PACIFIC RIM
ADVISORY COUNCIL

Pacific Rim Advisory Council
February 2022 e-Bulletin

MEMBER NEWS

- ►ARIAS Welcomes Renowned Environment Expert to Firm
- ►BRIGARD URRUTIA Strengthens Tax Practice Adding New Partner
- ►GIDE Elects New Partner In Warsaw
- ►HAN KUN Welcomes Two New Partners
- ►PRAC Appoints New Board Chair and Vice-Chair

COUNTRY ALERTS

►ARGENTINA Antitrust Authority Updates Merger Control Thresholds and Monetary Penalties ALLENDE BREA

►BRAZIL 2022 Infrastructure and Energy Newsletter TOZZNIFREIRE

►CANADA Introduces "Excessive Interest and Financing Expenses Limitation" BENNETT JONES

►CANADA Commercial Leasing Tips to Know When Registered and Beneficial Ownership are Separate RICHARDS BUELL SUTTON

►CHILE SERNAC Sets New Guidelines About Processing of Consumers' Personal Data CAREY

►CHINA Revised 2021 Negative List for Foreign Investment HAN KUN

►COLOMBIA Pacific Alliance and Singapore Sign Free Trade Agreement BRIGARD URRUTIA

►FRANCE Increased Risk of Criminal Liability for Parent Companies GIDE

►GUATEMALA Regulation Changes to Insolvency and Bankruptcy Procedures: Approval Lifts Existing Regulations to International Standards ARIAS

►HONG KONG Cyber Risk Management – the HKMA's Regtech Adoption Practice Guide HOGAN LOVELLS

►LUXEMBOURG New Registration Formality NAUTADUTILH

►MALAYSIA Department of Personal Data Protection Issues Codes of Practice for Private Hospitals in the Healthcare Industry and Utilities Sector (Water) SKRINE

►MEXICO Official Mexican STANDARD NOM-241-SSA1-2021, Good Manufacturing Practices of Medical Devices SANTAMARINA y STETA

►PHILIPPINES Tax Tips and Practical Solutions SYCIP LAW

►SINGAPORE Court of Appeal Sets Out Principles for Recognizing Lack of Consent DENTONS RODYK

►TAIWAN Supreme Court Interprets Requirements for Prior Use of Trademarks in Good Faith as Defense against Trademark Infringement Accusation LEE AND LI

►UNITED STATES California Communications Infrastructure Update: A Look Ahead at Potential Regulatory Developments in 2022 DAVIS WRIGHT TREMAINE

►UNITED STATES SEC Proposed Rule Amendments for Private Funds HOGAN LOVELLS

CONFERENCES & EVENTS

PRAC Let's Talk!

upcoming virtual events
February 23/24, 2022
March 21/22, 2022

International Conference - New Delhi Hosted by KOCHHAR & Co. TBA
International Conference - Mexico City Hosted by Santamarina y Steta TBA
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

►ALLENDE |Assists Rincon Mining US$825M sale of Argentine lithium project to Rio Tinto

►BENNETT JONES | Advising Equitable Bank in its Agreement Acquire Concentra Bank

►BRIGARD URRUTIA | Diesco US$275m loan from Goldman Sachs

►CAREY | Assists Chilean Energy Group Alea in US$686Million Sale to Canada's Innergex Renewable Energy

►GIDE | Counsel to Unibail-Rodamco-Westfield SE on the sale of a 45% stake in Westfield Carré Sénart

►HAN KUN | Advises Bright Dairy on its private placement of A shares

►HOGAN LOVELLS | Advises Ad Hoc Group on restructuring of Yestar Notes

►NAUTADUTILH | Assists Apax Partners SAS

►RICHARDS BUELL SUTTON| RBS Wins Landmark Decision: Government Liable for Trademark Infringement

PRAC TOOLS TO USE
COVID-19 SITE FOR ALL UPDATES

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

ARIAS WELCOMES RENOWNED ENVIRONMENTAL LAWYER ROBERTO CORDERO

COSTA RICA - 01 FEBRUARY 2022: With excitement we announce the incorporation of renowned lawyer Roberto Cordero, to our Environmental Law practice. Roberto has served as a leader in Environmental Law practice in the country for more than 20 years.

Roberto Cordero

The addition of Roberto marks a milestone in the practice of ESG (environmental, social and governance) at a regional level. With Roberto's arrival, the firm will have new services and significant added value in the department, including compliance reports, environmental health and safety audits, environmental and social due diligence, access to online legal databases, new strategic social and governance requirements, and much more, for example, carbon and water footprints, sustainability strategies: in the value/procurement chain Roberto is characterized by offering personalized and field service with years of experience in this type of hands-on situations, which is an important factor of differentiation for the Firm.

Arias has a team of lawyers specialized in a wide variety of practice areas including corporate advice, taxes, tax planning, labor law, financing, infrastructure and real estate, litigation and arbitration, intellectual property, environmental law, among others.

.

Roberto affirms that "To be part of a regional firm where we work with focus, dedication and have the expertise, technical and legal capacity to attend, resolve and add value to the issues, businesses and needs of our clients. This is the comprehensive and highest quality solution that companies, individuals and economic and social activities can and do require. In this historical moment, where moving with ethics, professional values, and excellence, is not an added value, it is our obligation; and even more so if we deliver sustainability services with the experience and ability to identify, remedy and continuously improve their operations, in balance with our planet and society".

Gabriela Delgado, associate of the firm's environmental team, who has worked in the sustainability area for 14 years: "Roberto and I share the vision that sustainability services must genuinely respond to the needs of clients, providing an appropriate response and with a business continuity perspective in balance with the environment and society. This is what we will provide at the ESG department in Arias, a committed team with a desire to do things well, involved out in the field with our customers, understanding their real needs and providing them with solutions. "

Carolina Flores, Managing Partner our office in Costa Rica, comments: "We are very excited about Roberto's arrival at the Firm, we are confident that he will provide exceptional added value to our clients by being a lawyer with more than 20 years of experience and a personalized, disruptive and effective way of doing things."

Roberto joins the firm as Partner and Leader of the Environmental Law Department and Occupational Health and Safety and Food Safety, as well as the Sustainability Services (Environmental, Social, Governance). He has more than twenty years of experience at the service of national and international organizations. He stands out for his services to corporate clients, public institutions, as well as non-governmental organizations in Central and South America, providing comprehensive legal advice, innovative solutions and a preventive approach based on risk analysis on environmental legal matters, in occupational health and safety, which visualizes sustainability as an indispensable pillar for any company lasting over time.

According to Carlos Ubico, partner at the Firm: "The incorporation of Roberto, entails another example of the constant and sustained growth of Arias. His experience, in environmental law, comes to strengthen and complement the services offered by the Firm, having the best professional in environmental law in Costa Rica, not only for his knowledge of the legislation, but also for his experience in the field, which is vital to provide comprehensive environmental advice."

This event is a very important event for us in the Costa Rican market during the year 2022, marking a before and after in terms of ESG and sustainability.

For additional information visit www.ariaslaw.com

BRIGARD STRENGTHENS TAX PRACTICE ADDING NEW PARTNER

BOGOTA - 26 January, 2022: Colombian firm Brigard Urrutia has strengthened its tax offering with the addition of partner, Adrián Rodríguez. Rodigues was also appointed as co-head of the firm's tax department, alongside existing partners Catalina Jaramillo and Andrés Hernández as well as director Daniel Duque.

Rodríguez brings over 25 years of experience in tax law. He covers a broad range of matters and regularly advises local and international corporations on issues involving tax planning, foreign investment, corporate reorganisation and M&A work, among others. Alongside Colombia, Rodríguez is also licensed to practise tax law in the US states of New York and Illinois. The tax specialist is also vice president of Colombia's national tax law institute ICDT.

It was Rodríguez's successful reputation within the legal tax market that drew Brigard Urrutia towards him, says the firm's tax partner Hernández. "We have followed Adrian's career for many years and we agreed that, if we ever were to consider a new partner to help us lead our team, Adrian would be an ideal fit," he adds.

For additional information visit www.bu.com.co

GIDE ELECTS NEW PARTNER IN WARSAW

WARSAW - 26 January 2022: Gide is pleased to announce the election of Błażej Czwarnok to partner position. With the promotion of this highly talented lawyer, Gide consolidates and boosts its development on the international scene. Drawing on his recognised and respected skills in real estate transactions and financing, Błażej Czwarnok is committed to promoting the raison d'être of Gide, which is to provide clients the best possible service.

Gide now numbers 111 partners, working out of 11 offices worldwide.

Senior Partner Frédéric Nouel and Managing partner Jean-François Levraud states: "We are particularly proud to welcome Błażej within the partnership. As well as being an experienced lawyer who is highly appreciated by his clients, he excels in his field. We warmly congratulate him and wish him the best success in his new role."

Błażej Czwarnok is a member of the Real Estate team at Gide Warsaw. He supports investors and developers who carry out residential, office, retail and hotel investments, as well as those in the senior sector and financing sector, in all matters relating to real estate and the investment process, including transaction structuring, the acquisition and sale of real estate and real estate projects, legal due diligence reviews, zoning and construction process issues, as well as leasing. He also has extensive experience in court, administrative and court-administrative proceedings related to real estate.

Błażej graduated from the Faculty of Law and Administration of the University of Warsaw, the Faculty of Law and Social Sciences of the University of Poitiers and the Faculty of Law, Economics and Management of the University in Orléans.

Polish and international legal rankings, including The Legal 500 and Chambers and Partners, recommend Błażej in the field of real estate law.

For additional information visit www.gide.com

PRAC APPOINTS NEW BOARD CHAIR AND VICE-CHAIR

01 January 2022: The Pacific Rim Advisory Council is pleased to announce its newly elected Board Chair and Vice Chair for the two-year term 2022 thru 2023.

Chair: ***Marcio Mello Silva Baptista, Partner, TozziniFreire***
Head of TozziniFreire's New York office, in parallel to a strong presence in the São Paulo office, Marcio acts primarily in cross□border operations, focusing on mergers and acquisitions, private equity transactions, transnational contracts and joint ventures.

Marcio is co-head of TozziniFreire's Insurance and Reinsurance practice group and has extensive experience representing clients in the US, Asia, Europe and Latin America.

Vice Chair: ***Sarah English Tune, Partner, Davis Wright Tremaine LLP***
Sarah Tune is a skilled business transactions attorney that thrives on balancing high-level strategy with meticulous organization to achieve success in complex transactions for her clients. Sarah brings to the table her substantive expertise, a practical mindset and a desire to help her clients achieve their broader business goals. She is a valued advisor to her clients both in the heat of a transaction and in strategic planning and structuring of their organization and important contractual arrangements.

Sarah's client base consists primarily of operating companies and investors in consumer sectors with an emphasis on food and beverage, restaurant, fitness and franchised businesses. Sarah is also chair of the firm's executive committee and co-chair of the corporate and business transactions practice.

Speaking on his appointment, Marcio commented *"I am humbled and honored to be entrusted with the responsibility and grateful for the opportunity to serve the membership along with Sarah as we continue to move the organization ahead. I look to our members to continue to come together to continue strengthening our longstanding bonds and focus on the fundamental strengths of our organization, how it can be improved and how it can best be positioned for the future."*

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

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

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

For more information and to view our list of member firms visit www.prac.org

HAN KUN WELCOMES INVESTMENT FUND AND LIFE SCIENCES/ HEALTHCARE EXPERTS TO THE FIRM

BEIJING - 14 February, 2022:

Han Kun is pleased to announce that Ms. Pei Zhao has recently joined the firm. She has years of experience in fund formation and operation, and related areas. The addition of her to the firm will further enhance Han Kun's investment fund practice capabilities. Ms. Zhao will be primarily based in Han Kun's Beijing office.

Han Kun is pleased to welcome to the firm Mr. Aaron Gu, a legal expert in the life sciences and healthcare sector. Mr. Gu has for years been committed to advising market participants in the life sciences, biopharmaceutical, medical and healthcare industries, and is well-experienced in these fields. Mr. Gu will be primarily based in Han Kun's Shanghai office.

For additional information visit www.hankunlaw.com

ALLENDE BREA

ASSISTS RINCON MININ IN US$825M SALE OF ARGENTINE LITHIUM PROJECT TO RIO TINTO

BUENOS AIRES - 31 January 2022: Argentine firm Allende & Brea advised Rincon Mining, a local subsidiary of Australia's Rincon Rources, in it US$825million sale of a lithium project in Northern Argentina to Rio Tinto. The transaction, which is subject to customary closing conditions from Australia's Foreign Investment Review Board (FIRB), is expected to close in the first half of 2022.

Once complete, the acquisition will give Rio Tinto total control over the large undeveloped lithium brine site in the north-western Argentine province of Salta. The project, known as Rincon, extends across 3,000 hectares of land in the heart of the South American country's lithium extraction zone.

Counsel to Rincon Mining Allende & Brea Partners Florencia Heredia and Marcos Patron Costas, and associates Agostina Martinez and Valentina Surraco Urtubey in Buenos Aires; Herbert Smith Freehills (Brisbane)

Counsel to Rio Tinto Baker McKenzie LLP (London and Buenos Argentina)

For additional information visit www.allendebrea.com

BRIGARD URRUTIA

ASSISTS DIESCO OBTAIN US$275 MILLION FROM GOLDMAN SACHS

BOGOTA, 08 December 2021: Multinational Grupo Diesco has hired Brigard Urrutia in Bogotá, Headrick Rizik Alvarez & Fernández in Santo Domingo and Wakefield Quin in Bermuda to obtain a US$275 million investment from Goldman Sachs in an agreement signed in October 2021.

Diesco plans to use the proceeds from the investment to accelerate its expansion in the Dominican Republic. The new capital will also allow Diesco to invest in environmental, social and governance initiatives.

Acting in the transaction were Brigard Urrutia Partner César Felipe Rodríguez and associates Verónica Umaña Obregón, Santiago Jaramillo Martínez and Juan Pablo Tello Martínez in Bogotá.

For additional information visit us at www.bu.com.co

BRIGARD URRUTIA

ASSISTS DIESCO IN US$275M LOAN FROM GOLDMAN SACHS

BOGOTA, 08 December 2021: Multinational Grupo Diesco has hired Brigard Urrutia in Bogotá, Headrick Rizik Alvarez & Fernández in Santo Domingo and Wakefield Quin in Bermuda to obtain a US$275 million investment from Goldman Sachs in an agreement signed in October 2021.

Diesco plans to use the proceeds from the investment to accelerate its expansion in the Dominican Republic. The new capital will also allow Diesco to invest in environmental, social and governance initiatives.

Acting in the transaction were Brigard Urrutia Partner César Felipe Rodríguez and associates Verónica Umaña Obregón, Santiago Jaramillo Martínez and Juan Pablo Tello Martínez in Bogotá.

For additional information visit us at www.bu.com.co

BENNETT JONES

ADVISING EQUITABLE BANK IN ITS AGREEMENT TO ACQUIRE MAJORITY INTEREST IN CONCENTRA BANK

TORONTO - 11 February, 2022: Bennett Jones is acting for Equitable Bank in its agreement to acquire a majority interest in Concentra Bank and Equitable Group's concurrent $200-million bought deal offering of subscription receipts. Concentra is the 13th largest Schedule I bank in Canada. Based on Concentra's book value of $11.3 billion in assets at November 30, 2021, the acquisition would result in a total purchase price of $470 million, subject to customary adjustments at the time of closing. Equitable Bank is expected to become the 7th largest Canadian-owned bank by assets.

Equitable's internal legal team is led by Michael Mignardi, Equitable's General Counsel. The Bennett Jones team is led by Suzana Lobo and John Teolis and includes Curtis Cusinato, Jeff Kerbel, Matthew Hunt, Gordon McKenna, Adam Kalbfleisch, Jessica Thrower, Nusrat Ali, Benjamin Gal and Tyler McAuley.

For additional information visit www.bennettjones.com

CAREY

ASSISTS CHILEAN ENERGY GROUP ALEA IN US$686M SALE TO CANADA'S INNERGEX RENEWABLE ENERGY

SANTIAGO - 15 February, 2022: Carey Assisted Chilean energy group Aela and its portfolio of wind farms from UK investment fund Actis and Irish business Mainstream Renewable Power, in its US$686 million sale to Canada's Innergex Renewable Energy. Aela is a joint venture between Actis and Mainstream.

The acquisition is expected to close in the second quarter of 2022 subject to regulatory approval by the Chilean antitrust authority Fiscalía Nacional Económica.

Upon closing, Innergex will acquire holding companies Aela Generación and Aela Energía, indirectly purchasing the 332-megawatt portfolio of wind projects.

Counsel to Aela, Actis and Mainstream Renewable Power Carey Partners Claudio Lizana, Manuel Alcalde and Fernando Noriega, and associates Sofia Bobadilla, Manuel José Barros, Daniela Pfeffer, Loreto Ribera, Tomás Hernández, Diego Ibarrola, Valentina Mendoza, Ximena Jirón, Daniela León and Fernanda Valdés in Santiago; In-house counsel to Aela – Diego Corp; Clifford Chance LLP (London)

Counsel to Innergex Renewable Energy DLA Piper LLP (London and Chile).

For additional information visit www.carey.cl

GIDE

COUNSEL TO UNIBAIL-RODAMCO-WESTFIELD SE ON THE SALE OF 45% STAKE IN WESTFIELD CARRE SENART

PARIS - 10 February, 2022: Gide has advised Unibail-Rodamco-Westfield SE on signing a partnership with Société Générale Assurances and BNP Paribas Cardif for the sale of a 45% stake in shopping centre Westfield Carré Sénart, setting up a joint venture long-term, and implementing asset and property management contracts.

