, as part of the crisis exit protocol signed on 31 August 2015 by the representatives of SCOP SeaFrance, Eurotunnel and DFDS, in the presence of Alain Vidalies, the French Secretary of State for Transport.

The two ships that Eurotunnel chartered out to DFDS this summer and that had been under occupation by SCOP SeaFrance staff for two months are now the object of a return procedure.

In the agreement, DFDS commits to creating 202 new jobs open, as a priority, to former SCOP SeaFrance employees as part of its new organisation.

The SCOP SeaFrance co-operative was set up by former SeaFrance employees, a ferry company that was liquidated in August 2012, in connection with the creation of MyFerryLink by the Eurotunnel group. When MyFerryLink ceased its activity, SCOP SeaFrance was put into court-supervised liquidation on 31 July 2015.

The Gide team is composed of partner Foulques de Rostolan on employment law aspects, and partner Jean-Gabriel Flandrois on restructuring aspects.

For additional information visit www.gide.com

DAVIS WRIGHT TREMAINE

COURT DISMISSS CITY'S COPYRIGHT CLAIM AGAINST CRITIC FOR USING COUNCIL MEETING CLIPS IN YOUTUBE VIDEOS

A California city cannot hold one of its citizens liable for copyright infringement for using clips of city council meetings in his critical YouTube videos, a federal judge has ruled.

The August 20, 2015, Order in City of Inglewood v. Joseph Teixeira, C.D. Cal. No. 15-1815, makes clear that California governmental agencies cannot enforce copyright in public records absent specific statutory authorization. The decision by United States District Judge Michael W. Fitzgerald of the Central District of California also bolsters a growing consensus among federal courts that it is proper to dismiss copyright actions on the basis of fair use at the earliest stages of the proceedings where the defense is apparent from the works themselves.

The action arose from several documentary-style videos posted to YouTube by Joseph Teixeira, a resident of Inglewood, a city of about 112,000 people located near Los Angeles International Airport. The videos are sharply critical of the public statements and conduct of Inglewood's Mayor James T. Butts, Jr. at city council meetings. They feature short clips from the city's official recordings of these public proceedings, heavily modified with original text and narration that consists of Mr. Teixeira responding to the mayor's remarks and criticizing his political positions.

In one video, for example, Mr. Teixeira juxtaposes his original footage documenting traffic problems near a well-known Inglewood event venue with short clips of Mayor Butts positively characterizing the traffic situation in remarks at a council meeting. He also criticizes the mayor's remarks directly with on-screen text superimposed over the meeting footage and narration accusing the Mayor of lying. Other videos use similar techniques to address municipal issues such as crime, governmental transparency, and a controversy about the mayor's residency at the time he ran for office.   The city filed suit against Mr. Teixeira on March 12, 2015, claiming that his use of footage from the city's public meeting videos constituted copyright infringement. The city's complaint sought actual damages and attorneys' fees, as well as injunctive relief.

Mr. Teixeira moved to dismiss, arguing that: (1) the city is precluded by California law from asserting copyright protection in public records of its council meetings and (2) his videos are protected by the fair use doctrine. In a comprehensive opinion granting Mr. Teixeira's motion and dismissing the complaint with prejudice, the court agreed with both points.

On the threshold issue, the court noted that while the "Copyright Act bars protection for works created by the federal government, … whether state and local governments can claim copyright protection is governed by state law." After examining the relevant state law, the court concluded that "absent particular statutorily provided exceptions, California public entities are prohibited from enforcing any copyrights they may acquire as a matter of federal law. Whether in the eyes of federal law the city holds a copyright in the videos is irrelevant in the face of the state's decision that its entities may not act to enforce that copyright."

The court relied primarily on the California Court of Appeal's decision in County of Santa Clara v. Superior Court, 170 Cal. App. 4th 1301 (2009). That court reasoned that the California Constitution and California Public Records Act (CPRA) create a broad presumption of unrestricted disclosure of public records that "overrides a governmental agency's ability to claim a copyright in its work unless the legislature has expressly authorized a public records exemption." Id. at 1335. The court also noted that California has a number of statutes specifically authorizing public agencies to assert copyright protection in certain enumerated items, such as computer software and educational materials, suggesting that such specific statutory authorization is a prerequisite to copyright enforcement. Id.   Because Inglewood did not identify any specific grant of authority permitting it to enforce copyright protection in its video recordings of its city council meetings, the court held that its complaint failed as a matter of law.

The court also proceeded to consider Mr. Teixeira's alternative argument that his videos are protected by the fair use doctrine. Citing recent case law such as the 7th Circuit's opinion in Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012), the court found it appropriate to resolve Mr. Teixeira's fair use argument on a motion to dismiss because it was clear that the defense applied based on a review of the allegedly infringing works themselves, which were incorporated by reference into the complaint. Before issuing its ruling, the court allowed Inglewood to conduct limited discovery solely to confirm the authenticity of the copies of the videos that Mr. Teixeira submitted to the court.

The judge determined that each statutory factor favored a finding of fair use: (1) Mr. Teixeira's videos are "quintessential transformative works for the purpose of criticism and commentary on matters of public concern" (while Mr. Teixeira's videos are non-commercial, the court found them to be transformative even assuming a commercial use for the sake of argument); (2) given the "barely creative nature" and "informational purpose" of the council meeting videos, "they enjoy very narrow copyright protection"; (3) Mr. Teixeira "uses only small portions of the total works and uses them for very specific and particular purposes"; and (4) "there can therefore be no commercial market for the city council videos and no activity by Teixeira can deprive the city of any revenue," given that California law bars the city from charging anything more than the "direct costs of duplication" when providing copies of public records. Moreover, the court found that Mr. Teixeira's sharply critical videos would not be a substitute for the city's unadorned council meeting videos, even assuming a market could exist. — CONTINUES NEXT PAGE—

DAVIS WRIGHT TREMAINE CONT'D

COURT DISMISSS CITY'S COPYRIGHT CLAIM AGAINST CRITIC FOR USING COUNCIL MEETING CLIPS IN YOUTUBE VIDEOS

In sum, the court concluded that it could "scarcely conceive of works that are more appropriately protected by the fair use doctrine … than the Teixeira Videos. He is engaged in core First Amendment speech commenting on political affairs and matters of public concern." Finding that any amendment would be futile, the court dismissed the city's complaint without leave to amend.

Davis Wright Tremaine LLP attorneys Thomas R. Burke, Dan Laidman, and Diana Palacios represent Mr. Teixeira in this matter.

For additional information visit www.dwt.com

HOGAN LOVELLS

ADVISES INFLEXION PRIVATE EQUITY ON THE SALE OF RHEAD GROUP TO COSTAIN GROUP PLC FOR £36 MILLION

LONDON, 24 August 2015: Hogan Lovells has advised Inflexion Private Equity and Management ("Inflexion"), a leading independent private equity house on the sale of its investment in Rhead Group ("Rhead"), a technical professional services consultancy, to Costain Group PLC ("Costain"), one of the UK's leading engineering solutions providers, for a total cash consideration of £36 million on a debt and cash free basis.

The main focus of Inflexion's partnership with Rhead was to support the company's acquisitive growth and diversification strategy by broadening its service and sector offering, customer reach and expanding both its national and international presence.

The Hogan Lovells team advising was led by London corporate partner, Keith Woodhouse; with Oliver Vallée (senior associate) and Holly Hirst (associate) assisting.

Commenting on the transaction, Keith Woodhouse, partner in the London corporate practice, said:

"We are delighted to have advised Inflexion, a leading independent mid-market private equity house, on its most recent exit. This deal is another example of the transaction momentum we are seeing in the UK mid-market space, and a trend which we expect to continue over the remainder of the year."

For additional information visit www.hoganlovells.com

NAUTADUTILH

ADVISES MISC IN SALE OF ITS STALE IN VTII TO VIP TERMINALS FINANCE

ROTTERDAM, 21 August 2015: NautaDutilh Energy Team lead advised MISC, a subsidiary of PETRONAS, in relation to the sale of its 50% stake in VTTI (a global tank terminal operator) for a cash consideration of USD 830 million.

Completion is subject to satisfaction of conditions precedent, including EU anti-trust clearance.

The purchaser, VIP Terminals Finance B.V., is a wholly-owned subsidiary of Vitol Investment Partnership Limited, an investment vehicle managed by the Vitol group.

Completion is subject to satisfaction of conditions precedent, including EU anti-trust clearance. The purchaser is a wholly-owned subsidiary of Vitol Investment Partnership Limited, an investment vehicle managed by the Vitol group, one of the largest independent energy traders in the world.

The NautaDutilh Team comprised Jaap Jan Trommel, Ruud Smits, lead associate Lisa Schoenmakers, Gerard Carrière, Evert Jan van Drongelen, Nicole Dashorst, Mirjam Klompenhouwer (Corporate/M&A/Energy), Rob van der Hoeven (Litigation & Arbitration), Chris Warner, Edward Rijnhout, Janneke Speetjens, Sjuul Jentjens (Tax), Barbara Nijs and Babs Schoenmakers-van der Heijden (Competition).

For additional information visit www.nautadutilh.com

RODYK

ADVISES IN ACQUISITION OF NEDCOFFEE B.V. AMSTERDAM BY GROUPE SUCRES & DENREES

SINGAPORE Rodyk acted as the Singapore counsel for Groupe Sucres & Denrees ("Sucres"), one of the top 10 commodity traders in the global sugar market, in its acquisition of Nedcoffee B.V. Amsterdam ("Nedcoffee"), for an undisclosed sum.

The multi-jurisdictional transaction involving the acquisition of Nedcoffee's subsidiaries in Singapore, Indonesia, India and Vietnam, will enable Sucres to pursue its growth in the global coffee market.

The Rodyk team was led by corporate partner, Gerald Singham and supported by corporate partner, Sarah Choong, senior associate Mohamad Rizuan Bin Pathie, and associate Nicole Teo.

For additional information visit www.rodyk.com

SANTAMARINA Y STETA

HELPS BANCO INVEX ON US$88.2 MILLION NOTE ISSUANCE

MEXICO CITY, 27 August 2015: Santamarina y Steta has acted as deal counsel for Banco Invex's US$88.2 million notes issuance, the first offering from the bank's US$294 million debt programme.

