PACIFIC RIM
ADVISORY COUNCIL

Pacific Rim Advisory Council
January 2022 e-Bulletin

MEMBER NEWS

►ARIAS Announces Promotions
►ARIFA Partner Announcement
►CAREY Opens Miami Office; Appoints 4 New Partners
►CITY-YUWA Appointments Announced
►GIDE Promotes 13 to Counsel
►GOODSILL Partner Promotions
►HAN KUN Announces Partner Promotions
►HOGAN LOVELLS Welcomes New Year Additions and Promotions
►NAUTADUTILH Strengthens Corporate M&A Team
►SANTAMARINA Partner and Counsel Appointments Announced

COUNTRY ALERTS

►ARGENTINA ANMAT Publishes Authorizing Registration of Certain CBD Products ALLENDE BREA
►CANADA TSX Venture Exchange Updates Security-Based Compensation Policies BENNETT JONES
►CANADA Supreme Court of Canada Clarifies Tort Liability Exposure for Public Authorities RICHARDS BUELL SUTTON
►CHILE Financial Market Commission Opens Public Consultation on Authorization of Existence of Special Stock Corporations and Initiation of Operations of General Fund Managers CAREY
►CHINA Preliminary Analysis of the Measures for Cybersecurity Review HAN KUN
►COLOMBIA New Regulations on Wastewater Use BRIGARD URRUTIA
►FRANCE Increased Risk of of Criminal Liability for Parent Companies GIDE
►GUATEMALA Implementation of Customs Services Reasonable Doubt Digital System for Customs Valuation of Goods ARIAS
►HONG KONG Court Rules "informal freezing" of Bank Accounts Unlawful HOGAN LOVELLS
►MALAYSIA The Copyright (Amendment) Bill 2021 SKRINE
►MEXICO Minimum Wage Increase Effective Jan 1, 2022 SANTAMARINA y STETA
►NETHERLANDS Record fine for the Dutch Tax Administration from a legal perspective NAUTADUTILH
►NICARAGUA Regulation of Commercial Electric Energy ARIAS
►PHILIPPINES Tax Tips and Practical Solutions SYCIP LAW
►SINGAPORE Wealth Taxes - Present, and Glimmers of a Potential Future 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 Supreme Court Upholds CMS COVID19 Vaccine Mandate But Blocks OSHA Mandate for Businesses DAVIS WRIGHT
►UNITED STATES FDA Explains When Medical Device Makers Must Notify of an Interruption in Manufacturing HOGAN LOVELLS

CONFERENCES & EVENTS

PRAC Let's Talk!

upcoming virtual meetings
January 24/25, 2022
February21/22, 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 in the Initial Public Offering of Mineros SA on the Toronto Stock Exchange
►ARIAS Advised Telefonica in Sale of it Operations in El Salvador
►BENNETT JONES | CCP Shareholders Overwhelmingly Support Proposed CP-KCS Merger Agreement
►BRIGARD URRUTIA | Diesco US$275m loan from Goldman Sachs
►CAREY | Assists Banco de Chile issue US$500 million in first offering
►GIDE | Counsel to Egis in Tikehau Capital acquiring a stake in Egis
►HAN KUN | Advises Bright Dairy on its private placement of A shares
►HOGAN LOVELLS | Advises Ad Hoc Group on Restructuring of Yestar Notes
►NAUTADUTILH | Advises ALD and Société Générale on acquisition of LeasePlan
►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 PROMOTIONS ANNOUNCED

ARIAS EL SALVADOR PROMOTES TALENTED, COMMITTED, AND SKILLFUL ATTORNEYS

EL SALVADOR, November, 2021: Founded in 1942, at Arias El Salvador we are the law firm of reference in the country for having talented lawyers, with high knowledge of the law, creative solutions and focused on serving our clients.

At Arias we value our team and consider it key to offer our clients high quality services, which is why 7 of our associates in Arias El Salvador were promoted to Senior Associates and four of our Senior Associates were promoted to Senior Counsel, thanks to their merits since their incorporation into the firm.

Senior Associates
René García
Vanessa Granados
Marcela Canjura
César Bautista
Rafael Burgos
Rolando Alvarenga
Elisa González

Senior Counsel
Adam Araujo
César Lopez
Flor Rodriguez
Ernest Sanchez

Roberta Gallardo, managing partner of Arias El Salvador, comments: "*We are very proud of the professional development of our associates and grateful that they are part of our firm. Congratulations to our new senior associates and senior counsel who, with their effort, dedication and commitment have stood out in the firm. We know that with their work and professional development we will continue to offer the quality services that our clients deserve.*"

For additional information visit www.ariaslaw.com

ARIFA PARTNER PROMOTION

PANAMA CITY, 01 January, 2022: Arias Fabrega and Fabrega (ARIFA) is pleased to announce Fernanda Arias F. has become a partner of the firm.

Fernando has been a valued member of the ARIFA legal team since 2014. Fernando remains resolutely at the forefront of his generation having participated in the handling of important local and international financial agreement, in the negotiation of complex mergers and acquisitions, and in the closing of major financing deals for high-profile infrastructure projects.

He is also an active member of of the specialized muti-disciplanary group formed by ARIFA for the attention of multinational clients interested in consolidating their regional position with the establishment of commercial operations in Panama.

Fernando earned an LLM with emphasis in corporate law from New York University School of Law , an LLM from Northwestern School of Law, a Certificate of Business Administration from the Kellog School of Management, and a Bachelor of Law and Political Science , suma cum laude, from the Santa Maria la Antigua University in Panama. Between 2012 and 2013 he worked at Simpson Thacher & Bartlett LLP representing insurers and issuers iin various capital markets operatoins, with a focus on Latin America. He is a member of the Young Lawyers Council and the International Bar Association.

Fernanco has been recognized by the prestigious international publication The Legal 500 for Latin America for his work in the areas of banking and finance(2018-2022) as well as Corporate Law and M&A (2018-2022).

For additional information visit www.arifa.com

PACIFIC RIM ADVISORY COUNCIL

PRAC Let's Talk!

Join us in 2022 for our monthly live one-hour virtual meetings

Upcoming Event: January 24/25, 2022

PRAC - Let's Talk! events are open to PRAC Member Firms only

Registration required

Visit www.prac.org for details

CAREY OPENS MIAMI OFFICE; APPOINTS 4 NEW PARTNERS

MIAMI, 11 November, 2021: As Miami continues to flourish as a hub for Latin American investments, Carey has taken an important step to meet their clients' evolving needs. The Chilean law firm opened a commercial office in the Floridian city which will be focused on venture capital investments and startup clients, family offices and funds. The office will be led by Carey's partner and President of the Chilean Venture Capital Association, Francisco Guzmán, who has been settled in Miami since August.

The purpose of the Miami Office is to serve as a bridge for the local clients assisting them in their international investments and operations. Carey plays a fundamental role in the structuring of such process, considering the Chilean regulations applicable, and also in the soft-landing of the clients that are starting operations beyond passive investments. Although Francisco Guzmán and other Carey partners are admitted to practice law in New York, they are not practicing under Florida law, and it is not the firm's plan to do so. The focus is to assist the clients in their internationalization process and keep working with US counsel for the local matters as it has been the traditional practice of Carey. "We believe that this will permit us to work closer with the law firms with whom we usually work, being able to refer them more clients and generate new opportunities to work together" mentions Jaime Carey, Managing Partner of Carey.

The announcement of the new office was preceded by the first VC LATAM Summit, a groundbreaking event organized by the venture capital associations of seven countries throughout Latin America. The event was held in Miami on October 27 and 28 and brought together more than 250 top players from the VC industry, including funds and family offices to establish and strengthen relationships and learn about exciting investment opportunities that are taking place in the region.

A highlight of the two-day event was a cocktail party hosted by Carey in the Penthouse at Riverside Wharf. The event was attended by more than 200 guests including Carey partners Jaime Carey, Francisco Guzmán, Guillermo Carey, Manuel José Garcés and Manuel Alcalde.

Carey Appoints Four New Partners

SANTIAGO, 11 November 2021: *Carey is pleased to announce the following promotions from Senior Associate to Partner,* adding firepower to our M&A, Banking & Finance, Capital Markets, Energy and Antitrust groups.

Alejandra Daroch is a member of Carey's Mergers and Acquisitions, Banking and Finance, and Capital Markets groups.

Jose Tomas Hurley is a member of Carey's Energy Group and focuses his practice on the development of energy projects and associated infrastructure, the negotiation of supply and transportation contracts for electricity and fuels, ERNC accreditations, and on regulatory, contentious, and transactional matters of the power industry.

Jaime Carey, Jr. is a member of Carey's Corporate/Mergers and Acquisitions group and focuses his practice mainly on M&A transactions, corporate and commercial law, capital markets, international trade and public works bidding processes.

Jose Pardo is a member of Carey's Antitrust and Regulated Markets group and focuses his practice on antitrust, regulation, administrative and constitutional law, litigation and administrative litigation.

For additional information visit www.carey.cl

CITY-YUWA APPOINTMENTS ANNOUNCED

TOKYO, 01 January, 2022: City-Yuwa is pleased to announce the following:

Kentaro Sadahiro, Aya Kinoshita, Yutaka Takiguchi, Shotaro Aoki, Yusuke Shimada, Kosuke Hasegawa, Kenta Ikebe and Ryoichi Yoshida have been promoted to Partners of the Firm.

Yuichi Tamura has been promoted to counsel of the Firm.

Taehyok Im, admitted in 2019, has joined the Firm.

For additional information visit www.city-yuwa.com

GOODSILL PARTNER PROMOTIONS ANNOUNCED

HONOLULU, 10 January, 2022: Goodsill is proud to announce the promotions of **Daniel Lam** and **Deirdre Marie-Iha** to Partner.

Daniel Lam has been listed as one of the Rising Stars in Super Lawyers for the past 4 years and recognized by Best Lawyers in Ones to Watch for 2021 and 2022. Daniel's practice focuses on securities regulation, mergers and acquisitions, startups, corporate governance, entity structuring, and general business law. Prior to joining Goodsill in 2015, Daniel practiced as a corporate and securities attorney at McGrath North Mullin & Kratz, PC LLO, located in Omaha, Nebraska. Daniel graduated from Punahou School, Gonzaga University, and Creighton University School of Law in 2014 with magna cum laude honors. Before attending law school, Daniel lived and worked in Japan. "Daniel is a tremendous asset to our team and we are proud to see him move forward in his career," Michael O'Malley, Partner.

Deirdre Marie-Iha has been practicing for more than 20 years. Deirdre is a civil litigator and appellate practitioner. Her appellate experience is extensive and spans 18 years in both federal and state courts. She has argued numerous times before the Ninth Circuit Court of Appeals, the Hawai'i Supreme Court, and Intermediate Court of Appeals. Deirdre has handled well over a hundred appellate proceedings, and over the years her caseload has generated more than 40 published opinions in state and federal courts. Most recently her appellate work includes corporate governance, banking, other business matters, and trust litigation. Prior to joining Goodsill, Deirdre practiced for more than a dozen years as a deputy attorney general at the Hawai'i AGs office, where she handled a number of high-profile, high-stakes matters, including the furloughs during the 2008-2009 financial crisis; the enactment and subsequent defense of the Marriage Equality Act in 2013-2015; and complex litigation regarding the State's retiree health benefits. She was also instrumental in the State's challenge to the travel ban, Hawaii v. Trump. Deirdre graduated from Cornell University, Phi Beta Kappa, in 1996, and from the University of Colorado School of Law in 1999. Deirdre has served as Chair of the HSBA Appellate Section since 2021. "Deirdre sets the standard by which our team is measured and we are proud to announce her partnership," Edmund Saffery, Partner.

Goodsill Anderson Quinn & Stifel LLP, founded in Hawai'i in 1878, has over 50 attorneys representing local, national and international clients. Goodsill lawyers handle a wide range of business and legal matters, extending personalized legal services with cutting-edge resources.

For additional information visit www.goodsill.com

GIDE PROMOTES 13 TO COUNSEL

Gide promotes thirteen lawyers to Counsel in its Algiers, Casablanca, London and Paris offices

PARIS, 06 January 2022: Gide is pleased to announce the promotion to Counsel of thirteen promising young lawyers in its Algiers, Casablanca, London and Paris offices, in several practice groups. These appointments are effective as of 1 January 2022.

ALGIERS - Mergers & Acquisitions / Corporate - Xavier Lecomte

CASABLANCA - Projects (Financing & Infrastructure) - Frédéric Pia

LONDON - Mergers & Acquisitions / Corporate - Pierre-Antoine Degrolard

PARIS

Banking & Finance / Project Financing
Aurélien de Castéja
Matthieu Lucchesi

Competition & International Trade
Charles Terdjman

Criminal & Commercial Litigation
François Voiron

Dispute Resolution
Astrid Westphalen

Intellectual Property, Telecommunications, Media and Technology
Marie-Ange Pozzo di Borgo

Mergers & Acquisitions / Corporate
Pierre-Guillaume Sagnol
Ghizlen Sari-Ali

Public Law, Energy & Environment
Tiphanie Mareuse

Projects (Finance & Infrastructure)
Frédéric Colmou

The Counsel status highlights an excellent career to date within Gide. Each candidate was unanimously backed by his or her practice group, received individual sponsorship, and was approved by a commission comprising twelve partners. The Management Committee awards the Counsel status for an initial period of three years.

Partner Emmanuel Larere, member of the firm's Management Committee in charge of talent & diversity, says: "We are delighted to promote these thirteen promising lawyers to Counsel! The demanding process rewards their exemplary and highly technical professional career to date, and above all their ability to think outside the box. These high-potential lawyers will help guarantee the ongoing performance of our firm in the service of our clients."

For additional information visit us at www.gide.com

HAN KUN ANNOUNCES PARTNER PROMOTIONS

BEIJING, 04 January, 2022: As the new year begins, Han Kun Law Offices is pleased to announce the 2022 promotion of new partners. These new partners are based across Han Kun's offices, covering practice areas such as private equity, venture capital, mergers and acquisitions, domestic and overseas securities issuances and listings, investment funds and asset management, banking finance, asset securitization, foreign direct investment, real estate and infrastructure, corporate compliance, data protection, employment law, intellectual property, and dispute resolution.

Han Kun is committed to providing young lawyers with opportunities for further development, encouraging them to give full play to their abilities and helping them to quickly excel by providing more opportunities for responsibility and leadership. Han Kun values the vitality of these young lawyers and expects them to contribute to the firm's development by consistently upholding the Han Kun spirit of always aiming high and adhering to our philosophy of professionalism.

Facing the new journey in 2022, let us join hands to tackle new challenges and fulfill new expectations!

Chunyan He
Qi Wang
Zhao Zhang
Kemeng Cai
Lin Gui
Rong (Reese) Huang
Rui Huang
Xiao Li
Lifeng Lu
Jin Qian
Haoxiang Wang
Huajun Wang
Chi (Robin) Zhang
Yuxuan Zhang
Wanmei Zhao
Zhihan Zhao

For additional information visit www.hankunlaw.com

SANTAMARINA ANNOUNCES PARTNER AND COUNSEL PROMOTIONS

MEXICO CITY, 21 November 2021: We are pleased to announce that ***Daniel Legaspi, Guillermo Moreno and Diego Ostos*** have been appointed partners of the Firm.

Likewise, ***Margarita Casarín, Efraín Olmedo and Jaime Vázquez*** were promoted to counsels.

Both appointments will take effect from January 1, 2022.

For additional information visit us at www.santamarinasteta.mx

HOGAN LOVELLS WELCOMES THE NEW YEAR WITH 27 PARTNERS AND 71 NEW COUNSEL PROMOTIONS

LONDON and WASHINGTON, D.C., 05 January, 2022 – Global law firm Hogan Lovells today announced that 27 of its people have been promoted to partner effective 1 January across a network of 47+ offices in 24+ countries, spanning the Americas, Asia-Pacific, and Europe, the Middle East, and Africa.

Speaking on the promotions, Hogan Lovells' CEO Miguel Zaldivar commented: "Nurturing and promoting the excellent talent that we have at Hogan Lovells is central to our strategy of providing the best service and putting clients at the center of everything we do. The promotions of these talented individuals reflect the quality, breadth and depth of Hogan Lovells around the world, particularly our strength in a number of key sectors and in advising at the intersection of business and government. I am particularly pleased that a total of 48% of our new partners and new counsel are women, racial and ethnic minorities, and LGBTQ+. I congratulate all those who were promoted and wish them every success as they continue their career with the firm."

Each of Hogan Lovells' practice groups is represented in the 2022 partner promotions:

10 in Corporate & Finance (including in Capital Markets, Mergers & Acquisitions, Business Restructuring and Insolvency, and Real Estate)

7 in Global Regulatory & IPMT (including in Strategic Operations, Agreements & Regulation, Public Procurement and Education, Medical Device and Technology, Pharmaceuticals and Biotechnology, Antitrust, Competition and Economic Regulation, and Intellectual Property, Media & Technology)

10 in Litigation, Arbitration & Employment (including in Litigation, International Arbitration, Employment, and Investigations, White Collar and Fraud)

The additions to the partnership are a reflection of the firm's global legal practice. The new partners include:

12 in the Americas, spread across our Washington, D.C., New York, Philadelphia, Denver and Mexico City offices

14 in Europe, the Middle East & Africa, spread across our Birmingham, London, Munich, Hamburg, Paris, Madrid and Brussels offices

One in Asia-Pacific, in Hong Kong

44% women, 11% racial and ethnic minority and 5% LGBTQ+

In addition to the 27 new partners, 71 of our lawyers have been promoted to counsel.

For additional information visit www.hoganlovells.com

NAUTADUTILH STRENGTHENS CORPORATE M&A TEAM WITH THE ARRIVAL OF CHRISTOPHE WATHION AS COUNSEL

BRUSSELS, 14 January, 2022: Christophe Wathion joins NautaDutilh as counsel in the Corporate & Finance practice.

Christophe has practised corporate and commercial law for 12 years. He focuses in particular on Benelux and cross-border mergers and acquisitions for both financial and corporate clients. In this context he coordinates due diligence, negotiates and drafts share and asset deal documentation, and deals with post-closing issues.

Christophe has in-depth knowledge of corporate and commercial law and is known for providing business-oriented advice. He has experience assisting numerous Belgian and international clients with the setting-up (re)structuring and running of their corporate and commercial affairs.

He is also a passionate litigator and advises clients on a wide range of litigation-related matters, including national and international recovery issues and contractual and commercial disputes.

Didier De Vliegher, head of the Corporate & Finance practice at NautaDutilh Brussels: "We carefully scanned the market for talented M&A lawyers to assist with our increased workload. We identified Christophe as a top-notch lawyer, in particular due to his experience handling complex M&A transactions and his pragmatic, business-oriented approach. We look forward to working with Christophe to further bolster the strong position of our Corporate & Finance practice".

