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NOVEMBER 2022 e-Bulletin

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PRAC Let's Talk!

Virtual meeting - November 29, 2022

Conferences

Mexico City April 22-25, 2023
Hosted by Santamarina y Steta

Oct-Nov New Delhi 2023
Hosted by KOCHHAR & Co.

Paris TBA
Hosted by GIDE

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MEMBER DEALS MAKING NEWS

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►BENNETT JONES | SolGold & Cornerstone Announce Friendly Merger Transaction
► BRIGARD URRUTIA and CAREY | Landmark Cross-Border Restructuring of LATAM Airlines
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GIDE ADDS EMPLOYEE SHAREHOLDING PRACTICE WITH ARRIVAL OF NEW PARTNERS AND TEAM

PARIS , 18 October 2022: Gide is pleased to announce the arrival of Françoise Even and Sami Toutounji as partners, Barbara Streichenberger-Michel as Senior Counsel, as well as their team, to its Mergers & Acquisitions practice group to develop a new practice dedicated to employee shareholding.

With this new team, Gide is boosting the ability of its 500 lawyers, including 120 partners, to work alongside clients on their most strategic issues, with employee shareholding gaining in considerable momentum over these past few years.

This leading team behind the creation and development of this practice in Paris is one of the most active and respected players in the market. They advise listed and unlisted companies as well as European financial institutions on the design and international roll-out of their employee share ownership plans, as well as on the implementation of their compensation plans and related governance.

By joining Gide, Françoise Even, Sami Toutounji and Barbara Streichenberger-Michel and their team, Sonia Boulongne, Jérémy Lereau-Colonna and Maxime Ehrhart, will boost the practice of one of the largest M&A departments in the French market, with nearly 80 lawyers, including 23 partners, who have been involved in all the most significant transactions of the market.

They will also work closely with Gide's teams specialising in executive / management packages, securities and capital markets law, employment law and tax law.

Senior Partner Frédéric Nouel and Managing Partner Jean-François Levraud said: "We are delighted to welcome Françoise Even and Sami Toutounji to our firm. Together they have participated in establishing and developing this activity on the Paris market. The arrival of this new team is a natural complement to the firm's recognised practice in the field of managers and employees accessing the capital of their company, and strengthens our ability to support our clients as widely as possible".

Françoise Even and Sami Toutounji added: "We are very pleased to be joining the Gide teams in Paris. The reputation and quality of their various practices as well as the firm's international network are undeniable strengths that we will draw on to continue to provide the best possible support to our clients, both in France and abroad".

For additional information visit www.gide.com

HOGAN LOVELLS WELCOMES FORMER FCC DEPUTY BUREAU CHIEF

Hogan Lovells welcomes former FCC Deputy Bureau Chief Charles Mathias to Communications, Internet and Media practice

WASHINGTON, DC, 10 November 2022: Global law firm Hogan Lovells is pleased to announce that Charles Mathias, former Deputy Chief in the Federal Communications Commission's (FCC) Wireless Telecommunications Bureau (Wireless Bureau), has joined the firm's Washington, D.C., office as Senior Counsel in our Communications, Internet and Media (CIM) practice.

"We are delighted to welcome Charles to the firm," said Ari Fitzgerald, Head of the Hogan Lovells CIM practice. "Charles has a stellar reputation as a thought leader within the communications industry and will be a tremendous asset to our team, which advises and represents clients across the full spectrum of telecoms regulation."

At Hogan Lovells, Mathias will advise on regulation and policy issues across the information and communications technology sectors, including on infrastructure deployments, spectrum allocation and licensing, and new network and facilities models.

He brings a wealth of experience in regulation, telecommunications, and private practice. Most recently Mathias served as Bureau Lead on a variety of complex FCC initiatives, including wireless network and national security matters and innovative uses of spectrum. He regularly advised FCC commissioners and the Wireless Bureau Chief on a broad range of policy, regulatory, and legal issues, including license transfers, spectrum transactions and use, sharing and re-purposing of spectrum, and mobile device safety and integrity.

Mark Brennan, Head of the firm's global Technology & Telecommunications industry sector group, said: "We are thrilled to have someone with Charles' breadth of experience join us. Our clients across the world will benefit from his vast experience on a wide range of issues, including 5G, the Internet of Things, artificial intelligence, and more."

Mathias said: "I'm very happy to be joining Hogan Lovells, which has one of the leading telecoms and technology regulatory practices in the world. As communications and their associated technologies continue to develop at a rapid pace, I look forward to helping clients navigate the regulatory environment, which is changing just as fast.

Michele Farquhar, Washington, D.C., Office Managing Partner, added: "Charles is joining Hogan Lovells at an exciting time: while we have long been one of the largest law firms in Washington, we are committed to continuing to grow our office, and Charles is a great addition."

Prior to his role at the FCC, Mathias spent nine years as Director of Government and Regulatory Affairs at Lucent Technologies in both Washington, D.C. and Brussels, Belgium.

Mathias earned his J.D. from the University of Virginia School of Law and holds an A.B. from Harvard University.

For additional information visit www.hoganlovells.com

KOCHHAR WELCOMES SENIOR PARTNER STRENGTHENING BANKING, FINANCE AND REAL ESTATE PRACTICE

NEW DELHI – CHENNAI, 27 October, 2022: We are pleased to welcome Ms.Sujatha Rangachari who recently joined the Chennai Office of Kochhar & Co. ("The Firm") as a Senior Partner to expand its banking, project finance and real estate practice in the South India region.

