PACIFIC RIM ADVISORY COUNCIL

Reach. Reliability. Resources.

Pacific Rim Advisory Council

November 2020 e-Bulletin

MEMBER NEWS

► ALLENDE BREA Appoints Two Partners
► BAKER BOTTS Names New Partner-in-Charge of Houston Office
► GIDE Strengthens Tax Practice with Partner Addition
► KOCHHAR Strengthens Infrastructure, Banking & Structured Finance Practices

COUNTRY ALERTS

► ARGENTINA Amendments to non-financial credit providers and for non-financial companies that issue credit and/or purchase cards ALLENDE BREA
► BRAZIL National Congress Overrides Vetoes of Telemedicine Law TOZZINIFREIRE
► CANADA Corporations are not Entitled to the Constitutional Right Against Cruel and Unusual Punishment BENNETT JONES
► CANADA Upcoming Changes to Trust Filing Requirements RICHARDS BUELL SUTTON
► CHILE Ministry of Economy approves Regulation on Content and Information of Financial Products and Services CAREY
► CHINA Expansion Greenlighted for Certain R/QFII Investment Products HAN KUN
► COLOMBIA Government Creates Real Estate Life Annuity BRIGARD URRUTIA
► EL SALVADOR Special Transitory Law to Contain the Pandemic Due to Covid-19 ARIAS
► FRANCE Commission Publishes the Inception Impact Assessment for the VBER and the Vertical Guidelines GIDE
► INDIA Attempts to Thwart Import of Chinese Goods under FTAs KOCHHAR & CO.
► MALAYSIA Securities Commission and Bursa Malaysia introduce framework for Enhanced Rights Issue Mandate SKRINE
► MEXICO Outsourcing Reform SANTAMARINA
► NETHERLANDS Act on the Management and Supervision of Dutch Legal Entities Coming Soon NAUTADUTILH
► NEW ZEALAND Public sector agencies - Tread Carefully With Requests for Personal Information SIMPSON GRIERSON
► PHILIPPINES PCC Issues Rules Implementing Section on Transaction Value Threshold for the Exemption from Compulsory Notification SyCip Law
► SINGAPORE The Curious Case of the Unending Sale - A Cautionary Tale to Errant Retailers DENTONS RODYK
► TAIWAN Amendment to Taiwan's Design Patent Examination Guidelines LEE AND LI
► UNITED STATES Washington State Supreme Court Rules Dairy Workers Entitled to Overtime DAVIS WRIGHT TREMAINE
► UNITED STATES A Step in the Right Direction - Encouraging Diversity in Clinical Trial Populations HOGAN LOVELLS

CONFERENCES & EVENTS

PRAC - Let's Talk!

upcoming virtual meetings
November 23/24, 2020 | December 14/15, 2020

67th International Conference - New Delhi Hosted by KOCHHAR & Co. TBA
68th International Conference - New Zealand Hosted by Simpson Grierson TBA
69th International Conference - Mexico City Hosted by Santamarina y Steta TBA
70th International Conference - Paris Hosted by GIDE TBA

www.prac.org

Coronavirus
COVID-19

The coronavirus (COVID-19) health pandemic continues to impact countries around the globe, presenting a large scale public health crisis.

Visit us online for the latest up-to-date, country specific information on potentially relevant legal questions and issues relating to the coronavirus pandemic.

http://www.prac.org/member_publications.php

MEMBER DEALS MAKING NEWS

► ARIAS | International Finance Corporation in Support of Banco Agromercantile for Financing SMES in Guatemala
► ARIFA | Simon Property Group in Sale of LatAm Operations of Forever 21
► BAKER BOTTS | Waste Management $2.5 Billion Senior Notes Offering
► BENNETT JONES | Apollo Global Management on $200-Million Joint Venture
► BRIGARD URRUTIA | Colombia's Interconexión Eléctrica Acquires 4G toll road concession for US$528 million
► CAREY | Chile's Banco de Crédito e Inversiones with its continued banking expansion in the US
► DENTONS RODYK | Successfully represents Indonesian shipbuilder in concerning a business email impersonation scam
► GIDE | Group Crédit Agricole on Amarenco's EUR 150 million capital increase
► HAN KUN | Tencent Music Entertainment Group on USD 800 million Senior Note Offering
► HOGAN LOVELLS | Novartis on Vedere Bio acquisition
► KOCHHAR & CO. | Sterlite Power on a INR 20.7 billion mega financing deal
► MUNIZ | US$1.3 Billion Cross Border Salt Mining Deal
► NAUTADUTILH | Wins another enforcement case against a sovereign state
► TOZZINIFREIRE | Global digital marketing group Jellyfish Enters Latin America

PRAC TOOLS TO USE
COVID-19 SITE FOR ALL UPDATES

PRAC CONTACTS MEMBER DIRECTORY EVENTS
VISIT US ONLINE AT WWW.PRAC.ORG

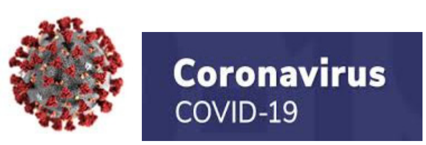
ALLENDE BREA PARTNER APPOINTMENTS

Allende & Brea has elected Tomás Di Ció and Federico Rossi Rodriguez as partners effective January 1, 2021.

Tomás is a member of Allende's Corporate Department and Federico is a member of Allende's Antitrust Department.

We wish them success in this stage of their professional careers.

For additional information visit www.allendebrea.com



The coronavirus (COVID-19) health pandemic continues to impact countries around the globe, presenting a large scale public health crisis.

Visit us online for the latest up-to-date, country specific information on potentially relevant legal questions and issues relating to the coronavirus pandemic.
Visit us online for full coverage
http://www.prac.org/member_publications.php

BAKER BOTTS NAMES NEW PARTNER-IN-CHARGE OF HOUSTON OFFICE

HOUSTON, 15 October 2020: Baker Botts L.L.P., a leading international law firm, has announced that Russell Lewis has been named Partner-in-Charge of the firm's Houston office. He is succeeding Rebeca Huddle, who has been appointed to the Texas Supreme Court.

"Rebeca has strategically led our Houston office for the last 18 months. Under her leadership, the office has strengthened its reputation as a pillar in the city's business landscape, serving as our clients' trusted advisors in their most challenging and complex matters," said John Martin, Managing Partner of Baker Botts. "While we will miss Rebeca's business-minded focus, innovation and loyalty to the firm, the Houston office will be in capable hands with Russell, whose proven leadership skills will be invaluable as we solidify our dominance in the Houston market and beyond."

Since January, Mr. Lewis has served as chair of the Litigation Department in the firm's Houston office. Under his leadership, the Litigation Department in Houston has enjoyed marked success, with substantial new clients and matters, significant case wins, and increased thought leadership. He previously served as deputy department head of Houston Litigation and on the Employment Committee. Mr. Lewis has substantial experience helping clients navigate multi-faceted matters that include complex commercial cases, crisis response, class actions, and government investigations. He also regularly counsels companies on regulatory and compliance matters.

"I am excited to assume this new role," Mr. Lewis said. "Baker Botts' Houston office continues to enjoy a great deal of momentum in this environment. I am eager to help our lawyers in Houston strengthen and expand their client relationships even further as we continue to be a go-to firm in the region to handle our clients' most sophisticated needs."

For additional information visit www.bakerbotts.com

GIDE STRENGTHENS ITS TAX PRACTICE WITH PARTNER ADDITION

Gide strengthens its tax practice with the arrival of Paul de France as partner

PARIS, 10 November 2020: Gide is pleased to announce the arrival of Paul de France as partner in its Paris office.

Prior to joining Gide, Paul worked for major international law firms and most recently served as Deputy Tax Director of the Casino Group, one of the world's leading food retail companies. He notably oversaw and implemented the tax aspects of its asset disposal plan, announced by the group in 2018 and 2019 (EUR 4.5 billion of assets sold).

Ten years after having started his career at Gide, as a trainee and then as an associate, Paul now returns to the firm. His extensive experience in transactional tax, particularly in private equity transactions, will strengthen the firm's tax practice. In particular, he will aim to develop the practice dedicated to assisting corporate directors and founders alongside the team led by **Jean-François Louit** and **Caroline Lan**.

Gide has developed a leading tax practice in areas including corporate restructurings and business combinations, real estate taxation, assistance with audits and litigation, international tax law, financial taxation, property taxation and criminal tax law.

Gide has now more than 17 lawyers specialising in tax law in Paris, including six dedicated partners, making it one of the largest and most recognised teams available in France to assist clients with their tax matters.

Xavier de Kergommeaux and **Stéphane Puel**, Gide's senior and managing partners, said: *"We are delighted to welcome Paul de France to our partnership, 10 years on from his early days at the firm as a trainee and associate. Paul's arrival will allow us to advance in our aims of providing support to executive teams and developing our private equity offering. It also ties in with our belief that the careers of private practice lawyers and in-house counsels are mutually beneficial. Combining law firm culture and corporate experience at the highest level, the career path of this tax specialist is a real asset for Gide."*

Paul de France added: *"I would like to thank Xavier, Stéphane and all of the partners for their confidence. I am extremely pleased to be joining a top-tier firm, in particular its Executives team, and help it meet new opportunities that will undoubtedly be created."*

Biography / Professional Experience

Admitted to the Paris Bar in 2009, Paul de France (36) is a transactional tax specialist, particularly as regards the tax structuring of LBO and M&A transactions. He has been involved in a number of major transactions, both on the investor and executive sides, such as Charterhouse with respect to its investments in the Comexposium, Cooper and Sagemcom groups; Eurazeo in the acquisition of Grape Hospitality; and the executive teams in the Rubix (formerly IPH) and But transactions. As Deputy Tax Director of the Casino group (2018-2020), he contributed to the implementation of several real estate disposals (Monoprix), disposals of the R2C, Vindemia and Leader Price subsidiaries, and BPI and Tikehau Capital's investment in GreenYellow. Paul also assisted in the reorganisation of the group's scope and operations in Latin America.

Paul de France also held associate roles within Gide, EY's New York and Paris offices (2010-2013), and then in the tax team of Mayer Brown's Paris office (2013-2018).

He is a graduate of Paris-Dauphine University (Master's in Corporate Taxation, 2007) and holds a *Diplôme Supérieur de Comptabilité et de Gestion (DSCG*, formerly *DESCF*, 2006).

For additional information visit www.gide.com

KOCHHAR STRENGTHENS INFRASTRUCTURE, BANKING & STRUCTURED FINANCE PRACTICE

NEW DELHI, October, 2020: We are delighted to announce the addition of Mr. Pradeep Ratnam who joins Kochhar & Co. ('**Firm**') as Senior Partner and the Co-Chair of the Infrastructure, Banking and Finance Practice of the Firm. Pradeep and his long-time colleague Ms. Parul Verma who accompanies him into the Firm as a Partner, will both be based out of the Firm's New Delhi office.

Mr. Pradeep Ratnam: Pradeep obtained his Bachelor's degree in law (B.A., LL.B. (Hons.)) in 1997 from the prestigious National Law School of India, Bangalore, followed by an LL.M. in 1999, as a British Council Chevening Scholar, from the University of Warwick, UK. Pradeep is dual qualified in India and the UK and has over 22 years of multi-jurisdictional work experience in the areas of Infrastructure, Government Contracts, Procurement, Project Finance and PPP. Additionally, Pradeep advises his clients on Restructuring, Stressed and Opportunistic M&A and Private Equity in Infrastructure and allied sectors.

Prior to joining Kochhar & Co., Pradeep had a distinguished career in Infrastructure and International Law with global firms including Herbert Smith LLP, Allen and Overy and White and Case LLP in London and in Singapore. In the last decade since his return to India, Pradeep oversaw the legal function as Director (Legal) in IDFC Alternatives (the erstwhile alternative assets platform of IDFC Bank), and was thereafter Group General Counsel in Infrastructure Leasing and Financing Services Ltd. (IL&FS), followed by private practice in the areas of Infrastructure and Banking in New Delhi.

Ms. Parul Verma: With post qualification experience of over a decade, Parul specializes in Infrastructure, Project Financing, Fintech, Financial Regulation and Real Estate. Prior to joining Kochhar & Co, Parul worked in top tier Indian law firms and in marquee in-house corporate positions in India.

Pradeep and Parul advise infrastructure companies, domestic and international banks and their borrowers, Indian NBFCs, multilateral and development financial institutions, asset reconstruction companies, and investment and credit funds in transactions in Infrastructure, Banking and Real Estate.

Mr. Rohit Kochhar, Founding Member and Chairman of Kochhar & Co. extended a warm welcome, and said: *"Pradeep and Parul will be pivotal to the Firm's outreach and deep commitment to Infrastructure and Banking, which, post pandemic, are more critical to India than ever before. Pradeep's advisory and transactional skills, derived from years of diverse work experience in top tier firms and in coveted and highly challenging inhouse roles, are a perfect complement to the Firm's strategic vision for the future. Equally, Parul brings a decade of solid deal experience in Project Financing, Core Infrastructure and Real Estate. I am delighted to welcome Pradeep and Parul in to the Firm and wish them the very best for the future."*

Pradeep responded with the following message: *"I am tremendously excited to be joining Kochhar & Co. and look forward to contributing to the Firm. I am deeply impressed by Mr. Kochhar's vision, his institution-building abilities, and the searing mastery and acumen that he demonstrates over a wide repertoire of legal matters. I am pleased to join an exceptional community of lawyers working across both core and emerging areas of legal practice."*

Parul responded, "*I am delighted to be on board as a Partner in Kochhar & Co.'s Infrastructure, Banking and Finance Practice and look forward to contributing to the Firm.*"

With the addition of Pradeep and Parul, Kochhar & Co. now has over 52 Partners and more than 200 lawyers. Kochhar & Co. is one of the leading and largest corporate law firms in India, with a full-service presence in the six (6) prominent Indian cities including New Delhi, Mumbai, Bangalore, Chennai, Gurgaon and Hyderabad; and overseas offices - in Dubai, Singapore and Chicago.

