PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council
June 2017 e-Bulletin

MEMBER NEWS

► CAREY Partner Announcements
► DAVIS WRIGHT TREMAINE Elects New Exec Committee
► GIDE Strengthens Projects Practice Group
► HOGAN LOVELLS Confirms 2017 Board Appointments
► NAUTADUTILH Elects New Board
► RICHARDS BUELL SUTTON Expands Asia Practice Group
► SIMPSON GRIERSON Welcomes New Senior Partner

COUNTRY ALERTS

► AUSTRALIA Potential Peru-Australia Free Trade Agreement: A step forward for exports into Latin America CLAYTON UTZ

► CANADA New Federal Methane Reduction Regulations for the Upstream Oil and Gas Sector BENNETT JONES

► CHILE Labor Reform – Union's Right To Access Financial Information CAREY

► CHINA China's draft data localisation measures open for comment HOGAN LOVELLS

► COLOMBIA The Energy and Mining Planning Unit announced the public bids for the National and Regional Transmission System BRIGARD URRUTIA

► FRANCE French Renewables Support Scheme and Contract for Difference: Overview of the Latest Regulations GIDE

► GUATEMALA Exchange of Tax Information Convention on Mutual Administrative Assistance in Tax Matters ARIAS

► INDONESIA Supreme Court Issues Significant Guidance on Handling Corporate Crimes ABNR

► LUXEMBOURG Modernisation of Luxembourg Company Law: Extension of the Debt-to-Equity Swap Rules NAUTADUTILH

► MALAYSIA Framework for Digital Investment Management Services Launched SKRINE

► NEW ZEALAND New NZ Stock Exchange Corporate Governance Code - What Listed Companies Need to Know SIMPSON GRIERSON

► TAIWAN New Inventive Step Examination Guidelines to Take Effect on July 1 Act LEE & LI

► UNITED STATES Supreme Court Curtails SEC Disgorgement Claims: Holds Five-Year Statute of Limitations Applies BAKER BOTTS

► UNITED STATES California Supreme Court Explains "Day of Rest" Requirements for Employers DAVIS WRIGHT TREMAINE

► UNITED STATES Supreme Court Rules That Structured Dismissals Must Follow Ordinary Priority Rules GOODSILL ANDERSON QUINN & STIFEL

CONFERENCES & EVENTS

Upcoming Conferences

PRAC 62nd International Conference
Sao Paulo - Hosted by TozziniFreire - October 21 - 24, 2017

PRAC 63rd International Conference
Honolulu - Hosted by Goodsill Anderson Quinn & Stifel LLP
April 21—24, 2018

For more information visit www.prac.org

MEMBER DEALS MAKING NEWS

► BAKER BOTTS Represents Underwriter in $400 Million Floating Rate Senior Notes Offering by Spectra Energy Partners, LP

► BENNETT JONES North West Redwater Partnership Completes Dual-Tranche Issuance of C$1,500,000,000 of Senior Secured Bonds

► BRIGARD URRUTIA Acts for Buyer in Acquisition of Local Airport Operators

► CAREY Acts for Incofin USD$40 million Bond Issuance

► CLAYTON UTZ Advises MMG Limited on US $210 million sale of Golden Grove mine to EMR Capital

► DAVIS WRIGHT TREMAINE Leads $83 Million CMBS Refinancing for the Westin Palo Alto Hotel

► GIDE Counsel to Michelin on the SIPH cash tender offer

► HOGAN LOVELLS Secured a major victory in the Ninth Circuit in Fox Television Stations, Inc. v. Aereokiller, LLC.

► NAUTADUTILH Assisted Van Lanschot Kempen with the acquisition of UBS's domestic wealth management activities

► RCD Advises Farga Group on acquisition of ice cream company Kalise La Menorquina

► SANTAMARINA Y STETA Assists Grupo Industrial Saltillo sale of water heater business to Rheem for 4 billion pesos (US$220 million).

► TOZZINIFREIRE Advises Underwriters in Brazilian ethanol and sugar company Raízen Energia debt tap

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CAREY APPOINTS THREE TO PARTNER

SANTIAGO – 06 June, 2017: Chile's largest law firm, Carey, has elected three new partners across its labour, corporate and IP practices.

Cristián Figueroa **Francisca Corti** **Ignacio Gillmore**

Cristián Figueroa, Francisca Corti and Ignacio Gillmore were elected this week as Carey's new partners. As a result, the largest firm in Chile, with 230 lawyers, now has 30 partners and eight counsels.

Cristián Figueroa's practice focuses on corporate law, mergers & acquisitions, capital markets and general practice. Cristián graduated from Universidad Católica de Chile (2007) and holds an MSc in Law and Finance from University of Oxford (2011).

Francisca Corti, graduated from Universidad Católica (2009), focuses her practice area on employment and labor matters. She holds a Master in Human Resources Management and Organisational Analysis from King's College London (2013) and a Master in Labor Law from Universidad Adolfo Ibáñez (2012).

Ignacio Gillmore specializes in regulatory, pharmaceutical law and life sciences. He advises companies in intellectual and industrial property issues related to the pharmaceutical industry and its regulation, the cosmetic industry and medical devices, scientific investigation and clinical trials, among others. Ignacio graduated from Universidad de Chile (2006) and is a professor of the Pharmaceutical Regulatory Affairs in Pharmaceutical, Biological and Cosmetic Products Graduate Program from the same university, since 2009.

For additional information visit www.carey.cl

DAVIS WRIGHT TREMAINE ELECTS NEW EXECUTIVE COMMITTEE LEADERSHIP

SEATTLE - 16 May, 2017: The partners of Davis Wright Tremaine elected new leadership for the firm's executive committee, which provides long-range planning and policy direction for the firm.

Mark Berry, a partner in our Bellevue office, has been elected chair of the executive committee, and **Sarah English Tune**, a partner in our Seattle and New York offices, has been elected vice-chair.

Berry is a highly experienced employment lawyer and recently became firmwide chair of the firm's 75-attorney employment services group. He is recognized for excellence by all three of the top lawyer-ranking organizations: Chambers USA, Best Lawyers, and Super Lawyers. He is also the former partner-in-charge of our Bellevue office.

Tune is co-chair of the firm's national corporate and business transactions practice. She represents companies and investors, primarily in the consumer sector, and has helped to build the firm's nationally recognized practice serving the food and beverage and restaurant industries.

Three new members were also elected to the executive committee:

Allison Davis, a partner in our San Francisco office, who has both an antitrust counseling and litigation practice;
Emilio Gonzalez, a partner in the employment practice in our Los Angeles office; and
Kelsey Sheldon, a labor and employment partner in our Bellevue office.

Davis Wright Tremaine continues to build its record of excellence and leadership in the legal industry. The firm was named "Innovative Law Firm of the Year" each of the past two years by the International Legal Technology Association. Jeff Gray remains the firm's managing partner.

For more information, visit www.dwt.com

SIMPSON GRIERSON WELCOMES NEW SENIOR PARTNER

WELLINGTON - 01 June, 2017: Simpson Grierson is pleased to announce the appointment of senior lawyer Sally McKechnie as a partner in its Wellington office.

Sally joins the firm's public law team and brings extensive experience of the central government environment. Her role focuses on assisting the firm's public sector facing clients with strategic, regulatory and policy-related issues.

Sally commented "I am excited to join Simpson Grierson. The firm has a great reputation for its work in the public sector, and a strong existing team. I am looking forward to building the firm's practice in this area."

Chairman Kevin Jaffe commented "Sally is an outstanding public law litigator and has a superb track record in high profile Crown-related work. Her appointment reflects the demand we have from clients for assistance with complex public law matters."

Sally was a team leader at Crown Law. She has a first class honours degree in Law and a BA from Otago University, was a Rhodes Scholar and attained a BCL with distinction and MPhil in International Relations from Oxford University.

Sally joined the firm on 22 May and will become a partner following the completion of Law Society requirements.

For additional information visit www.simpsongrierson.com

GIDE STRENGTHENS ITS PROJECTS PRACTICE GROUP WITH THE ARRIVAL OF DELPHONE JACQUEMONT

PARIS - 23 May, 2017: Gide is pleased to welcome Delphine Jacquemont as Counsel within its Projects (Finance & Infrastructure) practice group in Paris.

Delphine Jacquemont is highly specialised in the energy sector, and has developed specific expertise, in France and abroad, in gas-related contracts and projects (LNG and gas sale and purchase agreements, LNG terminals, transmission and storage infrastructures, hydrocarbon exploration and production projects), power plants development and construction, joint ventures and M&A transactions. Delphine acts on all aspects of these transactions and projects, from the development phase up to closing and post-closing operations, including advising businesses during implementation and managing pre-litigation claims.

Delphine Jacquemont has acted on a number of energy projects, including a regasification terminal in France, a cross-border gas pipeline in Europe, a "Gas to Power" project in Latin America, a gas storage project in Germany, the acquisition of hydrocarbon production licences in western and eastern Europe, as well as a number of M&A transactions worldwide. She has 25 years' experience working for one of the world's largest energy groups, EDF, where she occupied various functions including, most recently, that of general counsel in charge of gas, and deputy general counsel international. Admitted to the Paris Bar, Delphine is a graduate of the Paris Political Studies Institute and of Paris I – Panthéon-Sorbonne University (Master's degrees in business law and in international and European law). She is also a lecturer at the Paris Political Studies Institute Law School ("Major international infrastructure projects: legal practitioners' key role in mitigating and managing risks").

Partner Stéphane Vernay, member of Gide's Executive Committee, says: "I am very pleased to see Delphine Jacquemont joining our Projects (Finance & Infrastructure) practice group, which already draws on the knowledge and expertise of some of the best specialists in the field. With her considerable experience in the energy sector both in France and abroad, she will boost our ability to offer our major public and private French and international clients the highest level of legal advice on all their development issues".

Gide's Projects (Finance & Infrastructure) practice group numbers 25 lawyers, including 9 partners in Paris.

For more information visit www.gide.com

HOGAN LOVELLS CONFIRMS 2017 BOARD APPOINTMENTS

LONDON and WASHINGTON, D.C., - 20 April 2017: Hogan Lovells has elected a new partner to its board.

Bruce Oakley has been elected as The Americas representative. Leopold von Gerlach has been re-elected as the representative for the Continental Europe region, and Ben Higson has been re-elected to the 45 and under seat. All begin or continue their roles with immediate effect.

The Hogan Lovells Board comprises 12 members in total and has supervisory responsibility for overseeing the affairs of the firm, but without executive responsibility for strategy, management, and operating decisions. It provides input to the CEO and Hogan Lovells' International Management Committee. Members of the Board make up the Compensation Committee and are part of the Equity Elevation and Partner Admission Committees which they chair. Membership of the Board is designed to reflect the broad scope of the business, with members representing a combination of geographic and other backgrounds.

Biographical details on Bruce Oakley:

Bruce Oakley is Managing Partner of our Houston office. He has more than 25 years' experience as a trial lawyer in Houston, helping commercial clients solve problems through advice, analysis, and advocacy. Having served as a judge presiding over thousands of lawsuits, Bruce knows particularly well the risks and opportunities facing clients with business disputes; and what works and does not work at the courthouse. Bruce regularly represents businesses across the energy spectrum — from exploration and production, drilling operations, refineries, pipelines, and to the services sector.

The Board will now comprise:

Chair (and "At Large"): Nicholas Cheffings
CEO: Steve Immelt
AsiaPacific Middle East: Andrew McGinty
Continental Europe: Leopold von Gerlach
Washington, D.C. area: Cate Stetson
London: Ruth Grant
The Americas: Bruce Oakley
The Americas (except D.C.): Miguel Zaldivar
45 and under: Ben Higson
"At Large" representatives: Marie-Aimée de Dampierre, Craig Hoover, Phoebe Wilkinson

"I am honored to welcome Bruce Oakley to the Board and look forward to continuing to work with Leopold von Gerlach and Ben Higson," said Hogan Lovells Chair Nicholas Cheffings. "The Board plays an important role in the governance of Hogan Lovells, in its relationship with our management team, and in listening to, and representing, the views of partners. The high level of participation in this election process is testament to that."

For more information, see www.hoganlovells.com

NAUTADUTILH ELECTS MEW BOARD

Petra Zijp, Jaap Jan Trommel, and ***Chris Warner*** have been appointed as board of NautaDutilh with effect from 1 June 2017.

