PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council
JUNE 2016 e-Bulletin

MEMBER NEWS

►BAKER BOTTS Adds Two New Partners to San Francisco
►CAREY Appoints Three New Partners
►GOODSILL Adds New Associate to Corporate and Securities
►HOGAN LOVELLS Senior FDA Official Joins Firm

COUNTRY ALERTS

►ARGENTINA Portfolio Investments By Non-Residents in Argentina ALLENDE & BREA
►AUSTRALIA Fintech Regulatory Sandbox One Step Closer With Release of Consultation Paper CLAYTON UTZ
►BELGIUM Private Equity Barometer NAUTADUTILH
►CANADA TSX Proposed Mandated Website and Updated Equity Compensation Plan Disclosure Requirements BENNETT JONES
►CHILE New Law On Waste Management Extended Liability of the Producer and Recycling CAREY
►CHINA New Law On Foreign NGOs - Does it Apply to You? HOGAN LOVELLS
►HONDURAS Integration Between Honduras and Guatemala Protocol in Force ARIAS MUNOZ
►INDONESIA New Registration Procedure of IP Licensing Agreement ABNR
►MALAYSIA Out With the Old, In With the New - Constitution and No-Par Value Regime Under the Companies Bill 2015 SKRINE
►NEW ZEALAND Changes to the Overseas Investment Office's Good Character Assessment Processing SIMPSON GRIERSON
►PANAMA Modern Bankruptcy Law Enacted ARIFA
►SINGAPORE Competition Law Rights of Private Action DENTONS RODYK
►TAIWAN Introduction to Draft Amendments of Trademark Act and Copyright Act in Adaption to the TPP LEE & LI
►TURKEY New Law on Mobbing and Discrimination at Workplace GIDE
►UNITED KINGDOM BREXIT First Aid for Pharma HOGAN LOVELLS
►UNITED STATES
►Court Finds Market Price Not Sufficient, Awards Premium in Appraisal Proceeding BAKER BOTTS
►Final EEOC Wellness Plan Rules – The Headache Continues DAVIS WRIGHT TREMAINE

CONFERENCES & EVENTS

MEMBER DEALS MAKING NEWS

►ARIAS FABREGA & FABREGA Advises Citigroup Global Markets in USD$575 Million International Secured Bond Offering by Tocumen International Airport
►BAKER BOTTS Represents Barclays as Financial Advisor to Memorial Resource Development Corp. in $4.4 Billion Merger with Range Resources Corporation
►BENNETT JONES Assists Paramount Resources Ltd. and Pembina Gas Services Limited Partnership Complete Sale of Musreau Facility and Closed Midstream Deal
►CAREY Advises Acciona Energia Structure Wind Farm Sale
►CLAYTON UTZ Marks First Milestone in Western Australia's 75.4 Million Scarborough Beach Foreshore Revitalization
►GIDE Advises Bank Syndicate On Issuance of EUR 1.5 billion Notes By VIvendi
►HOGAN LOVELLS Appellate Team Earns Supreme Court Victory in Jury Recall Ruling
►MUNIZ Helps Launch Lindley Tender offer
►NAUTADUTILH Assisted ASR Nederland N.V. ("ASR") with Admission to Listing and Trading on Euronext Amsterdam

PRAC TOOLS TO USE

PRAC Contacts PRAC Member Directory Events

Visit us online at www.prac.org

BAKER BOTTS ADDS TWO NEW PARTNERS IN SAN FRANCISCO

SAN FRANCISCO, May 16, 2016: Baker Botts L.L.P., a leading international law firm, today announced the admission of Stuart Plunkett and Jonathan Shapiro as partners in the firm's recently opened San Francisco office.

"Both Stuart and Jon are outstanding litigators and we are delighted that they have chosen to join us," said Andrew M. Baker, Managing Partner of Baker Botts. "Baker Botts has a strong presence in California, and the addition of both Jon and Stuart in San Francisco speaks to the interest and momentum that we have seen, since we opened our office earlier this year," added Mr. Baker.

Mr. Plunkett has 19 years of national experience representing clients in complex antitrust and commercial litigation matters. His clients include companies and individuals in a broad range of industries, including high tech, financial services, energy and healthcare.

Mr. Plunkett regularly speaks and writes on antitrust litigation topics. He served as Chair of the Antitrust Section of the Bar Association of San Francisco and currently serves on the Bar Association's Executive Committee. Mr. Plunkett previously served on the Executive Committee of the Antitrust Section of the State Bar of California.

Mr. Shapiro's practice focuses on the defense of business and securities litigation and government enforcement actions. He has litigated class actions, challenges to corporate transactions and governance, and other matters regarding allegations of fraud and breach of fiduciary duty, including jury and bench trials.

Mr. Shapiro's clients include public and financial services companies, officers and directors, and investment bankers. He also serves as counsel defending and conducting internal investigations to those subject to enforcement action under the Securities and Exchange Commission, the Department of Justice, FINRA, and other government agencies and self-regulatory organizations.

Mr. Plunkett joins the firm from Morrison Foerster, while Mr. Shapiro joins from Mintz Levin.

"Adding Stuart and Jon in San Francisco is another step in the execution of our strategic plan to help us meet growing client demand in California, while ensuring we maintain our high level of professional excellence and client service. We expect to add other high quality legal talent to our Bay Area offices in the near term," said Pat Stanton, Partner-in-Charge of the firm's San Francisco office.

For more information, please visit www.bakerbotts.com

GOODSILL ADDS NEW ASSOCIATE TO CORPORATE & SECURITIES GROUP

HONOLULU, 07 June 2016: Daniel R. Lam is a new associate in Goodsill's Corporate and Securities group. He concentrates his practice in the areas of securities regulation, corporate governance and finance, and real estate finance.

Daniel has experience in registered and exempt securities offerings, and also works with clients on corporate governance issues as well as various internal, operational, and transactional business matters.

A graduate of Punahou School, Daniel received a Bachelor of Arts degree from Gonzaga University and Juris Doctor from Creighton University School of Law, where he graduated magna cum laude. Prior to joining Goodsill, he worked for a prominent law firm in Omaha, Nebraska which represented a number of Fortune 500 companies.

For additional information visit www.goodsill.com

HOGAN LOVELLS SENIOR FDA OFFICIAL JOINS MEDICAL DEVICE PRACTICE GROUP

WASHINGTON DC, 25 May 2016: Hogan Lovells announced today that Dr. Herbert Lerner, former Deputy Director of the Division of Reproductive, Gastro-Renal and Urological Devices at the Food and Drug Administration (FDA), will join the firm on 1 July as Senior Director of Medical and Regulatory Affairs in its Medical Device Practice Group.

In his new role at Hogan Lovells, Dr. Lerner will assist the firm's more than 700 medical device clients in developing strategies for obtaining market authorization for new technologies. He will also work with the firm's attorneys and other non-lawyer regulatory specialists and scientists in relation to the design of clinical trials to support device clearances and approvals and with regard to medical device advisory panel meetings.

Dr. Lerner joins the firm following an accomplished 13-year career at FDA, where he oversaw medical device reviews in connection with premarket approval applications, 510(k) notices, de novo petitions, and investigational device exemption applications for reproductive, gastro-renal, and urological devices used in in hospitals, doctor offices, or by patients in their homes. He also led FDA efforts to improve the regulation of devices for the treatment of obesity. In previous positions at FDA, Dr. Lerner was involved in the premarket and medical reviews of many other types of devices including dermal fillers, breast implants, and a variety of medical scopes.

Prior to joining FDA, Dr. Lerner worked in private medical practice for 16 years at North Broward Surgical Associates, where he performed general and colorectal surgery. He did his residency in general surgery at the Beth Israel Medical Center in New York and Mount Sinai Medical Center in Florida, and a colorectal surgery fellowship at the Carle Clinic, Champagne, Illinois.

"We welcome Dr. Lerner to our practice and we are certain he will be of invaluable assistance to our clients in navigating the FDA premarket processes for new technologies. He will join a number of other former FDA officials at Hogan Lovells who for many years have successfully assisted our clients in obtaining market authorization for their products ", said Janice Hogan, co-director of the Medical Device Practice Group

Hogan Lovells' Medical Device Practice Group operates on a global scale, coordinating among lawyers in offices in all of the world's major medical markets to sequence and streamline regulatory approvals. Many of the firm's lawyers have worked for regulatory agencies and in private industry, and have backgrounds in biostatistics, medicine, public health, immunology, biomedical engineering, material science, and genetics, among other disciplines.

For more information, see www.hoganlovells.com

CAREY APPOINTS THREE NEW PARTNERS

SANTIAGO – June, 2016: Aldo Molinari, Jorge Ugarte and **Francisco Guzman** were elected as new partners at Carey, the largest law firm in Chile.

Aldo Molinari's practice is focused primarily on civil and commercial litigation as well as administrative and environmental regulatory litigation before special and ordinary courts. He also has experience in domestic and international commercial and investment arbitration. Between 2013 and 2014 he worked at Herbert Smith Freehills' International Arbitration Group in New York. He studied law at Universidad de Chile where he won the Montenegro prize in 1998 as the best student in his class and the Fueyo Foundation award for best undergraduate thesis in 2002. In 2013 he obtained his LL.M. at Columbia University's School of Law (Becas Chile Scholarship). Currently, Mr. Molinari is a professor of Civil Law at Universidad de Chile, where he has taught since 2003.

Jorge Ugarte's practice focuses mainly on mergers and acquisitions, shareholders agreements, board's liability and corporate governance, capital markets and financial transactions in general. He received his law degree from Universidad Católica de Chile in 2002, and was recognized with the honors scholarship in 1999, which is awarded each year to the top student in the class. In 2009 he obtained his LL.M. at Columbia University's School of Law. He is a professor of Commercial Law at Universidad Católica de Chile, author of several legal articles and of the book "Share Transfer Agreements" (Editorial Jurídica de Chile, 2016).

Francisco Guzman's practice focuses on representing Chilean and foreign clients in M&A transactions, investment funds, private equity, venture capital and corporate law in general. Between 2010 and 2011 he worked at White & Case in New York. He studied law at Universidad Católica de Chile, where he graduated in 2006. In 2010 he obtained his LL.M. at Columbia University's School of Law, where he won the Kent Scholar Award, the highest distinction awarded by the school. Mr. Guzman was admitted to the New York Bar in 2011. He authored the book "Inside Information in the Securities Market" which was published by LexisNexis, and he has also been a professor at Universidad Católica de Chile.

For additional information visit www.carey.cl

ARIAS FABREGA & FABREGA

ADVISES CITIGROUP GLOBAL MARKETS IN USD$575 MILLION INTERNATIONAL SECURED BOND OFFERING BY TOCUMEN INTERNATIONAL AIRPORT

PANAMA, 25 May, 2016: ARIAS, FABREGA & FABREGA advised Citigroup Global Markets Inc., acting as Sole Initial Purchaser of the international offering by Tocumen International Airport of its USd$575 million secured bonds due 2036, the largest cross-border bond issuance by an entity wholly-owned by the Panamanian government.

i. ARIFA advised in the amendment by Aeropuerto Internacional de Tocumen, S.A. of its existing USD$650 million 5.75% Secured Notes due 2023, and

ii. In the international offering by Tocumen of USD$575 million of senior secured Regulation S / Rule 144A notes due 2036 (the "New Notes"), related to the construction of the new South Terminal. The New Notes were publically offered in Panama, and are listed on the Panamanian and Luxembourg stock exchanges.

It is the largest cross-border bond issuance by an entity wholly-owned by the Panamanian government, and required significant amendments to Tocumen's existing USD$650 million secured publically-offered Notes and the related trust agreement and other security documents.

Key ARIFA attorneys who handled the matter: Estif Aparicio, partner; Cedric Kinschots, international associate; Javier Yap Endara, associate; Marianne N. Romero, associate;

Completion Date: May 18, 2016

About Tocumen : Tocumen International Airport is one of the busiest airports in the Central American region and in January 2012, tenders were invited for the construction of a new south terminal at the airport. In September of 2015, Norberto Odebrecht was awarded the construction contract for the terminal expansion. The new terminal, expected to be completed by 2017-2018, will have new areas for immigration, customs and 20 additional boarding bridges.

Related information: In 2015, ARIFA represented arrangers in connection with a USD$150 million factoring facility agreement with Construtora Norberto Odebrecht, providing financing for completing the construction of the new South Terminal of Tocumen International Airport.

For additional information visit www.arifa.com

BAKER BOTTS

REPRESENTS BARCLAYS AS FINANCIAL ADVISOR TO MEMORIAL RESOURCE DEVELOPMENT CORP. IN USD$4.4 BILLION MERGER WITH RANGE RESOURCES CORPORATION

HOUSTON May 16, 2016 – Range Resources Corporation (NYSE: RRC) and Memorial Resource Development Corp. (NASDAQ: MRD) announced today a definitive merger agreement under which Range will acquire all of the outstanding shares of common stock of MRD in an all-stock transaction valued at $4.4 billion. This valuation includes the assumption of MRD's net debt, which was $1.1 billion as of March 31, 2016.

Under the definitive agreement, MRD shareholders will receive 0.375 shares of Range common stock for each share of MRD common stock held. Based on the Range closing price on May 13, 2016, the transaction has an implied value to MRD shareholders of $15.75 per share, representing a 17% premium to the closing price of MRD stock. Following the transaction, shareholders of MRD are expected to own approximately 31% of the outstanding shares of Range. MRD will have the right to nominate an independent director from MRD to a seat on Range's Board.

The Boards of Directors of both companies have unanimously approved the terms of the agreement, and have recommended that both shareholder groups approve the transaction. Completion of the transaction is subject to the approval of the respective companies' shareholders, certain regulatory approvals and other customary closing conditions. The transaction is expected to close in the second half of 2016.

Baker Botts represented Barclays Capital Inc. as financial advisor to MRD. Baker Botts Lawyers/Office Involved:
Josh Davidson (Partner, Houston); Carina Antweil (Associate, Houston).

For additional information visit www.bakerbotts.com

BENNETT JONES

ASSISTS PARAMOUNT RECOURCES LTD. AND PEMBINA GAS SERVICES LIMITED PARTNERSHIP COMPLETE SALE OF MUSREAU FACILITY AND CLOSED MIDSTREAM DEAL

- Date Announced: March 17, 2016
- Date Closed: April 20, 2016
- Deal Value: $600,000,000
- Client Name: Paramount Resources Ltd.

On April 20, 2016, Paramount Resources ("Paramount") completed the sale of sour gas processing assets in north western Alberta to Pembina Gas Services Limited Partnership, an indirect wholly owned subsidiary of Pembina Pipeline Corporation ("Pembina") for cash and other considerations.

As part of the transaction, Paramount and Pembina have entered into a twenty year midstream services agreement that secures Paramount's priority access to sold capacity at the Musreau Facility. Under the terms of the transaction, Pembina has acquired Paramount's preliminary engineering studies, licenses and surface rights with respect to a proposed sour gas processing facility and additional sour gas processing assets, and has agreed, at Paramount's election, to provide additional capacity on agreed terms.

Paramount was represented in-house by Mitchell Shier (General Counsel & Corporate Secretary Manager, Land), Bernie Lee, Paul Kinvig, Anne Love and Reid Yester and Bennett Jones LLP by a team led by Pat Maguire and including Donald Greenfield, Tom McInerney, Jana Prete and Megan Bertram (Corporate/oil & gas) and Beth Riley (Competition).

For additional information visit www.bennettjones.com

CAREY
ADVISES ACCIONA ENERGIA STRUCTURE WIND FARM SALE

SANTIAGO, 06 June 2016: Spanish renewable energy company Acciona Energía has bought a 183-megawatt wind farm and a transmission line in southern Chile for US$32 million with help from Carey.

Philippi Prietocarrizosa Ferrero DU & Uría (Chile) advised the seller of the San Gabriel wind farm and the 33 km long Tolchén transmission line, Chilean developer Inversiones Bosquemar Limitada. The transaction closed on 17 May.

Acciona Energía sought previous advice from Carey in 2013 to sell US$100 million worth of renewable non-conventional energy credits to Chilean electricity company Colbún.

Acting in the transaction were Carey Partner Juan Francisco Mackenna and associates Pablo Morales and Ricardo Edwards.

For additional information visit www.carey.cl

GIDE
ADVISES BANK SYNDICATE ON ISSUANCE OF EUR 1.5 BILLION NOTES BY VIVENDI

PARIS, 27 May 2016: Gide has advised a syndicate of banks constituted by BNP Paribas, Commerzbank Aktiengesellschaft, Crédit Agricole Corporate and Investment Bank, Crédit Industriel et Commercial, Merrill Lynch International and Mitsubishi UFJ Securities International plc on the issuance by Vivendi of EUR 1.5 billion notes with two tranches due 2021 and 2026 respectively and listed on Euronext Paris.

Darrois Villey Maillot Brochier advised Vivendi.

Gide's team was led by partner Hubert du Vignaux, assisted by Laurent Vincent and Aude-Laurène Dourdain.

For additional information visit www.gide.com

CLAYTON UTZ
MARKS FIRST MILESTONE IN WESTERN AUSTRALIA'S $75.4 MILLION SCARBOROUGH BEACH FORESHORE REVITALIZATION

PERTH, 19 May 2016: Clayton Utz is advising on one of the largest infrastructure revitalisation projects being undertaken in Western Australia the - $75.4 million Scarborough redevelopment.

In partnership with the City of Stirling, the Western Australia (WA) Government - through the Metropolitan Redevelopment Authority - plans to transform the iconic Scarborough Beach foreshore in Perth into a world-class beachfront and tourism hotspot.

The WA Government last week announced an additional $18 million funding for the project and its intention to shortly award a contract to start forward works.

Clayton Utz's Perth office is assisting the Metropolitan Redevelopment Authority through a collaborative effort involving the firm's Construction team (led by Clive Luck), its Environment and Planning team (led by Brad Wylynko), and its Real Estate team (led by Simon Taskunas and Mary Pringle).

