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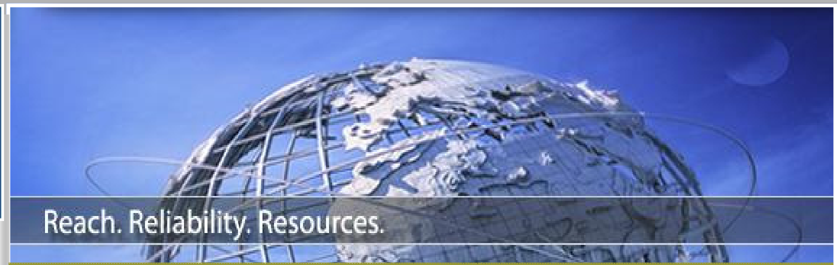

Pacific Rim Advisory Council
October 2018 e-Bulletin

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65th International Conference
Costa Rica - Hosted by ARIAS
April 6 - 9, 2019

66th International Conference
Seattle - Hosted by DAVIS WRIGHT TREMAINE
October 5 - 8, 2019

Visit www.prac.org for all events and details

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BAKER BOTTS STRENGTHENS LITIGATION DEPARTMENT WITH 14 NEW JUDICIAL CLERKS

HOUSTON - 04 October 2018: Baker Botts L.L.P, a leading international law firm, is pleased to announce that 14 of its new associates who joined the firm this fall have completed high profile judicial clerkships.

“Baker Botts is well known for the depth and experience of our litigation and trial practice. Adding 14 new judicial clerks who are ready to serve our litigation clients simply deepens an already impressive bench across the litigation department,” said Van Beckwith, a Dallas based partner and Chair of the firm’s Litigation Practice.

“Our clients look to us to have associates ready to work directly with our clients on important matters immediately. In this very competitive market, the fact that this incredibly impressive class of judicial clerks has chosen Baker Botts speaks to the momentum of our firm and our strength in first-chair litigation. Our firm is one that recognizes the importance of collegiality, professional excellence, integrity, and service while rewarding and encouraging individual accomplishments,” said Mr. Beckwith.

“Baker Botts' litigation practice is comprised of world-class associates who handle disputes and try cases around the globe, and in the courthouse down the street, in cases involving business and commercial, antitrust and M&A, intellectual property, class actions, energy, and securities and shareholder litigation,” added Mr. Beckwith.

These new associates include:

Tecuan Flores (Austin); Intellectual Property— Judge Sparks, U.S. District Court (Western District of Texas)

Christopher Ratway (Austin); Intellectual Property—Chief District Judge Gilstrap, U.S. District Court (Eastern District of Texas)

Shayna Goldblatt (Houston); Litigation—Judge Miller, U.S. District Court (Southern District of Texas)

Margaret Wittenmyer (Houston); Litigation—Judge Harmon, U.S. District Court (Southern District of Texas)

Delaney McMullan (Austin); Litigation—Judge Loken, U.S. Court of Appeals (8th Circuit)

Joshua Morrow (Austin); Litigation/Environmental—Judge Brown, Supreme Court of Texas

Mary Margaret Roark (Austin); Litigation—Chief Justice Hecht, Supreme Court of Texas

Alex Hernandez (Houston); Litigation—Judge Southwick, U.S. Court of Appeals (5th Circuit)

Andrew McCartney (Washington D.C.); Litigation—Judge Elrod, U.S. Court of Appeals (5th Circuit)

Clark Oberembt (Austin); Intellectual Property—Judge Taranto, U.S. Court of Appeals (Federal Circuit)

B. Caleb Graves (Dallas); Litigation—Judge Rodriguez, U.S. District Court (Western District of Texas)

Anthony Lucisano (Houston); Litigation—Justice Devine, Supreme Court of Texas; Judge Reavley, U.S. Court of Appeals (5th Circuit)

William Seidleck (Washington D.C.); Litigation—Judge Wolski, U.S. Court of Federal Claims

Jamie Drillette (Dallas); Litigation—Justice Green, Supreme Court of Texas

*New lawyers may not have yet been admitted to their respective State Bar

For additional information visit www.bakerbotts.com

GOODSILL WELCOMES FORMER DEPUTY ATTORNEY GENERAL AND FOUR CAPTIVE INSURANCE LAWYERS

HONOLULU -18 September 2018: ***Deirdre Marie-Iha***, formerly a Deputy Attorney General for the State of Hawai'i, has joined Goodsill as counsel.

Deirdre has over a decade of experience in appellate matters and complex civil litigation. She has handled numerous high-profile matters for the State of Hawai'i, including successful defenses of Hawaii's Marriage Equality Act and campaign finance laws. She was also pivotal in the State's challenge to the travel ban. At Goodsill, Deirdre will be focusing her practice on appeals and business litigation.

Goodsill also welcomed ***Gerald C. Yoshida, Paul B. Shimomoto, Asako C. Shimazu*** and ***Arik M. Look*** to the firm on October 1.

Gerald and Paul join the firm as partners with practices that will focus in the areas of corporate and insurance regulatory law, with an emphasis on the formation and representation of captive insurance companies, risk retention groups and other insurance regulatory matters in the State of Hawai'i. They both represent clients locally and abroad with general business planning matters, and their captive and insurance regulatory clients include publicly-traded Fortune 500 and Global 500 companies from the U.S. and Japan.

Gerald has been active in the captive insurance industry locally since the State's captive law went into effect in 1987, and he was instrumental in licensing the first captive in Hawai'i. Paul has been actively representing his clients in the captive and insurance regulatory space since 2000.

Asako will join the firm as counsel and practices law in the areas of captive insurance, immigration, contracts, real estate and business law. Fluent in Japanese, she is a member of the State Bar of California, Hawai'i State Bar Association and American Bar Association.

Arik will be an associate within the firm and focuses his practice on captive insurance. He holds multiple advanced degrees including Master of Accounting from University of Hawai'i Shidler College of Business, Master of Business Administration from Chaminade University of Honolulu and Juris Doctor from University of Hawai'i William S. Richardson School of Law.

For additional information visit www.goodsill.com

HAN KUN WELCOMES NEW PARTNER

SHANGHAI - 29 September, 2018: Han Kun Law Offices is pleased to announce that ***Ms. Paula Liu*** has joined the firm as a partner. Paula works primarily in the firm's Shanghai office.

Prior to joining Han Kun Law Offices, Paula has more than thirteen years of experience working at international law firms. Paula worked at Clifford Chance LLP for over 10 years, and later joined Kirkland & Ellis LLP as a partner. Paula focuses on private equity financing and mergers and acquisitions, representing various international and domestic private equity funds and multinational and domestic companies on their investments, acquisitions and strategic transactions in China and overseas across a broad range of business sectors. Paula has a Bachelor of Laws degree from Peking University, a Master of Laws degree from The George Washington University, and a Juris Doctor degree from University of California, Davis School of Law.

For additional information visit www.hankunlaw.com

TOZZINI WELCOMES THREE NEW PARTNERS

SAO PAULO, 03 September 2018: We are proud to introduce TozziniFreire's new partners in São Paulo: ***André Camargo (M&A), Guilherme Ribas (Antitrust) and Gustavo Rabello (Capital Markets).*** With the hirings, the law firm expands its practice in the country and reinforces the work of the respective areas, aligned with its growth strategy for this year.

(L-R) Guilherme Ribas, Gustavo Rabello, Andre Camargo

With eighteen years of experience, ***André Camargo*** provides strategic assistance to clients in the corporate, contract, civil and corporate governance fields. He has great expertise in mergers and acquisitions, corporate reorganization, business restructuring and issues relating to management liability, as well as cases involving audit and anti-corruption matters.

Guilherme Ribas has nineteen years of experience in competition law, having worked at both public agencies and private companies, where he drafted the antitrust compliance guidelines (SDE Ordinance No. 14/2004) and conducted the first antitrust dawn raids in Brazil. He holds a master's and a doctoral degree from USP (Universidade de São Paulo), and his published works are a reference to the antitrust community, such as his most recent book, Processo Administrativo de Investigação de Cartel [Administrative Proceeding of a Cartel Investigation].

Working for over ten years in the capital markets, ***Gustavo Rabello*** has solid experience in advising local and foreign clients on investment fund formation and management in Brazil, as well as on syndicated loans and project finance. Gustavo's expertise includes assisting securitization companies, asset managers and multinational corporations, due diligence processes and coordination of transactions involving trustee collateral services such as collateral agency roles and custodian of notes and securities. He is a specialist in Business Administration from FGV-SP (Fundação Getulio Vargas de São Paulo) and holds an LLM in International Business Transactions from the University of London - Queen Mary College.

TozziniFreire welcomes the new partners and wishes them the best of success!

For additional information visit us at www.tozzinifreire.com.br

ALLENDE BREA

ASSISTS AUSTRALIAN GALAXY RESOURCES IN SALE OF LITHIUM MINING RIGHTS IN ARGENTINA TO SOUTH KOREAN STEELMAKER POSCOA

Allende & Brea in Buenos Aires assisted Australian Galaxy Resources in its sale of lithium mining rights in Argentina to South Koreal Stellmaker Posco for US$280 million. The deal was signed on 27 August. Posco, which will explore a mine in the northwest of the country, also plans to build a lithium plant in Argentina that will produce 25,000 tonnes per year for 20 years. Production is set to start in 2021.

Allende & Brea's team was led by Partner Florencia Heredia and associates Agostina Martinez and Valentina Surraco Urtubey .

For additional information visit www.allendebrea.com.ar

ARIFA

INTER-AMERICAN DEVELOPMENT BANK ISSUES US $1BILLION BONDS FOR FIRST TIME IN PANAMA STOCK EXCHANGE

PANAMA - 01 October, 2018: ARIFA has advised The Inter-American Development Bank (IDB), the leading provider of development financing to Latin American and the Caribbean, and in a minor role to Citigroup, in the issuance of US$1 billion Callable Step-Rate Bonds through the Panama Stock Exchange, due September 26, 2048. The bonds were purchased by Citigroup Global Markets Inc. ARIFA has assisted the IDB regarding the listing in the Panama Stock Exchange.

It is the first issuance of securities by the IDB in the local securities market and could pave the way for other multilaterals to place notes in the Panamanian Market.

ARIFA lawyers acting in transaction were led by Estif Aparicio, leading partner; Cedric Kinschots, Senior International Associate and Ana Isabel Quijano, Associate.

Sullivan & Cromwell LLP, USA counsel to Citigroup Global Markets

For additional information visit www.arifa.com

BAKER BOTTS

REPRESENTS CARRIZO OIL & GAS, INC. IN $215 MILLION ACQUISITION OF DEVON ENERGY CORPORATION'S DELAWARE BASIN PROPERTIES

HOUSTON, 14 August, 2018 – Carrizo Oil & Gas, Inc. (Nasdaq:CRZO) ("Carrizo") announced that it has agreed to acquire Delaware Basin properties from Devon Energy Corporation ("Devon") for $215 million in cash, subject to customary closing adjustments.

Acquisition Highlights:

- Approximately 10,600 gross (9,600 net) acres located in the Delaware Basin in Reeves and Ward counties, with the majority of the position adjacent to Carrizo 's existing acreage
- High degree of operational control with more than 90% of net acreage operated
- Minimal near-term drilling obligations as 94% of the acreage is held by production
- Low average royalty of approximately 20%
- Net production of approximately 2,500 Boe/d (60% oil)
- More than 100 net potential de-risked drilling locations identified across the Wolfcamp A and B based on 7,000-ft. laterals, with significant upside potential from additional zones, further delineation, and future downspacing
- Includes salt-water disposal wells that can be integrated into Carrizo 's system
- Significant opportunities to generate efficiencies from increased scale, extension of lateral lengths, and integration of infrastructure

The acquisition is currently expected to close during the fourth quarter of 2018 and increases Carrizo's acreage position in the Delaware Basin to approximately 46,000 net acres on a pro forma basis.

Baker Botts L.L.P. represented Carrizo in the acquisition. Baker Botts Lawyers/Office Involved: Gene Oshman (Partner, Houston); Luke Burns (Associate, Houston); Justin Clune (Associate, Houston); Jon Lobb (Partner, Houston); Matthew Larsen (Partner, Houston); Jordan Hahn (Associate, Houston)

For additional information visit www.bakerbotts.com

BENNETT JONES — DAVIS WRIGHT TREMAINE

TRIWEST CAPITAL PARTNERS INVESTS IN PRT GROWING SERVICES LTD

TriWest Capital Partners invested in PRT Growing Services Ltd. in partnership with senior management. The financial terms of the transaction were not disclosed.

PRT is an industry leader in commercial-scale containerized growing processes for a wide range of forestry seedling species. PRT currently operates 18 growing and cold storage facilities serving both Canada and the US, primarily supplying North American forestry and timber players, as well as land owners and government agencies. PRT's nurseries have a combined capacity to produce in excess of 215 million seedlings per year. The Company provides growing and logistics services that enable customers to meet various reforestation initiatives and requirements. PRT boasts significant market share in its core North American forestry seedling markets. PRT's scale and geographic reach differentiate it from all major competitors and present a strong competitive advantage for the Company.

Bennett Jones LLP and Davis Wright Tremaine LLP represented TriWest Capital Partners, with a team from Bennett Jones led by Bryan Haynes and also consisting of Eric Chernin, Brian Wells, Byron Tse and Heidi Konnert (M&A/corporate), Scott Bodie (tax), and Karen Dawson, Jeremy Russell, Taylor Davis and Samantha Lush (financial services) and with a team from Davis Wright Tremaine consisting of Sarah Tune (M&A/corporate), Scott MacCormack (debt finance), Omar Vasquez (M&A/corporate) and Christie Totten.

For additional information visit www.bennettjones.com

BRIGARD URRUTIA

ASSISTS US MINING COMPANY NEWMONT

BOGOTA - 01 October 2018: Brigard Urrutia assisted US mining company Newmont invest in Canadian company Orosur Mining and sign an exploration agreement for its Anzá project in northwestern Colombia.

The deal closed on 10 September.

The agreement gives Newmont a three-phase earn-in structure, which will hand the miner a 75% stake in Orosur if it invests US$30 million over 12 years. It also requires Newmont to pay US$4 million in cash to Orosur over two four-year phases and complete a feasibility study for the Anzá project. The project is in the country's Antioquia department. Newmont also bought a minority stake in Orosur for US$2 million.

The deal comes only a few weeks after it signed an option agreement with Canadian miner Miranda Gold, which could give Newmont a majority stake in the Lyra gold project, also in Antioquia.

Newmont is the world's second-largest gold miner after Canadian Barrick Gold.

Local counsel to Newmont Brigard Urrutia team led by Partners Carlos Umaña Trujillo, Carlos Urrutia and Darío Laguado Giraldo, director Marianna Boza Morán and associates Andrés Eduardo Hernández and Christian Díaz Ordoñez in Bogotá.

For additional information visit www.bu.com.co

CAREY

ACTS FOR UNDERWRITERS IN CHILEAN BANKING COOPERATIVE ISSUANCE OF US$1 BILLION IN NOTES

SANTIAGO - 01 October, 2018: Financial services cooperative Coopeuch issued US$1 billion worth of notes. The underwriters – UBS, Credit Agricole CIB and Daiwa Capital Markets America, retained Linklaters in London and Carey in Santiago.

