

**Pacific Rim Advisory Council  
January 2020 e-Bulletin**

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**CONFERENCES & EVENTS**

67th International Conference  
New Delhi - Hosted by KOCHHAR & Co.  
March 14 - 17, 2020

68th International Conference  
Mexico City - Hosted by Santamarina y Steta  
Fall, 2020

Visit [www.prac.org](http://www.prac.org) for details

**MEMBER DEALS MAKING NEWS**

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- BENNETT JONES Assists Wilbur-Ellis Acquisition Nachurs Alpine Solutions LLC
- CAREY Advised IMD Group on a credit for USD\$70 million Telcoms Acquisition Financing
- CLAYTON UTZ Advised Acciona on acquisition of Lendlease's Engineering Business
- GIDE Advises ENGIE on its Future Zero-carbon Headquarters
- HAN KUN Advises China Structural Reform Fund on its Investment and Participation in CITIC Dicastal's Mixed-ownership Reform
- HOGAN LOVELLS Advises Altavant Sciences in its Acquisition of Onspira Therapeutics
- MUNIZ Advises China Yangtze Power (CYP) buy US Sempra Energy's Peruvian Business for US\$3.6 Billion, in the Largest Overseas M&A Transaction by a Chinese Company in 2019
- NAUTADUTILH Assists Tencent on acquisition of 10% stake in Universal Music Group

**PRAC TOOLS TO USE**

[PRAC Contacts](#) [PRAC Member Directory](#) [Events](#)

**PRAC APPOINTS NEW BOARD CHAIR AND VICE CHAIR**

**01 January 2020:** The Pacific Rim Advisory Council is pleased to announce its newly elected Board Chair and Vice Chair for the two-year term 2020 thru 2021.



**Chair:** Jaap Stoop, Partner, NautaDutilh. Jaap specializes in corporate law. His main focus is on mergers and acquisitions, joint ventures, fund formation and restructurings. Jaap acts for both domestic and international clients. He is Co-Chair of NautaDutilh's China Desk and M&A Tech Group, and member of the M&A Financials Group.



**Vice Chair:** Marcio Mello Silva Baptista, Partner, TozziniFreire. Head of TozziniFreire's New York office, in parallel to a strong presence in the São Paulo office, Marcio acts primarily in cross-border operations, focusing on mergers and acquisitions, private equity transactions, transnational contracts and joint ventures. Marcio is head of TozziniFreire's Insurance and Reinsurance practice group and has extensive experience representing clients in the US, Asia, Europe and Latin America.

The Pacific Rim Advisory Council ("PRAC") is a unique strategic alliance within the global legal community, with unparalleled expertise on the legal and business issues facing not only Asia but the broader Pacific Rim region. PRAC members are top-tier, independent law firms, each of which provides legal services to major international companies conducting substantial business across the Pacific Rim region.

With over 12,000 lawyers practicing in key business centers around the world, these prominent member firms provide independent legal representation and local market knowledge. Whether you are an Institutional client or an emerging business our member firms are leaders in their fields and understand your business needs and the complexities of your industry.

Beyond the prominent standing that PRAC members already enjoy in their respective countries, member firms demand from each other that our unique alliance remains at the forefront of global and regional issues and trends. We remain committed and look forward to the challenge of ensuring that these objectives are met.

For more information and to view our list of member firms visit [www.prac.org](http://www.prac.org)

## BENNETT JONES ADDS TWO PARTNERS

**TORONTO, 01 January,2020:** John Teolis and Suzana Lobo have joined Bennett Jones as partners in Toronto.

John is one of the most respected and accomplished leaders in banking and financial regulatory law in Canada. Suzana advises clients on complex and innovative transactions in all areas of banking and finance. She also advises financial institutions on regulatory matters. They both serve as trusted advisors to Canadian clients in their domestic and international operations and global clients doing business in Canada.

"John and Suzana will provide outstanding strategic advice to clients in the rapidly changing financial services industry," says Hugh MacKinnon, Chairman and Chief Executive Officer of Bennett Jones. "They have exceptional experience in regulatory law and complex transactions and bring a strong focus on relationships with clients. We are very pleased to welcome John and Suzana to the firm."

John's practice focuses on regulatory law that governs financial institutions, corporate, commercial and consumer finance, banking, M&A, money transmission, information processing and payment processing. He has been consistently ranked by Canadian and global legal directories as one of the best lawyers in the world in banking and regulatory law. Clients regularly benefit from the close relationships John has built with Canadian financial regulators during his distinguished career.

Suzana's experience includes acting for banks, borrowers and financial institutions in complex secured and unsecured lending transactions—including international and cross-border financings, syndicated loan transactions, acquisition finance transactions, construction and real estate financings, equipment financings, project financings and debt restructuring transactions. She regularly advises Canadian and international clients on sophisticated and high-profile transactions.

For additional information visit [www.bennettjones.com](http://www.bennettjones.com)

## CITY-YUWA ANNOUNCES PARTNER PROMOTIONS AND NEW HIRES

**TOKYO, 01 January 2020:** City-Yuwa announced the following:

- **Kanoko Inokuchi** has joined the Firm as a Partner.
- Six attorneys newly admitted, **Takahito Okuda, Takanari Sasai, Ayaka Sato, Shun Takahashi, Daisuke Midorikawa and Hirotsuke Yoshizawa** have joined the Firm.
- **Daigo Nomura, Rie Hosaka, Eiichiro Hino, Junichi Ueno, Go Kobayashi and Katsuki Matsuura** have been promoted to Partners of the Firm.
- **Taketomo Morita, Naoyuki Kishimi, Aya Kinoshita, Koji Mizutani, Yuka Sakai and Sayaka Eguro** have been promoted to counsel of the Firm.

For additional information visit [www.city-yuwa.com](http://www.city-yuwa.com)

**CAREY ELECTS TWO PARTNERS****SANTIAGO, 01 January, 2020**

Patricia Silberman, Partner

Patricia focuses her practice mainly on mergers and acquisitions, corporate and commercial law, national and international financing and capital markets. She graduated from Universidad de Chile and holds an LL.M. from the University of Pennsylvania. She is admitted to practice law in Chile and the United States. After starting her professional career at Carey, she worked for five years as an associate of an important New York law firm (2006–2011). Currently, she is an arbitrator of the Arbitration and Mediation Center of the Santiago Chamber of Commerce and a member of the International Steering Committee of the Women in the Profession (WIP) Program of the Vance Center. She participates actively as public speaker and in local and international publications.



Manuel José Garcés , Partner

Manuel José focuses his practice mainly on tax consulting, advising large multinationals on foreign investment processes and business reorganizations, as well as on their defense in tax audits and complex litigation cases. He graduated from Universidad Católica, holds a graduate degree in Tax Law from Universidad Diego Portales (2010), and an LL.M. in International Taxation from the University of Florida (2011). From 2013 to 2018, Manuel José was Professor of the Master of Tax Law at Universidad Diego Portales.

He is a frequent lecturer in seminars, both in Chile and abroad, including conferences about tax law for the International Bar Association (IBA).

For more information visit [www.carey.cl](http://www.carey.cl)



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## CLAYTON UTZ ANNOUNCES NEXT CHIEF EXECUTIVE PARTNER TO LEAD THE FIRM FROM 01 JULY 2020

**SYDNEY, 11 December 2019:** The Board of Clayton Utz has today announced the appointment of Bruce Cooper to succeed Rob Cutler as the firm's next Chief Executive Partner, effective 1 July 2020. The appointment is for a three-year term.

Bruce joined Clayton Utz in 2010 as a partner from Freshfields Bruckhaus Deringer, having practised largely in project finance throughout Asia for nearly two decades, and between 2007 and 2010 was the Head of Freshfields' Asian finance group. He was a Board member of Clayton Utz in 2013, and was appointed in 2014 as one of the firm's two inaugural Deputy Chief Executive Partners, with a focus on strengthening the firm's clients and markets initiatives, and guiding the firm's international strategy.

Clayton Utz Board Chair Steve O'Reilly said Bruce's appointment reflected his focus on clients and our people as being at the centre of the firm's success.

"Bruce is well-positioned to lead Clayton Utz into its next stage of growth in what continues to be a competitive legal market. Over the past few years, he has been at the forefront of initiatives to embed a true client service culture within the firm, has strengthened our international relationships which has led to strong revenue growth, and introduced truly unique and engaging experiences for our people and clients such as the Clayton Utz Art Partnership. We're confident in Bruce's ability to strengthen further Clayton Utz's reputation and market position through his vision."

On behalf of the Board, Steve acknowledges Rob Cutler's leadership and contribution. "The Board thanks Rob for guiding the firm successfully through its past five and half years of strong growth in ever-changing market conditions. He has been an exceptional leader who we know will continue his able contribution to the firm's success when his term as CEP ends on 30 June."

For additional information visit [www.claytonutz.com](http://www.claytonutz.com)

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## HAN KUN FURTHER STRENGTHENS FIRM'S DISPUTE RESOLUTION TEAM

**BEIJING , 02 January, 2020:** Han Kun Law Offices is pleased to announce that Denning Jin, a highly regarded litigator in litigation and international arbitration, has joined the firm as a partner, further strengthening the firm's dispute resolution practice.

Mr. Jin focuses his practice on complex commercial and financial litigation, international and domestic commercial arbitration, large-scale tort litigation, insurance litigation, patent litigation, IP-related antitrust litigation, unfair competition disputes, administrative and criminal litigation, and environmental liability cases.

Before joining Han Kun, Mr. Jin was previously a dispute resolution partner of two other prestigious Chinese law firms. Mr. Jin is highly recommended in various legal rankings, including Chambers & Partners, China Business Law Journal, and The Legal 500 Asia Pacific. He has been consecutively recognized as a "Band 1 dispute resolution lawyer in China" and one of the "A-List China's Elite 100 Lawyers".

Mr. Jin serves as an arbitrator at the China International Economic & Trade Arbitration Commission ("CIETAC"), Shanghai International Economic & Trade Arbitration Commission, Hong Kong International Arbitration Center, Arbitration Center Across the Straits, Hangzhou Arbitration Commission, and a CEPA mediator at the CIETAC Investment Dispute Settlement Center.

Mr. Jin also serves as a member of the Administrative Reconsideration Committee of the Shanghai Municipal Government, a member of the Advisory Committee and adjunct professor at the East China University of Political Science & Law Lawyers Institute, and an external mentor for LL.M. candidates at Shanghai University of Finance & Economics Law School.

For additional information visit [www.hankunlaw.com](http://www.hankunlaw.com)

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**HOGAN LOVELLS CONFIRMS MIGUEL ZALDIVAR AS NEW CEO FROM 1 JULY 2020**

**19 December 2019:** Partners at Hogan Lovells have voted to confirm current Asia Pacific and Middle East regional chief executive Miguel Zaldivar as their new global CEO from 1 July 2020. Current head of the Litigation Arbitration and Employment practice, Michael Davison will be Deputy CEO from the same date. Both will serve initial four year terms.

Miguel Zaldivar's appointment will make him the only current Amlaw 50 law firm leader of Hispanic American origin.

The two will replace the current CEO Steve Immelt and Deputy CEO David Hudd, who will both have served six years in their roles since 1 July 2014. During that time revenues at the firm rose from US\$1,717m in 2013 to US\$2,119m in 2018 with profits per equity partner rising from US\$1.2m in 2013 to US\$1.38m in 2018.

Miguel Zaldivar was recommended to partners in November to be the new CEO by the firm's 12-partner Board following an internal appointment process which began in August. The recommendation was subject to a partner vote which closed on Wednesday 18 December.

Commenting on the confirmation, Hogan Lovells' Chair, Leopold von Gerlach said: "Miguel and Michael are an excellent choice. They possess all the attributes necessary to drive a firm with our global reach.

"I'd like to thank all of those candidates who put themselves forward for the CEO role. We had extremely qualified and motivated candidates and it is a reflection of the strength of the talent within firm that the Board was faced with high quality choices when it came to recommending our next CEO."

According to Miguel Zaldivar: "I see my priorities as focusing on client service, investment in our key markets, incentivizing collaboration across the partnership, managing our profitability and supporting diversity & inclusion."

"I am extremely passionate about the firm and its success and that starts with its clients and ensuring the service we deliver to them is consistently of the highest quality. We are in a unique position with the depth of our practices worldwide to be the adviser of choice for clients who need their lawyers to be tuned into the financial, commercial, regulatory and political dynamics of their industries and markets."

#### Background on Miguel Zaldivar and Michael Davison

**Miguel Zaldivar:** Currently based in Hong Kong as the firm's Regional Chief Executive for the Asia Pacific Middle East region, Miguel Zaldivar focuses on international project development and finance. He has closed complex multi-billion transactions over his more than 30 year career. He has worked with cross-office teams in the successful negotiation and execution of such deals across various jurisdictions and industries and across various disciplines including project finance, capital markets, mergers & acquisitions, joint ventures, settlement of arbitral disputes and myriad other corporate, commercial and financing matters for governments and international financial institutions. Previous roles at the firm include developing its Latin American practice over many years, co-leadership of the Infrastructure, Energy, Resources and Projects practice, and serving as a member of the Board.

**Michael Davison:** An international arbitration lawyer by background, Michael is qualified in England, France and the Republic of Ireland. He currently heads the firm's Litigation, Arbitration, and Employment practice and is involved in the Technology, Media, and Telecoms and Energy and Natural Resources industry sector groups. He has handled many international disputes before the world's leading arbitration institutions.