For additional information visit www.kochhar.com

PRAC EVENTS

UPCOMING EVENTS

PRAC-Let's Talk!

Join us for our monthly live one-hour virtual meetings

Like millions around the globe, the COVID-19 pandemic has impacted our members and how we work.
We pivot. We adapt.
We continue to meet and talk virtually face to face
Across the miles, oceans and regions
In varying places and hours of the day and night.
It isn't the same - we can all admit to that.

What remains the same is our commitment to continue forming new bonds and strengthening our long-standing ties
With our friends and colleagues around the world.

Together, we will see it through.

May 19, 2020 - *Conducting Business in the time of Covid-19 Part 1- wrapped up!*
June 22, 2020 - *Conducting Business in the time of Covid-19 Part 2 - wrapped up!*
July 28/29, 2020 - *Conducting Business in the time of Covid-19 Part 3 - wrapped up!*
August 24/25, 2020 - *Recent developments in Foreign Direct Investments - wrapped up!*
September 28/29, 2020 - *Mentoring, Training and Conducting Business - the Long View - wrapped up!*
October 26/27, 2020 - *Corporate Social Responsiblity Part 1 - wrapped up"*
November 23/24, 2020 - *CSR Part 2* | *Buiness Development Team Pitch by ARIAS*
December 14/15, 2020

PRAC - Let's Talk! events are open to PRAC Member Firms only
Registration required
Visit www.prac.org for details

ARIAS

ADVISES INTERNATIONAL FINANCE CORPORATION IN ITS SUPPORT OF BANCO AGROMERCANTILE FOR FINANCING SMES IN GUATEMALA

GUATEMALA CITY, November, 2020: After the economic instability for small and medium-sized companies due to the contingency generated by the COVID-19 pandemic, and several months of negotiation, the granting of a loan of US $ 20 million was achieved by International Finance Corporation (IFC), to the Agromercantil bank, to be used exclusively in the development area.

Arias represented IFC, in what was the first transaction of this type, since it is the first granting of funds in Guatemala, as part of a global economic rescue plan, to mitigate the impact of the pandemic on the global economy.

The representation of this initiative, which seeks to promote the sustainable development of the economy for the well-being of all Guatemalans, was carried out by the banking and finance team of Arias Guatemala, with Jorge Luis Arenales founding partner of the country's office, along with Arias associate, Manuel Montenegro.

Foror additional information visit www.ariaslaw.com

ARIFA

ADVISES SIMON PROPERTY GROUP IN SALE OF LATIN AMERICAN OPERATIONS OF FOREVER 21

PANAMA, 10 October 2020: Arias Fabrega & Fabrega acted as Panamanian Counsel to Simon Property Group in the sale of the Panamanian and Latin American operations of Forever 21 to AR Holdings, member of the Promerica Group.

Under the terms of the deal, AR Holdings will distribute the brand across all channels in the region s including e-commerce, wholesale and 26 retail stores in in Panama, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala and Peru.

Acting in the transaction on Estif Aparico, lead partner, Fernando Arias F., senior associate.

For additional information visit www.arifa.com

BAKER BOTTS

ADVISES WASTE MANAGEMENT IN $2.5 BILLION SENIOR NOTES OFFERING

HOUSTON, 10 November 2020:

Deal Description: On November 5, 2020, Waste Management, Inc. (NYSE: WM) ("Waste Management") announced the pricing of its public offering of $2,500,000,000 aggregate principal amount of the following notes:

$500,000,000 aggregate principal amount of 0.750% Senior Notes due 2025;

$500,000,000 aggregate principal amount of 1.150% Senior Notes due 2028;

$1,000,000,000 aggregate principal amount of 1.500% Senior Notes due 2031; and

$500,000,000 aggregate principal amount of 2.500% Senior Notes due 2050.

Waste Management intends to use the net proceeds from the offering to repay all of the outstanding borrowings under the company's $3.0 billion, 364-day, U.S. revolving credit facility, to redeem its $400 million aggregate principal amount of 4.60% Senior Notes due March 2021, including the payment of accrued and unpaid interest, and for general corporate purposes. Pending such application of the net proceeds, the company may temporarily invest in short-term investments.

The senior notes offering is expected to close November 17, 2020, subject to satisfaction of customary closing conditions.

Baker Botts L.L.P. represented Waste Management in the offering.

Waste Management, based in Houston, Texas, is the leading provider of comprehensive waste management environmental services in North America. Through its subsidiaries, the company provides collection, transfer, disposal services, and recycling and resource recovery. It is also a leading developer, operator and owner of landfill gas-to-energy facilities in the United States. The company's customers include residential, commercial, industrial, and municipal customers throughout North America.

Principal Baker Botts Lawyers/Office Involved:

Corporate: Jason Rocha (Partner, Houston); Jude Dworaczyk (Associate, Houston); Gita Pathak (Associate, Houston); Jack Chadderdon (Associate, Houston); Malakeh Hijazi (Associate, Houston)

Environmental: Aileen Hooks (Partner, Austin); Catie Arnold (Associate, Austin)

Labor & Employment: Jennifer Trulock (Partner, Dallas); Mark Bodron (Partner, Houston); Gabriela Alvarez (Associate, Houston)

Tax: Michael Bresson (Partner, Houston); Leah Patrick (Associate, Houston)

For additional information visit www.bakerbotts.com

BENNETT JONES

ADVISES APOLLO GLOBAL MANAGEMENT ON $200 MILLION JOINT VENTURE

CALGARY 16 October, 2020: Bennett Jones acted for Apollo Global Management, Inc., in connection with its joint venture investment in Great Bay Renewables, a subsidiary of Altius Minerals Corporation, a publicly traded company listed on the TSX.

Apollo expects to invest up to US$200 million and will have the opportunity to acquire up to a 50% stake in Great Bay, the proceeds of which will be used by Great Bay to invest in prominent renewable energy development platforms in North America. Through the investment, Apollo's infrastructure strategy becomes the first in its asset class to fund renewable royalties and expects to establish a leadership position in the space.

The Bennett Jones team was led by John Mercury and included John Lawless and Colin Perry.

For additional information visit www.bennettjones.com

BRIGARD URRUTIA

ASSISTS COLOMBIA'S INTERCONEXION ELECTRICA ACQUIRE 4G TOLL ROAD CONCESSION FOR US$528MILLION

BOGOTA, 06 November, 2020: Brigard Urrutia in Bogotá have helped the Chilean subsidiary of Colombian transport operator Interconexión Eléctrica (ISA) buy a toll road concession in northern Colombia for US$528 million.

The deal was announced on 30 October.

The 146-kilometre motorway connects the northern port cities of Barranquilla and Cartagena and is part of Colombia's 4G programme, which aims to renovate the country's road network. The nationwide infrastructure project includes around 50 motorways, accounting for some 10,000 kilometres in total.

It is understood that this is the first time that a Colombian 4G project – which has previously received international financing – has been acquired. The project has previously raised over US$435 million, which includes a US$235 million bond offering back in 2016.

Through the acquisition of the 25-year concession, ISA's Chilean subsidiary Intervial has entered the Colombian infrastructure market for the first time. Intervial will operate and maintain the toll road, which is 98% complete.

Counsel to ISA and Intervial Clifford Chance LLP (New York, London); Brigard Urrutia (Bogota) Partner Darío Laguado and associates Laura Ricardo and Elisa Escobar.

For additional information visit www.bu.com.co

CAREY

ADVISES CHILE'S BANCO DE CREDITO E INVERSIONES WITH ITS CONTINUE BANKING EXPANSION IN THE UNITED STATES

SANTIAGO, 12 November 2020: Carey in Santiago advised Banco de Crédito e Inversiones ("BCI") with its third Florida-based bank acquisition, adding Executive National Bank to its portfolio for US$62 million. Executive Banking Corporation is the parent company of Executive National Bank.

The deal closed on 9 October.

Local Counsel to Banco de Crédito e Inversiones Carey Partner Francisco Ugarte and associate Alejandra Daroch in Santiago.

For additional information visit www.carey.cl

DENTONS RODYK

SUCCESSFULLY REPRESENTS INDONESIAN SHIPBUILDER IN ITS INTERNATIONAL ARBITRATION CLAIM ASGAINST A SINGAPORE BUYER CONCERNING A BUSINESS EMAIL IMPERSONATION SCAM

SINGAPORE 19 October, 2020: Business email impersonation scams are on the rise. Scammers utilise highly sophisticated means to hack or spoof business email accounts, or create new accounts that closely mimic genuine ones. The scammers lurk within the email database of their unsuspecting victims to learn about business practices and transactions, and the personal email traits of employees. The scammers then use these fraudulent spoof accounts to issue fraudulent payment instructions to victims, for funds to be transferred to a new bank account controlled by the scammers.

In the legal context, would payment based on fraudulent instructions discharge a buyer's payment obligation? Much would depend on the facts, but in an ad hoc international arbitration, Dentons Rodyk successfully represented a prominent Indonesian shipbuilder (Client) in persuading the Tribunal that the answer ought to be a firm 'no'.

Our Client had commenced arbitration for an unpaid milestone payment of about S$900,000 for new vessels under a shipbuilding contract. The buyer (Buyer) claimed it had already paid based on (fraudulent) payment instructions that "emanated" from our Client. The case involved highly technical features which, in the Tribunal's words, allowed the unknown fraudster(s) to be "well aware of the parties' practices and exchanges".

Nevertheless, the Tribunal ultimately rejected, amongst other things, the Buyer's pleas that the fraudulent payment instructions were issued by email accounts allegedly under our Client's control, and that our Client had owed the Buyer a duty of care to protect it from third party fraud, finding in our Client's favour.

The case is a timely reminder for companies and their employees to remain vigilant in their online business dealings, particularly where payment instructions are concerned.

The Dentons Rodyk team was led by Senior Partner Rodney Keong, and assisted by Partner Terence Wah and Associate Chong We Feng.

For additional information visit www.dentons.rodyk.com

GIDE

COUNSEL TO GROUP CREDIT AGRICOLE ON AMARANECO'S EUR 150 MILLION CAPITAL INCREASE

PARIS, 12 November 2020: Gide has advised Idia Capital Investissement, subsidiary of group Crédit Agricole, on the EUR 150-million capital increase of Amarenco group, a major global solar IPP leader in sustainability.

This new capital raise of Amarenco, which follows that of April 2020 from various entities of Group Crédit Agricole, combines a share capital increase, an issuance of sustainable convertible bonds, and an equity line totalling EUR 150 million. The capital raise was subscribed by the co-founders themselves, by Tikehau Capital and by CA Transitions B (managed by Idia Capital Investissement).

Amarenco expects to have more than 1GW of projects under construction during 2021 as a result of the maturity of its development pipeline in Oman, and its external growth activity in Iberia and Asia-Pacific.

The Gide team advising Idia was headed by partner Alexis Pailleret, working with associate Chloé Bouhours on M&A/ Corporate aspects, and partner Emmanuel Reille on competition aspects.

For additional information visit www.gide.com

HAN KUN

TENCENT MUSIC ENTERTAINMENT GROUP ON USD $800 MILLION SENIOR NOTE OFFERING

BEIJING 05 September, 2020: Han Kun advised and acted as the PRC counsel to Tencent Music Entertainment Group (NYSE: TME) on a USD 800 million senior note offering.

Tencent Music Entertainment Group is the largest online music entertainment platform in China, and currently operates several well-known brands, including QQ Music, Kugou Music, Kuwo Music and WeSing.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

ADVISES NOVARTIS ON VEDERE BIO ACQUISITION

NEW YORK, 10 November 2020: International law firm Hogan Lovells is advising Novartis on its acquisition of Vedere Bio, a transaction which will add a powerful new platform for AAV-based delivery of gene therapies and a best-in-class optogenetics program to help reimagine the treatment and prevention of vision loss and blindness.

It further builds on the company's commitment in cell and gene therapy, and will enable Novartis to further advance its efforts to bring transformative therapies to a wide range of patients with blinding diseases.

Novartis is broadening its footprint in the gene therapy space, with a focus on three distinct platforms—AAVs, chimeric antigen receptor T-cells (CAR-Ts) and clustered regularly interspaced short palindromic repeats (CRISPR). The acquisition of Vedere Bio's unique technology is the latest addition to the company's expanding therapeutic arsenal.

The Hogan Lovells team was led by M&A partner and Head of the Corporate & Finance practice group in New York, Adam Golden, and Private Equity & Funds partner Michael Szlamkowicz. M&A senior associates Jeffrey Jay and Brittany Raway also assisted in the deal. Other key support included Tax, Pensions & Benefits partners Carin Carithers, Christine Lane, and Kurt Lawson; Global Regulatory partners William Ferreira and Susan Lee; counsel Mike Applebaum, and Tao Y Leung; senior associates Lauren Battaglia, Steven Palyca, David Mitchell, David Steenburg; and associates Andrew Brandes, Kate McGuigan, and Sarah Godwin.