The offering closed on 31 August.

Carey's team was led by Partner Diego Peralta and associates Paluska Solar, Nadia Jara, José Tomás Otero and Manuel José Garcés in Santiago.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES BROOKFIELD AND MACQUARIE ON US$2.15 BILLION QUADRANT SALE TO SANTOS

SYDNEY - 27 August, 2018: Clayton Utz has advised a consortium of sellers led by Brookfield and Macquarie on the US$2.15 billion sale of Quadrant Energy to Santos Limited.

This is one of the most significant M&A transactions in the energy and resources sector and marks the culmination of significant due diligence, planning and negotiations following the decision by Quadrant's owners to embark on a sale of the business.

Clayton Utz partners Emma Covacevich and Stuart Byrne led the transaction along with Peter Feros. Other core team members included Ben Cansdale, Johnson Lo, Katy Warner, Kwan Leung, Kaz Field and Andrew Lassman.

Clayton Utz acted for the sellers, a consortium comprising Brookfield Business Partners together with its institutional partners, and Macquarie Capital together with its institutional partners.

Subject to regulatory approvals, the transaction is expected to complete at the end of 2018.

For additional information visit www.claytonutz.com

HAN KUN

ADVISES COOTEK (CAYMAN) INC. ON ITS U.S. INITIAL PUBLIC OFFERING AND LISTING ON NYSE

28 September, 2018: Han Kun advised and acted as the PRC counsel to the joint bookrunners on CooTek (Cayman) Inc.'s U.S. initial public offering and listing on the New York Stock Exchange.

CooTek is a leading innovative mobile internet company in China.

For additional information visit www.hankunlaw.com

DENTONS RODYK

SINGAPORE COUNSEL TO FLIPKART PRIVATE LIMITED

Dentons Rodyk has acted as Singapore counsel to Flipkart Private Limited ("Flipkart"), in the US$16 billion acquisition leading to Walmart Inc ("Walmart") becoming Flipkart's largest shareholder. The transaction which closed on 18 August 2018 has resulted in Walmart holding a stake of approximately 77% of Flipkart, while the remaining shareholders include Flipkart co-founder Mr. Binny Bansal and existing shareholders such as Tencent, Tiger Global and Microsoft.

Flipkart is India's leading marketplace e-commerce platform and Dentons Rodyk is proud to have supported Flipkart from its early beginnings, including having previously acted on its investment funding rounds.

The Dentons Rodyk team advising Flipkart was led by Partner Ray Chiang along with Deputy Managing Partner Gerald Singham, and Senior Associate Nicole Teo.

For additional information visit www.dentons.rodyk.com

GIDE

GROUP BPCE PROJECT TO DIVEST BANKING INTERESTS IN AFRICAN BANKS TO MOROCCAN GROUP BCP

11 October 2018: France's second largest banking group Groupe BPCE is entering exclusive negotiations with the Banque Centrale Populaire group in Morocco, with a view to divesting equity interests held by BPCE International in Africa:

- in Cameroon: 68.5% in Banque Internationale du Cameroun pour l'Épargne et le Crédit (BICEC);
- in Madagascar: 71% in Banque Malgache de l'Océan Indien (BMOI);
- in the Republic of the Congo: 100% in Banque Commerciale Internationale (BCI);
- in Tunisia: 60% in Banque Tuniso-Koweitienne (BTK).

This project would give the banks concerned the backing of a financial and industrial partner possessing solid experience in the banking field, and capable of further developing their business in Africa.

This proposed divestment of banking interests in Africa to the Moroccan banking group BCP is in line with Groupe BPCE's strategy of refocusing on sectors and regions considered to be priorities for developing the Group's business lines, and follows on from the divestment of Banque des Mascareignes to BCP announced back in February.

The project will shortly be presented to BPCE International's employee representative bodies by means of an information-consultation procedure. The proposed agreement will also be subject to the usual condition precedents for this type of transaction, and particularly to the approval of regulators in Morocco and in the various territories concerned.

The Gide team advising Groupe BPCE was headed by partners Antoine Lelong and Julien David from the firm's Mergers & Acquisitions/Corporate practice group, with associates Anne Chiappa, Julia Michorczyk, Abel Colomb and Clémence Dubreuil. Partner Magali Buchert also advised on the operation on tax aspects, as well as partner Emmanuel Reille on aspects related to merger control.

The Moroccan group BCP was advised by Allen & Overy - Naciri & Associés.

For additional information visit www.gide.com

HOGAN LOVELLS

ADVISES WALMART IN US$16 BILLION MAJORITY INVESTMENT IN FLIPKART

SILICON VALLEY, 18 August 2018: International law firm Hogan Lovells advised retailer Walmart Inc. as lead transactional counsel in finalizing its acquisition of approximately 77 percent of Flipkart Group, India's leading marketplace eCommerce platform, for an announced price of approximately US$16 billion.

Walmart is now the largest shareholder in Flipkart. This transaction is believed to be the biggest such e-commerce deal in history.

The Hogan Lovells team advising Walmart was led by Silicon Valley M&A partner Rick Climan, along with Silicon Valley M&A partners Jane Ross and Chris Moore, and Stephanie Keen.

For additional information visit www.hoganlovells.com

KOCHHAR & CO.

SUCCESSFULLY REPRESENTS PSU OMCS BEFORE THE CCI AGAINST ALLEGATIONS OF ANTI-COMPETITIVENESS AND ABUSE OF DOMINANT POSITION

Kochhar & Co. successfully represented PSU OMCs before the CCI against allegations of anti-competitiveness and abuse of dominant position; CCI imposes penalty of USD 5.2 million (INR 38.05 Crore) on the leading sugar manufacturers in India and their industry associations

NEW DELHI - September 2018: Kochhar & Co. successfully represented the three leading public sector units (PSUs) namely Bharat Petroleum Corporation Limited – BPCL; Hindustan Petroleum Corporation Limited – HPCL; and Indian Oil Corporation Limited – IOCL; together referred to as the Oil Marketing Companies (OMCs) before the Competition Commission of India (CCI) against allegations of anti-competitiveness and abuse of dominant position.

Kochhar & Co's competition team comprising of Reeta Mishra and Abhishek Verma, led by the Anti-trust & Competition practice head - Piyush Gupta, represented the OMCs before the CCI.

In a common order dated 18 September 2018 relating to six complaints wherein 26 parties were arrayed as opposite parties, the CCI imposed a penalty of USD 5.2 million (approx. INR 38.05 Crore) on 20 parties (18 sugar mills and 2 trade associations) while rejecting the allegations against the OMCs.

The CCI, while exonerating the three OMCs of charges of violating the provisions of the Competition Act, 2002 by floating a joint tender, has held that "since the terms of the tender are same for all the OMCs, floating a joint tender is not only a more efficient option, but is also more cost-effective, as it eliminates cost, time and effort in floating multiple tenders with the same terms and conditions", while going on to say that "floating of joint tender by OMCs for procurement of ethanol per se cannot be construed as anti-competitive particularly when such process has evident efficiency benefits". Below is the link to the CCI order https://www.cci.gov.in/sites/default/files/C.%20Nos.%2021%2C29%2C36%2C47%2C48%20%26%2049%20of%202013.pdf

This is a landmark decision wherein the CCI has undertaken an in-depth study of the benefits of joint purchasing and distinguished the same from cartelization because of the pro-competitive effects accorded by the former as against the adverse impact that the latter has.

MUNIZ
ACTS FOR SCOTIABANK IN PERU GAS PROJECT FINANCE

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera in Lima have helped Scotiabank lend US$150 million to Argentine oil and gas company Pluspetrol. The bilateral unsecured 5-year loan closed on 27 September. The proceeds will fund operations of the Camisea gas field in Peru, which produces 50,000 barrels of liquified petroleum gas per day and is responsible for 92% of the gas produced in Peru.

Pluspetrol operates the Camisea field, at the head of a consortium formed by Hunt Oil, SK Energy, Tecpetrol, Repsol and Sonatrach.

Local Counsel to Scotiabank Muñiz, Olaya, Meléndez, Castro, Ono & Herrera team led by Partners Andres Kuan-Veng and Frezzia Saavedra, and associates Alesandra Azcarate and Francisco Quevedo in Lima.

For additional information visit www.munizlaw.com

SANTAMARINA
AASSISTS ALOXOM MARKETING IN SALE OF MEXICO'S BIG NAME SHOE BRANDS

Santamarina y Steta advised Aloxom Marketing, which sold 100% of its stake in Tennix to clothing shop operator Axo who acquired shoe retailers The Athlete's Foot and TrueKids along with franchise rights to The Athlete's Foot and brand ownership of TrueKids. The deal was signed on 4 September pending antitrust clearance. No value was disclosed for the transaction.

Counsel to Aloxom Marketing Santamarina y Steta Partners Carlos Argüelles and Jorge Barrero, and associates Bárbara Asiain and Lisa Carral.

For additional information visit www.s-s.mx

SANTAMARINA
ACTS FOR DLF SEEDS IN ACQUISITION OF PGG WRIGHTSON'S SEED AND GRAIN BUSINESS

AUCKLAND, 07 August 2018: New Zealand's Simpson Grierson acted for Danish cooperative DLF Seeds in its recently announced purchase of PGG Wrightson's seed and grain business for $421 million.

This sale allows DLF, as the world's leading cool season clover and grass seed company, to strengthen their global customer offering via access to the leading temperate forage seed operation in the Southern Hemisphere. The deal also includes a long-term distribution agreement and the right for the seed and grain business to continue using the PGG Wrightson name and brands. Simpson Grierson partner Simon Vannini led the law firm's team on this work, which involved a number of specialists from multiple areas of the firm.

"The complexity of this deal stemmed from the need to deliver ongoing value through the acquisition and resulting partnership of these two companies, that meets both shareholder and regulatory approval," says Vannini.

The law firm advised DLF Seeds on the full range of legal aspects of the transaction, including the Overseas Investment Act and Commerce Act, and negotiations of the transaction documents. Simpson Grierson also coordinated legal counsel in Australia (Clayton Utz) and Uruguay (Guyer & Regules) and worked closely with DLF's financial and tax advisors (EY).
The sale is subject to the approval of PGG Wrightson shareholders, as well as regulatory approvals.

Simpson Grierson Team acting in the transaction: Partners Simon Vannini, Andrew Matthews, Andrew Harkness, James Hawes, Earl Gray, Greg Towers, John Rooney, Senior Associates Tara Wylie, Rebecca Rendle, Warren Bangma.

For additional information visit www.simpsongrierson.com

TOZZINIFREIRE

ADVISES CHINESE WASTE TO ENERGY INVESTOR

SAO PAULO, 22 June 2018: TozziniFreire Advogados has helped Chinese investors Jingjiang buy a majority stake in a project to build Brazil's first waste-to-energy thermoelectric plant.

Seller, Foxx Innova Ambiental, which will continue to hold the remaining 49% of shares. The thermoelectric plant, which will be located in the city of Barueri in São Paulo state, will produce electricity from urban waste material in a process known as waste-to-energy. Thought to be the first of its kind in Brazil, the project is set to receive financing from the IFC and Caixa Economica Federal. Once built, all solid waste produced by the city of Barueri will be delivered to the facility. It will have capacity to receive 825 tons of waste per day and a power generation capacity of 17 megawatts. Awarded to Foxx Innova in 2011 as a 30-year private public partnership concession, the project was delayed due to lack of investment during Brazil's economic crisis.

The Jingjiang deal was signed on 20 April and is expected to close in the third quarter of 2018.

TozziniFreire partner Reinaldo Ma says the project is attracting interest from other municipalities in the region. "The legislation for waste management has become a burden to city administrations because the old landfills need to be closed, so this pioneering project brings a solution which is environmentally attractive for them," he says.

Ma, who co-leads the China desk at TozziniFreire, believes the deal demonstrates Chinese investors' continued appetite for assets in Latin America. "We are seeing new Chinese players in the market – Jinjiang is an example – so we are likely to continue seeing an expansion of Chinese investments," he says.

Counsel to Jinjiang Environment TozziniFreire Advogados Partners Leonardo Miranda and Reinaldo Ma, and associate Vitor Yeung Casais.

For additional information visit www.tozzinifreire.com.br

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30 AUG 2018

Sweet little lies: Heinz fined $2.25m for misleading claims on Little Kids Shredz packaging

BY RICHARD HOAD, KEZIA ADAMS

Product development and marketing review processes should encourage careful consideration of the accuracy of any product claims, including claims that may be implied from product packaging.

Last week's Federal Court order that Heinz pay a $2.25 million penalty for breaches of the Australian Consumer Law (**ACL**) in relation to its Little Kids range of Shredz products is a reminder to businesses to carefully consider claims made on packaging, including implied claims, to avoid breaching the ACL.

What was the Heinz case about?

In Australian Competition and Consumer Commission v H.J. Heinz Company Australia Limited [2018] FCA 360, the ACCC pursued Heinz for breaches of the ACL in relation to its Heinz Little Kids range of Shredz products, aimed at children aged 1 to 3 years.

The ACCC's case was about three products in the Shredz range. The packaging for the "berries apple & veg" Shredz is shown below.

The packaging for each of type of Shredz included, as required by the Australia New Zealand Food Standards Code, nutritional information which showed that the products were each approximately two-thirds sugar.

The ACCC alleged that the Shredz packaging represented that the products:

- had an equivalent nutritional value to the natural fruit and vegetables depicted on the packaging (**the Nutritional Value Representation**). The ACCC alleged that this representation was made by implication from the prominent photograph of fruit and vegetables, the location of the fruit and vegetables next to the picture of the Shredz, and the proximity of the fruit and vegetables and the Shredz to the words "99% fruit and veg";
- were a nutritious food and beneficial to the health of children aged 1 to 3 years (**the Healthy Food Representation**). The ACCC alleged that this representation was made by the packaging as a whole and, in particular, by the use of words such as "nutritious"; and
- encouraged the development of healthy eating habits for children aged 1-3 years (**the Healthy Habits Representation**). The ACCC alleged that this representation arose from the totality of the packaging and the statement on the box that "we aim to inspire a love of nutritious food that lasts a lifetime".

Heinz's Nutritional Value and Healthy Habits representations

The ACCC was unsuccessful in persuading the Federal Court that the Nutritional Value Representation and the Healthy Habits

Representation were made by Heinz.

The Court found that the Nutritional Value Representation was not made because, contrary to the ACCC's allegations, the reference to "99% fruit and veg" was a representation about the ingredients of the product – and not a representation that the product was the same as, or as good as, the fruit and vegetables depicted on the packaging. The Court noted that consumers understand that the processing of multiple ingredients will change those ingredients and would not expect that, despite the processing, the nutritional equivalence would be preserved.

The Court found that the Healthy Habits Representation was not made because ordinary reasonable consumers would understand the phrase "we aim to inspire a love of nutritious food that lasts a life time" to be aspirational and would not think that a "representation was being made that consumption of one processed product would encourage the development of healthy eating habits".

Heinz's Healthy Food Representation

The ACCC was, however, successful in relation to the Healthy Food Representation.

The Court had "no difficulty" in concluding, based on the combination of words and imagery on the packaging, that Heinz made the Healthy Food Representation. It also found that two internal Heinz documents, a comms briefing and a brand refresh update document, supported the inference that Heinz's general intention was to promote Shredz as nutritious and healthy.