For additional information visit www.nautadutilh.com

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

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

Visit us online for full coverage
http://www.prac.org/member_publications.php

ALLENDE BREA

ASSISTS IN THE INITIAL PUBLIC OFFERING OF MINEROS SA ON THE TORONTO STOCK EXCHANGE

BUENOS AIRES, 19 November 2021: Mineros S.A. (TSX: MSA; MINEROS:CB), a Latin American gold mining company headquartered in Medellin, Colombia became the first Latin American company to directly list its common shares on the Toronto Stock Exchange ("TSX"). Mineros announced the closing of its previously announced initial public offering (the "Canadian Offering") in Canada, and its over-subscribed concurrent public offering in Colombia (the "Colombian Offering"). Pursuant to the Canadian Offering, Mineros issued 22,222,223 common shares of the Company ("Common Shares") at a price of US$0.90 (being C$1.1207) per Common Share (the "Offering Price") for total gross proceeds of approximately US$20 million (being approximately C$24.9 million). Pursuant to the Colombian Offering, Mineros issued 12,777,777 Common Shares at the Offering Price, including 1,666,666 Common Shares following the exercise in full by the Colombian underwriter of its over-allotment option, for total gross proceeds of approximately US$11.5 million.

The Canadian Offering was led by Scotiabank and Sprott Capital Partners LP as co-lead underwriters and joint bookrunners (together, the "Underwriters").

Allende & Brea, together with Fasken Martineau DuMoulin, trough a team lead by Allende & Brea Partner Florencia Heredia and associates Agostina L. Martinez and Valentina Surraco Urtubey, assisted the Underwriters in relation to the Argentine aspects of the Mineros' asset in Argentina (the Gualcamayo mine located in the province of San Juan, Argentina).

https://mineros.com.co/en/Bulletins/artmid/435/articleid/1674

https://www.bloomberg.com/press-releases/2021-11-19/mineros-begins-trading-on-the-toronto-stock-exchange-closes-20m-initial-public-offering-in-canada-and-11-5m-offering-in

https://www.mondaq.com/pressrelease/81084/mineros-sa-becomes-first-latin-american-company-to-list-shares-on-tsx-closes-canadian-ipo-and-concurrent-colombian-public-offering?navCountryId=/2/all-regions/Nigeria

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

ARIAS

ADVISES TELEFONICA IN THE SALE OF ITS OPERATIONS IN EL SALVADOR

EL SAVADOR, OCTOBER, 2021: Arias advised Telefónica, S.A., TLK Investments, C.V. and Telefónica Centroamérica Inversiones, S.L., as selling companies, in the signing of the share purchase agreement regarding the sale of 100% of its interest in the operations in El Salvador in favor of General International Telcom Limited, a sale valued at 144 million dollars. The closing of the sale is subject to the authorizations of the corresponding regulatory authorities.

Arias' participation consisted in providing advice regarding the applicable legal and regulatory aspects required to carry out the sale, support in the due diligence stage, support in the drafting of the transaction documentation which was governed by New York law, among others. The teams were made up of professionals from various practice areas (corporate, Mergers and Acquisitions, regulatory, intellectual property, competition and taxes) to efficiently meet the needs of this transaction. Arias will continue to advise Telefónica in the authorization process before the Competition regulator, and if applicable, in the closing of the transaction.

Telefónica's subsidiary, Telefónica Centroamérica Inversiones, S.L. A company owned, directly and indirectly, 60% by Telefónica and 40% by Corporación Multi Inversiones (through its vehicle TLK Investments, C.V.), has reached an agreement with General International Telecom Limited, for the sale of its interest in the company of Telefónica Móviles el Salvador, S.A. de C.V. (hereinafter, "Telefónica El Salvador") . On the buyer's side, the transaction has been structured by affiliates of Grupo Atlántida, entities that financially support the acquisition.

Telefónica El Salvador's transaction price is 144 million US dollars (approximately 125 million euros at the current exchange rate), an implicit multiple of approximately 7 times the company's 2020 OIBDA.

This operation is part of the asset portfolio management policy of the Telefónica group, based on a strategy for creating value and optimizing return on capital.

The legal team of the sellers was made up of internal attorneys from Telefónica, Latham & Watkins as external advisers in New York and Arias as external advisers in El Salvador.

Arias is proud to advise its clients on this type of transactions through its multidisciplinary team.

We thank our clients, Telefónica, S.A., TLK Investments, C.V. and Telefónica Centroamérica Inversiones, S.L., for trusting our firm to carry out this transaction. This project began in 2019 and we have advised them in the Central American countries in each step of their strategy. We congratulate everyone involved!

The participating Arias team is:

EL SALVADOR Lead Attorneys: Lilian Arias and Roberta Gallardo, M&A; PARTNERS: Mario Lozano, Corporate;
Luis Barahona, Taxes; Fernando Montano, Competition; Morena Zavaleta, Intellectual Property; ASSOCIATES: Ernesto Sanchez; Julissa Castro; Rolando Alvarenga

In collaboration with: Francisco Zuluaga, Associate (Arias Guatemala); and Diana Fonseca, Associate (Arias Nicaragua)

For additional information visit www.ariaslaw.com

BENNETT JONES

CP SHAREHOLDERS OVERWHELMINGLY SUPPORT PROPOSED CP-KCS MERGER AGREEMENT

TORONTO, 08 December 2021: Canadian Pacific Railway (CP) has announced that its shareholders voted overwhelmingly in favour of the issuance of CP common shares to Kansas City Southern (KCS) common stockholders in connection with the proposed CP-KCS combination.

CP and KCS entered into the historic US$31-billion merger on September 15, 2021, which will create the first single-line rail network linking the United States, Mexico and Canada.

Bennett Jones advised CP on Canadian M&A, corporate/securities, tax, finance, employment and competition/antitrust matters. The deal team was led by Jeff Kerbel (corporate/securities) and includes: Harinder Basra, Brent Kraus, Eric Chernin and Annie Tonken (corporate/securities); Scott Bodie, Anu Nijhawan and Jared Mackey (tax); Karen Dawson and Mark Powell (finance); Carl Cunningham employment); Melanie Aitken, Robert Staley and Adam Kalbfleisch (competition/antitrust).

Bennett Jones' public and private M&A practice spans all industries, and particularly those that drive the Canadian economy.

For additional information visit www.bennettjones.com

CAREY

ASSISTS BANCO DE CHILE ISSUE US$500 MILION IN FIRST OFFERING

SANTIAGO, 07 January 2022: Carey in Santiago have helped Banco de Chile issue US$500 million in its first offering under its US$3 billion medium-term note programme in an offering that closed last month. The notes have a 2.99% interest rate and mature in 2031.

Banco de Chile is one of the Andean country's largest financial institutions, with 45 trillion pesos (US$53 billion) worth of assets.

Counsel to Banco de Chile: Carey Partners Diego Peralta and Fernando Noriega, and associates Diego Ibarrola and Fernanda Valdés in Santiago; Shearman & Sterling LLP NYC

Counsel to Bank of America Securities, Citigroup Global Markets, Goldman Sachs & Co and JP Morgan Securities: Linklaters; Garrigues (Chile)

For additional information visit www.carey.cl

GIDE

COUNSEL TO EGIS PARTENAIRES ON TIKEHAU CAPITAL ACQUIRING A STAKE IN EGIS

PARIS, 11 January, 2022: Egis group, Caisse des dépôts and Tikehau Capital have announced the finalisation of the acquisition by Tikehau Capital of a 40% stake in the share capital of Egis. Caisse des Dépôts retains a 34% stake, alongside Egis' executive partners and employees (Egis Partenaires), who now own around 21% of Egis.

The arrival of Tikehau Capital is a significant step in the Egis group strategy, which focuses mainly on international growth and aims to position Egis group as the world-leading engineering company.

Egis group specialises in engineering, construction and mobility services. It creates and operates smart buildings and infrastructure that can meet the challenges of the climate emergency and the major trials of our time, through more balanced, sustainable and resilient land use.

As part of this transaction, Gide advised the executive partners and employees of Egis group, now brought together under entity Egis Partenaires.

Gide's team was headed by partners Jean-François Louit and Caroline Lan, working with associates Franciane Rondet and Léa Levesque on corporate aspects; and partner Paul de France and associate Charles Ghuysen on tax aspects.

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.

“We are pleased to advise the ad hoc committee in successfully navigating a path out of the turbulence caused by the COVID-19 pandemic” said Mr Leitch. “Our involvement for the ad hoc committee attests to our experience and capabilities in acting as trusted legal counsel to sophisticated investors on their complex, cross border financial restructuring transactions in Asia”.

For additional information visit www.hoganlovells.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


2019 PRAC
COSTA RICA


PACIFIC RIM
ADVISORY COUNCIL

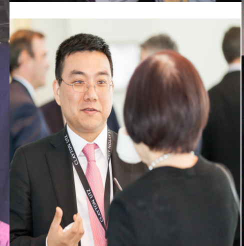

PRAC @ SAO PAULO
PACIFIC RIM
ADVISORY COUNCIL


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.

The National Administration of Medicines, Food and Medical Technology Authorized the Registration of Cosmetic Products, Personal Hygiene Products and Perfumes containing extracts and natural oils of the Cannabis Sativa L. plant.

Practice Areas:

Life Sciences

Lawyers:

Fernando Martínez Zuviría, María Morena Del Río

On November 16, 2021, Provision No. 8504/2021 of the National Administration of Medicines, Food and Medical Technology (ANMAT) was published, which establishes that products that fall under the definition of Cosmetic Products, Personal Hygiene Products and Perfumes according to the Resolution of the (former) Ministry of Health and Social Action No. 155/98, and that contain the cannabinoid called pure Cannabidiol (CBD) of natural origin or CBD present in extracts and natural oils of certain parts of the Cannabis sativa L. plant, with no more than 0.2% w/w of THC, may be registered as Cosmetic Products, Personal Hygiene Products and Perfumes under the classification Grade 2, according to the provisions of ANMAT Provision No. 345/06.

Products covered by ANMAT Provision No. 8504/2021

The products covered are those that fall under the definition of Cosmetic Products, Personal Hygiene Products and Perfumes according to Resolution of the (former) Ministry of Health and Social Action No. 155/98, and that may contain as ingredient pure Cannabidiol (CBD) exclusively of natural origin, its isomers, acids, salts and salts of isomers, or CBD present in extracts and natural oils of certain parts of the Cannabis sativa L. plant, provided that the THC content does not exceed 0.2 % w/w.

Documentation required for the registration of the products referred to in ANMAT Provision No. 8504/2021.

For the registration of the products the following documentation must be submitted:

Authorization of the supplier of the raw material issued by the competent authority of the country of origin for the production and/or commercialization of ingredients derived from cannabis.
Certificate of analysis of the supplier of the aforementioned ingredients that includes the determination of THC. The THC determination must consider the potential to convert ATHC to THC.
Validated quality control methods.
Local certificate of analysis of the raw material issued by the manufacturer of the finished product that includes THC determination. The THC determination must consider the potential to convert ATHC to THC. In case of outsourcing the determination of THC in raw material, the certificate of analysis must be issued by a laboratory of official agencies or entities.
Note in the form of a sworn statement on the irrecoverability of the traces of THC in the final product.
Declaration of compliance with the "Safety Evaluation" established by ANMAT Provision No. 2196/2019.

Product Labeling

The labeling of the products shall be governed by ANMAT Provision No. 374/06 and its amendments and shall not mention the percentage of CBD ingredient that composes the formulation, nor therapeutic properties attributable to the product. Likewise, the labeling must contain the following warnings: "Do not ingest, for topical use only", "Cosmetic product, not suitable for medicinal use", "Exclusive use in adults", "Not recommended for use during pregnancy or breastfeeding", "Do not apply on wounds or where the skin is not intact".

Imports of products and raw materials

Applications for import authorization of finished products and bulk, as well as applications for certificates of free sale and export testimonials of finished products with CBD of natural origin with no more than 0.2% w/w of THC, will be made with the intervention of the ANMAT's Directorate of Evaluation and Management of Monitoring of Health Products.

Requests for import of raw material, of the CBD component with traces of less than 0.2% w/w of THC, will be made with the intervention of the foreign trade area of the National Institute of Medicines (INAME).

Advertising of products

All advertising of the products shall strictly comply with the provisions of the product registration under the terms of Resolution (ex) MS and AS) No. 155/98 and shall be governed by the provisions of Annexes I and V of ANMAT Provision No. 4980/2005.

Likewise, advertising must include the legend "Cosmetic product containing CBD cannabinoid. Not suitable for medicinal use or ingestion" and shall not be directed and/or starred by minors, pregnant women and/or nursing mothers.

TSX Venture Exchange Updates Security-Based Compensation Policies

Written by John E. Piasta, Jon C. Truswell, Andrew N. Disipio and Eric Wiebe

On November 24, 2021, the TSX Venture Exchange (the Exchange) revised its policies regarding security-based compensation. Specifically, Policy 4.4 — *Incentive Stock Options* (the Former Policy) has been replaced by new Policy 4.4 — *Security Based Compensation* (the New Policy). The New Policy, which takes effect immediately, represents a significant change to the Former Policy, providing greater flexibility for Exchange-listed issuers insofar as the New Policy:

a. covers a wider variety of incentive securities, rather than only stock options;

b. provides greater flexibility in structuring security-based compensation plans;

c. permits the exercise of stock options on a cashless and net exercise basis; and

d. codifies certain pre-existing, unwritten rules of the Exchange governing security-based compensation plans and grants.

New Types of Incentive Securities Issuable Under Security-Based Compensation Plans

The Former Policy only covered stock options, whereas the New Policy expands the incentive securities issuable under security-based compensation plans of Exchange-listed issuers beyond stock options to include deferred share units, performance share units, restricted share units and stock appreciation rights (collectively, Incentive Securities).

In many instances, grants of Incentive Securities under the New Policy are subject to many of the same rules and procedures as compared to grants of stock options under the Former Policy. There are, however, some important distinctions. For example, the New Policy provides that Incentive Securities may not vest for a period of at least one year from the date of grant or issuance, subject to acceleration in limited circumstances, whereas the Former Policy did not contain any such vesting condition. In addition, under the New Policy, persons providing investor relations services may only be granted stock options and the grant of stock options to these persons must vest in stages over a period of not less than 12 months, whereas the Former Policy did not contain include such a restriction.

It should be noted that capital pool companies and issuers listed on the NEX may only grant stock options and no other types of security-based compensation.

New Categories of Security-Based Compensation Plans

The New Policy provides for four categories of permitted security-based compensation plans (an issuer must choose one category):

a. a "Rolling Plan" under which the number of listed shares of the issuer that are issuable pursuant to all security-based compensation plan(s) in aggregate is equal to up to a maximum of 10% of the issued shares of the issuer as at the date of grant or issuance of any security-based compensation under any of such security-based compensation plan(s);

b. a “Fixed Plan” under which the number of listed shares of the issuer that are issuable pursuant to all security-based compensation plan(s) in aggregate is a fixed specified number of listed shares of the issuer up to a maximum of 20% of the issued shares of the issuer as at the date of implementation of the most recent of such security-based compensation plan(s) by the issuer;

c. a "Hybrid Plan" consisting of a rolling stock option plan up to 10% and other fixed up to 10%, under which the number of listed shares of the issuer that are issuable pursuant to the exercise of stock options is equal to up to a maximum of 10% of the issued shares of the issuer as at the date of any stock option grant, and “fixed” security-based compensation plan(s) (other than stock option plans) under which the number of listed shares of the issuer that are issuable pursuant to all such security-based compensation plan(s) (other than stock option plans) in aggregate is a fixed specified number of listed shares of the issuer up to a maximum of 10% of the issued shares of the issuer as at the date of implementation of the most recent of security-based compensation plan(s) (other than stock option plans) by the issuer; and

d. a "Fixed Stock Option up to 10% Plan" under which the number of listed shares of the issuer that are issuable pursuant to the exercise of stock options is a fixed specified number of listed shares of the issuer up to a maximum of 10% of the issued shares of the issuer as at the date of implementation of the stock option plan by the issuer.

The Former Policy permitted only two "types" of stock option plans, being the Rolling Plan and Fixed Plan. While these types of plans remain available to issuers, both have been expanded to permit the issuance of the Incentive Securities. Moreover, the Hybrid Plan is a new category, designed to provide additional flexibility to issuers in meeting their compensation needs. Meanwhile, the Fixed Stock Option up to 10% Plan, is effectively a subset of the Fixed Plan in that it permits a fixed number up to 10% only, and it is further limited to stock options only (and no other types of Incentive Securities).

Shareholder Approval

Issuers must obtain shareholder approval for the implementation of all security-based compensation plans described above with the exception of the Fixed Stock Option up to 10% Plan.

While the Fixed Stock Option up to 10% Plan may be implemented without shareholder approval, it is subject to certain requirements, including that it does not permit the net exercise of stock options and that the number of listed shares issuable under the Fixed Stock Option up to 10% Plan not be increased more than once in a 24 month period.

Any amendments to an implemented security-based compensation plan, including when the number of shares issuable under the security-based compensation plan is modified, also requires shareholder approval.

The New Policy also requires shareholder approval on annual basis for the Rolling Plan and the rolling portion of the Hybrid Plan.

Other Changes

Net Exercise/Cashless Exercise

Under the Former Policy, the exercise price of a stock option was required to be paid in cash. By contrast, the New Policy permits stock options to be exercised on a "net exercise" basis, where there is no cash payment to the issuer and the participant receives shares based on a formula using the five-day volume weighted average trading price of the underlying shares. The New Policy also expressly permits "cashless exercise" where a brokerage firm facilitates the exercise of a stock option, and the issuer still receives the exercise price of the stock option in cash.

Security-Based Compensation Outside of a Security-Based Compensation Plan

The New Policy permits the Exchange to consider, in certain specified circumstances, an application of an issuer to grant or issue security-based compensation outside of a security-based compensation plan, for example where:

a. **Securities for Services**: Under the New Policy and Exchange Policy 4.3 — *Shares for Debt*, an agreement by the issuer to compensate a person by way of securities for services is subject to a number of requirements imposed by the Exchange. For example, if the person providing the services is a non-arm's length party to the issuer or to any of its affiliates, the New Policy stipulates that only listed shares may be issued. Moreover, the New Policy states that such securities cannot be issued for investor relations, promotional or market making activities;

b. **Compensation Owed to Non-Arm's Length Parties**: Under Policy 4.3, an agreement by the issuer to settle outstanding debt for securities is subject to a number of requirements imposed by the Exchange. In particular, Policy 4.3 states that the Exchange may deny acceptance of any shares for debt transaction if the debt relates to management fees of more than $2,500 per month. Under the New Policy, the Exchange increased this limit to $5,000 per month per person and $10,000 per month in aggregate per issuer. Only listed shares may be issued under Policy 4.3;

c. **One Time Payments as Inducement or Severance**: The New Policy permits issuers to issue listed shares as an inducement or as severance without shareholder approval provided that the maximum number of listed shares that an issuer may issue is limited to:
   i. 1% of the issued shares for any particular issuance;
   ii. 1% of the issued shares to any one person in any 12-month period; and
   iii. 2% of the issued shares to all persons in aggregate in any 12-month period.

d. **Loans**: Where an issuer wishes to lend funds to a person for the purpose of acquiring securities of the issuer, such loan must first be approved by the shareholders of the issuer.