For additional information visit www.hoganlovells.com

KOCHHAR & CO

ADVISES STERLITE POWER IN INR 20.7 BILLION MEGA FINANCING DEAL

NEW DELHI October, 2020: We are delighted to announce that Kochhar & Co. ("The Firm") represented Sterlite Power (India's leading power transmission infrastructure company) on a INR 20,700,000,000 (Rupees Twenty Point Seven Billion) financing of its newest power transmission SPV, Vapi II North Lakhimpur Transmission Limited (VNLTL). VNLTL, with a mandate to execute and strengthen India's largest interstate power transmission system project, is transformative in its green potential as it will supply solar, nuclear and hydro power to the western and north-eastern regions of India. Moreover, the transmission project will augment and decongest the Navi Mumbai Industrial Corridor in the State of Maharashtra, and is thus a critical infrastructural addition to the State.

Sterlite Power secured the entire debt funding for VNLTL from Power Finance Corporation, which is India's nodal pubic sector power financing company. We are pleased to report that the transaction closed in a record period (despite enormous market headwinds and challenges) owing to the Sponsor's indisputable pedigree, and thorough, focused and commercially astute advice and negotiation from Kochhar & Co. as borrower's counsel. Senior Partner, Pradeep Ratnam, Partner Parul Verma and their team acted for Sterlite Power on this deal.

Kochhar & Co.'s Banking and Finance Practice Group comprises of a best in class team of legal professionals with vast experience in advising international and domestic clients on financing transactions in India. Our lawyers focus on delivering commercially driven, practical, innovative and business-oriented legal solutions across transactions in general banking, structured finance, project finance, securitisation and debt capital markets. The Firm regularly advises lenders and borrowers on an array of financial products and transactions including secured lending, refinancing and take out financing, share backed financing, credit enhancement, project financing, debenture issuances, and high yield and mezzanine financing. Moreover, our Banking and Finance Practice Group in seamless collaboration with the Firm's Restructuring Practice Group, offers tailored solutions to asset reconstruction companies and stakeholders in distress debt transactions, corporate insolvency resolution under IBC and other contemporary and emergent forms of hybrid and structured financings in the Indian market today.

For additional information visit www.kochhar.com

MUNIZ
ACTS IN US$1.3 BILLION CROSS BORDER SALT MINING DEAL

LIMA, 11 November 2020: Peruvian law firm Muñiz, Olaya, Meléndez, Castro, Ono & Herrera advised German chemicals company K&S salt mining business in its sale to US holding company Stone Canyon Industries in Brazil, Chile, Peru, Canada and the United States. The deal, which includes K+S Chile, K+S Peru, K+S Windsor Salt in Canada and Morton Salt in the US, as well as assets in Brazil, was signed on 5 October. The transaction is expected to close in 2021, subject to antitrust approvals.

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera (Lima) Partners Mauricio Olaya and Sergio Oquendo, and associates Alesandra Azcárate and Milagros Mejía acted in the transaction.

For additional information visit www.munizlaw.com

NAUTADUTILH
BENELUX ARBITRATION TEAM WINS ANOTHER ENFORCEMENT CASE AGAINST A SOVEREIGN STATE

LUXEMBOURG, 11 November 2020: On 5 November 2020, the Luxembourg Court of Appeal handed down a judgment in Hellenic Republic v. Leidos Inc., confirming the exequatur in Luxembourg of a EUR 40 million arbitral award against the Hellenic Republic. Leidos is a global leader in the integration and application of information technology.

In this landmark decision, the appellate court dismissed all of the Hellenic Republic's claims of corruption and followed the reasoning of NautaDutilh's Benelux Arbitration Team. The court ruled that the Hellenic Republic "has failed to present any evidence to support the acts of corruption to which it refers" and that the award does not violate Luxembourg public policy. This ruling paves the way for Leidos to enforce the award in Luxembourg. The court of appeal's ruling is the latest development in a long-running legal battle - with King & Spalding acting as global counsel - to enforce a 2011 arbitral award relating to IT contracts for the 2004 Summer Olympics in Athens.

"This victory extends the successful record of our Benelux Arbitration Team in enforcement matters of arbitral awards" comments Antoine Laniez.

NautaDutilh's Luxembourg team was led by Antoine Laniez and Florence Remouchamps, in close cooperation with our Arbitration teams in Amsterdam (Mirjam van de Hel - Koedoot, Kasper Krzeminski and their team) and Brussels (Sophie Jacmain, Stan Brijs and their team).

For additional information visit www.nautadutilh.com

TOZZINIFREIRE
ASSISTS GLOBAL DIGITAL MARKETING GROUP JELLYFISH ENTER LATIN AMERICAN MARKET

SAO PAULO, 29 October 2020: Brazil's TozziniFreire Advogados have helped London-headquartered digital marketing group Jellyfish enter Latin America by acquiring Brazilian marketing company Reamp and Mexican counterpart San Pancho.. The deal closed on 5 October with no value disclosed.

Jellyfish acquired the entirety of Reamp, with the company's international division holding 60% in the target and its Brazilian subsidiary holding the remainder. The deal is part of Jellyfish's plans to expand its digital marketing presence to Latin America.

Local Counsel to Jellyfish TozziniFreire Advogados Partners Carla do Couto Hellu Battilan, Marcela Ejnisman and Ricardo Maitto, and associates Lucas Markan, Victor Frias Françoso and Luis Felipe Bueno Sima in São Paulo.

For additional information visit www.tozzinifreire.com.br

PRAC EVENTS

PRAC @ SAO PAULO

PRAC @ Taipei 2014

PRAC @ Brisbane

PRAC @ INTA

PRAC @ Vancouver

PRAC @ PDAC

PRAC @ IPBA

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.

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.

www.prac.org

Amendments to the regulations on non-financial credit providers and for the non-financial companies that issue credit and/or purchase cards

On October 22, 2020, by means of Communiqué "A" 7146, the Argentine Central Bank ("Central Bank"), provided for adjustments to the rules on "non-financial credit providers", extending the application of the Law on Financial Institutions to "other non-financial credit providers", establishing that they will be bound by the rules on "Protection of users of financial services", with respect to the financing they provide.

Among the adaptations incorporated by the Communiqué, the following stand out:

• The registration in the "Registry of other non-financial credit providers" is mandatory for the other non-financial credit providers ("Non-Financial Providers"), and for the non-financial companies that issue credit and/or purchase cards ("Non-Financial Companies"), when they have granted financing for an amount exceeding $10 million.

• As of March 1, 2021, Non-Financial Providers and Non-Financial Companies must comply with the provisions of the "Transparency" and "Claims" Sections of the "Monthly Accounting Information System".

• The extension of the application of certain provisions on "Interest Rates in Credit Operations" to Non-Financial Providers and Non-Financial Entities, with respect to financing not included in the Credit Card Law, is determined.

• Non-Financial Providers and Non-Financial Companies, must submit a compliance report with the corresponding certifications, which must be prepared as established by the Central Bank.

• It is clarified that the provisions will not apply to mutual and cooperative associations.

• Finally, the Communiqué establishes a schedule of adaptation, which will be completed on March 1, 2021.

This report cannot be considered as legal or any other kind of advice from Allende & Brea.

Lawyer

Carlos M. Melhem
Jorge I. Mayora

September 22, 2020

COVID-19 | Life Sciences - Telemedicine

Brazilian National Congress overrides vetoes of the Telemedicine Law

updated on Sep 22 at 10:25 am

On August 12, 2020, the Brazilian National Congress rejected two vetoes of the President of the Republic to Law No. 13,989/2020 (Telemedicine Law).

With the overriding of vetoes, the regulation of telemedicine after the pandemic is once again the responsibility of the Federal Council of Medicine (CFM).

In note published on the CFM website (link), https://portal.cfm.org.br/index.php?option=com_content&view=article&id=28769:2020-08-13-16-39-51&catid=3
the Council stated that a Special Commission is already reviewing the telemedicine practice in the country, and a draft of resolution to be discussed at the CFM Plenary should be presented in the coming months.

Another veto overridden by the Congress concerns the validity of digitally presented medical prescriptions, provided they have an electronic or digital signature of the prescriber, being dismissed the presentation of the prescription form.

www.tozzinifreire.com.br

BLOG

Corporations are not Entitled to the Constitutional Right Against Cruel and Unusual Punishment

November 10, 2020

Written by Ranjan Agarwal, Radha Curpen, Brad Gilmour, Sharon Singh and Greg Whiteside

On November 5, 2020, the Supreme Court of Canada released its decision in *Quebec (Attorney General) v 9147-0732 Québec Inc,* 2020 SCC 32, in which the court decided that the constitutional protection against being subject to cruel and unusual punishment provided under section 12 of the *Canadian Charter of Rights and Freedoms* does not apply to corporations. This decision restricts even more the available rights under the *Charter* that are extended to a corporation in quasi-criminal and regulatory proceedings and importantly confirms that there is no constitutional protection against large and potentially disproportionate fines for corporate offenders.

This decision does not, however, impact other well-founded sentencing principles, including that a fine must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Given the increase in regulatory fine regimes and regulatory prosecutions across the country, corporations engaged in regulated industries must be aware of the effects of even minor contraventions resulting in prosecution, given that another ground to defend against disproportionate fines has been eliminated. Below we outline the background of the case, the decision, and its implications on corporations.

Background

In May 2016, the Court of Quebec convicted a construction company for performing residential renovations without the appropriate licenses. Under the provincial *Building Act*, CQLR, c. B-1.1, a license is required for all persons or corporate entities providing construction services. As in most regulated industries, a breach of regulatory requirements can lead to prosecution and fines for their contraventions. Here, section 197.1 of the *Building Act* creates a range of fines for offenders with a mandatory minimum penalty of $30,843 and possible maximum penalty of $154,215.

The Court of Quebec accepted that the company had accidentally invoiced the clients from their corporation, rather than another related and co-owned entity that had the appropriate licenses to perform construction services. Effectively, the court accepted that the offence was an "administrative error" "(*"une erreur de codification")* by the company. Despite the relatively minor nature of the contravention, the court had to apply the mandatory minimum sentence under the *Building Act*.

The company appealed unsuccessfully to the Quebec Superior Court, arguing that the application of such a high fine infringed the company's rights under section 12 of the *Charter*, (which prohibits "cruel and unusual punishment"). The company appealed again to the Quebec Court of Appeal. A majority of the Quebec Court of Appeal came to a different conclusion than the previous courts, finding that where the *Charter* provides a "tangible benefit" to a corporation, the corporation can avail itself of that right. Since a corporation could suffer harsh or severe economic impacts from a high fine, the penalty could be "cruel and unusual".

Cruel and Unusual Punishment

In their argument for the application of section 12, the company suggested that fines could be cruel and unusual where they were "so excessive as to outrage standards of decency" and "abhorrent or intolerable" as found in the recent case of *R v Boudreault*, 2018 SCC 58, [2018] 3 SCR 599. However, the Supreme Court distinguished *Boudreault*, which dealt with the mandatory application of victim fine surcharges under the *Criminal Code* being levied against convicted criminals without the means to pay: "recognizing the suffering of individuals from harsh economic treatment by the state does not lead to the inference that section 12 protects the economic interests of corporations."

Instead, the judges in three concurring reasons, all agreed that the word “cruel” is inherently linked to the pain and suffering of humans or other living beings, not “inanimate objects without a soul or emotional life.” Furthermore, the protection against cruelty is inextricably linked to the dignity of all human beings, something which corporate entities could not experience. Thus, based on these grounds, the court found that the appropriate constitutional interpretation of section 12 precluded its application to corporations.

The Limited Use of the *Charter* in Quasi-Criminal and Regulatory Proceedings

Given the Supreme Court’s decision, the *Charter* remains of limited application to a corporate accused in quasi-criminal and regulatory proceedings. While sections 7 to 14 of the *Charter* are legal rights provided to all accused persons, the primary rights that generally remain applicable to corporations are section 8, section 11(b), and section 11(d):

- section 8 continues to protect corporations from unreasonable search and seizure of property—the basis for this protection however largely stems from the potential effects of a search on employees;
- section 11(b) provides that corporations, like people, are entitled to trial in a reasonable time—again, the basis for this was not based on any personal characteristics of a corporation, but on every accused’s right to a fair trial; and
- section 11(d) provides all accused, including corporations, to be presumed innocent until proven guilty.

Increased Fines in Quasi-Criminal and Regulatory Proceedings

In recent years, there has been a significant trend increasing both mandatory minimum and possible maximum fines to punish corporate offenders. As an example, in the area of environmental regulation, governments have imposed mandatory minimum fines in Ontario (under the *Environmental Protection Act*), Quebec (under the *Environment Quality Act*), and federally (under the *Fisheries Act* and *Migratory Birds Convention Act*). While mandatory minimums may seem relatively small in some cases and in some circumstances, these fines are often calculated for each day an offence occurs and can disproportionally affect corporations with massive fines in total.