The bank's parent company, Invex, and BBVA Bancomer acted as underwriters in the deal, which closed on 21 August.

Santamarina y Steta Partner Sergio Chagoya and associates Alfonso Monroy, Pablo Garza, Diego Ostos and Elias Zaga acted in the deal.

For additional information visit www.s-s.mx

TOZZINIFREIRE

ASSISTS SEVEN BOYS SALE TO WICKBOLD

SAO PALO, 18 August 2015: Brazilian baker Seven Boys has been acquired by local competitor Wickbold. The deal closed 10 August for an undisclosed sum.

TozziniFreire Advogados Partner Maria Elisa Gualandi Verri and associates Bruno Sbardellini Cossi and Fernando Silveira Carvalho assisted on the transaction.

For additional information visit www.tozzinifreire.com.br

SIMPSON GRIERSON

ACTS ON LARGEST BLOCK TRADE EVER UNDERTAKEN IN NEW ZEALAND

AUCKLAND 05 August 2015: The Simpson Grierson team of Michael Pollard and Andrew Matthews recently advised Macquarie Capital on the $1.81 billion sale by Origin Energy of its 53.1% shareholding in Contact Energy.

The sell down was the largest secondary markets transaction in New Zealand in the last 10 years and one of the largest deals ever undertaken in New Zealand.

The deal involved a number of technical firsts under the new Financial Markets Conduct Act. Michael Pollard says, "The trade was genuinely a landmark capital markets transaction. It had a fair amount of complexity and it was extremely satisfying to be involved in it."

For additional information visit www.simpsongrierson.com

UPCOMING PRAC EVENTS

58th International PRAC Conference - Vancouver
Hosted by Richards Buell Sutton LLP
September 26—29, 2015

PRAC @ IBA Vienna October 5, 2015

PRAC @ PDAC Toronto, March 8, 2016

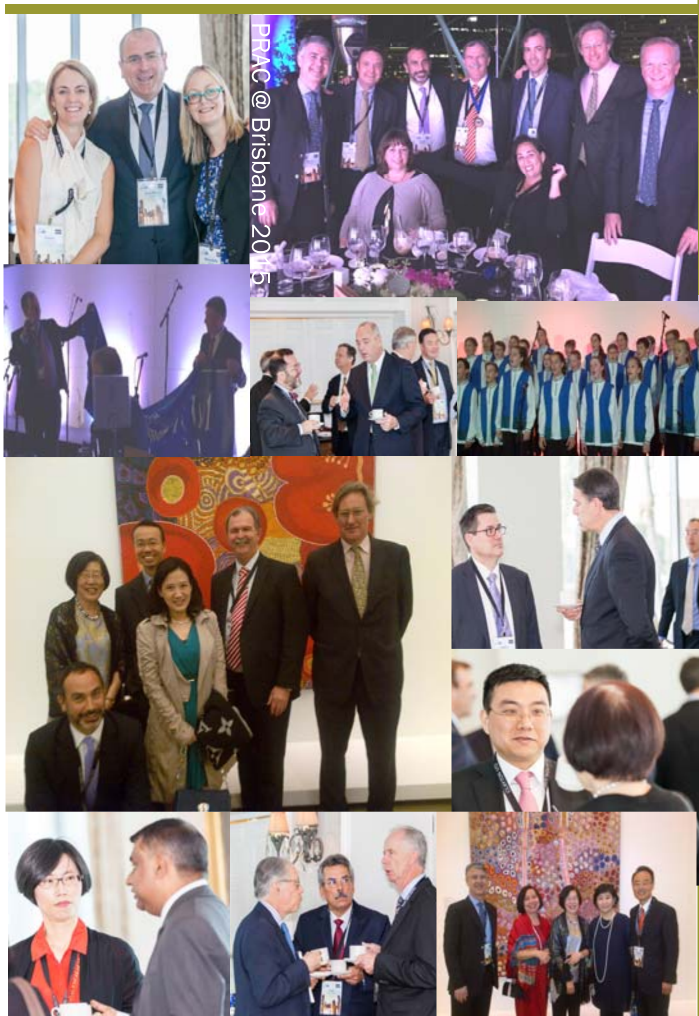
PRAC @ IPBA Malaysia, April 14, 2016

PRAC @ INTA Orlando, May 22, 2016

59th International PRAC Conference - Barcelona
Hosted by Rousaud Costas Duran SLP
May 21—24, 2016

PRAC @ IBA Washington September 19, 2016

60th International PRAC Conference - Manila
Hosted by SyCip Salazar Hernandez & Gatmaitan
September 24 - 27, 2016



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www.prac.org

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CLAYTON UTZ

20 August 2015

New foreign investment regime introduced into Parliament

The Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 and its associated legislation (**Bills**) introduced into Parliament today are substantially similar to the drafts released earlier this year. The legislation is intended to begin on 1 December 2015.

The important changes that you should be aware of are:

- the types of actions a foreign person will need to notify to the Treasurer before taking that type of action;
- acquisitions of interests in Australian Land will need to be notified to the Treasurer unless an exemption applies;
- the Treasurer will be able to make a range of orders if the actions of a foreign person are contrary to the national interest;
- the monetary thresholds which will apply to actions before they are caught by the legislation;
- the legislation will apply to foreign government investors;
- fees will be introduced for applications for approvals;
- an extensive penalty regime will be implemented;
- some purchasers of land will be required to pay 10% of the purchase price (as a withholding tax) direct to the ATO (if they know the vendor is a foreign person); and
- civil and criminal offences will apply for a wide range of circumstances including extending to third parties like company officers, lawyers, accountants and real estate agents;
- foreign persons who hold agricultural land as at 1 July 2015 will need to register those interests by 31 December 2015 with the ATO.

For more detailed information on this package of legislation see our Briefing Note.

We will be holding Briefing Sessions on Australia's Foreign Investment Reforms in most of our offices. Your invitation to our Briefing Session will follow shortly.

NautaDutilh

Privacy & Data Protection

Belgium

Confidentiality Agreements Are Not Data Processing Agreements

Wednesday, 9 September 2015

Companies often rely on third parties to manage their websites, host databases, maintain their IT infrastructure, organize marketing campaigns, etc.

When the activities performed by a third party entail the processing of personal data, the third party is generally considered a data processor under Belgian data protection laws.

The Data Protection Act, which implements the Data Protection Directive (Directive 95/46/EC), provides that when a third party processes personal data on behalf of a controller (i.e. the party that determines the purposes and the means of the processing), the controller must enter into a written agreement with the third-party processor. The agreement must at least:

- stipulate that the processor shall act only on instructions from the controller;
- determine the liability of the processor to the controller; and
- lay down the technical and organizational measures to be implemented by the processor.

Even though this obligation entered into force in 2001, many data processing agreements still do not contain the statutorily required provisions.

By now, you're probably wondering what all this has to do with confidentiality agreements. Well, not only do many data processing agreements not contain the required provisions, it is, unfortunately, also the case that certain suppliers are not aware of the obligation to enter into a data processing agreement and do not even know what a data processing agreement is! When we mention a data processing agreement, suppliers often tell us that they don't need one since they already have a confidentiality agreement in place or their terms and conditions contain a confidentiality clause. It goes without saying that this is not correct. A confidentiality agreement is merely an agreement by which the parties agree not to disclose certain information. This type of agreement does not deal with the processing of personal data per se and does not contain the required clauses.

The importance of a well-drafted data processing agreement cannot be overstated as it allows controllers to clearly determine how third-party suppliers should handle their data and which organizational and security measures must be put in place. The latter is very important given the increasing number of cyber security threats.

The forthcoming Data Protection Regulation maintains the obligation to enter into a data processing agreement and even provides for additional mandatory clauses. In particular, the agreement must oblige the processor to:

- obtain the controller's consent before engaging another (sub)processor;
- assist the controller in responding to requests from data subjects;
- make available to the controller all information necessary to demonstrate compliance with its obligations.

Finally, here are some best practices when dealing with third-party processors:

1. Always enter into a written agreement with the processor.
2. Ensure that the agreement contains at least the statutorily required clauses.
3. Draw up a list of minimum organizational and security measures to be taken by third-party processors.
4. Spell out the organizational and security measures in the agreement or an annex thereto (you can use your list) and do not merely state in general terms that the processor must put appropriate technical and organizational measures in place.
5. Tailor the agreement and the technical and organizational measures to the nature and volume of activities performed by the processor.

For more information, please contact:

Heidi Waem | Brussels | +32 2 566 8450

Jacqueline van Essen | Amsterdam | +31 20 71 71 714

Vincent Wellens | Luxembourg | +352 26 12 29 34

Significant Amendments Made to Bermuda's Partnership Legislation

September 8, 2015 | by Phelecia Barnett, Associate, Bennett Jones (Bermuda) Ltd.

Bermuda is widely perceived as a blue chip offshore financial centre (not just in insurance and mutual funds) and continues to introduce new or amend existing legislation to attract more investors to use the jurisdiction.

After extensive consultation with industry stakeholders, a series of amendments to Bermuda's partnership legislation were passed by the Bermuda government on May 29, 2015, and became operative in June 2015.

The amendments operate to broaden Bermuda's appeal as a premier offshore jurisdiction for private equity and investment funds generally, and add a competitive edge to operation of Bermuda partnerships.

The key changes to the existing partnership legislation are described below.

Partnerships can convert into Companies and Companies can convert into Partnerships

Exempted limited partnerships which have legal personality can transition into exempted companies under the *Bermuda Companies Act 1981* and exempted companies can transition into exempted limited partnerships. This amendment allows entities to convert to a different and more advantageous structure based on their individual business needs without having to dissolve the entity from which they wish to convert.

Partnerships can continue into Bermuda

Similar to the legislation governing Bermuda exempted companies, partnerships registered in certain jurisdiction can now deregister in their home jurisdiction and continue in Bermuda, and partnerships registered in Bermuda can deregister from Bermuda and continue into another jurisdiction. This amendment provides additional flexibility for an exempted partnership to either: (1) relocate its business to Bermuda without having to dissolve the partnership; or (2) be registered in Bermuda as an overseas partnership under our existing legislation.