It is important to note that, any such grant or issuance of security-based compensation outside of a security-based compensation plan, unless otherwise provided (such as *One Time Payments as Inducement or Severance* as noted above), will be subject to shareholder approval, which may be obtained at a meeting or by written consent.

Form 4G

The former Form 4G has been expanded to address the additional types of security-based compensation that issuers may issue, and to include "snapshot" summaries of outstanding security-based compensation plans and outstanding security-based compensation. It now also includes the former Form 4F as its Schedule "A". Further, the new Form 4G is now simply a reporting form and it will no longer be used to apply to the Exchange for its acceptance of a proposed amendment to security-based compensation (rather, a letter application will be required in relation to the latter).

The Form 4F certification and undertaking required from an issuer granting an incentive stock option has been repealed, as the new Form 4G includes the substantive contents of Form 4F.

Transition Provisions

The New Policy is effective as of November 24, 2021. The New Policy permits security-based compensation plans filed with the Exchange prior to November 24, 2021 (a Legacy Security-Based Compensation Plan) and all security-based compensation granted, issued or amended before or after November 24, 2021 pursuant to such Legacy Security-Based Compensation Plans, to remain in force in accordance with their existing terms. However, any Legacy Security-Based Compensation Plan that is to be placed before shareholders for approval and any other security-based compensation plan that is implemented or amended after November 23, 2021, must comply with the New Policy. Any security-based compensation that is granted, issued or amended after November 23, 2021, other than pursuant to Legacy Security-Based Compensation Plans must comply with the New Policy.

If you have any questions regarding changes to the TSX Venture Exchange's security-based compensation policies, please contact a member of the Bennett Jones Capital Markets group.

Authors

John E. Piasta
403.298.3333
piastaj@bennettjones.com

Jon C. Truswell
403.298.3097
truswellj@bennettjones.com

Andrew N. Disipio
416.777.5034
disipioa@bennettjones.com

Eric Wiebe
403.298.3391
wiebee@bennettjones.com

Posted on: December 15, 2021

SUPREME COURT OF CANADA CLARIFIES TORT LIABILITY EXPOSURE FOR PUBLIC AUTHORITIES

By: Ryan Shaw

In a recent landmark decision, the Supreme Court of Canada ("SCC") clarified when public authorities will be exposed to tort liability in relation to decisions which result in injury to the public. The SCC unanimously ruled in *Nelson (City) v Marchi*, 2021 SCC 41 (*Marchi)* that municipalities will not be granted immunity when facing allegations of negligence unless the impugned act or failure to act was a core policy decision which falls within a new framework outlined by the SCC. The new framework for determining when core policy immunity arises will have a far-reaching impact for underwriters of public authorities and those in the industry who deal with claims involving public authorities.

THE FACTS

In response to heavy snowfall on January 4 – 5, 2015, the City of Nelson (the "City") plowed and sanded the streets. One of the tasks completed was to clear snow in angled parking stalls in the downtown core by plowing the snow to the top of the parking spaces, creating a snowbank along the curb that separated the parking stalls from the sidewalk. Having created the snowbank, the City did not clear an access route to the sidewalk for drivers parking in the stalls. On the evening of January 6th, Ms. Marchi parked in one of the angled parking stalls. She decided to cross the snowbank to access a business and while doing so seriously injured her leg. She sued the City for negligence and the parties agreed that she suffered $1 million in damages.

Since 2000, the City had relied on a written document called "Streets and Sidewalks Snow Clearing and Removal" (Policy). Broadly, the Policy stated that snow removal, sanding, and plowing would be carried out "on a priority schedule to best serve the public and accommodate emergency equipment within budget guidelines". The Policy set out priorities for various types of routes and specific guidelines for the timing and manner of snow plowing. The Policy did not specifically mention clearing parking stalls or creating snowbanks. The City also had several unwritten practices concerning the timing and manner of snow plowing and clearing that did not specifically mention parking stalls or creating snowbanks. Throughout the snowfall in question, the City's public works supervisor followed the Policy and made decisions about how many employees should be on snow removal shifts. Her evidence was that all streets in the City were first cleared of snow, and snowbanks were only removed after all snow plowing was complete.

THE RULINGS

The trial judge held that the City did not owe Ms. Marchi a duty of care because its snow removal decisions were core policy decisions and thus were immune to tort claims. Alternatively, the trial judge found that the City did not breach the standard of care because the snowbank did not pose an objectively unreasonable risk of harm — the City did what was reasonable in the circumstances.

The Court of Appeal unanimously allowed the appeal and ordered a new trial. On tort immunity, it held that the trial judge did not properly engage with the distinction between government policy and operation, simply accepting the City's submission that all snow removal decisions were core policy decisions. The Court of Appeal also found errors in the trial judge's analysis on standard of care and causation that required a new trial.

The SCC had to decide three issues: (a) whether the trial judge erred in concluding that the City did not owe Ms. Marchi a duty of care because its snow removal decisions were core policy decisions immune from negligence liability; (b) whether the trial judge erred in his standard of care analysis; and (c) whether the trial judge erred in his causation analysis.

The SCC's ruling on the first issue was the most significant as it outlined four factors to assess in determining whether the nature of a government's decision is core policy or operational: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria.

Applying the four factors, the SCC determined that the City's decisions in how and when to plow its roads of snow bore none of the hallmarks of core policy. The extent to which the City supervisor was closely connected to a democratically-elected official was not clear, but the evidence showed she did not have the authority to make a different decision with respect to the clearing of parking stalls. In addition, there was no suggestion that the method of plowing the parking stalls resulted from a deliberative decision involving any prospective balancing of competing objectives and policy goals by the supervisor or her superiors. There was no evidence suggesting an assessment was ever made about the feasibility of clearing pathways in the snowbanks; the City's evidence was that this was a matter of custom. Although it was clear that budgetary considerations were involved, these were not high-level budgetary considerations but rather the day-to-day budgetary considerations of individual employees. Finally, the City's chosen method of plowing the parking stalls could easily be assessed based on objective criteria. In the result, the SCC determined that the City's impugned decision was not protected by policy immunity and thus a duty of care was imposed. The Court agreed with the Court of Appeal that errors in the trial judge's analysis of the standard of care and causation could only be resolved in a new trial.

PRACTICAL CONSIDERATIONS

Marchi will impact indemnitors, brokers and claims handlers that work with claims or potential claims involving public authorities.

In all such claims, the nature of the decision must be carefully scrutinized on a case-by-case basis to determine whether the decision qualifies as a core policy decision; the more involved elected or high-ranking officials are in creating the protocols and procedures that are implemented and followed within the authority, the more likely their decisions will attract core policy immunity. Insurers must carefully evaluate how much discretion and decision-making authority is up to individual employees implementing municipal policies and public authorities should attempt to narrow that discretion as much as possible to limit their liability exposure. As usual, evidence is key in evaluating whether a core policy immunity defence has a genuine likelihood of success based on the new factors and framework identified in *Marchi.*

Should you have any questions about this article, contact Insurance Lawyer, Ryan Shaw at rshaw@rbs.ca.

Chilean Financial Market Commission opens public consultation on authorization of existence of Special Stock Corporations and initiation of operations of General Fund Managers

January 12, 2022

On January 3rd, 2022, the Chilean Financial Market Commission (**FMC**) opened a public consultation process (the "**Regulatory Proposal**") on new regulations regarding the procedure to authorize the existence of certain special stock corporations (**SSCs**) and to authorize the commencement of operations of general fund managers (**GFMs**).

The Regulatory Proposal is addressed to *(I)* entities that are required to be incorporated as a special stock corporation, subject to FMC oversight, that currently do not have regulations governing this matter (i.e., entities that are not banks, issuers of non-banking payment cards, payment card operators, managers of clearing and settlement systems for financial instrument and insurance companies, for which regulations on the authorization of existence are already in place) and *(II)* GFMs, which, pursuant to the provisions of Law No. 20,712, may only initiate operations upon providing satisfactory evidence to the FMC that they meet the applicable legal requirements and that they have the policies, procedures and controls required by a general rule.

The public consultation process will be open until January 28th, 2022 and the text of the Regulatory Proposal can be found at the following **link.**

I. Application for the authorization of existence of SSCs

The Regulatory Proposal establishes that the request for authorization of existence of SSCs subject to FMC supervision must be submitted by one of the future partners of the identification data of those individuals and their participation (as a percentage) in the capital stock of the SSC.

3. With respect to legal entities directly participating in the incorporation of the SSC, the applicant shall provide identification data of such entities, including the identification of representatives, copy of the public deed of incorporation, certificate of good standing and marginal annotations, and the relevant powers of attorney.
4. With respect to the individuals that will act as provisional or permanent directors of the SSC, and those who will perform the functions referred to in Article 50 of Law No. 18,046, a sworn statement signed by the relevant person that he/she is not under any of the inabilities set forth in Articles 35 and 36 of Law No. 18,046 or, in the case of stock exchanges, in Article 46 of Law No. 18,045.
5. Information on whether any of the foregoing individuals have been accused of or have been convicted for the conducts and/or crimes indicated in the Regulatory Proposal or are subject to liquidation proceedings in Chile or have been declared bankrupt abroad, identifying the person and circumstance.
6. Description of the ownership structure of the corporate group to which the SSC will belong, indicating the main businesses carried out by the companies of that group and, if applicable, a brief description of the company that originated the SCC (in case it is the result of a merger, spin-off or transformation).
7. Summary of the strategic plan and business plan of the SSC, indicating expected revenues and expenses, main lines of business, and organization chart with a description of the main functions of its areas.
8. Documents evidencing that the partners have the necessary liquidity to satisfy their committed capital contributions and comply with the minimum capital requirements of the SSC as provided by law.

Further information on each of the documents and other information that must be submitted with the application is contained in the Regulatory Proposal.

The Regulatory Proposal also regulates the ongoing requirement of communicating to the FMC any modification to the information submitted as part of the application process, regardless of whether such modification takes place during the authorization process or after the authorization has been granted, which must be satisfied through the FMC's Online Information Delivery System (*Sistema de Envío de Información en Línea* – SEIL).

Finally, as indicated in the Regulatory Proposal, the regulations on the process of requesting authorization of the existence of SSCs will enter into force as from the date of its enactment and will not be applicable to requests for authorization of existence internal regulations of any mutual or investment fund, they must submit a request to the FMC, together with the following information:

1. Outline containing the organizational and functional structure, with a brief description of the functions of each unit and identification of the committees that support the management of the GFM and of the persons or units in charge of the risk management, internal audit and compliance functions.
2. Security and information management policies.
3. Risk management and internal control handbook.
4. Handbook for the prevention of money laundering, bribery, or financing of terrorism.
5. Document containing a brief description of the main information or support systems for the GFM's relevant processes, including those for information security.
6. Risk matrix of the entity, divided according to the business cycles contemplated in Section III of Circular No. 1,869 of 2008, indicating the probability of materialization of risks and estimated impact before and after the strategic responses adopted by the entity.
7. Identification of the areas or services to be outsourced, indicating the counterparties in case the respective contracts have been entered into and the safeguards adopted to ensure that such outsourcing does not affect the normal operation of the GFM or the protection of client information, and does not generate circumstances that may result in an inadequate resolution of conflicts of interest.
8. Business Continuity Plan.

More information on each of the documents and other information that must be submitted with the application may be found in the Regulatory Proposal.

Finally, as indicated in the Regulatory Proposal, the regulations on the application for commencement of operations of GFMs will enter in force as of the date of its enactment.

AUTHORS: Diego Peralta, Fernando Noriega, Fernanda Valdés.

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

BACK

Preliminary Analysis of the Measures for Cybersecurity Review

Authors: Han Kun Law Offices Kevin DUAN | Kemeng CAI | Minzhe HU
Han Kun's Hong Kong Associated Law Firm Charles WU

On January 4, 2022, 13 ministries and commissions, including the Cyberspace Administration of China ("**CAC**") and the China Securities Regulatory Commission ("**CSRC**"), jointly promulgated the Final Measures for Cybersecurity Review (the "**Final Measures**"). The Final Measures are binding and will become effective on February 15, 2022. Overall, the Final Measures follow the basic regulatory framework set out in the Measures for Cybersecurity Review (Revised Draft for Comments) (the "**Draft Measures**") promulgated by such 13 ministries and commissions on July 10, 2021 (for our previous analysis on the Draft Measures, please click *here*). The Final Measures do contain, however, a few key revisions compared to the Draft Measures. This newsletter will briefly analyze these new revisions. We have also attached a comparison between the Final Measures and the Draft Measures for your reference.

The continued use of "listing in a foreign country", which may indicate regulatory intention to exclude operators listing in Hong Kong from the obligation of applying for a mandatory cybersecurity review

The concept of "listing in a foreign country" is retained in the Final Measures, though not further clarified. However, whereas the Regulations on Network Data Security Management (Draft for Comment) issued by CAC on November 14, 2021 (the "**Draft Regulations**") makes a distinction between the standards for a mandatory cybersecurity review for "listing in Hong Kong" and a "listing in a foreign country", the fact that the Final Measures apply the obligation for a mandatory cybersecurity review only to "listing in a foreign country" seems to indicate that the Final Measures intend to exclude Hong Kong listings altogether from mandatory cybersecurity reviews, though this interpretation has yet to be confirmed by regulators in practice. In addition, the Final Measures, prior measures and the Draft Measures all grant regulators the right to initiate cybersecurity reviews ex officio. Therefore, in practice, companies intending to list in Hong Kong may want to voluntarily apply for a cybersecurity review as a precautionary measure if they engage in a substantial amount of sensitive data processing activities. As with the Draft Measures, the Final Measures require CAC to respond within ten business days following the receipt of an application for cybersecurity review on whether there is a need for such review.

Like the Draft Measures, the Final Measures do not specify their scope based on the method of listing. The Final Measures only state that they apply to "application materials for listing such as an IPO". However, we are still inclined to believe that aside from traditional IPOs, Chinese companies proposing to list in the U.S. via SPACs (Special Purpose Acquisition Companies), RTO (Reverse Takeovers), direct listings and other methods should proactively apply for a cybersecurity review.

Entities subject to cybersecurity reviews when listing in a foreign country changed to "online platform operators"

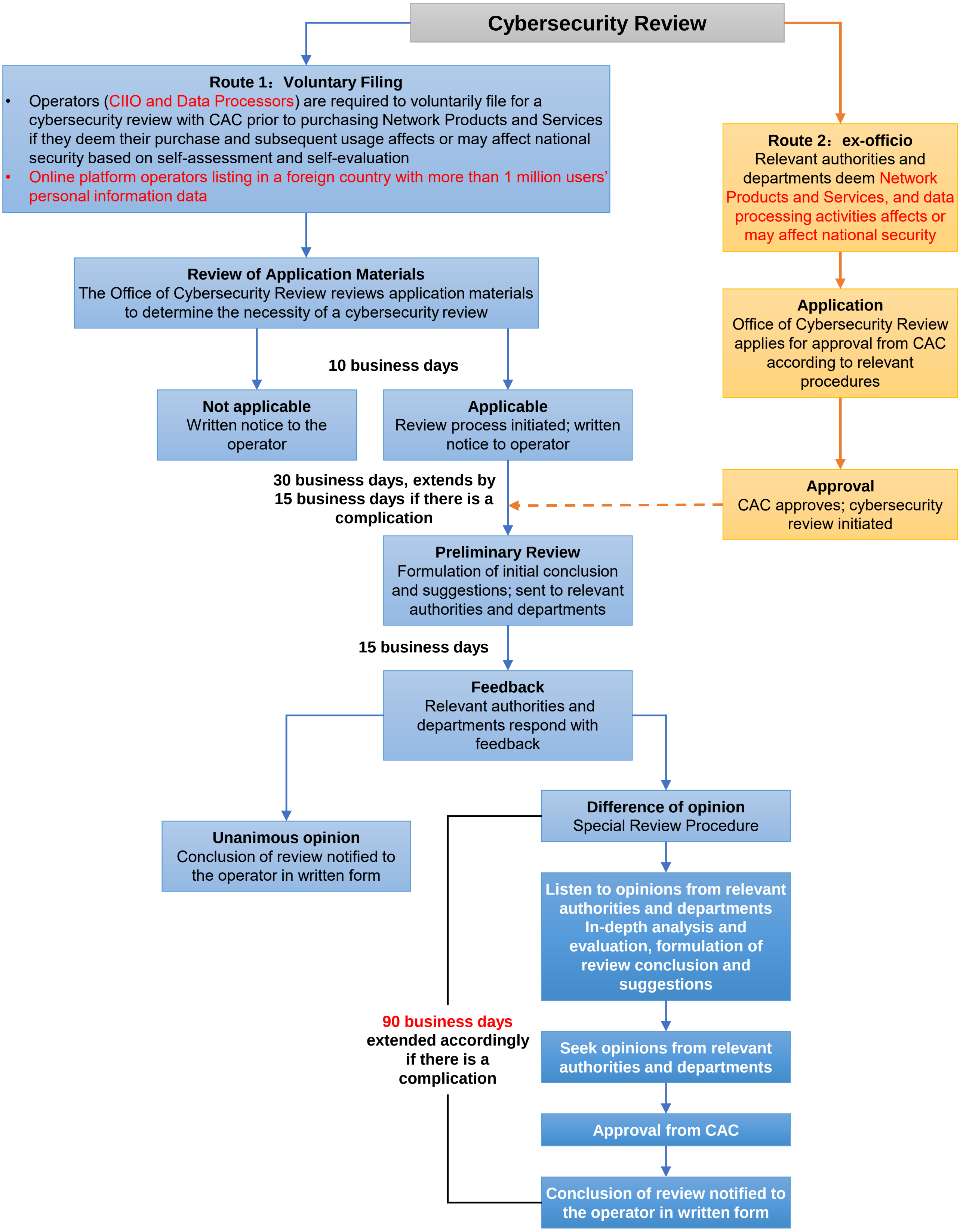
The Final Measures stipulate that "online platform operators listing in a foreign country with more than one million users' personal information data must apply for a cybersecurity review with the Cybersecurity Review Office." This provision continues to follow the jurisdictional (i.e. "listing in a foreign country") and quantitative (i.e. one million users) cybersecurity review thresholds set out by the Draft Measures. However, entities subject to cybersecurity reviews have changed from "data processors" to "online platform operators". The Final Measures do not define "online platform operator", but the Draft Regulations defined it as "data processors who provide Internet platform services such as information publishing, social networking, transaction, payment, or audio-visual services". Common sense suggests that the scope of "online platform operators" seems narrower than "data processors" previously used and seems to exclude self-operated e-commerce services of fast-moving consumer goods companies that do not provide online platform services. However, the vagueness of "online platform operators" leaves room for interpretation by regulators in practice, who may require all types of operators with "more than one million users' personal information" to proactively apply for cybersecurity reviews.