Michael has been a member of the International Management Committee since 2013 and, alongside his client and management commitments, he has been a major supporter of and contributor to the firm's pro bono work and diversity and inclusion commitments. He has a strong interest in the use of technology including AI to support the firm's clients and is leading a number of projects in this area.

For additional information visit [www.hoganlovells.com](http://www.hoganlovells.com)

**NAUTA DUTILH WELCOMES NEW REAL ESTATE PARTNER**

**AMSTERDAM, 29 November 2019:** As of 1 December, Jochem Spaans, a renowned specialist in spatial planning law, environmental law and general public law, will be joining NautaDutilh's Real Estate group as a partner.

Before joining NautaDutilh, Jochem served as senior counsel at Allen & Overy, where he headed the environment and regulatory team. Jochem advised and litigated for US, European and multinational corporations on a broad range of public law matters, including large project developments and permitting matters. He has extensive experience in the (renewable) energy and industrial sectors, including offshore and onshore wind and (petro-)chemical / industrial projects.

In prior Chambers editorials, Jochem was praised for, inter alia, providing excellent legal advice and understanding how to deal with multi-jurisdictional matters. He is ranked as a Chambers and Partners Band 2 individual.

"We are delighted that Jochem is joining NautaDutilh", says managing partner Petra Zijp. "With his broad public law expertise and his extensive experience in the energy and industrial sectors, he is a valuable addition to, and will significantly reinforce, the Real Estate group. We wish him every success in his new role."

For additional information visit [www.nautadutilh.com](http://www.nautadutilh.com)



67th International Conference

New Delhi

Hosted by Kochhar & Co.

March 14 - 17, 2020

Details and Registration

[www.prac.org](http://www.prac.org)

**RBS WELCOMES MICHELLE A. QUINN TO THE PARTNERSHIP****VANCOUVER, 08 January, 2020:**

Michelle practices in all areas of personal injury litigation and employment and human rights law. She is Co-Chair of the CBABC Employment Law Section Executive, and a member of the CBABC Human Rights Executive. A tenacious and pragmatic lawyer, her approach to litigation is based on empathy and compassion for her clients.



For additional information visit [www.rbs.ca](http://www.rbs.ca)

**ALLENDE & BREA**

ASSISTS BANK OF CHINA ARGENTINA LAUNCH

**BUENOS AIRES – 19 December 2019:** Argentina's central bank announced the opening on 5 December. Bank of China will begin operating on 16 December.

The Chinese banking giant will invest US\$50 million in its Argentine operations. It will primarily cater to companies that do trade between Argentina and China.

Counsel to Bank of China - Allende & Brea led by Partners Santiago Sturla and Jorge Mayora, and associates Santiago Cassina, Paula Costas, Francisco Samra and Dolores Muñiz

For additional information visit [www.allendebrea.com.ar](http://www.allendebrea.com.ar)

**BENNETT JONES**

ASSISTS WILBUR-ELLIS ACQUISITION NACHURS ALPINE SOLUTIONS

**CALGARY, 19 November, 2019**

## Mandate Details

Date Announced:	November 19, 2019
Date Closed:	November 19, 2019
Deal Value:	US\$175,000,000
Client Name:	Wilbur-Ellis

On November 14, 2019, Wilbur-Ellis Holdings II, Inc. ("Wilbur-Ellis") entered into a definitive equity purchase agreement, pursuant to which Wilbur-Ellis agreed to acquire Nachurs Alpine Solutions, LLC (the "Transaction"). The Transaction closed on November 19, 2019.

The Transaction marks the largest acquisition in Wilbur-Ellis' history.

Founded in 1921, the Wilbur-Ellis companies are leading international marketers and distributors of agricultural products, animal nutrients and specialty chemicals and ingredients. By developing strong relationships, making strategic market investments and capitalizing on new opportunities, the Wilbur-Ellis companies have continued to grow the business with sales now over \$3 billion.

Bennett Jones LLP acted as counsel to Wilbur-Ellis in Canada and Pillsbury Winthrop Shaw Pittman LLP acted as counsel to Wilbur-Ellis in the United States.

For additional information visit [www.bennettjones.com](http://www.bennettjones.com)

**CLAYTON UTZ**

ADVISES ACCIONA, S.A. ON ACQUISITION OF LENDLEASE'S ENGINEERING BUSINESS

**Melbourne, 20 December 2019:** Clayton Utz has advised global sustainability business Acciona, S.A. (Acciona) on its \$180 million acquisition of ASX-listed Lendlease's Engineering business, announced to the market yesterday.

Corporate partner Michael Linehan led the firm's deal team, which included Special Counsel Quentin Reidy, and Senior Associate Claire McKenzie, as well as other specialist lawyers. The team advised Acciona throughout the sale process including initial offer proposals, due diligence and final agreement negotiation and execution.

Congratulating Acciona, Michael said: "This is a significant transaction for both our client and Lendlease, and involved particularly complex aspects. The transaction involved a team effort from many different disciplines, from both within Acciona and Clayton Utz. It was a joy to work with the Acciona team, and we are proud to have helped Acciona in its successful negotiations to achieve this outcome. We look forward to being able to continue to work with Acciona as it continues to grow its Australian business operations."

The acquisition is expected to complete in the first half of 2020, subject to conditions and regulatory approvals. Acciona will acquire the Engineering business excluding the NorthConnex, Kingsford Smith Drive and Melbourne Metro projects.

Acciona provides renewable energy, infrastructure, water and services in response to society's needs. Lendlease is a listed property group specialising in project management and construction, real estate investment and development.

For additional information visit [www.claytonutz.com](http://www.claytonutz.com)

**GIDE**

COUNSEL TO ENGIE ON ITS FUTURE ZERO-CARBON HEADQUARTERS

**PARIS, 06 January 2020:** Law firms De Pardieu Brocas Maffei, Gide, PDGB Avocats and Lacourte Raquin Tatar have respectively advised the joint venture between ENGIE and Nexity, Engie, Nexity and Swiss Life Asset Managers France on signing a commitment to purchase the future global head office of ENGIE, located in La Garenne-Colombes, a natural extension of Paris' business district La Défense.

The zero-carbon building complex boasts exceptional features, and will offer a very high-quality work environment to employees.

Jointly developed by ENGIE and Nexity, the complex will comprise six buildings of six to seven stories each, for a total floor area of 135,000 sq.m and an excellent level of performance and services. The eco-site was designed by architecture firms SCAU, Chaix & Morel et Associés and Art & Build, with landscaping by Base. Delivery is planned between the second quarter of 2023 and the end of 2024.

The Gide team advising ENGIE was headed by partner Frédéric Nouel, working with counsel Antoine Mary on real estate aspects.

De Pardieu Brocas Maffei team advised the joint venture between ENGIE and Nexity on real estate and tax aspects. PDGB Avocats advised Nexity on real estate aspects. Lacourte Raquin Tatar advised Swiss Life Asset Managers France on real estate aspects.

For additional information visit [www.gide.com](http://www.gide.com)

**HAN KUN**

ADVISES CHINA STRUCTURAL REFORM FUND ON ITS INVESTMENT AND PARTICIPATION IN CITIC DICASTAL'S MIXED OWNERSHIP REFORM

**BEIJING, 28 December 2019:** Recently, CITIC Dicastal Co., Ltd. successfully completed its restructuring reform in Beijing upon the execution of transaction documents and closing procedures. This transaction is the first mixed-ownership and employee stock ownership reform to be approved by the PRC Ministry of Finance. CITIC Dicastal is the world's leading aluminum wheel and lightweight component manufacturing company, whose production and sales volume of aluminum wheels have ranked first in the world for ten consecutive years. China Structural Reform Fund participated in the reform of CITIC Dicastal, together with six other Chinese and foreign investors and employee stock ownership platforms.

Han Kun acted as the legal counsel for China Structural Reform Fund in the transaction and was fully involved in the review, revision and negotiation of the transaction documents and other ancillary documents, and the provision of legal advice and analysis for the transaction.

For additional information visit [www.hankunlaw.com](http://www.hankunlaw.com)

**HOGAN LOVELLS**

ADVISED ALTAVANT SCIENCES IN ITS ACQUISITION OF ONSPIRA THERAPEUTICS

**NEW YORK, 08 January 2020:** International law firm Hogan Lovells advised clinical-stage biopharmaceutical company Altavant Sciences in its acquisition of Onspira Therapeutics, a private drug development company similarly focused on therapeutics for rare pulmonary diseases.

This acquisition expanded Altavant's pipeline to include OSP-101, a novel inhaled interleukin-1 receptor antagonist (IL-1Ra) with US FDA orphan drug designation. OSP-101 is in development for the treatment of bronchiolitis obliterans syndrome (BOS), the leading cause of morbidity and mortality in post-lung transplant patients.

"Hogan Lovells offers an unparalleled level of knowledge of biotech industry and dealmaking in the sector, in addition to their excellent support for their clients," said Lyn Baranowski, Chief Operating Officer of Altavant Sciences. "We benefitted greatly from their expertise and look forward to working with them in the future."

The transaction closed on December 30, 2019. Terms are not being disclosed.

The Hogan Lovells team was led by New York M&A partner Adam Golden, counsel Jessica Bisignano and associate Caroline Brown. Global Regulatory partner Susan Lee, Benefits counsel Michael Applebaum, Tax partner Christine Lane and senior associate Catherine Yiren Chen also advised on the matter.

For additional information visit [www.hoganlovells.com](http://www.hoganlovells.com)



**NAUTADUTILH**

ASSISTS TENCENT ON ACQUISITION OF 10% STAKE IN UNIVERSAL MUSIC GROUP

**AMSTERDAM, 02 January 2020:** NautaDutilh assisted a consortium led by Tencent on the acquisition of a 10% stake in Universal Music Group, the world's largest music company, from Vivendi.

The consortium, led by Tencent and participated in by Tencent Music Entertainment and certain global financial investors, is set to acquire 10% of the share capital of UMG, based on an enterprise value of EUR 30 billion for 100% of UMG's share capital. The consortium also has the option to acquire, on the same price basis, an additional amount of up to 10% of UMG's share capital until January 15, 2021.

The transaction will be submitted to the competent regulatory authorities. The closing of the transaction is expected by the end of the first half of 2020.

NautaDutilh advised Tencent alongside Davis Polk & Wardwell. The NautaDutilh team consisted of David Viëtor, Jinne van Belle and Tamara Gang (Finance), Sybren de Beurs, Lieke van der Velden and Alex Draaisma (Corporate M&A), Wijnand Bossenbroek and Esther Schreiber (Corporate Notarial).

For additional information visit [www.nautadutilh.com](http://www.nautadutilh.com)

**MUNIZ**

ADVISES CHINA YANGTZE POWER (CYP) BUY US SEMPRA ENERGY'S PERUVIAN BUSINESS FOR US\$3.6 BILLION IN THE LARGEST OVERSEAS M&amp;A TRANSACTION BY A CHINESE COMPANY IN 2019

**LIMA, October, 2019:** Baker McKenzie LLP's Chicago and Miami offices and **Muñiz, Olaya, Meléndez, Castro, Ono & Herrera** in Lima have helped China Yangtze Power (CYP) buy US Semptra Energy's Peruvian business for US\$3.6 billion, in the largest overseas M&A transaction by a Chinese company in 2019.

White & Case LLP in New York, Shanghai and Beijing and Rodrigo, Elías & Medrano Abogados in Lima advised Semptra Energy. Sullivan & Cromwell LLP in New York advised BofA Merrill Lynch as financial advisor to Semptra.

The deal was announced on 30 September and is expected to close during the first quarter of 2020.

Once complete, CYP will obtain an 83.6% stake in Peru's largest electricity company – Luz del Sur – which operates in the southern part of the Lima region. The transaction includes an interest in Luz del Sur's power generation business Inland Energy and energy infrastructure company Tecsur, which provides services to Luz del Sur.

Semptra Energy has agreed on the sale to focus on its operations in North America, particularly in California and Texas. It holds electricity assets in Chile too, which it expects to divest later this year.

Counsel to China Yangtze Power International Baker McKenzie LLP (Miami); **Muñiz, Olaya, Meléndez, Castro, Ono & Herrera** Partners Andrés Kuan-Veng, Jorge Muñiz, Rolando Salvatierra, Mercedes Fernandez, Jorge Otoya, Guillermo Flores, Frezzia Saavedra and Renato de Vettori, and associates Alesandra Azcarate, Raul Alosilla, Milagros Mejía, José Ângulo, Francisco Quevedo, Denisse Valderrama, Hilda Fernández, Emmanuel Polando and Germán Gomez in Lima

For additional information visit [www.munizlaw.com](http://www.munizlaw.com)

**NAUTADUTILH**

ASSISTS IN RAISING UP TO USD \$627.6 MILLION FOR THREE BIOTECH COMPANIES WITHIN 48 HOURS

**AMSTERDAM, 07 November 2019:** On November 5 and 6, NautaDutilh assisted argenx and Merus in their follow-on offerings and Centogene in its Nasdaq IPO, raising a total of up to USD 627.6 million for these companies within 48 hours.