Having concluded that Heinz made the Healthy Food Representation, the next question for the Court to consider was whether that representation was misleading.

The Court broke the representation down into two separate limbs:

1. Shredz were a nutritious food; and
2. Shredz were beneficial to the health of toddlers.

The Court found that the first limb was not false or misleading because the products had some of the nutrients necessary to sustain human life. However, the Court held that the second limb was false or misleading because the high levels of sugars in Shredz are not beneficial to the health of toddlers, having regard to dietary considerations (including World Health Organisation Guidelines) and sugar's potential to cause dental cavities.

Dr Rosemary Stanton, one of the ACCC's expert witnesses, gave evidence that a single serve of Shredz contained the equivalent of just under three teaspoons of free sugars. Free sugars are sugars added to foods by the manufacturer, cook or consumer, including those contained in honey, syrups, fruit juices and fruit juice concentrates. Dr Stanton gave evidence that the free sugar content of the Shredz products was equal to half of the recommended daily intake of energy from free sugars for 1-2 year olds and 35% for 3 year olds. Dr Stanton noted that a single serve of any product contributing so much of the recommended levels of free sugars could not be regarded as a healthy food.

The Court also considered whether Heinz's nutritionists should have known that the second limb of the Healthy Food Representation (that Shredz were beneficial to the health of toddlers) was misleading. There were a number of internal Heinz documents in evidence which contained guidance and criteria for Heinz's toddler food products. These documents stated (variously) that:

- ugar is a "public health concern";
- ietary guidelines recommended that toddlers should consume only moderate amounts of sugars and foods containing sugars;

- products should aim to limit use of concentrated fruit juices and pastes; and
- Heinz aims for less than 30% of total sugars for a sweet snack.

Having regard to their training and experience as nutritionists, the Court found that the Heinz nutritionists ought to have known it was misleading to represent that a product containing approximately two-thirds sugar was beneficial to the health of toddlers.

What the Court ordered Heinz to pay – and do

The $2.25 million penalty imposed by the Court was significantly less than the $10 million penalty sought by the ACCC – but much greater than the $400,000 that Heinz argued was appropriate (this apparently reflected Heinz's profits from the sale of Shredz).

In addition to the $2.25 million penalty, the Court ordered Heinz to:

- establish and maintain a consumer law compliance program for three years; and
- pay the ACCC's costs of the proceeding.

The ACCC had also sought an order for corrective advertising. In refusing this order, the Court noted that Heinz stopped marketing the products shortly after the ACCC issued proceedings in 2016 and that the proceedings had attracted media attention (which had achieved some of the purposes of corrective orders).

Takeaways for businesses making product claims

In order to minimise the risk of contravening the ACL, businesses should:

- ensure that their product development and marketing review processes encourage careful consideration of the accuracy of any product claims, including claims that may be implied from product packaging;
- ensure that, where products are marketed to a specific group of consumers (eg. toddlers), claims are tested and assessed having regard to any specific guidelines relating to that group of consumers (for example, in this case, the World Health Organisation Guidelines and Heinz's internal guidelines);
- not assume that the presence of nutrients and ingredient information, as required by the Australia New Zealand Food Standards Code, will "cure" any false representations about the "healthiness" or other characteristics of the product. The presence of nutritional information showing that Shredz were two-thirds sugar did not affect the Court's finding that Heinz had contravened the ACL – the Court considered it unlikely that ordinary reasonable consumers would look at the nutrients and ingredients panel when purchasing. This is another reminder that fine print cannot counteract the dominant marketing message; and
- ensure that they have a robust and appropriate consumer law compliance program, which includes regular training about the ACL.

Thanks to Julia Gillies for her help in preparing this article.

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Argentina's Antitrust Authority fines collecting society SADAIC for abusing its dominant position by charging discriminatory and excessive licensing fees to hotels

In a decision released in July 2018, the Secretary of Commerce –following the recommendations of the Argentinean Antitrust Commission (CNDC)- imposed a fine worth AR$42.7 million (approximately US$1.5 million) to the Argentinean Society of Music Authors and Composers (SADAIC) for abusing its dominant position in breach of the Antitrust Law No. 27,442 (the "Antitrust Law") by charging excessive and discriminatory fees to certain hotels for the secondary reproduction of music.

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1. Background of the decision

SADAIC is a collecting society comprising Argentinean music authors and composers, which enjoys a legal monopoly with respect to the collective management and distribution of the revenue stemming from the use of musical works. Although the legislation that created SADAIC provides caps on the fees it can charge to certain users, said legislation fails to regulate the fees that can be charged to hotels, therefore, SADAIC enjoys wide discretion in that respect.

Due to a complaint lodged by the Argentinean Hotel and Gastronomy Business Federation (FEGHRA), an entity gathering hotel and gastronomic businesses in Argentina, the CNDC ascertained that during the investigated period (comprised between April 2009 and October 2014) SADAIC had abused its dominant position by fixing fees which were excessively high for all types of hotels, discriminatory between different hotels, and unreasonable in connection with the reproduction of music in hotels.

2. The abuse of dominance

The CNDC concluded that the fees charged by SADAIC to approximately 4,500 hotels in Argentina implied an abuse of its dominant position since they were: (a) discriminatory as different fees were charged for the provision of exactly the same service without any plausible justification; and (b) excessive, when compared with both the fees charged to hotels in other countries and those charged to hotels by other collecting societies in Argentina.

(a) Discriminatory pricing

The CNDC's investigation concluded that SADAIC established its licensing fees for hotels on a discriminatory basis.
SADAIC entered into preferential agreements with certain hotels or associations of hotels in certain regions of Argentina, in which the occupancy and seasonality factors were taken into consideration to the purpose of setting fees, thus charging these hotels up to 75% less than to those not included in such agreements. Therefore, SADAIC's fee policy was considered to amount to a third degree price discrimination since hotels comprised in the agreements paid a preferential fee whereas hotels not comprised in any agreement paid a general fee that did not consider the seasonality and occupancy factors.

Likewise, the CNDC understood that SADAIC had engaged in first degree price discrimination by fixing its fees in accordance with the economic capacity of the licensees by setting them on the basis of the price of the hotel's end-product (i.e. the room's price). In other words, fees were fixed according to the hotels' presumed income and not their real income. Hence, fees failed to reflect the value of the economic use of the music managed by SADAIC, and the intention was to extract, to the maximum extent possible, the hotels' surplus without regard for the value of the service being provided. In this case, the higher income was obtained from captive licensees, i.e., three, four and five star hotels which are legally required to provide music to guests. All in all, the captive character of certain customers, added to the legal nature of SADAIC's monopoly, clearly created an environment that favored an abuse of dominance.

(b) Excessive pricing

The fees were also deemed abusive by the CNDC since they were excessively high (even in those cases in which a preferential agreement was in place). To that end, the CNDC compared the fees charged by SADAIC to hotels in Argentina with regard to those charged to hotels by music collecting societies in other countries such as Chile, Mexico, Paraguay, Colombia, Venezuela and Spain. The CNDC concluded that SADAIC charged fees which were between 7 and 10 times higher than the fees charged by its peers in other countries.

Likewise, the CNDC compared the fees charged by SADAIC with those charged by other collecting societies of other intellectual property rights entities that operate in Argentina (such as ARGENTORES and AADI). In this respect, the CNDC concluded that SADAIC's fees were, depending on the type of the hotel, between 5 and 25 times higher.

The CNDC considered that the fees set by SADAIC were also unreasonable as they were fixed with regard to the presumed income and not the real income of hotels. As a result, SADAIC's fees resembled a tax. The CNDC therefore established that fees must reflect the economic value of the use that hotels make of the repertoire managed by SADAIC.

3. Recommendation to the Executive Power

The CNDC, which has no powers to either regulate or determine the fees to be charged by SADAIC, recommended the Executive Power to issue a new regulation setting hotel fees on the basis of the following criteria: (i) non-discrimination, entailing that similar fees must be charged for equivalent services so that if preferential or special conditions are offered to a certain group of users, the same conditions must be available for all other users that are in similar conditions; (ii) reasonableness, meaning that fees must reflect the economic use of the repertoire provided by SADAIC; (iii) transparency, meaning that the methodology to determine applicable fees must be simple, clear and accessible for users and should there specific preferential agreements be in place, these must be publicly available; and (iv) limited scope, meaning that fees must solely be collected in relation to the intellectual property rights managed by the collecting society.

4. Damages actions

The fine imposed to SADAIC, like any infringement to the Antitrust Law, shall be collected by the Ministry of Production. Nevertheless, any victim of the infringement (in particular, the hotels affected by the abusive fees) may bring actions seeking compensation of the damages that may have been caused by SADAIC's behavior as provided for in Chapter IX of the Antitrust Law.

The Antitrust Law provides that decisions issued by the National Competition Authority shall have binding or res judicata effects on judges hearing follow-on damages actions. The deadline to initiate follow-on damages actions is two years as from the time the National Competition Authority's infringement decision becomes final.

5. Concluding remarks

The commented decision evidences a renewed CNDC's interest in investigating and sanctioning dominance cases in Argentina (regardless of whether parties, as in the case of SADAIC, have a legal monopoly) and reminds dominant companies of their special responsibility not to restrict competition.

Likewise, the decision in SADAIC can be seen as part of the strengthening process of antitrust policy which has taken place in the recent years in Argentina, resulting, among many other things, in an increased interest of the Antitrust Law's enforcement authority in unilateral conducts of dominant companies.

The decision is available at https://www.argentina.gob.ar/sites/default/files/resolucion_371-2018_0.pdf

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For further information on this topic please contact Julián Peña and Federico Rossi

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Belgian Entities Required to Disclose their UBOs before 30 November 2018

Tuesday, 28 August 2018

Background: implementation of the Fourth and Fifth Anti-Money Laundering Directives

This newsletter gives a brief overview of the practical aspects of a new obligation for Belgian entities to gather information about their ultimate beneficial owners (UBOs) and enter it in a central UBO register.

In its fight against the use of the financial system for the purposes of money laundering or terrorist financing, the European Union has imposed far-reaching measures – including the requirement for EU member states to each establish a central UBO register – by means of the Fourth and Fifth Anti-Money Laundering Directives (Directives 2015/849 and 2018/843). In Belgium, most of the Directive's provisions have been implemented in national law through the Act of 18 September 2017 for the prevention of money laundering and terrorist financing and for the restriction of the use of cash ("the Act"). The Act provides for the establishment of a Belgian UBO register, but does not elaborate on the modalities in this regard.

The Royal Decree of 30 July 2018 on the working modalities of the UBO register (the "Royal Decree") has now finalised the implementation process by providing detailed rules on the operation of the UBO Register. The focus of this newsletter is on entities other than foundations, trusts and Belgian or international non-profit organisations, for which the Royal Decree sets out similar (but not identical) rules.

Who are an entity's UBOs?

Under the Act, the UBOs of an entity consist of the following individuals (natural persons):

(i) the individual(s) who ultimately owns/own or controls/control that entity through direct or indirect ownership of a sufficient percentage of the voting rights or shares or other ownership interest in that entity;

(ii) the individual(s) with control over the entity by other means (such as a shareholders' agreement).

With regard to (i), where an individual holds more than 25% of the voting rights or a shareholding or other ownership interest of more than 25%, this will constitute an indication of direct ownership by that individual. Where the relevant voting rights or shareholding or other ownership interest are/is held by an entity that is under the control of one or more individuals, or by multiple entities that are under the control of the same individual(s), this will constitute an indication of indirect ownership by the individual(s) in question.

(iii) If, after having exhausted all possible means and provided there are no grounds for suspicion, no individual meeting the criteria of points (i) or (ii) is identified or if there is any doubt that the individual(s) identified is/are the beneficial owner(s), the individual(s) who holds/hold the position of senior managing official(s) of the entity will be deemed to be its UBO(s). Where this is the case, records of the steps taken to identify the entity's UBO(s) must be drawn up and kept.

What information must be disclosed?

Article 3 of the Royal Decree sets out fifteen items of information that must be disclosed about each UBO:

1) surname;
2) first name;
3) day of birth;
4) month of birth;
5) year of birth;
6) nationality/nationalities;
7) country of residence;
8) full residential address;
9) the date on which the individual became a UBO of the entity;
10) identification number in the Belgian National Register (or equivalent foreign register);
11) type of UBO according to article 4(27)(2)(a) of the Act;
12) whether the individual is a UBO of the type identified under (11) alone or together with other UBOs;
13) whether the individual is a direct or indirect UBO;
14) in the case of an indirect UBO, detailed information about intermediaries;
15) the size of the total interest in the entity.

What are the modalities and deadlines for compliance with the disclosure obligation?

The UBO register will be maintained by the Federal Public Service for Finance (the General Administration of Treasury).

The entity's directors or legal representatives must enter the requisite information in the UBO register before 30 November 2018 or, in the event of subsequent changes in the composition or details of the UBOs, within a maximum of one month following the change in question. In addition, the UBO information in the register must be confirmed annually. The medium for the disclosure, updating and confirmation of UBO information will probably be the electronic MyMinFin platform, for which a Belgian e-ID is required.

Failure to comply with the disclosure requirements in a timely manner is punishable by a court-imposed fine ranging from EUR 50 to EUR 5,000 (art. 155 of the Act). Furthermore, in some cases the Minister of Finance can impose an administrative penalty ranging from EUR 250 to EUR 50,000 (art. 132(6) of the Act), taking into consideration the circumstances of non-compliance.

Who can access the information?

Everybody will have access to the UBO register. However, the Royal Decree distinguishes three categories of parties with different access rights:

(i) the competent authorities (i.e. those entrusted with enforcement of the anti-money laundering rules, such as the Belgian tax authorities);
(ii) "obliged entities" (i.e. parties that are required to apply the anti-money laundering rules when providing professional services, e.g. banks, lawyers and auditors; these parties are listed in article 5 of the Act);
(iii) members of the general public.

A UBO will not be notified when a search of the UBO register involving his/her information is performed. However, UBOs will (most likely through the MyMinFin application) receive a copy of all information recorded about them in the register.

While the competent authorities and obliged entities will have access to all information, members of the general public will only have access to items 1, 4-7, 9 and 11-15 of the list given above. Obliged entities and members of the general public will have to pay a fee (still to be determined) to access the UBO register.

Some of the technical modalities regarding access to the UBO Register still have to be finalised. However, it is already clear that information requests will be archived for ten years.

In order to safeguard the personal privacy and security of UBOs, two main limitations apply: firstly, it will not be possible to perform a general search to receive a list of all entities of which an individual is a UBO (i.e. searches are only possible per entity using the entity registration number); secondly, a UBO can request that all or part of the information about him/her in the register be kept confidential and not disclosed (e.g. if disclosure would expose the UBO to a disproportionate risk or a risk of being kidnapped, if the UBO is a minor, etc.)

What should entities do now?

Now that it is clear what information must be disclosed, entities are advised to ensure that all the relevant data is gathered and that a legal representative of the entity has her/his e-ID (with pin code) ready. It goes without saying that we will inform you as soon as the UBO register becomes operational or if there are any other relevant developments.