Petra Zijp leads the Capital Markets team and advises issuing institutions, banks, and institutional investors on capital market transactions. In 1999 and 2000, she worked from NautaDutilh's office in London. Petra, one of the driving forces behind our firm's diversity and inclusiveness policy, was the 2016 Legal Woman of the Year. She joined NautaDutilh in 1995 and became a partner in banking and securities law in 2002.

Jaap Jan Trommel advises on mergers, acquisitions, and corporate law, primarily for clients in the energy sector. He has also gained a great deal of international experience, partly as a result of the years he worked in Spain, Singapore, and Indonesia. He is the co-head of NautaDutilh's China and Japan desks and has been a partner at the firm since 1995.

Chris Warner advises Dutch and international clients about the tax aspects relating to issues such as listed M&A transactions, public-private partnerships, and corporate reorganisations. He joined NautaDutilh exactly 20 years ago, and has headed the firm's tax practice since 2006. He worked in our New York office from 2002 until 2006.

Petra, Jaap Jan, and Chris will be taking the baton from Erik Geerling and Gaike Dalenoord, who are returning to their law practices after seven and three years, respectively. The board was expanded so that each of the three new board members can remain active in practicing law. The new board will not have a chairperson, but will instead operate based on togetherness.

For additional information visit www.nautadutilh.com

RICHARDS BUELL SUTTON LLP EXPANDS ITS ASIA PRACTICE GROUP

VANCOUVER - 01 June, 2017: RBS is pleased to announce that **Tommy M. Chan** and **Yue Fei** have recently joined the firm as members of the firm's Asia Pacific Practice Group. Yue is also a member of the firm's Intellectual Property and Business Law Practice Groups. She is fluent in Mandarin and has extensive experience with translating between Chinese and English. Tommy M. Chan joined the firm as an Associate with the Estate and Wealth Advisory Group in May 2017 and maintains a litigation practice in the areas of wills and estates, foreclosure, and insolvency law. Tommy can provide legal services in Cantonese and is also conversant in Mandarin.

"We are pleased to welcome Tommy and Yue as the newest members of our Asia Pacific Practice. They will add language expertise, depth and bench strength when servicing our regional and Asia Pacific clients" - Sze-Mei Yeung, Leader of the Asia Pacific Practice Group.

Richards Buell Sutton's Asia Pacific Group is comprised of lawyers with language capabilities in Mandarin, Cantonese, and Japanese and their work encompasses small to large deals, litigation matters, securities advice and transactions, wealth management, estate planning, immigration, real estate transactions, and other corporate-related matters that support private individuals and businesses across many industries, including the energy sector. RBS also receives Asia Pacific referral work from other local and international law firms which is a testament to its experience and capabilities in this area of law.

For more information visit www.rbs.ca

October 21—24, 2017

Visit www.prac.org/events.php

BAKER BOTTS

REPRESENTS UNDERWRITER IN $400 MILLION FLOATING RATE SENIORNOTES OFFERING BY SPECTRA ENERGY PARTNERS, LP

On June 7, 2017, Spectra Energy Partners, LP (“SEP”) (NYSE:SEP) completed an underwritten public offering of $400 million aggregate principal amount of Floating Rate Senior Notes due 2020. SEP intends to use the net proceeds of the offering to repay a portion of its outstanding term loan credit facility borrowings and for general partnership purposes.

Baker Botts represented Merrill Lynch, Pierce, Fenner & Smith Incorporated, as underwriter in the offering.

For additional information visit www.bakerbotts.com

BENNETT JONES

NORTH WEST REDWATER PARTNERSHIP COMPLETES DUAL-TRANCHE ISSUANCE OF C$1,500,000,000 OF SENIOR

- Date Announced: May 16, 2017
- Date Closed: May 19, 2017
- Deal Value: C$1,500,000,000
- Client Name: North West Redwater Partnership

On May 19, 2017, North West Redwater Partnership completed a private placement of $1,500,000,000 aggregate principal amount of senior secured bonds, C$750,000,000 aggregate principal amount of 2.80% Series J senior secured bonds due June 1, 2027 and C$750,000,000 aggregate principal amount of 3.65% Series K senior secured bonds due June 1, 2035.

The bonds were offered through a syndicate of investment dealers co-led by RBC Dominion Securities and TD Securities Inc. and included CIBC World Markets Inc., J.P. Morgan Securities Canada Inc., BMO Nesbitt Burns Inc., Barclays Capital Canada Inc., Citigroup Global Markets Canada Inc., Merrill Lynch Canada Inc., MUFG Securities (Canada), Ltd., Scotia Capital Inc., Desjardins Securities Inc., AltaCorp Capital Inc., National Bank Financial Inc. and Casgrain & Company Limited.

Bennett Jones acted as counsel to North West Redwater Partnership and was led by Darrell Peterson (Capital Markets), together with a team that included Phil Backman, Q.C. (Financial Services), Kahlan Mills and Kristopher Simard (Capital Markets).

For additional information visit www.bennettjones.com

BRIGARD URRUTIA

ACTS FOR BUYER IN ACQUISITION OF LOCAL AIRPORT OPERATORS

BOGOTA - 27 April, 2017: Colombia's Brigard Urrutia assisted local airport operators Aeriopuertos de Oriente with its acquisition of controlling stakes from Nexus Capital Partners and Limpia Group. Airplan and Aeropuertos de Oriente operate 12 airports in Colombia.

Counsel to Grupo Aeroportuario del Sureste - Brigard & Urrutia Abogados Partner Sergio Michelsen and associates Jeison Larrota, Ana Maria Cortes Gomez and Paula Morales Rivadeneira in Bogotá.

For additional information visit www.bu.com.co

CAREY

ACTS FOR INCOFIN IN USD$40 MILLION BOND ISSUANCE

SANTIAGO - 05 May, 2017: Carey has acted as deal counsel for a US$40 million bond issuance by Chilean manufacturing company Incofin. The underwriter was Banco Santander. The offering closed on 28 March.

Carey Partner Diego Peralta and Associates Elvira Vial and Gabriel Acuna acted in the transaction.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES MMG LIMITED ON US$210 MILLION SALE OF GOLDEN GROVE MINE TO EMR CAPITALCTS FOR BUYER IN ACQUISITION OF LOCAL AIRPORT OPERATORS

PERTH - 13 January, 2017: Clayton Utz is advising Hong Kong Stock Exchange and ASX-listed global resources company MMG Limited on the sale of its Golden Grove mine located in Western Australia to EMR Capital.

On 30 December 2016, MMG entered into a conditional share sale agreement with EMR Golden Grove Holdings Pty Ltd, an entity owned and managed by EMR Capital, for the sale of MMG Golden Grove Pty Ltd for US$210 million.

Subject to MMG board and other approvals, the sale is expected to be completed in early 2017.

Clayton Utz corporate partner Brett Cohen is leading the team on the transaction, which includes senior associate Armin Fazely and lawyers Kaley Ohariw and Milana Sarenac. The core transaction team has been supported by specialist teams from Clayton Utz including tax, environment, native title and employment.

Commenting on the transaction, Brett said: "We are pleased to have been given the opportunity to provide strategic advice and support to this longstanding client of Clayton Utz, working alongside MMG and its financial adviser Goldman Sachs to execute the sale agreement for this transaction in a compressed timeframe over the 2016 Christmas holiday break."

For additional information visit www.claytonutz.com

DAVIS WRIGHT TREMAINE

LEADS USD$83 MILLION CMBS REFINANCING FOR WESTIN PALO ALTO HOTELS FOR INCOFIN IN USD$40 MILLION BOND ISSUANCE

JANUARY 12, 2017: Davis Wright Tremaine has advised Mr. Clement Chen, the principal owner of The Westin Palo Alto Hotel, in securing an $83 million CMBS loan from LStar Capital, the credit affiliate of global private equity firm Lone Star Funds.

The Westin Palo Alto is owned by an affiliate of Mr. Chen's Pacific Hotel Management LLC, which operates eight prestige properties in California, including the new concierge-style super-luxury hotel, The Clement Hotel, also in Palo Alto, and InterContinental The Clement Monterey, on historic Cannery Row in Monterey. The latter property was also refinanced by LStar in 2015 for $72.5 million, another loan in which DWT advised Mr. Chen.

"Our client's hotels are outstanding performers, and comprise a significant part of the LStar funds in which they are securitized," said Steve Ledoux, co-chair of the DWT's Hotels & Resorts practice group. "We are starting 2017 off with a bang, and look forward to a positive and dynamic year for CMBS borrowers and for all kinds of strategic hotel transactions."

The mortgage broker for The Westin Palo Alto loan and for the InterContinental The Clement Monterey loan was Highland Realty Capital.

For additional information visit www.dwt.com

HOGAN LOVELLS

HOGAN LOVELLS SECURED A MAJOR VICTORY IN THE NINTH CIRCUIT YESTERDAY IN FOX TELEVISION STATIONS, INC. V. AEREOKILLER, LLC.

Hogan Lovells scores big copyright win for broadcast television stations and copyright holders

WASHINGTON, D.C. - 22 March, 2017 – Hogan Lovells secured a major victory in the Ninth Circuit yesterday in *Fox Television Stations, Inc. v. Aereokiller, LLC.*

The case presented a vitally important question of copyright law: Whether services that capture the signals of broadcast television stations and retransmit them over the Internet are "cable systems" under the Copyright Act. "Cable systems" are eligible for a compulsory license that allows them to retransmit broadcast television programming without the consent of the copyright holders.

The list of clients represented by Hogan Lovells reflects the broad importance of the issue to the industry: Fox Television Stations, LLC, CBS Studios Inc., NBC Universal Media, LLC, American Broadcasting Companies, Inc., Disney Enterprises, Inc., and a number of subsidiaries and local broadcast affiliates.

Hogan Lovells' Appellate team was hired after a district court in California held that an Internet-based retransmission service named FilmOn was a "cable system" and therefore potentially eligible for the compulsory license—a decision The *Hollywood Reporter* described as "seismic." The Appellate team first persuaded the Ninth Circuit to hear the issue on an interlocutory basis, and then briefed and argued the case on the merits. The Ninth Circuit reversed.

In particular, the Court held that FilmOn's position was "a poor fit with [the Act's] text and structure," and "could very well undermine the balance of interests Congress attempted to strike when it designed" the compulsory license. Further, the Court deferred to the Copyright Office's consistent, longstanding, and well-reasoned position that Internet-based retransmission services are not cable systems. The Court thus concluded that FilmOn is ineligible for the cable compulsory license.

The Court's full opinion can be found here. http://cdn.ca9.uscourts.gov/datastore/opinions/2017/03/21/15-56420.pdf

Neal Katyal, a partner at Hogan Lovells and the former Acting Solicitor General of the United States, argued the case in the Ninth Circuit. Partner Frederick Li

u and Senior Associate Thomas P. Schmidt joined Katyal on the briefs.

For more information, see www.hoganlovells.com

GIDE

COUNSEL TO MICHELIN ON THE SIPH CASH TENDER OFFER

PARIS - 08 June, 2017: Gide advises the Michelin group, the leading tyre company, in the context of the all-cash simplified tender offer initiated by Compagnie Financière Michelin SCmA (CFM), a subsidiary of Compagnie Générale des Etablissements Michelin (CGEM), acting in concert with the Ivory Coast company SIFCA, on the shares of the Société Internationale de Plantations d'Hévéas (SIPH) not held by the concert parties, at a price of €85 per SIPH share.

The primary aim of the friendly offer is to enable CFM and SIFCA to strengthen their ties and raise their stake in SIPH's capital in light of the increasingly important role that West Africa is playing in global natural rubber production against a backdrop of intensified competition between the players in these markets.

Following the tender offer, and if the requisite conditions are met, CFM will request a squeeze-out of any remaining minority shareholders of SIPH.

The Gide team comprised Antoine Tézenas du Montcel (partner), Régis Henry (counsel) and Arthur Debourdeaux.

For additional information visit www.gide.com

RCD

ADVISES FARGA GROUP ON THE ACQUISITION OF ICE CREAM COMPANY KALISE LA MENORQUINA

BARCELONA - 26 April, 2017: The company received a capital injection to undertake the acquisition of the ice cream company for 40 million euros. With the acquisition, the group's global business will be valued at more than 140 million euros and will obtain the Kalise Menorquina business on the Iberian Peninsula and in the Balearic Islands. The transaction included simultaneous smaller investment transactions, the sale of real estate, debt refinancing, and underwriting in a sale and lease back transaction of machinery, for a total combined value of approximately €200 million.