Brad Wylynko commented: "Clayton Utz is excited to be partnering with the MRA to deliver another landmark project for Perth. It's a great example of the State Government further consolidating Perth's appeal as a place to live, and as a leading tourism and business destination in the Asia Pacific region."

For additional information visit www.claytonutz.com

HOGAN LOVELLS

APPELLATE TEAM EARNS SUPREME COURT VICTORY IN JURY RECALL RULING

WASHINGTON, D.C. 9 June 2016: Hogan Lovells secured a decisive victory today in Dietz v. Bouldin, a case before the Supreme Court of the United States. Ruling in favor of Hogan Lovells' client, the Justices decided, by a 6-2 vote, that a federal district court has the inherent authority to recall a jury that has been discharged in order to correct a mistake in the verdict.

As the Court explained, "rescinding a discharge order and recalling the jury can be a reasonable response to correcting an error in the jury's verdict." And in the particular circumstances of this case, the Court concluded, recalling the jury was reasonable because there was "no apparent potential for prejudice" from doing so.

The Court's ruling recognizes a common-sense alternative to conducting a new trial when an error is discovered soon after a jury has been discharged. By recalling the jury for further service, a district court may save all involved—the judge, the parties, the lawyers, the witnesses, and society—from having to endure the heavy expense of a new trial.

Neal Katyal, a partner at Hogan Lovells and the former Acting Solicitor General of the United States, argued the case, his 28th argument before the Supreme Court and fourth in the current term alone (associate Frederick Liu argued a 5th case for the firm this year as well). A team of Hogan Lovells appellate lawyers—including Leila K. Mongan from the San Francisco office and Frederick Liu, Colleen E. Roh Sinzdak, and Daniel J.T. Schuker from the Washington, D.C. office—joined Katyal on the briefs.

For more information, see www.hoganlovells.com

MUNIZ

HELPS LAUNCH LINDLEY TENDER OFFER

LIMA, 6 May 2016: Peruvian Coca-Cola bottler Corporación Lindley has launched a cash tender offer to buy back US$200 million worth of notes with help from Muñiz Ramírez Pérez-Taiman & Olaya in Lima and the New York office of Paul Hastings LLP.

Citigroup and JP Morgan acted as the dealer managers in the transaction and called on Cleary Gottlieb Steen & Hamilton LLP in New York and São Paulo. The tender offer closed on 2 May.

Lindley launched a tender offer to buy back notes due in 2021 and 2023, the latter of which it issued in 2013.

Counsel to Corporación Lindley Muñiz Ramírez Pérez-Taiman & Olaya lead by Partners Andrés Kuan-Veng and Jorge Otoya Cabrera, and associate Guillermo Flores Borda in Lima.

For additional information visit www.munizlaw.com

NAUTADUTILH

ASSISTED ASR NEDERLAND N.V. ("ASR") WITH ADMISSION TO LISTING AND TRADING ON EURONEXT AMSTERDAM

AMSTERDAM, 10 June 2016: The transaction concerns an offering by NLFI, on behalf of the Dutch State, of up to 60,000,000 ordinary shares (including over-allotment shares) with an offer price of EUR 19.50 per share in the share capital of ASR and the admission to listing and trading of the shares on Euronext Amsterdam.

The shares were offered to institutional and retail investors in the Netherlands and via a private placement to certain (qualified) institutional investors internationally.

ABN AMRO Bank N.V., Citigroup Global Markets Limited and Deutsche Bank AG, London Branch, acted as Joint Global Coordinators and formed the group of Underwriters together with Barclays Bank PLC, Coöperatieve Rabobank U.A. (Rabobank), HSBC Bank plc, ING Bank N.V. and Joh. Berenberg, Gossler & Co. KG.

ASR is a leading Dutch insurance company with a comprehensive product offering for its customers. ASR is the fourth largest composite insurer in the Netherlands.

NautaDutilh's deal captains were Petra Zijp (capital markets) and Leo Groothuis (corporate M&A) and the core deal team further consisted of Paul van der Bijl, Dewi Walian and Joppe Schoute.

For additional information visit www.nautadutilh.com

UPCOMING PRAC EVENTS

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

61st International PRAC Conference - Hong Kong
Hosted by Hogan Lovells
April 22 - 25, 2017

The Pacific Rim Advisory Council is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 28 top tier independent member law firms.

Since 1984, Pacific Rim Advisory Council (PRAC) member firms have provided their respective clients with the resources of our organization and their individual unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region.

www.prac.org

With over 12,000 lawyers practicing in key business centers around the world, including Latin America, Middle East, Europe, Asia, Africa and North America, these prominent member firms provide independent legal representation and local market knowledge.

ALLENDE & BREA

Portfolio Investments by non-residents in Argentina

1. Introduction

This paper summarizes the alternatives and requirements for foreign individuals and companies for making portfolio investments in Argentina.

In order to do general business and operate on a regular basis, foreign companies should establish a branch or incorporate a subsidiary, which exceeds the purpose of the document.

---

2. Foreign investment.

The legal regime for foreign investment is governed by the Foreign Investment Act ("Ley de Inversiones Extranjeras") enacted in 1993. For the purposes of this law there is no distinction between national and foreign investors irrespective of the type of business they get involved in. Foreign investors have the same rights and obligations as local ones under the parameters stated by the National Constitution regarding the development of lawful economic activities in Argentina.

There are no limitations on the participating percentage of foreign ownership in a local entity regardless of the type of vehicle chosen.

Argentina has executed a number of Bilateral Investment Treaties (BITs) with third countries and is a member of the Multilateral Investment Guarantee Agency (MIGA), the Overseas Private Investment Corporation, and the International Centre for the Settlement of Investment Disputes (ICSID).

Treaties in force entered into by Argentina with third countries for the avoidance of double taxation are developed in the Tax section below.

2.1. Direct and Portfolio Investments by non-residents.

Following international standards set forth in IMF Payment Manual, foreign investment in Argentina can be classified as "direct investments" or "portfolio investments". Direct investments comprises real estate investments and participations in local companies of at least 10% of the ordinary shares or voting rights, while portfolio investments are participations below this cap, in debt or equity securities of Argentine issuers, holdings in Argentine pesos and deposits in Argentine banks.

Direct investments and portfolio investments made after December 16, 2015 should stay in Argentina at least 120 days in order to be repatriated, unless a specific exception applies. New investments made prior to such date are subject to the minimum stay set forth in Decree No. 616/2005 of 365 days.

3. Portfolio investments by foreign residents.

Inflows to the FX Market of portfolio investments by foreign residents are not subject to any restriction. Non-residents can either exchange the foreign currency into Pesos in the FX Market or keep the foreign currency by performing arbitrage among other currencies.

Opening banking and securities accounts by non-residents requires the compliance with the AML -*Anti-money laundering*- and internal securities regulations which may entail filing of certified copies of incorporation documents, identification of ultimate beneficiaries and granting of special powers of attorney, inter alia. The foreign resident should obtain a non-resident tax ID, known as CDI (*Clave de Identificación)* - to obtain it a power of attorney should be issued and certain documentation should be filed before the Tax Authority. Also, the foreign company should submit the documentation required by the financial institutions to comply with the FATCA -*Foreign Account Tax Compliance Act*- (information provided about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest) and CRS -*Common Reporting Standard*- (information provided to the tax authority about companies with multiple residencies).

4. Repatriations by Foreign residents.

Foreign residents (whether individuals or legal entities) are allowed to purchase foreign currency and transfer funds abroad subject to:

Foreign investments made since December 16, 2015 the non-residents have access to the FX Market without further requirements, provided that the minimum 120-days term has elapsed.

a) Foreign investment made prior to December 16, 2015, the non-residents are allowed to access the FX Market subject to the following requirements:

1. Without any limit, for the amounts collected in Argentina on account of :

i) transactions by international or multilateral credit agencies;

ii) outstanding imports of goods and services or debts related with such imports;

iii) foreign financial debts paid by Argentine residents or local entities in local currency in Argentina;

iv) services and other current transfers abroad;

v) interest payments of Argentine sovereign securities denominated in pesos;

vi) interest and principal payments of Argentine sovereign securities denominated in foreign currency;

vii) recovery of credits allowed in local bankruptcies or reorganization procedures;

viii) inheritances, pursuant to an unappealable heir declaration;

ix) repatriation of direct investments in the private non-financial sector or real estate investments, to the extent that the foreign investor may evidence, with registry of the legal entry of the investment, that he has maintained such investment in Argentina for more than 365 days. This item allows repatriation of investments by foreign investor due to sales of equity, capital reductions, wind-up proceeds, and reimbursement of capital contributions in local entities;

x) damages granted by local courts to non-Argentine residents in a non-appealable decision.

2. Up to US$500,000 per calendar month, for amounts received in Argentina on account of portfolio investments (including interests or other income) and/or resulting from the sale of these investment portfolios, such as stock portfolio, minority participation in local entities, investment in mutual investment funds and local trusts, purchases of bank loan portfolios, investments in local bonds issued in pesos and purchases of other local credits. In all these cases, the foreign investor must evidence, with registry of the legal entry of the investment, that they have maintained such investment in Argentina for more than 365 days.

3. Up to US$5,000 per calendar month, in cash, without further requirement.

5. Foreign Exchange Regulations.

The following is a brief overview on foreign exchange regulations, generally applicable to residents and non-residents, currently in force:

5.1. Financial Debts.

Argentine Central Bank regulations allow Argentine borrowers (whether individuals or legal entities) to transfer abroad and pay principal of cross-border financial debts to foreign lenders through the Argentine Foreign Exchange Market, upon maturity, provided that the borrower evidences:(i) the legal entry and repatriation through the Argentine Foreign Exchange Market of the proceeds of the loan, (ii) that such loans complied with a minimum 120[1]-day tenor (starting from the date of the legal entry of the funds in Argentina or since the renewal of the loans, if applicable) and (iii) that the cross border financial debt has been disclosed in the quarterly indebtedness regime of the Argentine Central Bank. No prior Argentine Central Bank authorization is required.

In addition, Argentine borrowers may prepay principal with foreign creditors (completely or in part) in advance to the relevant maturity date, provided that the minimum 120-days term has elapsed.

5.2. Interest, profits and dividends.

Argentine Central Bank regulations authorize Argentine residents (whether individuals or legal entities) to transfer abroad through the Argentine Foreign Exchange Market accrued interest to foreign creditors, within 15 days prior to the relevant maturity.

Local residents are also allowed to remit profits and dividends to foreign equity holders when resulting from annual financial statements certified by external auditors. To the extent that profits or dividends are declared in annual financial statements certified by external auditor, Argentine Central Bank regulations do not differentiate between dividends paid as a result of retained earnings of previous fiscal years or from the net income of the last fiscal year approved.

5.3. SERVICES.

There are no material restrictions for Argentine residents or local entities to transfer abroad and pay services rendered by non-Argentine residents or foreign entities not established in Argentina after December 16, 2015 (e.g., insurance premiums, royalties, fees). In some cases, documental evidence of the actual performance of the services has been required.

The Central Bank established a payment schedule with thresholds for the cancellation of commercial debts for unpaid services rendered or accrued by non-residents before December 16, 2015: (i) from 2/01/2016 up to USD 2 million per resident per month; (ii) from 3/01/2016 and until 5/30/2016 up to USD 4 million per resident per month; (iii) as from 6/01/2016 with no amount limitations.

From 1/04/2016 and until 1/31/2016, the cancellation of debts for services rendered or accrued until December 16, 2015 will be reduced from the cap of USD 2,000,000 established for portfolio investments.

5.4. IMPORTS OF GOODS.

The payment for imports could be cancelled by the following payment methods: (i) advance payment; (ii) letter of credit, (iii) D.A.P. (document against payment), and (iv) documents against acceptance.

Imports of goods may be totally paid in advance regardless of the type of product, provided that nationalization of such goods takes place within 180 days following the payment.

Likewise cancellation of debts related to the import of goods may be paid in advance regardless of their maturity date. Evidence of customs and commercial documents related to the import of goods are required.

Commercial debts for unpaid imports -with customs cleared prior to December 16, 2015- may be cancelled as they become due with no restrictions, in the following cases: (i) debt from federal or provincial states, including state-owned companies; (ii) imports secured by letter of credits or bonds issued or granted by local financial entities; (iii) debts owed to official or multilateral credit agencies (ECAs) and/or debts guaranteed by such parties.

The Central Bank established a payment schedule with thresholds for the cancellation of commercial debts for unpaid imports with customs cleared prior to December 16, 2015: (i) until 12/31/2015 up to USD 2 million per importer and per month; (ii) from 1/01/2016 and until 5/30/2016 up to USD 4.5 million per importer and per month; (iii) as from 6/01/2016 with no amount limitations.

5.5. INVESTMENT PORTFOLIOS OF ARGENTINE RESIDENTS ABROAD.

Argentine residents may transfer abroad up to US$2,000,000 per calendar month, on account of foreign real estate investments, loans granted to non-Argentine residents or foreign entities, direct investments abroad or portfolio investments. In the case of portfolio investments, transfers must be made to accounts opened under the name of the local resident or the company making the transfer, at financial entities incorporated in FAFT-GAFI compliant jurisdictions.

6. TYPES OF COMPANIES.

Operating in Argentina on a permanent basis requires the incorporation of a branch or a wholly or partially owned subsidiary.

The subsidiary may operate under any of the several types of corporate entities available. The most common are (i) the stock corporation (Sociedad Anónima or "S.A."); and (ii) the general partnership (Sociedad de Responsabilidad Limitada or "S.R.L."), similar to an LLC, which members cannot exceed 50 partners and it has the advantage that its operations are subject to fewer formalities. Both, Sociedad Anónima and Sociedad de Responsabilidad Limitada limits partners liability to their capital contribution.

7. Tax Considerations.

Argentine taxes are levied at three levels: (i) Federal, (ii) Provincial and (iii) Municipal.

7.1. Income tax.

Income tax is levied on worldwide income obtained by Argentine residents, i.e. income from Argentine and/or foreign source, while non-residents are taxed only on their Argentine source income. Branches and other permanent establishments are considered as residents and taxed accordingly.

Non-resident beneficiaries are liable to 35% income tax withholding on a deemed net income. Withholding rates applicable to the most common cross-border payments are the following:

Type of Payment	Subtype of payment	Portion of Payment Subject to Tax (%)	Effective Withholding Rate (%) (1)	With Grossing up (1) (2)
1. International transportation	1.1. Transport and chartering.	10%	3.5%	3.6269%
1.2. Container business.	20%	7%	7.5269%	
2. International news agencies		10%	3.5%	3.6269%
3. Insurance		10%	3.5%	3.6269%
4. Film reels, magnetic tapes, radio and TV programs, telex and facsimile transmissions, and any other means used to broadcast or screen images, pictures or sound, or to further disseminate them.		50%	17.5%	21.2121%
5. Transfer of technology	5.1. Agreements in compliance with the Transfer of Technology Act:			
5.1.1. Fees for technical assistance, engineering or consulting services not available in Argentina.	60%	21%	26.5823%	
5.1.2. Patent and trademark royalties and other.	80%	28%	38.8889%	
5.2. Agreements not in compliance with the Transfer of Technology Act	90%	31.5%	45.9854%	
6. Copyright royalties (under certain circumstances)		35%	12.25%	13.9601%

Type of Payment	Subtype of payment	Portion of Payment Subject to Tax (%)	Effective Withholding Rate (%) (1)	With Grossing up (1) (2)
7. Artists hired by the Federal, Provincial or Municipal Government or non-for profit organizations	For a period not exceeding two months per calendar year.	35%	12.25%	13.9601%
8. Interest	8.1. Public bonds	Exempt	0%	0%
8.2. Private bonds in compliance with Private Bonds Law.	Exempt	0%	0%	
8.3. Interests on foreign loans:				
8.3.1. Loans granted to the Federal, Provincial or Municipal Government or Federal Central Bank.	Exempt	0%	0%	
8.3.2. Transactions involving the importation of depreciable movable property (except automobiles) granted by suppliers.	43%	15.05%	17.7163%	
8.3.3. Loans granted to financial institutions as defined by Law 21,526.	43%	15.05%	17.7163%	
8.3.4. Loans granted by a Bank or financial institution incorporated in a country not deemed as a low tax jurisdiction, or in a jurisdiction which signed agreements providing for the exchange of information and where bank secrecy or secrecy referring to stock exchange cannot be alleged upon request of information by tax authorities.	43%	15.05%	17.7163%	
8.3.5. Public bonds registered within two years from issuance in accordance with Law 23,576 in countries with an Investment Protection Treaty.	43%	15,05%	17,7163%	
8.3.6. Other loans.	100%	35%	53.8462%	
8.4. Interests on saving accounts, time deposits and other according to Central Bank regulations:				
8.4.1. In case it does not result in a transfer of tax revenue to foreign countries.	Exempt	0%	0%	
8.4.2. In case it results in a transfer of tax revenue to foreign countries.	43%	15,05%	17,7163%	
9. Salaries, wages and fees	Paid to individuals (excluding artists on a tour) who work in Argentina for less than six months.	70%	24.5%	32.4503%
10. Rentals	10.1 Movable property.	40%	14%	16.2791%

Type of Payment	Subtype of payment	Portion of Payment Subject to Tax (%)	Effective Withholding Rate (%) (1)	With Grossing up (1) (2)
10.2 Real estate.	60%	21%	26.5823%	
12. Sale of assets located in Argentina		50%	17.5%	21.2121%
13. Dividends of corporations and profits earned by branches and Limited Liability Companies		10%		
	Exceeding accumulated and reported taxable income on the previous fiscal year	100%	35%	35%
14. Other unspecified payments		90%	31.5%	45.9854%

Capital gains derived from the trade stock, shares, bonds and securities in general, including limited liability companies' quotas are taxed at a 15% rate when obtained by non-resident aliens. A presumption of deemed net income of 90% of the transacted amount applies, i.e. the final tax burden amounts to 13.5% of the gross selling price.

Withholding rates in general may be reduced or eliminated on a Double Taxation Treaty scenario or if a Treaty on International Transport applies.

Grossing up shall not apply in case of interests derived from loans applied to industrial, extractive or primary activities.