Update regarding the Netherlands

The Implementation act of the Fourth Anti-Money Laundering Directive entered into force in the Netherlands on 25 July 2018, and the amended Money Laundering and Terrorist Financing (Prevention) Act (the Wwft) applies from that date. The Implementation decree Wwft 2018 and the amended Implementing regulation Wwft also came into force on 25 July 2018.

As a result of the adoption of the Fifth Anti-Money Laundering Directive, the legislative process which had been started in the Netherlands for the establishment of the local UBO register has been put on hold. The amended draft bill for the Dutch act on the registration of UBOs of companies and other entities established in the Netherlands is currently expected to be submitted to the Dutch House of Representatives in the beginning of 2019. A separate legislative process will be launched for the introduction of a register containing information on the UBOs of trusts and similar legal constructions.

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Bennett Jones

Equity Claims Relief Granted as Part of CBCA Restructuring

September 07, 2018

Written by Kevin J. Zych, Sean Zweig and Preet K. Bell[1]

On June 26, 2018, Regional Senior Justice Morawetz of the Ontario Superior Court of Justice granted an order approving a plan of arrangement under the *Canada Business Corporations Act* ("CBCA"), in respect of Concordia International Corp. and Concordia Healthcare (Canada) Limited (collectively, "Concordia").[2] The Concordia plan of arrangement, and the order approving it under subsection 192(4) of the CBCA, contained provisions which, in effect, limited recovery on equity claims embodied in class action proceedings which were extant to available insurance proceeds, and released all other equity claims against Concordia. Such provisions, while common in plans of arrangement under the *Companies Creditors' Arrangement Act* ("CCAA"), had not previously been implemented within a CBCA plan of arrangement. The Concordia decision represents an example of the flexible use of the CBCA plan of arrangement provisions to implement balance sheet restructurings that would otherwise need to be implemented under the CCAA with the resultant increase in cost, delay and potential value destruction.

The Company

Concordia, together with its subsidiaries, is an international specialty pharmaceutical company, with sales in more than 90 countries and a diversified portfolio of more than 200 established off-patent products. When it came before the Court for relief, Concordia had an unsustainable capital structure with approximately $4 billion of secured and unsecured outstanding debt obligations and 2017 EBITDA that was 33 percent lower than its 2016 EBITDA. Through the plan of arrangement, Concordia strengthened its financial position by reducing its indebtedness by approximately $2.4 billion, reducing annual cash interest costs by approximately $171 million and improving the company's capital structure and liquidity.

The CBCA Provisions

The CBCA plan of arrangement provisions (section 192) are used to implement complex corporate transactions which are impractical to effect under other provisions of the CBCA. In recent years, section 192 has been increasingly used to implement balance sheet restructurings, as it was used in this case. Procedurally, under the CBCA plan of arrangement provisions, applicants typically first apply for an interim order to permit one or more meetings of creditors and/or shareholders to vote on the plan. If the vote is successful, the company will then apply to court for a final order to approve the plan.

The Preliminary Interim Order

In certain CBCA proceedings, applicants have sought what is referred to as a "preliminary interim order" in advance of the interim order that would normally commence CBCA proceedings. On October 20, 2017, Concordia sought such an order. Typically, at the time of an interim order application, the company would have a proposed plan of arrangement and is seeking to set the wheels in motion for the vote on that plan and other procedural steps. However, when seeking a preliminary interim order, the company may not yet have a fully finalized plan but is generally seeking the imposition of a stay of proceedings so that it can continue to negotiate with stakeholders and work on developing and finalizing a plan of arrangement, without fear of debtholders declaring defaults and taking enforcement steps. In the examples of cases where preliminary interim orders had been made (including the CBCA proceedings of *Essar Algoma, Tervita Corporation* and others), the company generally had a relatively defined framework for a deal with certain of its major stakeholders on the proposed new capital structure. However, that was not the case for Concordia. Concordia had aspirations of reducing its debt by in excess of $2 billion, however, while both of the ad hoc committees of Concordia's secured and unsecured debt securities were supportive of continued negotiations and did not oppose the making of the preliminary interim order, no agreement on the specifics of the new capital structure had been agreed to at the time.

In making the preliminary interim order, Morawetz R.S.J. stated that "where there is an expectation of debt compromise, the parties should not hesitate to incorporate structures or processes that are found in the CCAA and the *Bankruptcy and Insolvency Act*"[3]. While the CBCA plan of arrangement provisions do not expressly contemplate such an order, courts have relied on the broad and discretionary authority granted to them under section 192 of the CBCA to provide such relief.

The test to obtain a preliminary interim order is: (a) whether the basic statutory requirements are met; and (b) whether the application is being brought in good faith.

There are four statutory requirements: (1) the arrangement constitutes an "arrangement" within the meaning of subsection 192(1) of the CBCA; (2) the applicants are not "insolvent" within the meaning of subsection 192(2) of the CBCA; (3) it is not practicable for the applicant to effect a fundamental change in the nature of the arrangement under any other provision of the CBCA; and (4) the applicants have given the CBCA director notice.

Concordia was found to meet all requisite statutory requirements:

1. The arrangement provisions in the CBCA have been applied very broadly to give effect to a number of complex transactions, including balance sheet restructurings as in this case. Morawetz R.S.J. also noted that the proposed Arrangement was to affect the interests of non-CBCA entities that were guarantors of the parent company's debt. These entities were all wholly-owned direct or indirect subsidiaries and would be consenting to the transactions. In approving this feature, His Honour noted and relied upon other cases in which courts have approved arrangements involving non-CBCA corporations.
2. The solvency requirement can be satisfied if only one of the applicants is solvent. One of the Concordia applicants was found to be solvent.

3. The "impracticability" requirement is one of "practicability", not impossibility, and also considers the most efficient means of implementing the transaction. It was found that the contemplated transactions could be accomplished far more efficiently through the plan of arrangement provisions and therefore it was impracticable to use the other provisions of the CBCA.
4. The requisite notice was provided.

Morawetz R.S.J. also found that Concordia was acting in good faith as it was proceeding with the arrangement for a valid business purpose. His Honour granted the preliminary interim order, including the stay of proceedings, finding that it would "assist the Company working to advance and finalize the terms of the Recapitalization Structure and to return to court for an Interim Order and to ultimately seek approval of a proposed Arrangement."[4]

The Equity Claims Relief

When it applied under the CBCA provisions, Concordia was facing certain securities class actions, alleging misrepresentations, brought by its shareholders. As part of the final order approving its plan of arrangement, Concordia sought novel equity claims relief, which included releasing all "equity claims", which was based on the definition in the CCAA (essentially claims and proceedings based on equity interests), and that the class actions shareholders' recovery be limited to available insurance proceeds. Concordia submitted that given its debtholders were not obtaining full recovery on their claims, channeling the class actions claims to the insurance policies preserved value for the plaintiffs and was fair and reasonable. Notice of the requested equity claims relief was provided to shareholders as per the interim order.

Similar equity claims relief has been granted in insolvency proceedings under the CCAA. Concordia submitted that the objectives of CCAA and CBCA plans of arrangement are to ensure the future viability of applicants, and therefore the principles applied by CCAA courts in granting such orders should also apply here. In addition, the CBCA plan of arrangement provisions are broad and provide for a court to make "any interim or final order it thinks fit", allowing for a fair amount of discretion.

In this case, Morawetz R.S.J. granted the relief sought, relying on CCAA precedents, and concluding that the equity claims relief was extensively negotiated, formed an integral part of the plan of arrangement, and was appropriate in the circumstances.[5] Overall, Morawetz R.S.J. found the plan of arrangement to be fair and reasonable.

Conclusion

In his decision, Morawetz R.S.J. quoted from earlier cases "that section 192 of the CBCA is a flexible statutory provision capable of 'incorporating whatever tools and mechanisms of corporate law the ingenuity of their creators bring to the particular problem at hand'."[6] The broad discretion granted to courts within section 192 supports such a statement. CBCA plans of arrangement continue to incorporate novel elements to assist a company with effecting a significant restructuring outside of insolvency statutes. The Concordia plan of arrangement is no exception and could expand the circumstances under which large balance sheet restructurings under the CBCA may be implemented.

[1]Bennett Jones LLP acted as counsel to the ad hoc committee of unsecured debtholders.

[2]Reasons followed on July 19, 2018: 2018 ONSC 4165. The implementation of Concordia's restructuring occurred on September 6, 2018.

[3]2017 ONSC 6357 at para 49.

[4]*Ibid*. at para 50.

[5]2018 ONSC 4165 at paras 50-52.

[6]*Supra* note 2 at para 32.

Posted on: August 23, 2018

ACCIDENTAL UNDERWRITING: INSURERS BOUND BY BROAD COVERAGE PROVISION INCLUDED IN ERROR

By: Nicholas M. Safarik

In the recent Supreme Court of British Columbia decision in *Surespan Structures Ltd. v. Lloyd's Underwriters*, 2018 BCSC 1058, the Court found that a design-build contractor and an architectural and engineering firm were both entitled to coverage under a policy that included a broad provision to insure "any firm(s)" providing "professional services" to a construction project. The decision was made despite the insurer's argument that the broad coverage provision "was included in error and does not reflect the intent of the parties with respect to the scope of coverage provided by the Policy".

The Facts

In 2014, the Vancouver Island Health Authority entered into an agreement with THP Partnership (**"Project Co."**) to design and build two hospitals and parkades in Campbell River and Comox on Vancouver Island (**"the Project"**). Project Co. subcontracted the design-build portion of the Project to Graham Design Builders LP (**"Graham"**).

Graham subcontracted the design-build work for the parkades to Surespan Structures Ltd. (**"Surespan"**), and Surespan, in turn, subcontracted much of the design work for the parkades to HGS Limited (**"HGS"**), an architectural and engineering firm.

In late 2016, cracks said to present an imminent risk were discovered in both parkades. Graham alleged the parkade defects were the result of errors or omissions in the design by Surespan and HGS, and demanded that Surespan repair the alleged defects immediately. In response to correspondence from Surespan and HGS notifying it of the potential loss regarding the parkades and requesting coverage, the insurer denied coverage on the basis that Surespan and HGS were not named in the Policy.

The Dispute

Surespan and HGS filed Petitions seeking declarations that they are "insureds" under the Policy. The Petitions were solely concerned with the issue of whether Surespan and HGS are insureds under the insurance policy; the Court was not asked to determine the issue of coverage generally, or fault for the

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alleged defects in the parkade.

The insurer issued a project professional liability insurance policy for the Project. Under the heading "INSURED(S)", the Policy included a broad provision to insure "any other firm(s) which have or will provide PROFESSIONAL SERVICES in regard to the Project" (**"Clause 3"**). Also included as insureds under the Policy were "any other firm(s) which have or will provide professional services in regard to the Project provided that such additional firms are reported and accepted by the Insurer…" (**"Clause 5"**).

The insurer argued that Clause 3 of the Policy "was included in error and does not reflect the intent of the parties with respect to the scope of coverage provided by the Policy". Interestingly, it did not seek rectification of the Policy to correct the "error", but rather submitted that the Court should simply ignore Clause 3. To explain this "error", the insurer relied on the Affidavit of an insurance broker regarding his negotiations with the representatives of the Project, and asserted that the parties intended Clause 5 to govern the scope of the term "insureds". Since neither Surespan nor HGS had been reported to and accepted by the insurer (as required by Clause 5), it argued they were not insureds and should be excluded from coverage on that basis.

Surespan and HGS primarily argued that they fit under the clear and unambiguous definition of insured set out in Clause 3 and Clause 3 could only reasonably be interpreted in their favor when the Policy was read as a whole.

The Ruling

The Court began its analysis by reviewing the purpose of a project liability insurance policy, which is intended to cover all project participants to ensure that there are funds available to the parties performing the insured services in order to rebuild in case of loss by professional negligence and to avoid litigating amongst themselves, followed by a review of the governing principles of insurance policy interpretation.

In response to the insurer's invitation to review the circumstances surrounding the issuance of the Policy, the Court acknowledged the authorities allow the Court to consider evidence of the commercial purpose of the contract and its aims and objectives, the nature of the industry in which the contract was executed and the parties' objective intentions. However, the Court agreed with the Petitioners' objection to the admissibility of extrinsic evidence regarding negotiations prior to the Policy being issued (in the form of the insurance broker's Affidavit), stating "this evidence does not affect the interpretation of the language of the Policy".

In interpreting the Policy language, the Court determined that:

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- Clause 3 provides coverage for firms that provide professional services, including the design and construction of the parkades;
- The professional services provided by the Petitioners were a component of the services contemplated in the insurance application;
- The language of the Policy generally and Clause 3 specifically was unambiguous, and the Petitioners fell within the definition of insured which did not require that the Petitioners be specifically named in the Policy;
- Clause 3 and Clause 5 could be read “harmoniously”; and
- When read as a whole, the meaning of insured is clear and unambiguous in the circumstances.

In reaching its decision, the Court rejected the insurer’s invitation to simply ignore Clause 3 in the interpretive exercise, which would, in the Court’s view, be tantamount to using the surrounding circumstances to “deviate from the text such that the Court effectively creates a new agreement” and “creating an ambiguity where none exists”.

Practical Considerations for Insurers

The Court’s decision in *Surespan Structures Ltd.* serves as an example of the principle that insurers are bound by clear and unambiguous policy language, despite such language being included in a policy in error. Evidence of an underwriting error will not prevail or even affect the Court’s interpretation of the clear language of the policy.

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August, 2018

PAYMENT CARDS: CENTRAL BANK PUBLISHES, FOR PUBLIC CONSULTATION, AN AMENDMENT TO ITS PAYMENT CARDSOPERATION REGULATIONS

On August 23, the Central Bank of Chile published, for public consultation purposes, a proposed amendment to Chapter III.J.2 of its Financial Regulations Compendium, on Payment Cards Operation, for the general public to make, within a month, comments or observations that may arise from their analysis.

The main amendments included in this proposal are the following:

I. *Review of the definition and requirements of the Brand Holder, for Operation purposes*

To allow for a foreign state, foreign public or private entity or foreign company owned or managed by a foreign state to be a Brand Holder, as long as the sovereign debt of the foreign state has at least a BBB risk qualification, or its equivalent.

To empower the interested Operators upon authorization by the Superintendence of Banks and Financial Institutions ("**SBIF**"), to enter into an agreement with a Brand Holder that does not meet all requirements set in the relevant regulations. The SBIF shall issue general instructions in this regard.

II. *Incorporation of a new Operation method*

The proposal states that the operation of Payment Cards may be provided by an Operator by means of an agreement with another Operator, to the extent that this agreement establishes, at a minimum: **(i)** which party will assume the responsibility for the payment to the affiliated entities, and **(ii)** the necessary measures to assure the settlement and/or full and timely payment of the transactions owed to the affiliated entities.

III. *Extension of the limit for the Operation activities that a Payment Processing Services Provider ("PSP") may perform*

The total of payments that, on an exceptional basis, a PSP is authorized to make to affiliated entities is extended from 0.5% of the total amount of the contracting Operator's annual payments, to 1% of the total amount of all annual payments made on behalf of all Issuers or Operators with whom the PSP has a valid agreement.

The consultation period will be open until September 24, 2018.