Ms. Rangachari is a senior legal professional with extensive cross sectoral experience in banking, finance, infrastructure and real estate. She has over two and a half decades of banking experience having led the in-houselegal function of various banks and financial institutions traversing diverse practice areas including retail, corporate finance, new products & initiatives, debt restructuring and financial recoveries.

Ms. Rangachari has spearheaded complex legal funding structures, including equity and VCFs, and initiated establishment & administration of investment vehicles and related regulatory compliances. She has successfully negotiated out of court settlements in complicated litigation matters and has led transactions involving restructuring of stressed assets, and corporate debt recovery. Her real estate experience also includes due diligence, clearing up titles, negotiating and signing off on development agreements and joint ventures, tying up of finance, loan restructuring, initiating and defending litigation.

Mr. Rohit Kochhar, Founding Member and Chairman of Kochhar & Co. extended a warm welcome, and said: "I am pleased about Sujatha joining our Chennai team. Her rich experience in the banking and finance sector will bring a fresh perspective to this area of practice. She brings on board a unique advantage of having extensive exposure of handling legal intricacies in the real estate and infrastructure domain. I am confident that she will prove to be an asset to the Firm."

Ms. Rangachari added. " I have been an established player in the financial legal space in India for a long time, and it is a matter of pride for me that throughout my professional journey, I have been able to successfully deliver timely, feasible and business friendly solutions. I am confident that in my new avatar in Kochhar & Co., I will continue to show the same passion and zest and be able meet all expectations."

Kochhar & Co. is one of the leading and largest corporate law firms in India, with a full-service presence in the seven (7) prominent Indian cities including New Delhi, Mumbai, Bangalore, Chennai, Gurgaon, Chandigarh and Hyderabad; and three overseas offices- in Dubai, Singapore and Chicago.

For additional information visit www.kochhar.com

ALLENDE BREA

ASSISTS MARJOREL DELIVER GLOBAL CUSTOMER EXPERIENCE

BUENOS AIRES - 30 September, 2022: Allende & Brea in Buenos Aires helped multinational customer experience company Majorel acquire Madrid-based counterpart Findasense, including the target's operations in Latin America.

Findasense relied on Martínez-Echevarría in Madrid for the transaction, which was announced on 1 September for an undisclosed amount. Marjorel also relied on Cuatracasas; Perez Bustamante; Alta Melara; Alta Valdes Suarex & Velasco and Alta Batalia across various jurisdictions.

Counsel to Majorel - Allende & Brea Partner Valeriano Guevara Lynch and associates Mercedes Hel, Lucila Ana Lódola de San Martín, Juan Alberch and Bautista Dasso in Buenos Aires

For additional information visit www.allendebrea.com

BENNETT JONES

SOLGOLD & CORNERSTONE ANNOUNCE FRIENDLY MERGER TRANSACTION

Bennett Jones: SolGold & Cornerstone Announce Friendly Merger Transaction

TORONTO, 17 October 2022: SolGold plc and Cornerstone Capital Resources Inc. announced they have entered into a definitive agreement, where SolGold will acquire all of the issued and outstanding shares of Cornerstone, other than Cornerstone shares already held, directly or indirectly, by SolGold, pursuant to a court-approved plan of arrangement.

Bennett Jones is acting for SolGold on the deal.

The merger of the two companies will significantly strengthen their ability to create value for shareholders by consolidating 100% of the Cascabel copper-gold project, along with a robust portfolio of other projects, primarily across Ecuador.

The Bennett Jones team is led by James Clare, Christopher Doucet and Marshall Eidinger (Corporate/M&A) and includes Jessica Thrower, Bikaramjit Sandhu and Evan Stein (Corporate/M&A) and James Morand and Phil Ward (Tax).

More details on the transaction are available in SolGold's news release here: http://ir.q4europe.com/Tools/newsArticleHTML.aspx?solutionID=3676&customerKey=Solgold&storyID=15574581

For more informatoin visit us at www.bennettjones.com

BIGARD URRUTIA AND CAREY Y CIA

LANDMARK CROSS-BORDER RESTRUCTURING OF LATAM AIRLINES

09 November 2022

Colombia's Brigard Urrutia and Chile's Carey y Cia were among the US and Latin American law firms assisting in a landmark cross-border restructuring of LATAM Airlines.

Brigard Urrutia in Bogotá, was among the firms advising LATAM Airlines. Chile's Carey y Cia was among the firms representing Quatar Airways, one of several stakenholders..

The airline emerged from its restructuring on 3 November and lands with more than US$2.2 billion worth of liquidity and a debt pile reduced by US$3.6 billion. LATAM's Chapter 11 involved US$16 billion worth of liabilities and 38 debtors,including the airline's passenger and cargo airline subsidiaries.

Ful details about the restructuring can be found here: https://www.latamairlinesgroup.net/news-releases/news-release-details/latam-group-completes-restructuring-and-emerges-solid-financial

Counsel advising LATAM Airlines included Brigard Urrutia Partners Carlos Umaña, Catalina Santos, Jaime Robledo, Irma Rivera and Luis Gabriel Morcillo, and associates Paola Guerrero, Antonio Garlatti, Maria Fernanda Sánchez, Raúl Vargas, Camilo Mutis, Viviana Araujo and Maria Fernanda Avendaño in Bogotá

Counsel advising Quatar Airways included Carey Partners Jaime Carey, Diego Peralta, Pablo Iacobelli, Cristián Figueroa, Ricardo Reveco and Manuel José Garcés, and associates Jaime Coutts and Benjamín Echeverría in Santiago

For further information visit Brigard Urrutia (Bogota) www.bu.com.co and Carey y Cia (Santiago) www.carey.cl

GIDE

ADVISES FOODCHAIN ID ON THE ACQUISITION OF LEXAGRI INTERNATIONAL

PARIS, 08 November 2022: Gide has advised FoodChain ID, a leading provider of technology-enabled food safety, quality, and sustainability solutions, on the acquisition of Lexagri International, a leader in the AgTech industry focused on verifying, harmonizing, structuring, and distributing global agricultural data. FoodChain ID is a portfolio company of Berkshire Partners.