On November 5 and 6, NautaDutilh assisted argenx and Merus in their follow-on offerings and Centogene in its Nasdaq IPO, raising a total of up to USD 627.6 million for these companies within 48 hours. Antonia Netiv and her team acted as underwriters' counsel in the up to USD 484 million argenx global follow-on offering. Paul van der Bijl and his team acted as issuer's counsel to Merus and Centogene on their up to USD 79.2 million follow-on offering and up to USD 64.4 million Nasdaq IPO, respectively.

With these transactions, NautaDutilh demonstrates its position as market leader in these types of deals, having been Dutch counsel in 65% of initial public offerings of all current Nasdaq-listed Dutch companies and more of their follow-on offerings than any other Dutch law firm.

For additional information visit [www.nautadutilh.com](http://www.nautadutilh.com)

**SANTAMARINA Y STETA**

ASSISTS CONGLOMERATE GRUPO INDUSTRIAL SALTILO OBTAIN US\$245 MILLION LOAN FROM A GROUP OF LENDERS LED BY HSBC

**MONTERREY October, 2019:** Thompson & Knight LLP in New York, Santamarina y Steta in Monterrey and Cuatrecasas in Barcelona have helped Mexican conglomerate Grupo Industrial Saltillo obtain a US\$245 million loan from a group of lenders led by HSBC.

Santamarina y Steta acted as lead counsel for Grupo Industrial Saltillo.

The deal closed on 11 September and includes a six-year US\$195 secured term facility and a US\$50 million revolving credit facility. The loan also involved collateral governed under Spanish law.

Saltito will use the proceeds to refinance the company's existing debt and for general corporate purposes.

**Counsel to Grupo Industrial Saltillo** Thompson & Knight LLP (New York); Cuatrecasas (Barcelona); and Santamarina y Steta Partner Carlos Argüelles and associate Bárbara Asiain in Monterrey.

For additional information visit [www.s-s.mx](http://www.s-s.mx)



PRAC EVENTS







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

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

[www.prac.org](http://www.prac.org)

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



12 DEC 2019

# Inconsistent particulars of contract: NSW Supreme Court shines light on transfer of title following RCR insolvency

BY JONATHAN MCTIGUE, SEAN KELLY

In a helpful illustration of the orthodox process of construing a contract, the Supreme Court of NSW construed a contract containing a contradiction between standard form provisions and specific contract particulars.

The interaction between some important rules of contract interpretation has been highlighted and explained in a recent judgment of the Supreme Court of NSW in *NEXTracker Inc v ACN 003 905 093 Pty Ltd* (formerly RCR O'Donnell Griffin Pty Ltd) (in liq) [2019] NSWSC 1604.

The key rules and principles considered by the Court were:

- **Objective test:** rights and liabilities under a contract are determined objectively, by reference to the text, context and purpose of the document.
- **Construing terms:** the meaning of the words used in a contract is ascertained by asking: what would a reasonable businessperson have understood those words to mean? This exercise involves consideration of the language in the context of the document as a whole, as well as the circumstances addressed by the contract and commercial purpose or objects of the contract.
- **Avoiding redundancy:** a construction that gives effect to all provisions in a contract will generally be preferred to one that leaves any provisions redundant (**redundancy principle**). However, the redundancy principle is merely a guide to assist in ascertaining the parties' objective intentions.
- **Amendments to standard terms:** courts will pay particular attention to language that has been specifically chosen by the parties, on the basis that this is more likely to reflect their objective intentions.

Upon applying these rules and principles, NEXTracker Inc was held to have transferred title in solar farm equipment (**Equipment**) to RCR O'Donnell Griffin Pty Ltd (in liq) (**RCR**) despite the fact that NEXTracker will never receive payment for the equipment.

## Project background

Prior to RCR entering into liquidation in March 2019, NEXTracker contracted with RCR for the provision of Equipment for use on the Greenough River Solar Farm in Western Australia.

After the Equipment was loaded for shipping to site and NEXTracker provided associated documentation to RCR – but before

RCR paid for the Equipment – RCR entered into liquidation. The Equipment was sold in the liquidation of RCR. The proceeds of that sale would belong to the party who proved it had title to the Equipment.

The resolution of the case required the reconciliation of conflicting terms, including specific language inserted into the particulars of contract annexed to a standard form contract. That specific language dealt with subject-matter (being transfer of title) of a nature that was already addressed in the General Conditions and went beyond the purpose that the contract particulars usually fulfil.

Clause 20 of the General Conditions was the critical clause. It provides, in part:

### **20.1 Risk in the Equipment**

Risk in the Equipment shall pass from the Supplier to the Purchaser as stated in Item 27.

...

### **20.2 Ownership of Equipment**

Ownership of ... the Equipment ... shall pass to the Purchaser at the time ... specified in Item 28.

If the Equipment ... is to be imported, ownership of the Equipment ... shall pass to the Purchaser upon:

- a) payment to the Supplier of the value of the Equipment ...; and
- b) [the provision of certain documents].

Item 27 of Annexure Part A did not simply record a date upon which risk in the Equipment would pass, but instead included language that was akin to a general condition. It stated that "the risk of loss **and title** for the Equipment shall pass from the Supplier to the Purchaser at the port of origin" (emphasis added).

The default position in Item 28 of Annexure Part A was that ownership would pass at the time of payment for the Equipment (which never occurred). However, the parties altered the default position by choosing specific, tailored language which stated that the time at which title to the Equipment passes to the purchaser is: "Date that the Purchaser receives the confirmed marine (or transit) insurance policy and the Equipment has been loaded on the boat at the port of origin".

Therefore, the unamended language of clause 20.2 provided that title passed upon payment; whereas the language of Item 28 of Annexure Part A provided that title passed when the Equipment was loaded onto the ship and insurance was confirmed.

### **Analysis and resolution**

It was common ground that RCR had not paid for the Equipment. NEXTracker's case therefore depended upon clause 20.2, because if title only passed upon payment – as provided for in clause 20.2 – the proceeds of the sale would belong to NEXTracker.

Although Justice Ball recognised that this argument was "attractively simple", it was rejected. Instead, Items 27 and 28 of the particulars in Annexure Part A were relied upon by the judge when determining that title in the Equipment passed to RCR at the port of origin.

The specific language inserted by the parties into Item 27 extended beyond the concept of "risk of loss" to "risk of loss **and title**". Justice Ball concluded that this was evidence of the parties' objective intention that the identified marker (being at the port of origin) set the time at which title also passed to RCR, not only the risk of loss. As a result, it was held that "whatever the intended purpose of Item 27 was in the structure of the Standard Conditions, the parties chose to record more of their

agreement in that item than the Standard Conditions contemplate".

NEXTracker also argued that clause 20.2 provided an exception to that position, in cases where the Equipment was imported. However, Justice Ball held that this interpretation would not make commercial sense. This is because, at the time the agreement was entered into, the parties anticipated that all Equipment would be imported. Therefore, NEXTracker's interpretation would have meant that the specific, tailored language inserted into Item 28 was intended to only cover circumstances that were not in contemplation at the time, being the sourcing of Equipment from within Australia. This was held to be an unlikely scenario, particularly in circumstances where the parties had deliberately changed the default position in Item 28, which otherwise would have provided for the transfer of title upon payment.

Justice Ball recognised that if Items 27 and 28 were given complete primacy, then clause 20.2 would become redundant. However, this alone was not a sufficient reason to adopt a different interpretation of the contract as a whole. The redundancy principle was forced to yield when the resultant interpretation "does violence to the words that the parties specifically chose to insert in Items 27 and 28 to express their agreement".

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## NEW BRAZILIAN FRANCHISING LAW IS SANCTIONED

### Intellectual Property

President Jair Bolsonaro sanctioned Law No. 13,966 of December 26, 2019, (Brazilian Franchising Law), which regulates the franchising system in Brazil and revokes Law No. 8,955/1994 (former Franchising Law).

The new Franchising Law is an important mark for the franchising in Brazil, not only because it is more detailed than the previous legal text, but also because it corrects the terminology of the former law to avoid the possibility of framing this type of agreement as a consumer or employment relationship (it also makes reference to the non-existence of such relationships between franchisor and franchisee's employees) and clarifies some issues that were being debated/handled by the judiciary.

The new Law adopts a clearer terminology to enforce the franchisor's obligation to provide the franchisee with a Franchise Offering Circular (COF) at least 10 days prior to signing the agreement or payment of the franchising fees by the franchisee. If the franchisor does not observe this provision, then the franchisee may argue for the nullity or invalidity of the contractual relation, as the case may be, and request the refund of the amounts paid with monetary correction.

Furthermore, the new Law removes the provision that required the indication of a guarantee fee; and it is clear about the need for details on (i) penalties and fines; (ii) transfer and succession rules; and (iii) rules related to the territorial action policy (including the territorial competition between franchisor's owned units and franchised units).

As for intellectual property rights, the Law adopts the terminology "trademarks and other intellectual property rights" rather than providing only the right to use "trademark or patent", in order to make the scope of industrial property rights that can be licensed broader.

For international franchises, the new legal text of the Law provides that the contracting parties shall be free to state the applicable law to the agreement between the domicile of the franchisee or the domicile of the franchisor.

Finally, it is noteworthy that this Law was sanctioned by the president with one single veto (article 6), which specified the bidding rules applicable to this business model in government-owned companies, mixed-capital companies and entities controlled by the Federal Government, states, municipalities and the Federal District.

This new Franchising Law will come into force by the end of March this year.

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Blog

# Supreme Court of Canada Reforms Judicial Review

January 03, 2020

Written by Scott Bower, Andrew Little, Brynne Harding and Russell Kruger

Signaling an increased willingness to overturn decisions of administrative tribunals, the Supreme Court of Canada has reformed the law governing judicial review in *Vavilov*, a case about the children of Russian spies, and in two *Bell Canada* cases over Super Bowl commercials.

The *Vavilov* trilogy concerns how Canadian courts review the decisions of administrative tribunals and government officials. The Supreme Court both revised the framework for determining the standard of review and issued extensive guidance on its application. Its reasons attempt to bring more coherence and predictability to a challenging area of law.

The trilogy's impacts will be felt by many who are subject to the expansive Canadian administrative state—in areas ranging from pipeline and major public infrastructure approvals, to professional regulation, intellectual property, environmental law, regulated industries, immigration, and many others.

Among the trilogy's pronouncements on the state of administrative law, two central points emerge:

- the reasonableness standard of review will presumptively apply, subject to certain (and fewer) kinds of exceptions; and
- review on a reasonableness standard is "robust", given the expectation that administrative decisions be "justified" in relation to their factual and legal context—raising the standard that administrative decisions must meet.

In each of the three cases, the Court overturned an administrative decision-maker. In *Vavilov* itself, the



Court concluded that the Canadian Registrar of Citizenship's interpretation of her home statute was unreasonable. In the *Bell Canada* cases, the Court overturned determinations of the Canadian Radio-television and Telecommunications Commission, applying a correctness standard.

## The New Standard of Review Framework in *Vavilov*

In *Vavilov*, the Court has reformed the existing framework for identifying the standard of review, and replaced it with a simple presumption of reasonableness. That presumption may be rebutted in certain limited circumstances.

The presumption of reasonableness will be rebutted: (1) where the legislature has expressed an intention for correctness review to apply, either by so stating or by providing a statutory right of appeal; or (2) where the rule of law requires a different standard of review by the court—a "correctness" standard.

The "rule of law" category is itself comprised of three types of cases that require decisions to be correct: cases involving (1) constitutional questions; (2) "general questions of law of central importance to the legal system as a whole"; and (3) questions on the jurisdictional boundaries between tribunals.

The theoretical underpinning of the presumption of reasonableness is that reviewing courts must defer to the "institutional design choices" of legislators. Where the legislature has chosen to give final decision-making authority to an administrative decision-maker rather than a court, the courts are to respect that choice by only applying a reasonableness standard of review. However, as a corollary, where the legislature has provided for an appeal to the courts, the standard of review will be the same as for any other appeal—meaning correctness will apply on questions of law.

In practice, this change may provide greater scope to parties challenging decisions of tribunals and other decision-makers in a statutory appeal process.

The Court made a clear effort to simplify the standard of review analysis. Its reasons in *Vavilov* eliminate so-called "contextual" factors in identifying the standard of review. The Dunsmuir "pragmatic and functional approach" predicated deference or its absence on four contextual factors, including the perennially controversial "expertise of the decision-maker". In the intervening years, a presumptive reasonableness standard had emerged, rebuttable by reference to contextual factors. Context will now play no role in finding the standard of review.

An open question in *Vavilov*'s wake is the breadth of the "rule of law" category. We expect future litigation to focus on whether an issue may fall within the category of an issue of "central importance to the legal system as a whole" so as to attract a less deferential "correctness" review.

## Applying the Reasonableness Standard of Review

Prior to the *Vavilov* trilogy, binding guidance from the Supreme Court on the application of the reasonableness standard was sparse. Judicial review litigants have long struggled to assess their prospects: what kind of error will justify a reversal of an administrative decision? What is sufficient to

withstand a court's scrutiny?

As in its earlier jurisprudence, the Court addressed both of the opposing forces in judicial review: the need for "robust" judicial review to ensure the legitimate exercise of public power, and the need for courts to respect the expertise and jurisdiction of administrative decision-makers. The reasons and outcome in *Vavilov* seem to lean towards more rigorous judicial review.