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

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August 2, 2018

Capital Markets Law

Analyzing the Measures for Administration of Strategic Investment by Foreign Investors into Listed Companies (Draft for Comment)

Yang CHEN | Zhao ZHANG

On July 30, 2018, the Ministry of Commerce, State-owned Assets Supervision and Administration Commission, China Securities Regulatory Commission, State Administration of Taxation, State Administration for Market Regulation and the State Administration of Foreign Exchange jointly issued the *Measures for Administration of Strategic Investment by Foreign Investors into Listed Companies (Draft for Comment)* ("**Comment Draft**"). The currently effective *Measures for Administration of Strategic Investment by Foreign Investors into Listed Companies*[1] ("**Effective Measures**"), which became effective on January 31, 2006, have only undergone minor non-principled revisions in 2015 and have been unable to meet practice requirements. The management of foreign-invested enterprises has entered a new age of record-filing, particularly since the promulgation in 2016 of the *Interim Measures for Administration of Record-keeping for Establishment and Alteration of Enterprises with Foreign Investment*[2] ("**Interim Measures**"), (for details, see [Foreign investment in A-share Listed Companies: New Record-filing changes]), and the Effective Measures has proven to be quite inconsistent with current foreign investment management practices. In addition, the Effective Measures has increased uncertainty and transaction costs for foreign investors participating in mergers and acquisitions involving A-share listed companies due to strict requirements as to the types of foreign investors, asset holdings, investment shareholding ratios, lock-up periods and so on.

[1] [Measures for Administration of Strategic Investment by Foreign Investors into Listed Companies] (Min. of Commerce et al., Decree [2005] No. 28; promulgated Dec. 31, 2005, effective Jan. 31, 2006) 2006 ST. COUNCIL GAZ. 33 (*revised by* Min. of Commerce, Decree [2015] No. 2; promulgated and effective Oct. 28, 2015).

[2] [Interim Measures for Administration of Record-keeping for Establishment and Alteration of Enterprises with Foreign Investment (2018 Revision)] (Min. of Commerce, Decree [2018] No. 6; promulgated and effective June 30, 2018).

In light of the current background, the Comment Draft makes significant breakthroughs compared to the Effective Measures with respect to approvals and record-filings for foreign investors that invest in A-share listed companies, simplified investment examinations and approvals, foreign investor qualifications and requirements related to strategic investment. The Comment Draft also makes breakthroughs with respect to the issue of cross-border equity swaps when contrasted with the *Provisions on Merging and Acquiring Domestic Enterprises by Foreign Investors*[3] ("**M&A Provisions**").

I. Distinguishing between approval and filing administration in industries based upon whether they involve special administrative measures for foreign investment access

i. Key Revisions

The standard in the Comment Draft bases the distinction between approval and record-filing administration on whether special administrative measures for foreign investment access ("**Negative List**") are involved, which is consistent with the Interim Measures.

ii. Han Kun Comment

Before the issuance of the Comment Draft, a foreign investor's investment in an A-share listed company has been subject to the Effective Measures in cases where the Negative List does not apply to the A-share company's industry, and also record-filing administration in accordance with the Interim Measures. However, the approval system under the Effective Measures and record-filing provisions of the Interim Measures have different regulatory requirements for foreign investors investing in A-share listed companies which increases complexity in practice.

The Comment Draft is consistent with the Interim Measures on the issue of approvals and record-filing administration for foreign investors investing in A-share listed companies. The Comment Draft stipulates that "the record-filing institution shall be responsible for record-filing and administration under the provisions of the [Interim Measures] where strategic investments do not involve national provisions on special administrative measures for foreign investment access … the [Ministry of Commerce] shall be empowered by the State Council to examine, approve and administer strategic investments that involve national provisions on special administrative measures for foreign investment access." As a result, the Comment Draft proposes that Ministry of Commerce approval will only be required where foreign investments are to be made in certain restricted industries under the Negative List.

[3] [Provisions on Merging and Acquiring Domestic Enterprises by Foreign Investors] (Min. of Commerce, Decree [2009] No. 6; promulgated and effective June 22, 2009) 2009 ST. COUNCIL GAZ. 25.

The Comment Draft adopts the same standard for dividing between approval and record-filing administration as the Interim Measures – whether the Negative List is involved. The Comment Draft stipulates that "where a foreign investor holds the shares of a public company and continues to invest through means such as a transfer agreement, the public company's issuance of new shares or a tender offer, when the proportion of the foreign investor's shareholding changes by more than 5% and control or the relative control position has changed, the foreign investor is required to comply with Article 3 of [the Comment Draft] in performing record-filing or approval procedures." **<u>That is, record-filing administration will be adopted where a foreign investor makes an initial investment in an A-share listed company or the foreign investor's shareholding ratio has changed (meeting the stipulated criteria), as long as the Negative List does not apply.</u>**

- **Legal Provisions**

Measures for Administration of Strategic Investment by Foreign Investors into Listed Companies (Draft for Comment)

Article 3: "the record-filing institution shall be responsible for record-filing and administration under the provisions of the [Interim Measures] where strategic investments do not involve national provisions on special administrative measures for foreign investment access.

The Ministry of Commerce or the competent Ministry of Commerce authority of the province, autonomous region, municipality directly under the central government, designated municipality and the Xinjiang Production and Construction Corps (hereafter the "**provincial-level MOFCOM authorities**") shall be empowered by the State Council to examine, approve and administer strategic investments that involve national provisions on special administrative measures for foreign investment access. The provincial-level MOFCOM authorities shall be responsible for the approval and administration of those strategic investments under the threshold amount.

In the case of strategic investments made through transfers by agreement, new listed company share issuances, the above threshold amount shall be calculated according to the purchase amount stipulated in the share issuance or share transfer agreement; for investments through acquisition, the highest amount possible through the offer shall be calculated. Where a strategic investment is made through multiple of the foregoing investment methods concurrently, the amounts shall be aggregated."

Article 15 "where a foreign investor holds the shares of a public company and continues to invest through means such as a transfer by agreement, the public company's issuance of new shares or a tender offer, when the proportion of the foreign investor's shareholding changes by more than 5% and control or the relative control position has changed, the foreign investor is required to comply with Article 3 of these Measures in performing record-filing or approval procedures."

II. Loosening of cross-border equity swap restrictions

i. Key Revisions

The Comment Draft broadens the scope of offshore enterprises in cross-border equity swaps and embodies the policy of encouraging cross-border equity swaps.

ii. Han Kun Comment

Cross-border equity swaps are currently regulated under the M&A Provisions. According to the M&A Provisions, when a foreign investor acquires a domestic company with equity of a foreign company as consideration (a "**cross-border swap**"), the requirements for the foreign equity to be used as payment consideration are: (1) the equity of the offshore company is listed on a public and legitimate offshore securities exchange market (excluding over-the-counter markets); or (2) the equity is of a "special-purpose company" (which refers to offshore companies directly or indirectly controlled by a domestic company or natural person for the purpose of listing an owned domestic company offshore). The equity of an overseas company that does not meet the above requirements generally cannot be used as a consideration for foreign investors to subscribe for shares of domestic listed companies.

To a certain extent, these restrictions limit the use of offshore equity as payment consideration for A-share listed companies engaging in overseas mergers and acquisitions, thus there have been very few cases in practice where the Ministry of Commerce has approved cross-border swaps.

The Comment Draft loosens the above restrictions on offshore companies by requiring only that the companies be lawfully established, that the companies and their management have not been subject to major penalties imposed by regulatory authorities in the last three years, and that the foreign investors legally hold shares in the foreign companies and that those shares are legally transferrable.

- **Legal Provisions**

Measures for Administration of Strategic Investment by Foreign Investors into Listed Companies (Draft for Comment)

Article 6 "Where a foreign investor makes a strategic investment in a listed company with the equity of a foreign company he holds or with the issuance of additional shares as a mean of payment, the following conditions shall also be met:

There is a sound legal system in the foreign country where the company is lawfully established and registered, and the foreign company and its management have not been subject to major penalties imposed by regulatory authorities in the last three years;

The foreign investor lawfully holds shares in the offshore company which are transferrable in accordance with law;

Compliance with the relevant provisions of the China Securities Regulatory Commission.

III. Adjusting foreign investor entity qualification requirements

i. Key Revisions

1. The Effective Measures requires foreign investors to have capital of no less than USD 100 million or to manage offshore assets of no less than USD 500 million. For foreign investors that do not acquire control of the listed company, the Comment Draft relaxes the total capital requirement to no less than USD 50 million or to manage total assets of no less than USD 300 million. The Comment Draft does not change the asset requirements for foreign investors that become controlling shareholders of listed companies.

2. The Comment Draft clarifies that foreign natural persons can participate as foreign investors in strategic investments in listed companies.

ii. Han Kun Comment

According to provisions of the Effective Measures, foreign investors are "foreign legal persons and other organizations established and operated in accordance with law," which precludes strategic investments by foreign natural persons. The Comment Draft clarifies that foreign natural persons may make strategic investments, and provides certain requirements for foreign natural persons. It should be noted that the Comment Draft will not apply to the acquisition of listed company shares by foreign natural persons as equity incentives, which will be regulated by the *Measures for Administration of Equity Incentives of Listed Companies*[4] that do not require Ministry of Commerce approval or record-filing, although the disclosure obligations should be fulfilled.

In some respects, the Comment Draft relaxes the qualifications for foreign investors, such as by allowing foreign natural persons to be foreign strategic investors, and by reducing the asset requirements of foreign investors in the event that they do not acquire control of a listed company.

However, the Comment Draft may introduce more stringent requirements for foreign investors that invest in A-share listed companies.

According to Article 2 of the Comment Draft, strategic investment means "the act of a foreign investor acquiring and holding shares of an A-share listed company for a certain term through means such as transfer by agreement, the public company's issuance of new shares (including non-public capital raising share issuances and share issuances for the purchase of assets), tender offer and other means stipulated by national laws and

[4] [Measures for Administration of Equity Incentives of Listed Companies] (China Sec. Reg. Comm., Decree No. 126; promulgated July 13, 2016, effective Aug. 13, 2016) 2016 ST. COUNCIL GAZ. 33.

regulations." Foreign investors of the strategic investment should comply with requirements under Article 5 of the Comment Draft, stipulating that the total assets of foreign investors or of the foreign investor's actual controller shall be no less than USD 50 million or the total assets managed shall not be less than USD 300 million. In the case of foreign investors that become controlling shareholders of a listed company, the total assets of foreign investors or of the foreign investor's actual controller shall be no less than USD 100 million or the actual assets managed shall be no less than USD 500 million.

Based on the articles of the Comment Draft, foreign investors will need to fulfill the above-mentioned asset requirements if they are to acquire and hold shares of A-share listed companies for a certain period of time by means of transfer by agreement, share issuance or tender offer, even if the foreign investor is managed under the record-filing system.

We expect to see a clear answer to this issue when the new *Measures for Administration of* Strategic *Investment by Foreign Investors into Listed Companies* is formally promulgated.

- **Legal Provisions**

Measures for Administration of Strategic Investment by Foreign Investors into Listed Companies (Draft for Comment)

Article 2 "These Measures apply to the act of a foreign investor acquiring and holding shares of an A-share listed company for a certain term through means such as transfer by agreement, the public company's issuance of new shares (including non-public capital raising share issuances and share issuances for the purchase of assets), tender offer and other means stipulated by national laws and regulations (hereafter "strategic investment").

Article 5 Foreign investors shall fulfill the following requirements:

Foreign companies, enterprises or other economic organizations shall be established and operated in accordance with law, with sound financial stability, good credit standing and mature management experience, sound governance structures, good internal control systems and norms of business conduct; foreign natural persons shall have the appropriate capacity to identify and bear risk;

The total assets of foreign investors shall be no less than USD 50 million or the total assets managed shall not be less than USD 300 million; or the assets of the assets of the foreign investor's actual controller shall be no less than USD 50 million or assets managed shall be no less than USD 300 million;

In the case of foreign investors that become controlling shareholders of a listed company, the total assets shall be no less than USD 100 million or the actual assets managed shall be no less than USD 500 million; or the assets of the assets of the foreign investor's actual controller shall be no less than USD 100 million or assets managed shall be no less than USD 500 million;

Foreign investors and their actual controllers have not been severely punished by domestic or offshore regulatory agencies within the past three years; those with fewer than three years since establishment shall be accounted for as of the date of establishment; foreign investors who are foreign natural persons shall also provide records proving no criminal conduct within the past three years.

IV. Modifying requirements related to strategic investment

i. Key Revisions

1. **Adjusts the sale lock-up period from three years to twelve months;**
2. **Cancels the requirement that foreign investors' strategic investments in A-share listed companies can be no less than 10%;**
3. **Allows foreign investors to acquire listed companies through tender offer.**

ii. Han Kun Comment

The Effective Measures stipulates that foreign investors that strategically invest to acquire shares of A-share listed companies shall not transfer those shares for a period of three years; the Comment Draft shortens this sales restriction period to twelve months. In practice, many foreign investors have avoided the three-year sales limit by arguing that their investments did not constitute "strategic investment."

According to the Effective Measures, the shareholding ratio of the foreign investor upon completing an investment may be no less than 10% of the outstanding shares of the issuing company. In practice, many transactions result in the foreign investor acquiring less than 10% of the shares of the A-share listed company, which is not considered to constitute a strategic investment and does not require Ministry of Commerce review and approval. One such example is the issuance of shares by Harbin Gong Da High-Tech Enterprise Development Co., Ltd. (SH 600701) to acquire 100% of the shares of Opzoon Technology and to raise matching funds. The Comment Draft adjusts this provision by making the sole criterion whether approval by the competent department of the Ministry of Commerce is required to be whether the Negative List applies to the transaction. Thus, approval by the competent Ministry of Commerce department will be required for A-share listed companies in industries subject to the Negative List, even if the foreign investor acquires less than 10% of the company's shares following completion of the transaction. From this perspective, the Comment Draft is more explicit and is also stricter with regards to strategic investments that need to be submitted to the competent Ministry of Commerce department for approval.

➢ **Legal Provisions**

Measures for Administration of Strategic Investment by Foreign Investors into Listed Companies (Draft for Comment)

Article 7 "Shares of A-share listed companies acquired by foreign investors through strategic investment shall not be transferred within twelve months. Where there are other provisions of the Securities Law, the China Securities Regulatory Commission and securities exchanges concerning the period of limitation for the sale of shares, such provisions shall prevail."

V. Simplifying approval procedures

i. Key Revisions

The Comment Draft simplifies approval procedures.

ii. Han Kun Comment

The Effective Measures requires foreign investors that make strategic investments to report to the Ministry of Commerce for review and approval, **while the Comment Draft delegates part of the approval authority to the provincial-level Ministry of Commerce departments.**

According to the Effective Measures, strategic investments should in principle first be submitted to the Ministry of Commerce for approval, undergo foreign exchange and securities registration, and then obtain a foreign-invested enterprise approval certificate from the Ministry of Commerce after completing the strategic investment, and apply for SAIC registration with the approval certificate. **Based on the Comment Draft, foreign exchange registration, securities registration and SAIC registration are no longer linked with Ministry of Commerce approval, and it is only necessary to comply with foreign exchange, securities, industry and commerce-related laws and regulations, thus making the examination and approval process more flexible and convenient.**

- **Legal Provisions**

Measures for Administration of Strategic Investment by Foreign Investors into Listed Companies (Draft for Comment)

Article 3. "The record-filing institution shall be responsible for record-filing and administration under the provisions of the [Interim Measures] where strategic investments do not involve national provisions on special administrative measures for foreign investment access.