Farga Group has completed one of the most important transactions in recent years in the food sector in Spain, buying the ice cream company Kalise La Menorquina. The Corporate & M&A practice area of RCD – Rousaud Costas Duran advised the group on the acquisition, the amount of which is in the range of €80 million. The transaction entailed six simultaneous sub-transactions that amount to €200 million.

The counsel RCD provided for these sub-transactions included advice on a €40 million investment in Farga Group made by a venture capital firm; the sale of real estate assets set at €27 million; debt refinancing and underwriting new debts with financial institutions for approximately €45 million; the refinancing and novation of other financial transactions with Altex Group and with the public institute Avançsa for a total amount of €16 million; underwriting in the sale and lease back transaction of industrial machinery for €12 million.

With this purchase, Farga Group acquires the business operation of Kalise La Menorquina in the Iberian Peninsula and Balearic Islands, the company being one of the main ice cream producers in Spain with a market share of 20%.

Likewise, the transaction will give the group control over Kalise La Menorquina's industrial facilities, distribution network and branches, the largest ice cream sales network in Spain. The purchase will increase the global business of Farga Group by more than €140 million and will serve to improve its international expansion, where it already operates with more than 60 stores (owned by the group and franchised). Farga Group owns the Farga coffee shops and the Farggi ice cream brand.

For additional information see www.rousaudcostasduran.com

NAUTADUTILH

ASSISTED VAN LANSCHOT KEMPN WITH ACQUISITION OFUBS'S DOMESTIC WEALTH MANAGEMENT ACTIVITIES

AMSTERDAM - 09 June, 2017: NautaDutilhh assisted Van Lanschot Kempen with the acquisition of UBS's domestic wealth management activities in the Netherlands. The transaction comprises the client relationships and employees of the wealth management activities of UBS Netherlands, a branch of UBS Europe SE, having currently Assets under Management (AuM) of around EUR 2.6 billion.

The transaction also comprises the products and services of the Netherlands branch of UBS Europe SE. Van Lanschot Kempen will pay an initial acquisition price of EUR 28 million for the activities to be acquired. Van Lanschot Kempen and UBS expect to complete the transaction in the third quarter of 2017.

The NautaDutilh team in this matter consisted of Lieke van der Velden, Edger Kleijer, Jacqueline Clement (all Corporate M&A), Piet Sippens, Tycho de Graaf, Jacqueline van Essen (all I&C, ICT), Larissa Silverentand, Roderick Watson (Financial Law), Niels Hagelstein (Finance), Nina Kielman (Tax), Albert van der Kolk and Joyce Trebus (Employment). The due diligence investigation was led by Willem van der Vossen, Esmee Salomons and Laura Brummelhuis.

For additional information visit www.nautadutilh.com

SANTAMARINA Y STETA

ASSISTS GRUPO INDUSTRIAL ALTILLO SALE OF WATER HEATER BUSINESS TO RHEEM FOR 4 BILLION PESOS (US$220 MILLION).

MEXICO CITY – 06 June, 2017: The sale includes subsidiaries Calentadores de America, Fluida and Water Heating Technologies, which manufacture and sell water heaters and pipe-fitting products. The deal was signed on 24 May, and is awaiting clearance from Mexico's antitrust authority.

Counsel to Grupo Industrial Saltillo Santamarina y Steta Partners Jorge Barrero Stahl and Carlos Argüelles González, and associate Bárbara Asiain.

For additional information visit www.s-s.com.mx

TOZZINIFREIRE

ADVISES UNDERWRITERS IN BRAZILIAN ETHANOL AND SUGAR COMPANY RAIZEN ENERGIA DEBT TAP

SAO PAULO - 02 June, 2017: TozziniFreire Advogados advised the underwriters for the deal, which closed on 5 May. Raizen Energia receivables issuance worth 969 million reais (US$300 million).

TozziniFreire Advogados Partners Alexei Bonamin and Kenneth Ferreira, and associates Ana Claudia Pires, Lais Claudio and Lucas Fantin acted in the transaction on behalf of Underwriters BB Banco de Investimento, Banco Bradesco, Banco Itaú, Banco Safra and XP Investimentos Corretora de Câmbio.

For additional information visit www.tozzinifreire.com.br

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ARIFA — Arias, Fabrega & Fabrega

Hogan Lovells

RCD — Rousaud Costas Duran SLP

Dentons Rodyk

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Kim, Chang & Lee

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Bennett Jones

Kochhar & Co. — Advocates & Legal Consultants

Simpson Grierson

Skrine

Brigard & Urrutia

理律法律事務所 — Lee and Li — Attorneys-at-Law

SyCip Salazar Hernandez & Gatmaitan

/Carey

Clayton Utz

Mulla & Mulla & Craigie Blunt & Caroe — Advocates, Solicitors and Notaries

TozziniFreire Advogados

CLAYTON UTZ

08 JUN 2017

Potential Peru-Australia Free Trade Agreement: A step forward for exports into Latin America

BY DAVID FOONG, KEN OOI, SAMY MANSOUR AND SIMON BRADY

A Peru-Australia FTA will open up opportunities for Australian exporters and place them on an even footing with the US, the EU and Canada. Importantly, a successful PAFTA will capture Australia's progress from the ongoing multilateral negotiations and keep up Australia's momentum of opening markets in the region.

Just a week after the launch of negotiations on an Australia-Hong Kong Free Trade Agreement, the negotiation of the Peru-Australia FTA (**PAFTA**) has been announced. The formal negotiation process for this agreement is expected to be relatively quick given the progress achieved between the two countries during negotiation of the Trans-Pacific Partnership Agreement (**TPP**). Australian businesses in, or considering involvement in, Latin America should consider the opportunities the PAFTA could present.

A snapshot of the Peru-Australia relationship

A review of the current trade and investment relationship reveals that in 2015-16, the value of two-way trade with Peru grew by 19.4% to A$504 million. Of this figure, the vast majority came from the sharp growth in the value of Australia's goods imports from Peru (up 53.7% to A$255 million). If Australia's objective to reduce red tape and deliver greater legal certainty in Peru is achieved, it is likely these trade figures will grow and offer increased opportunity for Australian businesses to capitalise on the growth in Latin America.

Peru is currently Australia's fifth-largest commercial partner in Latin America, with the value of Australian investment in Peru estimated to be worth A$5 billion. It is also one of the fastest growing Latin American economies and the PAFTA could offer a share of this growth and increased trade across the region for Australian business.

Why the PAFTA would benefit trade of Australian goods and services

Goods

Absent the TPP, the trade relationship between Australia and Peru is governed by Peru's obligations under the World Trade Organisation (**WTO**). This means that many of Australia's exports attract tariffs and face other barriers to entry, which are not encountered by Australia's competitors. For example, while Australian dairy and sugar exports attract tariffs of up to 29%, the US, EU and Canada have FTAs in place with preferential treatment with Peru. A successful PAFTA would allow Australian goods exporters to better compete in Peru by removing these barriers to entry and improve market access.

Services

Despite making up 80% of the Australian economy, services only represent slightly over 20% of Australia's exports and, as with other recent trade negotiations, increasing access for Australian services providers is also likely to be a focus of these discussions. Accordingly, Australian services suppliers, particularly sectors such as professional services, energy and mining-related services, environmental services, construction services and transport services will likely benefit from the PAFTA.

Major projects in Peru and the need for Australian expertise

The pipeline of major projects in Peru is extensive, and the PAFTA will facilitate the entry of Australian innovation and expertise into this market. This pipeline includes the:

- **2019 XVIII Pan American Games**: Peru's first major sporting event where expertise is required in areas such as event planning, venue design and construction, security, and transportation;
- **National Sanitation Plan 2014-2021**: a A$14 billion national scheme to achieve 100% coverage in the supply of potable water and sewage services; and
- **Mining sector**: a A$75 billion pipeline of major mining investments to be completed by 2020.

The opportunity the PAFTA presents for Australian business in the region

The Australia-Chile Free Trade Agreement (**ACFTA**), which entered into force on 6 March 2009, provides an example of the opportunities the PAFTA might provide. Since 2009, there has been a significant increase in the number of Australian companies operating in Chile and many of these companies have subsequently expanded into countries across Latin America.

Similarly, the PAFTA also has the potential to further:

- improve market access for Australian exporters of agricultural and manufactured goods;
- optimise terms and conditions for Australian exporters of services;
- provide improved procurement opportunities for Australian businesses;
- create greater legal certainty and transparency for Australian businesses;
- ensure digital trade (eg. e-commerce) remains free of barriers; and
- deliver improved two-way investment flows.

Reports suggest that the PAFTA also potentially signals a wider geopolitical play by Australia. Peru is a member of the Pacific Alliance trading bloc and a free trade agreement with Peru could be a stepping stone to a wider Australia-Pacific Alliance free trade deal, which would cover the other bloc countries – Mexico, Chile and Colombia.

How Australian businesses should respond

As earlier outlined, it is expected that trade negotiations will conclude quickly given the progress achieved from previous negotiations. Australian providers of goods and services, particularly those in the sectors earlier outlined, should now consider the new export and investment opportunities across the Pacific that a PAFTA may provide. We recommend that you consider how these changes might impact your business and position your business accordingly.

RELATED KNOWLEDGE

- A potential Australia-Hong Kong Free Trade Agreement: Excellent news for exporters, investors and service providers

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New Federal Methane Reduction Regulations for the Upstream Oil and Gas Sector

New Federal Methane Reduction Regulations for the Upstream Oil and Gas Sector

May 31, 2017 | Thomas W. McInerney, Mike Barrett and Kay She

The government of Canada has released its proposal for the first federal regulations on greenhouse gas emissions applicable specifically to the upstream oil and gas sector, titled *Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)*.

The proposed regulations, which will be enacted under the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, introduce facility and equipment standards to reduce fugitive and venting emissions of "hydrocarbon" gas (defined in the proposed regulations as methane and certain volatile organic compounds but for the purposes of this summary referred to collectively as "gas") from Canada's oil and gas industry. These standards will apply as of January 1, 2020 (with several exceptions noted below). The proposed regulations are part of the "Pan-Canadian Framework on Clean Growth and Climate Change" to meet greenhouse gas reduction targets (/Publications Section/Updates/Federal Government Announces Pan-Canadian Framework on Clean Growth and Climate Change).

The reduction requirements contemplated in the proposed regulations can be categorized broadly into two categories: (i) general requirements applicable to upstream oil and gas facilities; and (ii) requirements specific to upstream oil and gas facilities producing or receiving an aggregate of more than 60,000m^3 of gas in a 12-month period.

The proposed regulations define an "upstream oil and gas facility" as:

> "the buildings, other structures and stationary equipment — that are located on a single site, on contiguous or adjacent sites or on sites that form a network in which a central processing site is connected by gathering pipeline with one or more well sites — that function together in an integrated manner for the purpose of
>
> a. the extraction of hydrocarbons from an underground geological deposit or reservoir;
> b. the primary processing of those hydrocarbons; or
> c. the transportation of hydrocarbons — including their storage for transportation purposes — other than for local distribution."

I. General Upstream Oil and Gas Sector Requirements

Gas Conservation and Destruction Equipment

- Gas conservation equipment used at upstream oil and gas facilities must operate in a manner such that at least 95 percent of the gas routed to the equipment is captured and conserved, and must operate continuously (other than normal service and repair periods).
- Gas destruction equipment used at upstream oil and gas facilities must meet the requirements of:
  a. British Columbia's Oil and Gas Commission's *Flaring and Venting Reduction Guideline*, if the facility is in British Columbia;
  b. Government of Saskatchewan's *Directive S-20: Saskatchewan Upstream Flaring and Incineration Requirements,* if the facility is in Saskatchewan;

c. Canada-Nova Scotia Offshore Petroleum Board or the Canada-Newfoundland & Labrador Offshore Petroleum Board's authorization, as the case may be, with respect to venting and flaring of gas, if the facility is offshore; and

d. Alberta Energy Regulator's *Directive 060*, *Upstream Petroleum Industry, Flaring, Incinerating, and Venting*, in any other case.

Well Completion by Hydraulic Fracturing

- Wells that have been subject to hydraulic fracturing and have a gas-to-oil ratio of at least 53:1 cannot vent gas during flowback. Gas associated with flowback must be captured and routed to gas conservation or destruction equipment.
- The above provision does not apply to upstream oil and gas facilities in British Columbia or Alberta as existing provincial measures (e.g., British Columbia's Oil and Gas Commission's *Flaring and Venting Reduction Guideline* and Alberta Energy Regulator's *Directive 060*, *Upstream Petroleum Industry, Flaring, Incinerating, and Venting*) already cover these activities.