Creation of a Register of Charges for Partnerships with Separate Legal Personality

Partnerships which have elected to have legal personality may have charges granted over the assets of such partnership registered on a register of charges maintained by the Registrar of Companies in Bermuda. In so far as Bermuda law governs the priority of the security, such security will have priority over any subsequent registered charges and over any unregistered charges in respect of the asset which is the subject of the registered security. Like the register of charges for companies, the register of charges will enable the public to access information related to encumbrances against partnership assets.

This amendment will increase the attractiveness of Bermuda for our clients who wish to use Bermuda partnerships for transactions where security is required to be taken.

Secondary Names

Similar to the provisions set out in the *Bermuda Companies Act 1981*, exempted partnerships may now have a secondary name in addition to its primary name which can be in any language not using roman script.

Extension of Safe Harbour Provisions for a Limited Partner

The existing safe harbour provisions for activities of limited partners when a limited partner is consulting or advising a general partner without losing its limited liability status with respect to the business of the partnership have been clarified. A limited partner can consult or advise a general partner with respect to the business of the limited partnership, without taking part in the management of the limited partnership, if the limited partner or a representative of a limited partner serves on any board of committee of: (a) the limited partnership; (b) a general partner; (c) the limited partners; (d) the partners or any class or category of those partners; or (e) any person in which the limited partnership has an interest.

Conclusion

The amendments to the partnership legislation demonstrate Bermuda's commitment to enhancing its attractiveness as a jurisdiction of choice through efficient and modernized legislation and the effectiveness of the Bermuda government to be attentive to the needs of the international business community to ensure that Bermuda's legislative framework for business remains competitive.

We invite interested persons to contact us for additional information about the amendments or Bermuda as a jurisdiction of choice generally.

Bennett Jones (Bermuda) Ltd. primary contact:

Duncan C. Card, B.A., LL.B., LL.M., ICD.D
Managing Principal
T: 441.292.4229
E: cardd@bennettjones.com

INFRASTRUCTURE / PUBLIC PROCUREMENT

Brazilian Federal Government listens to the market and increases the Internal Rate of Return for new concessions

Aiming at increasing the participation of the private sector in the new round of concessions included in the second phase of the Program for Investment in Logistics ("PIL 2"), the Ministry of Finance has updated the parameters for the calculation of the reference Internal Rate of Return (*Taxa Interna de Retorno*, or "TIR") for the upcoming concessions. This change meets a request of the private sector that has been debated since the first phase of the plan ("PIL 1"). According to the Ministry of Finance, the methodology for the calculation of the TIR is the same that was used for the previous concessions. There are four criteria used for the update of the TIR, of which three include risk rates. It is worth noticing that the rates of the TIR disclosed do not necessarily correspond to the effective rate of return of the investment made by the companies, which will depend on the actual operation of the relevant projects by each investor, including, for example, the financing conditions.

Airports
With the update, the TIR for the airport concessions increased from 6.63% per year (used in the prior auctions) to 8.5% per year. According to the federal government, this value will be used only to define the minimum granting amount (*i.e.* amount to be paid by the winner of the auction to the government). The current plan is to carry-out the concessions of the Porto Alegre (RS), Florianópolis (SC), Fortaleza (CE) and Salvador (BA) airport terminals next year. The winner will be the company or consortium that presents the highest granting amount.

Ports
The government has also indicated that port tariffs shall increase. The Ministry of Finance established a TIR of 10% for the ports concessions in the PIL 2, compared to a rate of 8.3% in the PIL 1.

Toll-roads
The Ministry of Finance increased the TIR for the concession of toll-roads to 9.2%, compared to a rate of 7.2% in the PIL 1.

Railways
There is an expectation that the TIR for railways concessions will be set above a rate of 10%, considering that such projects seem to have higher risks among all the projects included in the new concession plan.

The federal government expects the new round of concessions of infrastructure projects to foster the economy – and the clarification of strategic points for investors, which include, among other matters, the definition of the return rates – are essential not only to increase the investments, but also to sustain their long-term growth.

Antonio Felix
de Araujo Cintra
Partner - São Paulo

Luis Felipe Bricks
Bourg
Associate – São Paulo
lbourg@tozzinifreire.com.br

.

International Public Procurement Practice Group

Claudia Elena
Bonelli
Partner – São Paulo
cbonelli@tozzinifreire.com.br

Ana Cândida
de Mello Carvalho
Associate – São Paulo
amcarvalho@tozzinifreire.com.br

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NEWS & EVENTS

B.C. COURT OF APPEAL APPLIES POLLUTION EXCLUSION CLAUSE IN CGL POLICY

August 21, 2015

Nicholas Safarik
Richards Buell Sutton Insurance Newsletter

In *Precision Plating Ltd. v. Axa Pacific Insurance Co.*, 2015 BCCA 277, the B.C. Court of Appeal considered the applicability of a pollution exclusion clause contained in a commercial general liability ("CGL") policy in the context of overflowing chemical vats consequent of a strata complex fire.

THE FACTS

The insured was in the business of electroplating and operates its business out of leased strata premises. The insured maintained and used vats filled with toxic chemical solutions that could contaminate and pollute the surrounding property if not properly stored.

On April 12, 2011, a fire at the insured's premises activated the building's sprinkler system and water from the sprinkler system caused the chemical vats to overflow. Diluted chemical solutions ran onto and contaminated the surrounding property used by neighbouring businesses. Following the fire, four of the surrounding business owners commenced actions against the insured for property damage caused by contamination.

The CGL policy contained the following exclusion:

> 4. This insurance does not apply to:
>
> (b) (i) Bodily Injury, Personal Injury or Property Damage <u>caused by, contributed to by or arising out of</u> the actual, alleged or threatened discharge, emission, dispersal, seepage, leakage, migration, release or escape at any time of Pollutants:
>
> (1) at or from any premises, site or location owned, rented or occupied at any time by an Insured;
>
> …

LAWYERS

Nicholas M. Safarik

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CONTACT
700 401 West Georgia Street
Vancouver, BC, Canada V6B5A1
Main: 604.682.3664

www.rbs.ca

> "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to <u>smoke</u>, odour, vapor, <u>soot</u>, fumes, airborne or waterborne particles, acids, alkalis, <u>chemicals</u>, sewage, micro-organisms and waste. Waste includes (but is not limited to) materials to be recycled, reconditioned or reclaimed.

The insurer refused to defend the insured in the actions on the basis that the claims therein were, in substance, pollution claims and thus excluded from coverage. The insured sought a declaration of coverage.

At trial, the insurer conceded that fire damage would be covered, despite the fact that smoke, soot and chemicals were included in the definition of pollution. The trial judge took issue with the insurer's "elastic approach" to interpreting the pollution exclusion clause, as a literal interpretation of that clause would bar coverage for third party claims arising out of many of the usual consequences of fire and the third party claims as pleaded were at least in part for damage caused by fire. The trial judge found the exclusion clause was ambiguous, as a reasonable CGL policy holder would expect that the policy insured the very risk that occurred in this case, and concluded that the exclusion should not be applied "where to do so would nullify coverage provided by the policy and would be contrary to the reasonable expectations of the parties."

On appeal, the insurer contended the trial judge had erred in finding the pollution exclusion ambiguous. The insurer further argued that the trial judge erred in finding that the cause of the damage was fire and that the application of the pollution exclusion clause to the facts of the case would render the policy coverage nugatory and defeat the reasonable expectations of its insured.

The insured countered that it purchased liability insurance to cover it for liability caused by fire, and it had a fire on its premises, which caused damage including the overflow of the vats which contaminated the neighbouring business owners' properties. The insured argued that the policy was ambiguous and any ambiguity should be resolved in its favor.

THE RULING

Initially the court was challenged by the standard of appellate review of insurance policy decisions rendered by lower courts. Rulings in 2014 and 2015 from the Supreme Court of Canada and the Alberta Court of Appeal were considered on the standard of appellate review. Based on the wide precedential value of court rulings on insurance policy interpretation questions the court determined the standard of review was correctness of the ruling below rather than a palpable and overriding error of the ruling below.

The court went on to find the trial judge had erred in framing his analysis as a question of the cause of the damage, rather than the cause of the liability; it is not the "true cause" of the damage that is relevant, but the true cause of the liability. The court's decision states as follows (at para. 41):

> "…The judge seemed to construe the policy as covering the peril of fire, rather than liability for damages. What the judge needed to determine in this case was whether the pleadings alleged the escape of pollutants as the source of liability, which would then be a cause of the potential 'loss' for the insured…"

The court also considered the "concurrent cause" language contained in the exclusion. It found that the words "caused by, contributed to by or arising out of" ousted coverage when liability for the release of pollutants was a concurrent cause of the loss, as it was pleaded in this case to be along with fire.

The court also considered the trial judge's conclusion that the exclusion was ambiguous. It ruled that the trial judge erred by conflating the reasonable expectations of the parties with a contextual analysis of the definition of "Pollutant". The court found that a strict or literal interpretation of the policy would exclude coverage and that, in the contextual circumstances, the insured could not reasonably expect that it would be indemnified for escape of chemicals from its vats.

Finally, the court analyzed the pleadings of the third party business owners and found that all four actions alleged liability based on the release of pollutants – the very risk to which the exclusion clause was intended to apply. As a result of its conclusion that there was no possibility the insurer would be obligated to indemnify it did not have a duty to defend.

PRACTICAL CONSIDERATIONS FOR INSURERS

The B.C. Court of Appeal's decision in *Precision Plating* confirms many established principles of insurance policy interpretation in the context of a pollution exclusion clause in a CGL policy.

Perhaps the most salient feature of *Precision Plating* is the court's consideration of the standard of appellate review of insurance contracts. Insurers considering the appeal of a lower court's adverse ruling on a question of policy interpretation should take comfort in the knowledge that predictability and certainty are among the courts' primary objectives in interpreting insurance policy language.