Timing and potential outcomes of a cybersecurity review

According to a Q&A on the Final Measures, online platform operators possessing personal information of no less than 1 million users are required to apply for a cybersecurity review prior to the submission of their listing application with non-PRC securities regulators. The outcome of the application may include: (i) review not required; (ii) where a review is initiated, the review concludes that the listing does not affect national security and grants clearance for the listing in a foreign country; and (iii) where a review is initiated, the review concludes that the listing does affect national security and the listing in a foreign country is prohibited. Operators with the former two outcomes may continue their listing application with non-PRC securities regulators. However, note that according to the Measures for the Overseas Issuance of Securities and Listing Record-Filings by Domestic Enterprises (Draft for Comments) issued by the CSRC on December 24, 2021, these companies must complete a separate filing procedure (of which clearance from CAC is a part) within 3 business days after the submission of their filing application.

Further extension of the time limit for special review procedures

Taken as a whole, the review process set forth in the Final Measures follows that of the existing measures and the Draft Measures with one exception: where there is disagreement between the members of the cybersecurity review group and the relevant departments, there will be a special review process seeking the opinions of the relevant authorities and the case will be reported to CAC. The time limit for this special review procedure is extended to 90 business days from the 3 months stipulated in the Draft Measures, and this time limit may be extended accordingly to the extent there are complications. The overall review process according to the Final Measures is shown in the figure below.



Risk prevention and mitigation measures should be taken accordingly during the review period

Article 16 of the Final Measures states that "to prevent risks, the party should take risk prevention and mitigation measures during the review period in accordance with cybersecurity review requirements". Past practice suggests that "risk prevention and mitigation measures" may include suspending new-user registrations, suspending app downloads, etc., and may include actions like divesting relevant data assets or even suspending relevant online product services.

Formal launch of review hotlines concurrent with the publication of review application procedures

The Q&A accompanying the release of the Final Measures published the channels through which applications are reviewed and accepted. Namely, "the Cybersecurity Review Office is located within CAC. Specific work will be carried out by the China Cybersecurity Review Technology and Certification Center ("**CCRC**"). Under the guidance and leadership of CAC, CCRC will be responsible for tasks such as accepting and formally reviewing application materials. CCRC has also set up cybersecurity review consultation hotlines." We hope that CAC and the CCRC will publish as soon as possible clearer application guidelines for companies fulfilling their application obligations as soon as possible.

Important Announcement

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

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

Kevin DUAN

Tel: +86 10 8516 4123
Email: kevin.duan@hankunlaw.com

Kemeng CAI

Tel: +86 10 8516 4289
Email: kemeng.cai@hankunlaw.com

Charles WU

Tel: +852 2820 5617
Email: charles.wu@hankunlaw.com

New Regulations on Wastewater Use

MADS issued new provisions related to wastewater use.

December 7th, 2021

The Resolution issued by the MADS stablished the provisions related to the use of wastewater. This Resolution applies to environmental authorities and users, so that water reuse is promoted as a practice to improve efficiency in the use of resources.

This new administrative act defines wastewater as water used or served, of domestic or non-domestic origin, and adds other relevant definitions. It also establishes that any user of the water resource may recirculate its wastewater, without requiring environmental authorization, if it is technically and economically feasible. It also states that obtention of a water collection permit will be necessary to acquire the right to use wastewater as a public good.

According to the Resolution, the Environmental Authority must be kept informed of all technical information of the management and prevention of risks associated with the use of wastewater.

Finally, those applications or modifications of wastewater collection permit that were filed in legal and due form before the entry into force of this Resolution, will continue to be governed by the provisions in force at the time of filing. However, a maximum term of six (6) months is granted so that the applicants may apply the new legal regime.

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

www.bu.com.co

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 -

IMPLEMENTATION OF CUSTOMS SERVICES REASONABLE DOUBT DIGITAL SYSTEM FOR CUSTOMS VALUATION OF GOODS

Dec/2021

On November 29th, 2021, the resolution SAT-IAD-005-201 was published in the Official Gazette, through which the Superintendency of Tax Administration (SAT) through the Intendant of Customs agreed to regulate the guidelines and conditions for the digital use of the Customs Service in relation to the procedures that are carried out through electronic documents that support the process of reasonable doubt in the customs valuation of goods. This process is derived from the right of the Customs Authorities to question, based on their information systems, the veracity of the data or documents presented as proof of the declared value at customs by the importers.

The purpose of the implementation of this new procedure is the acceleration of the value verification through the induction of a new software that will allow users of the customs system to present the information required from them digitally through the new software, to accelerate the dispatch of their merchandise or the additional payment of VAT and duties derived from the verification.

The services that will be implemented to obtain greater efficiency and transparency in the new Reasonable Doubt model are:

a. Access to request related to the process from the Virtual Agency;

b. Possibility of presenting digital proof;

c. Digital accessibility to consultations and traceability of the process; and

d. Electronic notifications and notices.

Please notice that through the new system for Customs Reasonable Doubt, the Information Requirements due to Reasonable Doubt will be receive through the email registered with the RTU, after being notified the user will have the option to request:

a. Request for rectification

b. Extend the deadline for the submission of new evidence

c. Record evidence in response to the Information Request

d. Request for release with guarantee

These options can be manage through the new computer system by entering the Virtual Agency; the documents will no longer have to be physically presented to the Customs Authority. Initially this system will only be available for Aduana Express Aéreo.

With this resolution, the Superintendency of Tax Administration (SAT) reinforces its international commitment to modernize and streamline customs operations in Guatemala.

For further information or advice regarding the matter, please contact:

Elisa Lacs, Associate
Elisa.Lacs@ariaslaw.com

Ximena Tercero , Partner
Ximena.Tercero@ariaslaw.com

Hogan Lovells

Unfrozen – Hong Kong court rules "informal freezing" of bank accounts unlawful

7 January 2022

A Hong Kong court has ruled that the longstanding use of "letters of no consent" to freeze bank accounts suspected of harbouring the proceeds of crime, is unlawful. The decision, unless reviewed upon appeal, may mean extra costs and expense for victims of cyber fraud scams, whose only choice now may be to seek urgent injunctive relief through the courts to try to prevent the dissipation of assets. As for banks, they may find themselves more frequently having to exercise their own judgment as to whether to continue an informal freeze, yet having only limited facts on which to base their decision.

A Hong Kong court has ruled that the longstanding use of "letters of no consent" to freeze bank accounts suspected of harbouring the proceeds of crime, is unlawful.

The court in *Tam Sze Leung v Commissioner of Police* [2021] HKCFI 3118 agreed with the applicants that the public had been left under-protected in terms of their "fundamental right to use their own property in the form of funds held in a bank account" through the practice, which had grown up as a means to combat money laundering and facilitate the confiscation of the proceeds of crime.

The decision, unless reviewed upon appeal, may mean extra costs and expense for victims of cyber fraud scams, whose only choice now may be to seek urgent injunctive relief through the courts to try to prevent the dissipation of assets. As for banks, they may find themselves more frequently having to exercise and rely on their own judgment as to whether to continue an informal freeze, yet having only limited facts on which to base their decision.

Unwelcome discovery

The applicants were Hong Kong permanent residents and members of the same family. They held between HK$30 to HK$40 million in accounts held at different banks. In December 2020, the applicants discovered that the accounts had become disabled and they were unable to withdraw funds held in the accounts.

The applicants eventually discovered that four "letters of no consent" (LNCs) had been issued by the police in December 2020 in respect of the accounts, following their suspected involvement for suspected stock market manipulation through a "ramp and dump" scheme that was being investigated by the Securities and Futures Commission.

Notwithstanding that ultimately no charges were laid against the applicants, the LNCs were in place for a period of roughly 10 months before the police obtained formal Restraint Orders over the accounts.

The No Consent Regime

The current "no consent" regime as operated by the police pursuant to their internal guidelines (now public) (Chapter 27-19 of the Force Procedures Manual) (No Consent Regime) relates to the Organized and Serious Crimes Ordinance (Cap. 455) (OSCO).

Section 25 of OSCO provides that it is an offence to deal with property known or is reasonably believed to represent the proceeds of crime. Section 25A requires a person dealing with property to make disclosure to an authorized person if they know or suspect the property to be the proceeds of crime. In addition, section 25A(2)(a) provides a statutory immunity to the dealing offense, where the person concerned has made a disclosure but obtained consent of an authorized officer to deal with the property in question.

Under the No Consent Regime, disclosure under section 25A of OSCO is made by way of Suspicious Transaction Reports (STRs) which, under a practice which has developed over the years, prompts a written response from the police as to whether consent is given to deal with the property in question. If a LNC is issued, the guidelines provide that the police should make "the best endeavour to obtain a restraint or confiscation order as soon as practicable, or, if the property belongs to a victim(s), advise the victim(s) to apply for a civil injunction in respect of the property." LNCs are usually reviewed monthly and should normally last no more than six months from the date of issue unless there are exceptional circumstances.

In the present case, it is noteworthy that prior to being contacted by the police, none of the banks appeared to have had any reason to file an STR in relation to the applicants or the accounts. However "when specifically informed by the Police that the Police suspected unlawful activity, and when the Police at the same time requested the filing of STRs, it seems obvious that the Banks would all have reacted by filing STRs."

Grounds for challenge

The applicants raised six grounds for challenge by way of judicial review:

1. Was the issue of the LNCs tainted by procedural impropriety and unfairness, in that there was a lack of notice, reasons given or opportunity for a fair hearing?
2. The LNCs were *ultra vires* OSCO, which does not confer power on the Commissioner to operate a de facto property freezing regime
3. The LNCs interfered with the applicants' constitutional rights under the Basic Law and Bill of Rights (BOR), including the right to a fair hearing under Article 10 BOR (the "prescribed by law" issue)
4. The LNCs breached the applicants' right to a fair hearing
5. The No Consent Regime and the LNCs disproportionately interfered with the applicants' property rights and rights to privacy and family
6. The decisions to refuse even partial consent to release of funds were unlawful

The court held that grounds 2, 3 and 5 were made out.

Informal freezing regime?

The court specifically considered the Court of Appeal decision in *Interush Ltd v Commissioner of Police* [2019] 1 HKLRD 892 in which the constitutionality of the No Consent Regime was upheld. However, the court found that the picture had since changed. The court noted that, in oral submissions, the Commissioner was "now saying that sections 25 and 25A of OSCO do create an 'informal freezing regime', and are used by the Commissioner for that purpose."

The court said that as constitutional rights were at stake, "the means by which the government may restrict those rights must be both clearly prescribed by law and proportionate." This was a high threshold to be met before the court would find it was the statutory intention for the No Consent Regime to be used as had been the practice.

The court acknowledged that "it has been recognized as a practical reality that the issue of a LNC will itself cause the financial institution not to deal with the relevant funds" and noted that as was accepted in *Interush*, "where consent is withheld, the bank invariably errs on the side of caution and refuses to make the payment, so that the result is that the account is 'informally frozen' for as long as the bank has the relevant suspicion and the police do not consent."

Therefore, in cases where "no other fact (except the fact of police investigation) was provided as might have permitted the financial institution to decide for itself whether it had "knowledge or reasonable grounds to believe" that the funds were tainted within the meaning of section 25(1), it is the LNC which is what causes the freeze of assets."

The court found it unlikely that the legislature could have intended a "secret, informal and unregulated asset freezing power" to exist, free from judicial oversight and of indefinite duration. The legislative history of OSCO appeared to indicate that the legislature had been "concerned with limiting executive powers to restrain property without court orders." The regime as presently operated lacked "sufficient clarity as to the scope of the power and the manner of its exercise."

The court found the No Consent Regime was ultra vires OSCO (ground 2).

As for ground 3, the "prescribed by law" issue, the court noted the "divergence or major development" in the Commission's own understanding of the true source, nature and extent of police powers under the regime. The court thought it unlikely that judicial review would provide an appropriate judicial safeguard and found a lack of clarity in the police operations manuals as to how the regime should operate. Coleman J concluded that the No Consent Regime as operated presently was not "prescribed by law."

In considering ground 5, the "proportionality" claim, the court noted there were "myriad alternatives [to the regime] for the Commissioner to take on a proactive role in tackling money laundering at an early stage of investigation, albeit with clearly defined powers and safeguards." Coleman J concluded that, after careful reflection, and in view of the stance that the regime in effect permitted an "informal freezing" of bank accounts, the regime also failed the proportionality assessment.

Implications

The judgment strongly hints at the need for reform of the No Consent Regime as currently operated by the police. Specifically, it is possible that going forward, LNCs may be issued for a significantly shorter period (for example, a seven day initial period and 31-day moratorium period, if the UK approach is followed).

Whilst the judgment may be reviewed upon appeal, for now, the chief implications would appear to be for victims of cyber fraud scams, where the early issue of a LNC often plays a crucial role in giving further support to banks' decisions to impose an informal freeze of bank accounts or in enhancing protection to victims should banks decide to alter their initial assessment, effectively preserving assets for victims to try to recover through legal proceedings. If LNCs are issued for a shorter period, victims will have less time to react while running the risk that any traceable asset may be dissipated once a LNC is withdrawn.

While a LNC is not a prerequisite or necessary condition to banks putting in place informal freezing measures in relation to suspicious accounts (banks may refuse customer instructions and withhold funds on their own initiative under most terms and conditions and/or in compliance with section 25 of OSCO), there is a question as to whether banks will continue any informal freezing measures after a LNC is withdrawn. This depends on the facts of each case and must be weighed against banks' general duty to comply with customers' instructions.

In order to preserve traceable assets with certainty, victims would seem to have no other option than to seek urgent injunctive relief, a more time consuming and costly method which may not be cost effective given the modest sums sometimes seen in such cases. As for banks, they may find themselves more frequently having to exercise and rely on their own judgment as to whether to continue an informal freeze, yet having only limited facts on which to base their decision.

Authored by Yolanda Lau and Nigel Sharman.

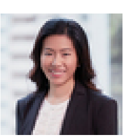
Contacts

Chris Dobby
Partner
Hong Kong
chris.dobby@hoganlovells.com

Mark Lin
Partner
Hong Kong
mark.lin@hoganlovells.com

Antonia Croke
Partner
Hong Kong
antonia.croke@hoganlovells.com

Byron Phillips
Partner
Hong Kong
byron.phillips@hoganlovells.com



Yolanda Lau
Senior Associate
Hong Kong
yolanda.lau@hoganlovells.com

Nigel Sharman
Senior Knowledge Lawyer
Hong Kong
nigel.sharman@hoganlovells.com

SKRINE

The Copyright (Amendment) Bill 2021

13 January 2022

The Copyright (Amendment) Bill 2021 (‘**the Bill**’) was recently passed by the Dewan Rakyat (House of Representatives) on 15 December 2021 and the Dewan Negara (Senate) on 22 December 2021. The Bill will be presented to the Yang di-Pertuan Agong for Royal Assent. The Bill will come into operation on a date to be determined by notification in the Gazette by the Minister of Domestic Trade and Consumer Affairs (‘**Minister**’) after being gazetted.

The key amendments, among others, to be made to the Copyright Act 1987 (‘**the Act**’) under the Bill are discussed below.

Accession to Marrakesh Treaty

New provisions have been introduced to give effect to Malaysia’s accession to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled 2013 (‘**Marrakesh Treaty**’). The Marrakesh Treaty is part of the body of international copyright treaties administered by the World Intellectual Property Office (WIPO) and allows for copyright exceptions to facilitate the creation of accessible versions of books and other copyrighted works for visually impaired persons.

These new provisions under Clauses 3 to 6 of the Bill mainly cover the introduction of various copyright infringement exemptions which cater for the making and distribution of an accessible format copy of any work for the exclusive use of a person with print disability. A “person with print disability” is defined to mean a person who is registered as a person with disability under the Persons with Disabilities Act 2008 who is (a) blind; (b) visually impaired or has a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person without such impairment or disability, and due to such impairment or disability is unable to read printed works to substantially the same degree as a person without such impairment or disability; or (c) unable to hold or manipulate a book or to focus or move the eyes, to the extent that would be normally acceptable to read due to physical disability.

Minor revisions to Voluntary Notification of Copyright system

The right of an author of a work to apply for a Voluntary Notification of Copyright under Section 26A of the Act will also be removed under Clause 7 of the Bill. This means that only the copyright owner of a work, an assignee of the copyright or a person to whom an interest in the copyright has been granted by licence will be entitled to apply for a Voluntary Notification of Copyright.

Enhancements to the Collective Management Organisations system

A number of amendments will enhance the provisions in relation to “licensing bodies” (i.e. bodies which represent and administer the rights for groups of copyright owners, typically granting licences to third parties and collecting royalties on behalf of the copyright owners), which under Clause 2 of the Bill will be renamed as “collective management organisations” (‘**CMO**’) to be in line with international practice.

These amendments include a new requirement whereby only companies limited by guarantee may apply to be declared as a CMO, in contrast to the previous position where any society or organisation could apply to be declared as a CMO. Applicants for declaration as a CMO will also be required to submit documents relating to the collection and distribution of the licensing scheme as part of the application process. The declaration of a body as a CMO will be limited to two years, subject to renewals. Previously, a body could be declared as a CMO indefinitely. A new Section 27M will also be introduced into the Act to allow the Controller of Copyright to issue guidelines relating to any matter on the declaration and operation of CMOs.

Introduction of new offences

The following new offences will be introduced, which appear aimed at tackling the latest trends of piracy on the internet, namely:

a. providing or sharing access to an online location containing pirated works;

b. committing or facilitating copyright infringement by manufacturing, importing or selling or letting for hire any streaming technology; and

c. intentionally causing any evidence relating to the commission of an offence to disappear, or giving any information in respect of the offence which they know or believe to be false, with the intention of screening the offender from legal punishment.

Strengthening of enforcement powers

The Bill will amend the Act to confer new investigative powers and enforcement powers on the Assistant Controller, including the power to search for and seize any infringing copies of works which are prohibited from being imported into Malaysia, without the need for an application to be made by the copyright owner first, and the power to direct a copyright owner or any authorised person to make test purchases for the purpose of determining compliance with the Act.

Comments

The amendments under the Bill are certainly welcome. The accession to the Marrakesh Treaty is timely as there have been numerous calls over the years by interest groups for the Intellectual Property Corporation of Malaysia (‘**MyIPO**’) to accelerate the accession in order to empower the blind and visually impaired.

The improvements to the CMO system in Malaysia also appear to be a step in the right direction. It is hoped that MyIPO will make use of the new Section 27M sooner rather than later to issue guidelines on the operations of CMOs to provide greater clarity on how CMOs work not only to the copyright owners which the CMOs may represent but to members of the public who may wish to seek licences from CMOs as well.

Lastly, the introduction of new streaming and linking related offences will certainly be lauded by copyright owners as it brings Malaysia’s copyright enforcement regime up-to-date with the scourge of online piracy in a world where most content (infringing or otherwise) is often communicated and consumed via streaming.

Article by Gooi Yang Shuh (Senior Associate) of the Intellectual Property Practice of Skrine.

Santamarina + Steta

Legal Update: Increase to the Minimum Wage

Dec 7, 2021 |

On December 1st, 2021, the Council of Representatives of the National Minimum Wages Commission ("CONASAMI" per its acronym in Spanish) approved an increase of 22% to the current general minimum wage of $141.70 Mexican pesos and to the minimum wage in the Border Free Zone North of $213.39 Mexican pesos.