The Gide team was led by partner David-James Sebag, working with counsel Paul Jourdan Nayrac and associates Sarah Doray and Joséphine Remoussenard on M&A/corporate aspects ; partner Paul de France and associate Charles Ghuysen on tax aspects ; partner Foulques de Rostolan and associate Bénédicte Perrier, on employment law aspects.

For additional information visit www.gide.com

HAN KUN

ADVISES TIMS CHINA DE-SPAC COMBINATION AND LISTING

BEIJING – 30 September, 2022: On September 28, 2022, TH International Limited, the exclusive operator of Tim Hortons coffee shops in China ("Tims China"), completed its business combination with Silver Crest Acquisition Corporation, a U.S. special purpose acquisition company ("SPAC"). Tims China officially became a publicly traded company on September 29, 2022, with its shares and warrants trading on NASDAQ under the symbol "THCH". The closing and related transactions will provide Tims China access to nearly US$ 200 million to support continued growth.

Han Kun provided legal services to Tims China throughout the de-SPAC combination and listing process. Previously, Han Kun advised Tims China on its multiple equity financing series.

Tims China is an emerging coffee champion in China with a vision to build the premier coffee and bake shop in mainland China. Tims China offers freshly brewed coffee, tea and other beverages, bakery and sides, and sandwiches through company-owned and -operated stores and franchised stores. Tims China had 390 system-wide stores across 21 cities in mainland China as of December 31, 2021 and aims to build a profitable network of 2,750 stores by 2026. Closing of the de-SPAC listing marks a notable milestone for Tims China, making it the "first Chinese coffee stock listed through a SPAC".

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

ASSISTS PERCEPT TO SECURE GROUNDBREAKING FAA WAIVER AUTHORIZING DRONE INFRASTRUCTURE DEPLOYMENT AT SITES NATIONWIDE

WASHINGTON, D.C., 08 November 2022: Global law firm Hogan Lovells counseled autonomous drone technology developer Percepto in securing a nationwide waiver from the Federal Aviation Administration (FAA) for Beyond Visual Line of Sight (BVLOS) operations. In a broad approval, the FAA granted Percepto authorization to operate at qualifying sites across the country remotely for increased safety, efficiency, and ease of operation. Further details can be found here.

Percepto's "drone-in-a-box" technology, used by electric utilities, oil & gas, solar power stations, and mining operations, detects infrastructure problems, enabling faster response times and ensuring remedial action is taken where it is needed most. Percepto's waiver enables the expansion of automated drone inspection and monitoring without the lengthy wait that has traditionally been necessary for site-specific BVLOS approvals.

Hogan Lovells partner Lisa Ellman, who leads the firm's Uncrewed Aviation Systems practice, said: "Obtaining authorization from the FAA to conduct BVLOS operations nationwide is a significant win for Percepto, and we are proud to have helped our client bring this over the finish line. In addition to being an important step for the industry as a whole, we hope this is a sign the FAA will continue to encourage innovation by key critical infrastructure operators in the field of AI."

In addition to Ellman, Washington, D.C.-based counsel Patrick Rizzi and senior associate Matthew Clark also advised Percepto. Hogan Lovells' UAS team also includes Arjun Garg, Emily Kimball, and Allisa Newman.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ADVISES A.S.R ON ITS PROPOSED BUSINESS COMBINATION WITH AEGON NEDERLAND

AMSTERDAM, 27 October, 2022: NautaDutilh assists longstanding client a.s.r. on the proposed business combination of a.s.r. and Aegon Nederland, reinforcing a.s.r. as leading insurer in the Netherlands. The combination strengthens a.s.r.'s leadership positions in profitable and growing market segments.

The transaction covers all insurance activities, including the mortgage-origination and servicing operations, the distribution and services entities and the banking business of Aegon Nederland. The total consideration amounts to EUR 4.9 billion and comprises of newly issued ordinary shares to Aegon and a cash consideration of EUR 2.5 billion.

The transaction is subject to customary closing conditions, such as regulatory clearance.

Managing Partner Lieke van der Velden, who leads the NautaDutilh team together with Willem Bijveld and Paul van der Bijl, commented: "Fantastic to be able to support our client a.s.r. on this strategic transaction. Our longstanding relationship with a.s.r. means that we truly work together as one team. Congratulations to a.s.r. and Aegon Nederland and their teams, who have done a terrific job!"

The core NautaDutilh team for this deal consisted of Lieke van der Velden, Willem Bijveld, Sophie Umans, Jafar Alhashime, Ashley Fleming (Corporate / M&A), Paul van der Bijl, Koen Biesma (Corporate Advisory), Nico Blom, Nina Kielman, Sjuul Jentjens (Tax), Frans van der Eerden, Roderick Watson, Larissa Silverentand, Rob Heslenfeld, Kim Heesterbeek, Valentine Schols, Alex Draaisma (Regulatory), Michaëla Ulrici, Sasha van Gerrevink, Marlies van de Meulengraaff (Structured Finance), , Homme ten Have, Annette van Beers (Employment), Mauricette Schaufeli, Dineth de Graaf, Emma Wiggers, Casper van der Meulen (Competition).