In certain cases, the foreign recipient may choose to override the deemed income and assess the real income according to the general provisions laid down in the Income Tax Law.

In addition, transfer pricing rules apply when an Argentine company enters into business transactions with related companies or permanent establishments located abroad, or with non-related entities located in jurisdictions not considered as "cooperative for tax information exchange" (i.e. tax havens).

For import/export transactions with independent parties for amounts higher than Ar$ 1,000,000 (approximately US $ 71,000) per year there are a number of information obligations intended to scrutinize the prices involved.

In case the agreed prices are not arm's length, the Federal Revenue Administration can make transfer pricing adjustments to the Argentine local party.

In this sense, pursuant to Decree No. 589/2013 and General Resolution (AFIP) No. 3576, jurisdictions considered as "cooperative" are those that have signed or are negotiating with Argentina a Double Taxation Treaty with broad information exchange clause, or that have signed or are negotiating a tax information exchange agreement. Currently, the list includes 113 cooperative jurisdictions.

Furthermore, the Tax Procedure Law provides for specific presumptions regarding the receipt of funds by Argentine residents from low tax jurisdictions or tax havens.

7.2. Treaties for the avoidance of double taxation.

Argentina has signed treaties for the avoidance of double taxation and fiscal evasion with the following countries:

Australia	Belgium	Bolivia	Brazil
Canada	Chile(*)	Denmark	Finland
France	Germany	Italy	Mexico(*)
Netherlands	Norway	Russia	Spain
Sweden	Switzerland(*)	United Kingdom	

(*) Ratification still pending

7.3. Tax on personal assets.

This tax is imposed on assets existing as of December 31 each year held by resident individuals and estates, over assets located in Argentina and abroad; and non-resident individuals and estates, over assets located in Argentina.

Individuals or companies located in the country who are joint owners, or that are vested with the possession, disposal, deposit, custody, safekeeping and/or administration of assets owned by non-residents, must act as substitute taxpayers. The tax rate is 1.25%.

Moreover, non-resident companies and individuals must pay an annual 0.5% tax on their shareholdings, or interest in capital, in Argentine companies. The tax is paid by the local entity, which has the right to be reimbursed by the shareholders for the tax paid; and for that purpose it may withhold and/or request the realization of the assets that originated the tax (i.e. shares, quotas, etc.).

7.4. Valued added tax (VAT).

VAT is levied on all sales of goods or performances of services made within the territory of Argentina in the course of a business, unless they are specifically VAT-exempt. VAT is also levied on all imports of goods and services into Argentina.

The general rate for VAT is 21%, though there are higher and lower rates for certain taxable events.

Payments are made on a monthly basis. To this end, the prior month's VAT credits (Input VAT) arising from purchases are deducted from the VAT debits (Output VAT) stemming from sales made in the same month. Non-residents are not entitled to compute tax credits, as they are considered end users.

Securities in general are exempted.

7.5. Tax on Financial Transactions (tax on debits and credits in bank accounts and other deals).

This tax is imposed upon any deposited funds either withdrawn or transferred from checking or savings accounts, and is withheld by Argentine banks.

The generally applicable rate is 6‰ for each debit and for each credit in bank accounts, but it becomes doubled on certain taxable events.

A portion of this tax may be credited by Argentine taxpayers against other federal taxes.

7.6. Turnover Tax.

Argentine provinces and City of Buenos Aires levy turnover tax *(impuesto a los ingresos brutos)* on the gross revenue of any enterprise that carries out commercial, industrial, agricultural, financial, or professional activities.

Tax rates vary depending on the type of activity and the turnover tax act of each jurisdiction, but the average rate is 3%.

The provinces and the City of Buenos Aires have signed an agreement (the so-called "Multilateral Agreement") to avoid the double taxation of activities performed in more than one jurisdiction.

7.7. Stamp Tax

Stamp tax is a local tax levied on public or private instruments executed in Argentina, or abroad when their effects are produced in one or more relevant jurisdiction within Argentina (provinces and the City of Buenos Aires).

In general, Stamp Tax applies to all acts and agreements (i) executed within the province's jurisdiction; (ii) executed outside the province's jurisdiction but when their effects are produced within it; (iii) executed in private form, public deeds or through correspondence, in the cases indicated by law, and (iv) also to monetary operations, registered in accounting records that represent delivery or reception of sums of money that accrue interest, made by financial entities.

Tax rates vary depending on the type of transaction and the regulations of each jurisdiction, but the average rate is 1% in most provinces. In general, the rate is assessed on the economic value of the transaction.

* * *

This document contains general information about doing business in Argentina. It is not intended to provide, and should not be relied on as a source of legal advice.

[1] The general rule is that loans made prior to December 16, 2015 are subject to a minimum 365-day tenor. A longer term is applicable to exceptional cases.

For further information on this topic please contact Jorge I. Mayora

CLAYTON UTZ

09 June 2016

Fintech regulatory sandbox one step closer with release of consultation paper

The long-awaited fintech regulatory sandbox could be a step closer with the release on Wednesday 8 June 2016 of the consultation paper promised in the Federal Budget.

In addition to the sandbox proposal, the paper – "Further measures to facilitate innovation in financial services" – sets out two other proposals: third-party sign-off for small, heavily automated businesses, and more guidance on making a submission on a responsible manager's knowledge and skills.

Our initial view of the consultation paper is that it will be of quite limited application, and will not assist with a range of other regulatory hurdles facing fintech innovators (including KYC, ACL and responsible lending obligations). Although many of these are not within ASIC's powers, it highlights the need for a cross-regulator approach to these matters if Australia is actually to take full advantage of the so-called "ideas boom".

At first glance ASIC's proposed sandbox does not seem as flexible as similar measures announced earlier this year in the UK by the FCA (for which applications for the first cohort close 8 July) and the Monetary Authority of Singapore on 6 June.

All comments and submissions are due by Friday 22 July.

The rationale for a regulatory sandbox exemption

ASIC has identified three reasons for this limited exemption for allowing providers to test new financial services:

- businesses would be able to attract investment before they begin negotiations with an AFS licensee about operating as an authorised representative, or incurring compliance costs such as obtaining an AFS licence;
- businesses would also be able to test and, where necessary, adapt their services at lower cost; and
- it would be pro-competitive as it would remove barriers to entry into the financial services market.

Who could play in the fintech regulatory sandbox?

ASIC proposes that the regulatory sandbox would be an industry-wide licensing waiver for new Australian businesses to test limited financial services provided to retail and wholesale clients.

As currently proposed, the exemption would be subject to the following restrictions:

- a limited time period;
- a limited range of products;
- a limited pool of customers;
- no exemption for existing AFS licensees (even, it would seem, for innovative products to which their current licence does not relate);

- a "sponsor" recognised by ASIC is required;
- modified set of conduct and disclosure obligations;
- membership of an external dispute resolution scheme;
- adequate compensation arrangements;
- compliance with AFS licensee "best interests" duty and conflicted remuneration requirements; and
- declaration to ASIC that the testing business has reasonable grounds to expect that it can operate its business for a period of six months

ASIC also propose to require a short report about a test following completion of the testing period (hopefully on a confidential basis), as well power to withdraw the exemption during the six-month testing period.

Limited time period

The waiver would apply to advice and dealing services only for a period of six months (and there will be no further relief to businesses who wish to test their services for an additional period). Payment products would not be eligible because there are already ongoing exemptions for low-value arrangements. As for other services, ASIC says it would be open to consider exemptions on a case-by-case basis, in line with existing policies.

Importantly, ASIC states in the proposal that "Testing businesses will need to consider how they intend to comply with the financial services laws after their six-month AFS licensing exemption expires (e.g. by applying for an AFS licence or acting as a representative of an existing AFS licensee). Testing businesses may need to cease operations for a period of time following the testing period until they can comply with the usual licensing obligations."

ASIC proposes that a person will only be able to rely on the exemption once. Presumably this is regardless of whether the exemption would be sought for a different financial product.

Limited range of products

The exemption would only apply to:

a) giving financial advice in relation to listed or quoted Australian securities, simple managed investment schemes and deposit products; or

b) arranging for other persons to deal in the products in paragraph (a).

A "simple managed investment scheme" is expressed to be a registered scheme that invests at least 80% of its assets in a bank account where funds can be withdrawn within three months, or in arrangements where the investments can be realised at market value within 10 days.

ASIC states that it would have concerns about services provided to retail clients that relate to:

- complex products (eg. derivatives);
- illiquid products or arrangements that cannot easily be reversed;
- products with a long-term focus (eg. superannuation); and
- products with a risk management focus (eg. general or life insurance).

The thrust of the exemption is towards exemption for services (eg. advice or distribution), rather than products issued by the testing businesses. This would seem to significantly limit the benefit of the exemption for many fintech businesses – for example, market-based lenders who use a managed investment scheme structure are unlikely to fall within the definition of "simple managed investment scheme".

Limited pool of customers

The relevant service could be offered to:

- up to 100 retail clients, with a maximum $10,000 investment per retail client; and
- an unlimited number of wholesale clients,

provided that total investment (retail and wholesale) would be capped at $5 million.

ASIC has invited views on a graduated exposure limit, but in the first instance believes that the complexity of such an approach outweighs its benefits.

Sandbox sponsors

ASIC suggests sandbox sponsors be not-for-profit industry associations or other Government-recognised entities which:

- are operated by fit and proper persons; and
- have conducted a preliminary assessment that the testing business's proposed business model is reasonably sound and does not present significant risks of consumer detriment.

Disclosure

The modified disclosure requirements would be some of the information typically included in a Financial Services Guide, such as:

- the kinds of services being provided;
- who the testing business acts for;
- any remuneration or other benefits the testing business receives; and
- the dispute resolution systems available;

or, where financial advice is given, some of the information typically included in a Statement of Advice:

- the advice provided (and the basis on which that advice is given);
- any remuneration or other benefits the testing business receives that could influence the advice; and
- any other interests or associations that could influence the advice.

Third-party sign-off for small, heavily automated businesses

Under this proposal, small, heavily automated businesses could appoint a third-party responsible manager to provide sign-off (ASIC suggests an accountant or auditor). The third party would be required to examine all the relevant material and certify that the AFS licensee is materially compliant with ASIC-administered legislation.

This proposal is designed for potential new AFS licensees establishing their business, who would then appoint additional responsible managers as their business grows, at which point ASIC could remove any tailored conditions from that their AFS licence.

ASIC stresses that this "does not change the AFS licensee's underlying obligations under the financial services laws. We are proposing that a licensee may, in some circumstances, be able to meet these obligations in a slightly different way."

Eligible businesses would be those that:

- provide financial services to no more than 1,000 retail clients; and
- only give advice on, or arrange for another person to deal in, liquid financial products, non-cash payment facilities, and products issued by a prudentially regulated business.

The sign-off must be lodged with ASIC at regular intervals, and at least one responsible manager who makes significant day-to-day decisions must be nominated. Responsible managers who provide a sign-off that contains false or misleading statements may commit an offence under section 1308 of the Corporations Act.

Assessing submissions on a responsible manager's knowledge and skills

Under Option 5 of RG 105, a prospective AFS licensee to provide submissions about why a responsible manager has appropriate knowledge and skills if they are unable to demonstrate the specific combinations of qualifications, training and experience set out in Options 1–4. As ASIC notes, "innovative start-up businesses frequently rely on Option 5 of RG 105 for one or more of their responsible managers".

ASIC is not proposing to change the way it assesses these submissions. It is, however, proposing to give more detail about what it expects a prospective AFS licensee to include in its submission, and give examples of where it would consider a responsible manager has (or does not have) the appropriate knowledge and skills.

Key dates for the regulatory sandbox consultation

22 July 2016: Comments due on the consultation paper.

September 2016: Drafting of regulatory guidance and/or licensing exemption.

December 2016: Regulatory guidance and/or licensing exemption finalised.

We'd be happy to help you further understand the implications of the proposals, or draft a submission.

NautaDutilh Q1 2016 Private Equity & Venture Capital Barometer Belgium

This is NautaDutilh Belgium's sixth Private Equity & Venture Capital Barometer. After our spring 2014 Interim Report, we decided to survey, on a quarterly basis, a select group of private equity and venture capital players, asking about current and expected trends in their practice. The present publication shares highlighted results from the first quarter of 2016 (Q1 2016).

For more information on NautaDutilh's Private Equity Team:

http://www.nautadutilh.com/en/home/expertises/industries/private-equity/

Elke Janssens

T: +32 2 566 81 50, M: +32 478 99 63 45

E: elke.janssens@nautadutilh.com

Pascal Faes

T: +32 2 566 86 12, M: +32 477 93 10 92

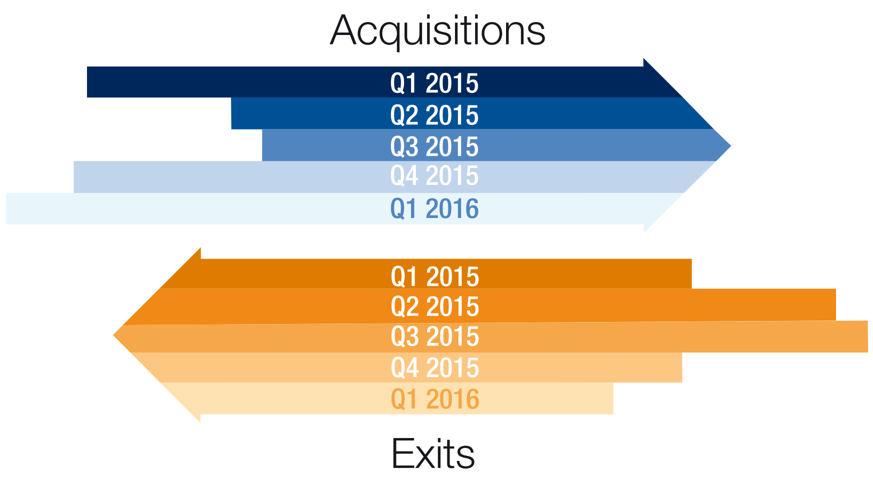
E: pascal.faes@nautadutilh.com

Sophie Jacmain

T: +32 2 566 81 94, M: +32 497 51 47 73

E: sophie.jacmain@nautadutilh.com

The 2013 Report refers to *NautaDutilh's 2013 Belgian Private Equity and Venture Capital Market - An Outlook, available at*
http://www.nautadutilh.com/PageFiles/10051/Private_Equity-Report_Belgium_2013%20UK.pdf.
The 2014 Interim Report is *NautaDutilh's 2014 Outlook on the Benelux Private Equity, Venture Capital & Leveraged Finance Market - An Interim Report, available at*
http://www.nautadutilh.com/Documents/Images%20and%20publications%20for%20news/Private_Equity_report_Benelux_2014_US-format.pdf.
The Q3-Q4 2014 Barometer refers to *NautaDutilh Belgium's first Private Equity & Venture Capital Barometer, available at*
http://www.nautadutilh.com/PageFiles/30802/PE%20and%20VC%20Barometer%20Q3%20Q4%202014%20Belgium.pdf.
The Q1 2015 Barometer refers to NautaDutilh Belgium's second Private Equity & Venture Capital Barometer, available at
http://www.nautadutilh.com/Documents/Images%20and%20publications%20for%20news/BarometerBelgiumQ1_2015.pdf.
The Q2 2015 Barometer refers to NautaDutilh Belgium's third Private Equity & Venture Capital Barometer, available at
http://www.nautadutilh.com/PageFiles/32766/Q2%202015%20Barometer%20Private%20Equity.pdf.
The Q3 2015 Barometer refers to NautaDutilh Belgium's fourth Private Equity & Venture Capital Barometer, available at
https://www.nautadutilh.com/PageFiles/35602/Q3%20Barometer%20Belgium.pdf.
The Q4 2015 Barometer refers to NautaDutilh Belgium's fourth Private Equity & Venture Capital Barometer, available at
http://www.nautadutilh.com/PageFiles/38955/NautaDutilh%20Private%20Equity%20Venture%20Capital%20Barometer%20Belgium%20Q4%202015.pdf.



Acquisitions are still on the rise, while exits continue to drop

While the number of exits had been increasing for three consecutive quarters, starting in Q1 2015 (exits rose from 50% in Q1 to 59% in Q2 and 62% in Q3), in Q4 2015 and Q1 2016 the reported number of acquisitions exceeded the number of exits. This trend is confirmed by MergerMarket (56% of reported transactions related to acquisitions).

In Q1 2016, Europe continued to struggle to attract private investment (the main reasons being problems affecting the European financial markets and political uncertainty), which of course impacts the private equity and venture capital sectors. There is increasing competition for high-quality assets, and large amounts of dry powder are available (due to both the large cash reserves of PE players and historically low interest rates). For high-performance targets and those with interesting growth potential, valuation and asset-class purchase multiples are higher than ever (i.e. at pre-crisis levels). After having declined sharply from 19 to 13 (Q4 2015), the number of weeks needed to sign/close a deal (from receipt of the information memorandum) dropped further to 11 in Q1 21016 (see infra «Deal speed»).