Compressors

- Compressors installed before January 1, 2020, must route emissions to gas conservation or destruction equipment, or to a vent. If routed to a vent, emissions from such a vent shall not exceed 0.023 m^3 per minute for reciprocating compressors and 0.17 m^3 per minute for centrifugal compressors.
- Compressors installed on or after January 1, 2020, must capture and route emissions to gas conservation equipment.

II. Requirements for Upstream Oil and Gas Facilities Producing More than 60,000m^3/year of Gas

Any upstream oil and gas facility that produces or receives an aggregate of more than 60,000m^3 of gas in a 12-month period, is subject to a number of requirements pertaining to venting limits, leak detection and repair, and use of pneumatic controllers and pneumatic pumps.

Venting Limit

- By January 1, 2023, such facilities will be required to limit vented volumes of gas to 250m^3/month, subject to certain exceptions.

Leak Detection and Repair

- Such facilities will be required to implement leak detection and repair programs, with regular inspections mandated three times per year. Leaks are to be repaired within 30 days.
- If repairs are not possible without shutting down the equipment, such facilities operator will be required to schedule a shutdown to take corrective action before the volume of gas from the leak is larger than the volume of gas that will be released by shutting down the equipment.
- If the such facilities is located offshore and the equipment cannot be repaired while operating, corrective action is to be taken within 365 days.

Pneumatic Controllers and Pneumatic Pumps

- Pneumatic controllers at such facilities with an aggregate compressor power rating of 745 kilowatts or higher will be prohibited from emitting gas as of January 1, 2023.
- Pneumatic controllers at such facilities with a total compressor power rating of less than 745 kilowatts must operate with a design bleed rate of 0.17 standard m^3/h or less as of January 1, 2023.
- Pneumatic pumps must be equipped with an emissions control device at such facilities where liquid pumping exceeds 20L per day as of January 1, 2023, subject to certain exceptions.

Stakeholders have until July 27, 2017, to provide comments to Environment and Climate Change Canada on the proposed regulations.

In tandem with the proposed regulations, the government has also proposed (/Publications Section/Updates/New Federal Volatile Organic Compounds Reduction Regulations for the Petroleum Sector) *Regulations to Reduce the Release of Volatile Organic Compounds (Petroleum Sector)*, which requires refineries, oil sands upgraders, and petrochemical facilities to regularly check and repair leaks from equipment, use cleaner technologies to minimize emissions, and monitor and report results.

We would be pleased to provide further information on any aspects of emerging provincial, territorial and federal emissions regulatory requirements.

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NEWSALERT

Labor Reform – Union's right to access financial information

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Pursuant to Law 20.940 (the "Labor Reform") which has entered into full force as of April 1st, 2017, employers have the obligation to periodically deliver certain documents to unions, which varies depending on the company's size.

1. **Large Companies**

   Companies that have 200 employees or more, must provide the following informatation on a yearly basis:

   1. Balance Sheet;
   2. Income Statement;
   3. Audited Financial Statements; and
   4. All public information that, according to the legislation currently in force, must be delivered to the Superintendence of Securities and Insurances ("SVS").

   This information must be delivered within 30 days counted from the date in which the documents were available or delivered to the SVS, as applicable.

2. **Micro, small and medium-size companies**

   Companies that have between 1 to 199 employees must deliver each year information regarding their incomes and expenses declared before the local Internal Revenue Service (*"Servicio de Impuestos Internos"*) for income tax purposes, pursuant to the tax regime to which the company is subject.This information must be delivered within 30 days following to the company's annual income tax statement.If such documents are not delivered within the legal term, affected Unions may request the intervention of the Labor Board. In case the company insists on not providing the corresponding documents, unions may file a claim before the Labor Courts for these purposes.

China's draft data localisation measures open for comment

4/18/2017

On 11 April 2017 the Cyberspace Administration of China (the "**CAC**") published a circular calling for comments on its *draft Security Assessment for Personal Information and Important Data Transmitted Outside of the People's Republic of China Measures* (the "**Draft Export Review Measures**").

The passage of the *People's Republic of China Cyber Security Law* in November 2016 (the "**Cyber Security Law**") left many questions unanswered as to the practical scope and effect of this important new piece of legislation (please see our briefing **here**). With less than two months to go before the implementation of the Cyber Security Law on 1 June, many outside observers were expecting to have seen a significant volume of implementing legislation demarcating boundaries around the expansive scope and intrusive nature of the Cyber Security Law. For those familiar with China's typical approach to legislative drafting, in which implementing rules often see the light of day after the law comes into effect, the issuance of the Draft Export Review Measures at this time may come as a welcome development.

The main legislative purpose of the Draft Export Review Measures is to clarify the process and requirements relating to the data localisation requirements in the Cyber Security Law, one of the most controversial aspects of the law. While the Draft Export Review Measures do add a significant level of implementing detail as to the practicalities of compliance, we expect that for many multi-national corporations ("**MNCs**") with operations in, or doing business with, China, the nature of the clarifications do not go in the direction that they would have wanted.

Please click **here** for the full article.

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Public Bids for STN and STR

Infrastructure and Public Utilities

The Energy and Mining Planning Unit announced the public bids for the National and Regional Transmission System

On June 1st, 2017, the Energy and Mining Planning Unit (UPME) held an event to reveal and promote the projects of the National Transmission System (STN) and the Regional Transmission System (STR). In this context, UPME announced the state of implementation and methodology by which the public bids for the Expansion Plan projects (2016-2030), approved by the Ministry of Mines and Energy, will be carried out.

UPME´s General Director, Jorge Alberto Valencia Marín, highlighted the entity´s interest in fostering the progress and implementation of the transmission projects that comprise the

Expansion Plan. To this end, he noted that, aware of the challenges and complexity identified in many of the projects, UPME has taken steps to promote a more efficient and harmonious development of projects for investors. To this extent, UPME has carried out efforts to socialize the Expansion Plan with the communities involved, the local authorities and the Regional Autonomous Corporations (Corporaciones Autonomas Regionales) to facilitate the procedures required by the investors in the achievement of the projects, such as in respect with permits and licenses.

In addition, UPME referred to the definition of the intended schedules for the public transmission bids, indicating that an ongoing scheme is being planned to involve a wider timeframe for the expected entry into operation date of the projects. This timeframe will allow the investors to perform the projects on the basis of a more realistic schedule, in line with the needs of each project.

As part of the STN and STR biddings, UPME announced, among others, the transmission projects which will enable the interconnection of renewable energy generation projects. Particularly noteworthy are the STN UPME bidding 09-2016: *Líneas Copey a Cuestecitas 500kV y Copey a Fundación a 220kV;* and the UPME bid *Conexión Eólicas.* The first project is expected to guarantee reliability in the departments of Cesar, La Guajira and Magdalena, delimiting the space provided for the connection of new solar and wind power plants. This public call is officially open. Its awarding hearing will be on June 21, 2017, and the project is expected to enter into operation on November 30, 2017.

On the other hand, with the UPME bid *Conexión Eólicas,* it is expected to build a 500kV Collector substation with reserve spaces for two transmission lines *Colectora – Cuestecitas* at 500 kV, and a transmission line *Cuestecitas* - La Loma 500kV. This project will be located in the departments of La Guajira and Cesar, which will allow the connection of wind power plants by 1250 MW. This bid will commence on July 2017, and awarded on November 2017. It is expected to enter into operation on November 30, 2022.

Along with the aforementioned bids, UPME announced the following projects, indicating the status, date of award, date of entry into operation and estimated amount of investment:

Project	**Status**	**Awarding hearing date**	**Entry into operation date (FPO)**	**Estimated (USD)**
Convocatoria UPME 09-2016 Líneas Copey a Cuestecitas y a Fundación	Open	June 21, 2017	November 30, 2020	101.919.733
Convocatoria UPME 01-2017 Bahía transformación El Bosque 220 kV/66 kV	Open	June 20, 2017	December 31, 2018	2.571.104
Convocatoria UPME STR 02-2017 Tercer transformador 220/66 kV El Bosque	Open	June 16, 2017	December 31, 2018	5.163.023
Convocatoria UPME 03-2017 Bahía transformación Valledupar 220 kV	Open	July 26, 2017	March 30, 2019	1.914.112
Convocatoria STR 04-2017 Tercer Transformador 220/34,5 Valledupar	Open	August 1, 2017	March 30, 2019	1.940.242
Convocatoria UPME 05-2017 Segundo Transformador 230/115 kV Altamira	Open	August 3, 2017	March 31, 2019	5.405.455
Convocatoria UPME Conexiones Eólicas 500 kV	In process of user guarantees. Will commence on July 2017	November, 2017	November 30, 2022	167.140.776
Convocatoria UPME STR La Marina 66 kV	Structured. Pending of definition of the substation real estate. Extensive negotiations with local authorities and entities involved		November 30, 2020	13.509.975
Convocatoria UPME Chinú-Toluviejo-Bolivar 220 kV.	Structured		November 30, 2020	31.333.700

Convocatoria UPME Nuevo Siete 230 kV	Structured		November 30, 2020	20.170.919
Convocatoria UPME San Juan 220 kV	Structured		August 31, 2020	8.977.336
Convocatoria UPME Termoflores – El Río – Tebsa 220 kV	Structured		November 30, 2020	15.085.968
Convocatoria UPME Sabanalarga-Bolivar 500 kV	Structured		November 30, 2020	36.782.130
Convocatoria UPME San Lorenzo 230 kV.	Structured		May 31, 2021	9.639.967
Convocatoria UPME STR Toluviejo 220/110 kV	Structured. Pending the expression of interest by the Network Operator		November 30, 2020	2.006.530
Convocatoria UPME STR San Juan 220/110 kV	Structured. Pending the expression of interest by the Network Operator		August 31, 2020	952.513
Convocatoria UPME STR el Río 220/110 kV	Structured. Pending the expression of interest by the Network Operator		November 30, 2020	1.922.803
Convocatoria UPME STR Nueva Montería –Río Sinú 110 kV	Structured. Pending the expression of interest by the Network Operator		November 30, 2020	2.036.961
Convocatoria UPME Variante línea Guavio – Reforma – Tunal 230 kV.	Structured		Under review	2.835.520
Convocatoria UPME STR Linea Altamira- Florencia – Doncello 115 kV.	Structured		Under review	14.017.064
Convocatoria UPME Tranformador de Ocaña 500/230 kV.	Structured		June 30, 2020	13.668.964
Convocatoria UPME Transformador Sogamoso 500/230 kV	Structured		November 30, 2019	15.618.679
Convocatoria UPME Bahía de reactor San Marcos 500 kV	To be structured on 2017		Under review	2.087.255
Convocatoria UPME línea san Antonio – Alcaraván – Banadía 230 kV.	To be structured on 2017		November 30, 2021	50.688.367
Convocatoria UPME Cabrera (Nueva Granada) 230 kV.	To be structured on 2017		November 30, 2022	14.642.854

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client alert

ENERGY | FRANCE | MAY 2017

FRENCH RENEWABLES SUPPORT SCHEME & CONTRACT FOR DIFFERENCE: OVERVIEW OF THE LATEST REGULATIONS

The French Government recently passed two pieces of regulation that add to the regulatory framework applicable to contracts for difference for renewable energy producers. This mechanism is now fully implemented and will progressively replace the former feed-in tariffs mechanism.

This Client Alert provides an overview of the general regulatory framework, with a focus on the wind power support scheme.

The French government has implemented a long-standing and favourable support scheme for renewable energy. It relied on two main mechanisms, based on (i) feed-in tariffs ("**FITs**"), paid over a fixed and long-term period by some electricity suppliers[1] , and (ii) tendering processes, occasionally launched by the French State and which aimed at awarding long-term contracts with a fixed price[2] .

Over the past few years, the FITs mechanism was challenged before French courts, mostly because of a breach of EU State aid rules. This challenge first dealt with the wind power support scheme[3] but also more recently with the photovoltaic support scheme[4] . Although it was ruled that the FITs mechanism for wind farms constituted a State aid scheme, it was nonetheless regarded as compatible with the internal market[5] .

Simultaneously, following new guidelines from the European Commission[6] , Law no. 2015-992 of 17 August 2015 *on energy transition and green growth* was passed in order to integrate renewable energies into the market.