The Court confirmed the existing hallmarks of reasonableness: "justification, transparency, and intelligibility." The Court also introduced a new refrain: to be reasonable, a decision must be "justified" in relation to the relevant "factual and legal constraints that bear on the decision." In assessing reasonableness, a court should consider both the outcome and the reasoning process used by the decision-maker.

Judicial deference to administrative decision-makers remains a central theme in the decision. The Court observed that "administrative justice" will not always look like "judicial justice", and directs that respectful attention be given to the demonstrated expertise of a decision-maker. Administrative decisions in highly specialized areas may use language and concepts unfamiliar to courts—but this is not a sign of unreasonableness. *Vavilov* confirms that the burden of establishing unreasonableness is on the applicant.

While contextual factors like a decision-maker's expertise no longer play any role in selecting the standard of review, they may be important to the court's evaluation of reasonableness. The Supreme Court described a non-exhaustive list of factors for consideration, including:

- the governing statutory scheme;
- other relevant statutory or common law;
- the principles of statutory interpretation;
- the evidence before the decision-maker and facts of which the decision-maker may take notice;
- the submissions of the parties;
- the past practices and decisions of the administrative body; and
- the potential impact of the decision on the individual to whom it applies.

The Court underscored the importance of the reasons provided for the decision under review. A decision-maker's reasons are not only the starting point of judicial review, but are also fundamental to the legitimacy of administrative decision-making. Thus, a reviewing court must develop an understanding of the reasoning process behind a decision and evaluate its "internal coherence" and rationality. The reviewing court may not engage in a "treasure hunt for error", or a "formalistic statutory interpretation exercise."

If neither the duty of procedural fairness nor the statutory scheme requires an administrative decision-maker to provide reasons, the reviewing court must "look to the record as a whole" to determine

whether the decision was reasonable. If the decision-maker has not provided reasons, "the analysis will then focus on the outcome rather than on the decision maker's reasoning process."

Although a reviewing court may focus on an outcome in the absence of reasons, the Court held that reviewing courts should not fashion their own reasons to buttress administrative decisions.

Whether the Court's guidance in *Vavilov* will assist courts as they endeavour to balance the need for meaningful review with the need for deference will be seen in cases to come.

*The authors thank Graham Cook and Annie Tonken, articling students-at-law, for their valuable assistance in preparing this article.*

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Posted on: November 21, 2019

## NEW “TRANSPARENCY REGISTER” THAT YOUR BC PRIVATE COMPANY MUST PREPARE BY MAY 1, 2020

By: Douglas G. Cottier

### **Background**

In 2017, Canadian finance ministers agreed to pursue legislative amendments to federal and provincial corporate statutes to ensure that corporations hold accurate and up-to-date information on their beneficial owners. This is an ongoing pursuit across the country, with the stated priority of preventing the misuse of corporations for tax evasion, money laundering, corruption, and other criminal purposes. In line with this, the records setting out accurate beneficial ownership are to be made available, upon request, to law enforcement and financial, tax, and legal authorities.<sup>[1]</sup>

The implementation of these measures in British Columbia is now at hand by way of amendments to the province’s *Business Corporations Act* (the “**Act**”). These amendments will take effect on May 1, 2020, the date by which all private companies recognized under the Act are obligated to create and maintain a “Transparency Register”.

The motives, intent, and mechanics of this Transparency Register draw many parallels to those of the *Land Owner Transparency Act* (British Columbia) that is in the pipeline with respect to BC real estate. While both schemes are aimed at increasing the openness of beneficial ownership information, the two are mutually exclusive, involve different disclosure requirements, and compliance with the obligations under one does not satisfy the obligations of the other; separate compliance under both will be required.

### **Transparency Register: Applicability and Contents**

The Transparency Register must catalogue each “significant individual” who is associated with the respective private company. One of the core principles in preparing the register is to trace back through all non-human shareholders to set out the identity of the controlling individuals. In essence, the Transparency Register is a self-reported record of individuals who have an (actual or potential) right or ability to directly or indirectly affect the control of the company.

When it comes to preparing a Transparency Register for your private BC company, consider:



1. *Does my company fall within the scope of “private company”?*

Unless your BC company is (a) a reporting issuer (or equivalent thereof), (b) listed on a designated stock exchange, or (c) within a prescribed class of companies pursuant to the Act’s regulations, it will be required to comply with the Transparency Register provisions of the Act as of May 1, 2020.

2. *Who is considered to be a “significant individual”?*

The Act specifies that an individual is a “significant individual” (and must therefore be listed on the Transparency Register) if:

(a) the individual has (direct or indirect) registered or beneficial ownership or control of either (i) 25% or more of the issued shares of the company, or (ii) issued shares of the company that carry 25% or more of the rights to vote at general meetings; and/or

(b) the individual is able to (directly or indirectly) elect, appoint or remove the majority of the directors of the private company by way of any one or more of the following rights or abilities:

(i) the right to elect, appoint or remove one or more of the company’s directors;

(ii) indirect control of the right to elect, appoint or remove one or more of the company’s directors; and/or

(iii) the ability to exercise direct and significant influence over an individual who has the right or indirect control described in the preceding subparagraphs (i) or (ii).<sup>[2]</sup>

Because this “significant individual” threshold captures indirect owners and holders of rights, companies must consider which individuals ultimately control any corporations or trusts that hold its shares, as well as review any agreements (such as shareholders’ agreements or financial contracts) that may grant any one or more of the abilities listed above to an individual.

Further, if any two or more individuals have rights or abilities that meet any of the above-noted criteria when exercised jointly, then each such individual must be listed as a “significant individual”. It is also important to note that two or more individuals that the Act considers to be “associated” with each other will be presumed to be acting in concert. The Act’s definition of “associate” includes spouses, children, and other relatives who share a home.

Some examples of significant individuals are:





- If Richard owns 15% of the company's shares personally, plus another 15% indirectly through a holding company wholly owned by Richard, Richard will be listed as a "significant individual" on the company's Transparency Register. He ultimately owns or controls an aggregate of 25% or more (30%) of the shares of the company.
- If 25% of the company's shares are registered to Buell as trustee of a family trust and the trust has three discretionary beneficiaries, all of the following must be disclosed as a "significant individual":
  - Buell as trustee, because Buell has direct registered ownership of 25% or more of the shares; and
  - each of the three discretionary beneficiaries, because for the purposes of the Transparency Register, every beneficiary of this trust is treated as having a 25% interest in the company.
- If Sutton and Sutton's spouse each own 15% of the company's shares, neither one of them meets the "significant individual" threshold independently but the Act presumes them (as each other's spouse) to act in concert. Therefore they must each be listed as "significant individuals" because, when taken together to act in concert, they own 25% or more of the shares of the company.

### 3. What information must be included in the Transparency Register?

The Transparency Register must include the following information for each "significant individual":

- (a) the individual's full name, date of birth, and last known address;
- (b) whether the individual is a Canadian citizen or permanent resident of Canada;
- (c) if the individual is not a Canadian citizen or permanent resident of Canada, every country or state of which the individual is a citizen;
- (d) whether the individual is resident in Canada for the purposes of the *Income Tax Act* (Canada) (the "ITA");
- (e) the date on which the individual became or ceased to be a significant individual in respect of the company;
- (f) a description of the basis upon which the individual is a significant individual; and
- (g) prescribed information, if any.<sup>[3]</sup>

Some of this information may not be readily available, so the director(s) of the company will likely need to make inquiries. For instance if a "significant individual" splits their time amongst a number of countries, a



director may not know the individual's residency for the purposes of the ITA. Directors should not guess at information, and should put the question of any unknown information to the shareholders of the company and to the possible significant individuals, and they in turn may need to consult their tax advisors.

### **Access to the Transparency Register**

The Transparency Register may only be accessed by certain authorized persons, and only during statutory business hours (or during a reduced number of hours, as may be passed by ordinary resolution of the company). The persons that will be authorized by the Act to access the Transparency Register are: directors of the company, RCMP or police officers, officials or employees of tax authorities, and officials or employees of regulatory authorities such as the BC Securities Commission, the Financial Institutions Commission, and the Law Society of BC.

### **Obligations of the Company and Shareholders**

Private BC companies must take "reasonable" steps to maintain an accurate and current Transparency Register. This reasonability standard accepts that all of this information may not be provided when requested, in which case the Transparency Register must contain a summary of the steps that the company took to try to obtain the information.

If a private company determines that there are no individuals who qualify as significant individuals, the Act requires the Transparency Register to contain a statement to that effect.

There are key time frames with respect to the maintenance of the Transparency Register of which companies and their directors should be mindful:

1. Upon adding or removing a "significant individual" to or from the Transparency Register, the company must notify said individual within 10 days.
2. Upon receipt of any new relevant information, the company must update the Transparency Register with said information within 30 days.
3. Each year during the 2-month period following the company's anniversary of being incorporated or recognized in BC, the company must take reasonable steps to confirm that the Transparency Register is accurate, complete, and up to date.
4. After an individual ceases to be a "significant individual", the company must:
  - (a) continue to record this individual on the Transparency Register for a period of six years showing the date



on which they ceased to be a “significant individual”; and

(b) within one year of the sixth anniversary the date on which the individual ceased to be a “significant individual”, delete the individual from the Transparency Register and destroy any records with respect to this individual that relate to the Transparency Register.

The Transparency Register must be kept at either the company’s records office or at another location so long as it is available for inspection and copying at the records office by means of a computer terminal or other electronic technology.

Companies may request “significant individual” information from shareholders at any time. Upon receipt of any such request, shareholders must take reasonable steps to compile the requested information and promptly send it to the company.

Under the Act, it is an offence for private BC companies to fail to take reasonable steps to comply with the obligations listed above. It is also an offence for (a) any director or officer of a private company to authorize, permit or acquiesce to any such non-compliance; or (b) a shareholder to send information to the company that is false or misleading. An individual who commits any of these offences risks penalties of up to \$50,000, and offenders that are non-human entities (such as private companies) risk penalties of up to \$100,000.<sup>[4]</sup>

Every private company that is incorporated or recognized under the Act must have its Transparency Register created on or before May 1, 2020. In the coming months, each private BC company that uses Richards Buell Sutton LLP as its registered and records office will be contacted by the firm to assist with the preparation of the Transparency Register.

*This article was authored by Douglas G. Cottier, member of the Business Law Group at Richards Buell Sutton LLP. If you have any questions related to this article, please reach out to any member of the Business Law Group, or contact Douglas directly at 604.909.9321 or [dcottier@rbs.ca](mailto:dcottier@rbs.ca).*

*The information contained herein is premised on the laws of the Province of British Columbia as at November 21, 2019. This article should not be treated or relied on as legal advice. Detailed legal counsel should be sought prior to undertaking any legal matter.*

<sup>[1]</sup> Department of Finance Canada “Agreement to Strengthen Beneficial Ownership Transparency”. Web: [https://www.fin.gc.ca/n17/data/17-122\\_4-eng.asp](https://www.fin.gc.ca/n17/data/17-122_4-eng.asp)

<sup>[2]</sup> s. 119.11 of the Act (as of May 1, 2020)

<sup>[3]</sup> s. 119.2(2) of the Act (as of May 1, 2020)

<sup>[4]</sup> s. 428(2.1) of the Act (as of May 1, 2020)

December, 2019

## INTERPRETATIVE GUIDELINE ON THE SCOPE AND CONTENT OF COMPLIANCE PLANS IN REGULATIONS REGARDING THE PROTECTION OF CONSUMER RIGHTS

On December 20 2019, the National Consumer Service (**SERNAC**) published the “**Interpretative Guideline of Compliance Plans**”, which seeks to provide guidance to suppliers about the scope and basic contents of the compliance plans contemplated in Law No. 19,496 on the Protection of Consumer Rights (“**CPA**”).

This Guideline is subject to a public consultation. Comments can be entered in SERNAC’s website (<https://www.sernac.cl/portal/618/w3-article-57789.html>) until January 7 2020. After this process, this guideline could suffer modifications.

Hereunder, you will find a brief presentation of the content of SERNAC’s guideline.

### I. What is a compliance plan?

The purpose of a compliance plan is to structure an organization’s risk management system. It can be defined *as the set of internal measures adopted to prevent, detect and mitigate the risk of infringing the duties of conduct required by the organization, either by their own actions or omissions, those of their representatives, advisors, dependents or collaborators, including service providers and the processes that, according to the law, are under their responsibility.*

It is important to note that, there is not a unique model of compliance plan, so they should be designed according to the particular characteristics of each organization.

### II. Compliance plans in the cpa and rol of SERNAC

**The CPA regulates compliance plans in two articles:** article 24 subsection 4 and article 54 letter P.

#### 1. Preventive compliance plan of article 24 subsection 4

Article 24 subsection 4 provides that mitigating circumstances will be considered in the context of the application of sanctions to suppliers that violate the norms of protection of consumer rights. “c) *The substantial collaboration that the offender has provided to the National Consumer Service, before or during the administrative sanctioning procedure or the one that has been provided in the judicial procedure. It will be understood that there is a substantial collaboration if the supplier keeps a specific compliance plan in the matters referred to in the respective infraction, which has been previously approved by the Service and its effective implementation and monitoring is accredited*”.



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

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This article refers to a preventive compliance plan. In this case, the company analyzes and evaluates its infringement risks before it has been committed, to establish preventive, detection and corrective measures pertaining to such risks.