The new minimum wages were determined by a direct increase of 9%, plus the amount of $16.90 pesos for the Independent Recovery Amount ("MIR" per its acronym in Spanish) for the general minimum wage, and of $25.45 for the minimum wage in the Free Zone of the North border.

Due to the aforementioned modifications, the new general minimum wage as of January 1, 2022 will be $172.87 Mexican pesos and the minimum wage in the North Border Free Zone will be $260.34 Mexican pesos.

Professional minimum wages will also receive a 22% increase.

Mexico City Office
Mr. Andrés Rodríguez R. (Partner)
Mr. Francisco Udave T. (Partner)
Phone: +52 55 5279 5400

Monterrey Office
Mr. Juan Carlos de la Vega G. (Partner)
Phone: +52 81 8133 6000

Queretaro Office
Mr. José Ramón Ayala A. (Partner)
Phone: +52 442 290 0290

www.santamarinasteta.mx

NautaDutilh
(url: https://www.nautadutilh.com/en)

The record fine for the Dutch Tax Administration from a legal perspective

Privacy & Data Protection 10-12-2021

On 7 December 2021, the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*, **DDPA**) imposed a penalty of EUR 2.75 million on the Minister of Finance (**Minister**) for the processing of personal data by the Tax Administration (*Belastingdienst*) in violation of the General Data Protection Regulation (**GDPR**) and the Dutch Personal Data Protection Act (**Wbp**). This penalty (url: https://autoriteitpersoonsgegevens.nl/nl/nieuws/boete-belastingdienst-voor-discriminerende-en-onrechtmatige-werkwijze%20(in%20Dutch).%20) was imposed for the unlawful processing of the (dual) nationality of applicants for childcare benefits in an unlawful, discriminatory and therefore improper manner.

The imposition of this fine was to be expected in view of the seriousness of the situation and the impact of the benefits affair on society. In addition, it is not surprising that the DDPA imposed a record fine, given the seriousness of the situation.

Facts

The DDPA investigated the Tax Administration's processing of the (dual) nationality of applicants for childcare benefits and published its investigation report dated 16 July 2020, "Tax Authority/Benefits, Processing of the Nationality of Applicants for Childcare Benefits (url: https://www.autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/onderzoek_belastingdienst_kinderopvangtoeslag.pdf)" (Investigation Report).

The Investigation Report reveals that the DDPA concluded that three of the data processing operations were unlawful. Firstly, the Tax Administration stored the dual nationality of applicants in the 'Benefits Provision System' (Toeslagen Verstrekking Systeem, TVS) without these data being necessary for the performance of its task. Secondly, the Tax Administration used the applicants' nationality as an indicator in a risk classification model (a system that automatically selects risky applications for the allocation of staff capacity). Thirdly, the Tax Administration used the applicants' nationalities for the purposes of detecting fraud.

The DDPA not only concludes that the processing is unlawful, but in respect of two of the processing operations it also concludes that these are discriminatory and improper.

Legal framework

The DDPA imposes the fine because of a violation of both the GDPR and the Wbp. The Wbp was repealed when the GDPR entered into application. In this penalty decision, the DDPA still applies the Wbp, because part of the violation took place before the GDPR entered into application. On the points relevant to the present situation, the GDPR and the Wbp are not that different.

Nationality falls within the scope of the definition of personal data referred to in Article 4 opening words and under 1 of the GDPR and Article 1 opening words and under a of the Wbp. After all, this concerns information about a natural person who is identifiable for the Tax Administration. Pursuant to Article 5(1)(a) GDPR, personal data may only be processed in a manner that is lawful, fair and transparent. In addition, personal data may only be processed lawfully if one of the processing grounds specified in Article 6 GDPR justifies this. Special personal data - such as personal data about race, health and religion - are given extra protection by the GDPR (and previously by the Wbp). In principle, these personal data may not be processed, but Article 9 GDPR provides a number of exceptions to this prohibition.

Points of attention

It was to be expected that the DDPA would impose a (large) fine on the Tax Authorities. Not least because the DDPA had already announced in its 2020 annual report (url: https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/ap_jaarverslag_2020.pdf) that 'digital government' is and will remain one of its focus areas. This is not the first time that a governmental body has been reprimanded for the processing of personal data in the context of fraud prevention. In November 2021 the DDPA ordered the Municipal Health Service (Gemeentelijke Gezondheidsdienst, GGD) to improve the protection of personal data (url: https://autoriteitpersoonsgegevens.nl/nl/nieuws/ggd-moet-persoonsgegevens-beter-beschermen) and in May 2021 the DDPA imposed a fine on the Employee Insurance Agency (Uitvoeringsinstituut Werknemersverzekeringen, (url: https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/boete_uwv_beveiliging_groepsberichten.pdf) UWV). In February 2020, the Court of The Hague also ruled that a governmental body had to adjust its processing of personal data: the use of the SyRi anti-fraud system was deemed to be in violation of Article 8 ECHR (Court of The Hague 5 February 2020, ECLI:NL:RBDHA:2020:865).

It is interesting to note that in the aforementioned judgment the civil court did not (explicitly) address Article 6(1)(e) GDPR, despite the fact that the claimant did argue that this Article was in conflict with the GDPR. Now the DDPA chooses to deem a fraud prevention system that is comparable on certain points in conflict with Article 6(1)(e) GDPR.

It follows from the Investigation Report that the GDPR had previously also investigated whether the processing of nationality involved the processing of special personal data, more specifically data about racial or ethnic origin. If such personal data would have been processed without a legal basis, this would constitute a violation of Article 9 GDPR (and previously Article 16 Wbp), which, according to the Fining Policy Rules Dutch Data Protection Authority 2019 (Boetebeleidsregels Autoriteit Persoonsgegevens 2019, the Fining Policy Rules (Government Gazette March 14, 2019, no. 14586)), would have resulted in a higher penalty than the penalty for the violation that was ultimately established. With respect to the qualification of nationality as special personal data, the DDPA first noted in the Investigation Report that it follows from Dutch case law for this qualification importance is attached to other processed personal data. If nationality were to be processed in combination with other personal data, such as country of birth or place of birth, this could lead to the qualification of nationality as special personal data. In addition, the DDPA considered that in certain cases the context of the processing can lead to nationality in itself qualifying as special personal data.

This would be the case if the purpose of the processing of nationality is to make a distinction between racial or ethnic origin, or if it can be reasonably foreseen that the processing will lead to the making of such a distinction. According to the website of the DDPA (url: https://autoriteitpersoonsgegevens.nl/nl/onderwerpen/foto-en-film/beeldmateriaal#mag-ik-als-werkgever-school-of-organisator-van-een-evenement-foto%E2%80%99s-en-filmpjes-maken-en-publiceren-waaruit-iemands-gezondheid-of-religie-af-te-leiden-is-7294), this is also the standard in certain other situations for determining whether personal data qualify as special personal data.The DDPA already came to the conclusion in the Investigation Report that nationality, as processed by the Tax Administration, does not qualify as special personal data because an indirect link between nationality and racial and ethnic origin could not be established. The decision to impose a fine therefore does not address this issue any further.

Fine amount

The DDPA imposes a total fine of EUR 2.75 million, consisting of: EUR 750,000 for unlawfully storing second nationality, EUR 1 mio for using nationality as an indicator for the risk classification model and EUR 1 mio for using nationality in the detection of organized fraud). In determining the amount of the fine, the DDPA applies the Fining Policy Rules. In view of the seriousness of the violations referred to, the DDPA significantly increases the basic amounts of the fines in accordance with the system set out in the Fining Policy Rules.

Following the DDPA's investigation the Tax Administration had already initiated putting an end to the infringement. The Tax Administration had removed the (dual) nationalities from its systems in the summer of 2020 and had thus also terminated the infringement. However, the fact that the Tax Administration terminated the infringement before the DDPA imposed the penalty does not result in the imposition of a penalty. The DDPA considers the violations to be so serious that there seems to be no room for mitigation at all.

Closing

No response to the penalty has yet been received from the Minister or on his behalf. Although the response to the Investigation Report and the Minister's response to the advance notice of this penalty indicate that the Minister acknowledges that the Tax Administration committed the aforementioned offences, the possibility cannot be excluded that the Minister may still lodge an objection to the penalty, for example on account of its amount. It has not yet been disclosed whether the Minister will do so.

With thanks to David van de Velde for his help in writing this blog.

Written by

The Netherlands


Anke Holtland (url: /en/our-people/holtland-anke)
Senior Associate


Terrence Dom (url: /en/our-people/dom-terrence)
Senior Associate

NICARAGUA

REGULATES THE COMMERCIALIZATON OF ELECTRIC ENERGY

Jan/2022

Last November 25th, 2021, Law No. 1094, Law of Amendments and Additions to Law No. 272 Law of the Electric Industry and its Reforms, came into effect, that seeks to strengthen and diversify the activities of the electric sector, through the regulation of the commercialization activity, among other matters.

Law No. 1094 not only introduced new concepts, such as Export Activity, Import Activity, Exporter, Importer and Regional Electricity Market, and granted new powers to the National Load Dispatch Center and the Ministry of Energy and Mines ("MEM"), but also established that in order to carry out the import and/or export activity it will be required to obtain a license to be granted by the Ministry of Energy and Mines for a term of up to 10 years, extendable for a period equal to that originally granted. In this sense, the MEM was empowered to establish the requirements and procedures to be followed to obtain such license.

Likewise, in accordance with the provisions of the Framework Treaty of the Central American Electricity Market, which has been duly signed and ratified by the State of Nicaragua, the import and export of electricity is exempt from all types of charges, taxes and/or special contributions.

Also, in order to seek a reduction in the price of energy to final consumers, the sale of electricity made by the importing agents with the distributing agents, are exempt from any type of charge, taxes, including value added tax (VAT) and/or special contributions, without prejudice that the importer, exporter and the distributing agents comply with the obligation to liquidate, declare and pay the Income Tax (IR) as established in Law No. 822, Tax Agreement Law and its reforms.

If you have any questions or would like to know more information about these new regulations, please do not hesitate to contact us.

Rodrigo Ibarra
Partner
rodrigo.ibarra@ariaslaw.com

Alejandro Sobenes
Paralegal
alejandro.sobenes@ariaslaw.com

SyCip Salazar Hernandez & Gatmaitan

SyCipLaw Center, 105 Paseo de Roxas
Makati City, 1226, Philippines
T: +632 8982 3500 |+632 8982 3600
F: +632 8817 3145 | +632 8817 3896
www.syciplaw.com

SyCipLaw TIPS TAX ISSUES AND PRACTICAL SOLUTIONS (International Edition)

2021 Top 10 TIPS

March 2021

1. What are the salient provisions on income tax under the Corporate Recovery and Tax Incentives for Enterprises Act, or CREATE Act?

On March 26, 2021, President Rodrigo R. Duterte signed the "Corporate Recovery and Tax Incentives for Enterprises Act" *(Republic Act No. 11534, the CREATE Act)* into law. It will take effect within 15 days from its publication in the Official Gazette or in a newspaper of general circulation.

The CREATE Act further amends certain provisions of the National Internal Revenue Code, as amended *(Tax Code)*. As stated in Section 2 of the CREATE Act, the declared policy of the amendments is to "increase the Philippines' global competitiveness by implementing tax policies instrumental in attracting investments, which will result in productivity enhancement, employment generation, countrywide development, and a more inclusive economic growth, while at the same time maintaining fiscal prudence and stability." The CREATE amends the following income tax provisions of the Tax Code:

SyCipLaw TIP 1:
Before filing their annual income tax returns, corporate taxpayers should familiarize themselves with the amended income tax rates under the CREATE Act as the income tax rates applicable to corporations have been reduced and some amendments take effect retroactively from July 1, 2020.

(a) Income Tax on Domestic Corporations – effective July 1, 2020, 25% in general and 20% for corporations with net taxable income not exceeding PhP5 Million and with total assets not exceeding PhP100 Million, excluding land on which the corporation's office, plant and equipment are situated (currently at 30%).

(b) Income Tax on Foreign Corporations Engaged in Trade or Business in the Philippines – effective July 1, 2020, 25% (currently at 30%).

(c) Minimum Corporate Income Tax on Domestic Corporations and Foreign Corporations Engaged in Trade or Business in the Philippines – effective only from July 1, 2020 to June 30, 2023, 1% (currently at 2%).

(d) Income Tax on Regional Operating Headquarters – effective January 1, 2022, regular corporate income tax of 25% (currently at 10%).

(e) Income Tax on Offshore Banking Units – With the repeal by the CREATE Act of the provision on offshore banking units *(OBUs)*, OBUs will be subject to the regular corporate income tax of 25% on Philippine-sourced income (currently, income derived by OBUs from foreign currency transactions with non-residents, other OBUs, local commercial banks, including branches of foreign banks, is exempt from income tax, while income derived by OBUs from foreign currency loans granted to residents other than OBUs or local commercial banks is subject to income tax at 10%) and income of non-residents from transactions with OBUs will be subject to tax (currently exempt).

(f) Interest Income derived by Resident Foreign Corporations from a depositary bank under the Expanded Foreign Currency Deposit System – 15% (currently at 7.5%).

(g) Dividends received by Domestic Corporations from Foreign Sources – exempt (subject to certain conditions), otherwise 25% (currently at 30%).

(h) Capital Gains from Sale by foreign corporations of Shares not Traded in the Stock Exchange – 15% (currently at 5% for gains up to PhP100,000 and 10% for gains over PhP100,000).

(i) Improperly Accumulated Earnings Tax – repealed (currently at 10%).

2. What fiscal incentives will be granted under the CREATE Act and who can avail themselves of these incentives?

The CREATE Act introduces in the Tax Code a new Title on Tax Incentives, or Title XIII, which rationalizes tax incentives and will cover Investment Promotion Agencies, which are defined under the CREATE Act as government agencies in charge of promoting investments, granting and administering tax and non-tax incentives, and overseeing the operations of economic zones and freeports. This new law amends certain special laws that grant tax incentives administered by existing Investment Promotion Agencies. To qualify for incentives, the activity has to be under the Strategic Investment Priority Plan which will be approved by the President.

Under Title XIII, the following tax incentives may be granted to registered projects or activities: (a) Income Tax Holiday *(ITH)* period; (b) Special Corporate Income Tax *(SCIT)* Rate; (c) Enhanced Deductions *(ED)* from taxable income; (d) duty exemption on importation of capital equipment, raw materials, spare parts, or accessories; and (e) Value-Added Tax *(VAT)* exemption on importation and VAT zero-rating on local purchases.

Qualified export enterprises may be granted an ITH period of four (4) to seven (7) years, followed by a period of ten (10) years of SCIT, or ED (based on the applicable regular income tax). Qualified domestic market enterprises may be granted an ITH period of four (4) to seven (7) years, followed by a period of five (5) years of ED (based on the applicable regular income tax).

The SCIT is a rate of 5% of gross income earned, and is in lieu of all national and local taxes. On the other hand, the EDs comprise the following: (a) additional deduction of 10% for buildings and 20% for machinery and equipment; (b) additional deduction of 50% of direct labor expense; (c) additional deduction of 100% of research and development; (d) additional deduction of 100% on training expense; (d) additional deduction of 50% on domestic input expense; (e) additional deduction of 50% on power expense; (f) deduction for reinvestment allowance to manufacturing company; and (g) Net Operating Loss Carry Over (NOLCO) – the net operating loss of the registered project during the first three (3) years from the start of commercial operations which has not been previously deducted from gross income can be carried over to the next five (5) consecutive taxable years immediately following the year of the loss.

SyCip Salazar Hernandez & Gatmaitan

Managing Partner:
Hector M. de Leon, Jr.

Tax Department Head:
Carina C. Laforteza

Tax Department Partners:
Carlos Roberto Z. Lopez
Ramon G. Songco
Benedicto P. Panigbatan
Russel R. Rodriguez
Ronald Mark C. Lleno
Hiyasmin H. Lapitan
Leah C. Abutan
John Christian Joy A. Regalado
Ma. Patricia B. Paz
Joanna Marie O. Joson
Maria Viola B. Vista
Maria Christina C. Ortua-Ang

Of Counsel:
Rolando V. Medalla, Jr.

Special Counsel:
Catherina M. Fernandez

Tax Department Senior Associates:
Austin Claude S. Alcantara
Mark Xavier D. Oyales
Camille Angela M. Espeleta-Castillo
Kristina Paola P. Frias
Hailin D.G. Quintos-Ruiz
Renz Jeffrey A. Ruiz

Tax Department Associates:
Spencer M. Albos
Diana Elaine B. Bataller
Kevin Joseph C. Berbaño
Roman George P. Castillo
Muhammad Murshid M. Marsangca

Editor:
Ronald Mark C. Lleno (Partner)

Contributors:
Carina C. Laforteza
Benedicto P. Panigbatan
Ronald Mark C. Lleno
Hiyasmin H. Lapitan
Joanna Marie O. Joson
Austin Claude S. Alcantara

Coordinators:
Marie Antoinette M. Ingcoco
Dhan Michael L. dela Peña
Angelita O. Dizon

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

SyCipLaw TIP 2:
The CREATE Act has made the Philippines more competitive with its neighboring countries in terms of attracting foreign investments! Investors intending to engage in a business which qualifies under the Strategic Investment Priority Plan of the Philippines through an export enterprise or a domestic market enterprise should familiarize themselves with the new fiscal incentives granted under Title XIII of the CREATE Act.

3. What is the Financial Institutions Strategic Transfer *(FIST)* Act and what are the tax incentives under this new law? (UPDATED)

Republic Act No. 11523, or the "Financial Institutions Strategic Transfer (FIST) Act" (*the FIST Act)*, seeks to assist banks and financial institutions in dealing with the adverse effects of the COVID-19 pandemic. This law took effect on February 18, 2021 and it provides a legal framework for the full transfer of bad loans and non-performing assets of banks and financial institutions by allowing them to clean their books and re-channel their resources to improve liquidity in the financial system.

Under the FIST Act, the transfer of non-performing assets *(NPAs)* from a financial institution to a Financial Institutions Strategic Transfer Corporation *(FISTC)*, and from an FISTC to a third party, or a dation in payment by the borrower or by a third party in favor of a financial institution or an FISTC, will be exempt from the following taxes, when applicable: (a) documentary stamp tax *(DST)*; (b) capital gains tax on the transfer of lands and/or other capital assets; (c) creditable withholding tax on the transfer of land and/or buildings treated as ordinary assets; and (d) VAT on the transfer of the NPAs.

SyCipLaw TIP 3:
Banks and financial institutions with NPLs and NPAs should familiarize themselves with the tax incentives and other privileges under the FIST Act as it provides them with an opportunity to dispose of their NPLs and NPAs at lower transaction costs. However, they will have only until February 18, 2023 to transfer the NPLs and NPAs in order to avail themselves of such incentives and privileges.

The following fees are also entitled to a fifty percent (50%) discount: (a) applicable registration and transfer fees on the transfer of real estate mortgage and security interest to and from the FISTC; (b) filing fees on any foreclosure initiated by the FISTC in relation to any NPA acquired from a financial institution; and (c) land registration fees.