For more information visit www.nautadutilh.com

SANTAMARINA Y STETA

ACTS IN ECUADOREAN FINTECH KUSHKI ACQUISITION OF MEXICO CITY BASED BILLPOCKET

MEXICO CITY, 07 October 2022: Santamarina y Steta assisted Ecuadorean unicorn Kushki with its acquisition of Mexico City-based counterpart Billpocket. The deal closed on 26 September for an undisclosed amount, just one month after Mexico's antitrust authority COFECE approved the transaction.

The deal comes just two months after the Ecuadorean fintech - which counts operations in Peru, Colombia, Chile and Mexico - received unicorn status by obtaining a valuation worth over US$1 billion. It has a team of more than 750 employees and processes more than 75,000 transactions per second.

Counsel to Kushki Santamarina y Steta Partners Carlos Argüelles, Vicente Grau, Juan Carlos de la Vega and Diego Ostos, counsel Karina Robledo and associates Daniela Flores, Lisa Carral, Ivan Szymanski, Denisse Avila, Raquel Ortiz, Marcela Flores and Tomás Jiménez in Mexico City; Morse, Barnes-Brown & Pendleton (Boston)

Counsel to Billpocket Simpson Thacher & Bartlett LLP NYC; Ritch Mueller y Nicolau, SC

For additional information visit www.hoganlovells.com

PRAC EVENTS
BULLETIN BOARD

Like millions around the globe, the COVID-19 pandemic has impacted our members and how we work.
Our industry follows others with a mix of restart and pause.
We meet in person where and when we can
while continuing to also 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.
We pivot. We adapt.
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 Events — Stay Connected

As we reboot our own in-person conferences in line with other industry related events ,
PRAC delegates can ***STAY CONNECTED!***
Let us know your plans to attend upcoming industry events and we will put you in touch
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Join us in 2022 for our live one-hour virtual meetings
PRAC - Let's Talk! events are open to PRAC Member Firms only
Register : events@prac.org

Visit www.prac.org for full event 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
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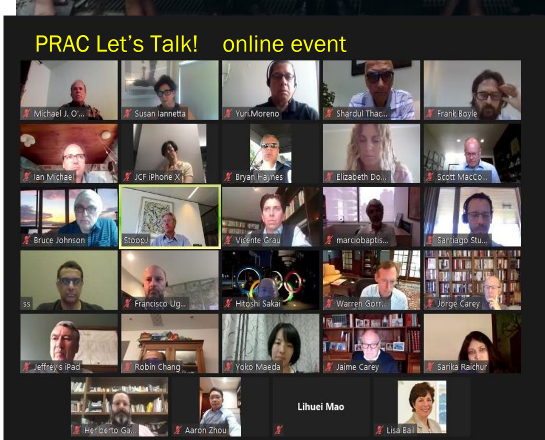
PRAC @ SAO PAULO
PACIFIC RIM
ADVISORY COUNCIL


PRAC @ Taipei 2014


PRAC Let's Talk! online event
Lihuei Mao


PRAC @ INTA


PRAC @ Vancouver


PRAC @ PDAC


PRAC @ IPBA

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

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

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

www.prac.org

AFIP and the Commerce Secretariat restructure the system of administrative approvals for importing goods and services

Practice Areas:

Customs, International Trade and Dumping

Lawyers:

Carlos M. Melhem, Jorge I. Mayora, Mateo H. Leiva Onetto

By means of General Resolution No. 5271, the Federal Administration of Public Revenues ("AFIP") along with the Commerce Secretariat, created the Import System of the Argentine Republic ("SIRA") to regulate and monitor the granting of administrative authorizations foreseen for imports of goods and services, replacing the existing system as from October 17, 2022.

Subjects importing and/or accessing the FX market for service payments abroad must inform and prepare a sworn statement through the web-system applied by AFIP.

The information registered in SIRA will be analyzed and report the intervening agencies (Secretariat of Commerce, AFIP/Customs, Central Bank of the Argentine Republic) which must analyze and rule over the operation within a term not exceeding 60 (sixty) calendar days as from the registration in SIRA. The authorizations will have a validity term of 90 (ninety) running days, counted from the date on which the ?SALIDA? status of the operation is obtained. The different status of SIRA´s declaration will be available through the My Customs Operations ("MOA") service, on AFIP's web page.

The evaluation and analysis of import orders for goods and services will consist be acceptable if the following conditions are met:

? Information provided by the subject and authorization request.
? Risk Profile, and compliance with the commercial regime (detection of eventual under- or over-invoicing).
? Financial Economic Capacity (CEF system)

Within the presentation, the importer must include the proposed payment term (from the official dispatch). On this information, in the eventual approval the Central Bank and the Secretary of Commerce will establish and inform the term of access in each case.

Regarding the submissions made under the SIMI in force, those with OFFICIALIZED or OBSERVED status will be cancelled and will have to be registered again through the SIRA. Those with OUTGOING status remain valid, unless they are observed by the General Customs Directorate. On the other hand, those importers that have made presentations within the framework of the Integral Monitoring System for Foreign Payments of Services ("SIMPES") and have an APPROVED status, shall remain valid.

This system is subject to regulation by the agencies involved.

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

Canada Proposes New Tax On Share Buybacks

Written By Jared Mackey and Spencer Brown

The federal government's 2022 Fall Economic Statement (Economic Statement), released on November 3, 2022, introduced a new tax on share buybacks by public corporations in Canada. Under the proposal, which would come into force on January 1, 2024, a two percent corporate-level tax would apply on the "net value" of a corporation's share buybacks. Share buyback programs are a means of returning value to shareholders and are initiated by companies for a variety of reasons. Particularly for companies who believe their stock is undervalued, the repurchase and cancellation of shares reduces supply, increases demand and can result in an increased share price.