Thus, the approval through an administrative process provided by SERNAC and validated by it, implies that the provider has provided “substantial collaboration” prior to the judicial procedure, and that, complying with the other legal requirements, will be considered as a attenuating circumstance when determining the fine associated with the offense committed, in said procedure.

## **2. Compliance plan within the voluntary procedure of article 54 P**

Article 54 letter P indicates that, in case of reaching an agreement within the voluntary procedure for the protection of the collective or diffuse interest of consumers, the Service will issue a resolution that will establish its terms and the obligations assumed by each of the parts. Thus, *“the resolution may contemplate the presentation by the supplier of a compliance plan which will contain, at a minimum, the appointment of a compliance officer, the identification of corrective or preventive actions or measures, the deadlines for its implementation and a protocol designed to avoid the risks of non-compliance”*. In this way, the compliance plan within the voluntary procedure aims to account for a double, reactive and preventive action. According to the nature of the infraction, the plan would be part of the agreement reached. Together with this, the Service could assume the monitoring and follow-up, since it is understood that, a disagreement in the implementation of said plan would lead to a breach of the agreement reached in the collective voluntary procedure.

## **III. Contents of the compliance plan**

Taking into account the provisions of article 54 P of the CPA, the National Consumer Service considers that the compliance plans must contain at least the following central elements for the implementation of effective instruments:

- 1. Appointment of a compliance officer**
- 2. Identification of corrective or preventive actions or measures**
- 3. Deadlines for implementation**
- 4. Protocol destined to avoid the risks of non-compliance**
- 5. Commitment of senior and middle management**
- 6. Correct alignment of incentives and application of disciplinary measures**
- 7. Reaction against findings**
- 8. Continuous improvement, periodic tests and review**
- 9. Monitoring and follow-up by SERNAC**

Notwithstanding the foregoing, the Service may request information regarding the compliance plan at any time and make observations, as well as substantiated proposals for accommodations, when deemed appropriate.

Finally, the regulation that disciplines the system that will guide and complement the compliance plans, it is still pending in the Ministry of Economy.

# Legal Commentary

November 16, 2019



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## Unveiling of the H-share “Full Circulation” Reform

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The China Securities Regulatory Commission (“**CSRC**”) has recently unveiled the H-share “full circulation” reform with the promulgation of the *Guidelines on Applying for “Full Circulation” of Unlisted Domestic Shares of H-share Listed Companies* (CSRC Circular [2019] No. 22, issued on November 14, 2019, the “**Guidelines**”) and publication on the CSRC website of official answers to questions related to the reform, the *CSRC Spokesperson’s Press Conference Q&A Regarding the Comprehensive Launch of the “Full Circulation” Reform for H-share Listed Companies* (the “**CSRC Q&A**”).

### H-share “full circulation” – a Primer

The “full circulation” of H-share listed companies has been a long-discussed topic. Prior to the pilot implementation of the reform, domestic companies listed on the H-share market could not publicly trade their domestic unlisted shares on the Hong Kong Stock Exchange, thereby restricting the overall liquidity of the companies’ shares and also, to a certain extent, causing the Hong Kong Stock Exchange to become less attractive as an IPO location for domestic companies.

Previously, during the “full circulation” pilot reform in 2017, several documents were promulgated with respect to the pilot implementation of the reform, beginning with CSRC issuing opinions on the H-share “full circulation” pilot reform, followed by China Securities Depository and Clearing Corporation Limited (“**CSDC**”) and the Shenzhen Stock Exchange promulgating the *Implementing Rules for the Pilot Reform of “Full Circulation” of Shares of H-share Listed Companies (for Trial Implementation)* and the *Guidelines for Handling Business under the Pilot Reform of “Full Circulation” of Shares of H-share Listed Companies (for Trial Implementation)*. During the pilot period, three companies were approved for “full circulation” of their shares on the H-share market, including Legend Holdings (03396.HK), China Aerospace Science and Industry Corporation (02357.HK), and Weigao Group (01066.HK).

This time, CSRC has promulgated the Guidelines to specify rules for H-share “full circulation”, marking the formal launch of the “full circulation” reform<sup>1</sup>.

<sup>1</sup> The reform involves H-share companies that are solely listed on the Hong Kong Stock Exchange. Unlisted domestic shares of H-share companies after being converted into H-shares can be listed and traded on the Hong Kong Stock Exchange. The “full circulation” program does not apply to A+H-share listed companies.



## **Key points of H-share “full circulation”**

### **I. Shares eligible to apply for “full circulation”**

According to the Guidelines, the following types of shares of H-share listed companies or companies applying for IPO on the H-share market are eligible to apply for H-share “full circulation”: unlisted domestic shares held by domestic shareholders before an overseas public offering; unlisted domestic shares issued after an overseas public offering; unlisted shares held by foreign shareholders.

It is worth noting that after an H-share listed enterprise is approved for “full circulation”, additional shares that it issues to domestic shareholders are still regarded as domestic shares, and it is thus necessary again to apply for “full circulation” for those shares to be traded on the H-share market.

### **II. Application conditions and requirements**

According to the Guidelines, domestic shareholders of H-share listed companies may decide on the number and proportion of shares to apply for “full circulation” and entrust the enterprise to submit a “full circulation” application, provided that doing so complies with relevant laws, regulations, and state-owned asset management, foreign investment, industry supervision, and other policy requirements.

According to the CSRC Q&A, CSRC will actively and orderly advance “full circulation” reform work in accordance with laws and regulations based upon the principle of “one mature, one put forward”. Compared with the previous CSRC requirements which consisted of four basic conditions for pilot enterprises, the Guidelines greatly reduce the thresholds for applicant enterprises by no longer placing conditions on the applicant’s industry and scale, or setting enterprise approval quotas and completion deadlines. (For the trial period requirements, please refer to CSRC Spokesman Chang Depeng’s Answer to Reporter’s Questions on Issues Related to the Pilot Implementation of “Full Circulation” Reform for H-share Listed Companies; of these basic conditions, two restricted pilot enterprises as follows: the enterprise applicant must be in an industry that upholds the development concepts of innovation, coordination, green, openness, and sharing, is in line with the direction of national industrial policy development, is suitable for the national strategy of serving the real economy and supporting construction of the “Belt and Road”, must represent an excellent enterprise, the equity structure of the enterprise’s shares is relatively simple, and the market value of its existing shares is not less than HKD 1 billion).

According to the Guidelines, the H-share “full circulation” must still abide by existing restrictions on foreign investment. That is, an enterprise may apply but must comply with foreign investment ratio restrictions when determining the number and proportion of shares to apply for “full circulation” if the enterprise is in an industry subject to special administrative measures for foreign investment (negative list) in which foreign investment is restricted but not prohibited. The specific implementation of these restrictions remains to be observed.

### **III. Application timing and decision-making, examination, and approval procedures**

In terms of application timing, according to the Guidelines, an unlisted enterprise that applies for an IPO on the H-share market may submit an application for “full circulation” together with its IPO

application. This means that it is possible for an H-share listed enterprise have restrictions removed on overall liquidity of its shares at the IPO through administrative approval procedures. Enterprises that have been listed on the H-share market may separately submit an application for “full circulation” to CSRC at any time, or they may choose to submit an application together with an application for overseas refinancing based on their own circumstances.

The relevant decision-making, examination, and approval procedures for the “full circulation” program mainly include the enterprise’s internal decision-making, approval by the competent authority (if applicable), and examination and approval by CSRC:

- 1. Internal enterprise decision-making:** H-share listed enterprises or enterprises applying for an IPO on the H-share market should undertake necessary internal decision-making procedures to fully protect shareholders’ right to know and right of participation. During the pilot period, three pilot enterprises clearly specified in their articles of association the relevant procedures for “full circulation” matters, and specified that they are not subject to voting procedures for shareholders’ meetings, class meetings, and other matters.
- 2. Competent authority approval:** The H-share “full circulation” program must be carried out “in compliance with relevant laws, regulations, and state-owned asset management, foreign investment, industry supervision, and other policy requirements.” In the CSRC Q&A, the spokesperson also emphasized the procedures for obtaining advance approval from the competent authorities: financial, quasi-financial, and other companies which have requirements for the admission of shareholders should obtain the approval of the competent supervisory authorities in advance; “full circulation” applications for state-controlled enterprises and state-held shares are required to comply with the relevant regulations on supervision and management of state-owned equity.

Relevant enterprises applying for “full circulation” should, based on actual circumstances, submit supervisory opinions issued by the competent supervisory department (if applicable), and the government approval to the state-owned equity conditions and the conversion of state-owned shares into overseas listed shares (if applicable), according to the administrative licensing guidelines published on the official CSRC website for the *“Examination and Approval of Overseas Public Offerings and Listings of Limited Companies (Including Additional Issuances)”* (the latest version was published in July 2019).

- 3. CSRC examination and approval:** Applications for “full circulation” will be handled through CSRC administrative licensing procedures for *“Examination and Approval of Overseas Public Offerings and Listings of Limited Companies (Including Additional Issuances)”*.

#### IV. Procedures for registering “full circulation” shares

Subject to the needs of cross-border securities market supervision, “full circulation” shares will be registered through special cross-border share conversion registration and share registration procedures:

- 1. Cross-border share conversion registration:** After CSRC approval, CSDC will undertake the

relevant procedures to convert the fully circulated shares from unlisted domestic shares to shares eligible to be listed and traded on the Hong Kong Stock Exchange.

It is worth noting that H-share “full circulation” applications for domestic unlisted shares are irreversible. This means “full circulation” shares which have undergone cross-border share conversion registration procedures to register as overseas-listed shares cannot be converted back into unlisted domestic shares. This issue requires the special attention of H-share listed companies and their shareholders who also plan to apply for IPOs on the A-share market.

- 2. Share registration:** Shares which have completed cross-border share conversion registration will be deposited with CSDC Hong Kong Co., Ltd. (“**CSDC Hong Kong**”), which will serve as the nominee holder. The shares will then be deposited in the name of CSDC Hong Kong with Hong Kong Securities Clearing Enterprise Limited, and Hong Kong Securities Clearing Company Nominees Limited will be registered as the ultimate nominee holder of the shares in the register of shareholders of the H-share listed enterprise.

## **V. Procedures for trading shares after “full circulation”**

According to the Guidelines, domestic shareholders of an H-share listed enterprise will be able to sell the “full circulation” shares of the enterprise and purchase the Hong Kong-listed shares of the enterprise (the purchase function has not been enabled for technical reasons and will be fixed after the completion of technical system and other conditions).

Domestic shareholders of an H-share listed enterprise must authorize the enterprise to choose a domestic securities company to participate in the trading of “full circulation” shares. Specifically, the domestic shareholders will entrust a domestic securities company to submit a transaction instruction through Shenzhen Securities Communications Co., Ltd. to a Hong Kong securities company designated by the domestic securities company. The Hong Kong securities company will then trade the shares on the Hong Kong Stock Exchange in accordance with the exchange’s rules.

In addition, according to the CSRC Q&A, domestic shareholders are allowed to participate in H-share “full circulation” services through existing RMB ordinary share accounts (i.e. A-share securities accounts) without having to open new securities accounts, which differs from the pilot period where shareholders of pilot enterprises were required to open special “full circulation” accounts with CSDC for share trading.

## **Looking forward**

The unveiling of the H-share “full circulation” reform provides flexibility for improving the liquidity of company shares, and may also attract more domestic companies to consider conducting IPOs on the Hong Kong Stock Exchange without establishing an overseas structure, especially those enterprises that are unsuitable for setting up overseas structures and have difficulty in completing public offerings on the A+H share markets, and will help domestic enterprises to make better use of both domestic and overseas markets and resources for development. It remains to be observed whether offshore structure-based IPOs, a prevailing IPO model for PRC enterprises to list on the Hong Kong exchange, will be affected after

the “full circulation” reform. In the future, CSDC will join with the Shenzhen Stock Exchange to formulate implementing rules related to the “full circulation” program to stipulate the specific business mechanisms and arrangements of the reform. We will also continue watching the progress, effects, and issues regarding the “full circulation” reform.

## ***Important Announcement***

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In 2020, entities incorporated in the country having no income of Costa Rican source must register before the Tax Authorities and submit a yearly equity statement to the Tax Authorities.

Regulation number DGT-075-2019, published in The Gazzete on December 20, 2019, establishes the obligation to register and submit a tax return for non-operative companies incorporated in Costa Rica.

Based on article 1 of the Regulation, legal entities domiciled in Costa Rica having no income of Costa Rican source must register in the Taxpayers Registry (RUT) of the Tax Authorities. Information of the legal representative, the fiscal domicile, as well as the business activity "960113 legal entities incorporated in the country that do not carry out business activity from Costa Rican source" must be included in the form.

The submission of the information should be done through the Virtual Tax Administration (ATV) platform. Tax Authorities will automatically assign the business activity 960113 to those companies that have recently updated the information of the legal representative and fiscal address recently. Therefore, if the company has the information updated in the ATV, the registration should not be performed again.

Registration in the RUT should be done in the month that corresponds based on the last number of their corporate identification number as detailed below:

Corporate numbers ending in:

Month:

1 and 2:	January 2020
3 and 4:	February 2020
5 and 6:	March 2020
7 and 8:	April 2020
9 and 0:	May 2020

Additionally, non-operative entities must submit form D.135 "Statement of Equity of non-operative legal entities" to inform on their assets, liabilities and capital stock. Form D135 should be submitted yearly no later than March 15th. Form will be available in the ATV platform.