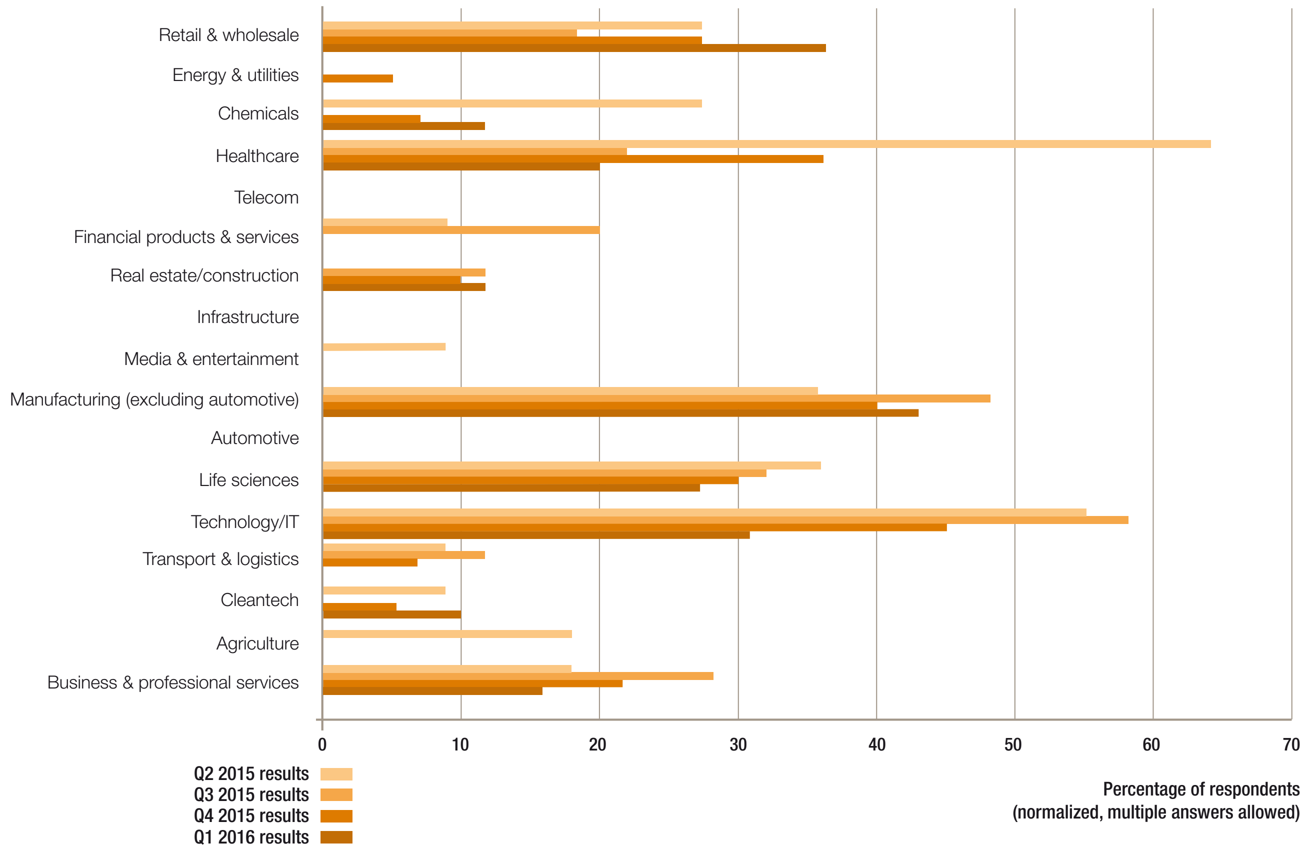
Sectors with the most PE/VC activity[1]

Before discussing the Q1 2016 findings, we would like to comment on two trends in the retail & wholesale and healthcare sectors revealed by the Q4 2015 Barometer.

In our Q1 2015 Barometer, we pointed out shrinking profit margins in the retail & wholesale sector due to changed customer behaviour, the entry of new players and the fact that many Belgian retail & wholesale companies have been put up for sale. While this trend appeared to have petered out by Q2 and Q3 2015, the retail & wholesale sector again held fifth place in Q4 2015 and climbed to second place in Q1 2016. This trend was confirmed by our Restructuring and Insolvency Team and by retail & wholesale transactions we handled at year's end 2015 and in Q1 2016 (see infra «Distressed assets»).

The healthcare sector made a sudden, but not totally unexpected, return to the top four in our Q4 2015 Barometer and (again) held fourth place. While we have since noticed increased interest on the part of foreign private equity and venture capital funds for Belgian life sciences and healthcare companies, these sectors accounted for only a small percentage of reported deals.

[1] This information is based on press coverage or obtained from www. mergermarket.com.



According to our Q1 2016 Barometer, the sectors with the most PE/VC activity were manufacturing, retail & wholesale, technology & IT, and life sciences.

The manufacturing (excluding automotive) sector climbed from second to first place in Q1 2016.
In this regard, noteworthy transactions included Platinum Equity's exit from Mactac Europe (a Belgian manufacturer of high-quality sensitive materials), Capricorn Venture Partners, LRM and GIMV's exit from Punch Powertrain (a Belgian manufacturer of fuel efficient powertrains), Cobepa's exit from the German company d&b audiotechnik, and Bencis Capital Partners acquisition of De Keyser (a Belgian manufacturer and distributor of meat products).

Retail & wholesale was the second most popular sector. Transactions that received press coverage included Sofina's sale of its stake in the Spanish online fashion retailer Privalia Venta Directa to Vente Privée.com (backed by Summit Partners), GIMV's exit from Onedirect (a French telephone hardware distributor), Vendis Capital's acquisition of Petrol Industries (a Dutch manufacturer and retailer of denim clothing), and Labeyrie's acquisition of Père Olive (a Belgian company specialising in packing olives and other products), backed by PAI Partners.

The technology & IT sector fell to third place in Q1 2016. Noteworthy transactions included GIMV's exit from GreenPeak Technologies (a Dutch developer of ultra-low power wireless data communication controller chips), Sofindev's acquisition of GeoDynamics (a Belgian specialist in location-based software solutions), HMS Industrial Networks' acquisition from the founders of eWon (whose mission is to connect industrial machines securely to the Internet), and Capital-E's bid for Silicon Mobility (a French manufacturer of semiconductors for the automotive sector).

The life sciences sector once again held fourth place. The most publicised deals were PMV's sale of Q-Biologicals (a Belgian developer of production processes for biological materials, set up by former managers of Innogenetics), Waterland's investment in the laboratories of HistoGenex (a Belgian biomarkers developer), Promethera Biosciences' bid for Cytonet (a German biotech company developing therapeutic products), and KeBeK Private Equity's sale of Applied Maths (a Belgian bioscience software developer).

In Q4 2015, the Flemish Institute for Biotechnology (VIB) launched a new life sciences fund, V-Bio Ventures, which aims to invest in start-ups in the fields of diagnostics, agrotechnology and biopharma. Capital is provided by the European Investment Fund (EIF), ARKimedes, Korys and KUL, amongst others. In February 2016, V-Bio Ventures announced the completion of Confo Therapeutics' first financing round, totalling EUR 6.7 million. Capricorn Health-Tech Fund, Qbic, Sofi and VIB were the original investors upon the company's incorporation in June 2015; V-Bio Ventures, MINTS and PMV subsequently joined in.

Start-ups and fintech

According to *De Tijd*, 2015 was a record year for Belgian start-ups: investors injected more than EUR 350 million (seed, start-up and growth capital) in start-ups and young biotech companies. The funds were raised in over 70 financing rounds. In Q1 2016, EUR 71 million was raised. The largest fundraising (totalling EUR 24 million) related to ETheRNA (established in January 2013 as a spin-off of the Vrije Universiteit Brussel), a company that develops novel immunotherapies targeting the fundamental role of dendritic cells in the human immune system. Other important deals (involving Belgian investors) included Capricorn ICT Arkiv's EUR 10 million investment in Dutch company Bluebee (a pioneer in cloud-based high-performance genomics solutions) and GIMV's EUR 4 million investment in German company Topas Therapeutics (a biopharma developer of a unique immunotherapy treatment for autoimmune diseases).

While early-stage investment in start-ups used to be a government matter (most investments were made through state-related funds, such as PMV, GIMV, SRIW and FPIM), today an increasing number of private companies are providing seed and early-stage capital. Two deals that received substantial press coverage were the EUR 1 million investment in fintech start-up Cash-force by Volta Ventures (the fund established by Jurgen Ingels, Michel Akkermans and Marc Coucke, amongst others) and the EUR 1 million capital injection in Intix (a financial data software provider).

In our Q4 2015 Barometer, we noted that while fintech companies are emerging worldwide as interesting targets for private equity players, no noteworthy fintech investments took place in the fourth quarter of 2015 in Belgium. In Q1 2016, however, UnifiedPost (a Belgium-based international provider of technology and services that enable the optimization of business processes across a variety of markets and industries), Mymicroinvest (a crowdfunding platform), Twikey (a provider of e-mandates and contracts), Intix (a financial data management specialist), and Cashforce (a smart cash flow management and forecasting platform for large capital-intensive businesses) all successfully raised funds, confirming the worldwide trend.

In addition, a first batch of seven fintechs moved into ING's accelerator, Fintech Village, located in the Eggsplore fintech hub in Brussels. More companies are expected to follow, thus creating even more interesting targets.

Distressed company deals

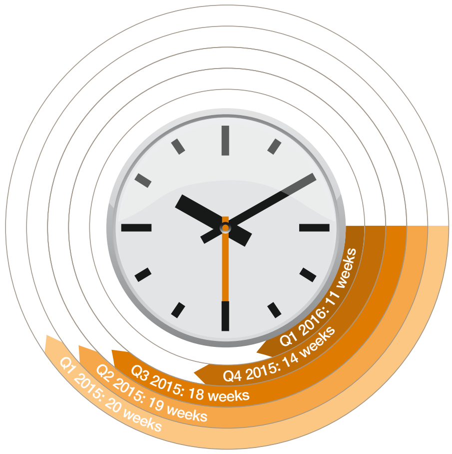
While the Q2 and Q3 2015 Barometers demonstrated a 50% increase in the number of deals involving distressed assets (a trend which had been predicted by **Sophie Jacmain** of NautaDutilh's Restructuring and Insolvency Team when commenting on the Q1 2015 results), in Q4 2015 and Q1 2016 respondents reported fewer distressed company deals. This trend is confirmed by the information available at Mergermarket.com. On the other hand, Bloomberg reported in early April that the investment firm KKR had raised USD 3.35 billion for its second special-situations fund, exceeding its original USD 3 billion target, as the private equity firm sees a corporate default cycle on the horizon. The special-situations fund provides debt or equity to companies with distressed capital structures or that are undergoing major events such as restructurings or mergers.

In Q1 2016, our Restructuring and Insolvency Team was kept busy assisting clients with the acquisition of distressed assets in the real estate (particularly office space in northeast Brussels), retail and renewable energy sectors. We were also involved in distressed asset litigation (shareholder disputes relating to exit possibilities) and silent restructurings.

The deal that received the most press coverage in Q1 2016 was the acquisition of the footwear company Brantano from the Euronext-listed Macintosh Retail Group, a Dutch company which filed for bankruptcy on 29 December 2015. NautaDutilh advised the buyers, BrantNew BVBA, a Belgian private venture fund started by R&S Retail Group's owner Rens van de Schoor, supported by Dieter Penninckx (FNG Group) and the Torfs family holding company. Brantano has over 134 stores in Belgium and Luxembourg and more than 1,100 employees.

Deal speed

A trend first identified in the Q4 2015 Barometer was increasing deal speed. While the number of weeks needed to sign/close a deal (from receipt of the information memorandum) used to be around 19 weeks, it dropped to 13 weeks in Q4 2015. In Q1 2016, the number of weeks needed to sign/close a deal (from receipt of the information memorandum) further declined to 11. Of course, much will depend on the



parties involved, but the most frequently cited reason for an accelerated deal is that buyers must act quickly in order to acquire good targets. As previously mentioned, in our experience, auction sales for desirable assets tend to be relatively brief affairs, and buyers more readily accept seller-friendly transaction documents.

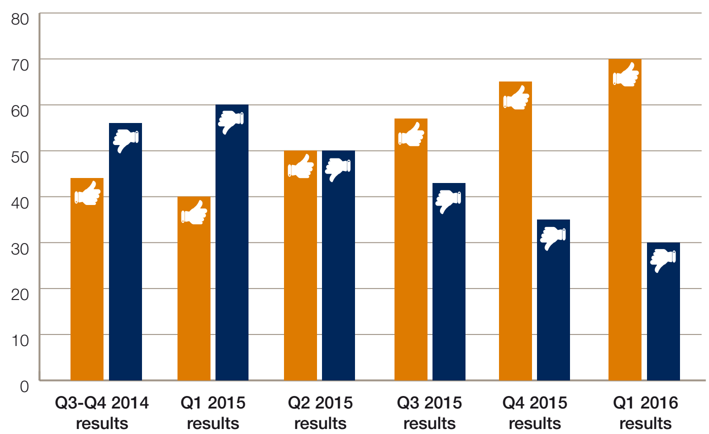
In our practice, we have identified two typical scenarios: the deal is closed either very quickly or not at all (in the event of protracted negotiations). As a result, we have witnessed an increase in aborted deals and deals involving top-quality assets, which are closed faster than ever.

Two key tax factors: advance rulings and interest deductibility

Greater interest in tax rulings

Last but not least, a more worrisome trend (noted for the first time in our Q3 2015 Barometer and confirmed by Q4 2015 and Q1 2016 data) is that an increasing number of respondents report post-closing issues, while in previous quarters they stated that in principle they do not face claims under the representations and warranties. When commenting on the Q3 2015 results, we predicted that tax issues would become more relevant. Indeed, in May 2015, we began to see increasing interest in tax rulings. This prediction was

Is Belgian ruling practice a factor when considering potential deals?



confirmed by the Q4 2015 and Q1 2016 results: while a year ago over 60% of respondents answered «no» to the question of whether Belgian ruling practice is a factor when considering potential deals, in Q1 2016 70% answered «yes». This turnaround is probably due to an increased awareness of *inter alia* BEPS (Base Erosion and Profit Shifting) rules, which will most likely (further) modify the tax climate in which companies operate.

Earlier this year, the Belgian tax ruling system received substantial (negative) attention, culminating on 11 January 2016, when Margrethe Vestager, European Commissioner for Competition, declared that the Belgian excess-profit ruling practice constitutes illegal state aid. On 22 March 2016, Belgium brought an action before the Court of Justice of the European Union against the European Commission's decision.

Future limitations on interest deductibility

In October 2015, the OECD released its final report on recommended limitations on interest expense deductions under its Action Plan on BEPS. The OECD recommends that countries implement a «fixed ratio» rule to limit net interest deductions claimed by an entity (or group of entities operating in the same country) to a fixed percentage of earnings before interest, taxes, depreciation and amortization (EBITDA).

Belgium wishes to amend its legislation and impose tighter restrictions (for instance, to disallow the deduction of interest on the acquisition of fixed financial assets). There is, however, no proposed legislation to this end in the pipeline. According to sources close to the government, a new rule is likely to be approved by this summer.

VAT on certain directors' fees

In Belgium, directors' fees have traditionally not been subject to VAT, provided the director is a natural person. Legal entities acting as company directors could decide whether to apply VAT to their fees. Further to a 30 March 2016 decision of the VAT administration, however, legal entity directors must apply VAT to their fees as from 1 June 2016.

In practice, companies that are not (or not fully) subject to VAT on their outgoing operations could see a substantial increase in the fees of board members providing services through a legal entity. Except in certain circumstances (such as VAT unity between the company and its legal entity board member or specific exemptions provided for by the VAT code), the non-deductible VAT will indeed be an additional expense (even if it can still be deducted for corporate tax purposes).

TSX Proposes Mandated Website and Updated Equity Compensation Plan Disclosure Requirements

June 2016 | Will Osler, Juliamai Giffen, Matthew Olson and Elyse van Spronsen

The Toronto Stock Exchange (TSX) has published for comment proposed amendments to the TSX Company Manual (Manual). If adopted, the amendments would, among other things, introduce mandated website disclosure for all TSX listed issuers (Part IV Amendments), and amend the current disclosure requirements regarding security based compensation arrangements (Part VI Amendments). The TSX is seeking public comment on the proposed amendments until June 27, 2016.

Part IV Amendments – Mandated Website Disclosure

Proposed Amendments

If adopted, the Part IV Amendments would introduce a new section 473 to the Manual containing requirements for listed issuers to maintain current copies of the following security holder documents on a publicly accessible website: (i) constating documents (including, as applicable, articles, by-laws, trust indentures, partnership agreements and other similar documents); (ii) corporate policies that impact meetings of security holders and voting; (iii) security holder rights plans (i.e. poison pills); (iv) security based compensation arrangements; and (v) certain corporate governance documents.

The Part IV Amendments also seek to amend existing provisions in the Manual relating to disclosure requirements applicable to TSX listed issuers that adopt a majority voting policy, by substituting the requirement to describe majority voting policies annually in materials sent to security holders with the requirement to post a current copy of such policy on the issuer's website.

Rationale

While certain key security holder documents are already publicly available on the System for Electronic Analysis and Retrieval (SEDAR), they may be difficult to locate due to issuers' differing practices for identifying and filing materials under consistent categories. The requirement to publish the above noted documents on an issuer's website is intended to address accessibility issues and ensure that policies and corporate governance documents that may not otherwise be required filings on SEDAR are made readily accessible to the investing public. In publishing the proposed Part IV Amendments, the TSX conducted a review of website requirements of other exchanges, including the New York Stock Exchange and London Stock Exchange's AIM, each of which has its own form of similar mandated website disclosure.

Part VI Amendments – Security Based Compensation Arrangement Disclosure Requirements

Proposed Amendments

The Part VI Amendments are intended to simplify the disclosure required in annual meeting materials and introduce a new form (Form 15) to replace the current narrative description of security based compensation arrangements (Arrangements) required to be filed with the TSX with tabular disclosure meant to be more user-friendly. Additionally, the proposed Part VI Amendments would amend certain parts of the Manual to specifically refer to a broader scope of Arrangements filed with the TSX, including plans that set out the general terms and conditions of options, deferred stock units, restricted stock units or other awards; individual awards not granted pursuant to a plan; financially assisted purchases of securities; and other compensation or incentive mechanisms involving the issuance of equity securities.

The Part IV Amendments, if implemented, would require the following new or modified disclosure (Disclosure Elements):

Outstanding Awards	The disclosure of the number of awards outstanding under an Arrangement would continue; however, if an Arrangement includes a multiplier (a feature where a participant in an Arrangement is eligible to receive a higher award based on corporate performance), the maximum payout must be used to calculate the number of securities that are issuable under the award (including as a percentage of issued and outstanding securities). Details in respect of the multiplier will require explanation in footnotes to the disclosure.
Burn Rate	New disclosure regarding the burn rate (rate at which the issuer grants awards under the Arrangement), defined as the number of awards granted in a year (net of cancellations), multiplied by a multiplier, if applicable, and divided by the number of issued and outstanding securities of the issuer at the beginning of that year.