Gide's team comprised partners Frédéric Nouel and Didier Martin, working with counsel Cléopha Thomann and associates Lucie Martins and Rosalie Schwarz on transactional aspects; and partner Rémi Tabbagh and associates Faten Anis and Margaux Lefebvre on financing aspects.

Unibail-Rodamco-Westfield SE was also assisted by Jean-Yves Charriau (Lacourte Raquin Tatar) on tax aspects, and notarial study Ginisty, represented by Sandrine Demoulins.

For additional information visit us at www.gide.com

HAN KUN

ADVISES BRIGHT DAIRY ON ITS PRIVATE PLACEMENT OF A SHARES

SHANGHAI, 24 December, 2021: Recently, Bright Dairy & Food Co., Ltd. ("Bright Dairy", Stock Code: 600597) concluded a private placement of A shares. Registration and custody formalities for the new shares were completed on December 20, 2021, at China Securities Depository and Clearing Corporation Limited Shanghai Branch. As legal counsel to Bright Dairy, Han Kun Law Offices was engaged throughout this project and provided Bright Dairy with professional, full-scope, and efficient legal services.

Bright Dairy, a dairy conglomerate principally engaged in dairy cow husbandry, the development, production, processing and distribution of dairy products, as well as logistics and distribution businesses, is a high-end brand leader in China's dairy industry. The RMB 1.93 billion raised by Bright Dairy through this private placement will be used to advance the company's milk-source ranch projects and supplement its working capital, which will help expand Bright Dairy's business, further improve the self-sufficiency of its milk sourcing and the quality of its products, thereby enhancing Bright Dairy's core competitiveness and sustainable development.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

ADVISES AD HOC GROUP ON RESTRUCTURING OF YESTAR NOTES

HONG KONG, 10 January, 2022: Global law firm Hogan Lovells has successfully advised an ad hoc committee of bondholders (the "Committee") on the restructuring of US$200m 6.9% senior notes due 2021 (the "Notes") issued by Yestar Healthcare Holdings Company Limited (2393.HK) ("Yestar"). Yestar is a leading medical consumables and equipment company operating in the PRC.

On 30 December 2021, Yestar completed a restructuring of the Notes by way of a scheme of arrangement in the Cayman Islands.

Hogan Lovells played a key role in the formulation and improvement of the restructuring terms which were subsequently supported by 94% of the noteholders who acceded to a restructuring support agreement and more than 95% of noteholders who attended and voted in favour of the scheme. The scheme was approved by the Cayman court on 10 December 2021 and the Restructuring Effective Date occurred on 30 December 2021.

Hogan Lovells worked seamlessly alongside Houlihan Lokey, the financial adviser to the Committee and Cayman Islands' counsel, Mourant Ozannes. A team of professionals from Hong Kong, Shanghai, Cayman Islands and the U.S., ultimately achieved a successful outcome for both the noteholders and the issuer. The Hogan Lovells team was led by Hong Kong based Corporate & Finance partner, Jonathan Leitch with support from lawyers Derrick Lau, Jenny Yim, Andrew Cobden and Teresa Kwok in Hong Kong and Shantay Cong in Shanghai. Capital Markets partner Richard Aftanas and associate Katherine Tyurin in New York provided US law advice.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ASSISTS APAX PARTNERS SAS

AMSTERDAM -10 February, 2022: French private equity company Apax Partners (Apax) has acquired the Dutch IT company Odin Groep (Odin) from Fortino Capital. Odin came into the hands of Fortino Capital in 2019. Since then, Odin with 650 employees managed to double its turnover to €140 mln in 2021. Odin manages online computer workstations, with which employees of companies have access to the right applications and data. Contrary to most competitors, it does not only provide cloud services by, for example, Microsoft, but also manages its own data centre. Under the wings of Apax, Odin will continue to further expand in the Netherlands and also expand to Germany and Belgium.

'Great teamwork on a cross-practice group basis in an intense M&A project. A clear example of an accelerated deal in which Apax Partners successfully ended up ahead of the pack in this competitive auction. Jeanine Evertse had only just made her landing and really hit the ground running in November, returning from our offices in New York. Together with Frans Ruijs on her side, they drove the deal across the finish line for Apax. Proud also of our broader team pulling some stunts in setting new standards in the market', says lead partner on this transaction, Gaike Dalenoord.

The core team consisted of: Gaike Dalenoord, Jeanine Evertse, Frans Ruijs (Corporate/M&A), Jules van de Winckel and Sanne Meester (Corporate Notarial), David Vietör, Jinne van Belle, Stephan Huis in het Veld (Finance). The team further consisted of: Ole de Vries, Ernst van de Luijtgaarden, Fleur Terlouw, Mariska Kamta (Corporate/M&A), Nima Lorje, Jasmijn van Koetsveld, Jurriaan Bos (Competition), Daniël Kuiper, Arjan Koorevaar (Employment), Cyril Christiaans, Eva Reinders, Tom de Smet (Information Technology), Martin Plak (Privacy), David Wumkes, Youri Jansen (Real Estate Owned), Florine Oosterloo (Insurance), Madelon de Blok (Real Estate Lease), Fleur Folmer, Jesper Vrielink (Intellectual Property), Jolize Lautenbach, Ruben Rekers (Regulatory).

For more information visit www.nautadutilh.com

RICHARDS BUELL SUTTON

WINS LANDMARK DECISION: GOVERNMENT LIABLE FOR TRADEMARK INFRINGEMENT

VANCOUVER, 21 June 21, 2021: In a landmark case involving multiple levels of appeal, RBS successfully represented a Vancouver-based energy consulting business against the Government of Ontario for trademark infringement. The decision established that public bodies can also be held liable for trademark infringement when adopting an official mark that may be confused with a prior registered trademark.

Full overview follows:

In Quality Program Services Inc. v. Ontario (Energy), 2018 FC 971, aff'd 2020 FCA 53 (leave to appeal to SCC denied), RBS LLP partner Jonathan M.S. Woolley successfully protected our client's registered trademark "EMPOWER ME" from infringement by the Government of Ontario. The Government of Ontario was ordered to pay damages of $10,000 to Quality Program Services Inc. (QPS) on the basis that the Ontario Ministry of Energy's campaign slogan "emPOWERme" and website launch of the same name was confusing with, and therefore infringed, QPS's registered mark. The key issue in this decision was whether the Government of Ontario could become immune to an infringement claim by adopting QPS's mark "emPOWERme" as an "official mark" of the government, even though it had been already registered by and accumulated goodwill associated with QPS.

Significance:

Under the Trademark Act, government and public authorities are entitled to adopt particular marks as "official marks". Once notice of the adoption is provided, these marks become removed from the realm of commerce, and any use of the official mark, or any mark confusing with it, becomes strictly prohibited. The trademark Registrar is not entitled to decline the registration of an official mark, no matter if it is confusing with, or even identical to, a company's pre-existing trademark. Examples of symbols intended to be protected by "official mark" status include the Canadian flag and the crests of Crown corporations.

The case is a landmark decision, as it is the first time anyone has ever successfully defended its trademark against a government agency seeking "official mark" or "super trademark" status for the same mark. The Federal Court of Appeal not only upheld the lower court's decision and sided with QPS, it sent the strong message that "a public authority that chooses to use a mark that is confusing to a registered trademark does so at its peril". As this case illustrates, official marks are controversial. They offer extremely broad protections, with few limitations. This decision changed the law by delineating the limitations of official mark protection.

The decision is significant to trademark and intellectual property professionals, and has received media attention. For example, CBC article "Move to 'emPOWER' Ontario energy consumers ends in $10K trademark confusion". https://www.cbc.ca/news/canada/british-columbia/power-trademark-ontario-slogan-1.4867595.

Factual Background:

QPS is a BC company that originated and used the phrase "EMPOWER ME" in connection with energy awareness since 2013, when the mark was displayed at QPS's booth at a festival in Surrey, BC. The trademark application for exclusive use of the mark was granted by the Canadian Intellectual Property Office on July 23, 2014.

In 2015, QPS became aware of the Government of Ontario's website using the name "emPOWERme" in connection with a campaign to educate Ontario residents about Ontario's energy system and energy conservation. QPS wrote to the Government of Ontario, requesting that it cease and desist its use of the mark. The Government of Ontario refused. Subsequently, it attempted to adopt PQS's mark "emPOWERme" as an official mark of the government pursuant to s. 9(1)(n) of the Trademark Act.

The Federal Court found that QPS owned the trademark EMPOWER ME for use in association with energy awareness, conservation and efficiency services, and that QPS has the exclusive right to the use of such trademark not only in BC, but throughout Canada. The Government of Ontario had wrongfully infringed QPS's trademark, contrary to the Trademark Act. The adoption of an official mark is powerful as it prohibits use by others, but does not go as far to protecting the government agency from itself contravening the Act, nor does it eliminate rights already conferred upon the owner of a registered trademark.

As a result, the Government of Ontario was ordered to pay $10,000 in damages to QPS. The Government of Ontario was unsuccessful in challenging the decision in the Federal Court of Appeal. The Supreme Court of Canada refused to grant leave to appeal, effectively solidifying QPS's win in the lower courts.

More Information: At RBS, we have a knowledgeable and experienced group of trademark agents and lawyers who manage all aspects of trademark portfolios in Canada, the USA, and around the world. For more information on protecting your trademark, or for general inquiries about trademark registration, please contact our Technology & Innovation Practice Group Leader Sze-Mei Young at syeung@rbs.ca.

For additional information visit www.rbs.ca

PRAC EVENTS

BULLETIN BOARD

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 at all 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.

PRAC-Let's Talk!

Join us in 2022 for our monthly live one-hour virtual meetings
PRAC - Let's Talk! events are open to PRAC Member Firms only

Visit www.prac.org for details

PRAC LET'S TALK!

PRAC @ NEW DELHI MICRO-CONFERENCE HOSTED BY KOCHHAR & CO.

NEW DELHI - 2021: PRACites around the globe gathered online for PRAC @ New Delhi micro-conference hosted by member firm KOCHHAR & CO. Congratulations to the entire Kochhar Team for a successful e-hosting!

Agenda
Opening Remarks - Jaap Stoop, PRAC Chair; Marcio Baptista, PRAC Vice Chair; Jeff Lowe, PRAC Corp Secretary
Greetings & Welcome - Rohit Kochhar, Chairperson and Managing Partner
Country Update - India - Pradeep Ratnam
Visual Presentation - Essense of India!
Kochhar Practice Update - M&A - Chandrasekhar Tampi
Kochhar Practice Update - Banking & Finance - Pradeep Ratnam
Firm update - Rohit Kochhar
Panel Discussion on "Regulation of Content on Social Media" - Moderator, Stephen Mathias, Kochhar & Co (Bangalore); Mark Brennan, Hogan Lovells (Washington); Mauricette Schaufeli, NautaDutilh (Amsterdam)

PRAC EVENTS

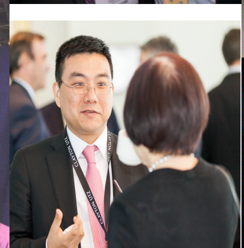
PRAC @ SAO PAULO

PRAC @ Taipei 2014

2020-21 monthly PRAC Let's Talk! online event

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.

www.prac.org

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

ALLENDE
ALLENDE & BREA

Argentinean Antitrust Authority updates merger control thresholds and monetary penalties

Practice Areas:

Antitrust

Lawyers:

Julián Peña, Federico Rossi

On February 2, 2022, the Secretary of Domestic Trade - Argentina's current Antitrust Authority- published Resolution No. 35/2022 whereby the value of the administrative unit created as a reference by the Antitrust Law No. 27,442 (the "Antitrust Law"), was increased from 55.29 pesos to 83.45 pesos, thereby updating both the merger control notification thresholds and the monetary penalties set forth in the Antitrust Law.

Pursuant to the Antitrust Law, both the merger control notification thresholds and the monetary penalties are expressed in administrative units, unlike the previous antitrust regime where these were expressed in fixed local currency amounts and thus quickly became outdated as a consequence of inflation.

The administrative unit's value, according to the Antitrust Law, is to be updated on a yearly basis by the Antitrust Authority following the evolution of the official consumer price index.

The increase of the administrative unit?s value has an impact in the merger control thresholds as well as in the monetary penalties provided in the Antitrust Law. The main resulting modifications are summarized below:

Merger control

Economic concentrations must be notified to the Antitrust Authority if the combined Argentine annual net sales of the acquiring group and the target group exceed AR$8,345 million during the preceding year (approx. US$77.4 million taking in consideration the exchange rate in force on December 31, 2021).

Additionally, the de minimis exemption was updated, and now otherwise mandatory economic concentrations are exempted from notification if both the amount of the Argentine portion of the transaction and the value of the assets to be transferred in Argentina are below AR$1,669 million (approx. US$15.5 million at the current exchange rate), unless where the acquiring group was involved in an economic concentration in the same market in Argentina valued in AR$1,669 million during the preceding 12 month period or AR$5,007 million (approx. US$46.5 million) during the preceding 36 month period.

Monetary penalties

Fines for anticompetitive conducts, when these cannot be calculated using the turnover or the illicit gain tests provided in the Antitrust Law, cannot exceed AR$16,690 million (approx. US$154.9 million at the current exchange rate).

Daily fines for breach of cease and desist orders, late filing and gun-jumping practices, when these cannot be calculated by means of using the turnover test set forth in the Antitrust Law, can now amount to AR$62.5 million (approx. US$580,858).

This briefing does not contain a full analysis of the law nor shall it be deemed as a legal or any other type of advice by Allende & Brea.

Tozzini Freire.
ADVOGADOS

São Paulo, Rio de Janeiro, Brasília, Porto Alegre, Campinas, New York

INFRASTRUCTURE AND ENERGY NEWSLETTER

February **2022**

Auctions of toll roads, the new legal framework for railways, contracts in foreign currency, and other news in the infrastructure sector.

IMAGEM: JARED MURRAY

INFRASTRUCTURE

Long-Term Integrated Plan for Infrastructure is published

The report of the first version of the Long-Term Integrated Plan for Infrastructure (PILPI), which covers the 30-year period between 2021 and 2050, was approved on December 14, 2022. The PILPI is prepared based on the sector-specific plans and will be updated every two years.

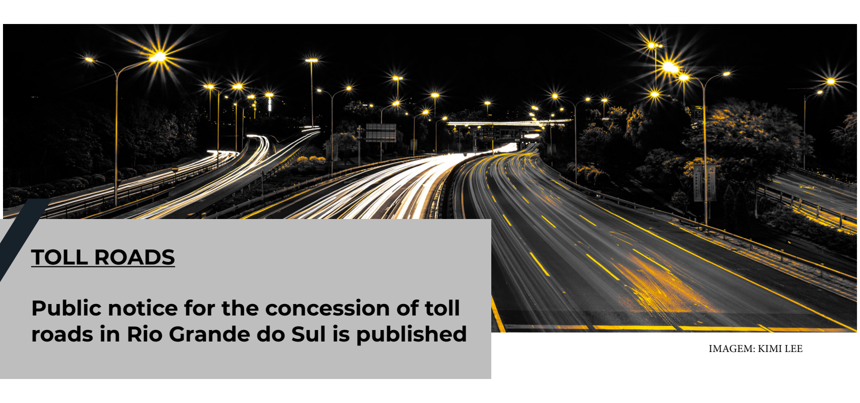


IMAGEM: KIMI LEE

TOLL ROADS

Public notice for the concession of toll roads in Rio Grande do Sul is published

The public notice for the concession of 271,5 kilometers of state toll roads in Block 3 of the RS Parcerias program was published on January 10, 2022. Bid bonds shall be submitted by April 7, at B3, São Paulo stock exchange, and the auction is scheduled for April 13, 2022. The Invitation to Bid, draft concessions contract and other documents can be found here.

ANTT opens public hearing for toll roads in the North and Midwest regions

The Brazilian National Land Transport Agency (ANTT) has opened public hearings to collect contributions for the drafts of the invitation to bid and contract related to the concessions of four groups of federal toll roads: (i) BR 060-452 (GO), with 425.70 km; (ii) BR 060-364 (GO) and BR 364 (MT), with 502.80 km; (iii) BR O70-174-364 (MT), with 887.60 km; and (iv) BR 364 (RO), with 729 km. Contributions may be sent until February 25, 2022 here.

ANTT schedules auction for the concession of BR 381-262 (MG-ES)

After successive postponements, the invitation to bid has been approved and the auction for the concession of BR 381-262, as known as the "Highway of Death", was for February 7, 2022, at B3, São Paulo stock exchange. In an effort to increase private interest in the toll road, a risk-sharing optional mechanism for the price of inputs has been included to mitigate the risk of variation in construction costs. Invitation to bid and draft concession contract can be found here.

Authorization for the opening of the bidding for the Northern Stretch of Rodoanel is published

The concession is structured as a sponsored concession (concessão patrocinada) of public services for the expansion, operation, maintenance and investments of the "Northern Stretch of Rodoanel". In addition to tariffs, the concessionaire will receive revenues from investments made by the State. The concession contract will have a term of 31 years with investments of R$3 billion. The Northern stretch is 44 km long and passes through the cities of São Paulo, Guarulhos and Arujá. The future concessionaire will be responsible for completing the construction work on the Northern stretch that has been suspended since December 2018. The public notice was published on January 28, 2022 in the São Paulo Partnerships website.