If you would like to have our legal assistance to make the registration before the Tax Authorities, please confirm us as soon as possible in order to send you the documents required to submit the registration on time.

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## G7 AND G20 REPORTS ON STABLECOINS

### Lessons and opportunities for industry players

On 18 October 2019, the G7<sup>1</sup> and the Financial Stability Board (FSB)<sup>2</sup> respectively published their first analyses of projects aiming to launch digital tokens with a relatively stable value, also called “stablecoins”<sup>3</sup>. The interest in these new instruments demonstrates that **international authorities are recognising their existence** and hope to anticipate their development outside of any adapted regulatory framework.

The first conclusions of the G7 and FSB reports are clear: considering the potential risks that **innovative projects enabling simplified international payments** are placing on the **monetary policy, the financial stability and integrity of the markets**, these initiatives will only be able to develop if they strictly comply with all the applicable international rules and standards.

The standards in question are not restricted to anti-money laundering and combating the financing of terrorism (AML-CFT). On the one hand, the G7 insisted on respecting (i) standards in terms of **operational resilience and cybersecurity**; (ii) rules ensuring the **protection of data**; and (iii) those pertaining to the **protection of consumers and investors**. On the other, the FSB report announced future works to facilitate the emergence of regulatory and supervisory approaches suited to these global projects.



*"We agree that no global stablecoin project should begin operation until the legal, regulatory and oversight challenges and risks are adequately addressed, through appropriate designs and by adhering to regulation that is clear and proportionate to the risks. Beyond regulation, the preservation of public prerogatives or core elements of monetary sovereignty will have to be taken into account".<sup>4</sup>*

### Background elements: work carried out by central banks and finance ministers of G7 and G20 countries

- ◆ Following the announcement of the LIBRA project, **the G7**, under French presidency, initiated in the summer of 2019 an *ad hoc* workgroup on stablecoins chaired by **Benoit Coeuré** (member of the ECB board). This group had a dual assignment. The first consisted in analysing the risks inherent to this type of project that, considering their worldwide nature, could represent a systemic hazard; the second consisted in identifying potential shortfalls in terms of regulation and supervision in order to limit regulatory arbitrage possibilities. The report, published on 18 October 2019, was presented during the annual meetings of the IMF and the World Bank in October 2019, and followed by an official statement by the heads of the G7.
- ◆ The FSB (and the **G20**, of which it is an offshoot) also took up the subject in the summer of 2019 considering its potential impacts on the current operation of the international financial system. At the Osaka Summit of June 2019, G20 leaders encouraged the FSB, as well as relevant international standard-setters (including the FATF<sup>5</sup>), to continue its investigations<sup>6</sup>. The October 2019 progress report announces the **conduct of an inventory of the various national regulatory and supervisory approaches** in order to (i) identify gaps

<sup>1</sup> G7 Working Group on stablecoins, "[Investigating the impact of global stablecoins](#)", October 2019.

<sup>2</sup> FSB, "[Regulatory issues of stablecoins](#)", October 2019.

<sup>3</sup> Excerpt of the FSB report: "A stablecoin can be defined as a crypto-asset designed to maintain a stable value relative to another asset (typically a unit of currency or commodity) or a basket of assets. These may be collateralised by fiat currency or commodities, or supported by algorithms. The term is used to describe a particular set of crypto-assets with certain design characteristics or stated objectives, but the use of this term should not be construed as any endorsement or legal guarantee of the value or stability of these tokens" p.1.

<sup>4</sup> [Official statement on stablecoins by G7 heads](#), 17 October 2019.

<sup>5</sup> Financial Action Task Force.

<sup>6</sup> [Excerpt of the G20 statement, Osaka Summit](#) (June 2019): "While crypto-assets do not pose a threat to global financial stability at this point, we are closely monitoring developments and remain vigilant to existing and emerging risks. We welcome on-going work by the Financial Stability Board (FSB) and other standard setting bodies and ask them to advise on additional multilateral responses as needed".



and/or deficiencies in national approaches and (ii) work towards the development of possible multilateral solutions

### Main risks identified by the G7

- ◆ The G7 report confirms the **reticence of central banks and governments vis-à-vis private initiatives aiming to facilitate cross-border payments**. Such reticence is justified by (i) the broad spectrum of certain projects, and (ii) their associated risks.
- ◆ The G7 report is targeting **global stablecoin** projects, i.e. stablecoin projects that may have a quick and massive uptake given the prior existence of an acquired client base (which is precisely the case of LIBRA). These global stablecoins, with their global reach, may potentially affect the stability of the international financial system. Since they aim to store values and be used as a means of international exchange, they could also come to **substitute traditional currencies** and thereby constitute **a danger for the sovereignty of monetary policies**.
- ◆ The report also highlights the concerns raised by these projects with regard to **compliance with competition and anti-trust rules**. It calls for increased vigilance by supervisory authorities on anti-competitive practices, abuses of dominant position, **market concentration** (in particular due to the network effect or the use of proprietary systems), and the emergence of oligopolies and monopolies.

### Main focus points for players as per the G7 report

- ◆ **Clear legal qualification: an essential prerequisite to launch a stablecoin project**

The G7 states that all stablecoin projects (regardless of their size) **must have a solid and secure legal basis**.

*"A stablecoin must be underpinned by clear legal terms that define and govern, with certainty and predictability, material aspects of how the underlying technical arrangements are utilised by parties".<sup>7</sup>*

- ◆ **Solid governance**

The G7 states that all stablecoin projects must come with a solid governance mechanism that guarantees the safety and efficiency of payments or the execution of stablecoin-related services.

*"Sound and efficient governance promotes the safety and efficiency of payments and related services. The governance structure of the arrangement must also be clearly defined and conveyed to all ecosystem participants".<sup>8</sup>*

- ◆ **Applicability of international AML/CFT standards**

The G7 states that the FATF international standards applicable to "virtual assets" must apply to stablecoin projects and to stablecoin providers. Supervisory authorities shall check that this is indeed the case.

*"[...] providers of stablecoins and other entities that are part of a stablecoin ecosystem should comply with the highest international standards for AML/CFT and countering the financing of the proliferation of weapons of mass destruction".<sup>9</sup>*

- ◆ **Applicability of international standards ensuring the safety, efficiency and integrity of payment services**

The G7 states that stablecoins, if they effectively aim to ease payment activities, must comply with international standards in the field.

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<sup>7</sup> G7 report, p.5.

<sup>8</sup> Ibid. p.6.

<sup>9</sup> Ibid. p.6.

*"Stablecoin arrangements are expected to meet the same criteria and abide by the same requirements as traditional payment systems, payment schemes or providers of payment services (i.e. same activities, same risks, same regulations). Innovation should support interoperability and seek to mitigate systemic interdependencies".<sup>10</sup>*

◆ **Necessary implementation of mechanisms that ensure the operational resilience and cybersecurity of stablecoin projects**

The G7 report states that the public supervisory authorities shall demand the implementation of tailored procedures and checks to ensure the resilience and cybersecurity of stablecoin projects.

*"Stablecoins may be subject to laws, regulations and guidance, and may also fall within the scope of international standards on operational risk".<sup>11</sup>*

◆ **Respect of rules applicable as regards data protection**

The G7 highlights the need to guarantee the protection of personal data in stablecoin projects and to ensure the protection of consumer rights (e.g. right of withdrawal and right to forget).

*"Authorities will apply appropriate data privacy and protection rules to stablecoin operators, including how data will be used by the participants in the ecosystem and shared between the participants and/or with third parties".<sup>12</sup>*

## Next steps for stablecoin players: a unique opportunity to discuss with international institutions and regulatory authorities and to put forward proposals

◆ **FSB - Upcoming workstream aiming at mapping national regulatory approaches with a view to developing possible recommendations (e.g. multilateral solutions).**

⇒ **The FSB will consult stakeholders** (roundtables, interviews, etc.).

◆ **International standard-setters (Basel Committee, CPMI<sup>13</sup> and IOSCO<sup>14</sup>) - Ongoing work to (i) adapt existing standards and (ii) draft new standards.**

⇒ **Window of opportunity to present ongoing stablecoin projects, objectives, and related regulatory implications.**

◆ **EU level & nationally - Foster a constructive dialogue with supervisory authorities and governments**

⇒ **Promote to public authorities solid stablecoin projects that can position France as a pioneering jurisdiction in Europe.**

⇒ **Feed public authorities on the necessary regulatory changes for the viable and long-lasting development of innovative stablecoin projects, all the while upholding the stability of the financial system and the protection of potential consumers.**

◆ **EU level & nationally - Ongoing discussions on the development of central digital currencies**

⇒ **Contribute to ongoing discussions on the implementation of central digital currencies (e.g. cooperation between public institutions and the private sector).**

<sup>10</sup> Ibid. p.8.

<sup>11</sup> Ibid. p.8.

<sup>12</sup> Ibid. p.10.

<sup>13</sup> Committee on Payments and Market Infrastructures (CPMI).

<sup>14</sup> International Organization of Securities Commissions (IOSCO).

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# SKRINE

## Industrial Relations (Amendment) Bill 2019

03 January 2020

The **Industrial Relations (Amendment) Bill 2019** ("Bill") was passed by the Dewan Rakyat (*House of Representatives*) and the Dewan Negara (*Senate*) of the Malaysian Parliament on 9 October 2019 and 19 December 2019 respectively. The Bill is presently awaiting royal assent after which it will be gazetted and come into operation on a date to be appointed by the Minister of Human Resources ("Minister").

The major changes to be made to the Industrial Relations Act 1967 ("IRA") under the Bill mainly involve the dispute resolution process surrounding unfair dismissal claims and union disputes.

A summary of the salient provisions of the Bill is set out below.

1. The Bill introduces a new Section 21(1)(aa) pursuant to which the position of 'Deputy President of the Court', to be appointed by the Yang di-Pertuan Agong, is created. According to the Hansard of the *Dewan Rakyat* dated 9 October 2019, the role of the Deputy President of the Industrial Court is to assume the role of the President while the President is away.
2. Significantly, the Bill removes the Minister's discretion to refer representations of unfair dismissals to the Industrial Court and shifts the power of referrals from the Minister to the Director General of Industrial Relations ("DGIR"). Section 20(3) of the IRA will now allow the DGIR to refer representations of unfair dismissal to the Industrial Court for an award, without fetter, if he is satisfied that there is no likelihood of the representations being settled. The rationale behind this move is to expedite the process of reference of representations to the Industrial Court and to increase access to justice and the right to be heard.
3. The Bill also widens the scope of representation for conciliation, benefitting both the employer and workman. The new Section 20(6)(a)(iv) and Section 20(6)(b)(iv) of the IRA allow for the appointment of any other person, except an advocate and solicitor, to represent the employer or workman during conciliation, subject to written approval by the DGIR.
4. Under the new Section 20(6A) of the IRA, a workman with mental disability may apply to the High Court for an order to appoint a guardian to represent him/her at conciliation meetings.
5. The Bill introduces a new Section 23A(2) to the IRA to state that any qualified person within the Legal Professional Act 1976 with at least 15 years of experience in labour and industrial relations in the Ministry of Human Resources may be considered for appointment as an Industrial Court Chairman.