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[1] The national electricity company EDF and the non-nationalized electricity distribution companies *(entreprises locales de distribution, ELDs*); Articles L. 314-1 et seq. of the French Energy Code.
[2] Articles L. 311-10 et seq. of the French Energy Code.
[3] It was alleged that such FITs granted renewable energy developers an undue advantage and therefore breached EU States aid legislation. This challenge gave rise to several decisions of justice: CE, 15 May 2012, *Vent de Colère !,* No. 324852; ECJ, 19 December 2013, *Association Vent De Colère !*, C-262/12; CE, 28 May 2014, *Vent de Colère !*, No. 324852; CE, 15 April 2016, *Vent de Colère !*, No. 393721.
[4] ECJ, 15 March 2017, *Ombrière le Bosc c./ Enedis*, C-515/16.
[5] EC, 27 March 2014, State aid SA.36511 (2014/C) (ex 2013/NN), Support mechanism for renewable energies and caps on the CSPE.
[6] EC, Guidelines *on State aid for environmental protection and energy 2014-2020*, (2014/C 200/01), § 12. The European Commission published these guidelines with a view to "*strengthening the internal market, promoting more effectiveness in public spending (…), greater scrutiny on the incentive effect, on limiting the aid to the minimum necessary, and on avoiding the potential negative effects of the aid on competition and trade*". The Commission required that, from 1 January 2016, beneficiaries of the support mechanism sell their electricity on the market and are subject to market obligations. All new aid schemes shall now be granted as a premium in addition to the market price whereby the generators sell their electricity directly on the market.

To this end, the French Energy Code sets forth a market-based premium regime (*complément de rémunération*) that is gradually to replace the FITs mechanism[7] . Two implementing decrees were published: Decree no. 2016-682 of 27 May 2016 on the power purchase obligation and the market-based premium, and Decree no. 2016-691 of 28 May 2016 defining lists and characteristics of plants that can benefit from support schemes.

These texts determined a general regulatory framework for contracts for difference ("**CFDs**") in France.

OVERVIEW OF THE MARKET-BASED PREMIUM SCHEME

Under the new framework of market-based premium, the income of the producer relies on a price obtained on the market: electricity can be sold directly on EPEX SPOT or under a power purchase agreement ("**PPA**") signed with any electricity supplier or any aggregator.

EDF is required to sign a CFD, which includes a market-based premium, with renewable energy producers using hydropower, domestic waste, biogas, geothermal, cogeneration and wind energy (*guichet ouvert* mechanism)[8]. For each power source, the right to benefit from the market-based premium scheme depends on the installed capacity and number of generators. Renewable energy projects that benefit from or benefited from FITs are not eligible to the market-based premium scheme[9].

The premium paid to the producer includes[10]:

- an energy premium (*prime à l'énergie*), that corresponds to the difference between (i) a reference tariff calculated on the basis of the average financing and operation costs for an efficient and representative installation, and (ii) the average electricity and capacity market-based prices[11]. The premium shall not exceed a "*reasonable return on capital in comparison with the risks involved*"[12] and shall be revised periodically so that the evolution of costs borne by installations are taken into account;

- a management premium (*prime de gestion*), that reflects the costs incurred by the producer to sell its production on energy and capacity markets.

Revenues from the sale of guarantees of capacity are withdrawn from these two premiums.

EDF shall make a proposal of CFD within three months of the submission of an application by the producer.

In order to provide certainty for investments made under the market-based premium, the administrative authority appoints a purchaser of last resort if the producer provides evidence that it is unable to sell its electricity directly or indirectly on the market[13]. In this case, the purchaser of last resort is obliged to sign a power purchase agreement related to the electricity produced by the installations falling within the market-based premium scheme. However, the price paid for the electricity cannot exceed 80% of the initial price due under the CFD.

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[7] Articles L. 314-18 et seq. of the French Energy Code.
[8] Articles L. 314-18 and D. 314-23 of the French Energy Code.
[9] Article L. 314-19 of the French Energy Code.
[10] The calculation formula of the market-based premium is given in Article R. 314-33 of the French Energy Code.
[11] Article D. 314-33 of the French Energy Code.
[12] Article L. 314-20 of the French Energy Code.
[13] Article L. 314-26 of the French Energy Code.

THE 2016 MARKET-BASED PREMIUMS

Ministerial Orders were issued at the end of 2016 covering several sources concerned by the market-based premium scheme: wind, geothermal, hydropower and cogeneration[14].

As far as wind power is concerned, Ministerial Order of 13 December 2016 ("**2016 Wind Order**") sets out the conditions under which operators of onshore wind projects can benefit from the market-based premium. Three types of producers are eligible:

- operators of installations for which a PPA was signed before 15 December 2016 and for which the application for the agreement was filed after 1 January 2016;
- operators of installations for which the application for the PPA was filed between 1 January and 31 December 2016, although no PPA has been signed;
- operators of new installations *i.e.* for which a complete application for a CFD was filed before 31 December 2016.

CFD duration under the 2016 Wind Order is 15 years. The reference tariff has been determined in order to target a remuneration of the electricity equivalent to the existing FITs, *i.e.* €82/MWh for the first ten years of the contract. For the last five years of the contract, the tariff decreases depending on the annual operating time[15]. In addition, the management premium is of €2.8/MWh.

2,500 applications were filed between 15 and 31 December 2016, 60% of which were filed by operators of new installations. However, 40% of the applications were incomplete and were therefore rejected. The reasons for rejection are in most cases the absence of a number of the establishment in the national register for companies and establishments (*SIRET*)[16] and the lack of information regarding the type of generator. It should be noted that EDF has been unable in most cases to meet the three-month deadline for providing a CFD, given the number of applications.

THE 2017 ONSHORE WIND MARKET-BASED PREMIUM

A new Decree no. 2017-676 of 28 April 2017 modifies the current support scheme.

From a general point of view, it provides for stricter criteria in order to limit the right to benefit from the market-based premium through the *guichet ouvert* procedure. For instance, with respect to wind power, only wind farms with six generation units or fewer and with no generation unit of more than 3 MW are now fully eligible for the market-based premium[17]. For wind farms with seven generators and more, subsidies will only be granted after a competitive bidding process (*procédure de mise en concurrence*)[18]. Such a bidding process was launched on 5 May 2017[19].

Decree no. 2017-676 also repeals the 2016 Wind Order three months after its publication, i.e. from 30 July 2017. Nevertheless, if a complete application is filed under the 2016 Wind Order before this date, the installation may still benefit from the conditions of the market-based premium defined by this Ministerial Order. Ongoing CFDs will also remain in force. The provisions of a new Ministerial Order of 6 May 2017 (the "**2017 Wind Order**"), together with Decree no. 2017-676, will apply to other installations.

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[14] Ministerial Orders dated 13 December 2016.
[15] €82/MWh for 2,400 hours and less; €68/MWh for 2,800 hours; €28/MWh for 3,600 hours and more.
[16] As required under Article R. 314-4 of the French Energy Code.
[17] Article D. 314-23 of the French Energy Code.
[18] Articles R. 311-13 et seq. of the energy code.
[19] The deadline for submitting offers is 1 December 2017 (First period). The total installed capacity over the six periods is 3,000 MW.

According to this 2017 Wind Order, the CFD now lasts for 20 years. In addition, the reference tariff is calculated differently from the tariff set by the 2016 Wind Order and results in less profitable CFDs. A first reference tariff will apply to a quota of MWh. This tariff will depend on the rotor diameter and will range from €74/MWh for rotor diameters smaller than 80 meters, to €72/MWh for rotor diameters exceeding 100 meters. Beyond this quota, a second reference tariff set at a lower level of €40/MWh will apply. The management premium remains the same as the one set by 2016 Wind Order.

In order to benefit from the 2017 Wind Order, a new wind farm must be at least 1,500 m distant from any existing wind farm that filed a complete application for a PPA within the two previous years. The Minister for Energy may allow a smaller distance if the owners of the two wind farms are independent from each other.

The European Commission approved this scheme under EU State aid rules[20], and the new support scheme will therefore provide predictability and stability to renewable energy projects, which suffered previously from the various changes applied to the regulatory scheme.

[20] EC, 5 May 2017, "*State aid: Commission endorses three French initiatives to produce more than 17 gigawatts in renewable energy*", IP/17/1231.

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ABNR
COUNSELLORS AT LAW

28/04/2017

GUIDANCE ON THE HANDLING OF CORPORATE CRIMES - SUPREME COURT REGULATION NO.13 OF 2016

The Supreme Court made a significant move which marks a new development in the Indonesian corporate criminal liability legislation, by enacting its Regulation Number 13 of 2016 regarding Manner and Procedure for the Handling of Crimes Committed by Corporations ("Regulation 13/2016").

Consisting of 37 articles, this Regulation 13/2016 is meant to provide law enforcers with guidance in handling corporate crime cases. It strengthens and complements the existing regulations, comprising (i) Letter from the Attorney General (Jaksa Agung) to all Chairmen of the Provincial Public Prosecutor's Offices (Kejaksaan Tinggi) No. B-036/A/Ft.1/06/2009 dated 29 July 2009 concerning Corporations As Suspects/Defendants In Corruption Criminal Cases and (ii) Regulation of the Attorney General (Peraturan Jaksa Agung) No. PER-028/A/JA/10/2014 dated 1 October 2014 concerning Guidance for the Handling of Criminal Cases with Corporations as the Legal Subject (*Pedoman Penanganan Perkara Pidana Dengan Subjek Hukum Korporasi*).

Officially signed by the Chairman of the Supreme Court on December 21st, 2016, Regulation 3/12016 defines "crimes committed by corporations" as crimes committed by person(s) on the basis of work relationship or other relationship, either severally or jointly, for and on behalf of the respective corporation, either inside or outside of the "corporation's environment". "Corporation's environment" is further defined as scope of the corporation or scope of the corporation's business or the work scope included in and/or which supports the business activities of the corporation, either directly or indirectly.

Corporations should take note of the following new rules set out by Regulation 13/2016:

<u>Corporate liability in a corporate crime:</u>

- In a corporation group situation, the parent and/or subsidiary and/or affiliate company (including sister company) of the prosecuted corporation may be prosecuted for involvement in the crime. In this case, the criminal liability will be apportioned based on the actual role/involvement of each corporation.
- In a merger or consolidation situation, the liability is limited to the value of assets placed in the surviving corporation or the newly established corporation.
- In a spin-off situation, the liability is imposed upon the spun off corporation or the corporation conducting the spin-off and/or both in accordance with their respective roles in the corporate crime.
- In a dissolution situation, the liability is still imposed on the dissolving corporation. A corporation that has been dissolved after a corporate crime occurs is immune from criminal proceedings. However, the dissolved corporation's assets that are allegedly being used for committing the crime and/or constituting the result of the crime are subject to the law enforcements' measures under the prevailing criminal law. Civil lawsuits may also be launched

against the ex-board members as well as against heirs or other third parties that control the assets deriving from the dissolution of the corporation. If there are concerns that the corporation intends to avoid its liabilities by way of dissolving itself, the investigators or prosecutors may request a court order to suspend the dissolution process.

Judges can determine whether a corporation is liable for a corporate crime by considering the following:

- Whether the corporation might gain profit or benefit from the criminal act or whether the criminal act is committed in furtherance of the corporation's interest;
- Whether the corporation allows the crime to take place; or
- Whether the corporation omitted to take the required steps to prevent the crime, to prevent the bigger impacts and to ensure compliance with prevailing laws and regulations for the purpose of avoiding criminal acts.

Judges have the power to sentence the corporation or the Board or both the corporation and/or the Board, as well as the accomplices, for a corporate crime.

The implementation of criminal (either primary or additional) and other disciplinary sanctions on corporations is regulated as follows:

- Criminal and other disciplinary sanctions on corporations must be executed on the basis of a final and binding court decision;
- Primary criminal sanctions in the form of fines being imposed on corporations must be complied by the corporations within 1 month as of the date the court decision becomes final and binding (which period can be extended for another month if there is a justified reason for the extension). Otherwise, the public prosecutor has the right to confiscate and auction the corporations' assets to satisfy the fine.
- Confiscation of goods from corporations for evidence purposes as an additional sanction can only be done for 1 month at the longest as of the date the court decision becomes final and binding. Any profit in the form of assets gained from the crime will be confiscated by the State.
- Additional sanctions in the form of compensation, indemnity and restitution must be implemented in the manner stipulated by the prevailing laws and regulations. The respective corporation has 1 month as of the date the court decision becomes final and binding to comply with the sanction, which period can be extended for another month if there is a justified reason for the extension. Otherwise, the public prosecutor has the right to confiscate and auction the corporation's assets to satisfy the sanction.
- Additional sanctions in the form of orders to take remedial actions to cure the damage resulting from the crime must be implemented in the manner stipulated by the prevailing laws and regulations.