In some cases, the magnitude of maximum penalties have also ballooned. For example, as a result of amendments under the *Environmental Amendment Act* in 2010, maximum fines for a summary conviction under several environmental statutes, such as the *Migratory Birds Convention Act* and *Canadian Environmental Protection Act,* increased from $300,000 to $4,000,000 per offence.

These amendments have also corresponded to dramatic increases in fine amounts issued by the courts for corporate offenders under environmental legislation, including recent decisions such as *R v University of British Columbia* ($1.15 million), *R v Kirby Offshore Marine Operating LLC* ($2.9 million), and *R v The Lake Louise Ski Area Ltd* ($2.1 million).

Key Takeaways

In summary, increased minimum and maximum fines in Canada for quasi-criminal and regulatory offences have become more common, resulting in the potential for significant penalties even in relatively minor circumstances. Despite this trend, the Supreme Court of Canada has made it clear that corporations cannot rely on section 12 of the *Charter* to argue that high fines constitute cruel and unusual punishment. In spite of this result, other well-established principles for determining the appropriate magnitude of a fine in quasi-criminal or regulatory proceedings, such as proportionality, parity and totality, remain intact.

For companies under investigation or subject to quasi-criminal or regulatory proceedings, *9147-0732 Québec Inc* provides several important considerations:

- as regulatory fines increase in Canada, the *Charter* will continue to be of limited use in its application to quasi-criminal and regulatory prosecutions;
- minor contraventions can lead to significant fines, which cannot be challenged under section 12 of the *Charter*; and
- the limitation of the *Charter* in this area will make it harder to challenge mandatory minimum and possible maximum fines.

The Bennett Jones Environmental Law group provides advice at all stages of quasi-criminal and regulatory proceedings. For any questions related to these issues, please contact the authors.

AUTHORS

Ranjan K. Agarwal, *Partner*

Radha D. Curpen, *Vancouver Managing Partner*

Brad Gilmour, *Partner*

Sharon G.K. Singh, *Partner*

Gregory Whiteside, *Associate*

Posted on: October 29, 2020

UPCOMING CHANGES TO TRUST FILING REQUIREMENTS

By: Alexander Pedlow

Are you the trustee of an express trust? Be prepared for significant changes to your CRA reporting requirements.

Changes to Trust Filing Requirements

As part of the 2018 federal budget, the Canadian government introduced new tax return and information reporting requirements for trusts. Previously, a trust that had no activity during the year or no income tax payable was not required to file a trust income tax and information return (also called a "T3 Return"). This meant that some trusts, such as those simply holding a vacation property or those created on an estate freeze which hold shares in a private company, may have never filed a T3 Return. However, for certain trusts with taxation years ending on or after December 31, 2021, these exemptions may no longer apply and these trusts will now be required to file a T3 Return as well as certain additional information.

Trustees should be mindful of these new reporting requirements as the penalties for non-compliance could be substantial.

New Information Required to be Filed

While the earliest a trust will have to file a T3 Return under the new rules will be 2022, it is important to get ahead of these changes and to begin to collect the information that will be required for these returns. These new rules will require express trusts, including those trusts created by a testator in his or her will, to report, along with the T3 Return, the:

- name;
- address;
- date of birth (for individuals);
- jurisdiction of residence; and
- taxpayer identification number (TIN)

for each of the following:

- the settlor;
- the trustee(s);
- the beneficiary(ies); and
- any person who has the ability to exert influence over trustee decisions regarding the distribution of income or capital from the trust (i.e. trust protector).

A TIN includes a social insurance number, a business number, and an account number issued to a trust. A schedule of the above information MUST be filed with the trust's T3 Return and CANNOT be filed on its own.

This information must be provided for any trustee or beneficiary in any given tax year even if that individual was only a trustee or beneficiary for a single day in that tax year. If any trustee or beneficiary does not want this information provided to the CRA then steps must be taken to remove that individual from the trust before December 31, 2020. Note that this may have unintended tax consequences especially if the trust owns a controlling interest in a company.

Penalties

Penalties for non-compliance with the new reporting requirements will include a $25 per day fine (with a minimum fine of $100) up to a maximum penalty of $2,500. Where the party filing the return knowingly or negligently makes a false statement on the return, those penalties increase up to 5% of the fair market value of the trust property (with a minimum penalty of $2,500).

It is important to note that while it may not always be possible to ascertain who a beneficiary of a trust is, much less collect that person's information, the trust's reporting requirements do not end there. Where the identity of a beneficiary is not ascertainable, steps must be taken to provide the CRA with detailed information in order to determine, with certainty, whether any particular person is a beneficiary of the trust.

Exemptions

Non-express trusts are excluded from these new filing requirements. In addition, certain express trusts will also be exempt, including:

- trusts governed by registered plans (i.e. RRSPs, TFSAs, and RESPs);
- graduated rate estates and qualified disability trusts;
- trusts that qualify as non-profit organizations or registered charities;
- trusts that have been in existence for less than three months; and
- trusts that hold less than $50,000 in assets throughout the taxation year (provided that the trust holdings are confined to one or more of cash, certain debt obligations, listed securities, and a few

other types of assets).

Therefore, based on the wording of the proposed legislation, if there are two express trusts, one settled with a $20 bill and one settled with a silver ingot, and neither trust holds any other asset, the trust holding the $20 bill would appear to be exempt from the new reporting requirements while the trust holding the silver ingot will likely need to file the required information. For trusts caught by this anomaly, a simple solution would be to sell the ingot for cash and have the trust continue to hold the cash as the settlement property. Note however that this would need to be done before December 31, 2020, to fall within the exemption.

While many bare trusts would fall within the meaning of an “express trust” and are not specifically exempt by the wording of the proposed legislation, subsection 104(1) of the *Income Tax Act* would appear to continue to exclude bare trusts from the application of the proposed changes.

Considerations for Professionals and/or Trustees

Estate planners should be especially aware of these changes as these changes will likely affect recommendations for estate planning. For example, where the intention was to use a trust as a Will substitute, the client must be made aware of these additional information collection and reporting requirements which they would not have if the distributions are made under a Will. This could pose a potential problem where the client does not want the beneficiaries of their estate to be known prior to their death.

Trustees, and those acting in a fiduciary capacity, need to be especially mindful of these changes to the filing requirements as the new rules place the onus on such fiduciaries to collect and file this information. If there is any doubt, the settlement indenture should be reviewed by a lawyer to determine what, if any, obligation there may be to report.

Note that non-resident trusts which are already required to file a T3 Return must also file the additional information set out above with the trust’s annual return.

Next Steps

Trustees should begin to take steps to collect the required information.

Where a trust has sat dormant or for trusts which no longer serve a purpose, trustees should consider winding these trusts up before December 31, 2020.

If any trustees or beneficiaries need to be removed from the trust prior to December 31, 2020, the settlement indenture should be reviewed by a lawyer and advice sought on the possible consequences of removing such a person.

The proposed changes present many potential issues. The lawyers in our Wealth Preservation Group are available to assist and advise on these matters.

VANCOUVER OFFICE:
700 - 401 W GEORGIA STREET
VANCOUVER, BC CANADA V6B 5A1
TEL: 604.682.3664 FAX: 604.688.3830

SURREY OFFICE:
200 - 10233 153 STREET
SURREY, BC CANADA V3R 0Z7
TEL: 604.582.7743 FAX: 604.582.7753

RBS.CA

The Chilean Ministry of Economy approves Regulation on Content and Information of Financial Products and Services' Liquidation Certificate

November 12, 2020

On November 9th, 2020, the Ministry of Economy, Development and Tourism published in the Official Gazette, the Regulation on the content and information of the liquidation certificate (the "**Regulation**"), which sets the format and content of the aforementioned certificate, as established on article 17 D of the Consumer Protection Act ("**CPA**").

The Regulation complies with the provisions of Law No. 21,236 on Financial Portability, which contemplated the issuance of a regulation that would define in detail the content of the financial products and services' liquidation certificate (the "**Certificate**").

I.Definition

The Regulation defines the Certificate as such physical or digital instrument, granted by a financial services or products provider (a "**Provider**"), on a gratuitous manner, by means of which both the status and background of one or more financial products or services contracted with a consumer are certified, for the consumer to be able to early terminate, either in whole or in part; renegotiate or transfer (*portar*) one or more contracted products or services or know the status and background of the same.

II. Request and Delivery of the Certificate

The Regulation establishes that the consumer may request the Certificate from his or her respective Provider in person or remotely, requiring its delivery either physically or virtually. For this purpose, Providers must enable an application form. Once the request is received, the Provider must provide the client with a filing proof, giving him/her a filing number of the request.

Provider must deliver the Certificate within a period of five business days from the request date.

Notwithstanding the foregoing, if the consumer requests the Certificate only regarding a single specific financial product or service, said Certificate must be delivered within three business days from the respective request date.

Likewise, Providers must deliver to consumers, within a period of five business days, any other required certificates and/or records, for the renegotiation of loans contracted with said entity.

Finally, the Regulation grants the Providers the authority to determine the authentication mechanisms they may deem necessary to verify either the identity or legal capacity of the individuals that require the issuance of the Certificate.

III. Sections of the Certificate

The Regulation first requires that the Certificate contain the title "LIQUIDATION CERTIFICATE" and it must contain the following sections:

1. General Information
2. Table of current financial products and/or services
3. Summary of the current financial products and/or services
4. Detail of the current financial products and/or services
5. Notification and payment in case of portability

Each of these sections must contain specific information, which is described in detail in the Regulation.

IV. Validity

The validity of this Regulation is immediate. However, Providers will only be obliged to follow some of the formats specifically detailed in the Regulation, after two months since its publication.

Nevertheless, the information and background must anyway be included in the Certificate, being able to be incorporated in other sections of the later, as long as they allow and ensure an easy understanding by the consumer.

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

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

Guillermo Carey
Partner
+56 2 2928 2612
gcareyc@carey.cl

Aldo Molinari
Partner
+56 2 2928 2213
amolinari@carey.cl

María José Martabit
Associate
+56 2 2928 2638
mjmartabit@carey.cl

Diego Lasagna
Associate
+56 2 2928 2216
dlasagna@carey.cl

Eduardo Reveco
Associate
+56 2 2928 2638
ereveco@carey.cl

Javiera Durand
Associate
+56 2 2928 2231
jdurand@carey.cl

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

Expansion Greenlighted for Certain R/QFII Investment Products

Authors: TieCheng YANG | Yin GE | Ting ZHENG | Flora WEI | Rachel ZHANG

Around one month ago, the China Securities Regulatory Commission (CSRC), the People's Bank of China (PBoC) and the State Administration of Foreign Exchange (SAFE) promulgated the combined R/QFII rules and expanded the investment scope of R/QFIIs to allow them to trade exchange-traded bond repos, depository receipts, NEEQ-listed securities, financial futures, commodity futures, options, etc., and to engage in margin trading and securities lending with China Securities Finance Corporation Limited (CSF). On 30 October 2020, mainland Chinese exchanges and other financial market infrastructures published relevant implementing rules two days in advance of the effectiveness of the combined R/QFII rules. These implementing rules detail some of the expanded investment products (i.e., depository receipts, NEEQ-listed securities, securities lending with CSF) and elaborate on relevant trading, settlement and monitoring arrangements. There is, however, no indication when other expanded investment products will become available.

Today is the first trading day after the new R/QFII rules came into effect, and foreign investors have already responded. China International Capital Corporation Limited (CICC) announced this morning that it had placed the first QFII market order for securities lending with CSF at 9:15 AM.[1]

We set out below a matrix of the detailed implementing rules issued by the relevant financial market infrastructures.

Financial Market Infrastructure	Notice/Rules	Highlights
Shanghai Stock Exchange (SSE)	■ *Guidelines No.1 on the Application of Securities Trading Rules of the SSE for Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (《上海证券交易所证券交易规则适用指引第 1 号——合格境外机构投资者和人民币合格境外机构投资者》)[2]	■ Expands investment scope: R/QFIIs can invest in depository receipts, stock options, government-backed bonds, etc. and participate in margin trading, securities lending with CSF and bond repos ■ Lowers from 26% to 24% the disclosure threshold for A-shares of a listed company collectively held by foreign investors

[1] Please see the CICC press release at https://www.cicc.com/cmscontent/91150.html (Chinese).

[2] The SSE rule application guidelines are available at http://www.sse.com.cn/lawandrules/sserules/main/trading/universal/c/c_20201030_5250860.shtml (Chinese).