There are few details available on the proposed tax, pending the 2023 federal budget. The government does state that the tax will be "... similar to a recent measure introduced in the United States". In August 2022, President Joe Biden signed the *Inflation Reduction Act* into law, which included a one percent tax on the market value of net public company shares repurchased, starting in 2023. The extent to which Canada's proposed share buyback tax will parallel its U.S. counterpart remains unclear. The U.S. version contains a number of exclusions and it remains to be seen whether Canada will offer similar relief.

The policy impetus for enacting a share buyback tax in Canada is not readily apparent. The Economic Statement framed the tax as a disincentive for corporations who may use buybacks to "... divert corporate resources away from making investments in their workers and businesses in Canada". For tax purposes, share buybacks by Canadian public companies through normal-course issuer bids are generally a more tax-efficient means of distributing profits to shareholders relative to dividends. Canadian shareholders who participate in a buyback program are taxed at a favourable 50 percent capital gains inclusion rate while non-resident shareholders are generally not taxable. Shareholders who continue to hold their shares pay no tax as a result of the buyback program until they dispose of their shares—whether through a sale or as a result of deeming rules in the *Income Tax Act*. Canada's proposed buyback tax could be viewed as a means of limiting these tax efficiencies and levelling the playing field.

The government predicts the proposed share buyback tax would increase federal revenues by $2.1 billion over five years. Until the federal government releases further details, Canadian businesses should give careful consideration to the timing of share buybacks and stock issuances.

We will follow these developments and are available to discuss how the proposed tax may affect your company. If you have any questions about the proposed tax on share buybacks, please reach out to the Bennett Jones Tax group.

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Posted on: August 3, 2022

TRIGGERING THE DOCTRINE OF EQUITABLE CONTRIBUTION

By: Salona Nainaar

Oftentimes an individual or business may have more than one insurance policy cover the same issue that could potentially arise. A recent decision from the Ontario Court of Appeal provided guidance when both policies cover the same loss and include language claiming to be excess insurance over the other.

In *Northbridge General Insurance Company v. Aviva Insurance Company*, 2022 ONCA 519 the court re-affirmed that if two insurance policies apply to an insured's loss and are irreconcilable, then both insurers are expected to share equally the costs of defence and indemnity.

The court outlined that the doctrine of equitable contribution between insurers applies when two insurance policies are irreconcilable to the extent that they both cover the loss at issue and neither is clearly in excess to the other. When these circumstances occur both insurers will be required to equally contribute to the insured's defence and indemnification.

Background

In *Northbridge* the plaintiff sought a declaration that the defendant be required to contribute equally to the defence and indemnification of an insured party that was sued in the underlying action.

The underlying action involved a pharmacist who was sued for professional misconduct. The pharmacist's employer, a pharmacy, was also named as a defendant in the action. The plaintiff had issued a professional liability insurance policy to members of the Ontario Pharmacists Association (the "Association Policy") that included the pharmacist. The defendant had issued a commercial general liability policy to the pharmacy (the "CGL Policy"). The CGL Policy included a Pharmacists Professional Liability Endorsement that extended liability coverage to the pharmacy's employed pharmacists. As such, the pharmacist was an insured covered by two policies.

The plaintiff settled the underlying action without contribution from the defendant and thereafter sought a declaration from the court that the defendant must contribute equally to the defence and indemnification of the pharmacist.

The Association Policy contained as a general condition an "other insurance" clause that stated "This insurance is excess over any other valid and collectible insurance...[and] does not apply to insurance which is purchased by the insured to apply in excess of the Policy". The CGL policy contained an Additional Condition that stated "The insurance provided under this endorsement is excess over any other valid and collectible insurance available to individual pharmacists...".

At trial the court found that the two policies were irreconcilable because they covered the same loss and had equivalent "other" insurance clauses wherein each policy claimed to be excess to the other. These two findings led the court to apply the doctrine of equitable contribution and grant the application that both insurers equally split the cost of the defence and indemnification.

The defendant appealed the trial judge's decision arguing that he erred in his conclusion that the two policies were irreconcilable.

Ruling

The Court of Appeal upheld the decision and found it was not in error, whether reviewed on the standard of palpable and overriding error or the standard of correctness.

In the context of the standard of appellate review, the court affirmed that matters of contractual interpretation are questions of mixed fact and law unless those questions involve the interpretation of standard form contracts or contracts with precedential value and there is no meaningful factual matrix relevant to the interpretation. In this case, the court concluded that the "other insurance" and other relevant provisions of the policies at issue are not "standard form contracts' or contracts with significant precedential value. This conclusion meant that the deferential standard of palpable and overriding error applied.[1]

The court cited *Family Insurance Corp. v. Lombard Canada Ltd*, 2002 SCC 48 and noted In this case the Association Policy and the CGL Policy both had the intention of achieving the same goal; rendering them excess if other insurance was available. This goal made them irreconcilable. Further, since the pharmacist was not the one that purchased the CGL Policy it did not fit within the Association Policy's other insurance exception. Finally, the "individual pharmacists" language in the CGL Policy, though intended to require pharmacists to have a separate professional liability policy, did not alter the CGL Policy's scope or context to one of a true excess insurance policy.

Consequently, the court dismissed the appeal.

Practical Considerations

This decision flags for insurers that when it comes to other insurance clauses and clauses aimed at limiting insurer obligations, specificity of language and the intention of specific clauses, though clearly important, may not be determinative. Perhaps more determinative is the “contextual analysis” the court referred to from *McKenzie v. Dominion of Canada General Insurance*, 2007 ONCA 480 at para 39. That analysis requires that an insurance policy be considered as a whole and that the availability of primary coverage, including a duty to defend obligation, cannot operate to change the nature of a policy to an excess or umbrella policy. This contextual analysis, if applied in a pre-eminent fashion, will render much of the competing “other insurance” clause litigation largely moot as most policies in these disputes can readily be found as primary insurance thus triggering the equitable contribution doctrine.