6. The Bill vests further powers with the DGIR as follows:
  - a. The Bill amends Section 8 of the IRA by providing the DGIR with the discretion to refer complaints of any contravention of Sections 4, 5 and 7 of the IRA to the Court for hearing. Under the present provisions of the IRA, the discretion is exercised by the Minister;
  - b. The Bill amends Section 9 of the IRA to provide the DGIR with powers to resolve disputes relating to the capacity of a workman and claims for recognition by a trade union of workmen. The DGIR will no longer have the discretion to refer disputes relating to the competence of a trade union of workmen to the Director General of Trade Unions. This change is aimed at expediting the resolution of such disputes.
7. The Bill also affects the operation of trade unions as follows:
  - a. The Bill prohibits trade unions of workmen from claiming for recognition under Section 9 of the IRA until and unless a present claim for recognition has been resolved, deemed to have been withdrawn by the DGIR or a decision is made by the DGIR;
  - b. The Bill amends Section 11 of the IRA by reducing the time period from three years to one year in which a trade union of workmen is barred from making a claim for recognition in respect of the same workmen or class of workmen in which another trade union of workmen has been accorded recognition for;
  - c. The Bill introduces Sections 12A and 12B in the IRA. These sections stipulate that where there is more than one trade union that can represent employees, the employees will have the right to vote by secret ballot to determine which trade union shall have the sole bargaining rights to represent them. Once a trade union of workmen has the sole bargaining rights to represent any workmen, no other trade union shall have the same rights for a period of three years or unless the trade union of workmen which obtained the sole bargaining rights ceases to exist;
  - d. The Bill amends Section 13 of the IRA by prohibiting employers, trade union of employers and trade union of workmen from commencing collective bargaining prior to the period of 90 days before the expiry of existing collective agreements. The amendments to Section 13 also allow trade unions of workmen to raise questions of a general character during collective bargaining;
  - e. The Bill amends Section 26(2)(b) of the IRA by inserting a proviso which states that trade disputes relating to a refusal to commence or a deadlock in collective bargaining can only be referred to the Industrial Court if parties have given their consent in writing, unless the trade dispute relates to the first collective agreement or any essential services in the First Schedule to the IRA or would result in acute crisis if not resolved expeditiously or parties to the trade dispute are not acting in good faith to resolve the dispute expeditiously.
8. The Bill grants additional powers to the Industrial Court as follows:

- a. Section 29 of the IRA is amended to provide the Industrial Court with the authority to hear and determine a matter notwithstanding the fact that the date of dismissal stated in the DGIR's reference under Section 20(3) of the IRA is disputed by any party or is incorrect. The Industrial Court is vested with the power to determine the date of dismissal;
  - b. Sections 29 and 30 of the IRA are amended to provide the Industrial Court with the power to continue conducting proceedings notwithstanding the death of a workman who makes a representation of unjust dismissal and to award backwages or compensation in lieu of reinstatement to the next of kin of a deceased workman. Any award made by the Industrial Court will also bind the next of kin of the deceased workman;
  - c. Section 30 of the IRA is amended to vest the Industrial Court with the power to impose interests up to the rate of 8% per annum on awards. The interest is to be calculated from the 31<sup>st</sup> day from the date of the making of the award until the day the award is satisfied. The Industrial Court has the discretion to choose any other date from which the interest is to be calculated upon receiving an application by an aggrieved party within 30 days from the date of the award;
  - d. The Bill increases the penalties to be imposed on parties who contravene the provisions of the IRA. Some examples of increased penalties include increased fines imposed under Sections 46, 47 and 48 for commencing, instigating and giving out financial aid for illegal strikes. The penalty for non-compliance with the provisions of the IRA, terms of a collective agreement, summons, orders, directions or an award of the Industrial Court have also been increased under Sections 56 and 60 of the IRA.
9. The Bill introduces a new Section 33C to the IRA, which stipulates that any person dissatisfied with an award of the Industrial Court can appeal to the High Court within 14 days from the date of receipt of the award. The procedure for such an appeal will be subject to the procedure prescribed in the Rules of Court 2012 and the High Court will exercise its appellate jurisdiction as if the appeal is from a decision of the Sessions Court. This is a significant change from the current procedure, where the main recourse available to a dissatisfied party is to apply for judicial review of the decision-making process that led to the Award. The introduction of an appeal process will provide the High Court with the option of reviewing the merits of the awards handed down by the Industrial Court.
10. The Bill also introduces a new Section 44A which provides additional power to the Minister to stop a strike or lockout if it extends beyond a certain time or scope.

In essence, the amendments brought about by the Bill are aimed at increasing the efficiency and expediting the dispute resolution process, particularly that in relation to trade union disputes and unfair dismissal claims. Although it is too early to assess whether these amendments will achieve the intended objective, they certainly represent a step in the right direction towards doing so.

*Summary prepared by Selvamalar Alagaratnam (Partner) and Balamurali Tamilwanan (Associate) of the Employment Law Practice of Skrine.*

January, 2020

## MEASUREMENT AND UPDATE UNIT FOR 2020

On January 9<sup>th</sup>, 2020, the value of the Measurement and Update Unit (the "Unit") for 2020 was published and set by the National Institute of Statistics and Geography ("INEGI" for its acronym in Spanish) at **\$86.88 pesos** per day.

The above is used as the base for an account unit, index, base, measurement or reference to determine payment obligations set forth in Federal, State and Mexico City laws (e.g., fines, taxes, governmental filings, tax exemptions, contribution base salary limits and others).

The official publication can be consulted directly at the following link:  
[https://www.inegi.org.mx/contenidos/saladeprensa/boletines/2020/OtrTemEcon/UMA2020\\_01.pdf](https://www.inegi.org.mx/contenidos/saladeprensa/boletines/2020/OtrTemEcon/UMA2020_01.pdf)

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# Update regarding the introduction of the Dutch UBO register

19-12-2019

You may have recently read that the Dutch UBO register will be introduced on 10 January 2020. However, that deadline will not be met. We expect that the UBO register will become operational later in Q1 2020.

On 10 December 2019, the Lower House of Parliament adopted a bill for the introduction of the UBO register. That bill has been submitted to the Upper House. The Finance Committee of the Upper House will conduct a so-called preparatory investigation into the introduction of the bill on 28 January 2020. This investigation is the first phase of the written preparation by that committee. Committee members can make written contributions with regard to the bill. A provisional report will be made of this, to which the Minister will respond in writing. If the committee members have no contribution with regard to the bill, the Upper House can proceed to a vote fairly quickly. It is currently unclear when this will take place exactly, but our current expectation is that the UBO register will become operational in the course of Q1 2020. We will of course keep you posted on further developments.

## Written by

### Netherlands



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## **Country of Origin of Food labelling - have your say**

December 20, 2019

### **Contacts**

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Draft regulations, a product of the Consumers' Right to Know (Country of Origin of Food) Act, have been released for consultation. The regulations cover the standards of information provided to consumers regarding where particular food items such as single types of fruit, vegetables, meat, fish or seafood have been produced. The consultation period is open from now until 10 February 2020. Feedback is welcome on whether the proposals will help consumers, and whether the proposals are workable for the food industry.

### **How the information must be disclosed**

- In clear English or Maori
- Must enable each person to whom the food is supplied, offered, or advertised to be informed of the relevant country, countries, or ocean where the food product came from
- Must be on the label or packaging or on signs located next to the food

### **Which food is covered by the disclosure requirements**

These regulations cover food that is only one type of fruit or vegetable, fish, seafood, meat or cured pork which may be fresh or frozen. The food must also have been minimally processed to be caught.

- Fresh means food that has not been processed for the purpose of preserving it or extending the period for which it may be eaten. For example, food that is vacuum sealed, or which requires refrigeration or chilling may still be classified as fresh. Pickling, freeze-drying or dehydration of food are examples of processing food that would make the food no longer fresh.
- Minimally processed is not defined but there are a number of examples of processing that would not by itself make food “not” minimally processed, such as cutting, juicing, deboning, peeling and sanitising.

Further examples and definitions including on cured pork, what it means to raise an animal, and whether or not a fruit or vegetable is grown in a country are set out in the draft regulations.

### **Exceptions**

Exceptions to these regulations include places where food is sold for immediate consumption such as restaurants, cafeterias takeaway shops, and fundraising events. There is also a grace period for frozen food for up to 18 months after the regulations take place, to account for the longer shelf life these products have. And audio radio

advertisements also do not have to comply with the origin identification regulations.

If regulated food is offered for sale where the food is not located (eg internet or mail-out), origin information must be disclosed as part of the offer so that its connection to the regulated food is clear.

If you are uncertain as to whether these new regulations will affect you, or if you would like any help in making your submissions on the draft regulations, contact us and we will be happy to help.

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# Updates to the Global Investor Programme – Attracting New Categories of Investors to set up base in Singapore

January 7, 2020

Next generation business owners, high net worth individuals (HNWI) who are founders of fast growth companies or Principals starting single family offices and looking to relocate to Singapore may wish to consider applying under the Global Investor Programme (GIP) for the purposes of obtaining residency status in Singapore. The GIP offers Permanent Resident (PR) status to select group of HNWI and business owners to relocate to Singapore or at least move part of their business to the island, if they can demonstrate a plan to infuse capital injection into the Singapore economy and create employment opportunities for Singaporeans whilst driving their business growth from Singapore.

The updates to the qualifying criteria would take effect from 1 March 2020 in order to continue attracting serious and high quality entrepreneurs and business owners who can contribute to the Singapore ecosystem.

Below is a summary of the updates to the GIP that would be of interest to individuals attracted to Singapore:

Key Changes	Updated Requirements (as of 1 March 2020) and Comments
	Minimum revenue requirements for established business owners would be increased to <u>S\$200 million</u> (from the existing requirement of S\$50million). Owners may consolidate up to 2 of their businesses engaged in any of the industries listed below to meet the minimum revenue criteria.
	The industries that qualify under the GIP remain unchanged and are as follows:
	<ol style="list-style-type: none"><li>1. Aerospace Engineering</li><li>2. Alternative Energy/ Clean Technology</li><li>3. Automotive</li><li>4. Chemicals</li><li>5. Consumer Business</li><li>6. Electronics</li><li>7. Energy</li><li>8. Engineering Services</li><li>9. Healthcare</li><li>10. Infocomm Products &amp; Services</li><li>11. Logistics &amp; Supply Chain Management</li><li>12. Marine &amp; Offshore Engineering</li><li>13. Media &amp; Entertainment</li><li>14. Medical Technology</li><li>15. Nanotechnology</li><li>16. Natural Resources</li><li>17. Safety &amp; Security</li></ol>
Update to existing requirements → Annual turnover of company for established business owners	

Key Changes	Updated Requirements (as of 1 March 2020) and Comments
	<ul style="list-style-type: none"> <li>18. Space</li> <li>19. Shipping</li> <li>20. Pharmaceuticals &amp; Biotechnology</li> <li>21. Precision Engineering</li> <li>22. Professional Services e.g. consulting, design</li> <li>23. Arts Businesses</li> <li>24. Sports Businesses</li> <li>25. Family Office &amp; Financial Services</li> </ul>
<p>New Investment options → Option (C) is a new option</p>	<p><b>Option (A)</b> - Invest S\$2.5 million in a new business entity here or expand an existing business operation; or</p> <p>Under Option A, a detailed 5-year business or investment plan has to be submitted. Additionally, applicants should have at least 30% shareholding in the Option A company and must be part of the management team.</p> <p><b>Option (B)</b> - Invest S\$2.5 million in a fund offered under the GIP scheme which invests pre-dominantly in Singapore-based firms</p> <p><b>Option (C)</b> - Invest S\$2.5 million in a new or existing Singapore-based single family office having Assets-Under-Management (AUM) of at least S\$200 million (Offshore assets can be qualified as part of the AUM requirement, provided at least S\$50 million AUM has been transferred into and held in Singapore).</p> <p>→ <b>Option C is a new investment option that would be added as an alternative to the existing investment options (A) and (B).</b></p> <p>The relevant investments are to be made within 6 months after the issuance of the Approval-in-Principle of the PR status by the Immigration &amp; Checkpoints Authority of Singapore.</p>
<p>New category of investors → 1) Next Generation Business Owners</p>	<ul style="list-style-type: none"> <li>• Immediate family should have at least 30% shareholding or is the largest shareholder in the company that an applicant uses to qualify;</li> <li>• Minimum revenue requirements for the company would be S\$500 million in the most recent year, and at least S\$500 million per annum on average for the last three years;</li> <li>• Business owner must be part of the management team (eg, C-suite/board of directors); <b>and</b></li> <li>• The company must be engaged in one or more of the industries listed above.</li> </ul>
<p>New category of investors → 2) Founders of Fast Growing Companies</p>	<ul style="list-style-type: none"> <li>• Individual must be a founder and one of the largest individual shareholder of a company with a valuation of at least S\$500 million;</li> <li>• The company must be invested into by reputable venture capital/private equity firms; <b>and</b></li> </ul>

Key Changes	Updated Requirements (as of 1 March 2020) and Comments
	<ul style="list-style-type: none"> <li>The company must be engaged in one or more of the industries listed above.</li> </ul>
	<ul style="list-style-type: none"> <li>Individual must possess at least 5 years of entrepreneurial investment or management track record; <b>and</b></li> </ul>
New category of investors → 3) Family Office Option	<ul style="list-style-type: none"> <li>Individual must have net investible assets of at least S\$200 million. Net investible assets would include all financial assets such as bank deposits, capital market products, collective investment schemes, and other investment products (but excluding real estate).</li> </ul>
Other updates → streamlining requirements for PR renewal	<p>Applicant who obtains the PR approval will be issued a re-entry permit that is valid for five years. This enables him/ her to retain his/ her PR status while away from Singapore.</p> <p>There are certain changes to the renewal of the PR status.</p> <p>For a three year renewal under <b>Options A or B</b>, the applicant has to meet the investment conditions under either (A) or (B) above (as the case may be) and either:</p> <ol style="list-style-type: none"> <li>1. Employ or set up a business with at least 10 employees (including at least 5 Singapore Citizens) and have incurred at least S\$2 million in total business expenditure in a year; or</li> <li>2. Applicant or dependent who has a PR has resided in Singapore for more than half the time.</li> </ol> <p>For a three year renewal under <b>Option C</b>, the applicant has to meet the investment conditions under (C) above and either:</p> <ol style="list-style-type: none"> <li>1. Employ or set up a business with at least 10 employees (including at least 5 Singapore Citizens) and 3 professionals (who are non-family members) and have incurred at least S\$2 million in total business expenditure a year; or</li> <li>2. Applicant or dependent who has a PR has resided in Singapore for more than half the time.</li> </ol> <p>For a five year renewal under <b>Options A or B</b>, the applicant has to meet the investment conditions under (A) or (B) above (as the case may be) and meet both the following conditions:</p> <ol style="list-style-type: none"> <li>1. Employ or set up a business with at least 10 employees (including at least 5 Singapore Citizens) and have incurred at least S\$2 million in total business expenditure a year; <b>and</b></li> <li>2. Applicant or dependent who has a PR has resided in Singapore for more than half the time.</li> </ol> <p>For a five year renewal under <b>Option C</b>, the applicant has to meet the investment conditions under (C) above and meet both the following conditions:</p> <ol style="list-style-type: none"> <li>1. Family Office in Singapore must employ at least 10 employees (including at least 5 Singapore Citizens) and 3 professionals (who are non-family members)</li> </ol>

Key Changes	Updated Requirements (as of 1 March 2020) and Comments
	<p>and have incurred at least S\$2 million in total business expenditure a year;  <b>and</b></p> <p>2. Applicant or dependent who has a PR has resided in Singapore for more than half the time.</p>

As the changes to the GIP will take effect from **1 March 2020**, applications received via EDB's system from 00:00hrs on 1 March 2020 onwards will need to meet with the revised qualifying criteria and milestones. The non-refundable application fee remains unchanged at S\$7,000.