Vesting	Updated and more specific disclosure will be required regarding default vesting provisions and whether vesting is time and/or performance based.
Amendments	Disclosure of any amendments to awards or an Arrangement will only be required in respect of amendments completed without security holder approval during the most recent fiscal year. Disclosure of amendments previously approved by security holders is no longer required.
Other Key Terms	Disclosure of "other key terms" in annual meeting materials will no longer be required; however, this disclosure will continue to be required in respect of meetings for the approval of an Arrangement or any amendments thereto.

Additionally, in coordination with the proposed Section IV Amendments and addition of section 473 to the Manual, an issuer will be required to disclose a hyperlink or webpage address providing the location on the issuer's website where a copy of any Arrangement may be found.

Under the Part VI Amendments, disclosure regarding, among other things, the amendment process, financial assistance, term, exercise and purchase price calculation and maximum securities available to insiders or to any one person or company would no longer be required by the TSX, although certain of these items may still be required to be disclosed by Form 51-102F6 – *Statement of Executive Compensation*.

Rationale

The TSX believes the proposed Part VI Amendments, including the updated or modified Disclosure Elements, simplify the disclosure of Arrangement details, while eliminating the disclosure of unnecessary information that may not be useful to security holders. The concurrent introduction of section 473 means that the full copy of the Arrangement would also be made available to the investing public on a listed issuer's website, diminishing the need for certain disclosure in annual meeting materials. The TSX has requested comment on a number of specific questions arising from the proposed Part VI Amendments, including whether the Disclosure Elements are useful and appropriate disclosure in the context of Arrangements.

Next Steps

Bennett Jones invites clients to contact the firm with any questions or comments and is available to assist clients who wish to submit comments on the proposed amendments to the TSX. We will also continue to monitor the proposed amendments and provide updates on any further developments.

/Carey

New law on waste management, extended liability of the producer and recycling

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

Rafael Vergara
Partner
+56 2 2928 2210
rvergara@carey.cl

Felipe Meneses
Associate
+56 2 2928 2381
fmeneses@carey.cl

Julio Recordon
Associate
+56 2 2928 2381
jrecordon@carey.cl

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

Today, Wednesday, June 1st, the Framework Law for the Management of Waste, Extended Liability of the Producer and Promotion of Recycling No. 20,920 (the "Law") was published.

Purpose

The Law seeks to reduce the generation of waste and encourage its reuse, recycling and other types of recovery. With this end, it establishes the Extended Liability of the Producer ("REP" on account of its Spanish acronym), **making the producer liable for the waste generated by its products**, from its inception to its final recovery or elimination.

Scope of Application

La Ley establece diversos productos prioritarios, a los cuales se aplicará el régimen de la REP. Estos son:

- Lubricant oils;
- Electric and electronic devices;
- Containers and packaging;
- Tires; and
- Batteries

For purposes of the Law, a producer is defined a person that (i) sells a priority product for the first time in the national market; (ii) sells under his/her/its own brand a priority product acquired from a third party that is not the first distributor; or (ii) imports a priority product for its professional use.

Associated Obligations

The following are the main obligations this Law shall impose for producers:

- Report the main aspects of its waste management to the Record of Emissions and Transference of Contaminants, on an annual basis.
- Organize and finance the collection, storage, transportation and treatment of priority products waste.
- Comply with the waste collection and recovery goals set for each category of product.
- Additional requirements that the Law enables the establishment of through supreme decree, include eco-design; certification, signage and labeling of products; deposit and reimbursement systems, among others.

/Carey

Practical Importance

As an example, companies that sell products which are packaged and marketed under the company's own brand shall be considered as producers for purposes of the Law, even if they acquire the packaging from third parties.

Producers shall organize and finance the collection, storage, transportation and treatment of their products waste. In order to meet these requirements, a company may choose to comply individually or jointly with other producers, and may enter into agreements with municipalities and waste managers. Regardless of how they choose to fulfill their duties, all companies are required to file a 5-year management plan in order to comply with the obligations set forth by the Law.

Additionally, the collection and recovery goals set by supreme decree and the associated obligations related to labeling, marketing, prevention of waste generation and operation of waste management facilities, among others, shall be met. In order to ensure compliance with these goals, a security deposit, insurance or other guarantee must be established and maintained valid.

Establishment of collection and recovery goals

The collection and recovery goals shall be set through supreme decree. For establishing the latter, a period of public comment shall be considered, in order for any individual or corporate body to issue his/hers/its observations.

Any person who claims that a supreme decree does not comply with the law and causes damage may file a claim before the Environmental Tribunal.

Enforcement and penalties

The Superintendency of the Environment will be charged with enforcement of the law, and will be authorized to impose penalties of up to 10,000 UTA (Unidades Tributarias Anuales, equivalent to approximately US$ 8 million) taking into consideration the seriousness of the infraction.

Validity

The Law shall come into force once it is published in the Official Gazette. Notwithstanding the aforementioned, the obligations related to collection of waste and compliance with goals shall be subject to the enactment of the specific supreme decrees.

China's New Law on Foreign NGOs: Does it apply to you, and if so, what do you need to know?

May 2016

Hogan Lovells

China's New Law on Foreign NGOs: Does it apply to you, and if so, what do you need to know?

Do you work for a non-profit or non-governmental organization that was formed outside of China, but is considering activities or plans related to China? If so, you will want to consider the implications of China's new Foreign NGO Law. Read on to see how it impacts you.

The PRC National People's Congress ("**NPC**") passed the final *Law of PRC on Management over Foreign NGOs' Activities in China* (the "**Foreign NGO Law**") on April 28, 2016, which will become effective from January 1, 2017. The Foreign NGO Law is the third of a series of laws that were proposed last year to address the growing concerns by China's leadership about national security and foreign interference with China's domestic affairs.[1] The second draft of the Law (the "**Second Draft**") had been released about one year ago and received extensive comment and criticism both from domestic and foreign parties concerned about its potential adverse impact. While the Foreign NGO Law as adopted reflects some improvements from the previous drafts and appears to relax certain previously proposed restrictions and burdens on Foreign NGOs' activities in China, many issues and questions are still not clarified or addressed. Whether or not the drafters intended to place a significant damper on the activities of Foreign NGOs in China will need to be further evaluated based on the implementing rules and guidance and the actual experience with the registration process.

The Foreign NGO Law includes a rather vague definition of a Foreign NGO (the "**Foreign NGO**") as follows: "non-profit, non-government social organizations that have been legally established outside China, such as foundations, social organizations, and think tanks, etc."[2] Particularly unhelpful is the inclusion of "etc." as part of the definition. This Alert discusses the key implications of the Foreign NGO Law and outlines some of the areas that will hopefully be addressed in the implementing guidance. (We have prepared a separate Alert that addresses the particular issues related to schools, hospitals, research institutions and academic organizations under the law, which can be accessed here.

I. TWO PATHS TO CONDUCT ACTIVITIES IN CHINA

Once the Law becomes effective, Foreign NGOs will only be able to conduct activities through one of two paths:

1. through a Foreign NGOs' representative offices ("**RO**"s) in China, which is the only type of legal form that Foreign NGOs are allowed to established in China under the Foreign NGO Law. It is also specifically provided that a Foreign NGO shall not establish branch offices within China, unless otherwise provided for by the State Council; or
2. as a "temporary activity" approved by and filed with the relevant authorities (such record-filing is valid for up to one year unless a new record filing is done with the Registration and Administration Authority).

II. ADMINISTRATION AND OVERSITE AUTHORITIES

1. Dual-layer approval and registration mechanism

The Foreign NGO Law sets out a "dual layer" of supervision over Foreign NGOs' activities in China. As to the first layer, (1) for establishing a RO, the Foreign NGO shall secure the approval from the Supervisory Authority; or (2) for carrying out temporary activities, a Foreign NGO is required to be

[1] The series of laws adopted or proposed last year to address the growing concerns by China's leadership about national security and foreign interference with China's domestic affairs include four legislations. The other three legislations are: (i) the National Security Law of the People's Republic of China, which became effective from July 1, 2015; (ii) the Anti-terrorism Law of the People's Republic of China, effective from January 1, 2016; and (iii) the PRC Cyber Security Law, the draft of which was released for public comments on July 6, 2015.

[2] See Article 2 of the Foreign NGO Law.

sponsored by a Chinese unit (which can be government agencies, people's organizations, public institutions or social organizations, the "**Chinese Cooperative Body**"), who must then obtain relevant authorities' approval for such temporary activities of the Foreign NGO. The second layer would fall under the authority of the Ministry of Public Security and its branches at provincial level ("**MPS**"), being either its approval on registration application for a RO establishment or the record filing with MPS (although the application obligation is also placed on the Chinese Cooperative Body) for the temporary activities.

In addition to the above "dual layer" administration and supervision mechanism, the government authorities that are authorized to exert their powers to regulate Foreign NGOs' activities in China broadly include the authorities for national security, foreign affairs, fiscal affairs, financial supervision and management, customs, tax and foreign experts, etc., according to their respective powers and responsibilities.

2. <u>MPS as the primary oversight authority</u>

A substantial change to the existing regulatory regime on the activities of (foreign and domestic) NGOs in China is that MPS will be the primary authority over a Foreign NGO, acting as the Registration and Administration Authority, as opposed to the current supervision and registration mechanism whereby the Ministry of Civil Affairs and its local branches ("**MOCA**") is the primary agency for activities of all NGOs in China. During the comment period, this shift raised considerable concerns from Foreign NGOs and other commentators, but given the national security impetus driving the adoption of this Law, this approach was retained by the drafters.

3. <u>Strengthened MPS's Powers</u>

In addition to the registration or filing authority of MPS over Foreign NGOs' activities, MPS has also been granted comprehensive supervisory and regulatory powers including (i) to conduct annual inspections of Foreign NGOs' ROs, (ii) to take various measures in case of discovery of acts violating the Foreign NGO Law, such as entering into and inspecting premises and activity venues of a Foreign NGO in China and checking, duplicating and sealing up relevant documents under its discretion, and (iii) to check the bank accounts of units or individuals related to an incident under investigation and to grant approval to freeze funds in the related bank accounts. The Foreign NGO Law has even further strengthened such enforcement powers by adding the below powers for MPS:

- to meet and discuss with the chief representative and other persons in charge of the RO(s) of Foreign NGOs;
- to order cessation of the temporary activities through the Chinese Cooperative Body (if MPS deems that the filed temporary activities may jeopardize the national security); or
- to blacklist a Foreign NGO and prohibit it from establishing RO(s) or carrying out temporary activities in China if such Foreign NGO commits certain severe crimes.

III. FUNDING LIMITATIONS IMPOSED ON FOREIGN NGOS' ACTIVITIES IN CHINA

The Foreign NGO Law includes various provisions restricting funding resources and use of funds by Foreign NGOs for their activities in China. In addition, Foreign NGOs and their ROs are specifically prohibited from fundraising within China. The permissible funding resources for the Foreign NGOs for their activities in China are limited to: (1) funds from lawful sources outside of China; (2) interest on bank deposits accrued in China; and (3) other funds legally acquired within China.

In addition, the Foreign NGO Law requires that:

- for a Foreign NGO with registered RO, it shall only use the RO's bank account filed with the MPS to manage the funds used in China;
- for the Foreign NGOs carrying out temporary activities, it shall use its Chinese Cooperative Body's bank account to manage the funds used in China, with the funds subject to separate bookkeeping and being earmarked for dedicated purposes; and
- other than the above two circumstances, a Foreign NGO, as well as it Chinese Cooperative Bodies and other individuals, are not allowed to use alternative methods to pay or receive funds relating to Foreign NGOs' activities in China.

IV. REPORTING AND PUBLICATION REQUIREMENTS

As required under the Foreign NGO Law, the RO of a Foreign NGO shall submit its activity plan for the next year to its Supervisory Authority for approval and then to the MPS for record filing. Its annual report shall also be filed with its Supervisory Authority for comments and then with the MPS for annual inspection. Such annual report shall be also disclosed online to the public. In case of temporary activities, a Foreign NGO and its Chinese Cooperative Body are obligated to submit a written report on such activities and fund use to MPS within 30 days following conclusion of the temporary activities.

V. UNCLEAR ISSUES SUBJECT TO FURTHER IMPLEMENTING RULES AND INTERPRETATIONS

Given the structure of the Foreign NGO Law, the implementing regulations will be critical to the actual ability of Foreign NGOs to comply with the Foreign NGO Law. Until the implementing regulations are adopted, there is no means for registration of a Foreign NGO's RO or for approval of temporary activities. Critical issues such as identifying the entities eligible to serve as a Chinese Cooperative Body and those government authorities that will serve as the Supervisory Authorities for the respective fields of activity will need to be accomplished sufficiently in advance of the effectiveness of the Foreign NGO Law to enable Foreign NGOs to arrange relationships with Chinese Cooperative Bodies and apply for approvals. Given that it will be quite complex and time-consuming to prepare the filing and obtain approval for a Foreign NGO's RO, the time is already tight in order to meet compliance by January 1, 2017.

1. **Will Foreign NGOs' activities be limited to engaging in a specified catalogue of activities?**

   The Foreign NGO Law provides that MPS will, in conjunction with the relevant authorities, formulate the catalogue of areas and projects for Foreign NGOs' activities and publicize the Supervisory Authority directory in order to provide guidance to the Foreign NGOs in carrying out their activities in China. However, as to the concern on whether Foreign NGOs will be only allowed to carry out activities in China only within those areas listed under this catalogue, the NPC Standing Committee indicated that such catalogue is not likely to be conclusive by the inclusion of "etc." However, this approach is likely to leave considerable uncertainties on the permitted scope of Foreign NGOs' activities in China, while at the same time, leaving discretionary authority to the relevant agencies to limit the scope of activities.

2. What is the intent of the prohibition on for-profit activities?

The Foreign NGO Law specifically prohibits the Foreign NGOs from engaging in or providing financial support to for-profit activities, political activities and, illegally, with respect to religious activities.[3] While the restrictions on political and religious activities have long been in effect, no guidance has been provided in the Foreign NGO Law on what types of activities will be deemed as either carrying out or sponsoring for-profit activities in China. For example, given the general inability to register a non-profit subsidiary in China in the past but the desire to be able to hire employees, rent space and conduct activities in China, many Foreign NGOs have set up subsidiaries in China as for-profit legal entities (usually in the form of a wholly foreign-owned entity, "**WFOE**"), either as a direct subsidiary, or perhaps within a holding company for its overseas operations. Given the prohibition on for-profit activities and the language of Article 9[4] that applies restrictions on direct or indirect activity, it is not clear whether these existing WFOEs will be permitted to continue their operations in China under grandfather approval rules, and whether the WFOE is still an available option for a Foreign NGO to enter into China with its overseas for-profit holding company.

3. Will there be a grandfather rule for Foreign NGOs' representative offices that have already established?

Under the final Foreign NGO Law, there is no clear provision addressing the treatment of those representative offices already established by Foreign NGOs and registered with the MOCA. Based on informal guidance from the NPC Standing Committee, it appears likely that these already established representative offices will be acknowledged as legally existing under PRC Law and permitted to continue their operation under a grandfather or transition rule. It also appears likely that a further mechanism will needs to be formulated to address the transition of the registration and administration authority over them from MOCA to MPS.

4. Will Foreign NGOs be allowed to establish a foundation or a private social organization in China?

It remains to be seen whether the elimination of the requirements and restrictions on establishment of a foundation or private social organization in China that were included in the Second Draft when the final Foreign NGO Law was adopted indicates that it is still be possible for Foreign NGOs to establish or co-establish foundations or private social organizations in China. The fact that the recently adopted PRC Charity Law (effective from September 1, 2016) does not include an explicit prohibition on a Foreign NGO itself or jointly establishing a charity organization (which includes, foundations, social groups, or social service institutions and similar organizations) in China does present some comfort. However, given the restrictions on fund-raising by Foreign NGOs, this is likely to be an area of continued uncertainty.

VI. LIABILITIES AND PENALTIES

[3] Article 5 of the Foreign NGO Law provides: "Foreign NGOs that conduct activities within China shall comply with the law of China; shall not threaten China's national unity and safety and the unity of all ethnic groups of China; shall not jeopardize China's national interests, societal public interests or the legitimate rights and interests of the citizens, legal persons and other organizations. Foreign NGOs shall not engage in or provide financial support to for-profit activities or political activities within China. They are also forbidden to illegally conduct or sponsor religious activities."

[4] Second paragraph of Article 9 of the Foreign NGO Law provides: "A Foreign NGO that has not established and registered a representative office or has not completed the record-filing for conducting temporary activities is not permitted to directly or indirectly conduct activities within China, and shall not directly or indirectly entrust and sponsor any unit or individual within China to conduct activities within China."

In addition to the risk of being blacklisted by the MPS as described under section II above, the Foreign NGO Law further provides other penalties that may be imposed on a Foreign NGO, its RO and/or its Chinese Cooperative Body in case of a Foreign NGO's violation of the Foreign NGO Law, such as confiscation of illegal assets and illegal gains and, under grave circumstances, revocation of the RO's registration certificate or ban on temporary activities of a Foreign NGO. Administrative detention and, in case of crimes committed, criminal charges applicable to various violation acts are also set out under the Foreign NGO Law. The law also provides that, in case the RO's registration has been cancelled or revoked, or a Foreign NGO's activities have been banned due to violation of the Foreign NGO Law, such Foreign NGO is prohibited from setting up RO(s) or carrying out temporary activities in China within 5 years from the date of the cancellation, revocation or banning.

VII. CETAIN POSITIVE CHANGES BY THE FINAL FOREIGN NGO LAW AS ADOPTED

Compared to the Second Draft, the final Foreign NGO Law reflects favorable reaction to some comments by eliminating some of the problematic provisions, including the following:

- the number of RO a Foreign NGO can establish in China;
- the duration of existence of the RO; and
- the staff hiring and volunteer recruiting activities of the RO and the Foreign NGO.