The Ministry of Commerce or the competent Ministry of Commerce authority of the province, autonomous region, municipality directly under the central government, designated municipality and the Xinjiang Production and Construction Corps (hereafter the "**provincial-level MOFCOM authorities**") shall be empowered by the State Council to examine, approve and administer strategic investments that involve national provisions on special administrative measures for foreign investment access. The provincial-level MOFCOM authorities shall be responsible for the approval and administration of those strategic investments under the threshold amount.

In the case of strategic investments made through transfers by agreement, new listed company share issuances, the above threshold amount shall be calculated according to the purchase amount stipulated in the share issuance or share transfer by agreement; for investments through acquisition, the highest amount possible through the offer shall be calculated. Where a strategic investment is made through multiple of the foregoing investment methods concurrently, the amounts shall be aggregated."

Article 10, paragraph 2. After a reply in principle has been given by the competent commerce department and completion of the issuance, the listed company shall apply to the competent Ministry of Commerce department for the foreign-invested enterprise approval certificate.

Article 11, paragraph 2. After the competent commerce department gives an approval in principle to the undertaking of the strategic investment by the foreign investor, the foreign investor shall undertake the formalities for transfer by agreement in accordance with the relevant provisions; after the transfer by agreement is completed, the listed company shall apply to the competent commerce department for a foreign-invested enterprise approval certificate.

Article 12, paragraph 2. After the competent commerce department gives an approval in principle to the undertaking of the strategic investment by the foreign investor, the foreign investor shall undertake the formalities for the tender offer purchase in accordance with the relevant provisions; after the completion of the tender offer, the listed company shall apply to the competent commerce department for a foreign-invested enterprise approval certificate.

Article 18. "Where a strategic investment involves national provisions on special administrative measures for foreign investment access, the foreign investor shall, after obtaining approval in principle from the competent commerce department, apply to open a foreign exchange expense account in accordance with the relevant foreign exchange administrative provisions, and handle procedures for the settlement and cancellation of accounts in accordance with the relevant foreign exchange provisions. The foreign investor shall complete the investment within 180 days of the approval in principle.

Where the foreign investor fails to complete the strategic investment in accordance with the investment plan within the prescribed time, the approval in principle of the competent commerce department shall automatically become invalid. Foreign investors shall handle the remittance procedures for foreign exchange purchases in accordance with the relevant foreign exchange provisions."

Article 19. “Foreign investors that undertake strategic investments that involve foreign exchange administration matters shall handle the formalities such as registration and cancellation, account opening and cancellation, foreign exchange settlement and cross-border receipts and remittances in accordance with the relevant foreign exchange provisions. Strategic investments that involve matters related to securities registration and settlement shall be handled in accordance with the relevant provisions on securities registration and settlement.”

Article 24. “Where the foreign investor’s strategic investment in a listed company involves changes to the registered items of the listed company, the listed company shall apply to the administration for market regulation department for registration in accordance with law.”

The quoted legal provisions cited in this article are unofficial translations and are to be considered for reference purposes only.

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If you have any questions regarding this publication or wish to request a free English translation of the *Interim Provisions on the Use of Hong Kong Institution Securities Investment Consulting Services by Institutions Engaged in Securities or Funds Business*, please contact **Ms. Yang CHEN (8610-8525 5554;yang.chen@hankunlaw.com).**

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PUBLICATION OF THE TECHNICAL GUIDE TO IMPLEMENT REMOTE WORK IN COMPANIES

By Graciela Soto and Javier Guerrero

> **The techonological advances allows companies to adopt new work modalities.**

On July 19th, 2018, the High Council of Labor conformed by the Government, private sector and trade union unanimously approved the, the purpose of the guide is to serve as a general technical reference framework to guide the implementation of remote working in private companies, as demanded by current labor law regulations. The technological advances we have every day allows companies to adopt new work modalities, such as Remote Work, which is to give the opportunity to employees to perform their daily tasks outside the physical facilities of the organization using technological means to carry out their projects and fulfill their obligations to the company; that is why companies must prepare their business model and their employees in order to maintain productivity and comply with labor standards.

Although, this Guide is not binding to private sector companies, it also offers a basic conceptual framework and application for this type of contractual agreement as an alternative to increase the employee's productivity in specific situations and maintain their lifestyle.

The Guide was presented on July 30th by the Ministry of Labor and Social Security and it is available on its website. Currently other bills have been introduced in relation to this topic within the Congress.

Do not hesitate to contact us if you need more information of this subject.

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Make the European Union "the global leader in the field of DLT"

4 October 2018

Blockchain is a central topic for European institutions. The vote of 3 October 2018 for a new resolution by the European Parliament on Distributed Ledger Technology (DLT) means Europe is stepping up the progress of community regulation in the field. In this context, and considering the deriving competitiveness challenges, the digital industry must seize this opportunity to fully contribute to the technical and legal changes driven by the EU institutions that will regulate and secure "on-chain" activities appropriately.

During its plenary meeting of 3 October 2018, the European Parliament voted in favour of a resolution entitled "European Parliament resolution on distributed ledger technologies and blockchains: building trust with disintermediation", presented by the committee in charge of industry, research and energy (ITRE).

This resolution follows on from the debate organised during the plenary session of 1 October 2018 on a question sent in by the ITRE committee to the European Commission on 31 August 2018[1]. Andrus Ansip, Estonian commissioner in charge of the single digital market, responded in-session to the questions put to him by MEPs[2], specifying that the European Commission was still working on the topic and that it covered the challenges of legal protection and competitiveness related to the use of DLT. For their part, the MEPs insisted on the need to guarantee the principle of technological neutrality, and to ensure the definition of rules guaranteeing the implementation, within the Union, of fair competition between the sector's main players.

Acting as a strong signal to ensure the European Parliament plays a key role in creating an appropriate regulatory framework on DLT, this resolution offers a balanced analysis of what this technology can contribute and the related regulatory challenges.

The contributions of DLT: reducing intermediation costs and trust driver

Borne by Eva Kaili[3], this resolution highlights the various usages and contributions of DLT in the fields of finance (improving transparency, reducing transaction costs, rationalisation of processes), energy (e.g. for the production, distribution and consumption of energy), healthcare (e.g. for the traceability and distribution of drugs or for the management of healthcare data and its use by insurance companies), education (e.g. to authenticate university qualifications or manage credits), and creative industries (e.g. for the management of copyright or patents).

The resolution highlights that the usage of DLT also increases efficiency in the public sector (e.g. digitalisation and decentralised management of public ledgers, land registry, licensing and citizen certification, etc.).

As regards financing, the resolution highlights the opportunities that may also be offered by Initial Coin Offerings (also known as ICOs) as alternative and complementary financing opportunities alongside traditional financing methods. In this regard, the text of the European Parliament stresses that "lack of clarity with regard to the legal framework applicable to ICOs can negatively affect their potential; [and] that legal certainty can be instrumental in increasing investor and consumer protection [...]".

Although blockchain technology can help reduce the costs of intermediation, increase transparency and ensure the traceability of transactions, it also poses a certain number of structuring regulatory questions.

"Right to oblivion", jurisdictional powers: how to ensure compliance with EU rules?

The resolution prepared by the ITRE committee highlights several issues pertaining to DLTs, in particular as regards the protection of personal data4. For instance, how can we ensure the "right to oblivion" in a mechanism whose constitutive parts rely on the irreversibility and immutability of data in a blockchain? The European Parliament's resolution also raises issues of legal territoriality and jurisdictional powers in the context of decentralised technology.

A call for a balanced regulatory approach to make the European Union a leader of DLT

The European Parliament's position is part of a broader regulatory consideration about regulating distributed ledgers, initiated by the European Commission with, in particular, the implementation in February 2018 of the EU Blockchain Observatory and Forum, and the publication in March 2018 of an action plan for FinTechs and the creation of the EU FinTech Lab5.

The resolution stresses that "any regulatory approach toward DLT should be innovation-friendly [and] be guided by the principles of technology neutrality and business-model neutrality". The regulatory challenge is therefore threefold: it is important to create a securing regulatory environment for European "users", which must be neither an obstacle to innovation, nor a hindrance to the development of the single market, in particular as regards financing.

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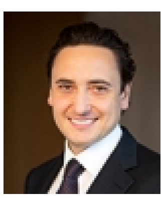

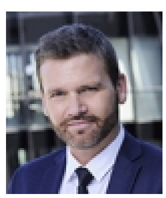

Stéphane Puel **Jennifer D'hoir** **Franck Guiader**

The regulatory response must therefore necessarily be innovative and completely new as regards the specificities and potential of blockchain technology. It must also concentrate on framing the concrete usages of DLTs, rather than on regulating the underlying technology that is inherently changing and forces creativity as regards legal standardisation. The regulatory dynamic in which the European institutions are now involved must increasingly draw on technical and legal expertise to reach a suitable, securing and growth-boosting framework for the single market. Consequently, it is of primary importance for industry players to get involved in these debates and this is precisely the reason why Gide 255 has developed its new offer.

Gide 255 supports its clients in their regulatory review and strategic initiatives in the digital field. Drawing on its multidisciplinary experience, the Gide 255 team works with its clients on the legal structuring of their activities and the changing rules that will apply to this booming economic sector. To find out more: **gide255.com**

1 Questions for oral answer to the Commission. Eva Kaili, on behalf of the Committee on Industry, Research and Energy. 31 August 2018. "1. How is the Commission planning to provide the environment of legal certainty that is needed to boost DLTs and blockchains in Europe? " and "2. What initiatives will the Commission undertake to create a competitive blockchain ecosystem in the EU?"

2 Members of the European Parliament (MEP).

3 Greek parliamentary, member of the S&D group.

4 EU regulation 2016/679, or GDPR (General Data Protection Regulation).

5 The EU FinTech Lab was put in place following the European Commission's publication of its FinTech action plan in March 2018. This initiative aims to bring together European providers of DLT technologies, as well as regulators/supervisors in order to better grasp the regulatory challenges related to this technological development. The EU FinTech Lab met for the first time on 20 June 2018 under the aegis of DG CONNECT (Directorate- General for Communications Networks, Content and Technology) and DG FISMA (Directorate-General for Financial Stability, Financial Services and Capital Markets Union).

Summary of principles from recent NEC cases

September 2018

Hogan Lovells

Summary of principles from recent NEC cases

As a market leading construction team with extensive experience in the NEC suite, Hogan Lovells has prepared a summary of principles from recent case law on NEC that may impact upon the construction industry. We hope that you will find it useful.

Arcadis UK Ltd v May and Baker Ltd (t/a Sanofi) [2013] EWHC 87 (TCC)

NEC3 Engineering and Construction Contract

Where two adjudications between the same parties were on very similar issues, the second adjudicator can have regard to the first adjudicator's decision.

J Murphy & Sons Ltd v W Maher and Sons Ltd [2016] EWHC 1148 (TCC)

NEC3 Engineering and Construction Contract

The words "any dispute arising under or in connection with this subcontract" (in Option W2 of the NEC3 Conditions) are broad enough to cover a dispute arising under the alleged settlement agreement.

Fiona Trust[1] principles applied, meaning that even when parties to a construction contract had reached a full and final settlement in relation to the final account, these disputes could be referred to adjudication.

Universal Piling & Construction Ltd v VG Clements Ltd [2016] EWHC 3321 (TCC)

NEC3 Engineering and Construction Short Contract

Under Clause 50, which incorporated the NEC short form contract NEC3 ECSC, when read with clause 10.1, the sub-contractor has the obligation to make payment applications, but such applications or their assessments are not conclusive as to the value of the work carried out.

Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd [2010] EWHC 1529 (TCC)

NEC2 Engineering and Construction Contract

Clause 93.1 of an NEC2 ECC, which provided for mandatory adjudication before referral for arbitration, did not fetter the right to refer the dispute to adjudication at any time but did fetter the right to commence arbitration at any time.

SGL Carbon Fibres Ltd v RBG Ltd [2012] ScotCS CSOH 19

NEC3 Engineering and Construction Contract

The onus of proof lay on the employers to a building contract in an arbitration when the employer was seeking to recover alleged overpayments made under an NEC3 ECC.

RWE Npower Renewables Ltd v J N Bentley Ltd [2013] EWHC 978 (TCC)

NEC3 Engineering and Construction Contract

Courts will look at the whole contract and its documents to determine objectively what a reasonable person with all the background knowledge reasonably available to the parties at the time of the contract would have understood the parties to have meant. A more commercial construction should be adopted.

Mears Ltd v Shoreline Housing Partnership Ltd [2015] EWHC 1396 (TCC)

NEC3 Term Service Contract, Option C

An employer was estopped by convention or representation from recouping alleged overpayments under an NEC3 TSC, Option C (target contract with price list).

[1] *Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, [2007] 4 All E.R. 951.*

SSE Generation Ltd v Hochtief Solutions AG and another [2015] CSOH 92

NEC2 Engineering and Construction Contract

A provision for joint names construction all risks (CAR) insurance does not displace the parties' liability under an NEC2 ECC.

Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319 (TCC)

NEC3 Framework Contract, NEC3 Supply Short Contract

The term of mutual trust and co-operation suggests that, whilst the parties can maintain their legitimate commercial interests, they must behave so that their words and deeds are “honest, fair and reasonable, and not attempts to improperly exploit” the other party. This obligation would go further than the negative obligation not to do or say anything that might mislead and would extend to a positive obligation on the part of a party to correct a false assumption obviously being made by the other.

Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd [2017] NIQB 43

NEC3 Professional Services Contract

The assessment of the effect of the compensation event should be calculated by reference to the actual cost incurred by the consultant rather than its forecast cost.

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2017] EWHC 1763 (TCC)

NEC3 Engineering and Construction Contract

Termination under the contractual provisions of NEC3 ECC did not have the same effect as acceptance of a repudiatory breach.

Where the parties contracted on the basis that the project manager would be independent from the parties, replacing the project manager with an employee of the employer’s parent company was invalid.

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC)

NEC3 Engineering and Construction Contract

The project manager's assessments of compensation events under the NEC3 ECC can be reviewed. The court was not bound by earlier assessments, although the basis upon which those assessments were made carry "powerful evidential weight."

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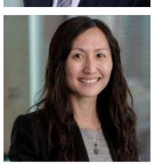

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DUTIES OF COUNCIL MEMBERS OF A MANAGEMENT CORPORATION

Oon Hooi Lin and Melody Ngai discuss a noteworthy case on stratified developments

In the case of *3 Two Square Sdn Bhd v Perbadanan Pengurusan 3 Two Square & Ors; Yong Shang Ming (Third Party)* [2018] 4 CLJ 458, the High Court had the opportunity to consider the duties of council members of a management corporation of a stratified development.

BACKGROUND FACTS

The plaintiff, 3 Two Square Sdn Bhd, was the developer of a commercial development called 3TwoSquare ("the Development"). The first defendant was the management corporation of the Development ("Management Corporation"), established pursuant to the Strata Titles Act 1985 ("STA") and the second to ninth defendants were council members of the Management Corporation.

The Development comprised six blocks of shop and office lots. The plaintiff remained the proprietor of all the parcels in one of the six blocks ("Crest Tower"), while the remaining parcels in the Development had been sold.