IMAGEM: KS KYUNG

RAILWAYS

New Legal Framework for Railroads is sanctioned

Law No. 14,273/2021 was published on December 23, 2021, instituting the regime for private exploitation of railroads by means of authorization. So far, more than 70 applications have been filed and more than 20 authorizations have been granted. See more details about the new framework in our newsletter, and see the article published on the bankability of rail projects after the new framework in the Agência Infra.

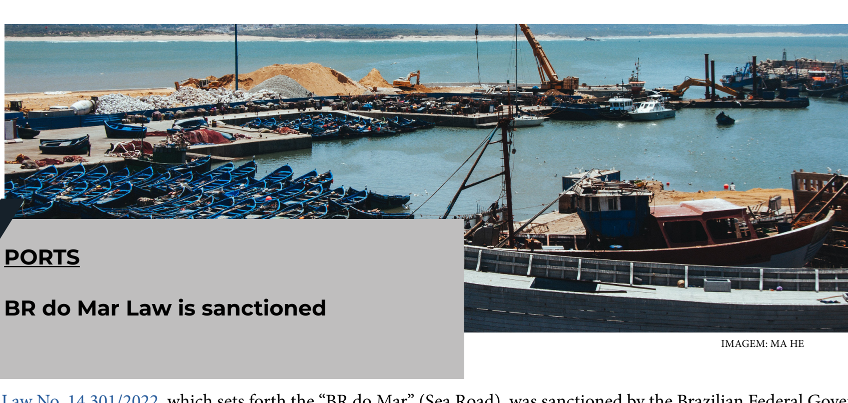


IMAGEM: MA HE

PORTS

BR do Mar Law is sanctioned

Law No. 14,301/2022, which sets forth the "BR do Mar" (Sea Road), was sanctioned by the Brazilian Federal Government and published in the Official Gazette on January 10, 2022. The program encourages cabotage, the navigation between the country's ports, and aims to rebalance the Brazilian transport matrix, as well as to reduce costs.

Auction of the first privatization of a Brazilian port authority is scheduled

The auction for the privatization of Companhia Docas do Espírito Santo (CODESA), which manages the ports of Vitória and Barra do Riacho, is scheduled for March 25, 2022. The privatization includes the transfer of control of Companhia Docas do Espírito Santo (CODESA) and the concession of the ports of Vitória and Barra do Riacho.

Invitation to Bid, Concession Agreement, and Share Purchase Agreement can be found here.

Terminals in the Ports of Paranaguá, São Francisco do Sul, and Rio Grande are qualified in PPI

On January 25, 2022, Decree No. 10,944 was published, qualifying three terminals of mineral and vegetable bulk in the South region of Brazil in the Investment Partnership Program of the Presidency of the Republic (PPI): the Port of Paranaguá, the Organized Port of São Francisco do Sul, and the Organized Port of Rio Grande.

Public Consultation Opened for the Privatization of the Port of Santos

The Brazilian National Agency for Waterway Transportation (ANTAQ) opened, on January 31, 2022, a public consultation to collect contributions in the documents relating to the tender of the Port of Santos. The tender will involve the transfer of control of the Santos Port Authority and the concession of the Port of Santos. Contributions can be sent until March 16, 2022, here.

IMAGEM: VOO QQQ

AIRPORTS

Fernando de Noronha Airport concession is approved

On January 17, 2022, the concession for the Governador Carlos Wilson Airport, located in the State District of Fernando de Noronha/PE was approved. The approval is conditioned to the adequacy of the bid to the "Management Plan of the Fernando de Noronha Environmental Protection Area".

The concession project was developed under Pernambuco's Strategic Partnerships Program (PPE). Further information here.

Conditions for the re-bid of São Gonçalo do Amarante are published

The Council of the Investment Partnership Program published, on January 17, 2022, a resolution approving the minimum conditions for the re-bid of São Gonçalo do Amarante Airport.

The re-bid will be through a concession, with a 30-year term, and the winning bid will be the highest concession payment. The project is currently being analyzed by the Federal Audit Court (TCU).

Ministry of Infrastructure creates Working Group to study the concession model for Santos Dumont Airport

The creation of the temporary Working Group was determined on January 18, 2022 due to concerns regarding damage caused by the concession of Santos Dumont Airport to the traffic at Galeão Airport. The working group is comprised of members of the Ministry of Infrastructure and the State Government of Rio de Janeiro.

IMAGEM: ZBYNEK BURIVAL

OIL & GAS

The permanent offer model for bidding on oil and gas fields is approved

On December 23, 2021, the Resolution CNPE No. 27/2021 was published, authorizing the application of the permanent offer model for bidding of exploratory blocks for oil, natural gas, and other fluid hydrocarbons, for both onshore and offshore basins, except for reserves in the pre-salt area or other strategic areas.

The new resolution extends the permanent offer modality, by which the Brazilian National Agency of Oil, Gas and Biofuels (ANP) offers exploration fields on an uninterrupted basis and grants them according to investor demand. This structure will also be adopted for the bidding of fields that have been returned or are in the process of being returned.

The deadline for contributions to the public consultation on third-party access to waterway terminals has been extended

The Brazilian National Agency of Oil, Gas and Biofuels (ANP) has extended, until February 11, 2022, the deadline for contributions to Public Consultation 27/2021, about the rule that establishes criteria for the use by third parties of waterway terminals for handling oil, oil products, natural gas products, and biofuels.

Contributions can be made here.

IMAGEM: MÉLISSA JEANTY

WATER & SEWAGE

ANA opens public consultation on quality and efficiency indicators

The Brazilian National Water Agency (ANA) has opened Public Consultation 1/22 to receive contributions to the proposed reference standard on indicators and standards of quality, efficiency and effectiveness for evaluating the provision, maintenance and operation of water supply and sanitation systems.

The Agency will receive contributions until February 17, 2022, at this link.

ANA invites contributions on the tariff regulation model

The Agency has opened the Call for Subsidies 1/22 to collect contributions for the drafting of a reference standard for the tariff regulation model for the water and sewage sectors, for existing and new contracts.

The Agency will receive contributions until February 11, 2022, at this link.

The deadline for submitting evidence of economic-financial capacity has expired

Decree No. 10,710/2021, which regulates the process of evidencing the economic and financial capacity of the sanitation companies, provided that the companies should send evidence of economic and financial capacity to meet the goals of the sector's new legal framework until December 31, 2021. The regulator will now analyze the documents provided by March 31, 2022.

Bids for Blocks B and C in the state of Alagoas are approved

The Government of Alagoas approved on January 7, 2022 the results of the public service concession bids for water supply and sanitary sewage in Block B (Agreste and Sertão) and Block C (Zona da Mata and Litoral Norte) of the State. The projects were awarded in favor of Consórcio Alagoas, formed by Allonda and Conasa (Block B) and of Consórcio Mundaú, formed by Cymi and Aviva Ambiental (Block C).

IMAGEM: RYOJI IWATA

SOCIAL INFRASTRUCTURE

Recife hires BNDES to model PPP in the educational area

The Municipality of Recife signed on January 25, 2022 a contract with Brazilian Development Bank (BNDES) for structuring and modeling a Public-Private Partnership (PPP) for the implementation and operation of 44 new educational units. It is expected that at least 5,000 new students will be received in day-care centers in the city. The concessionaire will receive monthly payments from the Municipalities, to be determined in the studies, and will be responsible for making the infrastructure available. The Municipality will be responsible for structuring and coordinating the educational project, as well as for hiring teaching staff.

Company selected for the studies of PPP of school units in Divinópolis

In January 2022, Divinópolis City Hall, together with the Public-Private Partnership Management Board (CGPPP), has announced that the company BTC Consultoria e Concessões Eirelli was qualified in PMI (Expression of Interest Procedure) No. 01/2021 to develop studies for modeling the construction and operation of public school units, including the provision of non-educational support services through PPP.

The initial project, to be presented in 30 days, will be evaluated by the PMI Special Evaluation Commission and, if approved, the company will have a new period of 90 days to present additional studies related to the PPP modeling.

IMAGEM: JOSH HILD

PUBLIC LIGHTING

Invitation to bid for administrative concession of the Public Lighting services of Jaboatão dos Guararapes (PE) is published

The public notice for the PPP, structured by the BNDES, was published on January 29, 2022. The concession involves the works services related to the modernization, expansion, operation, and maintenance of the infrastructure of the municipal public lighting network.

The concession term is of 22 years and the estimated value of the contract is R$ 280 million. The commercial proposals and bidding documents must be delivered to B3, in São Paulo, on March 11, 2022. The public session will take place on March 16, 2022 also at B3. The invitation to bid, the draft concession contract, and other documents can be found here.

Várzea Paulista opens public consultation for Public Lighting PPP

The project involves the administrative concession for the management, optimization, expansion, modernization and maintenance of the municipal public lighting system. Contributions can be sent until March 02, 2022. The drafts invitation to bid, concession contract, and other documents are available here.

IMAGEM CHRISTIAN DUBOVAN

FINANCING

Legal Framework of the Foreign Exchange Market allows contracts in foreign currency

Law No. 14,286/21, published on December 30, 2021, includes in the list of possibilities for payment in foreign currency, "contracts entered into by exporters in which the counterparty is a concessionaire, permissionaire, licensee or lessee in the infrastructure sectors."

Upon the entry into force (within one year of its publication), exporters will be able to enter into contracts with infrastructure companies with payment linked to foreign currency, thus matching their revenues with their costs.

The infrastructure company, in turn, will be able to use the revenues from these dollarized contracts as collateral to obtain financing in dollars, expanding its funding possibilities. Check out more details in our newsletter and see article authored by our members on the subject, published by Estadão newspaper.

IMAGEM: ÁLVARO SERRANO

ENERGY

Brazilian Federal Government publishes rules for development of offshore wind energy projects

On January 25, 2022, the Federal Government published Decree No. 10,946/2022, which provides the initial guidelines for the development of offshore wind projects in Brazil. The rule deals with one of the main challenges related to ventures of this nature – the assignment of the use of physical spaces and the use of natural resources for this type of electricity source.

The Ministry of Mines and Energy (MME) may hold specific auctions for contracting offshore power if sector planning requires. The MME will issue complementary rules within 180 days from the date they come into effect on June 15, 2022.

75.25 GW in projects were registered for the 2022 A-4 Generation Auction

A total of 1,894 generation projects, totaling 75.25 GW, were registered for the 2022 A-4 Auction, scheduled to take place on May 27. With 1,263 projects, accounting for 51,824 MW, the solar photovoltaic source represents more than half of all the energy registered for the auction, followed by wind, with 542 projects and 21,432 MW registered.

The A-4 Auction of 2022 will be the first in which wind and solar projects will compete in the same category, which, according to the Energy Research Company (EPE), will bring more competitiveness and benefit consumers.

Federal Government publishes legal framework for distributed generation

On January 7, 2022, the Law No. 14,300 was sanctioned, establishing the Legal Framework for Distributed Generation (DG) in Brazil.

Law No. 14,300 addresses the gradual remuneration for the use of the grid, subject to transition rules, establishing new forms of operation of shared generation. It also sets forth the requirement to submit a bond in certain cases and provides for the need for valuation of costs and benefits of DG, both by the National Energy Policy Council (CNPE) and the National Agency for Electrical Energy (ANEEL). ANEEL is still expected to publish regulations on some aspects provided for in Law No. 14,300/2022.

A legislative change makes it possible to enter into PPAs in foreign currency

As detailed in the item "Financing" of this newsletter, the Brazilian Federal Government published the Legal Framework for the Foreign Exchange Market.

Specifically with respect to the electric power sector, the new law makes it possible to enter into Power Purchase Agreements (PPAs) in foreign currency, when the offtaker is an exporter, a structure much discussed in the energy market in recent years. When the law comes into force, in December 2022, Power producers will, in turn be able to access foreign currency financing, using their revenues - also in foreign currency – as a "natural hedge".

For more energy news, see our newsletter Papo de Energia.

Tozzini Freire.
ADVOGADOS

Newsletter content produced by TozziniFreire's Infrastructure & Energy team

Partners responsible for the content:

- Ana Carolina Calil
- José Augusto Dias de Castro
- Jun Makuta
- Karin Yamauti Hatanaka
- Leonardo Miranda
- Marcelo Zenkner

www.tozzinifreire.com.br

Canada Introduces "Excessive Interest and Financing Expenses Limitation"

Written by Jared Mackey, Anu Nijhawan and Denise Bright

Multinational corporations, cross-border investments and many other Canadian public and private enterprises, will likely soon face a new and complex interest expense deduction limitation in Canada.

On February 4, 2021, the Canadian federal government released draft legislation to implement a variety of proposed tax measures including the new "Excessive Interest and Financing Expenses Limitation" (EIFE Limit) first announced in the April 2021 Federal Budget. The thrust of proposed EIFE Limit, which is contained primarily in proposed sections 18.2 and 18.21 of the *Income Tax Act* (Canada), is to limit a taxpayer's Canadian interest and financing expense deductions to an amount commensurate with the taxable income generated by its Canadian economic activity, based on tax-adjusted earnings before interest, taxes, depreciation and amortization (EBITDA). The EIFE Limit is aligned with the recommendations of the OECD relating to base erosion and profit shifting.

In most cases, the EIFE Limit will, if enacted, apply to tax years beginning on or after January 1, 2023. As such, affected taxpayers should take steps now to evaluate how they may be impacted by the EIFE Limit.

Application of the General EIFE Limit

The EIFE Limit is not conditioned on any avoidance or nefarious purpose; it applies mechanically. At its core, the EIFE Limit adopts an "earnings stripping" approach, restricting a taxpayer's (or a group's) deductions for net interest and financing expenses to no more than a fixed ratio of their "adjusted taxable income" generated by activities in Canada. "Adjusted taxable income" is generally EBITDA, but is determined based on tax, rather than accounting, concepts. The fixed ratio will generally be 40 percent for taxation years beginning in the 2023 calendar year and 30 percent thereafter, subject to an anti-avoidance rule for taxpayers attempting to manipulate their taxation years.

Notably, a taxpayer's "adjusted taxable income" is reduced by deductions received for inter-corporate dividends and by most non-capital and net capital losses deducted by the taxpayer. As pointed out in the Department of Finance explanatory notes, the result is that the EIFE Limit can limit the deductibility of interest expense incurred by a taxpayer to invest in dividend-paying shares.

The EIFE Limit will apply to "interest and financing expenses" which, in addition to ordinary course interest and various financing expenses, also includes interest and financing expenses that are ordinarily capitalized and deducted as capital cost allowance or as amounts in respect of resource pools and certain economically equivalent amounts, such as interest embedded in lease payments.

The EIFE Limit will also apply after the application of existing limitations on interest deductibility (*e.g.,* the thin capitalization rules and the transfer pricing rules). As a result, if another rule denies an interest deduction, that interest is excluded when applying the EIFE Limit.

General Relief for "Excluded Entities"

The EIFE Limit is intended to apply to large multinational enterprises and cross-border investments, including non-residents of Canada, where there is an increased potential for tax base erosion and profit shifting. The rules also apply indirectly to partnerships. The proposed rules provide a carve-out for:

i. Canadian-controlled private corporations that, together with associated corporations, have taxable capital employed in Canada of less than $15 million;
ii. groups of corporations and trusts whose Canadian members have aggregate net interest and financing expense of $250,000 or less; and
iii. certain Canadian-resident corporations and trusts (and groups consisting exclusively of Canadian resident corporations and trusts) that carry on substantially all of their business in Canada, have no foreign affiliates, do not have any 25%+ non-resident shareholders or beneficiaries and do not pay significant interest to certain "tax-indifferent investors."

As a result, most Canadian-owned small and mid-sized businesses that operate exclusively in Canada should be exempt. Taxpayers are encouraged to review their entitlement to relief under these provisions based on their specific circumstances.

Excluded Interest

To ensure that the EIFE Limit does not negatively impact commonly undertaken loss utilization transactions between members of an affiliated group, two related taxable Canadian corporations can jointly elect to exclude one or more intercompany interest payments from the EIFE Limit.

"Excess Capacity" Carryforwards

Unless it is subject to the group ratio rule discussed below, a taxpayer will have "excess capacity" in a particular year when its deduction capacity for the year, based on its adjusted taxable income, exceeds its interest and financing expenses. Subject to the taxpayer being subject to an acquisition of control, excess capacity can be carried forward for three years and will automatically be applied to reduce the amount of interest and financing expenses whose deductibility would otherwise be denied.

Transfers of "Cumulative Unused Excess Capacity"

If a taxpayer itself does not have sufficient excess capacity carryforwards, it can rely on transfers of "cumulative unused excess capacity" from one or more of its Canadian group members to reduce the amount of interest and financing expenses whose deductibility would otherwise be denied. Transfers of cumulative unused excess capacity requires a joint election by the transferor and transferee and can only occur between related or affiliated taxable Canadian corporations.

Carryforward of "Restricted Interest and Financing Expenses"

If a taxpayer is denied an interest or financing expense deduction under the EIFE Limit, the denied amount is added to the taxpayer's "restricted interest and financing expenses" and can be carried forward for 20 years. The taxpayer can deduct its "restricted interest and financing expenses" in a future year if it has excess capacity in the year or if has received a transfer of "cumulative unused excess capacity" from another group member. A taxpayer's "restricted interest and financing expenses" generally remain deductible following an acquisition of control provided that the taxpayer continues to carry on the same business.

Group Ratio Rule

The Canadian members of a multinational consolidated group may be eligible to jointly elect into the "group ratio" rule for a taxation year, potentially allowing them to deduct net interest and financing expenses in excess of the those permitted under the general rule. The benefits of the group ratio rule will typically only be available if the ratio of a group's aggregate arm's length interest expense to its total accounting EBITDA exceeds the fixed ratio, and the group is able to demonstrate this based on audited consolidated financial statements. Under the group ratio rule, the group determines the maximum amount of interest and financing expenses that the consolidated group members are collectively permitted to deduct, and then allocates the amount among the Canadian group members, thus allowing deduction capacity to be allocated to the taxpayers who need it the most.