The Foreign NGO Law has also introduced a carve-out to the Second Draft's prohibition on a Foreign NGO's RO and a Foreign NGO conducting temporary activities from recruiting members within China, if there are other regulations provided otherwise.[5]

VIII. TAX IMPLICATIONS

With the mandatory registration requirement, it will be possible for the Chinese authorities to track every movement and activity of Foreign NGOs in China, which can lead to significant tax exposure for Foreign NGOs in China if their activities are not planned properly. Also, compared to other types of legal entities in China, ROs are subject to a significantly higher tax burden, so Foreign NGOs will want to be fully aware of these tax exposures before undertaking any activities or establishing ROs in China. (We will prepare a separate Alert specifically addressing the main taxes and practice applicable to Foreign NGOs' activities in China.)

CONCLUSION

As the Foreign NGO Law will not come into effect until January 1, 2017, and the NPC Standing Committee has indicated that further guidance and implementing rules will become available before the effective date of the Foreign NGO Law, there is some time to assess the impact of the Foreign NGO Law and to discuss with the relevant regulators where clarification is needed. Hopefully, the time will be used to clarify what many observers consider to be a murky environment. Otherwise, China will, in trying to rid itself of unwanted influences from Foreign NGOs, have discouraged them from being involved as China seeks to transition to a developed economy.

[5] Based on informal guidance from the NPC Standing Committee, this exception may be limited to certain foreign natural science academies in which some Chinese experts, scientists and scholars have already joined, while any future member recruiting will still be subject to Chinese government's prior approval. However, given to the vague and broad language of this exception, there are clearly going to be some problems encountered as a result of unintended consequences. We deem that it is not likely that the intent was to preclude all Chinese people from belonging to professional organizations or societies that operate as non-profits, but perhaps some questions like this will be addressed in the implementing guidance.

CUSTOMS INTEGRATION BETWEEN HONDURAS AND GUATEMALA

The Enabling Protocol of the Customs Integration between Honduras and Guatemala came into force on May 13, 2016, which was approved by the Congress of Guatemala and Honduras on January 21, 2016 and December 8, 2015, respectively, deposited with the Secretariat of the Central American Integration System (SICA) on May 4, 2016.

“With the union between Guatemala and Honduras, a unique single customs territory of 44% of the total Central American territory (221.281 km2) is unified, along with 53% of the regional population (24.12 million) and 35% of the GDP (US $ 72.780 million). Moreover, half of the maritime cargo in the region is in both countries, component that makes this new customs territory more attractive for the local, regional and foreign investors’ market.

The implementation of types of border stations considered in this Customs Union is under work: The Free Circulation/Trade Facilitation station, located in El Florido and Entre Rios/Corinto; Integrated Control Station located in Agua Caliente which began operations on June 1, 2015; and a total of 13 Peripherals stations in the first stage, 6 in Guatemala (Puerto Quetzal, Puerto Santo Tomas de Castilla, Puerto Barrios, Tecun Uman, El Carmen and Pedro de Alvarado) and 7 in Honduras (Puerto Cortes, La Fraternidad, El Amatillo, El Guasaule, Puerto Henecán -in San Lorenzo- and the airports of La Mesa and Toncontín).” According to SIECA.

Among the benefits from the customs unions are: expediting the movement of goods, increasing the average speed from 16 to 30 km/h, approximately. An additional increase of 1% of GDP is also estimated and the participation of micro, small and medium enterprises of both countries will be facilitated.

If you require further information, feel free to contact us:

Claudia Midence
Associate
Claudia.Midence@ariaslaw.com

ABNR
COUNSELLORS AT LAW

NEWS DETAIL

03/05/2016

REGISTRATION PROCEDURE OF IP LICENSING AGREEMENT

The Ministry of Law and Human Rights of the Republic of Indonesia (“**MOLHR**”) has issued a new regulation which requires that all IP licensing agreements be registered for recordation at the ministry. The regulation is MOLHR Regulation No. 8 of 2016 regarding Rules and Procedures for the Recordation of Intellectual Property License Agreements (“**Regulation No. 8 / 2016**”).

Regulation No. 8 / 2016 applies to all of the intellectual property rights, namely, copyright and related rights, patents, marks, industrial design, integrated-circuit layout design, and trade secrets. For the recordation an application must be submitted by the licensor or the licensee or their representative. The application may be submitted either electronically or non-electronically. Below are the basic rules and procedures.

<table>
<tr><th>Electronically</th><th>Non-Electronically</th></tr>
<tr><td>The application is to be submitted through the official website of the Directorate General of Intellectual Property’s (“DGIP”). The below documents must be uploaded along with the application:</td><td>The application is to be manually submitted to the Ministry. The below documents must accompany the application:</td></tr>
<tr><td colspan="2">◦ A copy of the License Agreement or another evidence thereof;
◦ A copy of the certificate of the respective patent, mark, industrial design, integrated circuit layout design or ownership evidence of the respective copyright, related right, or trade secret which is still valid;
◦ Original specific power of attorney, if the application is made through a proxy; and
◦ Original receipt of the payment of the application fee.</td></tr>
<tr><td>In addition to the above, the applicant must complete and submit the electronically available Declaration Form which states that the intellectual property right referred in the respective license agreement:</td><td>In addidtion to the above, the applicant must complete and submit the Declaration Form provided as an attachment to Regulation No. 8 / 2016 which states that the intellectual property right referred in the respective license agreement:</td></tr>
<tr><td colspan="2">◦ is still validly protected;
◦ does not prejudice national economic interests;
◦ does not inhibit the development of technology;
◦ is not contrary to the provisions of the prevailing laws, morality and public order;</td></tr>
</table>

Foreign applicants must be represented by an IP consultant who is domiciled in Indonesia.

Under Regulation No. 8 / 2016, the processing of an application should not take more than 10 days as of the acceptance of the application. Incomplete applications will be returned to the applicants and the applicants will have no more than 10 days as of the date of the notification to complete the application. Failure in submitting the application within the prescribed time frame will result in that the application will be deemed as withdrawn. Successful recordation applications will be announced in the official website of the DGIP. The recordation is valid for 5 years, at the end of which the applicant may re-apply for the continued recordation.

This regulation has been in force since 24 February 2016. All recordation applications which were submitted before this issue of this Regulation No. 8 / 2016 will be processed on the basis of the provisions of Regulation No. 8 / 2016. (*by: Evelyn Irmea Sinisuka*)

OUT WITH THE OLD, IN WITH THE NEW

Sheba Gumis discusses the constitution and no-par value regime under the Companies Bill 2015

INTRODUCTION

The Companies Bill 2015 ("Bill") was passed by the Dewan Rakyat and the Dewan Negara on 4 and 28 April 2016 respectively. The Bill is pending Royal Assent and will come into operation on a date to be determined by the Minister.

The Bill, which seeks to promote a more modern, simplified and business-friendly corporate environment, will introduce many significant changes to the company law regime in Malaysia. Several legal concepts which have been enshrined in Malaysian company law have been deemed archaic and have been omitted from the Bill.

THE CONSTITUTION

The first fatality of the Bill is the memorandum and articles of association ("M&A"). The M&A, which are the constitutive documents of a Malaysian company, will be replaced by a constitution (Division 5 of the Bill).

In replacing the M&A with a constitution, Malaysia follows the example of Singapore, which in its Companies (Amendment) Act 2014 merged both the memorandum of association and the articles of association of a company into a constitution. The use of a constitution, instead of an M&A, has already been adopted in the United Kingdom, New Zealand and Australia.

Constitution Optional

Unlike the mandatory requirement to have an M&A under the current Companies Act 1965 ("Act"), a constitution will be optional (Clause 31(1)). The constitution may be adopted by a company by way of special resolution, and shall be binding on the company, its directors and its members (Clause 32).

Rights, Powers, Duties and Obligations under a Constitution and the Bill

Where a company elects to forego a constitution, the company, each director and each member of the company shall have the rights, powers, duties and obligations as set out in the Bill (Clause 31(3)).

However, where a company chooses to have a constitution, the rights, powers, duties and obligations of the directors and members will be as set out in the Bill save insofar as they are modified (to the extent permitted under the Bill) by the constitution (Clause 31(2)). The Bill further provides that the constitution has no effect to the extent that it contravenes or is inconsistent with the provisions of the Bill (Clause 32 (2)).

Company Limited by Guarantee

It is mandatory for a company limited by guarantee to have a constitution (Clause 38(1)). The Bill further provides, *inter alia*, that a company limited by guarantee must be a public company (Clause 11(2)) and must prohibit the payment of dividend to its members (Clause 45(2)(b)).

Existing company

Clause 34(c) provides that for a company registered under the Act, its M&A will be deemed to be its constitution. It should be noted that the provisions of the M&A have no effect if they contravene or are inconsistent with the provisions of the Bill.

Power of Court to Amend the Constitution

Clause 37(1) confers power on the Court to amend the constitution of a company if it is satisfied, upon the application of a director or member of the company, that it is not practicable to do so using the procedure set out in the Bill or in the constitution.

The Act only confers power on the Court to amend the M&A of the Company in the event of oppression under Section 181.

NO PAR VALUE

The par value concept is one that has its roots in common law and has been gradually phased out in various common law jurisdictions. Australia, New Zealand, Hong Kong and Singapore have abolished this concept. Malaysia too will follow suit under the Bill.

Par Value and Authorised Capital

Par (also known as nominal value of shares) refers to the minimum amount of monies worth that is, or will be, paid to a company for a share. For example, where a company's share has a par value of RM1.00, the minimum amount that the company must receive for that share is RM1.00.

A corollary of the par value concept is that a company is prohibited from issuing, or agreeing to issue, shares at a discount (i.e. below par value). A further concept that flows from the par value concept is the concept of authorised capital which imposes a ceiling on the number of shares that can be issued by a company.

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

The Corporate Law Reform Committee ("CLRC") in its Consultative Document on Capital Maintenance Rules and Share Capital, considered whether the concepts of par value and authorised capital protected shareholders and creditors.

For example, authorised capital purportedly restricts the further issue of shares which may dilute existing shareholders' rights and the value of their existing shareholding. The authorised capital and the par value concepts purported to protect creditors because the company implicitly warrants that the authorised capital of the company is the amount of capital it has available to pay creditors.

These protections were debunked by the CLRC in the above Consultative Document. The CLRC concluded that the protections are only illusory in the present business environment. New shares can always be issued in excess of the company's original authorised capital subject to increase of the authorised capital by the shareholders. Additionally, the authorised capital is not indicative of the actual issued and paid-up capital of the company. Accordingly, the purported protection to the creditors and shareholders does not exist.

The CLRC also took the view that the concepts of par value and authorised capital complicated the workings of company law and misled shareholders and creditors into believing that because of a company's authorised capital and par value, the company will have reserves and will be able to pay its debts to creditors. Additionally, shareholders were under the perception that they were entitled to receive at the very minimum the par value of the shares held by them in the company upon winding up of the company.

In order to simplify and streamline share capital rules, the CLRC proposed that the concepts of par value and authorised capital be abolished.

Moving to the No Par Value Regime

Clause 74 of the Bill effectively removes the concept of par value by providing that all shares issued before or upon the commencement of this Act shall have no par or nominal value.

In order to aid the transition into the no par value environment, the Bill provides for transitional provisions relating to the abolition of par value (Clause 618). A company may, within 24 months of the commencement of Clause 74, use the amount standing to the credit of its share premium account for certain purposes. These include, *inter alia,* the provision of premium payable on redemption of debentures or redeemable preference shares, payment of balance unpaid on bonus shares and payment of dividends to be satisfied by the issue of shares to members, so long as the aforementioned events occur before the commencement of Clause 74.

Unit No. 50-8-1, 8th Floor, Wisma UOA Damansara, 50 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur, Malaysia.
T: +(603) 2081 3999 F: +(603) 2094 3211 E: skrine@skrine.com W: www.skrine.com

Any amount standing to the credit of a company's share premium account and capital redemption reserve shall upon the commencement of Clause 74, become part of the company's share capital.

Effects of No Par Value Regime

The most important effect of the no par value regime is that it will simplify the concept of share capital and a Malaysian company will cease to be encumbered by par values and authorised capital.

All monies paid for such shares will become the share capital of the company. This simplifies accounting as the share premium account will become extinct.

Subdivisions and consolidation of shares will become easier as companies will no longer have to consider the par value of shares when dividing and consolidating shares. One share will simply be divided into two shares, instead of dividing one share of RM1.00 each into two shares of RM0.50 each under the Act.

Shares can also be easily issued (subject, if required, to members' approval) since there will not be a need to increase the company's authorised capital, as the concept will cease to exist.

The CLRC also concluded that the abolition of the par value concept will not affect the voting rights of shareholders as the number of votes held by a shareholder will be based on the number, and not the par value, of shares held by him.

CONCLUSION

By removing outdated concepts, the Bill dispenses with the old and brings in the new. It is anticipated that after the coming into effect of the Bill, the Malaysian corporate landscape will be substantially overhauled and become more business-friendly. Stakeholders who are used to the concepts of an M&A, par value and authorised capital will have to adapt to the new regime introduced under the Bill.

SHEBA GUMIS (sheba@skrine.com)
10 June 2016

Sheba is a Senior Associate in the Corporate Division of SKRINE. Her practice areas include mergers and acquisitions, and investment law.

Changes to the OIO's good character assessment process

June 07, 2016

Contacts

Partners **Peter Stubbs (http://www.simpsongrierson.com/people/peter-stubbs)**
Senior Associates **Sarah Lee (http://www.simpsongrierson.com/people/sarah-lee)**

International investment (/resources/international-investment)

The Overseas Investment Office (OIO) has instituted changes to its good character assessment process in the wake of revelations that Onetai Station, a 1317 hectare farm in Taranaki, was sold to a company controlled by two Argentinian brothers who have previously been prosecuted for chemical dumping in a river in Buenos Aires.

The case has highlighted shortfalls in the OIO's review process for assessing the good character of applicants. Media coverage in New Zealand has intensified the OIO's focus on ensuring the good character of both existing consent holders and applicants.

Statutory requirements of good character of an applicant

Consent will only be granted to an application where the person(s) in control of the investment are of good character. When assessing good character, the OIO will consider:

1. any offences or contraventions of the law by an individual;
2. any offences or contraventions of the law by a person in which any individual has a 25% or more ownership or control interest; and
3. any other matter that reflects adversely on the person's fitness to have the particular overseas investment.

The OIO's website states that any offence more serious than a traffic offence should be disclosed. It should be noted that the OIO's guidance advises that offences should be disclosed whether or not they resulted in conviction.

The OIO's process and upcoming review

Due to the shortfalls in the good character assessment process revealed by the Onetai Station case, the OIO confirmed **on 3 May 2016 (http://www.linz.govt.nz/news/2016-05/overseas-investment-office-review-process-around-good-character)** that it has taken steps to improve the assessment process. The following changes have been instituted:

1. the appointment of a dedicated and experienced person to undertake all web searches for information to inform the good character test;
2. the development of a list of web search terms (eg 'conviction' and 'fraud') to ensure searches are consistent and thorough; and
3. explicitly capturing and recording the outcome of web searches where issues are identified, and passing on this information to ministers in support of the OIO's recommendation.

In addition, Land Information New Zealand Chief Executive Peter Mersi has announced that Wellington-based barrister Peter McKenzie QC will review the OIO's process for assessing good character. Mr McKenzie QC's report is due for release by 15 June 2016.

What does this mean for you?

Both the media and the OIO have intensified their focus on the issue of good character following the Onetai Station revelations.

Labour party MP David Cunliffe has taken also taken up the issue, saying recently that the OIO's oversight with regards to checking the good character of applicants was "practically non-existent". Labour are actively conducting Google searches to identify failings in the OIO's good character process for existing consents.

If you intend to lodge an OIO application in the future, or if you are currently under an obligation to report to the OIO if a person ceases to be of good character or commits an offence, you need to be extra vigilant to ensure that all information regarding any investigations or convictions of controlling persons are disclosed in full.

If you have any questions or concerns about whether you are making adequate disclosure, please contact us.

Follow us on LinkedIn (https://nz.linkedin.com/in/peterstubbs) and Twitter (http://twitter.com/nzmarketinglaw) to stay up to date on the latest developments.

Contributors shahin.foroughian@simpsongrierson.com (mailto:shahin.foroughian@simpsongrierson.com)

ARIAS, FABREGA & FABREGA

PH ARIFA, 10th Floor
Boulevard Oeste
Santa María Business District.
PO Box 0816-01098
Panama, Republic of Panama
Tel: +507 205 7000
Fax: +507 205 7001

ARIFA Legal Flash

Litigation and Arbitration Practice Group

Primary contact

Octavio Amat
Senior Partner
Co-head of Practice
oamat@arifa.com
+507 205 7000

Fernando A. Arias
Partner
Co-head of Practice
farias@arifa.com
+507 205 7012

Lawyers in this practice

Juan F. Corro
Sofía J. Cohen
Claudio De Castro
Juan P. Benavides
Diego A. Alvarado
Ricardo E. Arosemena

Carol M. Durling
(IP Litigation)

María del C. Zúñiga
(Labor Litigation)

Jorge Loaiza III
(Shipping Litigation)

Cecilio A. Castillero, Sr.
(Of Counsel)

Panama enacts modern bankruptcy law

Panama, June 2016. After 100 years, Panama has enacted a new bankruptcy regulation, Law No. 12 of May 19, 2016, which will enter into force on January 2, 2017, and which is based on the UNCITRAL Legislative Guide on Insolvency Law, as well as on legislation from Colombia, Chile, Argentina, USA, Peru and Spain.

All bankruptcy proceedings filed before January 2, 2017, will continue to be regulated by the provisions of the Code of Commerce of 1916, which were based on the idea of sanctioning the defaulting debtor as well as liquidating the company and distributing all assets of the debtor among its creditors. The modern provisions of Law No. 12, in contrast, are based on the idea of protecting the credit and the survival of any business in difficulties.