In construing coverage under a CGL policy, remember the analysis should focus on the source of potential liability, and not the source of potential damage.

Where concurrent causes of loss are alleged, do not underestimate the power of language such as "caused by", "resulting from" and "arising out of" to remove any ambiguity from the meaning of an exclusion clause.

/Carey

Comder Central Counterparty S.A. becomes operational

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Carey contact.

Diego Peralta
Partner
+56 2 2928 2216
dperalta@carey.cl

Elena Yubero
Associate
+56 2 2928 2216
eyubero@carey.cl

Juan Pablo Loyola
Associate
+56 2 2928 2231
jployola@carey.cl

Carey y Cía. Ltda.
Isidora Goyenechea 2800, 43rd floor
Las Condes, Santiago, Chile.
www.carey.cl

On Thursday, July 30th, 2015, ComDer Central Counterparty S.A. began its operations, with the objective to manage netting and settlement of financial instruments.

To date, each bank typically performed derivatives transactions with customers or other banks on a bilateral basis; however, after the financial crisis of 2008, this became one of the most questionable practices. The laws regarding this matter began to be amended around the globe, and Chile wasn´t an exception. In this context, law 20,345 was enacted on June 6th, 2009, and gave the legal framework for the Financial Instruments Netting and Settlement Systems, but it wasn't until this year that this law took capital importance, due to the creation of the Netting and Settlement Systems for OTC Derivative Instruments, known as COMDER CENTRAL COUNTERPARTY S.A. (ComDer).

ComDer is a company incorporated in accordance with Title II of Law 20,345, to manage netting and settlement of financial instruments, and that will act as a Central Counterparty. A Central Counterparty is the entity with which all operations that would otherwise be settled directly between the parties are settled on a multilateral basis. This system includes a Registration and Confirmation of Operations module and Repository Centralized Operations module. The Central Counterparty acts as a buyer for every seller and as a seller for every buyer, assuming each transaction payment liability and diminishing the bilateral direct interconnection between the institutions involved.

The shareholders of this entity are Servicios de Infraestructura de Mercado OTC S.A. and the Association of Banks and Financial Institutions of Chile AG. ComDer´s direct participants are 17 banks and it has an investment portfolio in highly liquid financial instruments. In this sense, ComDer limits its market risk exposure by investing their surpluses in documents issued by the Central Bank, or fixed income financial instruments issued by banks and financial institutions, or fixed income mutual funds. Investments in financial instruments are short term. The financing policy gives preference to acting with ComDer's own resources.

ComDer will operate by high security electronic means for reception, confirmation, acceptance, netting and settlement of compensation orders received from participants. Specifically, the buyer and seller encapsulate a message through the SWIFT global network, then ComDer matches the information and confirms that the transaction is correct. Once confirmed, the novation of the contract is made by the House, which requests the guarantees and makes the corresponding margin calls.

The acceptance and compensation process is made in real-time and ComDer counterpart will always be a bank. The Central Counterparty objective is to avoid the system´s default, which is accomplished by requesting guarantees from the participants. If one of them is not able to comply with its obligations, the Central Counterparty takes the administration of its portfolio and its guarantees, managing the positions.

Among the main benefits attributed to this new system are the increase in transparency and security in derivatives markets, a better balance between risk management and liquidity cost, operational efficiency improvements and, of course, reduced systemic risk. In addition, when transferring the operational risks to ComDer, the banks are releasing lines and capital requirements.

Finally, on July 23rd, 2015, ComDer received Exempt Resolution No. 226 issued by the Chilean Superintendency of Securities and Insurances, which gave the necessary authorization to initiate its activities, completing the final stage prior to its operation.

Under this authorization, the board of ComDer set as the starting date of operations Thursday, July 30th, 2015 as stated in the plan of implementation. With this commissioning, one of the items of the global regulatory agenda of the Chilean Central Bank was met.

BRIGARD& URRUTIA

Normalization surtax declared constitutional

Mon, 08/31/2015 - 16:01

NewsFlash: 299

Normalization surtax declared constitutional

On August 26, 2015 the Constitutional Court issued Decision C-551 of 2015. By means of such Decision the Constitutional Court declared that the Normalization surtax, introduced by the last tax reform through Law 1739 of 2014, is a legitimate measure from a constitutional perspective, which results appropriate, necessary and helpful to achieve the essential objectives of a Estado Social de Derecho (social state of law). In accordance with the foregoing, the Constitutional Court ruled the constitutionality of the Normalization surtax.

It is important to mention that the Constitutional Court reaffirmed that amnesties on tax matters must obey to exceptional situations and it justification requires a strict proportionality test. However, the Court states that the Normalization surtax is not an amnesty but an actual tax obligation that the taxpayers must comply with, regardless of their willingness to do so.

The Constitutional Court specifically determined that the purpose of the Normalization surtax is to obtain information regarding the assets that Colombian tax residents have not declared, and for which there is no obligation to condone due to the fact that the Colombian Tax Administration has no information regarding such assets. Pursuant to the Constitutional Court, the fight against tax evasion, obtaining complete information about tax residents in Colombia and the normalization of their assets, are paramount to supply the necessary resources in order for the Estado Social de Derecho (social state of law) social and democratic state of law to fulfill its essential purposes.

In consequence, the Constitutional Court established the difference between the Normalization surtax and the amnesty set forth in the tax reform of 2012 (i.e., Law 1607 of 2012, article 163), which was declared inconstitutional in the same year.

In accordance with Decision C-551 of 2015 by the Constitutional Court, the Normalization surtax will remain in force under the terms of Law 1739 of 2014. In accordance with such Law, the Normalization surtax is triggered by the possession of omitted assets and inexistent liabilities (i.e., those not included in national tax returns when it was mandatory to do so), for January 1, 2015 (10% tax rate), January 1, 2016 (11.50% tax rate) and January 1, 2017 (13% tax rate). Finally, it is important to mention that pursuant to Law 1739 of 2014, the rights in private foundations, trusts or other fiduciary business abroad must be declared taking into account the rules governing fiduciary rights held in Colombia (i.e., the equity value will be determined on the basis of Article 271-1 Tax Code).

For more information please contact:

Sergio Michelsen

Jose Andrés Romero

Lucas Moreno Salazar

Paula Camacho Henao

Nicolás Bernal Abella

Calle 70A No. 4 - 41
Phone: (+57-1) 346 2011
Fax: (+57-1) 310 0609 - (+57-1) 310 0586
info@bu.com.co
Bogotá - Colombia
www,bu..com.co

GIDE
GIDE LOYRETTE NOUEL

client alert

MERGERS & ACQUISITIONS | TAX | FRANCE | 1 SEPTEMBER 2015

EQUITY-BASED INCENTIVE PLANS (FREE SHARES AND BSPCE): THE CHANGES WROUGHT BY THE MACRON LAW

The law for growth, activity and equality of economic opportunities (known as the "Macron law") was published on 7 August 2015.

Among the various measures of the Macron law, those relating to free share plans[1] are likely to result in a significant increase in the use of such instruments as equity-based incentive plans for employees and officers.

The legal and tax regime of founders' warrants (BSPCEs, which stands for "*bons de souscription de parts de créateurs d'entreprises*")[2] has also been amended, unlike the regime of stock-options, which remains unchanged.

FREE SHARE PLANS

The amended provisions apply to free shares plans approved by a shareholder's extraordinary general meeting held after publication of the Macron law, i.e. after 7 August 2015.

Acquisition period (*période d'acquisition*) and lock-up period (*période de conservation*)

Until now, free shares allotted to certain beneficiaries were only definitively acquired by such beneficiaries on the expiration of a period, known as the acquisition period, of at least 2 years (provided in most cases that the beneficiary has remained within the company until such time). After the acquisition period, free shares were then subject to a second period, known as the lock-up period, of at least 2 years during which the beneficiaries that had definitively acquired their free shares were not permitted to dispose of their free shares. However, if the acquisition period were equal to 4 years or more, it was possible to impose a lock-up period of less than 2 years or not to impose any lock-up period.

Since the Macron law:

- the minimal duration of the acquisition period is 1 year;
- the shareholders' general meeting is no longer required to set a minimal lock-up period;
- the aggregate duration of the acquisition period and lock-up period cannot be lower than 2 years.

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[1] Article L. 225-197-1 et seq. of the French Commercial Code.
[2] Article 163, bis G of the French Tax Code.

Maximum ratio rule

A previous law enacted in March 2014[3] had introduced a specific rule in case of free share plans for the benefit of all employees, pursuant to which the difference between the number of shares allotted to each employee could not exceed a 1:5 ratio.

This maximum ratio is no longer applicable to free share plans for the benefit of all employees that do not represent more than 10% of the share capital (or 15% in private SMEs when such a cap is provided in the by-laws). However, this maximum ratio remains applicable to free share plans for the benefit of all employees that exceed 10% (or 15%) of the share capital (the cap legally applicable in case of free share plans for the benefit of all employees being 30% of the share capital).

Changes in the social and tax regime

Employer and employee social security contributions

The employer's social security contribution rate has been reduced from 30% to 20%.

In addition, this employer's contribution is now due on the month following the date of the acquisition of the free shares by the beneficiary (i.e. after the acquisition period), and not on the month following the date of allotment of the free shares.

The tax base for such employer's contribution is also simplified, and now corresponds to the value of the free shares on the date of their definitive acquisition by the beneficiary.

Companies falling within the European definition of SMEs that have not paid any dividends since their creation are exempted from paying such employer's contribution within the limit of the social security cap per beneficiary (currently € 38,040 per annum). These conditions must be met on the date of allotment of the free shares.

Companies exempted from the employer's contribution are also exempted from the "*forfait social*" contribution.

The 10% employee's social security contribution is no longer applicable to free share plans.

Taxation upon sale of the shares

The beneficiary is no longer considered as making a profit upon the acquisition of free shares and a capital gain upon the sale of free shares, but only as making a profit equal to the value of the free shares on the date of their sale.

Such profit is deemed to be a capital gain and can give rise to tax reliefs based on the length of the period during which the free shares have been held by the beneficiary. However, the ownership period starts on the date of acquisition of the free shares and not on the date of their allotment.