The group ratio rule allows entities in groups that are highly-leveraged with external debt for genuine commercial reasons to deduct net interest and financing expenses in excess of the fixed ratio. The requirement for audited financial statements will likely significantly limit the number of groups who may benefit from the rule.

2022 Planning

The EIFE Limit, if enacted, represents a fundamental change to the existing interest deductibility regime for Canadian businesses. The new rules have the potential to impact a large number of Canadian public and private entities and even if their debt is arm's length. Taxpayers should consider whether they could be negatively impacted by the EIFE Limit, and whether any planning opportunities are available to reduce such negative impact. Businesses and investors with existing Canadian ventures and those who are planning new ventures should critically analyze whether the interest deductions that they have modeled as being available could be denied if the EIFE Limit takes effect next year. The new rules could result in projects becoming cash taxable earlier than anticipated. In addition, financial ratios calculated using taxes paid rather than accrued taxes may also be impacted.

The rules implementing the EIFE Limit are among the most complex in the Act, spanning 27 pages of draft legislation, and including various anti-avoidance provisions. The rules are subject to revision as the government has invited taxpayers to provide comments on the draft proposals with a submission deadline of May 5, 2022.

Members of the Bennett Jones Tax and Financial Services groups are available to discuss future implications of the EIFE Limit on your Canadian business or investment or to assist you with crafting a submission to the Canadian government.

Authors

Jared A. Mackey
403.298.4471
mackeyj@bennettjones.com

Anu Nijhawan
403.298.3389
nijhawana@bennettjones.com

Denise D. Bright
403.298.4468
brightd@bennettjones.com

Posted on: January 27, 2022

COMMERCIAL LEASING TIPS TO KNOW WHEN REGISTERED & BENEFICIAL OWNERSHIP ARE SEPARATE

By: Tamara Huculak & Justin Leung (articled student)

For many commercial properties, it has become common for a property to have both a registered owner and a beneficial owner. Therefore, it has become increasingly important for registered and beneficial owners to be aware of certain pitfalls they can avoid in the commercial leasing context.

1) Expressly State the Identity and Status of the Beneficial and Registered Owners on the Lease

Directly informing the tenant of the fact that there is a beneficial owner and identifying the beneficial owner can be extremely important in preventing the tenant from voiding a lease and in ensuring that the beneficial owner still has remedies against the tenant for breaching the terms of the lease. In *Laidar Holdings Ltd. v Lindt & Sprungli (Canada) Inc.* [2018] BCSC 66, the tenant tried to walk away from the lease and took the position that it was entitled to void the lease. The landlord did not accept the termination of the lease and sued the tenant. The tenant argued that the lease was void or voidable because the lease identified Laidar Holdings Ltd. as the registered owner of the property and bare trustee for Shery Wittenberg when, in fact, Laidar Holdings Ltd. was the beneficial owner of the property and Shery Wittenberg was the registered owner and bare trustee of the property for Laidar Holdings Ltd. Fortunately for the landlord in this case, the tenants had knowledge that Shery Wittenberg was the registered owner. At paragraph 232 the court stated,

In my view, the fact that Dr. Wittenberg was the person Lindt viewed as the decision-maker is not an answer to this issue. However, in my view there was no uncertainty about the Landlord. Lindt signed the Lease with Laidar as Landlord. [The tenant's]' attention was directed to the issue of the identity of the Landlord. She was aware that Ms. Wittenberg was the registered owner. She advised Lindt that the Lease was acceptable to her and waived the tenant-solicitor's condition.

Due to the fact that the tenant was advised of the landlord situation when they had agreed to the lease, they could not seek to use this mistake to render the lease void. At paragraph 248 the court ruled that,

The parties were clearly in agreement concerning the physical space that was to be rented. By the time the solicitor's condition was waived and the Lease signed, the parties were in agreement that Laidar was to be the Landlord. This is evidenced by what the parties said and wrote to one another in coming to their *agreement. Both parties were aware that Shery Wittenberg, not Laidar, was the registered owner.*

In the example above, the landlord was fortunate that the tenant had actual knowledge of the identity of the registered and beneficial landlords. However, to avoid voiding a lease, it is prudent to expressly set out in the lease the identity of both the registered and beneficial owners. In the following example, the landlords were not as fortunate. In *Price Security Holdings Inc. v Klompas & Rothwell* [2019] BCCA 36, the beneficial landlord, was not permitted to collect on arrears from the tenant because there was nothing in the lease to show such an intention. The court stated,

… I do not agree with Price Security that it can be found that the Landlord and Tenant intended to extend the Landlord's benefit under the Lease (and the overholding tenancy) to beneficiaries of trusts of which the Landlord may be or become the trustee. There is nothing in the Lease to evince such an intention, and there was no extrinsic evidence that such an intention existed at the time the Lease was entered into. The mere possibility that the Landlord held, or may in the future hold, the Property in trust for another person is not sufficient, in my view, to establish and intention on the party of the contracting parties to extend the benefits of the Lease to the beneficiary of the trust.

While the key point in this case was that there was no evidence the Tenant and Landlord shared an intention that a "potential" beneficial owner would receive the benefits of the Landlord under the Lease, the court also considered other factors. Among the factors considered, was that this situation only arose because Price Security deliberately structured their position as beneficial landlord to take advantage of certain tax benefits. As a result, the court decided that the beneficial landlord could not "have his cake and eat it too". The court held that,

It may be that the relaxation of the doctrine of privity will not prejudice the Tenant. However, it must be borne in mind that Price Security made the decision to have the Property held in trust for it by the Landlord. It admits that it did so to achieve tax savings. If it wishes to take advantage of a trust structure, it should be prepared to accept the limitation of such a structure, particularly when it was open to it to ameliorate those limitations.

Therefore to avoid this result, it would be good practice to ensure that the beneficial and registered landlords are both expressly inserted into the lease and that there is supporting evidence that the tenant had knowledge of the identity of both the registered and beneficial landlords and their status on the lease.

2) Wording Insurance and Indemnification Clauses

In *The Commercial Lease: A Practical Guide* (5th Edition) Harvey Haber suggests:

The Landlord should ensure that the Lease, in the context of insurance and indemnification, has the following wording, "for greater certainty, solely for the purpose of enforcing the Tenant's indemnification of the Owner in this Section, the parties agree that the Landlord shall be the agent or trustee of the Owner". This is because otherwise the Owner is not a party to this Lease, and in order to include the Owner as part of the indemnification clause from the Tenant, the Landlord is designated as the agent or trustee of the Owner.

…. The Landlord should also ensure that the proceeds of the insurance should be payable jointly to the Landlord, the Owner and the Tenant and expressly state this on the Lease.

Again, it is important to insert the beneficial owner into the lease, particularly the insurance and indemnification clauses if the beneficial owner hopes to have access to any insurance proceeds that would be payable to the registered owner and the tenant.

3) Wording Covenants for Quiet Enjoyment

There are a number of effects on both the landlord and the tenant when a party is relying on either a covenant for quiet enjoyment that is implied by the common law or an express covenant for the same. Landlords should be cautioned against inserting an absolute covenant for quiet enjoyment into the lease as it is a commitment against interruption by those who have a superior title to that of the landlord (i.e. the beneficial owner), meaning that if the beneficial owner takes any action that disturbs the "quiet enjoyment" of the tenant, the beneficial owner and the registered owner will be in breach of the covenant for quiet enjoyment. This covenant is more burdensome than the covenant implied by common law, which is a qualified covenant from the landlord assuring against interruption by either the landlord or by those claiming under it. This means that only the registered owner must abide by the covenant for quiet enjoyment, and even if the beneficial owner takes any actions that are contrary to the covenant, the covenant has not been breached. Thus, it is important when drafting such clauses to consider whether it is intended to bind both the registered and beneficial owner. These clauses should be carefully worded to ensure that both the landlords, whether registered or beneficial, and the tenant are satisfied by the terms.

Should you have any questions about this article, contact Leasing Lawyer, Tammy Huculak at thuculak@rbs.ca.

/Carey

News Alerts

SERNAC sets new guidelines about processing of consumers' personal data

February 9, 2022

Law No. 21,398 on measures to promote the protection of consumers' rights, incorporates Article 15 bis to Law No. 19,496 on Consumer Protection (hereinafter, the "CPL"), which expressly extends the mandate and functions conferred to SERNAC in Article 58 of the CPL to the processing of consumers' personal data that takes place within the framework of a consumer relationship.

In this regard, SERNAC has established guidelines and requirements for providers with respect to the processing of consumers' personal data in the following Interpretative Instructions:

- Interpretative Instruction on equity criteria in the provisions contained in consumer pre-formulated standard contracts (Exempt Resolution No. 931 of December 3, 2021).
- Interpretative Instruction on consumer protection regarding the use of artificial intelligence systems in consumer relationships (Exempt Resolution No. 33 of January 18, 2022).

A description of the main contents of each Interpretative Instruction is provided below:

Interpretative Instruction on equity criteria in the provisions contained in consumer pre-formulated standard contracts (Exempt Resolution No. 931 of December 3, 2021)

This Interpretative Instruction states that clauses that authorize providers to collect and process consumers' personal data, which are usually found in Privacy Policies and Terms and Conditions, should be examined in accordance with consumer protection regulations regarding the equity of contractual provisions.

When assessing whether these clauses are abusive or not, it is important to consider a harmonious interaction between the provisions of the CPL and the provisions of Law No. 19,628 on data protection (hereinafter, the "DPL"). In particular, the following provisions must be considered:

- Article 16 letter G of the CPL: establishes the mechanism to examine the equity of the terms and conditions under which consumers give their authorization to the processing of their personal data. Such clauses must aim not to infringe the principle of contractual good faith, not to cause damages or losses to the consumer, nor create a significant inequality between the parties' rights and obligations.

- Article 9 of the DPL: states the “Purpose Principle” for the processing of personal data, which implies that personal data may only be processed for the purposes for which they were collected and informed at the time of obtaining the data subject’s consent.

In this sense, SERNAC understands that providers must limit the processing of consumers´ personal data to the purposes for which they were initially collected and informed (Article 9 DPL) and that such purposes must satisfy the reasons that motivated the consumer to contract with the provider (Article 16 letter G CPL).

In addition, SERNAC points out that the following clauses will be considered abusive:

- Clauses in which the consumer generically authorizes the provider to process his/her personal data, without being previously informed of the purposes for which the provider will process it, nor identifying the third parties to whom the data could be transferred or the purpose for which these third parties could process such data.

- Clauses in which the consumer irrevocably authorizes the provider to process his/her personal data.

- Clauses in which the consumer relieves the provider of any liability that may arise from to the processing of his/her personal data.

- Clauses in which the consumer releases the provider from complying with the security obligations and responsibilities related to the processing of his/her personal data.

SERNAC specifies that a further Interpretative Instruction will address the equity of stipulations on the collection and processing of consumers' personal data.

Interpretative Instruction on consumer protection regarding the use of artificial intelligence systems in consumer relationships (Exempt Resolution No. 33 of January 18, 2022)

This Interpretative Instruction establishes guidelines and requirements addressed to providers that process consumers' personal data, especially regarding those processes carried out through Artificial Intelligence systems.

1.- Personal Data:

Article 2 letter F of the DPL defines personal data as any *"data relating to any information concerning identified or identifiable individuals”.*

In this sense, SERNAC considers that personal data may be numerical, alphabetical, graphic, photographic, acoustic or any other type of data referring to a person whose identity may be determined by direct or indirect means of identification.

In addition, SERNAC provide that data related to behaviors, preferences or personal habits collected through Artificial Intelligence systems will be considered Sensitive Data. Considering the nature of this data and the risks involved in these activities, SERNAC indicates that providers must comply with a special duty of protection, which implies the implementation of appropriate technical and organizational security measures to ensure the confidentiality, integrity and availability of such data.

2.- Data subject’s consent:

Under the provisions of the DPL, the only legal basis for the processing of personal data are: (i) the law; and (ii) the data subject's consent.

In this regard, SERNAC states that the provider must assure the obtention (and verification) of a valid consent (specific, express, and informed regarding the purpose of the data processing and its possible communication to third parties) and provide sufficient means for the consumer to exercise the right to revoke his/her authorization (at least by providing the same means by which the consumer gave his/her consent).

3.- Personal data processing:

Article 2 letter O of the DPL defines the processing of personal data as *"any operation or combination of operations or technical procedures, whether automated or not, enabling the collection, storage, recording, organization, processing, selection, extraction, comparison, interconnection, dissociation, communication, assignment, transfer, transmission or cancellation of personal data, or their use in any other manner".*

In this sense, SERNAC includes within the personal data processing operations the use of automated databases (Artificial Intelligence system) aimed to make predictions, recommendations, or decisions within the framework of a consumer relationship.

In addition, SERNAC states that the processing of personal data by Artificial Intelligence system providers must be carried out in accordance with the standards and principles of lawfulness, purpose, proportionality, confidentiality, security and accountability of the DPL.

Last, SERNAC establishes that the provider must take care of personal data with due diligence, assuming responsibility for any damage caused (Article 11 DPL).

4.- Data controller:

Article 2 letter N of the DPL defines data controller *as "the individual or private legal entity, or the respective public agency, responsible for decisions related to processing personal data".*

SERNAC considers that the provider must be qualified as a data controller, and, in this sense must, comply with the following duties and obligations set forth in the DPL:

- Quality or accuracy of personal data: personal data must be accurate, up to date, complete and consistent.

- Deletion, cancellation and modification of personal data: personal data must be deleted or cancelled when its storage lacks legal basis or when said data has expired; and likewise, erroneous, inaccurate, misleading or incomplete data must be modified.

- Purpose of the processing: providers may only use personal data for the purposes for which they were initially collected (and informed at the time of obtaining consent). If the processing is authorized through clauses contained in consumer pre-formulated standard contracts, the purposes must satisfy the reasons that motivated the consumer to contract with the provider.

- Exercise of ARCO rights: the provider shall guarantee consumers the possibility of exercising their rights of access (or information), rectification, cancellation (or elimination) and opposition, without any limitation.

3. The 2021 Revised Negative List for Foreign Investment

Authors: Han Kun Law Offices Bing XUE | Dana WU | Zhenyu WANG | Hui CHEN
Han Kun's Hong Kong Associated Law Firm Charles WU

On December 27, 2021, the National Development and Reform Commission ("**NDRC**") and the Ministry of Commerce ("**MOFCOM**") issued two revised versions of negative lists (collectively the "**2021 Foreign Investment Negative Lists**"), which came into effect on January 1, 2022:

- Special Administrative Measures (Negative List) for Foreign Investment Access (2021 Edition) (the "**2021 National Negative List**").
- Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2021 Edition) (the "**2021 FTZ Negative List**").

The Foreign Investment Law of the PRC, which came into effect on January 1, 2020, legally prescribed the PRC's use of a "pre-establishment national treatment plus negative list" management mechanism with respect to foreign investment in the PRC. The current revisions of the negative lists for foreign investment access ("**Negative Lists**") prominently highlight how emphasis is being placed on the **precision of these Negative Lists**. This echoes the recent filing-based regulatory reform in respect of the overseas listings of domestic enterprises proposed by the China Securities Regulatory Commission ("**CSRC**").

We have summarized key themes of the 2021 Foreign Investment Negative Lists, focusing on the new precision-focused regulatory model.

Reduction-focused revisions based on the existing principle of high-level opening up

The latest revised 2021 Foreign Investment Negative Lists contain **no additional entries with respect to all industries and sectors** compared with their 2020 counterparts. Instead, the number of entries in the Negative Lists have reduced, specifically from 33 to 31 with respect to the 2021 National Negative List, and from 30 to 27 with respect to the 2021 FTZ Negative List. As the two Negative Lists have been reduced, their main revisions are as follows:

- **Removal of restrictions on automotive manufacturing**. Both new Negative Lists have removed the requirement that "PRC capital must be no less than 50% for manufacturers of passenger vehicles" and the requirement that "a single foreign investor may establish up to two joint ventures ("**JVs**") in the PRC to manufacture the same type of vehicles". For the first time, the automotive manufacturing industry is made fully accessible to foreign investment.
- **Removal of restrictions on television and broadcasting equipment manufacturing**. Both new Negative Lists have removed the entry "investment in the manufacturing of ground receiving facilities and key parts for satellite television broadcasting", opening up the manufacture of ground receiving facilities and key components for satellite television broadcasting to foreign investment.

- **Zero manufacturing entries for pilot free trade zones ("FTZs")**. This revision results in zero manufacturing entries for FTZs, demonstrating that the PRC is willing to give further access to and promote its manufacturing industry.

- **Relaxed foreign investment restrictions with respect "market surveys" and "social surveys" for FTZs**. In addition to the 2021 National Negative List, the 2021 FTZ Negative List has eased foreign investment restrictions on "market surveys", no longer requiring "market surveys to be limited to JVs". Similarly, the restriction on foreign investment for "social surveys" has also eased. The previously prohibited provision banning foreign investment in the sector has changed to a restrictive one, requiring that "PRC capital must be no less than 67% and the legal representative must have Chinese nationality."