The main changes included in the new bankruptcy law are the following:

- Reorganization proceedings, which do not exist in the current legislation, are now possible in order to attempt to save companies in economic difficulties and avoid liquidation.
- Reorganization proceedings can be transformed into liquidation proceedings and vice versa.
- While reorganization proceedings are in place, pledge or mortgage foreclosure proceedings cannot be initiated and those already initiated will be stayed until the reorganization has concluded.
- While reorganization proceedings are in place, the debtor cannot be evicted from its place of business by its landlord for unpaid rental fees owed before the reorganization proceedings started.
- New circuit courts and a new appeals court are created to have exclusive jurisdiction over bankruptcy matters, which were previously decided by regular civil courts.
- Fixed timeframes are established for bankruptcy courts to decide the various matters presented to them, to avoid the current situation where courts do not have established timeframes to issue decisions which results in extremely lengthy proceedings.
- The party requesting the bankruptcy proceedings now has to post the initial costs of the liquidation proceedings, including the payment of the provisional salary of the liquidator, which is established at USD$3000 and is subject to modification by the assembly of creditors.
- The debtor, who under the current law was alienated from its assets and business, is now allowed to participate in the reorganization proceedings and propose a plan to save its business.
- Local and foreign creditors are treated equally.
- There is a new chapter on cross border bankruptcy to facilitate the recognition of foreign bankruptcy

- There is a new chapter on cross border bankruptcy to facilitate the recognition of foreign bankruptcy proceedings and facilitate cooperation among different foreign proceedings.
- Judicial decisions obtained fraudulently in prejudice of creditors are subject of annulment.
- Anyone who benefited from acts committed in prejudice of creditors and which have been declared null and void, are personally and proportionally liable. In the event that the person who benefitted from those acts is a legal entity, its managers, administrators, directors, officers, legal representatives, liquidators, agents, partners or shareholders, who benefitted indirectly, are also liable.
- In cases of fraudulent bankruptcies, criminal sanctions can be reduced in the event that the debtor cooperates with the proceedings.
- Once the liquidation of a company is declared, any creditor can request the seizure or attachment of the assets of the directors, legal representatives, managers, agents, or auditors of the company or any person who might have committed negligent or fraudulent acts against the creditors of the company.

We remain at your disposal for any further inquiries you might have,
or for additional information you might need, regarding this release.

Caudio De Castro
cdecastro@arifa.com
T: +507 205 7000

Competition law - Rights of private action

May 12, 2016

Key contact

Ajinderpal Singh
Senior Partner, Singapore
D +65 6885 3619
ajinderpal.singh@dentons.com

Introduction

Singapore's competition law regime has been in place since 2006 but you may not be aware that Singapore's competition law regime provides for the Right of Private Action, under Section 86 of the Competition Act (Cap. 50B). The Right of Private Action offers remedies for victims of anti-competitive conduct to obtain compensation for loss and damage suffered. It is also intended to be a further deterrent to anti-competitive conduct, resulting in a fairer market for all. Apart from facing fines for anti-competitive conduct, entities may still be taken to task for loss and damage suffered by third parties as a result of such anti-competitive conduct.

The Right of Private Action

The Right of Private Action arises in limited, but clear, circumstances. Section 86(2)(a) provides that a claim for damages only arises upon a final determination that an entity has infringed:

1. Section 34 (by entering into agreements which have as their intended objective or result in the prevention, restriction or distortion of competition within Singapore);
2. Section 47 (by abusing the entity's dominant position in a market in Singapore); and/or
3. Section 54 (where a merger with another entity results or is expected to result in the substantial lessening of competition in a market in Singapore).

Such a determination may be made by the Competition Commission of Singapore (the CCS) but is subject to the entity's rights of appeal, from the decision of the CCS to the Competition Appeal Board, which in turn is appealable to the High Court of Singapore and from there to the Court of Appeal within prescribed time limits. In waiting for the final determination, third parties may therefore have to wait until an entity exhausts all of its rights of appeal.

Once a final determination is made, third parties will have only two years to commence civil proceedings against the entity.

Given the complexity of the area of law, parties dealing with entities under investigation by the CCS would be advised to consult their lawyers and other experts to consider their likely losses resulting from the alleged anti-competitive conduct under investigation as soon as it is apparent that investigations are underway to ascertain if they are in fact victims of the anti-competitive conduct.

Victims must have suffered loss directly

Singapore's competition law regime limits the Right of Private Action to persons who have suffered losses directly as a result of such anti-competitive conduct. For example, in the case of commodities or consumables, aggregators may form a cartel to inflate wholesale prices, only for wholesalers and retailers to pass on the inflated prices to final consumers. Based on this requirement of direct losses, consumers may not be able to commence civil proceedings against the anti-competitive entity. Although the courts in Singapore have not yet authoritatively ruled on this issue, wholesalers not involved in the cartel activity would be able to recover damages for losses suffered instead.

Damages recoverable by victims of anti-competitive conduct

As the anti-competitive nature of the entity's conduct may not be challenged, an anti-competitive entity is likely to focus its efforts in contesting a third party's quantification of its damages. Damages are generally intended to compensate the third party's for its losses.

Such losses may include:

1. lost profits on actual and potential sales;
2. lost sales (due to consumers turning to available substitute goods); and
3. lost market share.

Quantifying such losses is usually a matter for expert evidence on complex microeconomic and econometric analysis. Such detailed expert analysis will also have to be interpreted and directly linked to the entity's anti-competitive conduct before third parties will be awarded damages. While the assessment of damages and analysis of microeconomic and econometric analysis are generally complex matters, it is likely that the direct victims of anti-competitive conduct will be able to establish their losses with greater ease and clarity than indirect victims.

As with other claims, it is unlikely that the Singapore courts will award exemplary or punitive damages, or require entities to disgorge their profits as it is more likely that the direct victims of anti-competitive behaviour in Singapore will be able to quantify their losses more readily. In this case, it is much more important for victims of anti-competitive behaviour to be certain of their losses. This, of course, is easier said than done.

Conclusion

Since January 2016, the CCS has issued two negative determinations in the life insurance industry and the fresh poultry industry; has issued statements in response to queries in two further industries; and, is currently considering a variety of complaints in separate industries.

To date, no third party has exercised their Rights of Private Action pursuant to Section 86 of the Competition Act. This however is a development which may take place in the near future.

The author acknowledges and thanks Ganesh Bharath Ratnam for his contribution in the writing of this article.

理律法律事務所
LEE AND LI
ATTORNEYS-AT-LAW

Introduction to Draft Amendments of Trademark Act and Copyright Act in Adaption to the TPP

05/31/2016
Tsung-Yuan Shen

Based on the consideration of the needs for economic and trade development as well as overall national interests, Taiwan has been aggressively working on joining the Trans-Pacific Partnership Agreement (hereinafter "TPP") so as to mutually benefit from free trade and a level playing field along with other countries and regions. However, Taiwan's intellectual property-related laws and regulations, including the Trademark Act and the Copyright Act, still comprise provisions inconsistent with those of the TPP, which need to be adapted accordingly. The Intellectual Property Office, the Ministry of Economic Affairs ("TIPO") thereby recently completed draft amendments to the Trademark Act and the Copyright Act on May 10th, 2016.

Regarding the Trademark Act, the aforementioned draft amendment consists of four focal points:

A. Amending the subjective essentials of infringement liabilities arising from counterfeiting trademark labels or packaging or otherwise:

As provided in Paragraph 3, Article 70 of the current Trademark Act, any act of manufacturing, possessing, displaying, selling, exporting or importing labels, tags, packaging or containers, or services relevant to articles that have not been applied in relation to goods and services, shall be deemed an infringement of trademark rights if the actor performs such activities without the consent of the proprietor of a registered trademark, and knowing that such articles would likely infringe trademark rights as prescribed in Article 68. However, the TPP regulates in Article 18.74 that civil liabilities of trademark infringement shall cover circumstances wherein an infringer knowingly, or with reasonable grounds to know, engages in infringing activities. The aforementioned provisions of the existing Trademark Act are, therefore, to be amended to specify that acts of counterfeiting trademark labels or packaging or otherwise, either knowingly or with reasonable grounds to know, shall be deemed an infringement of trademark rights.

B. Adding criminal penalties for counterfeiting trademark or collective trademark labels or packaging:

Referring to the provisions in Paragraph 3, Article 18.77 of the TPP, criminal penalties are to be added for acts of counterfeiting identical or confusingly similar trademark labels or packaging, on a commercial scale, for goods and services that are identical to those of the registered trademark. Moreover, in light of the flourishing digital transactions through the Internet, the draft amendment specifies that criminal penalties shall also apply to the same infringement through electronic media and the Internet.

C. Amending criminal penalties for counterfeiting labels of certificate marks or otherwise:

According to Paragraph 2, Article 96 of the current Trademark Act, any person shall be liable for criminal penalties if the person counterfeits labels of certificate marks, knowing the likelihood of infringement. “Knowing” here is limited to direct intention. Such provisions are inconsistent with those set forth in Paragraph 3, Article 18.77 of the TPP. Therefore, the essential of “knowing” is to be deleted, and the subjective essential of criminal penalties for counterfeiting labels of certificate marks or otherwise shall cover the direct intent and indirect intent as applicable to the principle of general criminal penalties. Moreover, in light of the flourishing digital transactions through the Internet, the draft amendment specifies that criminal penalties also apply to the same infringement through electronic media and the Internet.

D. Amending the subjective essential of criminal penalties for sale or intention of selling infringing articles or otherwise:

The criminal penalties regulated in Article 97 of the current Trademark Act are imposed with an essential that the infringer sells or intends to sell infringing articles, knowing the likelihood of infringement. “Knowing” here is limited to direct intent. Such provisions are inconsistent with those set forth in Paragraph 3, Article 18.77 of the TPP. The essential of “knowing” therefore is to be deleted, and the subjective essential of criminal penalties for sale or intent to sell infringing articles or otherwise shall cover the direct intent and indirect intent as applicable to the principle of general criminal penalties. Moreover, in light of the flourishing digital transactions through the Internet, the draft amendment specifies that criminal penalties also apply to the same infringement through electronic media and the Internet.

Regarding the draft amendment to the Copyright Act, the focal points are as follows:

A. Extending the term of economic rights for works:

Copyright-related provisions in the TPP provide that the term of protection for economic rights is calculated on a basis of 70 years. In adaptation to such disciplines, the term of protection for economic rights in Taiwan is proposed to be extended from “the author’s lifetime plus 50 years after the author’s death” to “the author’s lifetime plus 70 years, or to 70 years beginning from the time of public release.” To achieve a balance between rights protection and the public interest, the draft amendment proposes to exclude an extension for the works which have already become public goods due to expiration of the term subject to the current Copyright Act before the enforcement of the draft amendment.

B. Adding criminal penalties for circumventing technological protection measures:

1. With respect to acts of disarming, destroying or any other means circumventing (circumvention behavior) the technological protection measures employed by copyright owners to prohibit or restrict others from accessing works (access controls); for instance, an enterprise which does not purchase legitimate software but instead uses the software by installing an illegitimate version and entering a serial number; the current Copyright Act imposes only civil penalties on infringers as pursuant to Paragraph 1 of Article 80-2. However, such circumvention behaviors which are of commercial nature should be deemed significant in terms of damages caused to the copyright holder. It is obviously insufficient to impose only civil penalties on the infringers. Therefore, in reference to the TPP, Article 1204 of the U.S. Copyright Act and Subparagraph 3-2, Paragraph 2, Article 136 of the Korean Copyright Act, criminal penalties are thereby to be added to punish circumvention behaviors for commercial purposes or with intent to make profits.

2. In addition, Paragraph 2, Article 80-2 of the current Copyright Act provides that any equipment, device, component, technology or information for disarming, destroying, or circumventing technological protection measures shall not, without legal authorization, be manufactured, imported to be offered to the public for use, or offered in services to the public. Any person in violation of this provision shall be punished with criminal penalties pursuant to Subparagraph 2, Article 96-1 of the existing Copyright Act. Such regulations, however, fail to distinguish between commercial purposes and non-commercial use. Adjustments are thereby proposed in response to additional criminal penalties for circumvention behaviors to focus on combating acts violating technological protection measures with commercial purposes. Such amendments will reduce possible excessive interference by public authorities and avoid wasting judicial resources. Violation of technological protection measures by individuals with non-profit purposes will not be liable for criminal penalties to balance between public welfare and the Copyright holder.

C. Adjusting crimes prosecuted ex officio in adaptation to prosecution upon initiative:

In response to permissions granted by the TPP, which allow its competent authorities to act in prosecuted ex officio to initiate legal action against copyright piracy and distribution on a commercial scale, the amendment to the Copyright Act redefines two infringements as crimes prosecuted ex officio: reproducing the work with the intent to sell or rent set forth in Paragraph 2 of Article 91, and distributing a copy in digital format with the intent to make profits and knowing that the copy infringes on economic rights set forth in Paragraph 2 of Article 91-1. Moreover, in response to an increase in online piracy due to the development of digital technologies, any infringement of the public transmission right pursuant to Article 92 of the current Copyright Act is redefined as a crime prosecuted ex officio.

D. Adding civil and criminal protections for encrypted program-carrying satellites and cable signals.

Please be advised that the aforementioned draft amendments are indicative of future financial policy directions and have been listed as part of the executive power transition. The draft amendments will not be finalized until they are explained to, and discussed with, the successive administration. There are, therefore, possibilities that further adjustment might be made to the content of these draft amendments.

www.leeandli.com

GIDE
GIDE LOYRETTE NOUEL

ÖZDİREKCAN DÜNDAR ŞENOCAK
AVUKATLIK ORTAKLIĞI

client alert

EMPLOYMENT LAW | TURKEY | MAY 2016

NEW LAW ON MOBBING AND DISCRIMINATION AT WORKPLACE

A new "Law on Turkish Human Rights and Equality Institution" ("**Law**"), no. 6701, was published in the Official Gazette no. 29690 dated 20 April 2016. It entered into force on its publication date.

This new Law revoked the "Law on Turkish Human Rights Institution" no. 6332, dated 21 June 2012 ("**Amended Law**").

Pursuant to Article 3 of the Law, each person may equally benefit from legal rights and freedoms. The Law forbids discrimination based on gender, ethnicity, nationality, skin colour, language, religion, philosophical or political opinion, wealth, birth, marital status, medical condition, disability or age.

The Law stipulates nine types of discrimination, with mobbing listed as one of them with regard to Employment Law. The Law specifically describes mobbing as "intentional actions to disincline, to isolate and to make him/her wary of a person in the workplace based on the discrimination types listed in the Law under Article 2 § 1(g)."

According to Article 4 § 2 of the Law, adverse treatment of people and/or their representative, following the application of administrative and judicial procedures to prevent discrimination or maintain compliance with the principle of equal treatment, are also regarded as discrimination.

Article 6 of the Law is directly related to Employment Law issues. Pursuant to said article:

- During processes for the acquisition of information, job applications, selection criteria, recruitment conditions, working and ending a working relationship, an employer or person authorised by said employer cannot discriminate against the employee, job applicant, person taking place in a workplace to obtain practical job experience or applying for this purpose, person applying for getting information to work in any title or obtaining practical job experience in this workplace.

- The above paragraph also applies to job adverts, the workplace, working conditions, access to all levels and types of occupational guidance and occupational training, promotion and access to all levels of hierarchy, in-service training, social benefits and the like.

- An employer or person authorised by such employer cannot reject a job applicant for reasons of pregnancy or child care.

- Discrimination is also forbidden in the recruitment of freelancers, license, registration, discipline and other similar issues.
- These rules shall apply to employment contracts that do not fall within the scope of the Turkish Employment Law No. 4857.

The Law also provides for exclusions in certain special circumstances, where:

- Occupational conditions require it by providing a proportional and expedient treatment in the private sector,
- The nature of the job requires the hiring of only a particular gender,
- Different treatment based on age is necessary in recruitment and employment processes that provide proportional and expedient treatment,
- Hiring people believing in a certain religion is necessary, for instance to give religious education or a service in a religious institution.

1. APPLICATIONS TO THE TURKISH HUMAN RIGHTS AND EQUALITY INSTITUTION ("INSTITUTION")

All real and legal entities ("**Applicant**") may apply to the Institution free of charge. Any such applications may be made through Governorships in cities, and District Governorships in counties.

Where concerned, the Applicants shall first request from the Violator entity a revision of, and improvement to, their treatment before applying to the Institution. If the Violator party rejects this request or does not respond within 30 days, the injured party may apply to the Institution. Nevertheless, in urgent situations, the Institution has a right to examine the applications without such 30-day delay. The Institution shall then request a written explanation from the Violator, which must be delivered to the Institution within 15 days and notified to the Applicant.

If the Applicant can prove the violation, the burden of proof showing that no violation was made against the Applicant shall rest on the Violator. The head of the Institution may call the parties to a conciliatory meeting. Applications that cannot be resolved with such a meeting shall be presented to the Institution within 20 days.

2. LEGAL SANCTIONS

The Law prescribes an administrative fine of minimum TRY 1,000 and maximum TRY 15,000 if a real person, public or private institution violates the Law. When setting the amount of the fine, the Institution shall consider the impacts of the violation and the economic situation of the Violator.

An administrative fine of between TRY 500 and TRY 2,000 shall be imposed under the following circumstances, where the Violator:

- Prevents the Institution from conducting an investigation,
- Prevents the Institution from visiting the places where the violation occurred,
- Prevents the Institution from taking a copy or example of related documents,
- Does not reply to the Institution's questions when it seeks information.

According to the Article 25 § 4 of the Law, the Institution may alter the administrative fine to a legal warning one time only. If the Violator once more infringes the Law, the administrative fine shall be increased 50%. This increase cannot exceed the maximum amount of the fines stated above.

Administrative fines shall be paid by the Violator within one month following the notification date, as per the Article 25 § 5.

In compliance with Turkish bar regulations, opinions relating to Turkish law matters which are included in this client alert have been issued by Özdirekcan Dündar Şenocak Avukatlık Ortaklığı, a Turkish law firm acting as correspondent firm of Gide Loyrette Nouel in Turkey.