Laws on corporate crimes and liability had been enacted in the past in Indonesia, including: Emergency Law Number 7 of 1955 regarding Investigation, Prosecution and Trial of Economic Crimes, Law Number 5 of 1997 concerning Psychotropic, Law Number 31 of 1999 as amended regarding Eradication of Corruption, Law No. 41 of 1999 as amended concerning Forestry, Law Number 35 of 2009 concerning Narcotics, Law Number 31 of 2004 as amended regarding Fishery, Law Number 38 of 2004 regarding Road, Law Number 32 of 2009 regarding Environment Protection and Management and Law No. 8 of 2010 concerning Prevention and Eradication of Money Laundering.

Prior to the enactment of Regulation 13/2016, a decision which was issued by the Supreme Court, No. 936 K/Pid.Sus/2009, became a case law. This Supreme Court decision declared the respective corporation as guilty of committing continuous corruption and imposed on it primary and additional penalty in the form of (i) temporary closure and (ii) seizure of its assets. (*by: Kevin Sidharta*)

NautaDutilh

Corporate

Luxembourg

Modernisation of Luxembourg Company Law: Extension of the Debt-to-Equity Swap Rules

Thursday 8 June 2017

*The Luxembourg Act of 10 August 1915 on commercial companies (the "**Act**"), as amended by the Act of 10 August 2016, now provides that the debt-to-equity swap rules set out in Article 94-2 et seq. can be applied to any issuance of securities by a Luxembourg or foreign issuer.*

1. Opt-in mechanism

The rules laid down in Articles 84 to 94-8 of the Act mainly relate to the organization and powers of bondholders' meetings and representatives.

Luxembourg and foreign issuers can now opt to apply some or all of these rules to any issuance of securities (*valeurs mobilières*).

2. Debt-to-equity swaps in a nutshell

It is now possible for the general meeting of securities holders to agree to shares in the issuer being substituted for bonds or other securities or to shares or bonds of other companies being substituted for bonds or other securities of the issuer. In order for such a decision to be validly adopted, the following conditions must be met:

(i) The general meeting must be presented with a statement of the company's assets and liabilities prepared by the statutory auditor and dated within two months prior to the meeting. A report by the board of directors justifying the proposed measures must also be presented.

(ii) The issuer's share capital must be paid up in full.

(iii) A quorum of at least half the outstanding securities must be present or represented at the meeting. If this condition is not met, a new meeting must be called which can validly deliberate regardless of the percentage of securities represented.

(iv) The decision must be approved by a two-thirds majority of the votes cast, excluding abstentions and invalid ballots.

Where the decision to substitute shares for bonds results in an increase in the issuer's share capital, this increase must be approved by the general meeting of shareholders within three months' time.

Extracts from such decisions shall be published in accordance with the Act.

The debt-to-equity swap rules are particularly useful for issuers facing financial difficulties as they present an interesting alternative to the more stringent, court-based pre-insolvency procedures. Any issuer can now decide in its issue documentation to apply these rules to an issuance of securities.

This newsflash forms part of a series which aims to provide insight into certain changes introduced by the Act of 10 August 2016. For further information and a general overview of the amendments please refer to our earlier newsflash "Modernisation of Luxembourg Company Law - What's new?".

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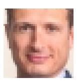

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THE THIRD WAVE

Malaysia launches the framework for digital investment management services

The Securities Commission Malaysia ("SC") has in recent years taken various measures to increase the breadth and depth of the Malaysian capital market by introducing frameworks for new products which leverage on information technology and the digital space.

The first step was taken in 2015 when the SC introduced the framework for equity crowdfunding. This was followed by the launch of the peer-to-peer financing framework in 2016. On 9 May 2017, the SC took the third step by introducing the framework for digital investment management services.

WHAT IS IT?

Digital investment management services, also described as "*robo-advisory*", is of fairly recent origin. It started in the United States about a decade ago and has since spread to the United Kingdom, Canada, Germany and Australia.

According to the SC's media release on 9 May 2017, digital investment management is a fund management business which incorporates innovative technologies into discretionary portfolio management services.

Hence, unlike traditional investment management services, digital investment management services seeks to leverage on technology such as algorithms and automated processes to execute orders and manage and rebalance investment portfolios with minimal or no human intervention.

In other words, digital investment management services can be aptly encapsulated in the tag line adopted by Canadian robo-advisor, Wealthsimple – "*Investing on Autopilot*".

THE FRAMEWORK

To implement the framework for digital investment management services, amendments were made by the SC to its Licensing Handbook ("Handbook") and Guidelines on Compliance Function for Fund Management Companies ("FMC Compliance Guidelines") on 9 May 2017.

LICENSING MATTERS

As fund management is a regulated activity under the Capital Markets and Services Act 2007, a person who proposes to offer digital investment management services is required to obtain a fund management licence in relation to portfolio management as a digital investment manager under paragraph 2.05(2) of the Handbook. The SC has announced that parties who are interested in providing these services may apply for such licence as from 9 May 2017.

General requirements

The general requirements that have to be satisfied for a fund management licence (including a fund management licence for digital investment management) are set out in Chapter 4 of the Handbook. Among the requirements that are to be satisfied are that the applicant must –

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(1) be a company incorporated in Malaysia;

(2) satisfy the fit and proper criteria set out in paragraph 4.01(1) of the Handbook;

(3) have (i) clear lines of responsibility and authority in its organisational structure; (ii) the necessary information technology systems and infrastructure for its business; (iii) adequate systems of internal control; (iv) risk management policies and processes; and (v) policies and procedures for managing conflicts and monitoring of unethical conduct and market abuse; and

(4) ensure that its directors, chief executive officers, managers and controllers are fit and proper and have the requisite qualifications and experience, as set out in the relevant provisions of Chapter 4 of the Handbook.

Specific requirements

Chapter 4 of the Handbook also sets out specific requirements that are to be satisfied by an applicant for a fund management licence for digital investment management services. An applicant for such a licence must -

(1) have a sufficient understanding of the rationale, risks and rules behind the algorithm that underpins its digital investment management business;

(2) ensure at all times that the outcomes provided by its algorithm (i) are consistent with the company's investment strategies; (ii) commensurate with the risk profile of the investor; and (iii) comply with securities laws;

(3) have the system to support the digital investment management business, including maintaining a secure environment pursuant to the SC's Guidelines on Management of Cyber Risk and other relevant guidelines;

(4) comply with the digital value proposition, including demonstrating that (i) its digital business model can deliver positive outcomes to its target investors and other target beneficiaries; (ii) the delivery of its services is user-centric; and (iii) the core components of its portfolio management services, including risk profiling and asset allocation and rebalancing, are automated;

(5) have a director who has a minimum of five years relevant experience in fund management and holds a Capital Markets Services Representative's Licence for portfolio management;

(6) have a dedicated compliance officer or a person responsible for compliance; and

(7) have a minimum paid up capital of RM2.0 million and at all times, a minimum shareholders' fund of RM2.0 million.

A holder of a fund management licence for digital investment management services may be wholly-owned by non-Malaysians.

The SC may impose the conditions and restrictions set out in Chapter 7 of the Handbook that are applicable to a holder of a fund management licensee on a holder of a fund management licence for digital investment management services.

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Variation of existing licence

A holder of a fund management licence for portfolio management or for boutique portfolio management may apply to the SC to vary its licence to include digital investment management if it satisfies the criteria that apply to digital investment management.

Outsourcing

A holder of a fund management licence for digital investment management services is permitted to outsource its services to a technology provider subject to compliance with the relevant requirements in Chapter 10 of the Handbook.

COMPLIANCE MATTERS

As a general rule, every holder of a fund management licence is required to comply with the FMC Compliance Guidelines. These requirements would also apply to a holder of a fund management licence for digital investment management.

General requirements

The requirements include complying with the 11 core principles set out in Chapter 1 of the FMC Compliance Guidelines, such as conducting its business with integrity, due care, skill and diligence, acting in the interest of its clients, avoiding conflicts of interest, protecting assets of its clients and taking reasonable care to ensure that its affairs are conducted in a responsible manner and with adequate risk management and in compliance with a sound compliance framework.

The board of directors and compliance officer of a holder of a fund management licence are required to comply with their respective responsibilities set out in Chapter 2 of the FMC Compliance Guidelines. The board is also required to establish a risk management framework that commensurate with the licensee's business.

To safeguard the assets of its clients, a holder of a fund management licence is required to appoint a qualified custodian to hold the assets of its clients in trust for them.

Additional requirements

In addition to the general requirements, a holder of a fund management licence for digital investment management is required to comply with the additional requirements set out in Chapter 13 of the FMC Compliance Guidelines. These include an obligation on the licensee's board of directors to ensure that the licensee has the technological capabilities to undertake digital investment management business. The licensee must–

(1) continue to comply with the requirements set out in items (1) to (3) of the specific requirements applicable to an applicant for a fund management licence for digital investment management set out earlier in this article;

(2) conduct at least an annual review on the effectiveness of the governance and supervision of the technology and algorithm underpinning its digital investment management business;

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(3) ensure that its risk management framework includes risks related to the digital investment management business;

(4) disclose and display prominently on its platform, all relevant information including the investment strategies used, the fact that an algorithm is used, the function of the algorithm used, the assumption and limitation of the algorithm, the risks inherent in the use of technology and the fees, charges and remuneration for the services provided; and

(5) establish, maintain and implement written policies and procedures including ensuring that (i) the algorithm is monitored and tested to ensure it is fit for purpose at all times; (ii) access to and the ability to make changes to the algorithm is limited only to authorised personnel; and (iii) ongoing due diligence is conducted on any third party that develops, owns or manages the technology and algorithm used by the licensee.

The compliance officer is responsible for establishing a compliance programme which takes into consideration the unique and specific aspects of the digital investment management business model.

A HAPPY COINCIDENCE?

Less than a fortnight after the launch of the framework for digital investment management, the SC announced that various measures will be introduced in 2017 to enhance the development of the domestic market for exchange traded funds ("ETF"). Among the measures being considered by the SC are reducing the issuers' costs and capital requirements for issuers and the introduction of new products.

As some robo-advisors, such as Betterment, Wealthsimple and Stockspot, invest a large part of the funds under management in ETFs, these measures to boost the domestic ETF market are timely and may assist in the development of the digital investment management sub-sector as well. A happy coincidence or a master stroke in strategic planning?

COMMENTS

According to the SC, the framework for digital investment management services aims to provide investors with a more convenient, affordable and accessible channel to manage and grow their wealth.

Sceptics have expressed doubts that the de-personalised "*robo advisory*" services will find favour with investors. Its proponents have, on the other hand, argued that the low minimum investment threshold and lower fees have made wealth management services accessible to a significantly wider segment of society.

In the final analysis, the success or failure of digital management services will depend primarily on whether the technology used will enable the investment objectives of the investors to be achieved in a reliable and secure manner.

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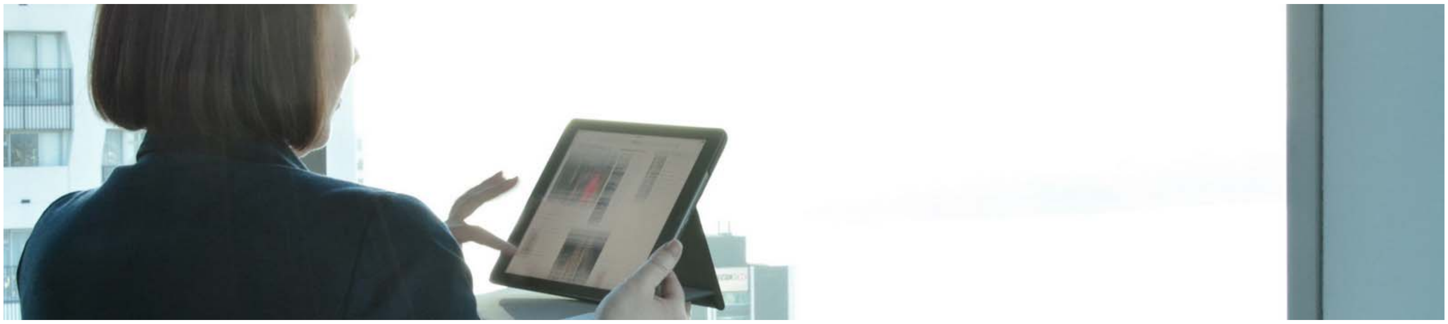
Simpson Grierson



New NZX Corporate Governance Code - what listed companies need to know

May 25, 2017

NZX has now released its new Corporate Governance Code (New Code**), which will replace the current Best Practice Code from 1 October 2017.**

The New Code is more comprehensive than the Best Practice Code. It is designed to reflect international best practice and the principles of corporate governance set out in the Financial Market Authority's Corporate Governance Handbook.