Once the 2021 Foreign Investment Negative Lists comes into effect, **the pre-establishment national treatment plus negative list** regulatory system will universally apply to all foreign investors looking to invest in the PRC. In addition to these Negative Lists, foreign investors must also comply with the Negative List for Market Access:

#	Name of negative list	Effective date	Applicable scope
1.	The Negative List for Market Access (2020 Version)	December 10, 2020	Universally applicable to all (**domestic and foreign**) investors in the PRC.
2.	The 2021 National Negative List	January 1, 2022	Applicable to foreign investors in the PRC.
3.	The 2021 FTZ Negative List	January 1, 2022	Applicable to foreign investors in FTZs and takes precedence over the 2021 National Negative List within FTZs.

Analysis of the precision-focused regulatory model

Section VI of the Notes attached to the 2021 Foreign Investment Negative Lists contains a new provision that improves the precision and inclusiveness of the Negative List-based regulatory system:

Any domestic enterprise engaging in businesses prohibited by the Negative Lists that lists, issues securities and trades shares overseas must ***obtain pre-approval consent from relevant competent regulator; overseas investors must not engage in the operation and management of the enterprise, and the percentage of foreign shareholding is subject to the relevant provisions in the administrative measures for domestic securities investments by foreign investors.***

The new provision discussed above, together with the *Administrative Provisions of the State Council Regarding the Overseas Issuance and Listing of Securities by Domestic Enterprise (Draft for Comments)* (the "**Administrative Provisions**") and the *Measures for the Overseas Issuance of Securities and Listing Record-Filings by Domestic Enterprises (Draft for Comments)* (the "**Filing Measures**"), both recently promulgated on December 24, 2021, will have a far-reaching effect on the regulatory system and market with respect to cross-border investments and overseas listings by PRC companies.

I Regulatory difficulties in choosing a listing structure for the overseas listing of PRC companies

Since the inception of Negative Lists used to regulate foreign investment, there remain numerous PRC companies operating in businesses restricted or prohibited from foreign investment that engage in various forms of "foreign" private investments or cross-border capital market activities. The "foreign" element of these activities causes these PRC companies to inevitably face risks associated with regulation and compliance, resulting in uncertain exit strategies for institutional investors. Against this backdrop, the market has created various cross-border investment and financing structures, including the VIE structure, to satisfy the financing and exit needs of investors.

Bound by policies relating to foreign investment access, if PRC companies operating in businesses that are on the Negative Lists intend to list and raise capital to the public, there are two main ways of doing so under the current regulatory framework:

- Use the domestic entity to list on domestic exchanges (A-Shares); or
- Establish a cross-border red-chip structure (due to the restrictions on foreign investment, either through control agreements or a VIE structure) to indirectly list overseas using an offshore entity, or to list on an A-shares market by issuing CDRs using the red-chip entity.

The 2021 revision of the Negative Lists provide more avenues for the listing of PRC companies engaging in businesses that are prohibited by the Negative Lists.

II Three basic requirements for the overseas listing of PRC companies

The 2021 Foreign Investment Negative Lists reserve room for flexibility for the overseas listing of domestic enterprises engaging in businesses that are prohibited by the Negative Lists. Specifically, the lists confirm that there are three basic requirements that this type of PRC company must satisfy prior to listing overseas:

Requirement 1: Pre-approval consent from the competent regulator

The NDRC and MOFCOM clarified in a public Q&A that the requirement of "pre-approval consent from relevant regulator" refers to the pre-approval consent as to the non-application of the prohibitions set out in the Negative Lists for the overseas listing of PRC enterprises, not the consent and approval of the overseas listing (of a PRC enterprise) itself.

We understanding that "***relevant regulator***" primarily refers to the competent authorities regulating the industry/sector in which the PRC enterprise operates. PRC companies should also consider communicating with the CSRC while obtaining pre-approval consent from the relevant regulator.

Requirement 2: Passive investment – foreign investors prohibited from participating in the management of the company

This requirement lays out the "passive" nature of foreign investments in prohibited industries set forth in the Negative Lists.

The 2021 Foreign Investment Negative Lists do not specify the criteria for determining "participation in the management of the company”, meaning the specific criteria for this requirement remain to be clarified, such as: (i) whether foreign investors have the right to nominate/appoint directors, supervisors, and senior management; (ii) whether foreign investors have the right to participate or vote in matters relating to the management of the enterprise.

This requirement will have a substantial impact on the governance of companies with VIE structures. How this requirement may be satisfied remains to be demonstrated through market practice once the Negative Lists have taken effect.

Requirement 3: Limitation on shareholding percentage – subject to the relevant provisions in the administrative measures for domestic securities investments by foreign investors

According to existing provisions in the administrative measures for domestic securities investments by foreign investors and a Q&A by the NDRC and the MOFCOM, the restrictions on foreign shareholding is as follows:

- The percentage of shares held by a single foreign investor and any related party must not exceed 10% of the company’s total shares.
- The percentage of shares held by all foreign investors and any related party must not, in the aggregate, exceed 30% of the company’s total shares.
- For enterprises listed in and outside of the PRC, the percentage of foreign shareholding must be calculated on a consolidated basis.

The shareholding restrictions discussed above provide a more open financing mechanism for PRC companies intending to list on either the domestic A-shares market or the overseas H-shares market. The market expects that overseas H-shares issuances and listings will be given more space for market development with the implementation of these parameters.

Although the 2021 Foreign Investment Negative Lists do not directly mention specific regulatory arrangements for domestic enterprises listing overseas using a red chip structure, it is reasonable to assume that the underlying principles of the “shareholding limitation” mechanism discussed above serve as a **potential reference** PRC companies listing overseas using a red-chip structure, that is, if (i) the PRC shareholding of the offshore parent entity in a red-chip structure is no less than 70%; (ii) the foreign shareholding is no more than 30%; (iii) the passive investment requirement is satisfied with respect to foreign investment; and (iv) the pre-approval consent from relevant regulator is obtained, PRC companies operating in industries prohibited by the Negative Lists may have the opportunity to satisfy the CRSC filing procedure to complete an indirect overseas listing after the foregoing conditions are met.

If the foregoing assumptions are officially acknowledged by the regulatory authorities, then the necessity of adopting VIE structures for PRC companies operating in businesses prohibited by the Negative Lists may be significantly reduced. The market demand for and design of transaction structures may also fundamentally change.

III No retroactive application of the law

The NDRC and MOFCOM confirmed in a public Q&A that in principle, the regulatory framework for new and existing companies will differ from one another. With respect to the few existing overseas listed PRC companies that have exceeded the foreign shareholding percentage limitation, they will not be required to reduce the number of shares already issued overseas or the number of A-shares already held by foreign investors.

IV Smooth transition of the overseas listing process

The CRSC will take the lead in regulating PRC companies listing overseas. After a PRC company engaging in businesses prohibited from foreign investment applies to the CSRC for an overseas listing, the CSRC will consult with the competent authorities of that industry/field when implementing relevant regulatory procedures.

Once the Administrative Provisions and the Filing Measures are officially effective, the precision-focused regulatory model established by the 2021 Foreign Investment Negative Lists will act as a more positive policy guidance for the overseas listing of PRC companies.

INCREASED RISK OF CRIMINAL LIABILITY FOR PARENT COMPANIES

The Criminal Division of France's Court of Cassation (Cour de Cassation) ruled, in its decision of 16 June 2021, that the criminal liability of a holding company could be engaged by the acts committed by a body that does not have a legal or statutory existence. It also considered that employees of a foreign subsidiary could be assimilated to de facto representatives of the parent company, and thus engage its criminal liability.

This decision illustrates the courts' willingness to seek the criminal liability of parent companies through a questionable interpretation of the provisions of Article 121-2 of the French Criminal Code, even though the alleged facts were committed by the executive teams or employees of one of their subsidiaries.

◆ ❖ ◆

In this decision (Crim. 16 June 2021, no. 20-83.098, published in the *Bulletin*), the Criminal Division of the Court of Cassation extends the scope of the criminal liability of parent companies, which may be incurred on the basis of Article 121-2 of the Criminal Code, under which the latter are criminally liable "*for offences committed on their behalf by their bodies or representatives*".

In this case, several employees of one of the subsidiaries of a group's holding company had paid commissions to Costa Rican public officials in order to help them obtain contracts for telephone equipment, using consulting contracts signed by another subsidiary of the group.

Convicted of active bribery of a foreign public official by the Paris Court of Appeal[1], the holding company argued that the employee of a subsidiary company could not be a representative of the parent company, within the meaning of Article 121-2 of the Criminal Code, in the absence of a delegation of powers to him or her.

The Criminal Division - and this is the major input of this decision - considers that the employees of a subsidiary of the parent company can be considered as representatives of the latter within the meaning of Article 121-2 of the Criminal Code and thus engage its criminal liability.

To reach this conclusion, the Court took into account the organisation of the group into business divisions, holding that "*as these acts were committed within the framework of a group of companies, of which the convicted company is the holding company, the active bribery of a foreign public official was committed on behalf of the parent company by the combined actions of three employees of the company's subsidiaries, who were the de facto representatives of the company due to the existence of the group's transversal organisation and the tasks entrusted to them, irrespective of the fact that there was neither a legal link nor a delegation of powers in their favour*".

1 CA Paris, Pôle 5 - Ch. 13, 15 May 2020, no.18/03310.

This decision is explained by the existence of strong hierarchical control by managers or employees of the French parent company over their counterparts in the foreign subsidiary, which the appeal decision described as a "*matrix organisation [...] involving hierarchical links within business groups and geographical areas*".

This reality - common in international groups - leads the Criminal Division to favour a functional approach over a purely legal one that would take into account the absence of any "*legal link*", and would therefore make it more difficult to characterise the representative role of the foreign subsidiary by its employee or manager.

While this solution can be explained by a particular factual context, it is nonetheless a highly questionable interpretation of Article 121-2 of the Criminal Code, which does not allow a legal entity to be held liable for acts committed by persons with whom it has no connection in the strict meaning of the term (no employment contract, no delegation of power or mandate, etc.) beyond the simple capital link - direct or otherwise - with their employer.

As regards defining which body can engage the liability of the legal person, the Criminal Division is in line with previous decisions that have already adopted a more flexible approach to the concept.

In particular, in 2018, the Court of Cassation had already held that the executive committee of a large French international group could constitute, despite its lack of legal or statutory existence, a "*body of the group*" within the meaning of Article 121-2 of the Criminal Code, whose actions made it possible for the legal person to incur liability[2].

In the case that resulted in the judgment of 16 June 2021, the Criminal Division similarly considered that the group's central Risk Assessment Committee that approved documents for the payment of commissions and the use of consultants abroad, was a body of the company that could incur its criminal liability.

The Court of Cassation takes into account the consequences of the intervention of the body at issue and the importance of its decisions concerning the consultants, rather than its status or the powers delegated to it by the legal representatives or statutory bodies of the company.

It appears, however, that the factual context of this specific case helps explaining the meaning of the decisions in appeal and *cassation*. The holding company whose liability was sought had in fact admitted the facts at issue (as well as several other acts of corruption committed in other countries)as part of transactional agreements with the US authorities, which led the Paris Court of Appeal to characterise a "*group policy*" leading to the "*multiplication of illicit payments, in different geographical areas*".

This decision illustrates the impact that the conclusion of an agreement negotiated abroad can have on the decisions of French courts due to lack of effective protection, given the restrictive application of the *non bis in idem* principle. This decision invites groups of companies to be particularly alert as to the consequences deriving from the implementation of their central control mechanisms.

2 Crim., 14 March 2018, no. 16-82.117.

The decision dated16 June 2021 is part of a more general trend towards easing the conditions under which the criminal liability of parent companies can be invoked. After having requested that the courts determine precisely the body or representative of the legal entity through which the latter's criminal liability can be held[3], if necessary by ordering additional information in this regard[4], the Criminal Divisionnow seems to take a more flexible approach of the concepts of parent company body or representative.

◆ ❖ ◆

Further reading: the decision of the Criminal Chamber is accessible here (in French).

CONTACTS

SOPHIE SCEMLA
sophie.scemla@gide.com

ARIANE FLEURIOT
ariane.fleuriot@gide.com

FRANÇOIS VOIRON
francois.voiron@gide.com

3 Crim., 6 September 2016, n. 14-85.205; Crim., 17 October 2017, no. 16-87.249.

4 Crim., 31 October 2017, no. 16-83.683.

Arias

GUATEMALA

REGULATION CHANGES TO INSOLVENCY AND BANKRUPTCY PROCEDURES: APPROVAL LIFTS EXISTING REGULATIONS TO INTERNATIONAL STANDARDS

Feb/2022

On February 8, 2021, the Congress of the Republic of Guatemala approved the Insolvencies Law. Such Law will imply material and important changes to the legal framework applicable to insolvency and bankruptcy procedures, which will be oriented to benefit the reorganization and continuation of business for debtors that are facing insolvency, so they may comply with their credit obligations without endangering the creditors' rights.

The next step for the Law on Insolvencies' entry into force, is to obtain the presidential approval and publication by the Executive Branch of government. At Arias Guatemala, we participated pro bono in the analysis of the bill by providing our observations and recommendations thereof, as we consider that it will create a balanced ecosystem between entrepreneurs and the continuation of business with its creditor, favoring business instead of its liquidation.

If you wish to have more details or information on the subject matter, please do not hesitate to contact us.

Jorge Luis Arenales, Partner
jorgeluis.arenales@ariaslaw.com

Cindy Arrivillaga, Associate
cindy.arrivillaga@ariaslaw.com

jorge Barrientos, Associate
jorge.barrientos@ariaslaw.com

Andrés Marroquín, Associate
andres.marroquin@ariaslaw.com

Hogan Lovells

Cyber risk management – the HKMA's Regtech Adoption Practice Guide

16 February 2022

On 26 January 2022, the Hong Kong Monetary Authority (HKMA) published its fifth edition of the Regtech Adoption Practice Guide (the Guide) focusing on cyber risk management regulatory technology (Regtech) solutions. The Guide provides authorised institutions (AIs) with information on the latest Regtech developments, practical guidance on implementation and provides example use cases to show how other institutions have addressed the challenges that arise in managing cyber risks.

Leveraging Regtech Solutions for Cyber Risk Management

The Guide identifies some of the key cyber risk challenges that AIs face, including difficulties in keeping up with the rapidly-changing nature of cyber risk, increased usage of and reliance on third-party services, and the lack of awareness of cyber risks, both amongst personnel and the general public.

The Guide highlights some of the benefits of adopting cyber risk management Regtech solutions in the face of these challenges. By following the Guide's recommendations, AIs should be in a better position to protect their operations by identifying cyberattack attempts at an early stage, developing vulnerability management solutions, and responding swiftly to cyber incidents.

In particular, AIs are advised to have in place a holistic cybersecurity programme and roadmap in light of the various Regtech solutions to support the planning and adoption of security solutions. Some of the practical considerations for AIs to bear in mind when preparing this roadmap include conducting a cost-and-benefit analysis, assessing the compatibility of Regtech solutions with the AI's existing security solutions, and developing training programmes for relevant personnel, as well as processes to facilitate and review the Regtech solutions on an ongoing basis.

Implementation Guidance

The Guide includes the HKMA's guidance on a number of specific considerations for AIs, including:

- Formulating a cross-functional implementation team by engaging individuals from different competencies to ensure adequate representation from all relevant stakeholders.
- Conducting business case analysis by evaluating the different solutions available.
- Conducting evaluation of prospective vendors before committing to a particular Regtech solution.

- Carrying out a proof of concept test to ensure the effectiveness of a Regtech solution and that it is conducive to the AI's business objectives.
- Other ongoing measures to facilitate the implementation of Regtech solutions; security operation processes should be updated on an ongoing basis.

Regtech Use Cases

The HKMA presents two use cases showing successful cyber risk management implementation in the Guide, which describe in detail the stages of implementation involved and the key lessons learned.

The Guide sets out the cyber risk management approach adopted by the AI in the use cases and outlines some of the key takeaways and methodologies. These include conducting on-going testing, configuring the Regtech solution, conducting proof of concept, defining use cases and end-goals, defining roles and responsibilities of team members, integrating the solution with existing functions, and upgrading to new capabilities.

Take-Aways for Legal and Compliance Teams and Next Steps

Regtech promises effective and efficient compliance solutions for AIs facing increasingly challenging compliance requirements.The Guide highlights how important Regtech can be in areas of critical operational risk, such as cyber security.

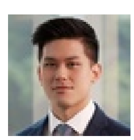
However, it is important to understand that Regtech solutions raise important legal and compliance issues, such as:

- Regtech solutions need to be assessed against the applicable regulatory requirements, taking into account applicable HKMA regulations, data protection laws, and other relevant considerations.
- In the context of cyber security incident response, Regtech solutions also need to be integrated with response plans and operating procedures.
- Agreements with Regtech vendors need to be carefully drafted and negotiated to reflect commercial considerations, AI risk management policies, and compliance with technology risk management and outsourcing requirements, where applicable.

Please see here for the link to the Regtech Adoption Practice Guide: Fifth Issue of Regtech Adoption Practice Guide Cyber Risk Management (hkma.gov.hk)

Contacts

Mark Parsons
Partner
Hong Kong
mark.parsons@hoganlovells.com



Anthony Liu
Registered Foreign Lawyer
Hong Kong
anthony.liu@hoganlovells.com

New registration formality for natural persons as of 31 March 2022

15-02-2022

On 31 March 2022, the Luxembourg Business Registers ("**LBR**"), which manages the Trade and Companies Register ("**RCS**"), will introduce a new requirement for certain natural persons, such as managers, directors, shareholders, partners, liquidators, authorised representatives and auditors, registered or to be registered with the RCS in connection with any registered legal entity. These individuals will have to provide a so-called Luxembourg national identification number ("**LNIN**") by completing the LNIN field on the registration form or by voluntarily updating their information on file. If they do not have an LNIN, they must apply for one. This obligation is based on Article 12bis of the Act of 19 December 2002 on the register of trade and companies and the accounting and financial statements of companies, introduced by the Act of 13 January 2019 establishing a register of ultimate beneficial owners.