Finally, evidentiary care must be taken when advancing these types of applications in order to ensure, as much as possible, that any appellate review can proceed on the correctness, as opposed to palpable and overriding error, standard.

[1] *Northbridge General Insurance Company v. Aviva Insurance Company*, 2022 ONCA 519 at paras 15-16.

For more information about this article, contact the author, Salona Nainaar here.

/Carey

News Alerts

18 October, 2022

Chilean Congress passes Fintech Law

After one year of processing, last October 12, Chilean Congress passed the Fintech Law initiative (the "Fintech Law").

The speed in the processing of this bill responds to the need to give legal certainty to the Fintech of companies, given their growth in recent years and their importance as a tool for strengthening the national economy. These entitites have proven to be a key element in driving the economic boom in Chile, reducing the costs of financial products, extending access to such services, allowing greater transparency and competition in the financial offer as well as using technology to provide more efficient solutions.

The new bill of law, which is aligned on several points with the Financial Market Commission ("CMF") proposal issued on February 2021, establishes a regulatory perimeter for certain kind of services that are based on Fintech technologies, specifically: crowdfunding platforms, alternative transaction systems, credit and investment advice, custody of financial instruments, order routers and financial instrument intermediaries. In addition, it creates an Open Banking System (Open Banking) that allows the exchange of customer information between different financial or related service providers.

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I. *Role of the Financial Market Commission*

The CMF plays an essential role because it will be the authority in charge of supervising the services regulated by the Fintech Law and will determine the regulations for the application and compliance of this law.

The CMF will have broad powers of oversight, regulation and information requirements. In addition, it will have the authority of issuing differentiated instructions, considering the nature of the service provided, the number or type of participants, the volume of transactions or instruments traded, among other factors. The CMF, in turn, may cancel the registration of certain Fintechs in several scenarios, such as the performance of activities other than those for which they are registered for.

Finally, the CMF will issue the regulations for the operation of the open finance system, oversee compliance with the obligations of its participants, including the requirement of information and background information necessary to verify compliance with their obligations, and monitor the operation of this system.

II. *Services regulated by the Fintech Law*

The Fintech Law regulates alternative transaction systems, such as those to offer, quote and trade cryptocurrencies, the advisory services for credit and investment, custody of financial instruments, order routers and intermediaries of financial instruments, and crowdfunding or crowdfunding platforms. In accordance with the principle of modularity enunciated by the Fintech Law, the focus of the law is on the regulation of services rather than on the regulation of the entities themselves.

Fintechs must have an exclusive line of business and comply with certain requirements in order to obtain authorization to operate from the CMF. Among them, the Fintech Law mentions: 1) Information obligations to financial clients and the general public, 2) Corporate governance and risk management obligations, 3) The constitution of guarantees to ensure compliance with their obligations, 4) The establishment of minimum permanent assets, and 5) Conditions of suitability for the provision of credit and investment advisory services. These requirements apply in a differentiated manner among the different financial service providers.

Finally, in order to operate, Fintechs must be authorized by the CMF and be registered in the corresponding registries.

III. *Open Finance System*

The Fintech Act creates a system of open finance (Open Banking) that will enable the exchange of information directly and securely, through remote and automated access interfaces, of financial customers who expressly consent to it.

Information providers such as banks and broker-dealers, information-based service providers and payment initiation service providers will be part of this open finance system. The latter two are also regulated by the Fintech Law, which establishes registration and oversight requirements by the CMF for both.

The operation and implementation of the open finance system will be determined by the CMF, which will issue the instructions for its implementation, supervise compliance with the obligations of its participants and monitor the latter and the system.

IV. *Entry into Force and Other Matters*

The Fintech Law will enter into force 30 days after its publication in the Official Gazette, with the exception of the provisions contained in Titles II (technology-based financial services) and III (open finance system), as well as other provisions that modify other regulatory bodies, which have their own rules of deferred entry into force. The current Fintech service providers will have a period of 12 months, counted from the General Rule issued by the CMF, to submit their respective applications for registration and authorization to the CMF. If they do not comply with this requirement, they must refrain from continuing to provide their services for the execution of new transactions and must only carry out acts aimed at concluding their existing transactions.

The CMF must issue the regulations for the implementation of the open finance system within 18 months from the publication of the Fintech Law. The regulations to be issued by the CMF must include a gradual implementation schedule for all participants.

Finally, we note that the Fintech Law introduced miscellaneous amendments to other legal bodies, among which we highlight Law 18.045 (Securities Market Law), Law 18.046 (Law on Corporations), Law 20.712 (Law on the Administration of Third-Party Funds and Individual Portfolios), Law 19. 913 (which creates the Financial Analysis Unit), Decree with Force of Law 251 of 1931 (which regulates insurance companies), Decree with Force of Law Number 3 of 1997 (General Banking Law) and the Commercial Code, among others.

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CSRC to Exempt Foreign Investors from Short Swing Profit Rule

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According to news reports issued on October 16, 2022, to further facilitate foreign capital investment in China A shares, the China Securities Regulatory Commission ("**CSRC**") is considering formulating a special exemption rule for the short swing profit rule ("**SSPR**")[1] for foreign investors (e.g. qualified foreign investors/QFIs and foreign investors under the Stock Connect scheme).