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[3] Law n°2014-384 dated as of 29 March 2014.

BSPCEs

The amended provisions apply to BSPCEs allotted after publication of the Macron law, i.e. after 7 August 2015.

Extension to subsidiaries

BSPCEs may now be allotted to employees and officers (subject to the tax regime for employees) of a subsidiary of the issuing company, provided that 75% of share capital or voting rights of such subsidiary is held by the issuing company.

However, the subsidiary is required to meet the criteria for the allotment of BSPCEs[4], apart from the condition relating to its ownership by individuals[5] (such condition must be met by the parent company issuing the BSPCEs).

In such case, the condition relating to the maximum market capitalization of the issuing company is calculated by aggregating the market capitalization of the issuing company and that of its subsidiaries whose employees have been allotted with BPSCEs of the issuing company in the last 12 months.

The periods during which a beneficiary has been employed in a subsidiary and in the parent company issuing the BPSCEs are now taken into account in determining whether the 3-year employment period beyond which the tax rate of the capital gain is reduced to 19% (instead of 30%) is reached.

Exception in case of continuation of existing activities

The Macron law has also introduced new exceptions in order to allow the issuance of BSPCEs by companies created in the context of a combination, reorganization, extension or takeover of existing activities, which was previously prohibited (subject to rare exceptions).

Such companies may now issue BPSCEs, provided that all companies involved in the corresponding operation meet the criteria required for the issuance of BSPCEs (cf. *supra*). To that effect, the condition relating to the maximum market capitalization is assessed by aggregating the capitalization of all the companies resulting from the operation, and the condition relating to the age of the company is assessed by taking into account the incorporation date of the oldest of the companies involved in the operation.

CONTACTS

CHRISTIAN NOUEL
christian.nouel@gide.com

BRUNO DONDERO
bruno.dondero@gide.com

BENOÎT MARTIN
benoit.martin@gide.com

[4] Substantially: i) be subject to corporate income tax in France, ii) not to have been created in the context of a combination, reorganization, extension or takeover of existing activities, iii) not be listed or have a market capitalization lower than € 150 million (such rule being subject to a transitional exception for 3 years if such cap is exceeded), iv) be incorporated for less than 15 years.

[5] Be continuously and directly held at least for 25% by individuals or by legal entities themselves held directly at least for 75% by individuals (provided that certain shareholders (e.g. venture capital vehicles) are disregarded to assess whether such percentages are reached).

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NEWS DETAIL

28/08/2015

NEW RULES FOR COMPANIES ACTIVE IN FREIGHT FORWARDING

On 9 April 2015, the Indonesian Minister of Transportation issued a new regulation on freight forwarding: Regulation No. 74 of 2015. The new regulation, which was amended by Regulation No. 78 of 2015, replaces the old Decree No. 10 of 1988 on Freight Forwarding as amended by Decree No. 10 of 1989. It became effective on 16 April 2015.

Compared to the old regulation, the new regulation contains more detailed provisions, inter alia on line of business, documentation, formation, licensing, foreign investment, obligations, liability insurance, adjustment and sanctions, as discussed in further detail below.

According to the new regulation, freight forwarding activities include shipment and receipt of goods via land, rail, sea, and air transportation and must be conducted by an entity specifically formed to do so.

Under the new regulation, the minumum required authorized capital of an entity engaged in freight forwarding is increased to Rp. 25 billion, of which at least 25% (i.e. Rp 6.25 billion) must be fully issued and paid-up, as evidenced by an acknowledgement of its receipt or upon an audit by a registered accountant. By comparison, under the old regulation, the minimum paid up capital was Rp. 200 million. However, the new regulation allows a company to have a lower amount of authorised, issued and paid-up capital, subject to the company obtaining a recommendation from related associations.

Different capital requirements apply to freight forwarders with foreign investment status. The Investment Coordinating Board will require foreign investors that want to be engaged in freight forwarding to invest at least US$10 million, of which at least 25% must be in the form of equity.

Note: Apart from different capital requirements, there are restrictions on foreign shareholding in an entity engaged in freight forwarding. Pursuant to the Presidential Regulation No. 39 of 2014 concerning List of Lines of Business that are Closed and Conditionally Open for Investments (the so-called Negative List), foreign share ownership in a company which line of business is freight forwarding services, is limited to 49%.

An entity engaged in freight forwarding is required to obtain a license. Contrary to the old regulation, which granted this authority to the Minister of Transportation, this license is issued under the new regulation by the Governor of the Province where the freight forwarder is domiciled. The license will be issued upon fulfillment of the administrative and technical requirements, and remains valid within the Indonesian territory as long as the freight forwarder continues to be engaged in freight forwarding.

A joint venture freight forwarder must have a license issued by the Governor where it is domiciled. A freight forwarder with foreign investment status must register with the Minister of Transportation and the BKPM, which will issue a principle license.

Upon obtaining a license, a freight forwarder must:

- comply with laws and regulations on shipping and others;

- start business not exceeding 3 (three) months upon the issuance of its license;
- submit reports on business (annually), shipment and receipt of goods (monthly), changes in data of its license, and opening of new branch offices;

To reduce any risk of liability and to guarantee the harmed parties, a freight forwarder must insure its goods and liabilities (this provision was not regulated in the old regulation).

A freight forwarder may form a branch office domestically and appoint and cooperate with agents abroad under the national and regional laws and regulations.

As a contractual transporter, a freight forwarder must issue documentation for national or international trade under the laws and regulations and the usual practices. This documentation, be it in print or electronic, is issued, managed, and organized by a freight forwarder engaged in shipment/receipt and distribution of goods.

Freight forwarders already in existence must adjust their licenses to this new regulation within 3 (three) years of the issuance of this regulation.

Administrative sanctions will be imposed in case of violation of any of the obligations through written warnings, suspension and/or revocation of a license. (*by: Wishnu W. Basuki, Bani W. Kusnandar & Gustaaf Reerink*)

LEGAL UPDATE

July, 2015

GUIDELINES FOR GRANTING CONCESSIONS OF TELECOMMUNICATIONS AND BROADCASTING

On July 24, 2015, the Guidelines for Granting Concessions of Telecommunications and Broadcasting were published in the Official Gazette of the Federation ("DOF" for its acronym in Spanish). The Guidelines became effective the day after their publication in DOF, this is, July 25, 2015.

The Guidelines establish, in a clear and precise manner, the terms and requirements to be met by those persons interested in obtaining from the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones*, "IFT", for its acronym in Spanish) a concession of the ones established in the Federal Law on Telecommunications and Broadcasting (the "LFTR" for its acronym in Spanish).

As may be recalled, the LFTR regulates the following types of Concessions:

- Sole Concession, which is used to render all kind of public telecommunications and broadcasting services. For its purposes, the Sole Concession is also classified in (i) commercial use; (ii) public use; (iii) private use; (iv) social use; (v) communal social use; and (vi) indigenous social use.

- Concession of radio spectrum, which is granted to use, develop and exploit frequency bands from the radio spectrum for determined use. For its purposes, the Concession of radio spectrum is also classified in (i) commercial use; (ii) public use; (iii) private use; (iv) social use; (v) communal social use; and (vi) indigenous social use.

- Concession of orbital resources, which is granted to use and exploit orbital resources. For its purposes, this Concession is also classified in (i) commercial use; (ii) public use; (iii) private use; (iv) social use; (v) communal social use; and (vi) indigenous social use.

Likewise, the Guidelines establish those requirements to be met by current concessionaires who obtained their corresponding concessions under the federal laws of telecommunications and radio and television (repealed by the LFTR), to move into the new concession regime set forth by the LFTR. By virtue of the aforementioned, the Guidelines establish the new requirements for current concessionaires to transit their concession to the sole concession and to consolidate concessions.

In case you require additional information, please contact the partner responsible of your account or any of the following attorneys:

Mexico City Office:	***Mr. Jorge León-Orantes B., jleon@s-s.mx (Partner)*** ***Mr. Carlos Díaz S., cdiaz@s-s.mx (Associate)*** ***Tel: (+52 55) 5279-5400***
Monterrey Office:	***Mr. Jorge Barrero S., jbarrero@s-s.mx (Partner)*** ***Tel: (+52 81) 8133-6000***
Tijuana Office:	***Mr. Aarón Levet V., alevet@s-s.mx (Partner)*** ***Tel: (+52 664) 633-7070***
Queretaro Office:	***Mr. José Ramón Ayala A., jayala@s-s.mx (Partner)*** ***Tel: (+52 442) 290-0290***

Simpson Grierson

Privacy Update - new offence provisions in proposed privacy reforms

02 Sep 2015

A focus on new criminal offences

Simpson Grierson is keenly tracking the progress of privacy law reform in New Zealand. A draft Privacy Bill has yet to be released but the Government (through a Cabinet paper) has indicated some key areas of focus.

In this Privacy Law update we look at the **new criminal offences**, which are expected to form part of the new legislation.

Inadequacies in the existing privacy regime

The Privacy Act 1993 is primarily enforced through civil remedies, rather than the criminal law. However, it was felt that new offences should be introduced that relate to wilful and unacceptable behaviour, which the civil law couldn't adequately deal with. As a consequence, the Law Commission (in its review of the Privacy Act) had recommended the introduction of two new criminal offences.

New criminal offences proposed

The Government agreed with the Law Commission and has indicated it will introduce the following new offences:

- **Misleading an agency** - Misleading an agency by impersonating an individual, or misrepresenting an authorisation from an individual, in order to obtain that individual's personal information (or to have that information destroyed, altered or used). This offence addresses the problem of "pretexting", whereby individuals systematically mislead agencies to obtain someone else's personal information. Under the current law, the affected individual can only complain about the agency for the unlawful disclosure - there is no sanction against the person engaging in deception.

- **Destroying documents** - Destroying documents containing personal information to which a person has sought access. This would criminalise the actions of an agency that intentionally destroys personal information which is the subject of a request. Currently, agencies must put in place safeguards against loss or misuse of information, but the Law

Commission considered that the complaints process is ineffective where the information in question has been destroyed.