As a result, qualifying natural persons will only be able to register or change their registration if they provide an LNIN.

For natural persons already registered with the RCS, there will be a transition period to allow them to comply. In the second phase, the filing of an LNIN will become mandatory (date to be confirmed). If this information is not provided, it will not be possible to complete the registration process.

LNINs will not be publicly disclosed and will not appear on documents issued by the Luxembourg entity, pre-filled requisition forms or the entity's RCS certificate.

Non-compliance with these rules may expose the Luxembourg entity to a fine and other sanctions.

For more information or assistance, please contact our team.

Written by

Luxembourg


Luc Courtois
Partner


Margaretha (Greet) Wilkenhuysen
Partner


Romain Sabatier
Partner


Peter-Jan Smet
Senior Associate

Salvatore Pugliese
Associate

Department of Personal Data Protection Issues Codes of Practice for Private Hospitals in the Healthcare Industry and Utilities Sector (Water)

15 February 2022

The Department of Personal Data Protection recently issued two codes of practice, namely the Code of Practice for Private Hospitals in the Healthcare Industry and the Code of Practice for Utilities Sector (Water).

The Code of Practice for Private Hospitals in the Healthcare Industry applies to all private healthcare facilities that are licensed as "Private Hospitals" under the Private Healthcare Facilities & Services Act 1998 ("PHFSA").

The Code of Practice for Utilities Sector (Water) is applicable to the Utilities Sector (Water), in which the Code makes specific references to Water Services Industry Act 2006 and Water Services Industry (Water Supply Services Agreement Between Consumer and Water Distribution Licensee) Rules 2014. This Code applies to registered data users listed under Order 11 of Personal Data Protection (Class of Data Users) Order 2013 and shall include any other entities as may be gazetted by the Personal Data Protection Commissioner from time to time.

Alert prepared by *Jillian Chia* (Partner) and *Beatrice Yew* (Associate) of the Personal Data Protection Practice Group of Skrine.

January 2022

Official Mexican STANDARD NOM-241-SSA1-2021, Good manufacturing practices of medical devices

On December 20, 2021, the Ministry of Health published, in the Official Gazette of the Federation, the new *Mexican Official Standard NOM-241-SSA1-2021, Good manufacturing practices of medical devices,* which aims to establish the minimum requirements for the processes of design, development, manufacture, storage, and distribution of medical devices, based on their level of risk, so that medical devices may be used by the patient or final consumer. According to the General Health Law, medical devices include medical equipment, prostheses, orthoses and functional aids, diagnostic agents, dental supplies, surgical and healing materials, as well as hygienic products.

The aforementioned NOM classifies medical devices according to the risk posed by their use, following these categories: Class I, Class II, and Class III. Likewise, the Quality Management System, through the measures adopted, guarantees the quality of the medical devices for the intended use, incorporating the standards of GMP, BPD, BPAD, GLP, and the principles of Risk Management.

Additionally, the standard establishes criteria for the design and development of medical devices, which must be planned by the Development Area Manager. As well as the requirements that must be met by the facilities and equipment used at the time of manufacture, storage, and release of finished products on the market, to guarantee the quality of medical devices.

Derived from the above requirements, a system of qualification and validation of compliance with the standard is incorporated, as well as studies of stability and final destination of the waste. It also establishes a complaint system so users can communicate the devices failures in an effective manner.

The entry into force of this Standard will nullify the Official Mexican Standard NOM-241-SSA1-2012, Good Manufacturing Practices for Establishments Dedicated to the Manufacture of Medical Devices.

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

Mexico City Office: **Mr. Alejandro Luna A., aluna@s-s.mx (Partner)**
Phone: (+52 55) 5279-5400

Monterrey Office: **Mr. César Cruz A., ccruz@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

SyCip Salazar Hernandez & Gatmaitan

SyCipLaw Center, 105 Paseo de Roxas
Makati City 1226, Philippines
T: +632 8982 3500 | +632 8982 3600 | +632 8982 3700
F: +632 8817 3570 | +632 8848 2030
www.syciplaw.com

SyCipLaw TIPS

TAX ISSUES AND PRACTICAL SOLUTIONS

1.What tax relief can private schools look forward to?

On December 10, 2021, the President signed into law Republic Act *(R.A.)* No. 11635 amending Section 27(B) of the National Internal Revenue Code, as amended (*Tax Code*). R.A. No. 11635 provides that the taxable income of qualified proprietary educational institutions is subject to the 10% corporate income tax rate (or 1% from July 1, 2020 until June 30, 2023 as provided under R.A. No. 11534 or the Corporate Recovery and Tax Incentives for Enterprises (*CREATE*) Act). If the gross income of a private or proprietary educational institution arising from trade, business or other activity that is not substantially related to the exercise or performance of its primary purposes or function exceeds 50% of the total gross income derived from all sources, the general regular income tax rate of 25% will be imposed on the entire taxable income. A 'proprietary educational institution' is defined as any private school maintained and administered by private individuals or groups with a permit to operate from the Department of Education, the Commission on Higher Education, or the Technical Education and Skills Development Authority.

R.A. No. 11635 is a welcome development to the private school sector after the issuance of Revenue Regulations (*RR*) No. 5-2021 on April 8, 2021 (implementing certain provisions of the CREATE Act) which defined 'proprietary educational institutions' as private schools which are non-profit. This meant that private schools should have been established as non-profit corporations in order to qualify for the lower corporate income tax rate of 10% (as well as the temporary tax rate of 1%). The definition of 'proprietary educational institutions' under RR No. 5-2021 could have been brought about by the language in Section 27(B) of the Tax Code which states that "[p]roprietary educational institutions and hospitals which are nonprofit shall pay a tax…" The implementation of RR No. 5-2021 with respect to the taxation of proprietary educational institutions was suspended under RR No. 14-2021 issued on July 28, 2021.

SyCipLaw Tip 1:
The promulgation of R.A. No. 11635 has hopefully cleared the confusion brought about by the issuance of RR No. 5-2021. The amendment to Section 27(B) of the Tax Code has made it clear that the "non-profit" qualification applies to hospitals only. Qualified private schools can avail of the lower tax rate of 10% provided that their gross income from unrelated trade, business or other activities does not exceed 50% of their total gross income.

2. When a taxpayer with a pending protest against a deficiency business tax assessment of a local government unit (*LGU*) has been denied renewal of its business permit, prompting it to file a Petition for Declaratory Relief with the trial court and ask for interim relief, will the Court of Tax Appeals (*CTA*) have jurisdiction over a petition for certiorari questioning interlocutory orders issued by the trial court?

Yes. In *Mactel Corporation v. The City Government of Makati* (G.R. No. 244602, July 14, 2021), the Supreme Court ruled that under R.A. No. 1125, as amended by R.A. No. 9282, the jurisdiction of the CTA includes jurisdiction over "decisions, resolutions, or orders of the Regional Trial Courts (*RTC*) in local tax cases originally decided or resolved by them in the exercise of their original or appellate jurisdiction." However, it must be noted that before the case can be raised on appeal to the CTA, the action before the RTC must be in the nature of a tax case, or one which primarily involves a tax case.

In order for the CTA to take cognizance of a petition for certiorari, the interlocutory order must have been issued by the RTC on a local tax case. A local tax case is understood to mean as a dispute between the LGU and a taxpayer involving the imposition of the LGU's power to levy tax, fees, or charges against the property or business of the taxpayer concerned.

In this case, however, the taxpayer has in its favor a final and executory judgment establishing the proper basis for the assessment of its business taxes. The interlocutory orders being questioned did not rule on the validity of the assessments but merely ordered the LGU to refrain from proceeding further with the assessments until the computation of the taxpayer's business taxes has been determined in accordance with the previous final and executory decision.

In its petition for declaratory relief with the RTC, the taxpayer merely asked the trial court to define its rights and obligations under the final and executory judgment. Hence, while the case may be related to a tax case because the previous final and executory judgment sought to be enforced is a local tax case, the declaratory relief petition is already civil in nature. The assailed orders, therefore, do not fall under the appellate jurisdiction of the CTA.

SyCipLaw TIP 2:
Before elevating a case from the RTC to the CTA, the petitioner must ensure that the case is anchored on a tax issue, *i.e.*, will it involve the application of tax laws?

Examples of local tax cases may involve: the legality or validity of the real property tax assessment, protests of assessments, disputed assessments, surcharges or penalties; the validity of a tax ordinance; claims for tax refund/ credit; claims for tax exemption; actions to collect the tax due; and even prescription of assessments. For these cases, they may be filed with the RTC and eventually, elevated or appealed to the CTA.

3. Are there exceptions to the mandatory nature of the 120-day period given to the Commissioner of Internal Revenue (*CIR*) to rule on an administrative claim for value-added tax (*VAT)* refund before a taxpayer can file a judicial claim?

Yes. In *Hedcor Sibulan, Inc. v. CIR* (G.R. No. 202093, September 15, 2021), the Supreme Court ruled that there are two recognized exceptions to the mandatory and jurisdictional nature of the 120-day period. First, if the CIR, through a specific ruling, misleads a particular taxpayer to prematurely file a judicial claim with the CTA. Second, if the CIR issued a general interpretative rule in accordance with Section 4 of the Tax Code which misleads all the taxpayers into prematurely filing judicial claims with the CTA. The CIR, in such cases, is not allowed to later on question the CTA's assumption of jurisdiction since equitable estoppel has set in.

Bureau of Internal Revenue (*BIR*) Ruling No. DA-489-03 falls under the second exception, *i.e.*, a general interpretative rule. Issued on December 10, 2003, the ruling expressly provides that a taxpayer-claimant may seek judicial relief with the CTA by filing a petition for review without waiting for the 120-day period to lapse. It was not until October 6, 2010 that BIR Ruling No. DA-489-03 was reversed in *CIR vs. Aichi Forging Co. of Asia, Inc.*, *G.R. No. 184823 (Aichi)*. Hence, all taxpayers can rely on BIR Ruling No. DA-489-03 from the time of its issuance on December 10, 2003 up to its reversal in *Aichi* on October 6, 2010.

For more information regarding the issuances discussed in this briefing, please contact:
Carina C. Laforteza
cclaforteza@syciplaw.com

In this case, the administrative claim was filed on June 25, 2010. Four days later, or on June 29, 2010, the taxpayer filed its judicial claim. The judicial claim was filed well within the issuance of BIR Ruling No. DA-489-03 before it was invalidated by *Aichi*. Thus, the taxpayer's immediate filing of the petition for review before the CTA without waiting for the prescribed period of 120 days to lapse is permissible.

SyCipLaw Tip 3:
Although the case is about exceptions, it is important for taxpayers to keep abreast of general rules – particularly those relating to prescriptive periods for filing refund claims. Such periods are not just mandatory, but also jurisdictional. Since the burden in claiming tax refunds rests upon the taxpayers, they should ensure compliance with all technical and substantive requirements so their refund claims will not be denied.

Notably, the previous 120-days given to the CIR to process and decide the VAT refund claims had now been reduced to 90 days under the Tax Reform for Acceleration and Inclusion (*TRAIN*) Law. The TRAIN Law also deleted the remedy of the taxpayer in case of unacted VAT refund claims. However, despite the lack of clarificatory guidelines, it appears that the better rule is to allow a taxpayer the option to appeal to the CTA within 30 days from the lapse of the 90-day period. This would treat the inaction as "deemed a denial." After all, RA No. 1125, as amended by RA No. 9282, provides that the CTA has jurisdiction over inaction by the CIR in cases involving refunds where the Tax Code provides for a specific period of action, in which case the inaction shall be deemed a denial.

4. May a supervening event suspend the two-year reglementary period to file a claim for refund of internal revenue taxes?

No. In *PMFTC, Inc. v. Commissioner of Internal Revenue* (CTA Case No. 10110, November 25, 2021), the Second Division of the CTA ruled that "it is clear that the administrative and judicial claims for refund or credit of internal revenue taxes must be filed within the two (2)-year prescriptive period, which commences from the payment of the tax; that such period is mandatory and jurisdictional regardless of any supervening cause that may arise after payment".

In this case, the Philippine Tobacco Institute, Inc. (*PTI)*, to which PMFTC, Inc. (*PMFTC*) is a member, filed a petition for declaratory relief with the Regional Trial Court (*RTC)* to question RR No. 17-2012 and Revenue Memorandum Circular (*RMC*) No. 90-2012 – which imposed excise tax on cigarette packs containing 5 and 10 sticks of cigarettes – for imposing taxes not authorized under R.A. No. 10351, or the Sin Tax Reform Law. The RTC granted PTI's petition for declaratory relief. The CIR appealed the RTC's decision to the Supreme Court, which issued a temporary restraining order (*TRO*), restraining the enforcement of the RTC's decision. During the effectivity of the TRO, PMFTC paid the excise taxes for its cigarette packs, containing less than 20 sticks of cigarettes, for taxable years 2014 to 2015. The Supreme Court eventually affirmed the RTC's decision in the PTI case in a decision rendered in 2017.

In 2019, PMFTC filed an administrative claim for refund and, thereafter, a judicial claim for refund for the excise taxes it paid under protest in taxable years 2014 to 2015. PMFTC argued that the Supreme Court's TRO in the PTI case is a "special circumstance" and that it was "legally and practically prevented from filing a claim for refund or credit on its alleged overpaid excise tax."

SyCipLaw Tip 4:
Considering that the two-year prescriptive period in claims for tax refund is mandatory and jurisdictional, regardless of any supervening cause that may arise after payment, the taxpayer should be mindful of the date when it paid the tax and ensure that both its administrative claim and judicial claim are filed before the lapse of the two-year period.

A motion for reconsideration of the decision is currently pending.

CTA decisions, while persuasive, do not become the law of the land, unlike decisions of the Supreme Court.

The CTA ruled that "[t]he second paragraph of the aforequoted Section 229 of the NIRC of 1997 is plain and clear: 'In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment' Thus, no supervening cause may interrupt the running of the said two (2)-year prescriptive period." The CTA further ruled that it "does not subscribe to [PMFTC's] reasoning to the effect that the filing of the refund claim concerning the subject excise taxes would be a futile exercise. While it may be true that considering [the CIR] would have the tendency to adhere to, and uphold, its issuances, he may deny outright [PMFTC's] administrative claim, upon the filing thereof, or not act on the same at all, the law allows [PMFTC] to lodge its appeal, within the time prescribed, on the denial or inaction of [the CIR], before [the CTA], which would act on it objectively and judiciously." Thus, "nothing prevented [PMFTC] from complying with the mandate of Section 229 of the NIRC of 1997, whether it be the filing of the administrative and judicial claims and/or in observing the two (2)-year prescriptive period."

SyCipLaw TIP 5:
To the extent possible, service agreements and supporting documents (such as invoices and receipts) should indicate the location of the performance of services. Should parties intend that the subject services will be performed only in the Philippines and cannot be performed by the service provider outside the Philippines, it would be helpful to expressly state this in the service agreement, especially for purposes of showing that the services qualify for VAT zero rating.

A motion for reconsideration of the decision is currently pending.

CTA decisions, while persuasive, do not become the law of the land, unlike decisions of the Supreme Court.

5. Are taxpayers required to show that services were performed in the Philippines in order to qualify for VAT zero rating?

Yes, Section 108(B) of the Tax Code, requires that, in order to qualify for VAT zero rating, the services must be performed in the Philippines by VAT-registered persons.

In *Procter & Gamble Asia Pte. Ltd. v. Commissioner of Internal Revenue* (CTA EB No. 2301 [CTA Case Nos. 7581 and 7639], November 24, 2021), the CTA En Banc held that "[i]t is indispensable that a claimant of tax refund must prove that the services it rendered to its foreign affiliates must have been performed or rendered in the Philippines and not abroad."

In this case, the petitioner, Procter & Gamble Asia Pte Ltd., filed a claim for refund of unutilized input taxes attributable to its zero-rated sales covering the taxable periods January to March 2005 and April to June 2005. However, the CTA En Banc upheld the decision of the CTA in Division, denying the refund claim on the ground, among others, that petitioner failed to provide adequate evidence that the subject services were performed in the Philippines.

Upholding the finding of the Court in Division, the CTA En Banc held that "there is no evidence on record that will fully convince this Court that the services rendered by petitioner to its client-affiliates abroad were performed in the Philippines. In petitioner's Formal Offer of Evidence filed on July 3, 2009, petitioner did not offer any specific evidence to establish that the subject services were performed in the Philippines." The CTA En Banc held that petitioner cannot rely on the independent certified public accountant's report considering that the report did not refer to any documents or evidence that would show that the services were rendered in the Philippines. Neither can petitioner rely on the Service Agreements which contain a provision allowing the services to be provided by various service providers including the petitioner's head office and regional branches. Thus, the CTA En Banc held that "[c]onsidering that the services may be rendered not only in the Philippines but also in Singapore and in Japan, or outside the normal place of business of the service provider, the Service Agreements submitted by petitioner are not sufficient to prove that the services were rendered in the Philippines."

Finally, as tax refunds are in the nature of tax exemptions, a claimant has the burden of proof to establish the factual basis of the claim for tax credit or refund. Unfortunately, petitioner failed to discharge this burden when it failed to present adequate evidence that the subject services were performed in the Philippines.

6. How should airline companies treat the collection and remittance of domestic/international passenger service charges, also known as terminal fees, that are integrated into the sale of airline tickets?