Exemption for foreign mutual funds

Under current PRC rules, an investor must generally aggregate its positions with all its concerted parties for purposes of disclosure of interest ("**DOI**") rules[2] and SSPR; thus, in principle, an asset manager must aggregate all the positions held by different products under its management. However, CSRC has granted an exemption from this requirement to domestic mutual funds managed by CSRC-licensed fund management companies ("**FMCs**") with respect to their managed mutual funds (but not private funds or managed accounts); these FMCs may instead opt to comply with DOI rule and SSPR based on the positions held by each single mutual fund ("**CSRC Exemption**").

The CSRC Exemption is currently not available for foreign mutual funds managed by foreign asset managers that invest in A shares either via QFI or the Stock Connect scheme. The foreign asset management community has long been seeking a similar exemption by reference to the CSRC Exemption available to domestic asset managers. In particular, without the CSRC Exemption, managers who manage index-tracking and passive-investment products may easily trigger the reporting and trading limitation thresholds under the DOI rules and SSPR. Such a potential risk has become more realistic after the MSCI inclusion of A shares.

[1] SSPR refers to that a shareholder holding 5% or more shares or securities with equity nature in a listed company may not sell or purchase such securities in no more than 6 months after purchase or sale (as applicable) of the same; otherwise, the short swing profit shall be vested in the listed company.

[2] DOI refers to the disclosure and trading suspension obligations imposed on a shareholder that holds more than 5% shares or securities with equity nature in a listed company.

Now, reportedly CSRC is considering granting a special exemption to foreign mutual/public funds managed by foreign managers for SSPR purposes, by reference to the CSRC Exemption. Furthermore, it is anticipated that the same aggregation exemption will also apply for DOI rule purposes from a regulatory consistency perspective.

Exemption for HKSCC

Under Stock Connect rules, Hong Kong Securities Clearing Company Limited ("**HKSCC**") acts as the nominee holder for all foreign investors under the Stock Connect scheme and has been granted an exemption from complying with DOI rules for its nominee holdings. CSRC is also considering clarifying that HKSCC is exempted from complying with SSPR for its nominee holdings as well.

Reportedly, CSRC is in the process of formulating the special exemption rule and will officially issue the rule after its internal procedures are completed. This move by CSRC reveals a positive signal to the market particularly the international investors community, which will almost certainly stimulate foreign capital investment in A shares. We will continue to monitor the developments and provide further insight on a timely basis.

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.

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New Guidelines for the coexistence of mining and energy sector projects

02 of November

Through MME Resolution 40303 of 2022 (“Resolution”), the Ministry of Mines and Energy (“MME” for its Spanish acronym) repealed articles 18 and 19 of MME Resolution 180742 of 2012 and established new guidelines to promote and facilitate the coexistence of projects in the mining sector that are intended to be developed in the same area.

Prior to the Resolution, the partial or total overlapping of hydrocarbon and/or mining projects were resolved by applying the rules and procedures provided for these cases in articles 18 and 19 of MME Resolution 180742 of 2012 (as amended).

Additionally, the article 2.2.2.2.3.6.4. of Decree 1076 of 2015, state that environmental licenses could be granted to different projects in the same area, if the viability of the coexistence was demonstrated and the management and individual responsibility for the environmental impacts generated in the overlapping area was determined.

However, the MEM after considering (i) the uncertainty about how to proceed when two or more projects in the mining and energy sector overlap each other (considering that the projects in the sector are comparable and have the same legal status); and (ii) that the National Development Plan 2018-2022, in the Pact for Mining-Energy Resources, established that the mining-energy structure should include in its planning processes, the coexistence between the different productive activities, resolved to issue the Resolution. The points to highlight are the following:

1. The MME must implement a Public Digital Information System that contains updated information of mining and energy sector projects.

2. The ANH and the National Mining Agency (“ANM” for its Spanish acronym), before signing any contract for exploration, exploitation or production of hydrocarbons and minerals, shall verify the existence of previously assigned projects in the same area and in case of overlapping, shall inform (i) the Mining and Energy Planning Unit (“UPME”), the electric energy directorate of the MME, the ANH or the mining authority, as appropriate; (ii) the interested party in developing the new project; and (iii) the owner of the existing project. In such scenarios, a clause where the parties are obliged to ease the execution of Coexistence Agreements (as defined hereinafter).

3. The direct negotiation stage may not exceed the term of 120 working days, extendable for another 60 days, which maintains the term established in Resolution 180742 of 2012. Within the direct negotiation stage, the following steps shall be carried out: (i) The developer who first becomes aware of the overlap shall inform a) the competent authority within five working days, for the purpose of requesting its accompaniment in the negotiation; and b) the beneficiary of the overlapping project to express its interest in initiating the direct negotiation; (ii) in the 30 calendar period following said communication, the parties shall convene to hold an initial meeting (authorities may intercede for purposes of convening such meeting) and; (iii) after an agreement is reached, the parties shall sign an operational coexistence agreement, where the parties include the way in which both projects may coexist (e.g. technical and security aspects, environmental aspects, social aspects and conflict resolution aspects). Said agreement shall be sent to the corresponding authorities.
   During this stage, both developers must prepare a Technical Report for each project including basic project data, a schedule of activities, plans, among others. Said report shall be included as an annex to the coexistence operational agreement.

4. If parties fail to reach an agreement, a minute shall be drafted including: (i) the causes for the failure to reach an agreement, (ii) plans and activities that each party contributed during the negotiation, and (iii) the commitment to jointly apply for a conflict resolution mechanism within a maximum period of 1 year. The minutes of failed negotiations shall be submitted to the competent authority.