CONTACTS

MATTHIEU ROY
roy@gide.com

ALİ OSMAN AK
ak@odsavukatlik.com

Hogan Lovells

Brexit

First Aid for Pharma

Should the UK choose to leave the EU, there will be a substantial impact for the UK pharmaceutical industry. Crucially, these implications will not just be limited to the regulatory issues governing medicinal products.

"First Aid for Pharma" is intended for UK pharmaceutical companies that wish to continue to operate within the EU structure should the UK choose to leave the EU. It is intended to assist UK pharmaceutical clients in identifying issues that must be addressed.

1. Marketing Authorisation

The pharmaceutical sector is the most highly regulated sector in the EU.

A valid marketing authorisation for a medicinal product in the EU can be held only by an entity that is established within the EU. Should the UK choose to leave the EU, UK pharmaceutical companies will no longer have an EU establishment at which a valid marketing authorisation can be held.

i. Basic questions to be addressed concerning transfer of the marketing authorisation:

- Should the UK entity establish a presence in another EU Member State to which the marketing authorisation is transferred; or should the UK entity conclude a licensing agreement with an entity in another EU Member State?
- Would a transfer of marketing authorisation constitute a new marketing authorisation for a medicinal product; is a variation to an existing marketing authorisation an option?
- Is it necessary to change manufacturing facility?
- Is a new GMP audit required?
- Can the name and address of the UK entity remain on the packaging?
- Does the transfer procedure vary between EU Member States?
- How long does a transfer procedure take?

ii. Pharmacovigilance

What are the consequences for UK-based marketing authorisation holders concerning their regulatory obligations to report adverse events occurring with their products in the UK or in the EU?

Will UK pharmaceutical companies be required to appoint a new qualified person responsible for pharmacovigilance (QPPV) in an EU Member State?

2. Corporate Issues

Should a UK entity decide to establish a presence in another EU Member State, what would be the related corporate issues to be considered? These would include:

- Investigation of the national rules of individual EU Member States governing establishment of an entity;
- Determination of which EU Member State presents the most attractive alternatives to the UK.

3. Clinical Trials

Applications for marketing authorisation for medicinal products through the centralised marketing authorisation process must be supported by clinical data generated during clinical trials conducted in the EU. Data generated in third countries is considered "ancillary clinical data".

What is the validity of clinical data generated in clinical trials conducted in the UK, both pre and post UK departure, and intended to support marketing authorisation application for a medicinal product or the CE marking of a medical device?

4. Data Protection Issues

What would be the consequence of a UK departure for UK-based companies when they process personal data within the meaning of the Data Protection Directive and the future Data Protection Regulation? The UK could become an "adequate" third country in the medium term following a related decision of the European Commission but what would be the position in the short term, particularly in relation to data generated in on-going long term clinical trials?

5. Intellectual Property Issues

If a UK marketing authorisation holder either establishes a presence in another EU Member State to which the marketing authorisation is transferred or concludes a licensing agreement with an entity in another EU Member State which entity owns the marketing authorisation?

In a similar vein, who owns the patent in such circumstances? What consequences will there be for current European Patents that include the UK and for existing SPCs?

6. Contractual Issues

Changes in marketing authorisation holder will lead to a revision of contracts such as supply contracts governing APIs and final products. Where the UK marketing authorisation holder contracts out activities such as pharmacovigilance obligations related contracts will also require revision.

Will changes in national law governing related contracts be necessary?

What will the consequences be for supply contracts to competent authorities, hospitals, physicians within the EU?

7. Pricing and Reimbursement

Following a UK departure, competent authorities in EU Member States responsible for pricing and reimbursement may question the on-going suitability of sourcing supplies of medicinal products from a non-EU country. What are the related pricing and reimbursement issues?

What are the related issues concerning supplies based on previous public procurement activities in the EU Member States?

8. Employment Issues

Should a UK entity decide to establish a presence in another EU Member State, what would be the consequences of transfer for existing UK employees?

Which EU Member State presents the least employment challenges?

9. Tax Issues

Should a UK entity decide to establish a presence in another EU Member State, what would be the tax consequences of transfer for the existing UK entity?

Which EU Member State presents the least tax challenges and the most beneficial tax environment?

10. Trade Issues

Should a UK entity decide to establish a presence in another EU Member State, what would be the consequences from an international trade perspective?

Will the UK become a third country from an EU trade perspective?

What are the consequences for products/raw material, imported from the EU into the UK and exported from the UK towards the EU in terms of custom duties and controls?

Will the UK be required to renegotiate all trade agreements concluded directly by the EU with third countries?

11. EU Funding and Public-Private Partnerships

What are the consequences of a UK departure for UK-based companies participating in EU funding programmes such as Horizon 2020?

What are the consequences for UK-based companies participating in public-private partnerships such as the Innovative Medicines Initiative?

Join the conversation #Brexiteffect

www.hoganlovells.com/constitutionalchange

BAKER BOTTS

Ideas

Court Finds Market Price Not Sufficient, Awards Premium in Appraisal Proceeding

10 June 2016

Updates

In *In re Appraisal of Dell, Inc.*, the Court of Chancery awarded an appraisal value of $17.62 after Dell Inc. completed a merger related to a management buyout ("MBO"). The awarded appraisal exceeded the agreed merger price by more than 25%.

Background. In late 2012, Dell explored the possibility of taking the company private by way of an MBO. Of three interested sponsors, two dropped out during negotiations, concluding that the PC business was too risky. After pushing the remaining sponsor to increase its price twice—and after the Dell CEO agreed to roll over his shares at a lower valuation than the public would receive—the Board agreed to a deal for $13.65 per share. Dell's financial consultants contemporaneously agreed that the $13.65 price was fair to unaffiliated stockholders. After a go-shop period and early indications of stockholder opposition, the buyout group ultimately agreed to pay $13.96 per share.

The court explained at great length that, despite the fairly pristine process by which the Board achieved the merger price, the merger price was "not the best evidence of the Company's fair value." Instead, the court relied exclusively on a discounted cash flow ("DCF") analysis, settling on the $17.62 price after first rejecting the plaintiff's expert recommendation of $28.61 on the idea that a valuation of two times the Buyout Group's price was implausible, and then averaging the two DCF models proposed by Dell's expert after determining that one ($16.43) was "likely somewhat conservative" and the other ($18.81) was "likely somewhat optimistic."

Significance. In the future, companies undergoing an MBO should expect to see this opinion cited heavily in appraisal actions. The court in *Dell* granted a premium over the merger price despite going out of its way to highlight the virtues of the Company's negotiation process. The opinion suggests that, no matter the procedures followed, prices generated in the MBO context will be inherently suspicious and will lead to premiums in appraisal proceedings.

The court repeatedly explained that Dell acted properly, even commendably, in generating the merger price it did, noting that "the Company's process would sail through if reviewed under enhanced scrutiny." The Company "did many praiseworthy things" and the court "could not hold that the directors breached their fiduciary duties."

Despite the notable care exercised by Dell in this merger, the court would not accept that the merger price was fair to unaffiliated shareholders precisely because it was negotiated as an MBO, which "present different concerns than true arms' length transactions," such that prices generated in MBO mergers would "be evaluated with greater thoroughness" than mergers stemming from unaffiliated strategic buyers.

Three factors informed the court's view. First, the court found that the LBO pricing model used by all interested financial sponsors did not calculate "fair value" as a going concern. This was so despite the fact that no non-financial sponsors expressed interest in purchasing Dell.

Second, there was evidence of a substantial gap "between the market's perception and the Company's operative reality," which apparently was not sufficiently explained by the premium paid over the market price of Dell stock. The court was concerned that, theoretically, management teams would be able to strategically time MBOs so as to deny unaffiliated shareholders as-yet unrealized returns on long-term investments. Yet, the court noted that there was no evidence that Dell here sought to create a valuation disconnect so they could take advantage of it. To the contrary, the court recognized that Dell "tried to convince the market that the Company was worth more" and only "[w]hen the gap persisted despite their efforts" did they consider an MBO.

Finally, the court found that a lack of pre-signing competition undercut the merger price as an indication of "fair value." This was so despite the fact that the lack of competition was due to two financial sponsors dropping out during negotiations and despite the court noting that the merger agreement included an unusually flexible and open go-shop provision.

Going forward, this case suggests that even the most extensive procedures designed to insulate interested officers from negotiations and obtain the best value for a firm contemplating an MBO will not prevent courts from ordering a premium in appraisal proceedings. That, combined with the current interest rate environment, should encourage those considering appraisal litigation. In turn, one would expect the decision to increase the incentive for shareholders to object to MBO-related mergers.

In re Appraisal of Dell, Inc., C.A. No. 9322-VCL, in the Court of Chancery of the State of Delaware.

Related Professionals

Danny David

Partner

J. Matthew Schmitten

Associate

Jonathan A. Shapiro

Partner

David D. Sterling

Partner

Seth T. Taube

Partner

LOCATIONS:

AUSTIN | BEIJING | BRUSSELS | DALLAS | DUBAI | HONG KONG | HOUSTON | KUWAIT ALLIANCE | LONDON | MOSCOW | NEW YORK | PALO ALTO | RIYADH | SAN FRANCISCO | WASHINGTON

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

Final EEOC Wellness Plan Rules – The Headache Continues

06.02.16
By Dipa N. Sudra

Many employers have implemented wellness programs to encourage employees to adopt a healthy lifestyle and reduce medical claims. In recent years employers have revised wellness programs to comply with final regulations under the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA). Now employers must review their wellness programs for compliance with final regulations issued by the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

The final ADA regulations describe the extent to which employers may use employee incentives in wellness programs that include disability-related questions and/or medical examinations. Unfortunately, employers must navigate differences between the final ADA regulations and the HIPAA/ACA regulations.

The final GINA regulations confirm that employers may provide limited wellness incentives in exchange for an employee's spouse providing health status information, but cannot provide incentives for *children's* health status information.

The ADA's notice and incentive provisions, and GINA's incentive provisions, apply as of the first day of the first plan year beginning on or after January 1, 2017. Per the EEOC, all other provisions are clarifications of current requirements.

This advisory analyzes the final regulations, contrasts them with the final HIPAA/ACA regulations, and provides practical guidance for employers. For information on the background and a chart comparing the proposed ADA regulations (which were very similar to the final ADA regulations) to the HIPAA/ACA rules, refer to our previous advisory.

Employer to-do list

This is unlikely to be the final word on wellness from the regulators and the courts (litigation is pending).
For now employers should:

- [ ] Analyze how the various regulations apply to each wellness plan component
- [ ] Check compliance with applicable incentive limits under the ADA and HIPAA/ACA
- [ ] Review notices for compliance with ADA and HIPAA/ACA requirements

Four rules for ADA-compliant wellness programs

Under the final ADA regulations, wellness programs must:

- Be reasonably designed to promote health or prevent disease.

- Be voluntary (including provision of a notice), if they include disability-related questions or medical examinations.

- Limit participation incentives to 30%, if they include disability-related questions or medical examinations.

- Comply with confidentiality rules regarding medical information or history.

These requirements are described in more detail below, but it is important to understand that the ADA regulations are different in scope to the HIPAA/ACA regulations. The HIPAA/ACA rules prohibit group health plans from discriminating in premiums, benefits or eligibility based on a health factor, with limited exceptions for wellness programs, which are classified as participatory or health contingent. The ADA's wellness rules, including limits on incentives and notices, apply to any wellness program requiring employees to answer disability-related questions or undergo medical examinations to earn a reward or avoid a penalty, regardless of whether the program is participatory or health contingent under the HIPAA/ACA regulations, or whether it is part of a group health plan. Wellness programs that do not include disability-related inquiries or medical examinations are not subject to the ADA's limits on incentives and notice requirements, but must be available to all employees and are subject to the ADA's reasonable accommodation rules.

In other words, the ADA's incentive and notice rules do not apply to programs providing general health and educational information, or merely requiring employees to engage in certain activities, but those progams must provide reasonable accommodation for employees with disabilities. The reasonable accommodation requirement might equate to HIPAA/ACA's "reasonable alternative standard", but the HIPAA/ACA rules do not require a reasonable alternative standard for participatory-only programs, only for health contingent programs. Let's take some examples where the ADA's incentive limits do not apply:

- Employer X offers financial incentives to attend a nutrition class. Under the ADA regulations, the employer must provide a sign language interpreter for a deaf employee, or materials in braille for a blind employee, unless that would cause undue hardship to the employer. Under the HIPAA/ACA regulations, this type of program would be participatory-only, and the only requirement would be to offer it to all similarly-situated individuals.

- Employer Y offers financial incentives to complete a walking program. Under the ADA regulations, the employer must provide an alternative for a wheelchair user to participate. Under the HIPAA/ACA regulations, this program is classified as health contingent, activity-only, and is subject to HIPAA/ACA's incentive limits and reasonable alternative standards.

Program must be "reasonably designed to promote health or prevent disease"

The program must have a reasonable chance of improving the health of, or preventing disease in, participating employees, and must not be overly burdensome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease. This requirement is similar to that in the HIPAA/ACA regulations.

Programs designed to alert employees to health risks (e.g. high cholesterol or elevated blood pressure), or programs aimed at specific conditions prevalent in the workplace (e.g. diabetes or hypertension) are acceptable.

However, the following are unacceptable:

- Imposing undue time burdens or costs on employees.
- Requiring unreasonably intrusive procedures.
- Collecting medical information without providing employees with follow-up information or advice (e.g. feedback about risk factors, or using aggregate information to design programs or treat specific conditions).
- Shifting costs to employees based on their health.
- Using the wellness program only to predict the employer's future health care costs.

Program must be "voluntary"

A wellness program including disability-related questions or medical examinations is voluntary if the employer:

- Does not require employees to participate.
- Does not deny health coverage or limit the choice of plan or benefits.
- Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten employees choosing not to participate, or who do not meet certain health outcomes.
- Provides an understandable notice explaining what medical information will be obtained, how it will be used, who will receive it, restrictions on disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and how the employer will ensure medical information is not improperly disclosed (including whether it complies with HIPAA). Employers may need to revise current notices to comply (see our previous advisory for content information). The EEOC will issue a sample notice.

Program must limit participation incentives to 30%

General Rules

The total allowable incentive under programs with disability-related questions or medical examinations, whether classified as participatory or health-contingent under HIPAA/ACA regulations, and whether or not part of a group health plan, cannot exceed a 30% limit, calculated as follows:

Medical Coverage Options	Maximum Incentive
Employer offers only one medical plan	30% of total cost for self-only coverage

Employer offers multiple medical plans	30% of total cost for lowest cost self-only coverage
Employer does not offer any medical plan* * Beware the ACA's employer mandate!	30% of the cost for a 40 year old non-smoker's self-only coverage under the second lowest cost Exchange Silver Plan for the employer's principal place of business

Similar to HIPAA and the ACA, incentives include financial and in-kind incentives (e.g. reduced premiums, cash, time-off, prizes and other items of value). There is no *de minimis* exclusion.

Testing for nicotine use
If employees are tested for nicotine use, the EEOC treats this as a medical exam, so the incentive must be limited to 30%, even though the HIPAA/ACA regulations permit 50%.

If employees are merely asked about smoking habits, the ADA's incentive limits do not apply, so employers may use the 50% limit in the HIPAA/ACA regulations. However, the ADA's other rules, e.g. reasonable accommodation, would apply.

Program must comply with confidentiality rules

In addition to general confidentiality provisions under the ADA:

- Employers and plan administrators must ensure that medical information or history obtained under a wellness program regarding any individual is provided to the employer only in aggregate terms not disclosing, or reasonably likely to disclose, the identity of any employee. Generally, wellness programs can meet this rule by complying with HIPAA Privacy Rule requirements.

- Employers may not require an employee to either agree to the sale, exchange, sharing, transfer, or other disclosure of medical information, or waive confidentiality protections available under the ADA, as a condition for participating in a wellness program or receiving an incentive (unless permitted to carry out specific activities related to the wellness program).

See our previous advisory for practical guidance from the EEOC on complying with the confidentiality provisions.

There is no such thing as a *bona fide* benefit plan safe harbor

The ADA has taken a firm position that the ADA safe harbor (allowing employers to use information about risks posed by health conditions to make decisions regarding the cost of coverage) does not apply to wellness programs, which must comply with the "voluntary" standard. This is contrary to case-law in the *EEOC v. Flambeau, Inc.* and *Seff v. Broward County* decisions, which the EEOC believes were wrongly decided. The EEOC has appealed *Flambeau*, and we await the Seventh Circuit decision.

GINA's rules regarding incentives for spouses or children

Under Title II of GINA, employers may not use genetic information in making employment decisions. However, there is an exception for genetic information gathered under voluntary wellness programs. Genetic information includes information regarding the manifestation of a disease or disorder in family members of an individual, such as a spouse. Under the EEOC's final GINA regulations, employers:

- May offer incentives to an employee for completion of health risk assessments that include questions regarding family medical history or other genetic information, but must clearly explain that the incentive will be available regardless of whether the genetic information questions are answered.

- May offer incentives to an employee whose spouse provides information regarding the manifestation of a disease or disorder as part of an HRA, regardless of whether the wellness program is offered through a group health plan. The incentive cannot exceed 30% of the cost of self-only coverage, calculated using the same rules as the ADA. Spouses must provide prior, knowing written and voluntary authorization to complete the HRA. Note, GINA would not apply to inducements for spouses who participate in activities not disclosing information about current or past health status, such as attendance at a weight loss or nutrition program, or exercising.

- May allow children to participate in wellness programs, but cannot offer incentives to children (adult, minor or adopted) for their health information.

- Cannot deny benefits to, or retaliate against, any employee whose spouse refuses to provide information about current or past health status.

- Must design their programs to promote health or prevent disease. The requirements are the same as under the ADA regulations. Note that a program cannot penalize an employee because a spouse's manifestation of disease or disorder prevents or inhibits the spouse from participating or from achieving a certain health outcome. For example, an employer cannot deny an employee an incentive because the spouse has a biometric result that the employer considers too high. Perhaps a properly designed "reasonable alternative standard" under the HIPAA/ACA regulations would be sufficient to avoid this result.

- Must comply with confidentiality rules.

Contact your DWT attorney for more information

Disclaimer

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.