Both new offences will likely contain an intent element, with the exact wording to be determined during the drafting phase. The two new offences may carry a maximum fine (upon conviction) of $10,000, consistent with the proposed increase in penalties for existing offences under the Privacy Act.

It is also proposed that it will become an offence to fail to notify the Privacy Commissioner of a data breach. Again, the offence may carry a fine of up to $10,000 although for public sector agencies, who cannot currently be subjected to a fine under the Privacy Act, the sanction will be "naming and shaming". However, whether such failure will be a criminal offence in line with the other proposed offences is still the subject of consideration and could be dependent upon the outcome of work the Law Commission is undertaking on the use of civil pecuniary penalties.

How will we compare?

Internationally, offences similar to the two proposed new offences are already in place as part of the laws protecting privacy and information in comparable jurisdictions. For example:

- **United Kingdom:** The UK's Data Protection Act contains a provision that makes it an offence for any person to knowingly or recklessly obtain personal data, or procure the disclosure of that information to another, without the consent of the data controller (the equivalent to our Privacy Officers). The provision also creates further offences for selling that unlawfully obtained data.

- **Canada:** Organisations in Canada that hold personal information must retain the information for as long as is necessary to allow the individual to exhaust any recourse that they may have. Any person who knowingly breaches that requirement is guilty of an offence and liable to a substantial fine.

Mandatory breach notification is a common concept in a number of jurisdictions with the UK, Australia and Canada also looking at introducing this requirement.

The Government has noted that other jurisdictions rely on heavy fines to ensure compliance with privacy laws, including Australia which provides for fines of up to $1.8 million for serious and repeated privacy breaches. The Government has indicated it will adopt a more moderate package of fines until it has better determined the impact of the reforms.

How Simpson Grierson can help you

Simpson Grierson's privacy team has extensive experience on both sides of the privacy coin - compliance and crisis management. Our privacy page (http://www.simpsongrierson.com/dispute-resolution/privacy-2/) provides details about our team, and how we can help you.

www.simpsongrierson.com

Mechanism for Suspending and Resuming Trading Introduced by TWSE and TPEx

08/27/2015

Odin Hsu/Izzie Chen

"Taiwan Stock Exchange Corporation Procedures for Verification and Disclosure of Material Information of Companies with Listed Securities" and "Taipei Exchange Procedures for Verification and Disclosure of Material Information of Companies with TPEx Listed Securities" (together "Procedures for Verification and Disclosure of Material Information") respectively added new provisions relating to the suspending and resuming trading mechanism and this new mechanism will be implemented on 15 January 2016.

The establishment of the suspending and resuming trading mechanism by the Taiwan Stock Exchange Corporation ("TWSE") and Taipei Exchange ("TPEx") aims to provide sufficient time for real-time information and material announcements released during trading hours to be widely available to investors so as to reduce information asymmetry and allow investors time to digest the information.

As for trading suspension, the Procedures for Verification and Disclosure of Material Information require companies listed on the TWSE or TPEx to apply to the TWSE (TPEx) for trading suspension if the listed company announces or a board meeting of the listed company is held to pass any resolution relating to any of the following events:

1. serious decrease in production or complete stoppage of work;
2. events provided in Article 185 of the Company Act, except for those not materially affecting the rights of shareholders or the price of the securities;
3. filing for bankruptcy or reorganization;
4. merger or consolidation, division, acquisition, exchange or conversion of shares or transfer of shares from another, or revocation of a merger or consolidation, except for those not requiring shareholders' resolution pursuant to the Business Mergers and Acquisitions Act or not materially affecting the rights of shareholders or the price of the securities;

5. success in development of new products, trial products going into mass production or important progress in new products or technology, except for those not materially affecting the rights of shareholders or the price of the securities, and
6. events that materially affect the rights of shareholders or the price of securities.

In addition to the abovementioned events, companies listed on the TWSE are obliged to apply to the TWSE for trading suspension when the companies discover news in the media or other information that materially affects the rights of shareholders or the price of the securities and the companies are not able to clarify on the day of discovery.

Furthermore, while companies listed on the TWSE or TPEx may apply for trading suspension, the TWSE (TPEx) may order suspension or continuous suspension when (1) news in the media materially affects the rights of shareholders or the price of the securities, or (2) companies with TWSE (TPEx) listed securities fail to clarify suspension events.

With regard to resuming trading, companies listed on the TWSE or TPEx may resume trading following their applications or orders from the TWSE (TPEx) upon clarification or change of circumstances.

In order to accommodate the new mechanism, under the Procedures for Verification and Disclosure of Material Information, the TWSE (TPEx) requires companies listed on the TWSE or TPEx to issue and implement their own internal procedures to handle matters relating to suspending and resuming trading and such internal procedures shall be approved by the board of directors.

BAKER BOTTS

EPA Proposes Methane Standards for Oil and Gas Sources

21 August 2015

Updates

On August 18, 2015, EPA proposed a sweeping expansion of the existing Clean Air Act new source performance standards ("NSPS") designed to reduce methane and VOC emissions from upstream and midstream operations. The proposed amendments include standards for methane and VOCs for certain new, modified and reconstructed equipment, processes and activities across the oil and gas source category.

EPA has determined that the existing NSPS for VOCs (NSPS OOOO, first adopted in 2012) reflects the best system of emission reduction ("BSER") for methane. Therefore the current VOC standards reflect the BSER for methane reduction for the same emission sources. EPA is proposing to extend the existing 2012 VOC standards to additional equipment and processes not currently regulated, including:

- Centrifugal compressors, reciprocating compressors and pneumatic controllers at natural gas compressor stations
- Completions and recompletions of hydraulically fractured oil wells; and
- Equipment leaks at natural gas processing plants.

In addition, there are some aspects of the proposed rule that would apply new standards to reduce VOC and methane emissions from certain equipment/processes:

- Pneumatic pumps at all oil and gas sources: zero emissions at natural gas processing plants; 95% control at all other sites if a control device is already available on site.
- Fugitive emissions: monitoring of emissions and replacement/repair of emissions components at new or modified oil or gas well sites and compressor stations, including gathering and boosting stations.

EPA is also proposing some "improvements" to the existing NSPS for oil and gas sources after considering certain issues raised in petitions of reconsideration: storage vessel control device monitoring and testing provisions, initial compliance requirements in §60.5411(c)(3)(i)(A) for a bypass device that could divert an emission stream away from a control device, recordkeeping requirements of § 60.5420(c) for repair logs for control devices failing a visible emissions test, clarification of the due date for the initial annual report under the 2012 NSPS, flare design and operation standards, leak detection and repair (LDAR) for open-ended valves or lines, compliance period for LDAR for newly affected units, exemption to notification requirement for reconstruction, disposal of carbon from control devices, the definition of capital expenditure and initial compliance clarification.

Finally, EPA is also taking comment on the following approaches to enhance its enforcement capabilities through "next generation compliance" and rule effectiveness initiatives such as:

- The establishment of third-party compliance verification programs addressing: (1) Closed Vent Emission Capture System Design (an issue of significant concern to EPA as evidenced in the recent Noble consent decree); and (2) Infrared Camera Fugitive Emission Monitoring Programs
- Fugitive emissions independent audit program
- Third-party information reporting of a regulated entity's compliance performance directly to the regulator; and
- Increasing electronic reporting and public availability of reported information.

The cost and timing impacts of these proposed changes have not yet been fully evaluated, but are likely to be significant. Comments on the proposed rule will be due 60 days after the date of publication in the Federal Register. EPA will also hold public hearings on the proposal.

Avoiding Class Action Litigation Under Fair Credit Reporting Act

09.01.15

By James Howard and Samantha Funk

The Fair Credit Reporting Act (FCRA) is a growing source of class action litigation, due to the high potential penalties that it provides for very technical violations. The statute imposes conditions, among other things, on obtaining "consumer reports," e.g., information on a consumer's credit worthiness, character, or mode of living, for employment purposes. It is easy to commit technical violations that may sustain nationwide class action claims, making it vital for employers to understand FCRA requirements before procuring credit or background checks on prospective or current employees.

The FCRA applies to employers when they retain "consumer reporting agencies," e.g., companies that compile or evaluate consumer credit information or other information on consumers for the purpose of providing consumer reports to third parties in exchange for a monetary fee, to provide consumer reports regarding employees and prospective employees. It generally requires employers to make certain disclosures to the employee and reporting agency, to obtain authorization from employees before obtaining a consumer report, and to take specific action in the event that an adverse employment decision is made as a result of information contained in the credit or background report.

The statute provides for statutory damages of up to $1,000 per violation to any affected consumer, punitive damages, and attorney's fees for willful violations. If the employer negligently fails to comply, it can be liable for the actual damages incurred by employees or prospective employees, as well as attorney's fees.

Disclosure to Employees and Prospective Employees

The disclosure requirements prohibit employers from obtaining consumer reports unless, before the report is procured:

- A "clear and conspicuous disclosure has been made in writing" to the employee or prospective employee that a consumer report may be obtained for employment purposes;
- The disclosure is made "in a document that consists solely of the disclosure" (the "stand-alone disclosure" requirement); and
- The employee or prospective employee has authorized, in writing, the procurement of the consumer report.

RELATED PEOPLE

Henry E. Farber

Samantha Funk

James Howard

Michael J. Killeen

Class actions frequently rely upon the "stand-alone disclosure" requirement to construct claims alleging that the employer's disclosure improperly contains extraneous language or information, and, thus, does not consist "solely of the disclosure." While the case law on this issue is far from unanimous, courts often construe the "stand-alone disclosure" provision narrowly. Consequently, in order to avoid this type of litigation, the employer should use an obviously stand-alone disclosure in a separate document that does not include a release of liability and does not cross reference additional information or documents.