The BIR issued RMC No. 122-2021 clarifying the tax treatment of integrating the terminal fee at the point of sale of airline tickets. The RMC provides that domestic airline companies collecting the terminal fee from passengers should include the terminal fee in the official receipt that will be issued by the airline company to the passenger. The official receipt should reflect the 12% VAT and VAT exempt components of the terminal fee. The share of the Manila International Airport Authority (*MIAA*) in the terminal fee should be shown in the official receipt to be issued by the airline company as part of the receipts subject to VAT, while the airport aviation security fee and other fees under Presidential Decree (*P.D.*) No. 1957 should be reflected as VAT exempt. The VAT component of the terminal fee should be included in the total VAT.

In the case of international airline companies, the terminal fee should be reflected in the airlines' official receipt. The share of the MIAA in the terminal fee, the aviation security fee and other fees under P.D. No. 1957 will be reflected as VAT exempt.

RMC No. 122-2021 illustrates how domestic airline companies subject to VAT or international airline companies that are resident foreign corporations and, thus, subject to VAT on service fees should record in their books (i) the collection of the terminal fee (*i.e.*, the share of the MIAA, the aviation security fee and other fees under P.D. No. 1957) and (ii) the remittance to the MIAA of the terminal fees they have collected.

SyCipLaw TIP 6:
RMC No. 122-2021 clarifies the tax treatment and illustrates the invoicing requirement and proper recording of terminal fees that airline companies collect for, and remit to, the MIAA when the airline companies sell airline tickets to their customers, including the service fees that airline companies earn for collecting the terminal fees on behalf of the MIAA. Airline companies should thus be able to ensure compliance with the invoicing requirements and recording of the terminal fees as well as the service fees received from the MIAA. Airline companies may find it difficult to justify non-compliance given the guidance set out in RMC No. 122-2021.

When the MIAA pays the service fee to the airline companies for collecting the terminal fee, the payment shall be subject to creditable withholding VAT at the rate of 5% and creditable withholding tax of 2% of gross payments. The domestic airline companies shall issue a VAT official receipt for the service fees received from the MIAA. International airline companies, on the other hand, shall treat MIAA's payment of service fees as "other income" subject to the regular corporate income tax.

RMC No. 122-2021 further states that the terminal fee should be treated independently from the Gross Philippines Billings (*GPB*) tax imposed under Section 28(A)(3) of the Tax Code and the 3% common carrier's tax imposed under Section 118 of the Tax Code because the GPB refers to the amount of gross revenue derived from the carriage of persons, excess baggage, cargo and mail originating from the Philippines in a continuous and uninterrupted flight while the percentage tax on international carriers under Section 118 refers to gross receipts derived from the transport of cargo from the Philippines to another country. RMC No. 122-2021 clarifies that the terminal fee is a service charge for services performed within the Philippines, and thus, the terminal fee should be treated independently from taxes imposed on revenues derived from the carriage of persons, excess baggage, cargo and mail originating from the Philippines.

SyCipLaw Tip 7:
The heirs should be aware that their acts (*i.e.*, a specific waiver or renunciation of their inherited share to another heir) in a testate or intestate succession has tax consequences (*e.g.*, donor's tax and DST). Failure to pay the taxes due as a result of the specific waiver or renunciation will not only make the heirs liable to pay a deficiency tax, but also to penalties such as the 25% surcharge and interest of 12% on the amount of tax that should have been paid. The BIR may likewise refuse to issue the Certificate Authorizing Registration for the transfer of the shares of stock if the taxes are not paid.

7. Is Documentary Stamp Tax (*DST*) due on the transfer of shares of stock in a Philippine company from the decedent to the heirs?

It depends. In RMC No. 6-2022, the BIR observed that taxpayers appear unaware that certain transactions relating to the transfer of shares of stock are subject to DST. Accordingly, in the case of transfers via succession, the BIR clarified in RMC No. 6-2022 that the following are subject to DST under Section 175 of the Tax Code at the rate of Php1.50 on each Php200.00, or fractional part thereof, of the par value of the shares being transferred:

> (i) Transfer of shares of stock from the decedent's estate to the heirs pursuant to a decedent's will approved by the probate court in a judicial settlement of estate; or
>
> (ii) Transfer by an heir who specifically waives or renounces his share over the inherited shares to another heir/s, regardless of whether the transfer occurs pursuant to a judicial settlement of estate approved by a probate court or through an extrajudicial settlement of estate.

The transfer of shares of stock from the decedent's estate to the heirs through intestate succession (*i.e.*, transfer without a will), on the other hand, is not subject to DST under Section 175 of the Tax Code since ownership over the inherited shares is transferred to the heirs by operation of law.

Singapore Court of Appeal sets out the principles for recognising lack of consent as an unjust factor: Part II of Commentary on *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] SGCA (I) 1

DENTONS RODYK

February 9, 2022

Introduction

As observed in Part I of our commentary, unjust enrichment continues to develop as a distinct and important branch of the law of obligations. Central to the inquiry where unjust enrichment is alleged is whether there is "enrichment" recognised at law at the expense of the plaintiff and, if so, when can that enrichment be considered "unjust" such that the law will intervene to provide relief. We accordingly discussed the illegality of the enrichment as an unjust factor in the light of the recent decision of the Court of Appeal (CA) in *Esben Finance Ltd and others v Wong Hou-Lianq Neil* [2022] SGCA (I) 1 (*Esben*).

We now turn to the lack of consent as an unjust factor. The CA also examined this in *Esben* and laid down the guiding principles to determine when lack of consent would be recognised as an unjust factor.

The decision in *Esben* was issued a few months after the questions surrounding lack of consent as an unjust factor arose in the High Court (General Division)'s decision in *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd and others* [2021] SGHC 205 (*Ok Tedi*). The Court in *Ok Tedi* decided in the 2nd Defendant's favour, striking out the plaintiffs' unjust enrichment claims in respect of shares that BHP had transferred to it, primarily on the basis that the alleged enrichment was not made at the expense of the plaintiffs. As such, the question of lack of consent did not require a detailed examination. The CA's decision in *Esben* therefore provided welcomed clarity on this area of the law.

Decision of the Court of Appeal on the unjust enrichment claims

As described in Part I of our commentary, the plaintiffs in *Esben* sought to recover some 50 payments on the basis that they constituted unjust enrichment. The CA dismissed the plaintiffs' claims for 36 of those payments on the basis that there was no enrichment at the plaintiffs' expense.

The CA further dismissed the plaintiffs' unjust enrichment claims (UE Claims) for the remaining 14 payments founded on the plaintiffs' lack of consent.

In doing so, the CA laid down several guiding principles for recognising lack of consent as an unjust factor. As a starting point, the CA observed that there is (in principle) no reason why lack of consent ought not to be recognised as an unjust factor. Otherwise, defendants who have received value or stolen property may benefit from a windfall. However, such recognition cannot be blanket and uncircumscribed. To do so would result in unacceptable encroachments on other areas of the law, denuding them of their legal significance. Further, legally valid transfers of the claimant's property or value without his consent, or the retention by the defendant of the claimant's property or value to which the defendant is legally entitled, cannot be said to have been per se unjust simply by virtue of consent being absent. Thus, an unjust enrichment claim based on the unjust factor of lack of consent would generally not be available where:

a. the transfer of the property or value in question from the claimant is a legally valid one;
b. the defendant is legally entitled (under a legal principle, rule or defence to any claim) to retain the property or value which is the subject matter of the claim; and
c. the claimant has any other available cause of action for the recovery of the property or the value in question under established areas of law (for example, the vindication of property rights). This follows from the need to prevent unjust enrichment from encroaching on or making otiose established areas of the law or denuding them of much of their legal significance.

In *Esben*, the CA found that the remaining 14 payments had been made to the defendant without any valid basis or authorisation. Thus, the plaintiffs retained property to the monies transferred by them. In the circumstances, the plaintiffs should have pursued a proprietary claim against the defendant instead of their pleaded claim in unjust enrichment. It was on this basis that the CA dismissed the plaintiffs' UE Claims for these 14 payments. Further, as the plaintiffs did not plead a proprietary claim as an alternative cause of action, the CA observed that such a claim would potentially be barred by the extended doctrine of *res judicata*.

The interplay with other potential unjust factors

The reach of lack of consent as an unjust factor can therefore be limited by the scope of other legal doctrines. Where there is overlap, the mere fact that consent has not been given is unlikely to take precedence.

In *Ok Tedi*, the plaintiffs had sought to rely on ignorance as an unjust factor on the basis that they, being victims of certain alleged misrepresentations, were allegedly not aware of the true basis for the transactions leading to a transfer of assets to the 2nd Defendant. The High Court (General Division) rejected the plaintiffs' argument for two reasons. First, the plaintiffs' consent was legally irrelevant because they had no proprietary interest in those assets. Thus, the enrichment was not made at the plaintiffs' expense in the first place. In this connection, the Court's decision to strike out the unjust enrichment claims was made on a similar footing as the CA's dismissal of the UE Claims for the 36 payments in *Esben*. Apart from this, the Court in *OK Tedi* also held that the true substance of the plaintiffs' case was one of vitiated intent, which ought to be considered under other unjust factors such as mistake and not under the rubric of lack of consent.

Similarly, the CA in *Esben* distinguished between mistake and lack of consent as an unjust factor in and of itself. Where the plaintiff's case is based on an operative mistake – such as the alleged vitiated intent in *Ok Tedi*, the relevant unjust factor is that of mistake, even though the transaction concerned can be set aside because there has, *ex hypothesi*, been a lack of consent. To permit lack of consent amounting to a mistake in law to be an unjust factor in its own right and without any circumscription is not desirable, as it might well render other established unjust factors otiose or redundant. Thus, it was important to the CA that any recognition of lack of consent as an unjust factor cannot be made at the expense of denuding other established legal doctrines. At the same time, the existing doctrines may not be sufficiently adequate for a claimant seeking to recover value to which it does not have title. Seen in that light, the guiding principles formulated by the CA in *Esben* are meant to develop the law of unjust enrichment incrementally, while preventing it from encroaching on or rendering otiose other areas of the law.

Conclusion

A practical takeaway from both the CA's decision in *Esben* and the High Court (General Division)'s decision in *Ok Tedi* is that plaintiffs considering a claim in unjust enrichment, based on their lack of consent, should evaluate whether such a claim would encroach on other areas of the law. Moreover, such plaintiffs would have to be mindful of the threshold questions, including whether there was enrichment at their expense in the first place, before going on to consider whether an unjust factor is present.

As observed in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801, the law of unjust enrichment is still in a state of flux, being a relatively young doctrine as compared to other established areas of the law such as contract or tort. That said, there is no doubt about the increasing prominence of unjust enrichment given its continued development and its potential to establish liability without the benefit of enforceable contractual rights.

Dentons Rodyk acted successfully for the 2nd Defendant in *Ok Tedi*, striking out the plaintiffs' unjust enrichment claims in respect of shares transferred to it and a fund worth approximately US$1.48billion. The plaintiffs appealed against the decision (which is currently pending) but have withdrawn their appeal against, among others, the Court's decision to strike out their unjust enrichment claims.

Your Key Contacts


Mark Seah
Senior Partner, Singapore
D +65 6885 3652
mark.seah@dentons.com


Kia Jeng Koh
Senior Partner, Singapore
D +65 6885 3698
kiajeng.koh@dentons.com


Martin See
Partner, Singapore
D +65 6885 2766
martin.see@dentons.com

理律法律事務所
LEE AND LI
ATTORNEYS-AT-LAW

Newsletter

Supreme Court Interprets Requirements for Prior Use of Trademarks in Good Faith as Defense against Trademark Infringement Accusation

01/07/2022

Ruey-Sen Tsai

According to the Trademark Act, the prior use of a trademark in good faith before the filing date of the claiming registered trademark may be cited as defense against trademark infringement accusation. The Supreme Court expounded in a trademark infringement criminal case in 2021 that restrictions of such defense are based on the good faith use of the same or similar trademark for the same or similar goods or services before the trademark application date of another person’s trademark. If it cannot be proved that it is a prior use "in good faith", one cannot claim to be free from any liabilities due to infringement upon the trademark rights of others. In addition, whether the product is genuine is based on if the product is manufactured by the trademark owner or its licensee. Therefore, if the date of manufacturing and circulation of the product is earlier than the filing date of the registered trademark, it does not mean that the product is indeed the genuine product, which were manufactured by the trademark owner or its licensee.

8F, No.555, Sec. 4, Zhongxiao E. Rd., Taipei 11072, Taiwan, R.O.C.   Tel: +886-2-2763-8000

BLOG POST / BROADBAND ADVISOR

Infrastructure

California Communications Infrastructure Update: A Look Ahead at Potential Regulatory Developments in 2022

By James W. Tomlinson, David Huang, and Andrew W. McCardle

02.15.22

As explained in our earlier post, we expect the substantial pace of regulatory developments related to communications infrastructure in California to continue in 2022. Additionally, changes at the California Public Utilities Commission (CPUC) may alter the direction of current and future proceedings.

Alice Busching Reynolds and John Reynolds recently were appointed by Governor

Newsom to join the CPUC to fill roles left by the departures of former President Marybel Batjer and former Commissioner Martha Guzman Aceves.

As in 2021, we anticipate continued activity in CPUC proceedings in 2022 to: (i) **close the digital divide;** (ii) **improve access to utility poles**; and (iii) **enhance communications network resiliency**. Below is a brief overview:

Closing the Digital Divide

Statewide Middle-Mile Network

In 2021, the California Legislature adopted SB 156, which allots $3.25 billion for the construction of a new statewide open-access middle-mile broadband network. The legislation instructs the CPUC to issue a staff report recommending priority locations for the middle-mile network.

In November 2021, then-CPUC President Batjer sent a letter to the California Department of Technology memorializing the CPUC's concurrence in the 18 initial middle-mile project locations throughout the state. However, SB 156 set no deadline for the issuance of the staff report, which has not yet been released. (Rulemaking 20-09-001)

Federal Funding Account Broadband Infrastructure Grants

SB 156 also creates a Federal Funding Account (FFA) into which state and federal funds can be deposited, including $2 billion in federal funds intended to extend last-mile facilities to unserved and underserved areas in California. The CPUC noted that it will consider how the "digital divide and low and/or no broadband access impacts ... environmental and social justice communities," dividing the proceeding into three phases.

Having received comments on the apportionment of funds for the FFA grant program last fall, the CPUC's likely next action will be to issue a proposed decision setting out parameters and rules for the FFA program. There is no set timeline for this action. (Rulemaking 20-09-001)

California Advanced Services Fund (CASF) Developments

In January 2022, Commissioner Houck's office issued a proposed decision establishing a Local Agency Technical Assistance grant program. Comments on the proposed decision were filed in February 2022.

If adopted, this proposed decision would allow grants to be made available to local and tribal governments to reimburse costs related to the development of broadband network deployment projects (with symmetrical 100 Mbps download speed and upload speeds), including the cost of joint powers authority formation, environmental studies, network design, and engineering study expenses. In 2022, the CPUC also anticipates initiating a rulemaking on the Loan Loss Reserve Fund, which would help fund local government agencies' or nonprofit organizations' financing costs associated with the deployment of broadband infrastructure. (Rulemaking 20-08-021)

The annual CASF application deadline typically has been April 1. However, late last year, the CPUC postponed the next application submission deadline until the third quarter of 2022 (after previously postponing the deadline from April 1, 2021, to February 28, 2022). The CPUC has not yet announced the next application deadline.

Improving Access to Utility Poles

Track 2 Pole Database Proceeding

In accordance with Decision 21-10-019, the five major pole owners (AT&T, Frontier, PG&E, SCE, and SDG&E) held a four-day workshop in January 2022 to discuss strategies for complying with the Decision. By the end of March 2022, the major pole owners will file advice letters with more specific information about the attachment data to be collected and the collection process.

Commission staff should act on the advice letters in May 2022. Pole attachers will not need to submit data to the major pole owners until at least May 2023. (Investigation 17-6-027)

Possible OTMR Regulations

Last spring, parties filed comments on an Administrative Law Judge ruling proposing new One-Touch Make-Ready (OTMR) requirements in California as part of the CPUC's proceeding investigating access by competitive communications providers to utility poles and conduits. The ruling proposes rules that would implement new OTMR processes in California and (long awaited) mandatory timelines for steps in the make-ready process that mirror the FCC's rules.

The likely next step is a proposed decision, which is expected during the first quarter of 2022. (Rulemaking 17-06-028)

Enhancing Wireline Network Resiliency

Backup Power Requirements

Pursuant to Decision 21-02-029, by August 2021, wireline providers must have installed equipment to provide 72-hours of backup power for all of their facilities in the Tier 2 and 3 High Fire-Threat Districts (HTFDs), unless they secured a waiver for "facilities that do not need backup power, are unable to support backup power due to a safety risk, or are objectively impossible or infeasible to deploy backup power to," with a discussion of actions "to mitigate service loss resulting from the lack of backup power at those locations."

In 2022, facilities-based wireline providers will be required to file their Emergency Operations Plans and Wireline Resiliency Plans with the CPUC, but the filing dates have not yet been announced. Last year's deadlines for Emergency Operations Plans and Wireline Resiliency Plans were April 12 and August 11, respectively. (Rulemaking 18-03-011)

Other Actions

PG&E Undergrounding

Pacific Gas & Electric Company (PG&E), announced in July 2021 that it plans to underground 10,000 miles of its power lines to mitigate the risk of igniting wildfires. The removal of thousands of utility poles could have major implications for communications companies with attachments on those PG&E poles.