Financial Market Infrastructure	Notice/Rules	Highlights
	■ *Business Guidelines of the SSE No.1 on Filing of Qualified Foreign Institutional Investors* (《上海证券交易所证券交易业务指南第 1 号——合格境外投资者证券投资业务信息报送》)[3]	■ Clarifies availability of negotiated transfers of listed shares and non-trade securities transfers[4] ■ Launch of stock options and bond repos subject to CSRC's further approval
Shenzhen Stock Exchange (SZSE)	*SZSE Implementing Rules on Securities Trading of Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors (2020 Version)* (《深圳证券交易所合格境外机构投资者和人民币合格境外机构投资者证券交易实施细则（2020年修订)》）[5]	Similar to the SSE's revisions[6]
China Financial Futures Exchange (CFFEX)	*Notice on Participation of Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors in Stock Index Futures Trading* (《关于合格境外机构投资者和人民币合格境外机构投资者参与股指期货交易有关事项的通知》)[7]	Allows R/QFIIs to trade stock index futures for hedging purposes, the same as previous permissible product and trading patterns under the QFII stock index futures trading guidelines issued by CSRC in 2011 (invalidated on 1 November 2020)[8]
National Equities Exchange and Quotations (NEEQ)	■ *NEEQ Implementing Rules on Securities Trading of Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (《全国中小企业股份转让系统合格境外机构投资者和人民币合格境外机构投资者证券交易实施细则》)[9] ■ *NEEQ Filing Guidelines for Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (《全国中小企业股份转让系统合格境外机构投资者和人民币合格境外机构投资者信息报备指南》)[10]	Allows R/QFIIs to trade stocks and bonds listed and traded on NEEQ and to participate in their initial offerings through securities brokers registered with NEEQ[11]
China Securities Depository and Clearing Corporation Limited (CSDCC)	■ *Notice on Launch of the Relevant Services under the New R/QFII Registration and Settlement Regime* (《关于 QFII、RQFII 登记结算制度改革相关业务上线安排的通知》)[12]	■ NEEQ registration and settlement services launched from 1 November 2020, margin trading and stock options services to be launched upon completion of market development and testing ■ Clarifies specific circumstances and rules

3 The SSE filing guidelines are available at http://www.sse.com.cn/lawandrules/guide/jyznlc/jyzn/c/c_20201030_5250953.shtml (Chinese).

4 Please see the SSE press release at http://www.sse.com.cn/aboutus/mediacenter/hotandd/c/c_20201030_5250820.shtml (Chinese) and http://english.sse.com.cn/news/newsrelease/c/5251119.shtml (English).

5 The SZSE implementing rules are available at http://www.szse.cn/disclosure/notice/t20201030_582824.html (Chinese).

6 Please see the SZSE press release at http://www.szse.cn/aboutus/trends/news/t20201030_582827.html (Chinese).

7 The CFFEX notice is available at http://www.cffex.com.cn/jystz/20201030/24790.html (Chinese) and http://www.cffex.com.cn/en_new/ExchangeNews/20201030/24791.html (English).

8 Please see the CFFEX press release at http://www.cffex.com.cn/jysdt/20201030/24792.html (Chinese).

9 The NEEQ implementing rules are available at http://www.neeq.com.cn/important_news/200009280.html (Chinese).

10 The NEEQ filing guidelines are available at http://www.neeq.com.cn/important_news/200009278.html (Chinese).

11 Please see the NEEQ press release at http://www.neeq.com.cn/important_news/200009282.html (Chinese).

12 The CSDCC notice is available at http://www.chinaclear.cn/zdjs/gszb/202010/59baa1c8eab0423891815cc34b153d00.shtml (Chinese).

Financial Market Infrastructure	Notice/Rules	Highlights
	■ *Implementing Rules on Registration and Settlement of Domestic Securities Investment by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (《合格境外机构投资者和人民币合格境外机构投资者境内证券投资登记结算业务实施细则》)[13] ■ *CSDCC Beijing Branch Guidelines on Registration and Settlement of Domestic Securities Investment by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (《中国证券登记结算有限责任公司北京分公司合格境外机构投资者和人民币合格境外机构投资者境内证券投资登记结算业务指南》)[14]	for non-trade transfer ■ Expands scope of clearing participants to banks and securities companies[15]
China Securities Finance Corporation Limited (CSF)	*Notice on Application by Qualified Foreign Institutional Investors and RMB Foreign Institutional Investors for Securities Lending with CSF* (《关于合格境外机构投资者和人民币合格境外机构投资者申请参与转融通证券出借有关事项的通知》)[16]	Allows R/QFIIs to engage in securities lending with CSF through custodian settlement arrangements or broker settlement arrangements in accordance with the notice

Based on the implementing details above, we set out below a checklist for the major types of newly opened investment products to show their availability status:

Investment Scope	Availability Status
Exchange-traded depository receipts	√
Exchange-traded bond repos	subject to CSRC's further approval
NEEQ-listed shares and other securities	√
CFFEX-listed financial futures	stock index futures for hedging purposes √ treasury bond futures – unknown
Exchange-traded commodity futures	subject to CSRC's further approval
Exchange-traded options	stock options are subject to CSRC's further approval
Margin trading	subject to market development and testing
Securities lending with CSF	√

As the checklist above illustrates, only some of the newly expanded investment products will be available upon the effectiveness of the new R/QFII rules. Bond repos, stock options and margin trading will become available at a later stage. There is still no clear sign as to the availability of products and trading of other financial futures (e.g., treasury bond futures), commodity futures and options.

[13] The CSDCC implementing rules are available at http://www.chinaclear.cn/zdjs/editor_file/20201030183705568.pdf (Chinese).

[14] The CSDCC Beijing branch guidelines are available at http://www.chinaclear.cn/zdjs/editor_file/20201030165607914.pdf (Chinese).

[15] Please see the CSDCC press release at http://www.chinaclear.cn/zdjs/xgsdt/202010/073c265cf8104c778667ef1a77b7ed0a.shtml (Chinese).

[16] The CSF notice is available at http://www.csf.com.cn/publish/main/1009/1010/20201030175735698195162/index.html (Chinese).

Apart from clarifying available investment products, the financial market infrastructures have also specified detailed trading and monitoring arrangements to further facilitate R/QFII investments, such as non-trade transfers, simplifying information reporting procedures, removing the limit on the number of securities brokers, etc. We believe the new R/QFII scheme shows encouraging beginnings and foreign investors should keep a close eye on further developments for those items that are still pending.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this publication, please contact:

TieCheng YANG

Tel: +86 10 8516 4286
Email: tiecheng.yang@hankunlaw.com

Yin GE

Tel: +86 21 6080 0966
Email: yin.ge@hankunlaw.com

Brigard Urrutia

Colombian Government Creates Real Estate Life Annuity

Ministry of Treasury creates real estate life annuity to grant liquidity by means of the selling of real estate assets

13 November, 2020

Real estate life annuity is an insurance by means of which the a owner of a real estate property, as annuitant, transfers bare ownership of such property to the insurance company, as premium, and the later grants the annuitant a monthly indexed annuity until its death of the death of the beneficiaries. The Government created two types of this product.

The first one, the immediate real estate life annuity is the classic version previously referred herein. The second one, is the temporary fixed annuity with deferred real estate life annuity in which in exchange for the bare ownership of a property, at first the annuitant receives a fixed sum for a certain period of time and then the monthly annuity until the death of all annuitants. Therefore, in case of death during the fixed period, the owner or their heirs shall receive a fixed payment.

During the life annuity term the annuitants shall remain with the use of the property by means of a usufruct. Thus, all expenses arisen from public utilities and CAM shall be borne by the annuitant. As to the sale, the insurance company shall pay all expenses associated with the transfer and, from there, all taxes derived from the ownership of the property, such as property tax.

In addition, the Ministry of Treasury established the duties of the insurance companies regarding this product, such as professional recommendation, advice and perform their best efforts to obtain the best result within the deal.

For more information contact our team info@bu.com.co

El SALVADOR

SPECIAL TRANSITORY LAW TO CONTAIN THE PANDEMIC DUE TO COVID-19 DISEASE

Nov/2020

On October 29, 2020, the Congress of El Salvador approved Legislative Decree No. 757, which contains the "SPECIAL TRANSITORY LAW TO CONTAIN THE PANDEMIC DUE TO COVID-19 DISEASE", in order to establish the provisions for the comprehensive care, management and control of the COVID-19 pandemic, as well as the epidemic areas subject to sanitary control, ensuring in all cases free movement, the right to work, respect for human rights, respect for democratic institutions and comprehensive health of the population, as well as follow-up on measures that allow the continuity of labor, administrative and economic activities in public and private sectors, for the prevention and mitigation of contagion risks.

Even though this Legislative Decree is pending of approval by the President of the Republic of El Salvador and subsequent publication in the Official Gazette, we consider important to highlight certain sanitary rules for economic and social activities established in that legal framework, which order to expand the occupational risk prevention management programs to include the following extraordinary measures:

GENERAL MEASURES

- Physical distancing.
- Intensification of health conditions in workplaces.
- Intensification of order and cleanliness in the workplace.
- Prepare a specific training, awareness and promotion program for prevention measures against COVID-19.
- Uses of personal protection equipment.

IMPLEMENTATION OF WORK MODALITIES

- Home office.
- Rotating shifts.
- Adjustable working hours and days

REVIEW AND / OR EXTENSION OF HYGIENE AND HEALTH MEASURES.

- Permanent use of masks.
- Promote hand washing.
- Disinfect workstations, among others.

In the event that this decree is approved, it would enter into force on the day of its publication in the Official Gazette, ending its effects 8 months after its entry into force.

if you have any questions or want to know more information on the subject, please do not hesitate to contact us.

Mario Lozano, Senior Associate
mario.lozano@ariaslaw.com

Julissa Castro, Associate
julissa.castro@ariaslaw.com

GIDE
GIDE LOYRETTE NOUEL

The Commission published the inception impact assessment for the VBER and the vertical guidelines

3 November 2020

Client Alert | EU | France | Competition & International Trade

Within the framework of the revision of the Vertical Block Exemption Regulation ("VBER"), and following the publication of its **Staff Working Document**, the Commission has initiated the second phase of the review process of the Regulation and its guidelines: the impact assessment phase. At the end of October, the Commission published its **inception impact assessment** in which it outlines the first policy options considered to resolve the issues identified during the evaluation phase.

Broadly speaking, the Commission indicates that the existing rules should be clarified and simplified, in particular by incorporating recent case law, in order to avoid possible divergent interpretations. Notably, it refers to restrictions that have emerged or become more prevalent over the last ten years (such as restrictions on the use of price comparison websites or online advertising) and to new market players, such as online platforms.

The Commission then evokes some areas identified as problematic in the evaluation and that will have to be addressed in the new version of the Regulation. These include **(i)** indirect measures restricting online sales, **(ii)** dual distribution, **(iii)** active sales restrictions and **(iv)** parity obligations. For each of these topics, the Commission proposes several alternatives to the policies it is considering.

1. Regarding indirect measures restricting online sales, the Commission notes first that online sales have developed into a well-functioning sales channel over the last decade, whereas physical stores are facing increasing pressure. It further states that the evaluation highlighted several concerns, in particular regarding: **(i)** the impossibility of implementing dual pricing (charging the same distributor a higher wholesale price for products intended to be sold online than for products sold offline) or **(ii)** the obligation to impose criteria for online sales equivalent to those required for offline ("brick-and-mortar") shops (the "equivalence principle") in the context of selective distribution.

The Commission proposes the following policy options (Options 2 and 3 may be introduced cumulatively):

Option 1: baseline scenario - no policy change.

Option 2: no longer regarding dual pricing as a hardcore restriction, with safeguards to be defined in line with the case law.

Option 3: no longer regarding the imposition of criteria for online sales that are not overall equivalent to the criteria imposed in brick and mortar shops in a selective distribution system as a hardcore restriction, with safeguards to be defined in line with the case law.

2. Regarding active sales restrictions, the evaluation identified various concerns about the complexity and scope of the current rules and proposes the following policies:

Option 1: baseline scenario - no policy change.

Option 2: expanding the exceptions for active sales restrictions to give suppliers more flexibility to design their distribution systems according to their needs.

Option 3: ensuring more effective protection of selective distribution systems by allowing restrictions on sales from outside the territory in which the selective distribution system is operated to unauthorized distributors inside that territory.

3. Regarding dual distribution (*i.e.* a supplier sells its goods and services to distributors and also directly to end customers), the evaluation highlighted risks that the existing exception in the VBER may be too wide and exclude certain scenarios comparable to dual distribution. It proposes the following policies:

Option 1: baseline scenario - no policy change.

Option 2: limiting the scope of the exception to scenarios that are unlikely to raise horizontal concerns (*e.g.* introducing a threshold based on the parties' market shares in the retail market).

Option 3: extending the exception to dual distribution by wholesalers and/or importers.

Option 4: removing the exception from the VBER, thus requiring an individual assessment in all dual distribution cases.

Finally, the Commission indicates that it aims to improve clarity in relation to the treatment of possible efficiencies resulting from resale price maintenance (RPM), in particular through exchanges with businesses on concrete instances regarding the conditions under which efficiencies for RPM can be claimed.

Stakeholders may comment on this impact assessment before 20 November 2020. Towards the end of 2020, the Commission intends to launch a public consultation to gather feedback on the policy options.

♦ ♦ ♦

The partners of Gide's **Competition & International Trade** practice group are available to answer any questions you may have in this regard. You may also get in touch with your usual contact at the firm.

Contacts

Antoine Choffel

Franck Audran

Elsa Mandel

India attempts to thwart import of Chinese goods under FTAs

Author: Reena Asthana Khair, Senior Partner and Head International Trade & Indirect Taxation

Kochhar & Co.

Introduction

The balance of trade between India and China continues to be heavily tilted in favour of China. Trade remedies such as anti-dumping and countervailing duties have been used frequently by India to curtail import of Chinese goods. To overcome such barriers, India has long suspected that China has been routing its goods through the ASEAN countries by misusing the Free Trade Agreements ('FTA'). The strategy deployed is that intermediates are exported from China into these countries, and after undergoing minimal processing, are then exported to India under the relevant FTAs. The ASEAN countries have in recent times, seen a spurt in the import of Chinese goods, for export production to the rest of the world. With the double advantage of Chinese subsidies passed on through intermediates and duty concession under the FTAs, the exports are extremely competitive. It has been the long-standing demand of Indian Industry that remedial action be taken against such misuse.