When the "stand-alone disclosure" requirement is litigated, some district courts have concluded that the provision is too ambiguous to sustain claims for willful violations of the FCRA, or that a small amount of extraneous language does not create a violation. At the same time, however, many district courts have allowed consumer class action claims seeking damages for willful noncompliance of the FCRA to continue beyond the pleadings stage where plaintiffs can point to a disclosure containing information beyond the disclosure and requested employee authorization. For example, in *Harris v. Home Depot U.S.A., Inc*., Case No. 15-cv-01058, the Northern District of California recently denied Home Depot's motion to dismiss claims that it willfully violated the stand-alone provision by including language in the disclosure releasing it from liability for information obtained through the consumer report. District courts have even denied motions to dismiss "stand-alone disclosure" claims based upon allegations that the disclosure, albeit contained in a document separate from the allegedly offending extraneous information, was presented to plaintiff at the same time and read in conjunction with extraneous information. *Speer v. Whole Food Mkt. Grp., Inc.*, No. 8:14-cv-03035 (M.D. Fla. March 30, 2015). Thus, while questions of willfulness and a lack of damages on the part of employees may prove to be viable defenses for employers, many of these cases cannot be dismissed at the outset and are allowed to proceed into discovery.

Notice of Potential Adverse Action

Before taking an adverse action, e.g., denying employment or making other employment decisions that adversely affect current or prospective employees, as a result of information contained in the consumer report, employers must notify employees or prospective employees. The notice must include a copy of the consumer report, as well as a written description of the employee's rights under the FCRA.

Employers should provide as much advance notice as possible, but at least five business days, using a delivery method that would allow them to prove, if necessary, that advance notice was given. The statute does not specify a minimum amount of time for this notice period, but courts have interpreted the provision to require a reasonable amount of time to allow the employee to respond, and some have even specified a minimum of five business days. See *Reardon v. Closetmaid Corp.*, Civ. No. 2:08-1730, 2013 WL 6231606, at *12 (W.D. Pa. Dec. 2, 2013) (quoting legislative history as stating: "a reasonable period for the employee to respond … is not required to exceed 5 business days" following receipt). Plaintiffs are quick to attempt to create class action claims based on any arguable failure to comply with these requirements, alleging that the required materials were not provided or were not given sufficiently in advance of the adverse action.

Additional Information to Employees and Prospective Employees Upon Taking Adverse Action

If, after sending the pre-adverse action notice, the employer takes adverse action against the employee based upon information contained in his or her consumer report, the employer must provide a follow up notice to the employee that the adverse action was indeed taken. The required contents of the post-adverse action notice include:

- Identification of the consumer reporting agency, including its contact information;
- A statement that the agency did not make the adverse action decision and is unable to provide the specific reasons why adverse action was taken; and
- A summary of the consumer's right to challenge the accuracy or completeness of the report and to obtain a free additional report from the agency within 60 days.

Additional disclosures, including the employee's numerical credit score, may be necessary depending on the basis of the adverse action. Class action claims arising from alleged failures to provide this information are generally less successful, but they are still routinely asserted.

State and Local Laws

Employers should also be aware of state and local laws governing employment decisions based on credit reports and consumer background checks. Washington, for example, has a state Fair Credit Reporting Act, RCW Chapter 19.182, which largely mirrors the requirements imposed under the federal statute. However, in Washington, an employer may not obtain consumer credit information unless (1) the information is substantially job related and the employer's reasons for using the information are disclosed in writing, or (2) the information is required by law. California also imposes additional requirements for conducting background checks on job applicants, many of which are aimed at providing applicants and employees greater access to the background check results.

Before obtaining background checks or credit reports in a specific location, employers must research state and local requirements to ensure compliance.

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Hogan Lovells

Health, Pharmaceutical, and Biotechnology Alert
August 28, 2015

See note below about Hogan Lovells

Print Forward

340B Program: HRSA Releases Proposed "Omnibus" or "Mega" Guidance, Which Lives Up To Its Name

The Health Resources and Services Administration (HRSA) yesterday released its "340B Drug Pricing Program Omnibus Guidance," also known as the "Mega-Guidance," in proposed form. It was published in the Federal Register today, August 28, 2015. Comments will be due within 60 days of publication, or no later than Tuesday, October 27, 2015. We expect HRSA will issue the Guidance in final form after it receives and considers stakeholder input, but HRSA has not yet given any indication of what that timing may be. True to its name, the Proposed "Mega-Guidance" addresses a number of wide-ranging topics, some of which we discuss below.

Background: HRSA previously announced that it would issue a so-called "mega-rule" to address various aspects of the 340B program in the form of a binding regulation. HRSA withdrew the mega-rule from review by the Office of Management and Budget after the U.S. District Court for the District of Columbia vacated HRSA's final rule on the treatment of orphan drugs. The Court vacated that rule on the grounds that the Department of Health and Human Services (HHS), the parent agency to HRSA, does not have a general grant of authority to issue regulations to implement the Public Health Service Act, of which section 340B is a part. Shortly after that court decision, HRSA announced it would issue the mega-rule not in the form of a binding regulation, but rather as guidance, and HRSA has now done so.

What Is Guidance? Is It Binding? HRSA is proposing the Omnibus guidance not as a regulation, but rather explicitly as "guidance." The forthcoming court decision in the pending legal challenge to HRSA's orphan drug "interpretive rule" may address whether and how such guidance is binding on 340B program participants. In that case, the Pharmaceutical Research and Manufacturers of America (PhRMA) is challenging the ability of HHS to require manufacturers to comply with an "interpretive" rule. Notably, the proposed Omnibus Guidance is not styled even as an "interpretive" rule, but rather simply as "guidance." The proposed Omnibus Guidance clearly represents how HRSA believes the 340B program should operate (subject to stakeholder input), but it remains to be seen whether and to what extent HRSA will be able to require compliance with its views.

Patient Definition: Covered entities (CEs) may dispense drugs purchased at the 340B price only to the CE's own "patients," but that critical term is not defined by the 340B statute. The Proposed Guidance would "clarify" and appear to narrow the patient definition previously issued in HRSA guidance in 2007. Importantly, the Proposed Guidance states that the revised patient definition would be

Contacts

Alice Valder Curran
Partner, Washington, D.C.
alice.valder.curran@hoganlovells.com
+1 202 637 5997

Ken Choe
Partner, Washington, D.C.
ken.choe@hoganlovells.com
+1 202 637 5675

Christopher H. Schott
Associate, Washington, D.C.
christopher.schott@hoganlovells.com
+1 202 637 5467

Alice B. Leiter
Associate, Washington, D.C.
alice.leiter@hoganlovells.com
+1 202 637 5767

Jouya Rastegar
Associate, Washington, D.C.
jouya.rastegar@hoganlovells.com
+1 202 637 5421

applied “on a prescription-by-prescription or order-by-order basis,” meaning that a patient cannot qualify for 340B drugs for all of the patient’s needs based on being treated by a CE for only one medical issue. Taken together, a given prescription or order for a 340B drug would have to be generated by an encounter that satisfies all of the following criteria:

1. **Location = CE:** The individual receives a “healthcare service” at a CE site that is registered for the 340B program;
2. **Prescriber = CE:** The individual receives a healthcare service from a healthcare provider who is employed by the CE or who is an independent contractor of the CE, “such that the [CE] may bill for services” on behalf of the healthcare provider;
3. **1+2 = 3:** The individual receives a drug that is ordered or prescribed by the CE provider as a result of the service described in (2), but only if the service is not limited to “the infusion of a drug or the dispensing of a drug;”
4. **Scope Restriction, As Applicable:** The individual receives a healthcare service that is consistent with the CE’s scope of grant, project, or contract, as applicable (typically for grantee CEs only);
5. **Outpatient:** The individual is classified as an outpatient when the drug is ordered or prescribed, determined by how the services for the patient are billed to the insurer. For self-insured or uninsured individuals or where the CE covers the cost of care, the individual will be considered a patient if the CE has clearly defined policies and procedures that it follows to classify such individuals consistently; and
6. **Records:** The individual has a relationship with the CE such that the CE maintains “access to auditable health care records” which demonstrate that the CE has a “provider-to-patient relationship, that the responsibility for care is with the [CE], and that each element” of this patient definition is met.

As in prior guidance, the patient definition is different for CEs that are AIDS Drug Assistance Programs (ADAPs). For ADAPs, a patient is an “individual enrolled in a Ryan White HIV/AIDS Program AIDS Drug Assistance Program funded by Title XXVI” of the Public Health Service Act. HRSA also proposes to permit alternative patient eligibility criteria in the case of a public health emergency. The preamble discussion of the revised patient definition includes a number of informative examples and other helpful commentary.

<u>Contract Pharmacies</u>: The Proposed Guidance also addresses contract pharmacy arrangements. The preamble is noticeably oblique in its discussion of the HRSA’s authority to create the contract pharmacy option. HRSA explains that the statute “does not prohibit” contract pharmacy arrangements and that such arrangements are “permitted under State law,” but the Proposed Guidance does not otherwise describe the basis for HRSA’s authority to create that option for CEs in the first instance. In general, the Proposed Guidance emphasizes a CE’s compliance obligations with respect to such arrangements and would require that CEs conduct a quarterly review and annual independent audit of contract pharmacy arrangements. The Proposed Guidance would not impose any restrictions on the number of CE contract pharmacy locations or arrangements.

<u>Prohibition of Duplicate Discounts</u>: The Proposed Guidance acknowledges that the duplicate discount prohibition applies to covered outpatient drugs dispensed by a Medicaid managed care organization (MCO), and proposes to expand the use of HRSA’s existing Medicaid exclusion file to also identify whether a CE is dispensing 340B drugs to Medicaid MCO patients. CEs already must elect between the “carve-in” or “carve-out” options (terms that the Proposed Guidance now defines, as discussed below) for fee for service (FFS) utilization, and that election applies to all participating sites of the CE. The Proposed Guidance would require CEs to make this election for MCO utilization as well, but with significantly greater flexibility, permitting a CE to “make a different determination regarding carve-in or carve-out status for MCO patients than it does for FFS patients,” but also to “make different decisions by [CE] site and by MCO.” The CE must provide to HRSA “identifying information of the [CE] site, the associated MCO, and the decision to carve-in or carve-out,” and that information “may be made available on a 340B Medicaid Exclusion file.” It is unclear how HRSA expects such complexity to enable CE compliance, when the more simple binary election currently required for FFS utilization still is generating CE audit error rates in the range of at least 20 percent, as shown by HRSA’s 2015 audit results.