The incentives are time bound. For example, transfers of NPAs from financial institutions to an FISTC must be done within two (2) years from the effectivity of the FIST Act, while transfers from a FISTC to third parties are given a five (5)-year window from the acquisition of NPAs to dispose of the same with incentives.

Further, to encourage the infusion of capital and financial assistance by the FISTC for the purpose of rehabilitating a borrower's business, (a) the FISTC shall be exempt from income tax on net interest income and from DST and mortgage registration fees on new loans to such borrower with non-performing loans *(NPLs)* acquired by the FISTC, and (b) in case of capital infusion by the FISTC to the borrower with NPLs, the FISTC will be exempt from DST. These additional tax exemptions and privileges shall likewise be available for a five (5)-year period from the acquisition of the NPLs.

Revenue Regulations No. 11-2021, dated June 23, 2021, implements the tax exemptions and privileges under the FIST Act.

April 2021

4. How are the amendments under the CREATE Act on certain final taxes implemented by the Bureau of Internal Revenue *(BIR)*?

Revenue Regulations No. 2-2021 *(RR No. 2-2021)* implements the revised rates of final tax on certain types of income under Republic Act No. 11534, or the CREATE Act, by further amending Revenue Regulations No. 9-98.

RR No. 2-2021 provides that winnings by non-resident aliens engaged in trade or business in the Philippines is subject to a 20% tax, except for their winnings from the Philippine Charity Sweepstakes Office *(PCSO)* games amounting to PhP10,000 or less, which shall be exempt from income tax.

SyCipLaw TIP 4:
Taxpayers may file a claim for tax refund for taxes withheld if the withholding agents used a higher rate. The claim may be filed with the Revenue District Office/ Large Taxpayer Service having jurisdiction over the withholding agents.

With regard to income payments to resident foreign corporations, RR No. 2-2021 provides that interest on any currency bank deposit and yield or other monetary benefit from deposit substitute and from trust funds is now subject to a final withholding tax of 20%, while a final withholding tax of 15% applies to interest income derived from a depository bank under the expanded foreign currency deposit system.

The rate of capital gains tax on the sale by a resident foreign corporation or a non-resident foreign corporation of shares of stock not traded in the stock exchange is now 15%.

For other Philippine-sourced income derived by a non-resident foreign corporation, a reduced final withholding tax rate of 25% is now imposed on gross income from all sources within the Philippines. While dividends received from a domestic corporation by a non-resident foreign corporation is taxed at 25%, a lower tax of 15% is imposed if the country of the non-resident foreign corporation allows a 10% credit against the tax due from the non-resident foreign corporation, or does not impose any income tax, on dividends by the non-resident foreign corporation from a domestic corporation.

RR No. 2-2021 also provides that purchases made by government-owned and controlled corporations, National Government agencies, local government units, and other government instrumentalities from persons or entities subject to percentage tax are subject to a 1% withholding tax for the period of July 1, 2020 to June 30, 2023.

June 2021

5. What are the new procedures for availing of tax treaty benefits?

The BIR issued Revenue Memorandum Order *(RMO)* No. 14-2021, as amended by Revenue Memorandum Circular *(RMC)* No. 077-21, which revised and streamlined the procedures and documents for the availment of tax treaty benefits for all types of Philippine-sourced income that are subject to preferential tax treatment under a tax treaty, including dividend, interest, and royalty income which were previously covered by the Certificate of Residence for Treaty Relief (*CORTT*) Form prescribed under RMO No. 8-2017.

RMO No. 14-2021 amends other regulations relating to applications for tax treaty benefits, including RMO Nos. 30-2002, 72-2010, and 8-2017. RMO No. 14-2021 now allows the withholding agent *(WA)* to apply the preferential rate upon the submission by the non-resident income recipient *(NRIR)* of certain documents to the WA, but subject to the WA filing a Request for Confirmation *(RFC)* with the BIR's International Tax Affairs Division *(ITAD)* and obtaining a Certificate of Entitlement to Treaty Benefit *(COE)*. If the WA does not apply the preferential rate under the relevant tax treaty but instead applies the regular rates under the Tax Code, the NRIR, through its authorized representative, may still apply for a Tax Treaty Relief Application *(TTRA)* and a claim for refund with the ITAD.

RMO No. 14-2021 sets out the following process:

(a) Prior to receiving income from the WA in the Philippines, the NRIR shall provide the WA the following, which the latter may rely on to determine the appropriate withholding tax rate: (i) BIR Form No. 0901 or Application Form for Treaty Purposes; (ii) Tax Residency Certificate issued by the foreign tax authority; and (iii) the relevant provision of the applicable tax treaty on whether to apply a reduced rate of, or exemption from, withholding at source on the income derived by a nonresident taxpayer from all sources within the Philippines.

(b) The WA then remits income to the NRIR, in the form of dividends, royalty, interest, etc., and withholds tax at either the treaty rate or the regular rate.

(c) If the WA applied the treaty rate on the income, the WA must file with the ITAD an RFC. For capital gains, the WA may file the RFC at any time after the earlier of the payment of the income or the consummation of the transaction up to the last day of the fourth month following the close of the taxable year. For other types of income, the WA may file the RFC after the close of the taxable year up to the last day of the fourth month following the close of the taxable year. To illustrate, if an NRIR had both capital gains and dividend income on May 1, 2021, the RFC for capital gains may be filed any time after May 1, 2021 until April 30, 2022, whereas the RFC for dividends may be filed only from January 1, 2022 to April 30, 2022.

(d) If the BIR determines that the rate applied was correct or higher, the BIR will issue a COE confirming the NRIR's entitlement to the benefit. If the BIR determines that the rate applied was lower or the NRIR is not entitled to treaty benefits, the BIR will issue a BIR ruling denying the request and the WA must pay the deficiency taxes plus penalties.

(e) If, on the other hand, the WA applied the regular rate on the income, the NRIR must file with the ITAD a TTRA within the same period stated in (c) above in order to obtain a tax refund of the excess taxes withheld. Taxpayers with pending TTRAs for income earned in 2020 and prior years, including those with Notices of Archiving from ITAD, are given three months from the receipt of a Final Notice to Submit Additional Documents *(Final Notice)*, or from the effectivity of RMO No. 14-2021, whichever is later, to submit the lacking documents. Taxpayers who were issued a Notice of Archiving will no longer receive a Final Notice. Failure to submit the requested documents would result in the automatic denial of the TTRA for failure of the non-resident income recipient to substantiate or prove the recipient's entitlement to tax treaty benefits.

RMO No. 14-2021 was issued on March 31, 2021 and took effect immediately, and was thereafter amended by RMC No. 077-21 on June 15, 2021. Accordingly, all pending TTRAs shall be processed following the procedure therein. For dividends, interest, and royalties, the submission of the CORTT Form pursuant to RMO No. 8-2017 shall be discontinued. However, previously submitted CORTT Forms shall still be forwarded to the concerned Revenue District Offices for compliance check. For NRIRs who received income in 2020 and prior years, which income was subjected to the preferential treaty rates but no TTRA or CORTT Form was obtained or filed therefor, the WA has until December 31, 2021 to file an RFC, subject to a penalty of PhP1,000 per failure to file a CORTT Form, as may have been necessary.

SyCipLaw Tip 5:

Taxpayers must be aware that there are now new procedures for availing themselves of tax treaty relief. In addition to familiarizing themselves with the new procedures, taxpayers must check the detailed list of documentary requirements found in Section 5 of RMO No. 14-2021 for claiming relief from double taxation under a tax treaty. They must also coordinate with, and submit the relevant documents to, the withholding agent so as to enable the withholding agent to determine whether or not to withhold at the treaty rate or the regular rate.

To be safe, a taxpayer who previously filed a TTRA prior to the effectivity of RMO No. 14-2021 must check their application and ensure that they submit additional documents under RMO No. 14-2021 within three months from its effectivity. Similarly, those that previously submitted CORTT Forms should check with the relevant Revenue District Office to ensure that their submission is compliant with the current regulations. Failure to file RFCs and TTRAs under RMO No. 14-2021 within the periods prescribed therein will not result in an automatic denial thereof, but will subject the applicant to penalties for late filing.

August 2021

6. Are social media influencers required to register with the BIR?

Like all taxpayers, social media influencers are required to register with the BIR and secure a Philippine tax identification number. RMC No. 97-2021 defines a "social media influencer" as "all taxpayers, individuals or corporations, receiving income, in cash or in kind, from any social media sites and platforms (YouTube, Facebook, Instagram, Twitter, TikTok, Reddit, Snapchat, etc.) in exchange for services performed as bloggers, video bloggers or "vloggers" or as an influencer, in general, and from any other activities performed on such social media sites and platforms."

Unless exempted under the Tax Code (e.g., those earning a taxable annual income not exceeding PhP250,000), special laws or tax treaties, income derived (a) from sources within or without the Philippines by social media influencers who are resident citizens or (b) from sources within the Philippines by social media influencers who are non-residents or residents of the Philippines, are subject to Philippine tax.

SyCipLaw Tip 6:

Social media influencers are subject to tax on income they earn from their activities. Like any other taxpayer, they should be aware of their obligations under the tax laws. RMC 97-2021 sets out the taxes that are applicable to them.

The Tax Code requires every person subject to internal revenue taxes to register with the appropriate Revenue District Office *(RDO)* and to update his registration information with the RDO in case of any change in taxpayer details. Influencers who are already registered with the BIR (e.g., as employees) must ensure that their registration reflects their existing or current line of business and, if necessary, update their registration information with the RDO where they are registered. Accordingly, unless the social media influencer is exempt from Philippine tax under the Tax Code, special laws or applicable tax treaty, he must register or update his registration with the BIR to facilitate the filing of tax returns and payment or withholding of taxes on the income derived from his business activities as a social media influencer.

For resident foreign influencers, the RMC provides that income derived from Philippine-based contents is generally subject to Philippine tax. The resident foreign influencer has the burden of proving that the income was derived from sources outside the Philippines; otherwise, the income will be assumed to have been derived from sources within the Philippines and thus subject to Philippine tax.

7. How can a social media influencer avoid the risks of double taxation on income received from non-resident foreign companies residing in a country with which the Philippines has a tax treaty?

The influencer should inform the non-resident payor that he is a resident of the Philippines and thus entitled to claim tax treaty benefits under the applicable tax treaty. If the non-resident payor requires the presentation of proof of residency in the Philippines, the influencer may obtain a Tax Residency Certificate from the International Tax Affairs Division of the BIR in accordance with Revenue Memorandum Order No. 043-20 (SyCipLaw's Tax Department has prepared an article on the application for a Philippine Tax Residency Certificate in the international edition of its Tax Issues and Practical Solutions (T.I.P.S.) for the month of March, which may be accessed at https://syciplawresources.com/wp-content/ uploads/2021/03/SyCipLaw-Tax-TIPS-International-March312021.pdf).

RMC No. 97-2021 provides that if the influencer does not avail of the tax treaty benefits and his income from outside the Philippines was subjected to the regular tax rates, the influencer will not be allowed to claim foreign tax credits in excess of the amount of tax that was supposed to have been paid in the source state had the influencer invoked the tax treaty and proved his Philippine residency.

Alien individuals and foreign corporations are not allowed to claim foreign tax credits for taxes paid in foreign countries because they are subject to Philippine income tax only on Philippine source income.

SyCipLaw Tip 7:
Social media influencers should ensure that they comply with their tax obligations in the conduct of their activities as influencers. Under RMC No. 97-2021, the BIR advised its various offices to conduct a full-blown investigation against social media influencers residing or registered within their respective jurisdictions. Social media influencers who fail to truthfully declare their income and/or pay the correct taxes may be subject to penalties under the Tax Code, such as imprisonment and the payment of surcharges and interest on top of the amount of the unpaid tax.

September 2021

8. Sales to Export Enterprises - 12% or 0%? (UPDATED)

The issuance of Revenue Regulations *(RR)* No. 9-2021 on June 11, 2021 was reported in the news to have generated a lot of confusion among the export enterprises located in economic zones and freeport zones due to the imposition of the 12% VAT on the sale of goods and services to export enterprises pursuant to the provisions of Republic Act *(RA)* No. 10963, or the Tax Reform for Acceleration and Inclusion *(TRAIN)* Law. The imposition of the 12% VAT on the sale of goods or services to export enterprises was further confirmed when the implementing rules and regulations of RA No. 11534, or the Corporate Recovery and Tax Incentives for Enterprises Act *(CREATE Act IRR)* were issued on June 23, 2021. The CREATE Act IRR provided that the VAT zero-rating on local purchases apply to goods or services that are directly or exclusively used in the registered projects or activities of export enterprises, except that the transactions falling under Section 106(A)(2)(a)(3), (4) and (5) and Section 108(B)(1) and (5) of the Tax Code (which includes the sale of goods and services to export enterprises) will be subject to the 12% VAT pursuant to RR 9-2021. In response to the concerns raised by various stakeholders on the effect of RR No. 9-2021, the Department of Finance (DOF) deferred the implementation of RR No. 9-2021 on July 27, 2021, until an amended RR is issued.

In November 2021, the rules amending the CREATE IRR *(Amended CREATE Act IRR)* were issued. The Amended CREATE Act IRR amended the phrase "direct and exclusive use in the registered project or activity" to refer to "raw materials, inventories, supplies, equipment, goods, **packaging materials, services, including provision of basic infrastructure, utilities, and maintenance, repair and overhaul of equipment,** and other expenditures **directly attributable** to the registered project or activity without which the registered project or activity cannot be carried out; **provided that the VAT zero-rating on local purchases shall be granted upon the endorsement of the concerned Investment Promotion Agency, in addition to the documentary requirements of the BIR"** (amendments in bold). It is not clear under the Amended CREATE Act IRR what documents may be required by the BIR for the VAT zero-rating on local purchases.

The Amended CREATE Act IRR expressly provides that the VAT zero-rating and exemption of registered export enterprises shall apply for a maximum period of 17 years from the date of registration unless otherwise extended under the Strategic Investment Priority Plan. For enterprises registered with investment promotion agencies prior to the effectivity of the CREATE Act, the VAT zero-rating on local purchases will only apply to goods and services that are directly **attributable to** and exclusively used in the registered project or activity of the registered enterprise **located inside the ecozones and freeports until the expiration of the transitory period.**

On December 3, 2021, the DOF issued RR No. 21-2021 implementing Section 294(E) and (D) of the CREATE Act on duty and VAT exemptions and VAT zero-rating on local purchases. The RR reiterated the definition of "direct and exclusive use for the registered project or activity" under the Amended CREATE Act IRR, as well as the period of availment of the VAT zero-rating on local purchases of registered export enterprises for a maximum period of 17 years and until the expiration of the transitory period for existing registered export enterprises located inside ecozones and freeport zones.

The provision imposing the twelve percent (12%) VAT on transactions falling under Section 106(A) (2)(a)(3), (4) and (5) and Section 108(B)(1) and (5) of the Tax Code, as amended, does not appear in in RR 21-2021.

SyCipLaw TIP 8:
The sale to registered export enterprises of goods and services is subject to 0% VAT provided that such goods or services are directly and exclusively used in their registered projects or activities. The CREATE Act IRR and its amendment provide examples of what goods and services may be considered directly and exclusively used in the registered project or activity of an enterprise. The availment of the VAT zero-rating incentive on local purchases is further conditioned upon the endorsement of the relevant investment promotion agency and documents that may be required by the BIR. Given the requirement and considering that any deficiency VAT assessment will be imposed on the suppliers, suppliers will be seeking assurance from registered export enterprises that the goods or services being sold to them will be directly and exclusively used in their registered project or activity. Registered export enterprises will thus have to work with their suppliers to ensure that there is sufficient proof available to establish that the transaction between the supplier and the registered export enterprise is subject to 0% VAT in case of a deficiency VAT assessment from the BIR.

9. POGOs - *Quo vadis?* (UPDATED)

With the advent of RA No. 11590, a new law imposing taxes on Philippine Offshore Gaming Operations *(POGOs)*, what path might POGOs possibly take? Will POGOs continue staying in the Philippines or will they seek shelter elsewhere? RA No. 11590 took effect on October 8, 2021.

Under RA No. 11590, the entire gross gaming revenue or receipts of POGOs or the agreed predetermined minimum monthly revenue or receipts from gaming, whichever is higher, shall be taxed at five percent (5%) in lieu of all other direct and indirect internal revenue taxes and local taxes, with respect to gaming income *(Gaming Tax)*. In addition, the Philippine Amusement and Gaming Corporation *(PAGCOR)* or any special economic zone authority, tourism zone authority, or freeport authority where POGOs are located are granted the power to impose regulatory fees not cumulatively exceeding two percent (2%) of the gross gaming revenue or receipts derived from gaming operations and similar activities of all licensed POGOs or a predetermined minimum guaranteed fee, whichever is higher. "Gross gaming revenue or receipts" means gross wagers fewer payouts.

SyCipLaw TIP 9:
Under RA No. 11590, resident alien individuals will be taxed the same way as non-resident alien individuals with respect to their salaries and wages from the POGO. This is an exception to the general rule on the taxation of resident alien individuals under the Tax Code. The penalty of deportation of the employee for non-withholding by the employer POGO shows that RA No. 11590 goes beyond being merely a tax measure. Alien individuals working for POGOs should ensure that their POGO employers are properly withholding the relevant taxes on their compensation, as the risk of deportation and blacklisting for failing to withhold falls not on the POGO but on the employee.

To ensure that proper taxes and regulatory fees are levied, periodic reports about the operations of POGOs showing their gross gaming revenue or receipts shall be submitted to the BIR by PAGCOR or the concerned special economic zone authority, or freeport tourism zone authority, or freeport authority as certified by their third-party auditor which must be independent, reputable, internationally-known, and accredited by industry experts.

On the other hand, non-gaming revenues of POGOs duly-licensed by PAGCOR or any special economic zone authority, tourism zone authority, or freeport authority is subject to a tax of twenty-five percent (25%) of their taxable income (gross income less allowable deductions) from all sources within or outside the Philippines.

Sales by VAT-registered persons to POGOs subject to the Gaming Tax are subject to zero percent (0%) VAT. Services performed in the Philippines by VAT-registered service providers to licensed POGOs subject to the Gaming Tax shall likewise be subject to 0% VAT.

Alien individuals regardless of residency and who are employed and assigned in the Philippines by a POGO licensee or its service provider are subject to a final withholding tax of 25% of their "gross income" which shall be understood as including basic salary/wages, annuities, compensation, remuneration and other emoluments such as honoraria and allowances received from the POGO or its service provider. Failure of the POGO or its service provider to withhold this tax will result in the alien concerned being subject to deportation, barred from re-entering the Philippines, or blacklisted as a foreign employee by the Department of Labor and Employment, Bureau of Immigration, and other relevant agencies. Any other kind of income derived from all sources in the Philippines by the said alien individuals is subject to all existing and applicable local and national taxes.

It is noteworthy that while RA No. 11590 imposes taxes on POGOs, the declaration of policy of this law includes a statement that the State's recognition of legal forms of gambling, including POGOs, should not be understood as a favorable State endorsement of such activity.