PG&E more recently announced that its undergrounding project will cost its ratepayers more than $25 billion and will start in 2022. PG&E plans to underground 175 miles in 2022 and ramp up to 1,200 miles per year by 2026. PG&E has not yet announced the specifics of where and when it intends to underground, but there may be details forthcoming in PG&E's filings in its ongoing general rate case proceeding with the CPUC. (Application 21-06-021)

Updated CAL FIRE Fire-Threat Map

A news report from late December 2021 indicates the California Department of Forestry and Fire Protection (CAL FIRE) is in the process of updating its statewide fire-threat map, which is expected to result in an expansion of areas deemed to have high or extreme risk of wildfire. CAL FIRE's action could lead the CPUC to revise its own fire-threat map.

For communications companies, this means any facilities they have in the newly expanded high fire-threat areas will be subject to more stringent inspection and repair intervals, as required by CPUC General Order 95.

This advisory is intended to serve as a high-level overview of the most significant expected developments related to communications infrastructure regulations in California in 2022. Please contact DWT for more detailed information.

Hogan Lovells

Private Capital Alert
16 February 2022

This is a commercial communication from Hogan Lovells. See note below.

SEC proposes reforms to enhance private fund transparency

The U.S. Securities and Exchange Commission (SEC) proposed new rules promulgated under the U.S. Advisers Act of 1940 (the Advisers Act) on Wednesday, 9 February 2022. Pointing to over US$18 trillion in assets under private fund management and the growth of private funds in recent years, the SEC is introducing five related reforms, which it states are designed to protect private fund investors and to increase transparency, competition, and efficiency in the private fund market.

Broadly speaking, the proposed rules would impose five new requirements on private fund advisers:

— a **quarterly reporting requirement** that includes information about private fund fees and expenses and portfolio performance;

— an **annual audit requirement** for private funds;

— for adviser-led secondary transactions, a **fairness opinion requirement** and enhanced disclosures;

— **prohibition of certain activities** involving conflicts of interest or charging certain fees and expenses; and

— full disclosure to all investors of **preferential treatment** of other investors (such as through side letters).

Some of the new rules, especially as to the prohibition of certain activities, will impose new limits on the practices of private fund managers for which the SEC believes neither disclosure nor consent is sufficient to ameliorate. Other new rules seek to harmonize, clarify, or standardize disclosures that many private fund sponsors are already providing to investors, and that many investors already expect as "market" standards for private fund disclosure.

	Quarterly reporting requirement	Annual audit requirement	Secondaries fairness opinion	Prohibited activities	Preferential treatment	Annual review
Proposed rule	Proposed rule 211(h)(1)-2	Proposed rule 206(4)-10	Proposed rule 211(h)(2)-2	Proposed rule 211(h)(2)-1	Proposed rule 211(h)(2)-3	Proposed rule 206(4)-7(b)
Registered investment advisers	Detailed disclosure about fees and expenses, portfolio company imbursement, plus net/gross performance data, detailed for liquid, and illiquid funds	Similar to annual audit for custody rule, no proscribed time limit (but surprise audits don't meet requirement)	Fairness opinion required, plus additional conflicts disclosure	Cannot charge accelerated monitoring fees, non-*pro rata* fees and expenses, IA expenses; other restrictions apply to all advisers	No preferential treatment in respect to redemptions or transparency; other preferential treatment is prohibited unless disclosed to investors (including potential investors)	Already required
Exempt reporting advisers (and other exempt advisers)	N/A, but SEC specifically requests comments about scope	N/A, but SEC specifically requests comments about scope	N/A			Rules would introduce written annual review

The proposed rules would be subject to a one-year transition period, and any final rules adopted by the SEC may differ significantly from this proposal following the comment period.

In its proposal, the SEC provides that the new prohibited activities and preferential treatment disclosure requirements will apply to all advisers, including those that are exempt reporting advisers (ERAs) relying on the private fund adviser exemption or the venture capital fund adviser exemption, and also including those that are exempt from registration because they are foreign private advisers or advisers solely to small business investment companies (SBICs). In contrast, the SEC proposes that the quarterly reporting, annual audit, and secondary fairness opinion requirements would apply only to registered investment advisers (RIAs) and private funds. The SEC, however, is requesting comments on the scope of all of the proposed requirements, so it remains uncertain which, if any, of the five reforms would ultimately apply to exempt fund advisers.[1]

The SEC also proposes certain amendments to Rule 204-2 (the "books and records rule") to require registered private fund advisers to maintain additional records in respect of the new rules.

Also, in addition to the five headline reforms listed above, the SEC proposes to require all private fund advisers, including ERAs, to document the annual review of their compliance policies in writing, effectively extending the current requirement from RIAs to all private fund advisers.[2]

On the same day, the SEC proposed a new cybersecurity rule that, among other things, would require all RIAs to adopt written cybersecurity policies and procedures and report certain cybersecurity incidents to the SEC pursuant to the new Form ADV-C.

These proposed rules follow a third proposal on 26 January amending rules relating to Form PF that, among other things, would lower the threshold for filing Section 4 of Form PF for "larger private equity advisers" from US$2 billion to US$1.5 billion in regulatory assets under management, and would require additional reporting from large hedge fund advisers and large private equity advisers, in some cases within one business day.[3]

The proposed private funds rule is available in full here. The public comment period will remain open for the longer of 60 days following publication of the proposing release on the SEC's website or 30 days following publication of the proposing release in the Federal Register.

Prohibited activities

The new rules prohibit all private fund advisers from engaging in certain activities and practices that are contrary to the public interest and the protection of investors.[4] Given that the SEC proposes to prohibit all advisers (not just RIAs) from engaging in these activities, notwithstanding prior disclosure or investor consent, this prohibition may be the most consequential of the five reforms.

The prohibited activities include the following:

- charging certain fees and expenses to a private fund or its portfolio investments, including:
  - fees for unperformed services (*e.g.*, accelerated monitoring fees),
  - fees associated with an examination or investigation of the adviser,
  - regulatory of compliance expenses or fees of the adviser or its related persons, or
  - charging fees or expenses related to a portfolio investment on a non-*pro rata* basis;
- reducing the amount of any adviser clawback by the amount of certain taxes;

1 While the anti-fraud provisions of Section 206 of the Advisers Act apply to all advisers, and while Section 206 remains the heart of SEC rulemaking, the SEC is proposing these new rules chiefly under Section 211(h), part of the Dodd-Frank reform amendments to the Advisers Act that empowers the SEC both (i) to "facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest" and (ii) to "examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the [SEC] deems contrary to the public interest and the protection of investors."

2 Proposed rule 206(4)-7(b).

3 Proposed rule 204(b)-1. The SEC adopted the original Rule 204(b)-1 in 2011 to require registered private fund advisers to complete Form PF within 120 days of the end of the fiscal year, including Section 4 for certain "large private equity advisers."

4 Proposed rule 211(h)(2)-1.

— seeking reimbursement, indemnification, exculpation, or limitation of its liability for a breach of fiduciary duty, willful misfeasance, bad faith, negligence, or recklessness in providing services to the private fund; and

— borrowing or receiving an extension of credit from a private fund client.

Often, multiple fund vehicles may share in the same portfolio investment (i.e. multiple funds, co-investment entities, funds of one, or other multi-platform arrangements.) The SEC is proposing to prohibit any non-*pro rata* allocation of fees and expenses among such private funds.

The SEC believes that any non-*pro rata* allocation under these circumstances is contrary to the protection of investors because it would result in the adviser placing its own interest ahead of another's, including in circumstances where the adviser indirectly benefits by placing the interests of one or more clients or investors ahead of another's (including, for example, in a way that could maximize the adviser's compensation).

In particular, private fund advisers should note that the SEC proposes that even broken-deal expenses for an unconsummated portfolio investment be shared among private funds and potential co-investors, rather than be borne solely by the main fund and its investors.

Quarterly reporting requirement

The new rules require registered private fund advisers to provide investors with quarterly statements detailing information about private fund performance, fees, and expenses, potentially harmonizing the quarterly reports that many private fund advisers already provide to their investors.[5]

The quarterly report would include a detailed accounting of all fees and expenses paid by the private fund during the reporting period, disclose information regarding compensation or other amounts paid by the private fund's portfolio investments to the adviser or any of its related persons, and disclose information regarding the private fund's performance.

The fees and expense report would show, as separate categories, both (i) adviser compensation (*e.g.,* management fees, fee income, and/or performance-based compensation), with separate line items for each category of allocation or payment, and (ii) fund expenses (*e.g.,* organizational, accounting, legal, administration, audit, tax, due diligence, and travel expenses), again with separate line items for each category. The reporting would also include the amount of any offsets or rebates carried forward during the reporting period to subsequent quarters to reduce future payments or allocations to the adviser (or related persons).

In addition, the portfolio investment-level disclosure would include: (i) a detailed accounting of all portfolio investment compensation allocated or paid by each portfolio investment during the reporting period and (ii) the private fund's ownership percentage of each such covered portfolio investment as of the end of the reporting period. Such portfolio investment compensation would include, among other things, origination, management, consulting, monitoring, servicing, transaction, administrative, advisory, closing, disposition, directors, trustees, or similar fees or payments by the covered portfolio investment, again with separate line items for each category.

The proposed rule introduces a new definition of "illiquid fund" as generally closed-end funds that do not offer periodic redemption options, other than in exceptional circumstances, and that do not invest in publicly traded securities (except for a *de minimis* amount), intended to capture most private equity, real estate, and venture capital funds. Funds that do not meet these criteria are defined as "liquid funds," and is designed to capture most hedge funds.

For liquid funds, the quarterly statement would provide annual net total returns since inception, average annual net total returns over the one-, five-, and ten- calendar year periods, and quarterly net total returns for the current calendar year.

For illiquid funds, the statement would provide the gross and net internal rate of return and gross and net multiple of invested capital for the illiquid fund to capture performance from the fund's inception through the end of the current calendar quarter. The requirement for both gross and net performance matches the emphasis on dual gross and net performance in the marketing rule adopted by the SEC in December 2020, which takes effect in November 2022.[6]

5 Proposed rule 211(h)(1)-2. Note that, in addition, proposed rule 211(h)(1)-1 is a definitional rule that would apply to the additional rules adopted under Section 211(h).

6 Rule 206(4)-1, which replaced the old Rule 206(4)-1 (the "advertising rule") and old Rule 206(4)-3 (the "cash solicitation rule").

The rule would also require illiquid funds to provide a simple statement of contributions and distributions, presenting (i) all capital inflows the private fund has received from investors and all capital outflows the private fund has distributed to investors since the private fund's inception, with the value and date of each inflow and outflow; and (ii) the net asset value of the private fund as of the end of the reporting period covered by the quarterly statement.

The proposed rule would require advisers to calculate performance measures for each illiquid fund as if the private fund called investor capital, rather than drawing down on fund-level subscription lines of credit. It would also require advisers to consolidate reporting for substantially similar pools of assets (such as for parallel funds) to the extent doing so would provide more meaningful information to investors.

The SEC proposes to define "internal rate of return" as the discount rate that causes the net present value of all cash flows throughout the life of the private fund to be equal to zero and to define "multiple of invested capital" as (i) the sum of: (A) the unrealized value of the illiquid fund; and (B) the value of all distributions made by the illiquid fund; (ii) divided by the total capital contributed to the illiquid fund by its investors.

Annual audit requirement

The new rules require registered private fund advisers to obtain an annual audit for each private fund and cause the private fund's auditor to notify the SEC upon certain events.[7] The audit requirement is based on the annual audit requirement that many private funds currently use to comply with the custody rule under the Advisers Act.[8]

The audit must be performed by an independent public accountant subject to standards of independence under Regulation S-X and regular inspection by the Public Company Accounting Oversight Board, and the audit must meet the definition of audit under Regulation S-X. Audited financial statements must be prepared in accordance with U.S. generally accepted accounting principles (GAAP) or, in the case of foreign private funds, must contain information substantially similar to statements prepared in accordance with U.S. GAAP.

Unlike with the custody rule, however, a surprise audit conducted during each calendar year will not meet the proposed annual audit requirement. In addition, the new proposed audit requirement would mandate a written agreement with the auditor, pursuant to which the auditor is required to notify the SEC upon the auditor's termination or issuance of a modified opinion.

Notably, the proposed rules consider, but would not require, that the audit be delivered within 120 days after the end of the fiscal year; instead, the adviser must provide the fund's audited financial statements "promptly" following the audit's completion.

Preferential treatment disclosure

This proposal would prohibit all private fund advisers from providing preferential terms to certain investors regarding redemptions from the fund, an aspect of the reforms that would affect hedge funds in particular.[9]

It would also prohibit an adviser from providing information regarding the portfolio holdings or exposures of the private fund to any investor if the adviser reasonably expects that providing the information would have a material, negative effect on other investors in that private fund or in a substantially similar pool of assets.

In addition, the proposed rules would prohibit all fund advisers from providing other preferential treatment unless disclosed to current and prospective investors that often provide more favored rights to certain preferred investors, chiefly through side letters and side arrangements, such as anchor or strategic investors or investors with large commitments. The SEC designed this proposal to protect investors by prohibiting specific types of preferential treatment that have a material, negative effect on other investors, and it explicitly notes by way of example that excuse rights that accommodate one investor's unique investment restrictions may detrimentally affect other investors. In addition, preferential treatment with respect to the payment of carried interest, fee discounts, and co-investment allocations.

---

7 Proposed Rule 206(4)-10.

8 Rule 206(4)-2 and, in particular, Rule 206(4)-2(b)(4). The custody rule imposes certain requirements on RIAs with respect to custody of client funds or securities to protect client assets from loss, theft, or misappropriation, including the appointment of a qualified custodian, such as a bank or registered broker-dealer, to maintain client assets and securities. If an RIA, advising a limited partnership or similar pooled investment vehicle subject to audit, provides annually audited financial statements prepared in accordance with U.S. GAAP within 120 days (or 180 day for a fund of funds), the RIA need not comply with other aspects of the custody rule, including notice and quarter statement requirements and a surprise audit requirement.

9 Proposed rule 211(h)(2)-3.

While, in theory, not all side letter provisions would meet the proposed disclosure requirement, an adviser would meet its obligation by providing all investors and prospective investors access to the terms previously granted in the fund's side letters. For advisers engaged in fundraising, the required disclosures would be required prior to a prospective investor's investment in the private fund.

Fairness opinion for secondaries

The new rules require registered private fund advisers, in connection with an adviser-led secondary transaction – when advisers offer existing fund investors the option to sell or exchange their fund interests for interests in another vehicle managed by the adviser – to distribute to investors a fairness opinion and a written summary of certain material business relationships between the adviser and the opinion provider.[10]

The proposed rules would also require the adviser to prepare and distribute to the investors a summary of any material business relationships the independent opinion provider has or has had within the past two years with the adviser or any of its related persons.

Cybersecurity rules

In a separate release on 9 February, the SEC proposed new rules under the Advisers Act and the U.S. Investment Company Act of 1940 (the Company Act) to require both RIAs and investment companies to adopt and implement written cybersecurity policies and procedures reasonably designed to address cybersecurity risks. [11] The policies and procedures would include certain mandate elements, including:

— a risk assessment in the cybersecurity risks facing an adviser or fund;

— user security and access controls designed to minimize user-related risks and prevent unauthorized access to information and systems, such as (i) an acceptable use policy to require standards of behavior; (ii) two-factor authorization for individual users; (iii) procedures for timely distribution, replacement and revocation of passwords; (iv) restriction of access to specific advise or fund information solely to individuals requiring access as is necessary to perform their duties; and (v) securing remote access technologies;

— policies to monitor and protect information from unauthorized access or use;

— policies designed to detect, mitigate, and remediate cybersecurity threats and vulnerabilities; and

— measures to detect, respond to, and recover from a cybersecurity incident.

The proposed rules would also require RIAs to report significant cybersecurity incidents to the SEC, including on behalf of a private fund client, by submitting Form ADV-C, which unlike other aspects, of Form ADV, would be confidential reports.[12] Nonetheless, the SEC would require the disclosure of cybersecurity risks and incidents to clients and prospective clients though Form ADV Part 2A (commonly known as the "brochure"), which is publicly available.

Conclusion

It has been clear for some time that the SEC, under its new chair Gary Gensler, is seeking to enhance transparency and disclosure for all private fund investors, retail, and institutional alike. The proposed private fund rules, in addition to the proposed Form PF changes and introduction of the cybersecurity rule, take a bold step in that direction.

We will continue to monitor ongoing SEC rulemaking and provide updates as additional proposals emerge and/or the SEC adopts final rules regarding these proposals.

---

10 Proposed rule 211(h)(2)-2.

11 Proposed rule 206(4)-9 under the Advisers Act and proposed rule 38a-2 under the Company Act.

12 Proposed rule 204-6.

Contributors

Adam M. Brown
Partner, Northern Virginia
T +1 703 610 6140
adam.brown@hoganlovells.com

Parikshit (Parik) Dasgupta
Partner, New York
T +1 212 918 3000
parikshit.dasgupta@hoganlovells.com

Henry D. Kahn
Partner, Baltimore, Washington, D.C.
T +1 410 659 2780 (Baltimore)
T +1 202 637 3616 (Washington, D.C.)
henry.kahn@hoganlovells.com

Bryan R. Ricapito
Partner, Washington, D.C.
T +1 202 637 5481
bryan.ricapito@hoganlovells.com

David A. Winter
Partner, Washington, D.C.
T +1 202 637 6511
david.winter@hoganlovells.com

Kevin Lees
Corporate Funds Area Operations Manager, Washington, D.C.
T +1 202 637 5432
kevin.lees@hoganlovells.com

www.hoganlovells.com