In the contract pharmacy context, the Proposed Guidance establishes a presumption for both FFS and MCO utilization that any listed contract pharmacy will not dispense 340B drugs to Medicaid patients, and that the contract pharmacy can “carve in” only if the CE “will provide a written agreement for HHS approval … that describes a system to prevent duplicate discounts.” The Proposed Guidance does not include any mention of the public disclosure of those contract pharmacy “carve-in” agreements, in contrast to its proposal to publish manufacturer limited distribution plans, for example.

When Is an Outpatient Drug ***Not*** a Covered Outpatient Drug? The 340B statute provides that only "covered outpatient drugs" (CODs), as defined in the Medicaid statute, are subject to the 340B discount. The statutory definition includes a "limiting definition" that excludes from the COD definition outpatient drugs used in certain settings when they are paid for as part of the associated service, under a bundled rate for example. HRSA issued final guidance in 1994 that interpreted this limiting definition to exclude any drug used in the specified outpatient settings and paid for as part of a bundled or per diem rate, regardless of the payer involved. The Proposed Guidance departs from that decade-old guidance and would apply the limiting definition only when the outpatient drug is paid under a bundled rate by Medicaid, and not any other payers.

"Must Offer" and Limited Distribution Plans: The Affordable Care Act amended the 340B statute to provide that the Pharmaceutical Pricing Agreement (PPA) "shall require that the manufacturer offer each covered entity covered outpatient drugs for purchase at or below the applicable ceiling price if such drug is made available to any other purchaser at any price." HRSA has not yet revised the PPA to reflect this requirement, but the Proposed Guidance reiterates HRSA's view that the "must offer" provision nevertheless is binding, and relies on that position to support its purported imposition of standards regarding limited distribution plans. Specifically, the Proposed Guidance would require manufacturers to submit limited distribution plans to HRSA for approval and publication, and encourages CEs to contact HRSA and other appropriate federal agencies (e.g., the Department of Justice and the HHS Office of Inspector General) if issues regarding such plans cannot be resolved. HRSA does not specifically define when a distribution arrangement would qualify as "limited" and trigger the disclosure requirement, but the Proposed Guidance suggests that any specialty pharmacy, restricted, or limited supply distribution arrangement would do so.

CE Eligibility Requirements: The Proposed Guidance includes a number of details regarding CE eligibility. For example, the Proposed Guidance would evaluate the disproportionate share adjustment percentage based on a hospital's most recently filed Medicare cost report, but does not address what occurs if later revisions to the cost report determine the CE hospital (or child site) was not eligible in the first instance. HRSA also discusses how it will determine whether a disproportionate share hospital (DSH) qualifies for participation based on "formally governmental powers," and how a private hospital can qualify for participation based on a "contract with a State or local government." For purposes of determining the eligibility of a CE hospital child site, the Proposed Guidance would retain the current standard that the facility or clinic be listed on a reimbursable line of the hospital's Medicare cost report, but also would specify that the services provided at the facility or clinic have associated Medicare outpatient costs and charges. Notably, HRSA explicitly requests alternative proposals to replace this standard. The Proposed Guidance repeatedly emphasizes a CE's responsibility to notify HRSA promptly of any change in eligibility for itself or a child site and to immediately cease making 340B purchases once it becomes ineligible. HRSA also makes clear that a CE's inclusion in a larger organization, such as an accountable care organization (ACO), does not qualify that larger organization for the 340B program or otherwise qualify all individuals receiving care from the larger organization as "patients" of the CE.

Manufacturer Refunds to CEs: The 340B statute requires HRSA to establish a mechanism for manufacturers to issue refunds and credits to CEs if a manufacturer charges more than the ceiling price. The Proposed Guidance indicates that a refund would be required not just in the case of error or intentional overcharges, but also "in routine instances of retroactive adjustment to relevant pricing data." Manufacturers would be prohibited from offsetting overcharges against undercharges, and there would be no exception for refunds that are de minimis. The Proposed Guidance also provides that a refund or credit would need to occur within 90 days of the manufacturer or HRSA determining that an overcharge occurred, that the manufacturer would be obligated to inform HRSA of the recalculated ceiling price and the reason for the overcharge, and that the CE would waive its right to repayment if it fails to take action to accept or execute the refund (such as cashing the check) within 90 days of receipt.

GPO Prohibition: Three types of CEs — DSH hospitals, children's hospitals, and free-standing cancer hospitals — may participate in the 304B program only if they do not use a group purchasing organization (GPO) to purchase covered outpatient drugs. The Proposed Guidance incorporates this GPO prohibition but also would create three exceptions:

- An off-site outpatient clinic located at a separate physical address from the parent CE that does not participate in the 340B program and that purchases drugs through a separate account from the parent covered entity may use a GPO to purchase CODs;
- Product purchased through a GPO is used for a patient originally designated as an inpatient, but a subsequent review designates that patient as an outpatient for payment purposes; and

- A CE can purchase a covered outpatient drug only through a GPO, and the CE has documented its attempts to purchase the drug at the 340B price or wholesale acquisition cost (WAC) and has reported the circumstances to HRSA.

The Proposed Guidance also makes clear that the 340B Prime Vendor (currently Apexus) is not considered a GPO for purposes of this prohibition.

ADAP Rebate Option: ADAPs are the only type of CE that can access the 340B price through a rebate rather than through a discounted price at the time of purchase. ADAPs historically have used this rebate option to seek rebates even when they do not cover the full purchase price for a COD but instead act as a type of secondary payer, covering only a patient's out-of-pocket expense for a COD. The Proposed Guidance includes HRSA's first written guidance regarding ADAP access to 340B rebates in this latter scenario. The Proposed Guidance would continue to allow ADAPs to participate in the 340B program through a rebate model and/or by "directly" purchasing drugs at the 340B ceiling price (like other CEs), or through a combination or "hybrid" approach of the two. A rebate would be due from the manufacturer only when the ADAP (1) directly purchases a covered outpatient drug at a price greater than the ceiling price, or (2) pays for health insurance premiums that cover the covered outpatient drug ***and*** the payment of copay, coinsurance, or deductible amounts for the covered outpatient drug, regardless of how those ADAP expenditures compare to the ceiling price. The amount of the rebate would be defined as the unit rebate amount (URA) for the drug as determined for purposes of the Medicaid Drug Rebate program, and the ADAP's rebate claim would have to be supported by claims level data.

Audits of CEs/Manufacturers and Notice and Hearing Process: The Proposed Guidance details the processes and procedures for HRSA's audits of CEs and manufacturers alike, and for both, the Proposed Guidance also describes a "notice and hearing" process for disputing HRSA's audit results. In the case of HRSA audits of manufacturers, the Proposed Guidance would extend HRSA's audit rights to a "manufacturer (or its contractors, including wholesalers)." For manufacturer audits of CEs, the Proposed Guidance largely tracks existing program parameters, including that the manufacturer retain an independent auditor and continue to honor requests for the 340B price from the CE while the audit proceeds. Notably, the Proposed Guidance does not impose any requirement on HRSA to act on the audit results generated by a manufacturer's audit of a CE, in contrast to HRSA's own CE audits, which the Proposed Guidance specifies can result in a CE's termination from the 340B program or a requirement that the CE submit a corrective action plan.

Replenishment Models: The Proposed Guidance discusses CE use of replenishment models in the context of the GPO prohibition, the patient definition, and certain other topics. HRSA clearly recognizes these models are the de facto approach for most CEs and does include details regarding how such models must work in order to comply with the provisions of the Proposed Guidance.

Record Retention: The Proposed Guidance would impose a 5 year record retention requirement on CEs and manufacturers alike.

Definitions: The Proposed Guidance includes a number of defined terms, from "carve-in" to "carve-out," and "child site" and "parent site." HRSA uses these defined terms throughout the Proposed Guidance preamble and actual text.

If you have any questions or would like our assistance in relation to 340B drug pricing program matters, please contact one of the Hogan Lovells lawyers listed in the "Contacts" section.

Flash Legal Report

Obligations established by CADIVI will not need verification in Customs

On June 16th, Administrative Ruling SNAT/2015/022 was published in the Official Gazette N° 40.683, issued by the National Integrated Service of Customs and Tax Administration (SENIAT), completely repealing Administrative Ruling N° 0345, hereinafter referred to as Ruling 0345, published in the Official Gazette N° 38.177 of May 2nd 2005, also issued by SENIAT.

Annulling Ruling 0345 implies that customs agents will not verify compliance with the requirements established by the Foreign Exchange Administration Commission (CADIVI) for natural or legal persons involved in exports, particularly, those involving the registration in the Registry of Users of the Foreign Currency Administration System (RUSAD) and the obligation of presenting the commercial invoice corresponding to each transaction made in the legal tender of the country of destination, or, otherwise, in USD.

This new Ruling applies exclusively to the actions of SENIAT's officials during exportation processes carried out by natural and legal persons within the territory of the Bolivarian Republic of Venezuela.

Consequently, the aforementioned obligations regarding registration in RUSAD and the invoices of the exports in foreign currency will continue to be valid pursuant to Ruling 113, issued by CADIVI, published in the Official Gazette N° 40.128 of March 13th 2013, which establishes the Requirements and Processes for Exportation Operations. The only difference is that, from now on, compliance with said obligations will not be verified.

The new Administrative Ruling came into force on June 16th 2015.

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Hoet Peláez Castillo & Duque Abogados
Oficinas (Offices):
Edificio Atrium, piso 3
Av. Venezuela
Urb. El Rosal, Caracas
Tel.: +58 212 201.8611
Fax: +58 212 263.7744
Email: infolaw@hpcd.com
Website: www.hpcd.com

International Mailing Address:
CCS 13031
P.O. Box 025323
Miami, Florida 33102-5323, USA

Venezuela:
Apartado 62.414, Caracas 1060-A

Contact:
Gonzalo Capriles Baena
E-mail: gcapriles@hpcd.com
Tel.: +58 212 201.8511

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