Disputes arose as to the party who was responsible for the maintenance of certain areas and facilities within the Development, including the cooling tower located on the roof of Crest Tower and the toilets and lifts located in Crest Tower ("Disputed Facilities"). The plaintiff contended that the responsibility for such maintenance lay with the Management Corporation as the Disputed Facilities formed part of the common property of the Development. The plaintiff also sought to make the second to ninth defendants personally liable for what it alleged was a breach of a statutory duty by the Management Corporation, and for breach of fiduciary duties owed by the council members to the plaintiff.

The first to eighth defendants contended that the Disputed Facilities did not form part of the common property of the Development whilst the ninth defendant denied liability on grounds that he had not been involved in the decisions by the Management Corporation.

DUTIES OF COUNCIL MEMBERS

The Court held that the Disputed Facilities formed part of the common property and that the Management Corporation was responsible to maintain and upkeep such facilities. In order to determine whether the second to ninth defendants owed a duty to the plaintiff under statute, the Court had to first consider the nature and extent of fiduciary duties imposed on council members of a management corporation.

Due to the absence of legal precedent in Malaysia on the aforesaid point, counsel for the plaintiff referred to the legal position in several other jurisdictions where the fiduciary duty of the office bearers in a corporation that manages stratified property has been considered.

New South Wales, Australia

It has been held that the duties owed by an executive committee of an owners corporation to that corporation are not identical to those owed by directors to their company by reason that the executive committee and the owners corporation have corresponding decision-making powers, that is to say, the powers that may be exercised by one may also be exercised by the other (except for powers which are expressly reserved by statute to an owners corporation)(*2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No. 73943* [2014] NSWCA 409). It has also been suggested that while council members are at least in a position analogous to company directors, they may even have a higher fiduciary duty (*Re Steel Corporation and the Conveyancing (Strata Titles) Act* (1968) 88 WN Pt. 1 NSW 467).

Sri Lanka

The legal position is as follows – (i) the council of a management corporation is similar to a board of directors and functions in a fiduciary capacity; (ii) in fulfilling its fiduciary duties, a council owes the management corporation a duty of loyalty to avoid conflicts of interest and a duty of care to perform his duties in good faith, in the best interest of the management corporation and with such care as an ordinary person in a like position would use ("business judgment rule"); and (iii) the business judgment rule will protect council members if they have acted in 'good faith' in the given circumstances and believed that the decision was in the best interest of the condominium owners and the management corporation, as a whole (*Understanding the Concept of Condominiums: A Handbook on the Law and Practice based on Apartment Ownership Law of Sri Lanka"*; *Ajithaa Edirimane*).

Ontario, Canada

It has been held that the board of a condominium corporation is entitled to the benefit of the business judgment rule, in the same way that directors of for-profit corporations may not be held liable for decisions that were fairly and reasonably made, even if the decision turned out to be wrong with the benefit of hindsight (*Canada Inc v Carleton Condominium Corporation No. 375* 2016 ONCA 650).

After considering the authorities submitted by the plaintiff's counsel, the Judge cautioned that authorities from other jurisdictions are at best only of persuasive value, and that the legal position in Malaysia must take into account local circumstances and be consonant with the context of local legislation.

The Court noted that section 43(1) of the STA, *inter alia*, requires the management corporation to maintain the common property in good and serviceable repair whilst section 34(1)(b) confers the right of user on every proprietor in relation to the common property "*which he would have if he and the other proprietors were co-proprietors*" of such property. According to the Judge, when these provisions are read together, the duty of the management corporation under section 43(1) is owed to all proprietors collectively.

The Judge opined that the duty of a council member is not co-extensive as the duty that is owed by a director to the company of which he is a director. A council member should not be held to the same high standard of care as would be owed by a professional director in a company for the following reasons:

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(a) a management corporation established pursuant to the STA differs from a company incorporated under the Companies Act 2016: the former exists simply as a repository of rights that are common to all the proprietors in a development whereas the latter is formed for the purposes of pursuing a particular venture or economic activity;

(b) council members are elected from a much smaller pool of candidates, i.e. proprietors of the parcels in a particular development whereas a for-profit company may select and appoint its directors based on their skill and experience; and

(c) the requirement under the STA that a council member must be a proprietor of a parcel in the development means that a council member would always have a personal interest to advance as he must necessarily be a proprietor.

His Lordship then set out the applicable principles, which may be summarised as follows:

(1) A council member of a management corporation owes a fiduciary duty to act *bona fide* in the interests of the management corporation;

(2) The duty is owed to the management corporation and to the proprietors as a whole but not to individual proprietors;

(3) The nature of the fiduciary duty includes:

    (a) a duty to exercise due care and skill, having regard to the skill and experience of the council member in question; and

    (b) a duty of fidelity or loyalty that requires the council member (i) not to exercise a delegated power to advance a personal interest to the detriment of the management corporation or the proprietors as a whole; and (ii) to disclose any personal interest that he may have in any transaction or undertaking proposed to be carried out by the management corporation;

(4) Once the interest is disclosed, a council member is at liberty to exercise his right to vote in any way he deems fit at any council meeting or general meeting of the management corporation, including advancing a personal interest that he may have in his capacity as a proprietor, and to suborn the interest of the collective to his personal interests.

In light of the Judge's view that council members owe a fiduciary duty to the management corporation and to the proprietors as a whole but not to individual proprietors, His Lordship held that the plaintiff's claim against the second to ninth defendants for breach of fiduciary duty failed on a point of law. The Court was also satisfied that there was insufficient evidence to show that the council members had acted otherwise than in good faith and in what they considered to be in the best interests of the proprietors as a whole. Consequent thereto, the plaintiff's claim to make the council members personally liable for the breach by the management corporation of its statutory duty was dismissed by the Court.

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CONCLUSION

This decision is noteworthy as it is the first reported decision in Malaysia which considers and sets out the nature and extent of the duties of the council members of a management corporation of a stratified development.

As the plaintiff's action was commenced before the Strata Management Act 2013 ("SMA") came into force, the provisions of the SMA did not apply to this case and were not considered by the Court (except in relation to the issue of costs). It is submitted that the duties of council members of a management corporation expounded by the learned Judge in this case would be applicable under the regime of the SMA.

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Simpson Grierson

Amended Consumers' Right to Know (Country of Origin of Food) Bill released

September 07, 2018

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New Zealand Parliament's Primary Production Committee (Committee) has recommended amendments to the Consumers' Right to Know (Country of Origin of Food) Bill (Bill) after reviewing hundreds of submissions from stakeholders and the public. See our earlier note here (https://www.simpsongrierson.com/articles/2018/submissions-for-consumers-right-to-know-country-or-origin-of-food-bill)**.**

The Original Bill

The Bill in its original form had proposed that consumers must be provided with information about the country of origin of all single ingredient foods, to enable consumers to make informed purchasing decisions. These requirements would have applied to food that contained only one type of vegetable, fruit, meat, seafood, nut, grain, seed or oil, and the information would have to be on display at point of sale.

The Committee has opted for a simple, mandatory system and has recommended that labelling now be limited to only single types of fruit, vegetables, meat, fish or seafood, which have been minimally processed. This means that the requirements would not apply to foods such as nuts, seeds and grains, tinned fruit and vegetables, mixed frozen vegetables, crumbed fish fillets, dried fruit, marinated and cured meats (other than cured pork products).

The Committee's amendment

The Committee has recommended that the majority of the Bill's provisions be deleted, and has instead proposed that the Minister of Commerce and Consumer Affairs (the Minister), recommend regulations be made under section 27 of the Fair Trading Act (FTA), which provides for consumer information standards to be prescribed. The regulations will prescribe a consumer information standard that will contain the specific details of the country/place of origin requirements, instead of the information being contained in a permanent standalone Act.

The Committee's amendments also provide more flexibility for compliance with the new requirements of the Bill. For example, the reference to "labelling" in clause 3 of the Bill has been removed so that origin information can be provided on either labels or signage associated with the sale of the foods.

The Committee also proposes that clause 5 of the original Bill, which sets out the principles that apply to decisions made and actions taken under the Act, be replaced with the requirements for the new consumer information standard. The main proposed amendments to clause 5 include the following:

- Clause 5(1) would require the Minister to recommend regulations under section 27 of the FTA prescribing a consumer information standard for disclosing a food's country or place of origin;

- Clause 5(2) would require that the Minister is satisfied that the consumer information standard will:

- require that a food's country or place of origin is disclosed by reference to where it was grown, caught, or raised (not merely where it was packaged or manufactured);
  - commence 6 months after the date of notification in the Gazette (for fresh foods); and
  - not apply to frozen foods until 18 months after the commencement of the consumer information standard.

  The recommended commencement timeframe allows for frozen foods that have a longer shelf life than fresh foods to transition to the new rules.

- Clause 5(3) would specify the foods to which the regulations apply, namely:
  - one type of fresh or frozen, minimally processed fruit, vegetable, meat, fish or seafood; and
  - cured pork.

  This amended clause also stipulates that the requirements only apply to food for retail sale, but would not apply to food sold in restaurants, cafeterias, takeaway shops, canteens or by a caterer or at a fundraising event.

In considering the Bill's amendments, the Committee received advice from the Ministry of Business, Innovation and Employment, the Ministry for Primary Industries and the Ministry of Foreign Affairs and Trade.

The amended Bill can be found here (http://www.legislation.govt.nz/bill/member/2016/0231/latest/DLM4311404.html?src=qs).

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IP Income and Tax Incentives in Singapore

Recent efforts to address global concerns around base erosion and profit sharing (BEPS)

11 July 2018

Introduction

As of May 2018, Singapore has excluded intellectual property (IP) income from the Pioneer Service Incentive (PC-S) and the Development and Expansion Incentive (DEI), both of which are awarded by the Economic Development Board (EDB) to companies investing in Singapore.

This is a result of the recent changes under the Economic Expansion Incentives (Relief from Income Tax) (Amendment) Act 2018 (Amendment Act) and the Economic Expansion Incentives (Relief from Income Tax) (Intellectual Property Income) Regulations 2018 (Regulations).

These changes are part of a broader international effort to address concerns around tax planning practices that may lead to base erosion and profit sharing (BEPS). They not only demonstrate Singapore's commitment to fostering a conducive business environment in line with global tax trends, but may also incentivise companies with IP holdings in Singapore to shift more substantial business activities to Singapore.

Background on IP Income Exclusions

IP is frequently used in the tax planning of multinational corporations (MNCs) because it is mobile and valuable. With its favourable tax environment and robust business infrastructure, Singapore has proven to be an attractive destination for MNCs to house their IP. However, in recent years, there have been concerns that such practices, amongst others, give rise to opportunities for base erosion and profit shifting (BEPS).

Put simply, BEPS occurs when there is a mismatch between where profits are booked and where profits are generated, leading to a reduction of taxable base for certain countries. As such, certain practices of global tax planning, such as IP holding, have since faced greater scrutiny. Most notably, in 2013, the OECD and G20 countries have adopted a 15-point Action Plan to address BEPS (BEPS Action Plan). Singapore has accordingly committed to making amendments to its tax regime.

The BEPS Action Plan identified 15 actions along three key pillars, with the overarching goal of "aligning taxation with value creation". It involves changes to both domestic law and practice, and international treaty provisions. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) in 2017 is one key milestone of the BEPS Action Plan. With MLI, signatories can modify their existing double tax agreements (DTAs) to implement the BEPS minimum standards and other tax treaty measures. Singapore was one of the 67 countries which signed the MLI.

Changes to Singapore's Approach to Taxing IP Income

On the international front, Singapore has thus far taken a cautious approach – making provisional commitments to adopt certain provisions, while reserving the right to not adopt others. Potential modifications to Singapore's DTAs may affect when Singapore taxes profits arising within its territory. Companies therefore need to keep up with upcoming changes to Singapore's DTAs and domestic laws, as they will affect tax planning.

Singapore is also reforming the current tax incentives pertaining to IP income. As mentioned, the new legislation excluding IP income from PC-S and DEI has taken effect. The Regulations consider royalties or other income to be received as IP income if they are receivable as consideration for the commercial exploitation of the IP right.

Transitional Provisions

As there are a large number of companies which have obtained existing tax incentives which grant concessionary tax rates for IP income, the new legislation includes transitional provisions for such companies.

Companies whose PC-S or DEI is approved or extended on or after 1 July 2018 would cease to enjoy the concessionary tax rate for its IP income from the date of the approval or extension onwards. For companies whose PC-S or DEI was approved before 1 July 2018, the transitional provisions would apply in the interim period from 1 July 2018 to 30 June 2021. Transitional treatment would depend on whether the income is derived from "New IP Rights" or "Existing IP Rights".

Existing IP Rights are those acquired before 1 July 2018 and are not a right under sub-section (b) of the following definition of New IP Right. New IP Right refers to:

(a) IP that comes into the ownership of the company on or after 1 July 2018; or

(b) IP acquired from related parties after 16 October 2017 but before 1 July 2018 where the main purpose or one of the main purposes of the IP acquisition is to avoid income tax in Singapore or elsewhere.

IP income derived from Existing IP Rights will be grandfathered and subject to the concessionary tax rate under the existing PC-S or DEI until 30 June 2021, while IP income derived from New IP Rights will not be.

Companies seeking to take advantage of the transitional provisions would need to track their IP income derived from Existing IP Rights and New IP Rights. The Regulations provide some guidelines as to how the tracking should be done.

The Amendment Act also gives the Minister power under the Economic Expansion Incentives (Relief from Income Tax) Act to amend the concessionary tax rates of companies that have been granted the DEI. The Minister can exercise such discretion on his own initiative or on application by the company.

IP Development Incentive

In place of these incentives, the IP Development Incentive (IDI) has been proposed in Budget 2017. It is expected to incorporate the modified nexus approach, which is essentially a substance-based test, and should therefore comply with the BEPS Action Plan. It is hoped that further details will be released soon.

Conclusion

As a small and open economy, Singapore has earned a reputation for being business-friendly. Committing to comply with the BEPS Action Plan is not only an act of international comity, but one which opens up new opportunities for the economy. In light of the changes in the global tax environment, it is likely that MNCs will take greater advantage of Singapore’s conducive business environment and shift more substantial business activities here, in order to comply with the BEPS Action Plan, and to qualify for tax incentives.

If you are interested in understanding how these changes would affect your tax planning, please feel free to reach out to us.

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The Enforcement of the Rental Housing Market Development and Rental Housing Act

08/29/2018
Yi-Jiun Su/ Lily Kuo

With the aim of balancing the rights of tenants and landlords, and of establishing standards for rental housing services, the Rental Housing Market Development and Regulation Act ("Act") took effect on June 27 this year. The key provisions of the Act are summarized as follow:

I. **Scope of Application**: The Act is applicable to all "rental housing", i.e., buildings leased or to be leased for housing purposes, except for those used in any of the following scenarios, as they are different from regular rental housing:

1. Where the rental housing is used for purposes in connection with leisure or travel;

2. Where the rental housing is operated and managed by the government or a designated organization or agency established by the government;

3. Where the rental housing is operated and managed by a cooperative; or

4. Where the term of the lease is less than thirty days.

II. **Control over Contractual Terms**: The Act sets out restrictions on the terms of lease contracts to balance the rights of tenants and landlords. Major restrictions are summarized as follows:

1. Mandatory and Prohibitory Provisions: The Act authorizes the competent authorities to set out mandatory and prohibitory provisions for lease contracts. Any terms that contradict such mandatory and prohibitory provisions will be invalid. All such mandatory provisions will automatically become an integral part of all lease contracts, regardless of whether they are set forth in the contract or are verbally agreed upon between the parties (Article 5 of the Act).