New Regulations introduced to curb misuse of FTAs

With the introduction of Section 28 DA of the Customs Act, 1962 and the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020, ('**CAROTAR**') stringent measures for verification of origin of FTA imports have been introduced to curb misuse. The certificates of origin issued by the exporting countries, are no longer sufficient to establish origin and importers are being called upon to provide information adequate for an independent verification of origin.   India is in effect treating the certificates of origin issued by the exporting countries as inconclusive on the issue of origin.

Under the new measures, the importer is required to make a declaration as to the origin. It must also obtain relevant information from the exporter in support of its claim, while exercising reasonable care as to the truth and accuracy of such information. The importer would normally not have any direct knowledge of the information furnished nor any means to verify the correctness thereof, as this information is in the exclusive possession and knowledge of the foreign exporter. The consequence of any incorrect or incomplete information would also have to be faced by the importer, including confiscation of goods and penalty.

Pursuant to the new amendments, it is only where there is trust and cooperation between the exporter and importer, that the benefit of the concession can be availed. The exporter would have to provide to the importer complete information as to how the conditions of origin are met under the various criterion, such as change in HSN tariff classification at the 4 or 6 digit level, regional or domestic value content, or process rule. For a claim on heading change, the exporter would have to provide to the importer adequate material to demonstrate that the classification of the inputs, is different from that of the final product. For a claim under the domestic value content direct method, the exporter would have to share information of its costs and profits. Under the indirect method, value of non-originating material, would have to be disclosed to the importers. The process details would also have to be shared with the importer.

Consequences of CAROTAR and related Statutory Amendments

The aforesaid amendments to the Customs Act and the introduction of CAROTAR are likely to be most problematic for units in the MSME sector and smaller traders, who would not have much clout with foreign exporters. Imports may get concentrated in the hands of a few, to the detriment of smaller players.

Further, the new measures are bound to create strain and mistrust between India and its trading partners, as imports legitimately covered under the FTAs, could face unnecessary scrutiny, and delay. The exporters will have to establish origin twice, once in the exporting country and then again in India.   There may also be reluctance on the part of exporters to share commercially sensitive information with their customers.

Lastly, the said Rules appear to impose an unsustainably high burden on Indian importers to elicit business sensitive information from exporters. Though well intentioned to curb misuse of FTAs, the increased regulatory compliances above may end up arresting the pace of international trade, and ultimately manufacturing revival and economic growth in India.

Conclusion

While the legislative intent behind CAROTAR is laudable, for the new measures to be trade friendly, India must respect the certificates issued by the exporting country. Only in exceptional cases, where there is reason to doubt the origin, based on credible information, a second scrutiny should be carried out. The enquiries can be focused on certain products or certain regions, from where misuse has been noticed or there is a high possibility of diversion of Chinese goods. Subjecting all imports under the FTAs to the same level of scrutiny, will hamper the ability of importers to claim concessional rates of duty available to them under the FTAs. The spirit of co-operation which led to these Agreements should not be lost sight of.

Finally, the Amendments may prove to be a game-changer for alternative avenues for strategic international trade. One country's loss, as they say, could be another country's gain. The calculated legislative efforts to oust insidious and subsidized exports from China through intermediates, could work to the advantage of developed economies such as the US, which have had to cede ground to cheaper exports from ASEAN countries.

Reena Asthana Khair is a Senior Partner and Head of International Trade & Indirect Taxation law practice at Kochhar & Co.

SKRINE

Securities Commission and Bursa Malaysia introduce framework for Enhanced Rights Issue Mandate | Skrine - Advocates & Solicitors

13 November 2020

To further assist listed issuers weather the economic downturn caused by the Covid-19 pandemic, the Securities Commission Malaysia and Bursa Malaysia ('the Exchange') jointly announced on 10 November 2020 an enhanced rights issue framework ('Enhanced Rights Issue Mandate') to enable listed issuers to raise funds expeditiously.

The requirements that listed issuers have to satisfy in order to raise funds under the Enhanced Rights Issue Mandate are as follows:

No.	Subject	Details
1.	Eligible listed issuers	Listed issuers and listed real estate investment trusts ('REIT') listed on the Main Market of the Exchange and listed issuers on the ACE Market of the Exchange that in each case must have existing controlling shareholders and existing controlling unit holders, as the case may be. A controlling shareholder and controlling unit holder refers to any person who is, or a group of persons who together are, entitled to exercise or control the exercise of more than 33% (or such other percentage as may be prescribed in the Take-Overs and Mergers Code as being the level for triggering a mandatory general offer) of the voting shares in a company and the voting units in a unit trust scheme, or who are in a position to control the composition of a majority of the board of directors of such company.
2.	Approval and relevant legal requirements	The eligible listed issuer must: 1. procure approval of its shareholders or unit holders, as the case may be, for the Enhanced Rights Issue Mandate at a general meeting; 2. comply with all relevant applicable legal requirements including its constitution, deed or relevant constituent documents; and 3. in addition to the existing disclosures in the statement required under paragraph 6.03(3)/rule 6.04(3) of the Main Market Requirements ('MMLR')/ ACE Market Listing Requirements ('ACE LR'),

		include the views of the board of directors that the Enhanced Rights Issue Mandate is in the best interest of the eligible listed issuer and its shareholders or unit holders, as well as the basis for such views.
3.	Types of securities and limit	1. the Enhanced Rights Issue Mandate can only be used to issue ordinary shares where a listed issuer is a company and units where a listed issuer is a REIT; and 2. any issue of new shares or units must not exceed 50% of the total number of issued shares (excluding treasury shares) or issued units, as the case may be.
4.	Pricing	The shares or units must not be priced at more than 30% discount to the theoretical ex-rights price.
5.	Commitment from controlling holders	The listed issuer must procure irrevocable letter(s) of undertaking from its existing controlling shareholders or controlling unit holders, as the case may be, to subscribe for their full entitlements.
6.	Other requirements	The eligible listed issuer must continue to comply with all other requirements for new issue of securities under the MMLR/ACE LR, as applicable, including the obligation to announce the rights issue with the information prescribed in Appendix 6A of the MMLR/ACE LR upon implementation of the rights issue under the Enhanced Rights Issue Mandate.
7.	Cut-Off Date	Listed issuers may only use the Enhanced Rights Issue Mandate to issue new shares or new units up until 31 December 2021.

The Enhanced Rights Issue Mandate is in addition to the 20% General Mandate announced by the Exchange on 16 April 2020 which allows a listed issuer to issue to up to 20% (instead of 10%) of its total number of issued shares (excluding treasury shares) by 31 December 2021.

Alert by ***Phua Pao Yii*** *(Partner) and* ***Fariz Abdul Aziz*** *(Partner) of Skrine.*

November, 2020

Outsourcing Reform Initiative

On November 12, 2020, during the President's morning conference, a reform initiative on outsourcing was presented and sent to the House of Representatives to discuss the following:

- Prohibition of subcontracting of personnel: it is prohibited for an individual or company to place its workers at the disposal of a third party.

- New regulation for the provision of specialized services and works: it is only permitted to subcontract services that are not part of the corporate purpose or economic activity of the company and exclusively with individuals or legal entities that have been authorized by the Ministry of Labor and Social Security (STPS), who have proven their specialized nature and are up to date with compliance of their labor, tax and social security obligations, after which they will be registered in the public registry kept by said Ministry. The individual or entity that subcontracts specialized services or works will be jointly liable with the contractor, in case of failure to comply with its obligations.

- Limitation to the recruitment or placement agencies: the intermediary may only participate in the processes of recruitment, selection and training, among others, and may not be considered as an employer nor be able to hire in substitution.

- New obligations in case of employer substitution: for the substitution to take effect in labor matters, it is necessary for the assets of the company or establishment to be transferred to the substitute employer (as already determined by the Social Security Law).

- New transparency obligations in social security matters: the obligation to submit, on a quarterly basis, various data on the parties, contracts, base salary of contributions, authorization of the STPS, etc., is kept for purposes of the Mexican Social Security Institute and on a four-monthly basis for purposes of the National Workers' Housing Institute.

- More severe penalties: Fines are increased in the event of non-compliance in certain cases, tax deductions and credits are not permitted; the crime of qualified tax fraud is updated when simulated schemes for the rendering of specialized services or the subcontracting of personnel are used; and, when the amount of what is defrauded exceeds a certain threshold, it will be considered organized crime.

If approved, the Federal Labor Law, the Social Security Law, the Law of the National Workers' Housing Fund Institute, the Federal Fiscal Code, the Income Tax Law and the Value Added Tax Law would be amended.

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

Mexico City Office: **Mr. Andrés Rodríguez R., arodriguez@s-s.mx (Partner)**
Mr. Francisco Udave T., fudave@s-s.mx (Partner)
Phone: (+52 55) 5279-5400

Monterrey Office: **Mr. Juan Carlos de la Vega G., jdelavega@s-s.mx (Partner)**
Phone: (+52 81) 8133-6000

Queretaro Office: **Mr. José Ramón Ayala A., jayala@s-s.mx (Partner)**
Phone: (+52 442) 290-0290

NautaDutilh

Corporate

Netherlands | EU

Act on the management and supervision of Dutch legal entities coming soon

Thursday 12 November 2020

On 10 November 2020, a bill introducing legislation on the management and supervision of legal entities (the "Act") was adopted by the Upper House of the Dutch Parliament. The Act is expected to enter into force on 1 January 2021. The new legislation aims to unify the rules on the management and supervision of various types of legal entities and will affect the management and supervision of foundations, associations, cooperatives and mutual insurance companies, amongst others. This newsletter provides an overview of the most important changes.

Statutory basis for the establishment of a supervisory board by foundations and associations

Some associations and foundations have already set up a board of supervisors or a supervisory board on the basis of their articles of association, but there is currently no statutory basis for doing so. As from its entry into force, the Act will provide such statutory basis. In addition, there will be a statutory description of the powers, duties and responsibilities of the directors and members of the supervisory bodies of foundations and associations.

One-tier board for foundations, associations, cooperatives and mutual insurance companies

The Act facilitates the choice by foundations, associations, cooperatives and mutual insurance companies of a supervisory board or one-tier model (as is already the case for the BV and NV). However, it should be noted that sector-specific legislation could require a separate supervisory board, as is the case for banks and insurers under the Financial Supervision Act.

Uniform rules on conflicts of interest

Associations, cooperatives and mutual insurance companies will become subject to the same conflict-of-interest rules as NVs and BVs. Foundations will be subject to slightly different rules, however, as this type of legal entity does not have a general meeting. If, due to a conflict of interest, the board of a foundation is unable to take a decision, the supervisory board will decide in its stead. In the absence of a supervisory board, the decision may be taken by the management board, with a written explanation of the considerations underlying the decision, unless the articles of association provide otherwise. If the supervisory board of a foundation has a conflict of interest, it may nevertheless take the decision in question, subject to the provision of a written explanation of the considerations on which the decision is based, unless the articles of association provide otherwise. Once the Act enters into force, it will no longer be possible to invoke conflict-of-interest provisions in the articles of association of associations, cooperatives and mutual insurance companies that are based on the old statutory rules.

Uniform rules on the liability of directors and supervisory board members in the event of bankruptcy

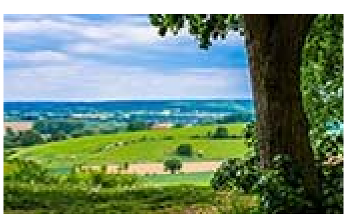
Under the current rules, the trustee in bankruptcy may hold directors and supervisory board members of a BV, NV, cooperative company, mutual insurance company, or commercial foundation or association (meaning one subject to corporate tax) jointly and severally liable under certain circumstances for mismanagement. These rules will be extended to informal associations and non-commercial foundations and associations. It should be noted that the presumption of mismanagement if, in short, the accounts are not in order will not apply, except in the case of directors and supervisory board members of semi-public institutions that are subject to an alternative annual accounts requirement pursuant to sector-specific rules (e.g. housing corporations, educational institutions, healthcare institutions and pension funds).

Mandatory statutory rules on absence and inability to serve

For NVs, BVs, foundations, associations, cooperatives and mutual insurance companies, the Act introduces uniform requirements for provisions in the articles on absence or inability to serve: the articles of association must contain provisions on the absence or inability to serve of *all* directors and supervisory board members and *may* contain such provisions for the absence or inability to serve of one or more directors or supervisory board members. Provisions to this effect must be included upon the first amendment to the articles of association following the entry into force of the Act.

Limit on the exercise of multiple voting rights

The Act provides that a given director or supervisory board member cannot cast more votes than the other directors or supervisory board members combined. This requirement already applies to BVs and NVs and will be extended to all other Dutch legal entities. Provisions of the articles of association that are not in line with the new voting rights rules will be deemed invalid after five (5) years. Derogating provisions in the articles of association must be modified upon the first amendment to the articles of association following the entry into force of the Act.



Extended grounds for the removal of directors and supervisory board members of foundations

The Act introduces more extensive grounds for the removal of directors and supervisory board members of foundations. At the request of an interested party or the Public Prosecution Service, directors and supervisory board members can be removed by the court for neglecting their duties, other important reasons, a significant change of circumstances based on which continuation of the directorship/membership cannot reasonably be expected, or failure to comply or properly comply with an order issued by the preliminary relief judge to provide information to the Public Prosecution Service.