The latest changes reflect the intention of authorities to attract more family offices, next generation business owners and founders of upcoming 'unicorns' to establish presence in Singapore in order to create more business and employment opportunities here and continue to enhance Singapore's status as a hub for high growth technology companies and investment activities whilst growing certain key industries here. The author's view is that it would be prudent for any potential applicant to ensure that the application clearly presents or reflects what economic value would be added to Singapore through the proposed business activities, and perhaps professional counsel and advice would be most useful in understanding the requirements and reviewing and assisting with any of such application. It is also hoped that more funds would participate as GIP funds (currently 2 funds at the date of this article) so as to provide more options to global investors. It is anticipated that increasingly more foreign-based founders and managers of family offices (alongside other high net worth business owners) would look at the updated GIP programme with greater interest if they are interested in shifting base to Singapore given several factors in favour of Singapore (i.e. relatively stable political climate, high education standards, green spaces, low crime and efficient infrastructure etc).

## Further readings

<https://www.edb.gov.sg/en/how-we-help/global-investor-programme.html>

This article is an update to an earlier article (prepared in 2016) based on upcoming revisions to the Global Investor Programme in 2020 - a scheme administered by Contact Singapore (a division of the Economic Development Board of Singapore). The previous article can be accessed [here](#).

Dentons Rodyk thanks and acknowledges practice trainee Ang Teng Da for his contributions to this article.

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## Copyright Protection and Fair Trade Act Issues of Handbag Design in Taiwan

12/23/2019

[Ruey-Sen Tsai](#)/Celia Tao

In the ever-changing world of the fashion industry, every signature handbag design represents the endeavor of the designers and the goodwill of the brands. However, whether such handbag design may be protected under the Copyright Act in Taiwan remains controversial. In the recent civil decisions, the Intellectual Property Court demonstrated how the Courts in Taiwan approach this issue.

The Plaintiffs in this case were two French luxury fashion brands, while the Defendant was a leather goods manufacturer in Taiwan. The Plaintiffs claimed that the Defendant infringed their copyrights over their signature handbag designs. In addition, the plaintiffs also pointed out that the Defendant's conduct also constitutes unfair competition, and was also an infringement of "well-known symbol" as prohibited under the Fair Trade Act in Taiwan.

Firstly, with regards to the issue of copyright protection over handbag designs, the first instance of the IP Court in this case held that handbag designs should be deemed as an "artistic work" protected under the Copyright Act. The second instance of the IP Court, however, reversed the court's decision of the first instance and took the different views. According to the second instance of the IP Court, the designs of the handbags did not reflect aesthetic considerations and only served functional purpose of carrying objects. Therefore, the second instance of the IP Court held that the handbag designs were not copyrightable.

As to the issue of Fair Trade Act, both of the first and second instances of the IP Court held that the evidence provided by the plaintiffs were not enough to prove that the handbag designs may be considered as "well-known symbol" in Taiwan. Nonetheless, the second instance of the IP Court stated that the Defendant's piggybacking conduct was deceptive or obviously unfair and held that it violated the Article 25 of the Fair Trade Act.

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BLOG POST / PAYMENT LAW ADVISOR

Consumer Financial Services

# New Federal Privacy Bill Would Require Audits of Algorithmic Decision-Making

By Nicole Mormilo, Matthew Jedreski,  
Lauren B. Rainwater, and Jonathan Mark

01.09.20

Senator Maria Cantwell (D-WA) and Democratic colleagues have proposed a sweeping data privacy bill that would require covered entities to audit certain "algorithmic decision-making" systems that use machine learning (ML) and other forms of artificial intelligence (AI) to facilitate important decisions about consumers, such as credit or employment decisions. Unveiled in November, the [Consumer Online Privacy Rights Act](#) (COPRA) would force companies to conduct annual impact assessments of any covered AI/ML systems in an effort to mitigate bias and other potentially negative consequences of automated decision-making.

The bill is one of several privacy proposals circulating in Washington, D.C. that extend their reach to AI/ML systems. It is unlikely to pass in the near term, however; the day after its introduction, Republicans introduced a [competing draft bill](#) that does *not* contain an algorithmic auditing provision (although the current debate over potential regulation of AI/ML systems has not followed partisan divides up to this point).

Nonetheless, COPRA's inclusion of provisions intended to regulate the use of AI/ML systems illustrates how lawmakers are looking more closely at automated, algorithm-driven decision-making and its potential effect on individuals.

### **COPRA's Proposed Limitations on the Use of Algorithmic Decision-Making Systems**

The bill would broadly prohibit "covered entities" from using "covered data" to engage in discriminatory practices regarding eligibility for housing, education, employment, or credit; to advertise or market for such purposes; or to otherwise impose restrictions on public accommodations.

Specifically, "covered entities" are prohibited from processing or transferring "covered data" on the basis of an individual's "actual or perceived" race, color, ethnicity, religion, sex, disability, gender or gender-related, or biometric information (and other protected information) to advertise, market, sell or engage in other commercial activities for housing, employment, credit or education.

While such "processing" of data can occur in many circumstances, it appears the purpose of this prohibition is to establish a national non-discrimination standard that would apply to entities using algorithmic decision-making systems (many of which are enabled by AI/ML technology) in housing, employment, credit or education.

COPRA also would require entities using such systems to undertake "annual impact assessments" when an entity engages in – or assists others in – algorithmic decision-making for:

- Making or facilitating advertising for housing, education, employment or credit opportunities;
- Making an eligibility determination for housing, education, employment or credit opportunities; or
- Determining access to, or restrictions on the use of, any place of public accommodation.

### **COPRA Definitions**

The bill defines "algorithmic decision-making" as a "computational process, including one derived from machine learning, statistics, or other data processing or artificial intelligence techniques that a covered entity uses to make a decision or facilitate human decision-making with respect to covered data."

- A "covered entity" is any entity subject to the Federal Trade Commission Act that transfers or processes covered data;
- "Covered data" is any information that identifies, or is linked or reasonably linkable to, an individual or a consumer device, including derived data.
- Covered data does not include: (1) de-identified data; (2) employee data; or (3) public records.

## **Impact Assessment Requirements**

The annual impact assessments under COPRA would have to:

- Describe and evaluate the development of the covered entity's algorithmic decision-making processes, including its design and training data, and any testing for accuracy, fairness and bias/discrimination; and
- Assess whether the algorithmic decision-making system produced discriminatory results on the basis of an individual's (or class of individuals') actual or perceived "race, color, ethnicity, religion, national origin, sex, gender, gender identity, sexual orientation, familial status, biometric information, lawful source of income, or disability."

The bill would permit covered entities to use independent, external examiners or auditors for this process. There would also be a duty to disclose algorithmic decision-making system impact assessments to the Federal Trade Commission (FTC), upon request. Covered entities can redact any trade secrets to avoid their public disclosure.

COPRA also would require the FTC to issue a report within three years regarding the use of algorithmic decision-making to facilitate decisions in finance, housing, education and employment. It also mandates the creation of a new FTC bureau dedicated to enforcement of federal laws addressing privacy and data security. That new bureau likely would have some authority to enforce the algorithmic-decision making provisions of the bill.

Finally, aggrieved parties (states and individuals) would have a private right of action, including recovery of penalties up to \$1,000 and attorneys' fees.

COPRA leaves unanswered many important questions. For example, in what detail must an entity "describe" its algorithm development or algorithmic decision-making process?

What would be the threshold for determining whether there are "discriminatory results"? How would entities share responsibility when they contribute to a single decision, such as when a company uses a vendor's software to make a decision?

## **COPRA Follows Prior Congressional Proposal to Impose Audit and Impact Assessments on Algorithmic Decision-making Systems**

COPRA follows the same regulatory framework as another federal bill proposed on April 10, 2019 by Senator Cory Booker (D-NJ) and Democratic colleagues called the [Algorithmic Accountability Act](#) (Accountability Act). The Accountability Act would authorize the FTC to create regulations requiring covered entities that use, store, or share personal information to conduct impact assessments (i.e., audits) of new and existing AI/ML "high-risk" automated decision systems ("ADS") and information systems.

The Accountability Act would apply to companies that:

- Have more than \$50 million in gross receipts;
- Possess or control personal information of at least one million people or devices;  
or
- Are data brokers.

And it defines "high-risk" systems to include, in part, those posing a significant risk to the privacy or security of consumers' personal information and/or involving personal information like race, color, national origin, political opinions, religion, trade union membership, gender, gender identity, sexuality, and sexual orientation. Like COPRA, the Accountability Act's assessments would require companies to review their use of ADS for "impacts on accuracy, fairness, bias, discrimination, privacy, and security."

The required AI assessments would include, among other things:

- A detailed description of the ADS, its design, training data, and its purpose;
- An assessment of "the relative benefits and costs" of the ADS, taking into account relevant factors like data minimization practices, the duration for which personal information is stored, consumer access to the results, and the recipients of the results of the ADS;
- An assessment of the risks posed by the ADS to the privacy or security of consumers' personal information and the risks that the ADS may result in or

contribute to inaccurate, unfair, or biased/discriminatory decisions impacting consumers; and

- The risk-minimizing measures the covered entity will employ.

The Accountability Act would require covered entities to conduct impact assessments in consultation with external auditors, if possible, and to address the results of the impact assessments in a timely manner. Covered entities could, at their discretion, make the AI assessment public.

Failure to comply with the FTC's regulations would be treated as "an unfair or deceptive act or practice" by the FTC, as laid out in the Federal Trade Commission Act. State attorneys general, and other authorized state officers, would be empowered to bring a civil action on behalf of citizens in their state if they have a "reasonable belief" that such individuals are being "threatened" or adversely affected. Finally, the Accountability Act specifically provides that it would not preempt state laws.

### **A Sign of Things to Come?**

While Congress is unlikely to pass the Accountability Act and COPRA in their current forms, the introduction of these proposals may signal increasing Congressional interest in incorporating AI-related regulations in proposals to adopt national data privacy frameworks. In the coming year, we expect to see even more proposals by regulators, lawmakers, consumers, and employees to test and audit AI/ML-driven decision-making systems.

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*This article was originally featured as an artificial intelligence [advisory](#) on DWT.com on January 7, 2020. Our editors have chosen to feature this article here for its coinciding subject matter.*

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## Congress' year-end funding bill included extensions of tax credits for renewable energy, including wind, biofuels, and others

7 January 2020

In a rare display of bipartisanship, both houses of Congress and President Trump were able to come to agreement in the waning hours of the 2019 congressional session to extend government funding for fiscal year 2020. Included in this package were some significant gifts to the renewable energy industry, in the form of tax credit extensions.

Among the energy tax items in the package were extensions for a host of tax credits that had expired in 2017 or 2019. These included (extensions to the end of 2020 unless otherwise noted):

- Biodiesel and renewable diesel credits (extended to 2022)
- Alternative vehicle fuels – excise tax credits
- Refueling/Recharging property credit
- Wind production tax credit and investment tax credit in lieu of PTC – One additional year (to end of 2020) to begin construction and qualify for 10 years of the production tax credit, or a one-time ITC, at 60 percent of full credit value (under construction in 2019 is at 40 percent of full credit value)
- Production Tax Credits for electricity produced from:
  - Biomass
  - Geothermal
  - Landfill gas
  - Municipal waste
  - Hydropower
  - Marine and hydrokinetic

Among notable energy tax items that did not make it into the final bill:

- No expansions for solar electricity credits
- No expansions for electric vehicle credits
- No new investment tax credit for energy storage



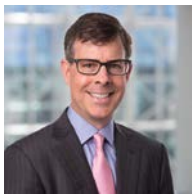
For alternative energy technologies, in particular the biodiesel and renewable diesel industry and wind and other renewable electricity providers benefitting from the production tax credit (other than solar), this bill represents a positive holiday surprise, as many in Washington doubted the ability of Congress to compromise and pass the extensions of these incentives (notably, in many cases reinstated retroactive to the beginning of 2018).

With respect to the extension of the wind PTC and ITC, one interesting question is whether the IRS/Department of the Treasury provides additional guidance with regard to whether construction on projects has begun in 2019 (at 40 percent credit value) or 2020 (at 60 percent credit value), and whether it would be possible to effectively cancel a 2019 project and restart it in 2020 in order to qualify for the higher credit value.

The enactment of this bill also makes clear that even in the midst of what could be called the most polarized U.S. Government since the Civil War, compromise is still possible, and tax extenders can still find their way to enactment, year after year.

As many tax items were left on the cutting room floor, however, we expect a strong push by many in Washington to move yet another tax bill in 2020. Stay tuned.

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