2. Exclusion of the Cap on Rent: Pursuant to Paragraph 1, Article 97 of the Taiwan Land Act, in cities and municipalities, house rentals shall not exceed an amount equivalent to an annual interest of 10 per cent on the total declared value of the land and the buildings thereon. If the rent exceeds such amount, the competent authorities may order the landlord to reduce it to within the limit prescribed above. In consideration of the gap between the market value and the assessed and published land value or the assessed building value, and of the fact that such assessed values might not properly reflect certain housing property's earning-capacity value, the Act

has excluded the above-mentioned cap on rent so as to allow market mechanism to set the rent (Article 6 of the Act).

3. Amount of Security Deposit: Article 7 of the Act stipulates that the amount of security deposit for a lease may not exceed the equivalent of two months' rent, which is consistent with Article 99 of the Taiwan Land Act.

4. Landlords' Obligation to Provide Explanations: As prescribed by Article 429 of the Taiwan Civil Code, unless otherwise agreed upon between the parties or except for certain customary obligations, landlords shall be responsible for the repair of the leased premises. The Act further requires landlords to explain to their tenants, before the execution of the lease contract, the items and scope that the landlords are responsible for repairing, and to provide the tenants with his/her contact information to be used if the need for repair ever arises.

5. Obligation to Formalize a Sublease: As landlords in Taiwan customarily allow tenants to sublet the leased building, the second half of Paragraph 1, Article 443 of the Taiwan Civil Code provides that unless otherwise agreed upon by the parties not to sublet, the tenant may sublet a part of the leased building to others. However, the Act stipulates that the tenant cannot sublease the rental housing in whole or in part without prior written consent of the landlord, thus constituting an exception to the foregoing rule.

6. The causes of termination, methods of termination and notice period applicable to landlords and tenants under lease contracts (Articles 10 and 11 of the Act):

(1)Tenants' Right to Early Termination: The Act is a "special law" under the umbrella of the Taiwan Civil Code. The tenants' early termination rights under the Act are generally similar to those prescribed under the Civil Code, except that the Act has a special provision to allow a tenant to terminate a lease contract early if he or she "needs long-term treatment and care to recover from any diseases or accidents".

(2) Landlord's Right to Early Termination: Pursuant to Article 100 of the Taiwan Land Act, an indefinite-term lease of housing in "cities and municipalities", whether used as residence or place of business, may only be terminated early due to an occurrence of the specified terminating events, of which the scope is narrower than that prescribed under the Taiwan Civil Code.

The Act is a special law specifically set forth for the leasing of houses; its application therefore shall take precedence over the Taiwan Land Act and the Taiwan Civil Code in respect of matters related to the leasing of houses. Hence, landlords may terminate the lease early under any of the following circumstances, provided that the relevant documentary proof and a termination notice shall be delivered to the tenants within the timeframe required by the law:

(a) Where the tenant has damaged the premises or the ancillary equipment therefore, and failed to repair such damages or provide compensation therefor;

(b) Where the tenant has failed to pay the rent or any fees, to the extent that the accumulated amount thereof has exceeded the amount of two months' rent, and has also refused to settle such delinquent payment upon the request of the landlord;

(c) Where the tenant has sublet the premises to others without the landlord's written consent;

(d) Where the landlord needs to take back the premises for the rebuilding of the premises; or

(e) Where the lease may be terminated early in accordance with the law.

III. Establishing a Regulatory Scheme for Rental Housing Services

The Act sets out provisions governing the management and activities of the rental housing service industry and requiring rental housing service practitioners to obtain professional certifications. The Act also introduces regulations governing the "rental housing management business" (the "Management Business") and the "rental housing subleasing business" (the "Subleasing Business") and requires service providers of these businesses to incorporate a company and to obtain a special license, in order to assist landlords and tenants in handling the complex tasks of managing rental housing properties and clarifying the rights and obligations between the parties.

According to a Q&A list made available by the competent authority in respect of the "industry aspect" of the Act, the Management Business and the Subleasing Business differs in their nature of business, scope of activities, and source of revenues. The key differences between them are as follows:

1. Nature of Business: Operators of the Management Business are engaged by the landlords to manage all affairs related to the landlords' rental housing properties. On the other hand, operators of the Subleasing Business sublease the premises, which they have leased from their landlords, to others for housing purposes and manage the leasing of such premises. By comparison, operators of the Management Business "manage the premises on behalf of the landlords" while operators of the Subleasing Business "manage the premises in the capacity of a sub-lessor" instead of on behalf of, or being engaged by, the landlords.

2. Scope of Activities: "Rental housing management activities" operated by the Management Business include inspecting the condition of the premises and equipment therein, handling the hand-over procedure, collecting and managing the security deposit and the rent, carrying out daily maintenance and repair, dealing with disputes, etc. On the other hand, operators of the Subleasing Business, in addition to the "rental housing management activities" described above, also carry out "leasing and subleasing" of rental housing properties; that is, operators of the Subleasing Business shall execute lease contract separately with their landlords and their sub-tenants, and therefore have the additional responsibility of performing the lease contracts, as compared to operators of the Management Business.

3. Source of Revenues: Operators of the Management Business generate revenues from charging an agreed upon management fees, which is usually a certain percentage of the monthly rent of the rental housing property and specified in the management service agreement between the landlords and the service operators. Meanwhile, operators of the Subleasing Business generate revenues from the difference between the rent they pay the landlords and the rent they charge the sub-tenants, but have to assume the risks of not being able to find sub-tenants to sublease the premises the operators rented from their landlords.

Real estate brokerages have now been allowed to conduct rental housing services without having to incorporate another company to do so. If a real estate brokerage intends to provide rental housing services, it only needs to, following the enforcement of the Act, file an application to include "rental housing management business" and "rental housing subleasing business" into its registered business scope, put up the operating bond, designate the management personnel for the rental housing services, enroll in the industry association and obtain the relevant registration before it can start conducting the rental housing management business and rental housing subleasing business.

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Ideas

Colorado Moves Into the Data Privacy Spotlight with Data Protection In Effect September 1, 2018

California is not the only state that wants to govern the data protection and security of its constituents. Colorado has also come out with a strong, bipartisan law that puts it on the map of GDPR-like state laws and Colorado is already in application.

On May 29, 2018, just days after the EU's General Data Protection Regulation ("GDPR") went into effect, the governor of Colorado signed into law HB 18-1128 (the "Bill") "concerning strengthening protections for consumer data privacy." The Bill took effect September 1, 2018, more than a year *before* California's law, which goes into effect January 1, 2020 and which has already been revised since passing in June 2018. The Colorado Legislature unanimously passed the Bill, signifying a bipartisan focus on data security and consumer protection. Though not truly centered on the precept of data privacy (*i.e.,* the collection, use, and sharing of information), the Bill provides additional consumer protections before and after potential data breaches. The changes bolster the state's ability to protect the Personal Information of its residents but could place heavy burdens on small business not already compliant with other U.S. data security laws.

The Bill incorporates three central revisions into the Colorado Consumer Protection Act ("CCPA"): (1) a 30-day security breach notification period; (2) a requirement to develop data destruction policies; and (3) a requirement to maintain and implement "reasonable security procedures and practices" to safeguard sensitive Personal Information.

Applicability and Scope. The Bill establishes detailed investigation and notification requirements for all "covered entities," defined as persons or entities that maintain, own, or license Personal Information in the course of their business, vocation, or occupation ("Covered Entities"). These requirements also apply to government entities. The Bill tweaks and updates the existing Colorado law by applying it to new types of data (discussed below) and adds a requirement that the state attorney general be notified in the event of certain types of breaches.

Enforcement. The Colorado Attorney General may bring an action to address violations of the Bill's updated breach reporting, data disposal, and security requirements and may enforce compliance, recover damages resulting from a violation, or both. The Bill also gives district attorneys the authority to prosecute criminal violations amounting to computer crime. Although the new Bill provisions are part of Colorado's CCPA, which provides a private cause of action in connection with certain "deceptive trade practices," it is unclear whether violations of the Bill will give rise to private causes of action under the CCPA. If a violation is interpreted to be a deceptive trade practice subject to the CCPA, a successful plaintiff could possibly recover treble damages and reasonable attorneys' fees from a Covered Entity.

Requirements for Security Breach Notifications

Types of Protected Data: "Personal information" is now defined as a resident's first name or first initial and last name *in combination* with any one or more of the following data elements that relate to the resident (when those data elements are not encrypted, redacted, or otherwise secured): medical information; health insurance identification number; biometric data; social security number; student, military, or passport identification number; or driver's license number or identification card. "Personal information" also includes a resident's username or email address, in combination with a password or security questions and answers that would permit access to an online account or a resident's account number, and a credit or debit card number in combination with an access code or password that would permit access to that account.

Notification Requirement: Additionally, businesses reporting a data breach affecting residents must notify the affected residents and, if more than 500 Colorado residents are affected, the state's Attorney General not later than 30 days after the date of determination that a security breach occurred. While this time period is certainly amongst the shortest in the nation, Colorado is not the first state to codify a 30-day requirement (*e.g.*, Florida), nor is this the shortest time period by which breach notifications must be made. For example, Puerto Rico requires government notification within ten days, and the EU requires certain notifications within 72 hours if there is a significant risk to individuals. If more than 1,000 Colorado residents are affected by a data breach, the Covered Entity must also notify all consumer reporting agencies.

Requirements for Data Disposal and Security Policies

The Bill obligates Covered Entities to create a written policy for the destruction or proper disposal of paper and electronic documents containing Personal Information, requiring the destruction of those documents when they are "no longer needed." The Bill also requires that Covered Entities implement reasonable and appropriate security procedures and practices regarding Personal Information to prevent data breaches. These policy requirements apply to a more limited set of data than do the breach notification provisions. Unlike the breach notification requirements described above, the data disposal and security procedure requirements do not apply to medical information or health insurance identification numbers, already regulated under other statutes. Certain states' legislation contains far more detailed proscriptive steps than Colorado in terms of what specific measures must be taken when securing sensitive information (*e.g.,* Massachusetts).

Importantly, a Covered Entity regulated by state or federal law that already maintains procedures for data disposal and security procedures is deemed to be in compliance with the Bill's provisions. For those companies, the Bill does not signal a radical change in compliance as does the GDPR, or as the California Consumer Privacy Protection Act. However, smaller companies without these established procedures must now shoulder the burden of the time and resources necessary to become compliant.

To ensure compliance with the Colorado law effective September 1, 2018, U.S. companies should review, and if necessary, revise security policies and procedures affecting Personal Information of Colorado residents and memorialize, internally, the data breach notification deadlines. The state's Attorney General's office has stated publicly that it assumes that it will take time for all Covered Entities to become compliant, but that businesses will be working hard to that end.

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DEFINING SUCCESS TOGETHER

Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing

10.15.18

By Michael J. Killeen, Jeffrey B. Youmans, and Joseph P. Hoag

On October 11, 2018, OSHA issued interpretive guidance designed to "clarify" controversial language in the Preamble to the anti-retaliation provisions in the recordkeeping and reporting amendments adopted by the Obama OSHA Administrator in 2016. The Preamble, which can be cited as authority in contested OSHA matters, suggested that employer safety-incentive programs are generally suspect because, in OSHA's view, they incentivize workers not to report injuries/illnesses (or put peer pressure on co-workers not to report) and suggested that post-incident drug-testing was facially grounds for proving retaliation against workers for reporting injuries/illnesses. The Trump OSHA Administrator isn't proposing a change to the regulation or the Preamble but backs away from interpretive guidance that pushed an aggressive view of the suggestions in the Preamble and "clarifies" that employers are not prohibited from adopting policies that provide safety incentives or post-incident drug-testing and gives advice as to other things an employer might do to show that it is promoting workplace safety and health, so to any avoid the argument that the employer's policy creates "inadvertent deterrence" to injury/illness reporting. Review OSHA standard interpretations here.

Bottom line: Employers still need to be thoughtful as to how they construct, communicate, and implement safety-incentive and drug-testing policies so as to avoid claims that the policies deter injury/illness reporting; but, employers now know that such policies will not be viewed by OSHA as a per se violation of OSHA's 2016 anti-retaliation regulation.

Hogan Lovells

ED's latest proposed rulemaking: Pursuing its own agenda

September 6, 2018

The U.S. Department of Education's (ED) higher education policymaking agenda so far in 2018 has to a large degree seemed to focus on rolling back initiatives of the Obama administration, including several rulemaking efforts focused on protecting student borrowers and increasing oversight of for-profit institutions. ED recently announced a plan to rescind the much debated gainful employment rule in favor of disclosure requirements to be applicable to all institutions. Expanded borrower defense to repayment rules, which had been re-written in the wake of the collapse of several large for-profit institutions, are now proposed to be significantly scaled back. And rules regarding state authorization of distance education were delayed again, except notably the requirements related to foreign locations.

While these sweeping changes are each subject to the publication of final rules or ongoing legal challenges and therefore require continued attention, ED now appears ready to "turn the page" and pursue its own ambitious rulemaking agenda. On July 31, ED announced its intention to establish a negotiated rulemaking committee with a focus on fostering innovation in higher education through de-regulation. ED plans to suggest revisions to numerous regulations, including several challenging and controversial topics, including

- criteria used by ED for the recognition of accrediting agencies with a focus on institutional mission and educational quality (including developing new standards for measuring and reporting job placement rates) as well as the process for recognition and review of accrediting agencies;
- rules on direct assessment programs and competency-based education, with a focus on identifying barriers to the implementation of such programs;
- the definitions of "regular and substantive interaction" for purposes of distance education and of the "credit hour";
- the "written arrangements rules" governing the outsourcing of educational programs to another educational institution or organization (which were previously the subject of ED's Educational Quality through Innovative Partnerships (EQUIP) pilot program);
- state authorization requirements for distance education programs, including disclosures to enrolled and prospective students; and
- other barriers to innovation and competition in postsecondary education or to student completion, graduation, or employment, including the eligibility of faith-based entities to participate in Title IV programs.

ED is accepting written comments on the topics suggested by ED and suggestions for additional topics that should be considered by the negotiated rulemaking committee until September 14, 2018.

The negotiated rulemaking process also will include three public hearings in September, which will be followed by the nomination and selection of participants to the negotiated rulemaking committee. ED anticipates it will convene the committee in January and is proposing two subcommittees to facilitate the work of the committee — one focused on direct assessment programs/competency-based programs and another on the eligibility criteria for faith-based entities. Based on this initial timeline, final rules potentially could be developed and released by fall 2019, to take effect July 1, 2020.

In the absence of any significant progress in Congress on the reauthorization of the Higher Education Act, this rulemaking likely will take center stage in 2019 as far as the Title IV programs are concerned. Like the Obama administration's comprehensive 2010 "program integrity" rulemaking package, ED's new regulatory agenda promises to impact in significant ways virtually all higher education institutions, as well as many higher education investors and ed tech companies.

We are available to respond to questions.

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