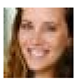
What do these changes mean for you?

No publication decree has been published yet, but the Act is expected to enter into force on 1 January 2021. Upon entry into force of the Act, associations and foundations will be able to retain their existing management and supervisory structures, such as, for example, one that provides for general and daily management or a supervisory board. The Act is not intended to change this. The transitional regime provides that foundations, associations, cooperatives and mutual insurance companies do not have to bring their articles immediately into line with the Act. Nevertheless, it is advisable for these types of legal entities to assess whether certain provisions of their articles and internal rules will need to be amended immediately or shortly after the entry into force of the Act. Particular attention should be paid to provisions governing conflicts of interest, absence or inability to serve, and multiple voting rights, where applicable.

Contact me

Geert Raaijmakers | Amsterdam | +31 20 71 71 992

Maarten Buma | Rotterdam | +31 10 22 40 182



Suzanne Rutten | Amsterdam | +31 20 71 71 954

NautaDutilh

International Law Firm | Amsterdam · Brussels · London · Luxembourg · New York · Rotterdam

Simpson Grierson

November 13, 2020 | 3 min read

Sally McKechnie

This week, the Court of Appeal ruled in *Dotcom v Attorney-General* that the actions taken by dozens of public sector agencies (agencies) regarding requests for personal information (RPIs) under the Privacy Act 1993 were unlawful. A decision of the Court of Appeal in this context is unusual and should be read carefully.

In this article, we look at what Public Sector Agencies need to know going forward.

Background

In 2015, Kim Dotcom made requests of 52 different agencies for all personal information held by them. Each request sought the information on an urgent basis.

Nearly every agency then transferred the request to the Attorney-General. The requests were declined by the Attorney-General on the basis that the requests were vexatious and included information which was trivial, and that insufficient reasons for urgency had been provided.

The Court of Appeal's judgment, finding that these actions were unlawful, provides helpful guidance on the interpretation of the Privacy Act generally, and specifically determines issues concerning transfers of RPIs to another agency, requests for urgency and grounds for refusing information requests.

Although this case determines issues under the Privacy Act 1993, all the relevant provisions in this case continue in the 2020 Act, which comes into force next month [PDF].

Agencies must follow strict processes when handling personal information requests

The Privacy Act is generally flexible. It sets out principles concerning how agencies collect, use, store, disclose and give access to personal information. But it expressly does not provide enforceable legal rights regarding these principles.

The one exception to this is where a person requests personal information from an agency. Where this happens, the person can enforce this request, or dispute the agencies' handling of the request, in court.

From this, the Court determined that the normally flexible approach of the Act does not apply when an agency refuses a request for information or takes any procedural steps (such as transferring an information request) under the Act. The courts should determine any issues by applying orthodox principles of statutory interpretation.

The Court then addresses two questions:

- Transfers of requests - can a request for personal information under the Privacy Act 1993 be transferred by the recipient to another agency where:
    a. The request seeks urgency;
    b. The recipient is not in a position to sensibly assess the basis for the urgency; and
    c. The transferee is the only agency who can assess the basis for urgency.
- Vexatious requests - is a request for urgency a relevant factor for an agency in determining whether to decline a request as vexatious?

Transfers of requests

Three points arise out of the judgment regarding transfers of requests.

First, an agency cannot consider a request for urgency when deciding whether to transfer the information request. Instead, an agency must consider the "information" sought, and whether that information is more closely connected with another agency. The request for urgency is not part of the information and whether the information is more closely connected to another agency.

Secondly, when deciding whether to transfer the request, an agency must follow the relevant statutory criteria and procedure carefully, and cannot merely decide whether there is anything to "preclude" a transfer.

Thirdly, the recipient agency can consult other agencies regarding the request. Here the requests sought urgency due to litigation the requestor was involved in. Instead of transferring the requests to the Attorney-General, the agencies could have consulted and sought advice from the Office or Crown Law.

Vexatious requests

Agencies can decline a request for information if the request is vexatious. Here, the Attorney-General determined the requests were vexatious due, at least in part, to the request for urgency.

According to the Court, when a person seeks urgency, the reasons advanced for the urgency can inform the decision-maker whether the request for information is vexatious. Hence the request for urgency itself could be a relevant factor in determining whether a request is vexatious.

However, agencies should tread carefully. The Court states that "the mere fact of a request for urgency would not alone be a proper basis for a refusal", and further, that "it is difficult to conceive" how the mere fact of urgency could be a consideration for refusal. The Court's message is if an agency wants to refuse a request on grounds of vexatiousness, it will need to provide more compelling reasons for doing so.

Get in touch

Please get in touch to discuss this judgment in more detail.

Contributors sam.hart@simpsongrierson.com
(mailto:sam.hart@simpsongrierson.com)

PCC Issues Rules Implementing Section 4(eee) of Bayanihan 2 on the Transaction Value Threshold for the Exemption from Compulsory Notification

October 6, 2020

The Philippine Competition Commission (PCC) has issued the rules for the implementation of Section 4(eee) of Republic Act No. 11494, the “Bayanihan to Recover as One Act” (Bayanihan 2)[1] on October 5, 2020 and these rules (PCC Rules on Bayanihan 2)[2] were published, and thus became effective, from the same date.

To recall, Section 4(eee) of Bayanihan 2 provides for the following, as part of the government’s economic recovery measures, and for the stated purpose of “promot[ing] business continuity and capacity building”:

(a) exempts from the compulsory notification requirement under Section 17 of the Philippine Competition Act all mergers and acquisitions with transaction values below Php50 billion if entered into within two years from Bayanihan 2’s effectivity; and

(b) exempts such transactions from the power of the PCC to review mergers and acquisitions *motu proprio* (or on the PCC’s own initiative) for a period of one year from Bayanihan 2’s effectivity.

We have issued a briefing on these measures under Bayanihan 2.[3]

---

[1] https://www.officialgazette.gov.ph/downloads/2020/09sep/20200911-RA-11494-RRD.pdf.
[2] https://phcc.gov.ph/crn22-2020-merger-rules-sec4eee-ra11494-baro/.
[3] See Bayanihan 2 Increases Compulsory Merger Notification Threshold to Php50 Billion for 2 Years.

The PCC Rules on Bayanihan 2 now clarify that the Php50 billion “transaction value” threshold applies to both “size of party” and “size of transaction” thresholds, which are the compulsory notification thresholds historically applied by the PCC. In other words, for a transaction to be compulsorily notifiable, both of the following must be at least Php50 billion: (a) the size of party (which refers to the aggregate gross Philippine revenues, or value of Philippines assets of the ultimate parent entity of at least of the acquiring or acquired entities, including that of all entities that such ultimate parent entity controls), and (b) the size of transaction (which varies depending on the nature of the transaction, *e.g.*, joint venture formation, voting shares acquisition, acquisition of assets inside the Philippines, etc.).

The PCC Rules on Bayanihan 2 also clarify that for a transaction to benefit from Bayanihan 2, the “definitive agreement” must be signed within two years from the effectivity of Bayanihan 2 (which is reckoned by the PCC from September 15, 2020).

The PCC Rules on Bayanihan 2 emphasize that:

(a) it is the continuing policy objective of the PCC to ensure the “efficiency of market competition”;

(b) transactions entered into during the effectivity of Bayanihan 2 (which is from September 15, 2020 to September 15, 2022) may be reviewed by the PCC *motu proprio* (or on its own initiative) after one year from the effectivity of the Bayanihan 2; and

(c) transacting parties may avail of voluntary notification even where their transaction is exempt from compulsory notification under Bayanihan 2.

The foregoing seems to indicate that the PCC will not hesitate to review transactions *motu proprio* starting September 16, 2021 and that transacting parties may be better off voluntarily notifying their transaction if it is subject to a risk of being viewed by the PCC as a transaction that can lead to a substantial lessening of competition in the relevant market.

The PCC Rules on Bayanihan 2 have shortened the review periods for voluntary notification. The Phase 1 review period is now for 45 days (instead of the 75 days provided under the Merger Review Procedure or MRP) while Phase 2 review is for 90 days (reduced from 120 days under the MRP).

It should be noted however that availing of a voluntary notification would be considered a waiver of the exemption under Bayanihan 2. What this highlights is the need for transacting parties – to a transaction where there are horizontal overlaps or vertical relationships between and among the seller, the buyer, and the target companies and assets -- to conduct a competitive assessment of their transaction to (a) assess whether or not the transaction would raise competition-related concerns, (b) consider the risks of the PCC conducting a *motu proprio* review after one year from the effectivity of the Bayanihan 2, (c) prepare possible defenses that may be asserted in the event that such a *motu proprio* review is conducted, and (d) evaluate if a voluntary notification would be the more prudent course of action to obtain deal certainty and avoid a subsequent review by the PCC.

For more information about the legal issuance discussed in this briefing, please contact any of the following:

Arlene M. Maneja
Partner
ammaneja@syciplaw.com

Franco Aristotle G. Larcina
Partner
fglarcina@syciplaw.com

SyCipLaw's Special Projects Department

This briefing was prepared by the firm's Competition and Anti-trust practice group which is under the Special Projects Department.

SyCipLaw has extensive experience in analyzing the competition law impact of various types of vertical restraints such as resale price restrictions, exclusivity and non-compete provisions, and sole supply arrangements.

We are active in the area of policy development, having worked closely with the PCC in developing implementing regulations and having provided critical feedback on rules relating to joint ventures and land acquisition.

SyCip Salazar Hernandez & Gatmaitan
SyCipLaw Center, 105 Paseo de Roxas
Makati City 1226, The Philippines
t: +632 8982 3500; +632 8982 3600; +632 8982 3700
f: +632 8817 3145; +632 8817 3896
e: sshg@syciplaw.com
www.syciplaw.com

The Curious Case of the Unending Sale: A Cautionary Tale to Errant Retailers

November 9, 2020

The End of the Unending Sale

On 16 October 2020, the Competition and Consumer Commission of Singapore (CCCS) announced that the owners and operators of “ABC Bargain Centre”, “Valu$”, and “ABC Express” retail outlets had voluntarily undertaken to cease the use of “Closing Down Sale” and “Fire Sale” advertisements at all their retail outlets with effect from 30 September 2020.

The CCCS had taken the view that such advertisements can mislead consumers into believing that there is a price benefit which would only be available for a limited period. This in turn could constitute an unfair practice in breach of the Consumer Protection (Fair Trading) Act (Cap. 52A) (CPFTA).

Many Retailers Remain Unaware

While the voluntary actions of these owners and operators are laudable and welcomed, many retailers appear to remain unaware of retail practices that are prohibited under the CPFTA even as the *CCCS Guidelines on Price Transparency* (Guidelines) came into force on 1 November 2020. The Guidelines, which apply to all suppliers whether operating online or physical store, set out pricing practices that could potentially infringe the CPFTA. These include:

- **Drip Pricing:** This involves the practice of advertising a product or service at a headline lower price only for additional and mandatory fees and charges being implemented at the point of transaction/payment;
- **Misleading Price Comparisons:** This includes misrepresenting the prices offered by competitors for the same product/service or representing the offer of better prices for non-similar products (e.g. representing the offer of lower pricing for a product which is an older model with inferior specifications as compared to a newer model with better specifications offered by a competitor);
- **Misrepresenting Discounts:** One common practice which is arguably experienced by many consumers involves the representation of a price benefit off a “regular” or “usual price” when such prices are artificially inflated (often shortly before the implementation of the discount) to misrepresent the actual price benefit. In such cases, a purported discount of 50% of an inflated “regular” or “usual” price would entail a lower effective discount rate than claimed by the retailer; and
- **Claims of Freebies:** A similarly common practice, this involves retailers claiming to offer “free” products and services for a purchase made by the consumer when the costs of such “freebies” have been incorporated into the headline cost of the product or service being purchased. Such price increments would render the “freebies” not being entirely free but merely included in the headline price.

Keep Up or Get Caught

The practices outlined above and the Guidelines are certainly not exhaustive and many retailers may begin to earnestly comply or even devise new and creative methods to circumvent the practices that have been flagged as potentially infringing the CPFTA. While it is certainly open for retailers to craft novel ways of promoting and marketing their products and services especially in a competitive retail market, it would be imprudent to merely adhere to the literal recommendations set out in the Guidelines as opposed to the spirit of the CPFTA and the Guidelines.

When in doubt, retailers should seek professional legal advice lest their infringing practice become another cautionary tale as the CCCS seeks to actively enforce the CPFTA and act against the various infringing practices outlined in the Guidelines.

Dentons Rodyk thanks and acknowledges Senior Associate Nicole Teo for her contributions to this article.

Your Key Contacts

Gerald Singham
Deputy Managing Partner, Singapore
D +65 6885 3644
gerald.singham@dentons.com

Mohamad Rizuan Bin Pathie
Partner, Singapore
D +65 6885 3794
rizuan.pathie@dentons.com

理律法律事務所
LEE AND LI
ATTORNEYS-AT-LAW

Amendment to Taiwan's Design Patent Examination Guidelines

The Ministry of Economic Affairs (MOEA) in Taiwan announced an amendment to "Volume 3–Design Patent Substantive Examination" of the Patent Examination Guidelines (hereinafter referred to as "Guidelines") on 29 September 2020. The amended Guidelines will take effect on 1 November 2020.