On November 26, 2021, the DOF issued Revenue Regulations No. 20-2021 *(RR No. 20-2021)* implementing RA No. 11590. RR No. 20-2021 requires newly established POGO entities to submit to the BIR the Summary List and Status Update on Foreign Nationals Employed Form *(Summary List)*, which is Annex A of RR No. 20-2021. The Summary List shall contain an initial list of all foreign nationals the POGO employed until the end of the month of their registration with the BIR. The initial list shall be submitted together with original copies of the notarized Employment Contracts, and with the English translation of such documents if they are written in a foreign language, not later than the 20th day of the succeeding month. POGO entities shall regularly update the list of their foreign employees by submitting the Summary List, together with its attachments, not later than the 20th day after the close of each month. All existing POGO entities were directed by RR No. 20-2021 to submit to the BIR, on or before December 20, 2021, their Summary List, covering their foreign employees from January 1, 2021 to November 30, 2021.

10. Are your bingeing days in streaming platforms over?

Almost, unless you are willing to pay an extra 12%. The House of Representatives approved upon third reading House Bill No. 7425 (HB 7425), which seeks to impose VAT on digital transactions in the Philippines.

HB 7425 proposes to amend Section 105 of the Tax Code, to include among taxable goods those that are digital or electronic in nature, and to include among taxable services those that are rendered electronically.

It will also add a new provision on the persons liable for VAT in digital or electronic transactions. Under this new provision, it will be the non-resident digital service provider that will be liable for assessing, collecting, and remitting VAT on transactions that go through its platform.

HB 7425 provides that a "digital service provider" is a "service provider of a digital service or good to a buyer, through operating an online platform for purposes of buying and selling of goods or services or by making transactions for the provision of digital services on behalf of any person."

The "digital service provider" may be:

(1) a third party who, through information-based technology or the internet, sells products for its own account (such as a seller of goods and services);
(2) one who acts as an intermediary between a supplier of goods and services (such as a merchandiser or retailer) who collects or receives payment for such goods and services from a buyer in behalf of the supplier and receives a commission thereon;
(3) a platform provider for promotion that uses the internet to deliver marketing messages to attract buyers;
(4) a host of online auctions conducted through the internet, where the seller sells the product or service to the person who offers the highest price for it;
(5) a supplier of digital services to a buyer in exchange for a regular subscription fee over the usage of the said product or service; or
(6) a supplier of goods or electronic and online services that that can be delivered through an information technology infrastructure, such as the internet.

SyCipLaw Tip 10:
VAT is territorial in nature and should apply only when the sale takes place in the Philippines, or the services are rendered in the Philippines. With the proposed amendments to the Tax Code, it appears that digital goods and digital services will be considered sold or rendered in the Philippines if the buyer is a Philippine resident or "consumption" is within the Philippines. It is not clear how the provisions may be implemented (or specifically how the VAT will be collected) if the non-resident digital service provider does not register in the Philippines. Finally, non-resident digital service providers will have to consider whether registration for VAT purposes will trigger income tax issues and other "doing business" requirements.

On the other hand, the "buyer" is "any person who resides or consumes taxable digital services in the Philippines from a digital service provider either for personal consumption or for trade or business purposes."

"Digital service" is generally defined as "any service that is delivered or subscribed over the internet or other electronic network and which cannot be obtained without the use of information technology and whether the delivery of service may be automated."

The following services are considered as "digital services" under HB 7425:

(1) online licenses of software updates, and add-ons, website filters, and firewalls;
(2) mobile applications, video games, and online games;
(3) webcast and webinars;
(4) provision of digital content such as music, files, images, text, and information;
(5) advertisement platform such as the provision of online advertising space or intangible media platform;
(6) online platform such as electronic marketplaces or networks for the sale, display, and comparison of the price of trade products or services;
(7) search engine services;
(8) social networks;
(9) database and hosting such as website hosting, online data warehousing, file sharing, and cloud storage services;
(10) internet-based telecommunication;
(11) online training such as provision of distance teaching, e-learning, online courses, and webinars;
(12) online newspapers and journal subscription; and
(13) payment processing services.

More generally, Section 108 of the Tax Code, which, among others, defines the phrase "sale or exchange of services," will be amended to expressly state that "sale or exchange of services" means the performance of services for others for a fee, remuneration or consideration, whether rendered electronically or otherwise. The following were also added to the enumeration of services under Section 108:

(1) supply by any resident or nonresident of digital services such as online advertisement services, provision for digital advertising space, and any other facility or service for the purpose of online advertisement;

(2) supply by any resident or non-resident of digital services in exchange for a regular subscription fee over the usage of said product or service; and

(3) supply of electronic and online services that can be delivered through an information technology infrastructure, such as the internet.

Consistent with the proposed amendments of the other provisions to include digital goods and services among taxable goods and services, Section 109 of the Tax Code, which lists the exempt transactions, will be amended to include online courses and webinars and electronic or online sale of books, newspapers, magazines, etc. among the exempt transactions provided they comply with the other requirements stated in said section.

A non-resident digital service provider may be subject to VAT for digital services provided; however, HB 7425 provides that the non-resident digital service provider may not claim creditable input VAT.

A non-resident digital service provider who, in the course of trade or business, engages in the sale or exchange of digital services must register for VAT if:

(1) its gross sales or receipts for the past 12 months before the date of filing of VAT return, other than those exempt from VAT, have exceeded PhP3 million; or

(2) there are reasonable grounds to believe that its gross sales or receipts for the next 12 months from date of filing of VAT return, other than those exempt from VAT, will exceed PhP3 million.

The BIR must establish a simplified automated registration system for non-resident digital service providers. Subject to rules and regulations to be prescribed by the DOF, a VAT-registered non-resident digital service provider may issue an electronic invoice or receipt.

HB 7425 also proposes to amend Section 114 of the Tax Code, which relates to return and payment of VAT to provide those payments to non-residents for services rendered in the Philippines shall be subject to 12% withholding VAT unless they are duly registered with the BIR. Note that this amendment applies to all non-residents and not only to non-resident digital service providers.

If HB7425 is passed into law, its implementing rules and regulations shall be promulgated by the DOF upon recommendation of the BIR, and in coordination with the Department of Information and Communications Technology.

Wealth Taxes in Singapore – the Present, and Glimmers of a Potential Future

DENTONS RODYK

January 12, 2022

Introduction

Implementing wealth taxes has been a topic of great interest in Singapore in the past year, with the debate on its merits having attained high prominence in local policy discourse. During the Singapore Economic Roundtable (Economic Roundtable) held in October 2021, Minister for Finance Lawrence Wong emphasised the need for Singapore to guard against rising inequality, and highlighted that the Ministry of Finance is presently studying options to expand Singapore's system of wealth tax. The recent raising of Additional Buyer's Stamp Duty Rates (ABSD) with effect from 16 December 2021 for owners of multiple properties is arguably a clear indication of such a focus. This comes as no surprise, as governments worldwide grapple with depleted public finances as well as rampant wealth inequality, both of which are a direct result of the COVID-19 pandemic. To put things into perspective, the aggregate wealth of the super-rich grew nearly four-fold from US$41.5 trillion in 2000 to US$191.6 trillion in 2021, and their share of global wealth rose from 35 per cent to 46 per cent over the same 20-year period.[1]

This article discusses how Singapore's current tax system already encompasses certain features of a wealth tax, as well as how Singapore could explore further potential avenues of taxing wealth moving forward.

Wealth taxes in Singapore: at present

Wealth taxes can come in different forms, ranging from a pure wealth tax (i.e. a flat percentage tax on an individual's total net worth) to other forms of indirect wealth tax, such as inheritance tax, capital gains tax and real-estate tax.

Unlike in many other countries, Singapore's tax system at present does not employ any form of inheritance, estate, capital gains or net wealth tax. Instead, it mostly relies on the progressive nature of its existing tax base to ensure that the wealthy pay a greater proportion of tax. For example, the rates for personal income tax and buyer's stamp duty depends on the personal income of the taxpayer and the market value of the property respectively. As a means to tax homeowners (who are generally perceived as being better off), Singapore also levies property tax, which is based on the annual value of the property. Notably, property tax on residential properties is also subject to progressive tax rates, depending on whether the property is owner-occupied or not. As a form of indirect wealth tax, the government levies an additional tax in the form of Additional Buyer's Stamp Duty (ABSD) on homeowners who have the means to purchase multiple properties.

Moving forward: the options Singapore may consider in implementing wealth taxes

A balancing of factors

While few will dispute that in principle, wealth taxes contributes to a fairer and more progressive society, it cannot be over-emphasized that any government would need to have careful regard to the design and implementation of any proposed wealth tax. Particularly, in order for a wealth tax to be meaningful and consistent with Singapore's existing social-economic background and policies, it would have to strike a balance between certain fundamental trade-offs, such as:

1. the imperative to stay competitive and business-friendly given Singapore's regional status as a business and wealth management hub;
2. the ease of administration (in that its implementation and administration should be procedurally straightforward and cost-effective, whilst ensuring compliance with minimal scope for avoidance by taxpayers);
3. the sustainability of such a measure; and
4. the sufficiency of such a measure not just in terms of potential tax collectible, but in addressing the growing income inequality and wealth disparity in Singapore.

Such considerations were similarly echoed by Minister for Finance Lawrence Wong at the Economic Roundtable, where he noted that any expansion of Singapore's system of wealth tax must be carried out in a manner that "add[s] to our revenue resilience without undermining our overall competitiveness".

Crucially, any wealth tax proposal should not tip the scales as regards Singapore being an attractive destination for high net worth individuals and foreign investments. Put simply, it should not cause such parties to divert their capital out of Singapore. As a small and open city-state whose light-touch tax regime has for decades been a key competitive advantage in attracting foreign capital, a substantial capital flight would have clear knock-on effects on the Singapore economy.

The viability of reintroducing estate duty

Although Singapore repealed its estate duty regime in 2008, there has been growing talk in the past year of its reintroduction in order to address the growing wealth discrepancy. As an inheritance tax charged on the total market value of the assets of a deceased person on the date of his or her death, its design was previously intended to rebalance wealth and to prevent wealth from being concentrated within bloodlines across generations.

While conceptually attractive, any reintroduction of estate duty in Singapore would first need to address the design shortcomings of the previous regime, which had resulted in it being largely ineffective in taxing the wealthy.

Firstly, the Estate Duty Act (Chapter 96) had provided that lifetime gifts made more than five years before one's death (provided that the donor was excluded from any benefit under the gift) would not be subject to estate duty. Effectively, a person possessing valuable assets who wanted to escape the imposition of estate duty upon his or her death could simply transfer the assets five or more years before his or her death. As such, the rule had a tendency to benefit those who were financially able to make large gifts early in their lives without reducing their standard of living, which would typically be the case for the wealthiest.

Further, a tax that was only levied on the assets owned by a person upon his or her death also meant that it was easily avoided through tax planning, a service that the wealthy would typically have greater access to. For example, an individual wishing to avoid estate duty could easily transfer his or her assets to a lifetime trust or to a holding company, thereby ensuring that the assets were no longer held in his or her personal name. As the individual no longer owned the assets upon death, no estate duty would apply.

These drawbacks in the previous estate duty regime resulted in the high costs of administering the tax, as a proportion of tax collected. To put things into perspective, it was noted in the 2008 Budget Statement by the then-Minister for Finance Tharman Shanmugaratnam that the estate duty regime had, prior to its abolishment in 2008, on average collected only S$75 million per year. It is thus understandable that many jurisdictions, including Australia, Hong Kong, Malaysia and New Zealand, have similarly proceeded to abolish estate duty from their respective tax systems.

In any case, we would highlight that even if reintroduction of estate duty is being seriously considered, it would be unlikely that Singapore would reinstate the generous exemptions that applied to the previous regime (specifically, the S$9 million exemption threshold for residential properties), given that Singapore's policy with respect to residential ownership has clearly changed since then. This would mean that any newly introduced estate duty regime would, if at all, likely apply to a wider scope of assets (including not only residential property but extending potentially to digital assets, for example).

With the above in mind, any reintroduction of estate duty would undoubtedly need to take into account the real risk of jeopardizing Singapore's vibrant wealth management and private banking industry, the growth of which has been supported at least in part by the abolishment of estate duty in 2008 in the first place. Implementing an estate duty could disincentivize and even drive away wealthy individuals and families from parking their wealth and assets in Singapore.

Real estate taxes: low hanging fruit

Utilising real estate-related tax (i.e. property tax, stamp duties) as a means to tax the wealthy has historically been very popular in countries worldwide. This is logical, given that a large proportion of the wealthy store their wealth in real estate and that, increasingly, the widening wealth gap worldwide has been driven by property investments. The reality is that those with higher incomes can afford larger investments in real estate, and that the substantial value appreciation they enjoy over time is not available to those with lower incomes and smaller outlays for housing.

Real estate taxes as a form of wealth tax is also highly attractive from the perspective of administrative implementation. Tax on property represents a more stable revenue mobiliser as real property cannot be moved around, its ownership is transparently documented, and its valuation is relatively straightforward. In addition, the fact that real estate is generally a big-ticket purchase means that the revenue collected from such taxes is substantial. It would also be administratively easier for Singapore to leverage on an existing tax regimes such as stamp duty and property tax as a means of implementing a wealth levy, as opposed to creating a new class of tax, which would inevitably create some degree of legal uncertainty as to its application.

Property Tax

Building on its existing progressive nature, there is scope to make property taxes even more progressive. In this regard, an additional surcharge on luxury and larger properties could be explored. Such a surcharge can be further defined based on a threshold assessed value. Further, given the low rate of property tax at present (in relation to the full value of property), there is potential for a significant increase in rates.

Stamp Duty

The approach taken in relation to property tax can similarly be adopted for stamp duty on property transfers, in that higher buyer stamp duty rates could be implemented for larger and more expensive properties. This ensures that such measures are targeted only at wealthier taxpayers. Such a move is not new to Singapore – in 2018, the highest marginal Buyer's Stamp Duty rate was raised from 3 per cent to 4 per cent for residential property valued in excess of S$1 million. The latest hike in ABSD rates are clearly targeted at wealthier homeowners in the private housing market, as it only applies to purchasers who are acquiring additional residential properties (i.e. rates for first property purchases remain unchanged). Even so, notwithstanding that stamp duty remains an easy tax to administer and collect, raising stamp duty rates in itself would unlikely be a sufficient solution to taxing the wealthy. This is because the revenues collected are highly volatile as they depend purely on transaction volume. It is thus no surprise that the decision to increase stamp duty rates is traditionally seen as “part of a package of measures to cool the residential market”, rather than an exclusive tool to tax the wealthy. [2]

Alternative taxes: other possible avenues for wealth tax?

Income tax

In line with the current progressive nature of Singapore’s income tax regime, a common suggestion to address rising wealth inequality in Singapore is to increase the headline income tax rate for ultra-high income earners. By raising tax rates only for such individuals, this would address the concern that a tax on income would disincentivize hard work for the middle and upper middle income earners. Yet, such a proposal may not be effective in reducing the wealth gap, given that an income tax in itself does not operate as a tax on wealth, but only on accretions to wealth. It remains a truism that in many societies, including Singapore, the ultra-wealthy rely primarily on their capital assets (profits derived from financial proceeds of the sale of securities, properties and dividend income etc.) for wealth appreciation.

Goods & services tax (GST)

Given that Singapore has successfully designed its goods and services tax (GST) regime to align with its overall progressive tax system, another option for Singapore would be to leverage on GST as a means of taxing the wealthy. Under the current regime, lower and middle income households are able to rely on the permanent GST voucher scheme for cash support and utility rebates, effectively allowing these households to pay less GST as compared to higher income households. As a result, foreigners residing in Singapore, tourists and the top 20 per cent of resident households are estimated to bear more than 60 per cent of the net GST on households and individuals.[3]

In addition to raising the GST rate, another possibility could be to further subject certain types of goods (i.e. luxury, high value goods etc.) to a higher rate of GST. Taxes based on consumption have been historically easy to administer and collect, and would provide a steady stream of revenue to the government coffers, to fund more social programs to tackle inequality.

Motor vehicle taxes

It may be worth exploring the possibility that wealth tax in Singapore could also take the form of a tax on vehicle ownership. This is especially since motor vehicles have traditionally been seen, particularly in Singapore, as a second big-ticket physical asset class owned by individuals. At present, Singapore does not distinguish between households based on the number of vehicles they own. A possible method may be to tweak the Certificate of Entitlement regime so as to impose a tax on households with multiple vehicles. Another possible approach could be to levy higher tax rates on more expensive luxury cars above a certain purchase threshold, reflecting a degree of progressivity in motor vehicle taxes.

Difficulties with a net wealth tax

At the international level, the concept of a net wealth tax is not new, with countries increasingly exploring the viability of taxing an individual based on a percentage of his or her taxable assets (i.e. the value of his or her assets minus any related liabilities). In Argentina, a one-off levy at rates up to 5.25 per cent was passed into law on 4 December 2020. At the same time, the UK Wealth Tax Commission published its Final Report proposing an annual one-off wealth tax applicable to UK residents with personal wealth above a set threshold.[4] Member of Parliament Jamus Lim also recently proposed in his parliamentary speech that Singapore should impose a wealth tax of 0.5 per cent to 2 per cent on the most wealthy, as it could “help diversify Singapore’s revenue sources and also reduce income and wealth inequality”. [5]

While a net wealth tax may be conceptually attractive in ensuring progressiveness by applying only to the very rich, it has equally been observed that such a tax is administratively inefficient and cumbersome to implement.

The first limitation relates to the issue of disclosure and the inherent mobility of assets. It is easy to “hide” wealth in assets that can be effortlessly moved from one location to another (such as having offshore bank accounts, art, jewelry etc.), which complicates the determination of the net wealth tax base. This difficulty has become increasingly severe given the rise of digital assets, such as bitcoin and non-fungible tokens, as a popular store of wealth. While digital assets are increasingly subject to regulation by governments worldwide, current laws on the transparency and beneficial ownership of such assets remain fledgling and undeveloped.

The next major concern relates to the difficulty in valuing a taxpayer’s assets for the purposes of administering the net wealth tax. This is especially the case if the value of the asset in question cannot be easily assessed due to the lack of an active market, such as assets including works of art, antiques and jewelry, or when the value of the asset has a tendency to fluctuate over time. Without an objective method to compute asset value, it is foreseeable that the application of such a tax would produce significant inefficiencies given the high likelihood of challenges by taxpayers as to the valuation of such assets.