The New Code is structured into eight key principles, with recommendations and commentary under each principle. At a practical level, compliance with the code is measured against the recommendations rather than the overarching principles.

The key themes coming out of the recommendations include a preference for NZX listed companies to establish a more comprehensive policy framework and a focus on transparency for shareholders.

Comply or Explain

The New Code is not compulsory, but listed companies are required to report against their compliance with each of the recommendations in their annual report, on their website or a combination of both.

Listed companies must explain what policies and practices they have in place in respect of each recommendation and inform investors where they can find up-to-date copies of any materials referred to in the explanation. If the company does not comply with the recommendation, it must explain why.

We recommend that listed companies include a section in their annual report disclosing compliance, or explaining non-compliance, with each of the recommendations of the New Code, as well as a section on the company website, which can be updated on an ongoing basis.

Policies and Procedures

The New Code recommends that NZX listed companies establish the following policies, procedures and frameworks:

- A code of ethics that establishes minimum standards of behaviour to which the listed company's directors and employees are expected to adhere.
- A financial product dealing policy that outlines expectations for financial product dealing by employees and directors, and protects against a breach of insider trading laws.
- Written charters setting out the role and responsibilities of the board, audit committee, remuneration committee and nomination committee.
- Procedures for the nomination and appointment of directors and procedures to regularly assess director, board, and committee performance.
- A diversity policy that includes measurable objectives for achieving diversity, and an annual assessment of progress against those objectives. The policy should address gender diversity as a minimum.
- Appropriate protocols to be followed if there is a takeover offer for securities of the company, including the option of establishing an independent takeover committee.
- A continuous disclosure policy that explains how the company complies with its continuous disclosure obligations.
- A remuneration policy for the remuneration of directors and officers, which outlines the relative weightings of remuneration components and relative performance criteria.
- A risk management and reporting framework, which outlines the processes in place to identify and manage risks.
- A framework for the company's relationship with its external auditors (including communications, enabling the statutory audit role, other services and monitoring by the audit committee).

We recommend that listed companies carry out a review of their governance documentation to identify gaps and any areas where existing policies or procedures should be updated.

Many listed companies will already have some of the policies and procedures recommended by the New Code in place as part of good corporate governance, or as part of their compliance with the Best Practice Code. However, the New Code contains recommendations and commentary that may necessitate an update of existing policies or the establishment of new policies or procedures.

For example, although the Best Practice Code requires a code of ethics, the New Code is more prescriptive. Likewise, many companies will have adopted a risk management framework but existing frameworks should be reviewed in light of the New Code which emphasises regular reporting and the management of health and safety risks. Protocols to apply in a takeover situation may not have been previously formalised. Separate to the New Code, NZX has issued guidance notes on continuous disclosure and on gender diversity which will be relevant to continuous disclosure policies and diversity policies respectively.

Disclosure and Transparency

Disclosure and transparency is a key feature of the New Code. In addition to the requirement to report against each of the recommendations, the New Code recommends that:

- Key governance policies and documents are made available on the company's website.
- Information about each director (including experience, length or service, independence and ownership interests) is included in the annual report and on the company's website.
- The company's financial reporting considers material exposure to environmental, economic and social

sustainability issues.

- There is full transparency when recommending director remuneration.
- CEO remuneration is disclosed in the annual report (including base salary, short and long term incentives and performance criteria).
- Management of health and safety risks is disclosed and the company regularly reports on performance.
- Internal audit functions are disclosed (including structure and role).
- A modern communication system is established to allow electronic communication with shareholders.

We recommend that listed companies review their current investor disclosure regime to ensure compliance with the New Code. For most listed companies, compliance with the New Code will mean new information is published on their website and included in their annual report.

Next Steps

NZX listed companies are required to report against the New Code for financial years ending after 1 October 2017, although NZX is encouraging companies to comply earlier.

Simpson Grierson's is well placed to assist listed companies review their existing corporate governance framework and ensure that it is up to the standards set out in the New Code and international best practice. Please get in touch with one of our experts if you would like us to help.

May 31, 2017

New Inventive Step Examination Guidelines to Take Effect on July 1

Audrey Lo

The examination of inventive step is of paramount importance in examining patent applications. However, examiners of the Taiwan Intellectual Property Office (the "TIPO") tend to arbitrarily combine prior art references as if they were pieces of a mosaic, which, very often, results in many findings based on hindsight. In order to prevent this practice and to further enhance patent examination quality, the TIPO amended the inventive step examination guidelines in April 2017. The amendments, which are expected to come into force on July 1, 2017, include the following:

1. <u>Expanding the definition of PHOSITA</u>

According to the guidelines, the term "PHOSTIA" generally refers to a *hypothetical* person having ordinary skill in the art. However, in cases that require, for example, interdisciplinary knowledge or research efforts of a technical team, it would be more appropriate to expand the definition of the term to include *a group of persons having ordinary skill in the art*.

2. <u>Specifying the scope of relevant prior art</u>

Prior art references used in the examination of inventive step are usually chosen from technical fields identical or relevant to those to which the claimed invention pertains. Under the amendments, prior art references that belong to different or irrelevant technical fields but share some common technical features with the claimed invention are also regarded as relevant prior art references.

3. <u>Amending the definition of "easy-to-accomplish" (obviousness)</u>

The TIPO has deleted the following passage from the examination guidelines:

If a claimed invention could have been easily made by combining, modifying, substituting or adapting the teachings of one or more prior art references in view of the common knowledge at the time of filing, then the claimed invention as a whole is obvious. In that case, the examiner should determine that the claimed invention can be easily arrived at.

The TIPO has replaced the above-quoted passage with the provision that if a PHOSITA, in view of the prior art, would have arrived at the claimed invention through logical analysis, inference or routine work and experimentation, the claimed invention is obvious and can be easily accomplished.

4. <u>Identifying the primary reference</u>

When determining the possible differences between a claimed invention and the teachings of relevant prior art references, the examiner should choose one prior art reference from all the prior art references found as the primary prior art reference for comparison with the claimed invention, which may belong to the same technical field as the claimed invention or aims to resolve a problem substantially the same as that of the claimed invention.

5. <u>Redefining the test for determining whether there is an inventive step</u>

Under the amendments, the examiner should first determine whether it would be obvious to combine the relevant prior art references and the common knowledge at the time of filing. If yes, the examiner should then determine whether there is any evidence indicating that the claimed invention lacks an inventive step. In this step, the examiner should consider whether the prior art teaches away from the claimed invention and the advantages of the claimed invention. If there is logical and reasonable proof that the claimed invention can be accomplished easily, the claimed invention lacks an inventive step. Otherwise, the claimed invention involves an inventive step.

According to the amendments, a prior art reference is deemed to teach away from the claimed invention if it is obvious that the teachings of that prior art reference cannot be combined with those of another prior art reference. Some examples of teaching away are provided in the amendments.

It is believed that if the new guidelines are fully observed by all examiners, the quality of inventive step examination will be improved.

Ideas

Supreme Court Curtails SEC Disgorgement Claims: Holds That Five-Year Statute of Limitations Applies

06 June 2017

Updates

Rejecting the Securities and Exchange Commission's ("SEC" or the "Commission") expansive view of its ability to seek disgorgement in enforcement actions, the United States Supreme Court on June 5, 2017 issued a unanimous decision in *Kokesh v. United States*, No. 16-529 (581 U.S. __ (2017)), holding that SEC disgorgement constitutes a "penalty" that is subject to the five-year statute of limitations period under 28 U.S.C. § 2462. In reversing the judgment of the Tenth Circuit Court of Appeals, the Supreme Court's ruling not only resolves an issue which has recently divided the circuit courts, but protects individuals and the business community at large from having to plan for and defend against stale disgorgement remedies sought by the Commission.

Factual Background

In October 2009, the SEC brought a civil enforcement action against Charles R. Kokesh, alleging that from 1995 to 2009 he violated federal securities laws by misappropriating $34.9 million from four SEC-registered business development companies (the "Funds"). *See Kokesh*, slip op. at 3-4. Following a jury verdict in the SEC's favor, the district court made rulings on the civil penalty and disgorgement sought by the SEC. *See id*. at 4. As to the civil penalty, the district court held that § 2462's five-year limitations period "precluded any penalties for misappropriation occurring prior to October 27, 2004—that is, five years prior to the date the Commission filed the complaint." *Id*. Thus, the district court imposed a civil penalty of approximately $2.3 million, the amount Kokesh received during the limitations period. *See id*. The SEC, however, sought a $34.9 million disgorgement remedy, including $29.9 million in disgorgement stemming "from violations outside the limitations period." *Id*. The district court granted the Commission's request in full, concluding that because the disgorgement sought was not a "penalty," § 2462's limitation period did not apply. *Id*. On appeal to the Tenth Circuit, Kokesh contended that the SEC's disgorgement claim "must be set aside because the claim[] accrued more than five years before the SEC brought its action" and is therefore barred under § 2462. *SEC v. Kokesh*, 834 F.3d 1158, 1162 (10th Cir. 2016). The Tenth Circuit disagreed, affirming the order of the district court. 1

Discussion

Under § 2462, "an action, suit or proceeding for the enforcement of any civil fine, *penalty, or forfeiture* . . . shall not be entertained unless commenced within five years from the date when the claim first accrued." 18 U.S.C. § 2462 (emphasis added). Turning to the meaning of penalty under § 2462, the Supreme Court observed that "[a] 'penalty' is a ‘punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws.’” *Kokesh*, slip op. at 5 (quoting *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)). According to the Supreme Court, this definition results in two principles: First, “whether a sanction represents a penalty turns in part on ‘whether the wrong sought to be redressed is a wrong to the public, [and not] a wrong to the individual.’” *Id.* at 5-6 (quoting *Attrill*, 146 U.S. at 668). “Second, a pecuniary sanction operates as a penalty only if it sought ‘for the purpose of punishment, and to deter others from offending in like manner’—as opposed to compensating a victim for his loss.” *Id.* at 6.

Applying these principles, the Supreme Court held that SEC disgorgement is a penalty subject to § 2462's five-year limitations period. Addressing whether the imposition of disgorgement redresses a crime against the State, the Supreme Court held that “[t]he violation for which the remedy is sought is committed against the United States rather than an aggrieved individual,” further noting that “a securities enforcement action may proceed even if victims do not support or are not parties to the prosecution.” *Id.* at 7 (citing *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993); *SEC v. Teo*, 746 F.3d 90, 102 (3rd Cir. 2014)). Moreover, the Supreme Court concluded that because the primary purpose of disgorgement orders is to deter future violations of the federal securities laws, they are fundamentally punitive in nature. *See id.* at 8 (“[s]anctions imposed for the purpose of deterring infractions of public laws are inherently punitive because ‘deterrence [is] not [a] legitimate nonpunitive governmental objective.’” (quoting *Bell v. Wolfish*, 441 U.S. 520, 539, n. 20 (1979))); *see also United States v. Bajakajian*, 524 U.S. 321, 329 (1998).

Implications

The Commission has a long history of vigorously pursuing disgorgement awards. These awards are, more often than not, larger than any civil penalty that the SEC is statutorily entitled to seek. In 2016 alone, the SEC obtained disgorgement awards totaling over $2.8 billion; this contrasts with the approximately $1.3 billion that the SEC secured in civil penalties for the same period.2 Although today’s ruling in *Kokesh* will not deter the SEC from seeking disgorgement in the future, it will limit claims for disgorgement to a measurable period of time—i.e. five years from the date of the complaint. Thus, the Supreme Court’s ruling is a victory for individuals and businesses alike as it provides much needed certainty for those trying to plan for and defend against these types of claims. *See Kokesh*, slip op. at 5 (Statutes of limitations are “‘vital to the welfare of society’ and rest on the principle that ‘even wrongdoers are entitled to assume that their sins may be forgotten[.]’” (quoting *Gabelli v. SEC*, 568 U.S. 442, 448 (2013)).