The amendment mainly relaxes the disclosure requirements for a design patent specification and drawings, clearly stipulating that an architectural design and an interior design are eligible subject matter for a design patent, relaxing the requirements for filing a design divisional application, and amending the stipulation related to a graphic image design, among other changes. Details regarding the amendments are as follows.

1. Relaxing the disclosure requirements for design patent specification and drawings

Paragraphs 1 and 2, Article 53 of the Enforcement Rules of the Patent Act stipulate: "In a design patent application, the drawing(s) shall contain sufficient views so as to fully disclose the appearance of the claimed design; where the design is three-dimensional, the drawings shall contain a perspective view; where the design is applied to a continuous planar article, the drawing(s) shall contain an element view. The views indicated in the preceding paragraph may include a perspective view, a front view, a rear view, a left side view, a right side view, a top view, a bottom view, a plan view, an element view, or other auxiliary views."

According to the current Guidelines (page 3-1-9), the so-called "sufficient drawings" means that the drawings shall sufficiently disclose each view of a claimed design, such that the appearance of the entire claimed design can be fully disclosed. However, a view can be omitted under any of the following situations; otherwise the drawings will be deemed failing to sufficiently disclose the design:

(1) Where some of the views are identical or symmetric;
(2) Where a general customer would not notice a specific view of the design when purchasing or using an article to which the design is applied, or where a view is completely planar and contains no design features;
(3) Where an article is extremely thin such that a general customer would not notice a specific view showing the thin side when purchasing or using the article; or
(4) Where a specific view merely shows a simple cross-section and contains no design features.

In light of the "partial design" concept, the amendment to the Guidelines has relaxed the above-mentioned requirements. In principle, according to the amended Guidelines, if a view is not disclosed in the drawings, such view of the design will be deemed a "disclaimed portion" and the claimed design would accordingly belong to a partial design. Nevertheless, under any of the below-listed situations, a description as to the said situation must be included in the specification: (1) where some of the views are identical or symmetric; and (2) where an article is extremely thin such that a general customer would not notice a specific view showing the thin side when purchasing or using the article.

It should be noted that, even for a partial design, the views in the drawings must sufficiently disclose all the features of the claimed portion of the partial design. If the drawings are insufficient to disclose the appearance of the claimed portion or define the scope of the claimed design, a person skilled in the art would be unable to understand the claimed design from the limited drawings. In such case, the application would be deemed to violate the enablement requirement.

2. ***Clearly stipulating that an architectural design and an interior design are eligible subject matters for a design patent***

The Guidelines of 2005 stipulate that the article to which a design is applied has to be a tangible article with a three-dimensional shape and a movable property with a constant shape that can be transacted independently by a customer. In addition, the 2005 Guidelines specify that architecture such as a house or a bridge, or a realty design such as an interior design or a garden design should be deemed unpatentable.

The above stipulations were cancelled in the Guidelines of 2013. The amended Guidelines further clearly stipulate that "architecture, a bridge or an interior, etc." may also be an article to which a design is applied.

3. ***Relaxing the requirements for filing a design divisional application***

According to current Guidelines, if the drawings initially filed only disclose one design applying to one article and do not contain any other reference views or state-of-use views, a divisional application cannot be filed since the drawings do not clearly disclose substantially two or more designs.

In order to conform the requirement for the divisional application with that for effecting amendment and that for effecting a conversion, i.e., "an amendment/a conversion should not go beyond the scope of the specification and drawings initially filed," the amendment stipulates that if the content disclosed in the specification or drawings initially filed may cover two or more designs, even if only one design is claimed, the applicant may file a divisional application(s) for one or more designs clearly disclosed in the specification or drawings initially filed (e.g., a design clearly disclosed in the reference views of the drawings, a design of a component of the article embodying the claimed design or a design with a claimed scope different from that of the originally claimed design).

According to the amended Guidelines, an applicant may file a divisional application(s) during pendency of the parent application by changing a part of the solid lines in the drawings initially filed to broken lines, or vice versa. However, the divisional application still has to comply with the requirement of "not going beyond the scope of the specification or drawings as initially filed."

4. Amending the stipulation related to a graphic image design

Paragraph 2, Article 121 of the Patent Act stipulates that computer generated icons (Icons) and a graphic user interface (GUI) applied to an article may also be filed to obtain a design patent. According to current Guidelines, the article may be a screen, monitor, display panel or other display-related articles. However, these articles still cannot cover a graphic image design presented by cutting-edge technology such as a projection, virtual reality, etc. In addition, when an applicant exploits patent rights for a graphic image design, an accused product is usually an intangible software or program.

For these reasons, the amendment was made with reference to "Chapter 12 – Computer Software Related Invention" of the Guidelines, including relaxing the restriction that the graphic image deign has to be applied to a tangible article, which allows an applicant to designate a computer program product as the article to which a graphic image design is applied, such that the design can cover a tangible article as well as an intangible software or program. The amended Guidelines thus can meet the needs of the industry and keep pace with technological innovation. Meanwhile, the amended Guidelines also correspondingly include amendments to the disclosure requirements for the specification and drawings, which allow an applicant for a graphic image design to omit broken lines depicting a disclaimed screen, display or display panel on which such graphic image is shown.

5. *Other amendments*

(1) Adding stipulations for the disclosure of colors

When an applicant uses black-and-white photos (or computer-generated drawings in grayscale) to present the shape or patterns of a claimed design, to prevent the claimed design from being interpreted as containing black, white or gray as colors, the amended Guidelines explicitly stipulate that the applicant may specify in the Description of Design section: "The subject design is represented by black-and-white photos (computer-generated drawings in grayscale). The tone shown in the drawings only helps to show the contour of the subject design, but the subject design does not claim the colors of black, white, or gray as shown in the drawings."

(2) Adding a description of shape of an article created solely for a functional purpose

The amended Guidelines explicitly stipulate that "an unpatentable shape of an article created solely for a functional purpose" means that if the shape of an article is merely dependent on the basic shape of a "must-fit" portion of a conventional article, and the design as a whole is related to a consequential outcome for connecting or matching the conventional article but is not associated with any creative concept (e.g., the design of a bolt solely resulting from the shape of the threads of a conventional nut), such design is unpatentable.

(3) Amending principles for evaluating novelty and creativeness of a design containing a color(s)

The amended Guidelines clearly stipulate that if a claimed design differs from prior art only in the selection or change of a single color from a conventional color system, the application or change of such color in the design should be deemed as a minute difference lacking influence on the visual impression of the design as a whole. Accordingly, the design should be deemed similar to the prior art. However, if the claimed design contains two or more colors, when determining if such combination of colors would be easily conceived, it should be taken into consideration whether these colors provide the design as a whole with a unique visual effect. If the combination of the colors does not provide the design with a unique visual effect, such combination should be deemed easily conceivable.

Accordingly, the amended Guidelines would provide an applicant with a more flexible filing strategy. In addition, the applicant would have a more complete protection to the appearance of their design(s). Lee and Li will continue to monitor execution of the amended Guidelines after they take effect and update our clients. If you have any questions, please do not hesitate to contact us.

Lee and Li, Attorneys-at-Law

ADVISORIES

Food + Beverage

Washington State Supreme Court Rules Dairy Workers Entitled to Overtime

By Diane Butler, Christie S. Totten, and Jesse D. Lyon

11.06.20

Dairies in Washington must pay workers overtime wages, based on a Washington Supreme Court decision issued November 5, 2020. Under Washington state law, employers must pay at least the applicable minimum wage for all hours worked and overtime wages when working beyond the 40 hour per week overtime threshold, but the law exempts dairies from the overtime requirement. The Court held that the exemption violated the state constitution's prohibition on granting a privilege or immunity, as well as the equal protection clause.

While the Court reviewed the constitutionality of the provision exempting all agricultural workers from the state's overtime pay requirement, it distinguished the year-round nature of the dairy industry from seasonal farm work. The opinion applies only to the "affected class of agricultural workers"—dairy workers—and addresses only Washington state wage and hour law.

Under federal law, farms in Washington that hire foreign agricultural workers under the H-2A temporary seasonal worker program must pay foreign and U.S. workers according to the applicable adverse effect wage rate (AEWR), which is currently $15.83 per hour for Washington. While federal law also exempts agricultural employers from overtime requirements, dairies are not eligible for the H-2A program because the work is year-round and not seasonal.

A step in the right direction: Encouraging diversity in clinical trial populations

Differences between the draft and final guidance

The final guidance is based on a June 2019 draft version, and includes several suggestions for diversifying study populations. The new recommendations, discussed in more detail below, include broadening study subject eligibility criteria by using real-world data to find participants and using mobile medical professionals to visit participants at their locations instead of requiring participants to visit distant clinical trial sites. The final guidance also has new information on the inclusion of racial and ethnic minorities, advancing community engagement, and making recruitment events more accessible.

Broadening eligibility criteria

First, FDA recommends diversifying clinical trials by broadening eligibility criteria to avoid the unnecessary exclusion of specific subgroups. For instance, FDA notes that in preliminary trials, investigational drugs typically lack sufficient safety data to adequately assess the risks that the drugs present to more vulnerable populations, such as pregnant women and people with organ dysfunction. As a result, those populations are often necessarily excluded from clinical trials in the earlier stages of drug development.

However, as safety data become available and dosing adjustments are made, FDA believes there should be fewer exclusions related to concomitant medications or comorbidities. Likewise, as the study drug's safety profile improves, FDA recommends that clinical trial eligibility criteria be broadened to include those more medically complex subjects. This approach can be accomplished by narrowing the exclusion criteria in later trials to only those specific conditions that are associated with heightened safety risks. For example, where trial participation presents an unreasonable risk to participants with advanced heart failure, but not to participants with mild heart failure, only those advanced cases should be excluded.

Bridging the data gap between clinical trial population and real-world patient population

FDA also explains its view that inadequate participation of clinically relevant populations results in insufficient safety and efficacy data. Thus, clinical trial sponsors should seek to bridge the data gap between the clinical trial population and the real-world patient population by enrolling participants who reflect the characteristics of clinically relevant populations with regard to age, sex, race, and ethnicity. For example, FDA suggests that sponsors enroll infants and adolescents in confirmatory trials with adults, and enroll women and racial and ethnic minorities in numbers sufficient to allow for analysis of the study data by sex, race and ethnicity.

Using new trial designs and methodological approaches

FDA further recommends that sponsors consider various trial design and methodological approaches that will facilitate the enrollment of a broader population. Examples of such trial design considerations include:

- characterizing drug metabolism across populations that may metabolize or clear the drug differently in order to allow for dose adjustments and reduce the likelihood of unnecessary exclusion,
- using an adaptive clinical trial design to allow for pre-specified trial design changes during the trial when data become available,
- developing a broader pediatric development program, and
- including pharmacokinetic sampling to establish dosing in women who become pregnant during a trial.

The guidance also recommends utilizing enrichment, which is described as a trial design strategy involving the targeted inclusion of certain populations, with the goal of more readily demonstrating the drug's effect.

Reducing the burden of clinical trial participation

FDA explains that along with the diversity limitations imposed by narrow eligibility criteria, certain populations may be precluded from participating in clinical studies if they face additional challenges related to their obligations in the trials. For example, trials requiring frequent clinic visits may impose a greater burden on elderly, disabled, and adolescent participants. Financial costs associated with traveling to clinic visits and taking time away from work, may also preclude certain populations from participation. The guidance explains that these barriers may be addressed by designing clinical trials to be less burdensome, including:

- reducing the frequency of clinic visits,
- considering use of electronic communication to replace in-person visits,
- using mobile medical professionals to visit and assess participants at their locations, and
- using electronic informed consent forms to permit remote trial enrollment.

FDA also suggests that trial sponsors may consider offering financial reimbursements for costs associated with trial participation to alleviate any financial burden on study participants.

Adopting more inclusive enrollment and retention policies

In line with the guidance's overall theme of broader participation, FDA suggests that clinical trial sponsors adopt enrollment and retention policies that advance inclusiveness for diverse study populations. FDA recommends public outreach and education such as working directly with communities to assess and address potential participant needs, and remaining engaged with those communities after the conclusion of the trial to continue fostering trust.

Sponsors may also consider providing cultural competency and proficiency training for clinical investigators and research staff to help facilitate trust with underrepresented communities and help decrease biased communication and behavioral practices.

Further, trial sponsors should consider expanding clinical trial sites to include geographic locations with a higher concentration of racial and ethnic minorities, making recruitment events accessible by holding them often and on weekends, and using online and social media recruitment to reach participants who do not have access to traditional referral centers.

To facilitate outreach to non-fluent English speakers, the guidance also recommends providing trial resources and documents in multiple languages and providing multilingual research staff or interpreters.

Improving the quality of clinical studies

The guidance concludes its series of practical suggestions by stating that implementing these recommendations aimed at diversity in clinical trial populations will improve the quality of clinical studies:

- by ensuring that the study populations more accurately represent the population that will ultimately use the drug,
- by allowing for the development of important safety information about the drug when used in certain populations, and
- by increasing the ability to understand the drug's safety profile in later stages of drug development.

If you have any questions about this guidance, or clinical trial regulations more generally, please feel free to contact any of the authors listed below or the Hogan Lovells attorney with whom you regularly work.

Authored by Robert Church, Eman Al-Hassan, Heidi Gertner, and Blake Wilson