It is thus of no surprise that Singapore has been very cautious in considering the introduction of such a tax, with Prime Minister Lee Hsien Loong acknowledging at the November 2021 Bloomberg New Economy Forum that a net wealth tax is “not so easy to implement”. In a similar vein, Minister for Finance Lawrence Wong recently noted that the Singapore government “will not focus on taxing individuals based on their net wealth, but will look at the entire system of taxes here and identify areas which can be strengthened instead”. [6]

Conclusion: a cautious stance warranted

Given the soaring wealth inequality and the depletion of government reserves as a result of the COVID-19 pandemic, the case for a wealth tax in Singapore has never been more compelling. Even assuming a conclusion is reached that non-fiscal initiatives are insufficient to address the inequality issue—an analysis of which in itself, is highly complex and not the subject of this article—the question that has stumped policymakers is the form in which the wealth tax should take, and what lessons can be learnt from the experiences of other jurisdictions worldwide, so that Singapore’s tax system can be designed to ensure that the twin goals of fairness and fiscal sustainability are met without compromising economic dynamism and investor confidence. Although it is unclear at this point which direction the government will take in relation to this issue, it is certain that utmost caution should be exercised in designing a wealth tax system, as wealth levies may ultimately end up as a blunt instrument, which yielded carelessly, could inflict long-term collateral damage on Singapore’s economy and its allure for investment and asset management.

---

[1] https://www.businesstimes.com.sg/opinion/the-taxing-problem-of-implementing-wealth-tax-in-singapore

[2] https://www.iras.gov.sg/taxes/stamp-duty/for-property/buying-or-acquiring-property/additional-buyer's-stamp-duty-(absd)

[3] https://www.straitstimes.com/politics/budget-debate-heng-swee-keat-on-why-the-gst-hike-cannot-be-scrapped

[4] https://www.wealthandpolicy.com/wp/WealthTaxFinalReport.pdf

[5] https://www.straitstimes.com/singapore/politics/parliament-wp-mp-jamus-lim-proposes-wealth-tax-of-05-to-2-per-cent-on-the-richest

[6] https://www.businesstimes.com.sg/government-economy/government-will-not-focus-on-taxing-individuals-based-

Your Key Contacts

Edmund Leow, SC
Senior Partner, Singapore
D +65 6885 3613
edmund.leow@dentons.com

Jia Xian Seow
Partner, Singapore
D +65 6885 3658
jiaxian.seow@dentons.com

Shu Yih Ng
Associate, Singapore
D +65 6885 3709
shuyih.ng@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

Davis Wright Tremaine LLP

ADVISORIES

Healthcare

Supreme Court Upholds CMS COVID-19 Vaccine Mandate But Blocks OSHA Mandate for Businesses

By Darby Allen, Brandon Braithwaite, and Christine Parkins Johnson

01.14.22

In a 5-4 ruling, the U.S. Supreme Court on January 13, 2022, lifted two injunctions blocking the Centers for Medicare & Medicaid Services' (CMS) COVID-19 vaccination mandate for healthcare facilities. The Court's ruling means facilities across the country must ensure that their workforce is fully vaccinated and that policies and procedures are in place to support vaccination.

In a separate 6-3 ruling, however, the Court blocked OSHA's Vaccination and Testing Emergency Temporary Standard (ETS) for businesses.

CMS Mandate

On November 4, 2021, CMS published the Omnibus Health Care Staff Vaccination Rule (CMS Mandate) as an Interim Final Rule requiring that individuals working in certain Medicare- or Medicaid-certified providers receive their first COVID-19 shot prior to December 6, 2021, and be fully vaccinated against COVID-19 by January 4, 2022. The CMS Mandate also requires the creation and implementation of policies and procedures related to COVID-19 staff vaccination.

The CMS Mandate, however, immediately faced a number of legal challenges. The U.S. District Court for the Eastern District of Missouri issued an injunction against the CMS Mandate in 10 states and the U.S. District Court for the Western District of Louisiana issued a preliminary injunction that initially blocked the mandate nationwide but which was limited to 14 states by the 5th Circuit Court of Appeals. In December, the federal government asked the U.S. Supreme Court to stay the Missouri and Louisiana preliminary injunctions.

The Court held that the vaccination mandate falls within the authorities Congress granted to HHS, specifically that HHS can impose conditions on the receipt of Medicare and Medicaid funds that HHS "finds necessary in the interest of the health and safety of the individuals who are furnished services." The Court stated that one of the most basic functions of HHS is "to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety."

The Court also noted that HHS has long established conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds and among these conditions are infection prevention and control programs. The Court pointed out that healthcare workers and public health organizations "overwhelmingly support" the CMS Mandate, concluding that such support "suggest[s] that a vaccination requirement . . . is a straightforward and predictable example of the 'health and safety regulations' that Congress has authorized the Secretary to impose."

Finally, the Court held that the CMS Mandate was not arbitrary and capricious, and that CMS had good cause to delay notice and comment by publishing the mandate as an Interim Final Rule.

Deadlines for Vaccination

CMS issued guidance on December 28, 2021, stating that regulated providers in the 26 states and the District of Columbia who were not covered by the Missouri and Louisiana injunctions would be expected to require their workforce members to receive the first dose of a COVID-19 vaccine by January 27, 2022, and be fully vaccinated by February 28, 2022. Although CMS has not yet been explicit in its deadlines for the 24 states affected by the Court's ruling, industry groups such as the American Hospital Association expect the same deadlines to apply.

CMS Administrator Chiquita Brooks-LaSure said that providers in the states covered by the decision "will now need to establish plans and procedures to ensure their staff are vaccinated and to have their employees receive at least the first dose of a COVID-19 vaccine." The Interim Final Rule does not require vaccination of staff who work exclusively outside the facility setting and do not have direct contact with other staff or patients. Providers may consider whether this exception can be met to reduce staffing shortages in appropriate circumstances.

Although some states, such as Florida, have enacted laws that limit vaccination mandates, providers who wish to participate in Medicare and

Medicaid must adhere to CMS's rules.

OSHA ETS

Also on January 13, 2022, the U.S. Supreme Court blocked implementation of the Occupational Safety and Health Administration's (OSHA) COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) that applied to U.S. employers with 100 or more employees. The OSHA Vaccination or Test ETS, with few exceptions, required private employers with 100 or more employees to mandate their employees to be vaccinated from COVID-19 or undergo regular weekly testing and wear a face covering at work.

A majority of the Justices concluded that OSHA had exceeded the authority granted it by Congress. The Court stated, "Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly . . . [r]equiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category."

Moving Forward, What May Employers Do, If Anything?

The Court's ruling does not mean that employer vaccination mandates cannot exist. Employers may still elect to implement specific vaccination or testing policies as they deem appropriate, except in the few states where such policies are prohibited or limited by state law. Further, there are approximately 20 jurisdictions with OSHA-approved state plans permitting the state safety and health agencies to implement their own rules.[1]

The Court's decision does not directly impact those state requirements. To the contrary, Justice Gorsuch, joined by Justices Thomas and Alito, in a concurring opinion expressed that the states are the best place to implement the policies.

Nonetheless, OSHA could still issue a "regular," i.e., non-emergency, standard by following a formal notice and comment process. The comment period under the now stayed ETS is still open, and OSHA could easily build on that record and issue a proposed standard. However, a new standard would take substantial time and likely would not require vaccination, but easily could require face coverings, distancing, and testing.

Meanwhile, employers still have to consider (1) OSHA General Duty Clause obligations (which generally track CDC guidance), (2) the federal CMS mandates (discussed below) for healthcare employers, (3) the federal contractor vaccine mandate (currently stayed nationwide, but likely will be reviewed ultimately by the U.S. Supreme Court), and (4) applicable and often conflicting state and local law requirements and limitations.

FOOTNOTES

1 Oregon OSHA advised on their website that in light of the U.S. Supreme Court decision, Oregon OSHA will not move forward with adopting the same or similar standard in Oregon. Oregon OSHA maintains a COVID-19 rule that requires employers to implement protections for workers, including control planning, exposure risk assessments, sanitation, and notification. Cal/OSHA has already adopted a Covid ETS. It is unknown what Washington will do under its WISHA authority, although it has drafted an OSHA-identical ETS for possible implementation.

The facts, laws, and regulations regarding COVID-19 are developing rapidly. Since the date of publication, there may be new or additional information not referenced in this advisory. Please consult with your legal counsel for guidance.

DWT will continue to provide up-to-date insights and virtual events regarding COVID-19 concerns. Our most recent insights, as well as information about recorded and upcoming virtual events, are available at

Hogan Lovells

FDA explains when medical device makers must notify of an interruption in manufacturing

13 January 2022

On Monday, the U.S. Food and Drug Administration (FDA) issued the draft guidance "Notifying the FDA of a Permanent Discontinuance or Interruption in Manufacturing of a Device Under Section 506J of the FD&C Act," which aims to assist medical device manufacturers in providing timely, informative notifications about changes in the production of certain medical device products to help prevent or mitigate shortages of such devices as the government transitions out of temporary rules put in place for the duration of the public health emergency. This guidance does not apply only to the COVID-19 pandemic, but provides lasting recommendations to manufacturers on when and how they must notify FDA of a permanent discontinuance or interruption in manufacturing during a public health emergency or if the conditions are such that a public health emergency may well be imminent. FDA is accepting comments on the draft guidance through March 11.

Who must notify

Section 506J of the Federal Food, Drug, and Cosmetic Act (FDCA) requires medical device manufacturers to notify FDA, during "or in advance of" a public health emergency under section 319 of the Public Health Service Act (PHSA), of a "permanent discontinuance" in the manufacture of certain devices or an "interruption in the manufacture" of certain devices that is "likely to lead to a meaningful disruption in supply of that device" in the U.S. This applies to manufacturers of devices:

- that are critical to public health during a public health emergency, including those that are life-supporting, life-sustaining, or intended for use in emergency medical care or during surgery; *or*
- for which FDA determines information on potential meaningful supply disruptions is needed during, or in advance of, a public health emergency.

During the COVID-19 pandemic, FDA created a table of device types and corresponding product codes identifying devices that FDA believes to be critical to the public health during a public health emergency under the FDCA, which manufacturers should consider to determine whether they are required to notify FDA. However, the agency's latest draft guidance does not only apply to the current public health emergency, and it is not intended to supersede the COVID-19 Public Health Emergency guidance "Notifying CDRH of a Permanent Discontinuance or Interruption in Manufacturing of a Device under 506J of the FD&C Act during the COVID-19 Public Health Emergency," which will be withdrawn at the end of the COVID-19 Public Health Emergency, but will apply to future public health emergencies and the period when one may be emerging.

For manufacturers who are unsure whether they are required to submit a 506J notification, FDA recommends they evaluate the following circumstances to determine whether they manufacture devices for which a notification is required during or in advance of a public health emergency:

- Whether the device (with or without accessories) is life-supporting, life-sustaining, or intended for use in emergency medical care (examples could include extracorporeal life support, hemodialysis equipment, and automated external defibrillators);
- Whether the device (with or without accessories) is intended for use during surgery (examples could include cardiopulmonary bypass oxygenators, and infusion pumps and tubing);
- Whether the device (with or without accessories and/or testing supplies) is used to diagnose, cure, treat, mitigate, or prevent a disease that is related to a pandemic or other public health emergency (examples could include specific supplies from diagnostic and serological specimen collection kits, pulse oximeters, and cardiac and other monitoring equipment); or
- Whether the device (with or without accessories) would be in higher-than-typical demand during the response to a pandemic or other public health emergency compared to a similar period of time (examples could include personal protective equipment and personal oxygen concentrators).

These considerations will need to flexible to cover the needs of the next public health emergency.

When to notify

Manufacturers who must submit a 506J notification should do so **at least six months in advance** of a permanent discontinuance in manufacturing of a device or an interruption in manufacturing of a device that is likely to lead to a meaningful disruption in supply of the device in the U.S. If that timeframe is not possible, notification should be done “as soon as is practicable,” according to the draft guidance. FDA says it considers “as soon as practicable” to mean that a manufacturer should notify FDA **no later than 7 calendar days after an interruption** in manufacturing occurs, or no later than 7 calendar days after the manufacturer decides to permanently discontinue the device, as applicable. FDA defines a “meaningful disruption” as “a change in production that is reasonably likely to lead to a reduction in the supply of a device by a manufacturer that is more than negligible and affects the ability of the manufacturer to fill orders or meet expected demand for its product” and advises manufacturers to not consider the ability of other manufacturers to fill the void.

As already codified in the FDCA, the draft guidance spells out how FDA interprets a “permanent discontinuance” to mean when the manufacturer ceases manufacturing and distributing a product indefinitely for business or other reasons; and how FDA interprets “interruptions in manufacturing” to include those that occur as a result of a decrease in manufacturing capability or an increase in demand due to the current or potential public health emergency. Importantly, this is not an across the board obligation to notify FDA of any discontinuance or interruption in manufacturing, but rather is an obligation that is tied to a current or emerging public health emergency.

The draft guidance also explains the timelines for the terms “during…a public health emergency” and “in advance of a public health emergency.” Notably, FDA says that “if certain conditions exist prior to the occurrence of an outbreak or natural disaster that signal the potential for such event to occur and that may lead to the declaration of a public health emergency, FDA considers such conditions to be ‘in advance of a public health emergency.’” For example, 506J notification is required if:

- HHS activates the National Disaster Medical System or deploys the Strategic National Stockpile without yet determining a public health emergency;
- HHS authorizes assistance for research, investigations, demonstration, and studies into the causes, diagnosis, treatment, control, and prevention of a physical or mental disease under section 301 of the PHSA; or
- HHS authorizes assistance in the prevention and suppression of communicable diseases under section 311 of the PHSA.

Additional examples are provided in the draft guidance.

The draft guidance also notes that if the circumstances giving rise to a manufacturer's 506J notification change after notifying FDA, the manufacturer should notify FDA of this change in status as well and also recommends updates be provided every six weeks.

What information to include in 506J notifications

FDA recommends that manufacturers submitting 506J notifications include additional information that could inform FDA of current supply chain pressures, including indications of:

- Manufacturing pressures (e.g., labor shortages, delays in raw material supply, temporary plant closures, packaging or sterilization concerns, other unforeseen circumstances that prevent fulfillment);
- Distribution pressures (e.g., shipping/transportation challenges, export/import challenges, procurement issues);
- Increased or projected increased demand (e.g., backorder, allocation, low fulfillment 330 rates);
- Potential broader/connected interruptions (e.g., reliance on critical suppliers who are experiencing supply chain interruptions); and
- Actions or circumstances affecting software-enabled devices that may disrupt healthcare operations (e.g., device cybersecurity vulnerabilities or exploits).

In addition, FDA advises manufacturers to submit information that could help FDA better assess the overall state of the market and help inform potential mitigations, including a) potential prevention or mitigation strategies, including stakeholder and customer communications; and b) inventory and production capacity, including potential expansion capabilities (e.g., estimated market share, historic and current production capacity, maximum production volume).

The draft guidance recommends that manufacturers not delay notifying FDA until all information is available, but instead recommends that they provide initial 506J notification as soon as is practicable and then share additional information as it becomes available.

Appendix A of the draft guidance provides an example of the information that FDA recommends be included in a 506J notification, and examples of reasons for the discontinuance or interruption, as well as other voluntary information that could be included.

Last, the draft guidance also contains information on how FDA determines which devices are in shortage, its list of devices in shortage, and expected reviews and inspections for devices in shortage.

FDA authority to assist in mitigating shortages

The FDA has new authorities it can use to help prevent or mitigate device shortages both during a public health emergency or even in advance. FDA is required to maintain a publicly available, up to date list of devices it has determined to be in shortage. Currently on the list are clinical chemistry products, dialysis related products, general ICU/hospital products, hematology products, infusion pumps and related accessories, microbiology products, needles and syringes, personal protective equipment, sterilization products, testing supplies and equipment, ventilation related products and vital signs monitoring products. The Cares Act granted FDA authority to do more than simply log and collate products for which it has received notification. If the Secretary concludes that there is, or is likely to be, a shortage of a device, inspections, as well as review of submissions, may be prioritized and expedited to help mitigate or prevent shortages.

FDA also has the authority to issue letters in cases where the agency believes a manufacturer has failed to submit the necessary notification and where, upon review the agency concludes that there was indeed a failure, the agency plans to make the redacted correspondence publicly available on its website.

Relatedly, in March 2020, the President of the United States issued an Executive Order on "Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19," which invokes the Defense Production Act of 1950 (DPA) to confer upon the President a broad set of authorities to influence domestic industry in the interest of national defense. Specifically, the EO determines that personal protective equipment and ventilators, as well as other health and medical resources that may be identified by the Secretary of Health and Human Services (HHS) are "scarce and critical material[s] essential to the national defense" such that the Presidency can exercise its powers under the DPA to control the general distribution of such materials in the marketplace.

Under the Defense Priorities and Allocation System (DPAS), which are the implementing regulations for the DPA, several federal agencies may issue "rated orders," which are priority ratings that are assigned to government contracts that are needed to support certain approved programs, such as the government's response to COVID-19. In addition, the DPA allows the government to issue "allocation" orders "when there is insufficient supply of a material, service, or facility to satisfy national defense requirements through the use of the priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities." FDA may utilize this authority to respond to shortages, and may issue rated orders in response to notifications sent to the agency under Section 506J of the FDCA.

Next steps

While drug manufacturers have had obligations to notify FDA of drug shortages, medical device manufacturers have not had such an obligation until recently when the world was confronted with the COVID-19 pandemic. The COVID-19 pandemic has stretched the nation's health care infrastructure in ways that challenge the limits of disaster recovery plans and the ability of manufacturers to pivot and adapt. While the industry has stepped up in many ways to continue to supply product, issues such as the explosive needs for devices, supply chain shortage, worker shortages, and the duration of the pandemic have made it a reality that the industry may not be able to supply all of the medical devices it would like.

While the COVID-19 pandemic is not the first public health emergency this nation has had to confront, it has forced the industry and the nation to think hard about preparedness and confront the reality that there may well be another one – likely a very different one – in the future. As such, company's should reconsider their disaster recovery plans and whether there is a need for procedures that only get activated during a public health emergency for which their products are in great need, like this one for reporting discontinuations and interruptions in manufacturing. Additionally, manufacturers should consider what measures can be taken to strengthen the supply chain and apply the learnings from the challenges faced in this pandemic.

FDA said it invites comments on the draft guidance in general, and on the following questions, in particular:

- Whether the draft guidance provides sufficient clarity regarding what the FDA considers to be "in advance of a public health emergency," and whether any other situations should be considered in defining this term.
- How FDA could notify stakeholders when an event is considered to be "in advance of a public health emergency," or regarding shortages.
- Any circumstances where it is unclear whether a device manufacturer should submit a 506J notification.
- How FDA can best disseminate supplemental information during or in advance of a public health emergency to manufacturers and other stakeholders.
- FDA's recommendation that manufacturers provide updates to notifications every two weeks unless otherwise indicated

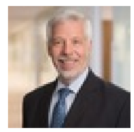
based on the nature of the situation, including the expected timeline for recovery, even if the status remains unchanged.

FDA is accepting comments on the draft guidance through March 11. If you have any questions on 506J notifications, would like assistance in strengthening your infrastructure, or may wish to submit a comment, please contact any of the authors of this alert or the Hogan Lovells attorney with whom you generally work.

Authored by Jodi K. Scott and Randy Prebula

Contacts

Jodi Scott
Partner
Denver
jodi.scott@hoganlovells.com



Randy Prebula
Partner
Washington, D.C.
randy.prebula@hoganlovells.com