Interestingly, the Supreme Court observes in a footnote that “nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context.” *Kokesh*, slip op. at 5, n. 3. Having confined the SEC’s ability to seek disgorgement to within the limitations period of § 2462, the Supreme Court may be suggesting a willingness, in a future case, to determine whether the Commission possesses the authority to pursue the longstanding equitable remedy of disgorgement at all. This question is particularly relevant in the context of SEC administrative proceedings, which have been increasingly used as a means to commence civil enforcement actions in the post Dodd-Frank era. These administrative proceedings, which have been forcefully challenged by many litigants on constitutional grounds, empower the Commission to seek the types of monetary penalties—including disgorgement—which the Commission would ordinarily pursue in federal court. The Supreme Court’s footnote in Kokesh may signal a warning that the Commission’s use of administrative proceedings will be reviewed by the high court some time in the near future.

[1]The Tenth Circuit's decision in Kokesh was in line with other circuit courts, which also have concluded that a disgorgement claim is not a penalty or a forfeiture within the meaning of § 2462, but rather is a nonpunitive equitable remedy that does not fall within the statute's purview. See, e.g., Riordan v. SEC, 627 F.3d 1230 (D.C. Cir. 2010); SEC v. Tambone, 550 F.3d 106 (1st Cir. 2008). Last year, however, the Eleventh Circuit Court of Appeals reached a contrary result in SEC v. Graham. See 823 F.3d 1357 (11th Cir. 2016). The Eleventh Circuit, finding "no meaningful difference in the definitions of disgorgement and forfeiture" held that "the remedy of disgorgement is a forfeiture" and, therefore, § 2462's five-year limitations period applies. Graham, 823 F.3d at 1363. This disagreement among the circuits set the stage for the Supreme Court's ruling in Kokesh.

[2]See https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2016.pdf (last accessed June 5, 2017).

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California Supreme Court Explains "Day of Rest" Requirements for California Employers

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By Jeff Bosley, Julie L. Hall, and Tracy Thompson

On May 8, 2017, the California Supreme Court clarified the proper interpretation of the "day of rest" requirements, set forth in the California Labor Code. The Court's rulings in the case provide many California employers with more flexibility in scheduling employees for work, particularly in the retail and hospitality industries.

In the subject case, the plaintiffs were former sales employees of a national retailer, and had worked in different California store locations. The employees claimed that the employer had violated California's "day of rest" statutes (Labor Code sections 551 and 552) because the employees had worked more than six consecutive days without a day off from work *on the seventh day*. During these consecutive periods worked, the employees' hours of work per day varied during any given workweek (Sunday through Saturday); some days, they worked more than six hours, and some days they worked less than six hours.

The first issue for decision before the Court involved the proper interpretation of Labor Code sections 551 and 552. Labor Code section 551 states: *[e]very person employed in any occupation of labor is entitled to one day's rest therefrom in seven.*" Labor Code section 552 states: *"no employer may cause his employees to work more than six days in seven."* The plaintiffs argued that Labor Code sections 551 and 552 required the employer to provide a day of rest after *any* six consecutive days of work, regardless of *when* the workweek started and ended. In other words, the protection applies on a rolling basis. In contrast, the employer contended that the statutes permitted scheduling employees to work *more than six* consecutive days so long as those consecutive work days spilled over to the next, separate workweek. (A "workweek" is defined as any seven consecutive days, starting with the same calendar day each week, and is a fixed, regularly recurring period of 168 hours, and seven (7) regularly occurring days, e.g., 12:00 AM- Sunday through 11:59 PM-Saturday.)

The Court agreed with the employer's interpretation, and held that the "day of rest is guaranteed for each *workweek*" and that "[p]eriods of work that stretch across more than one *workweek* are not *per se* prohibited." In other words, an employer may require an employee to work more than six consecutive days, without the seventh day off for rest, if the consecutive work days (in excess of six) fall over two workweeks.

The second issue the Court considered involved the proper interpretation of Labor Code section 556, which exempts employers from the application of day of rest requirement in Labor Code sections 551 and 552 "when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." The employer contended that, under Labor Code Section 556, the day of rest protections set forth in Labor Code sections 551 and 552 *do not apply* to employees who: (1) work 30 hours or less in a workweek; and (2) work six or less hours in *any* one of the work-days in that workweek. In contrast, the employees contended that, in order for the employer to enjoy the exemption provided under Labor Code Section 556, the employee must not only work no more than 30 hours in the workweek, but also may not work more than six hours in **all** work-days, during that workweek. The Court agreed with the employees, and held that the Labor Code Section 556 exemption only applies if the employee's hours of work are six hours or less for all work-days during that workweek.

The third and final issue for resolution by the Court involved the interpretation of the meaning of the term “cause” under Labor Code Section 552 *(“no employer may cause his employees to work more than six days in seven”*). The Court posed the issue as follows: “What does it mean for an employer to ‘cause’ an employee to go without a day of rest (§552): force, coerce, pressure, schedule, encourage, reward, permit, or something else?”

With regard to this third issue, the plaintiffs contended that whenever an employer “allows, suffers, or permits” an employee to work a seventh day, it has “caused” the employee to work. The employer contended that, unless the employer “requires, forces or coerces seventh-day work,” it has not “*caused*” the employee to work. The Court rejected both the employees and employer’s asserted meaning of “*caused*” to work. Rather, the Court held that it was the “employer’s obligation to apprise employees of their entitlement to a day of rest and thereafter to maintain absolute neutrality as to the exercise of that right.” The Court further stated that an “employer may not encourage its employees to forgo rest or conceal the entitlement to rest, but is *not liable* simply because the employee chooses to work a seventh day.”

Takeaways: Employer’s Flexibility and Best Practices

The Court’s decision provides clear guidance to employers who require employees to work more than six consecutive days. For example, employers who need to schedule employees to work more than six consecutive days can do so, if the days are staggered over two workweeks. Second, if an employer seeks to lawfully require an employee to work seven consecutive days in a workweek and not trigger daily and weekly overtime premiums, it can limit an employee’s hours of work to no more than 30 hours in the workweek, and no more than six hours in all work-days (e.g., seven four- hour shifts in a workweek). Third, if the employer seeks the flexibility of *permitting* employees to work more than six consecutive days in a workweek (potentially incurring daily or weekly overtime), the employer should consider presenting employees with a form for her/his signature, which states that the employee understands s/he is entitled to a day of rest on the date in question, that the employee is voluntarily requesting to work the extra day with no requirement by the employer to do so, and that there will be no reprisal by the employer should the employee elect to take his/her day of rest, which is a protected entitlement. Finally, employers may also wish to provide training to supervisors (or others responsible for scheduling work hours) regarding the day of rest requirements, lawful communications with employees concerning working on a seventh day, and scheduling options to minimize risk to the employer.

Supreme Court Rules That Structured Dismissals Must Follow Ordinary Priority Rules

Today, in the case of *Czyzewski v. Jevic Holding Corp., 15-649 (March 22, 2017)*, the U.S. Supreme Court ruled that a bankruptcy court cannot approve a structured dismissal that provides for distributions that do not follow ordinary priority rules without the affected creditors' consent.

BACKGROUND FACTS

In *Jevic*, a Bankruptcy Court dismissed a Chapter 11 bankruptcy case and, in doing so, ordered a distribution of estate assets that gave money to high-priority secured creditors and to low-priority general unsecured creditors but which skipped certain dissenting mid-priority creditors. Id. at 1. The skipped creditors opposed the structured dismissal claiming it was impermissible on the grounds that, among other things, they would have been entitled to payment ahead of the general unsecured creditors in a Chapter 11 plan (or in a Chapter 7 liquidation). Id. (citing 11 U.S.C. §§507, 725, 726, 1129).

The Bankruptcy Court recognized that the settlement's distribution scheme failed to follow ordinary priority rules, but held that this alone did not bar approval. Id. at 8. The Bankruptcy Court reasoned that, because the proposed payouts would occur pursuant to a structured dismissal rather than in an approval of a Chapter 11 plan, the proposed distribution scheme was permissible, particularly in light of the "dire circumstances" facing the estate and its creditors. Id. The Bankruptcy Court predicted that without the settlement and dismissal, there was "no realistic prospect" of a meaningful distribution for anyone other than the secured creditors, a confirmable Chapter 11 plan was unattainable, and there would be no funds to operate, investigate, or litigate were the case converted to a proceeding in Chapter 7. Id.

The District Court affirmed the decision of the Bankruptcy Court. Id.

The Third Circuit affirmed the District Court by a vote of 2 to 1. Id. at 9. The majority held that structured dismissals need not always respect priority, finding that Congress had only "codified the absolute priority rule . . . in the specific context of plan confirmation." Id. As a result, the Third Circuit determined that bankruptcy courts could, "in rare instances like this one, approve structured dismissals that do not strictly adhere to the Bankruptcy Code's priority scheme." Id.

The affected creditors appealed to the U.S. Supreme Court.

THE DECISION

The Supreme Court explained that the Bankruptcy Code's priority system constitutes a basic underpinning of business bankruptcy law. Id. at 11. It recognized that the distributions of estate assets at the termination of a business bankruptcy normally take place through a Chapter 7 liquidation or a Chapter 11 plan, and both are governed by priority. Id.[1]

The Court explained that the priority system applicable to bankruptcy distributions has long been considered fundamental to the Bankruptcy Code's operation. Id. at 12 (citing H. R. Rep. No. 103–835, p. 33 (1994) (explaining that the Code is "designed to enforce a distribution of the debtor's assets in an orderly manner . . . in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor")). The Court explained that, "[t]he importance of the priority system leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure." Id.

The Court also explained that dismissal of a case typically "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case"—i.e., a return to the prepetition financial status quo. Id. at 16. However, the Court recognized that Bankruptcy Code *does* permit the bankruptcy court, "for cause," to alter a Chapter 11 dismissal's ordinary restorative consequences. Id. at 3. (citing 11 U.S.C. § 349 (b)).[2] However, the Court found that such permission does not include a full-scale alteration of the priority scheme in the context of a dismissal as was done in this case. The Court explained:

> The Code gives a bankruptcy court the power to "dismiss" a Chapter 11 case. §1112(b). But the word "dismiss" itself says nothing about the power to make nonconsensual priority-violating distributions of estate value. Neither the word "structured," nor the word "conditions," nor anything else about distributing estate value to creditors pursuant to a dismissal appears in any relevant part of the Code.

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[1] The Court explained that, in Chapter 7 liquidations, priority is an absolute command— lower priority creditors cannot receive anything until higher priority creditors have been paid in full. Id. at 12 (citing 11 U. S. C. §§725, 726). The Court recognized that Chapter 11 plans provide somewhat more flexibility, but a priority-violating plan still cannot be confirmed over the objection of an impaired class of creditors. Id. (citing §1129(b)).

[2] The Court recognized that Section 349(b) allows the bankruptcy courts some flexibility in structuring dismissals, however, the Court determined that the cases in which a court has approved interim distributions that violate ordinary priority rules are usually in "such instances one can generally find significant Code-related objectives that the priority-violating distributions serve." Id. at 15. The Court found that, in doing so, these courts have usually found that the distributions at issue would "enable a successful reorganization and make even the disfavored creditors better off." Id.

Id. at 13. In finding that the structured dismissal at issue in *Jevic* differed from the relief ordered in similar cases, the Court explained:

> [B]y way of contrast, in a structured dismissal like the one ordered below, the priority-violating distribution is attached to a final disposition; it does not preserve the debtor as a going concern; it does not make the disfavored creditors better off; it does not promote the possibility of a confirmable plan; it does not help to restore the status quo ante; and it does not protect reliance interests. In short, we cannot find in the violation of ordinary priority rules that occurred here any significant offsetting bankruptcy-related justification.

Id. at 16.

CONCLUSION

The Supreme Court's decision today in *Jevic* clarifies that the priority rules of the Bankruptcy Code cannot be altered in the context of a dismissal. Although this is good news for mezzanine debt holders and trade creditors, who normally do not benefit from these types of structured dismissals, it deals a blow to debtors and creditors who use structured dismissals as an option for debt restructuring.

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Creditors' Rights and Bankruptcy. Goodsill's attorneys practicing in the area of creditors' rights and bankruptcy concentrate on the representation of creditors, trustees, committees and other interestholders in complex bankruptcy, foreclosure and receivership matters, commercial landlord-tenant matters and major collections matters. Goodsill attorneys are adept at helping creditors avoid protracted litigation through creative workouts and settlements. Goodsill attorneys in this practice area frequently contribute to publications and lecture at bankruptcy and collection law seminars.