From the point of view of the development of projects for the energy subsector, the Resolution, in its purpose of articulation between subsectors and publicity for the development of projects, makes important clarifications. In particular, the following stand out:

- Electricity and green hydrogen projects, may request a public utility and social interest certification through the digital system implemented by the Resolution.

- For purposes of registering electricity generation projects before the Energy and Mining Planning Authority ("UPME") in phase 1, the project's promoter shall evidence having notified the ANH, UPME and MME the coordinates of the projects so to confirm the overlapping with other projects. For purposes of registering the project in phase 2, the corresponding operational coexistence agreements shall be already signed.

- Calls upon the Energy and Gas Regulation Commission ("CREG") to adjust current regulations and include the obligation for promoters of electricity projects for easing up the coexistence of projects in case of overlap.

- In addition, the UPME, in the projects of expansion of the National Interconnected System seeking to be awarded via public auction, shall inform the ANH the characteristics and coordinates of the project for purposes of identifying potential overlapping of projects. The interested bidders shall confirm their commitment to ease the coexistence of projects. In the design of the grid, the interested party shall inform the relevant authorities about the possible overlaps. If said communications are not made, then any request for amendment of the Commercial Operations Date shall not be approved for delays in these coexistence agreements execution.

- A similar commitment shall be made for projects of the National Natural Gas Supply Plan, Expansion Plans of the Polyduct Network, Continuity Plan for Liquid Fuels and hydrocarbon transportation infrastructure.

The guidelines contained in this Resolution will be applicable to new technologies that are developed after its entry into force in any of the subsectors of the mining and energy sector and until specific rules are defined for them.

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Arias

COSTA RICA

BILL 23383 SEEKS TO REGULATE RECREATIONAL USE OF CANNABIS IN COSTA RICA

Nov/2022

President Rodrigo Chaves and his Ministers of the Presidency, Public Safety, Health, Agriculture and Livestock promoted file No. 23383 before Congress, with the initial text of the bill for the CONTROL AND REGULATION OF CANNABIS FOR RECREATIONAL USE, which seeks to regulate the use, production, distribution, sale, and possession of psychoactive cannabis for recreational use in the adult population. Additionally, it is proposed as a measure to protect people from the link with the illegal cannabis trade and from the health consequences of its problematic consumption.

The bill upholds the following guidelines for users of psychoactive cannabis:

- Absolute prohibition of use in people under 18 years of age.
- The regulated possession of up to 30 grams of the cannabis plant and other products for personal recreational consumption is authorized. The list of permitted products, together with their amount of possession and THC levels, will be regulated by the Ministry of Health.
- In terms of home-growth of cannabis, the project allows up to six plants per residence without the need for a license.
- In addition, a ban on smoking is established in several public and private centers listed in the text, such as health and hospital establishments, work centers, educational and training centers, sports facilities, shopping centers, public administration offices, bars and restaurants, among others.

The following commercial provisions should be noted:

- Cafeterias or coffee shops are enabled to store and distribute derivatives of edible or drinkable cannabis according to the regulations.
- Licenses are established for cultivation, production, industrialization, small-scale and craft industries, sale to the public by dispensary businesses (wholesale and retail), as well as the so-called social clubs for consumption.
- Crimes, infractions, confiscations, and sanctions are defined. In addition, the traceability and registration system is established.
- A special tax of 1% is established on net income, the amount collected from which will be allocated to the Ministry of Health, the Ministry of Agriculture and Livestock, the Costa Rican Institute on Drugs, the Costa Rican Social Security Fund and the National Development Fund.

Finally, some measures are provided for the fulfillment of the objectives of the law, such as:

- Income received by the Ministry of Health for licenses and special tax is directed towards strategies to delay the age of initiation of consumption, to increase the perception of the risk of abusive consumption and to reduce problematic consumption.
- The implementation of benefit measures for small producers and distributors.
- Packaging, labeling, and advertising guidelines to avoid consumption incentives.
- Promotion of Costa Rica as a tourist destination for the responsible consumption of cannabis for recreational use.

While the text is subject to change, there is a truly progressive intention behind the proposal. The ARIAS team will keep a close follow-up of the project, do not hesitate to contact us if you are interested in receiving additional information.

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Arias

EL SALVADOR

INCREASE IN FINES FOR EMPLOYER INFRACTIONS

Oct/2022

On October 4, through Legislative Decree No. 519, the Congress approved the amendment of article 627 of the Labor Code. The aforementioned provision establishes a generic rule for infringements of the labor obligations provided for in Books I, II and III of the aforementioned code that do not have a special sanction. So far the applicable fine for each infraction is up to US$57.14, but this amount has been modified through the aforementioned decree, setting staggered sanctions, according to the size of the companies.

From the entry into force of the aforementioned decree, which will occur eight days after its publication in the Official Gazette, the Ministry of Labor may apply the sanctions in the following terms:

- In companies with up to 10 workers a fine of up to 2 minimum wages (US$730.00).
- In companies with more than 10 and up to 50 workers a fine of up to 4 minimum wages (US$1,460.00).
- In companies with more than 50 and up to 100 workers a fine of up to 8 minimum wages (US$2,920.00).
- In companies with more than 100 workers a fine of up to 12 minimum wages (US$4,380.00).

It should be noted that the imposition of fines will take place for each of the benefits infringed and will not exempt the employer from the obligation to comply with the payment of the labor benefits regulated in the infringed rule.

In determining the sanctions, the economic capacity of the infringer or the size of the company will be taken into account, as well as the seriousness of the infringement, the intentionality and the damage caused. However, the employer will be exempt from all liability when it is proven that there has been a fortuitous event or force majeure.

Do not hesitate to contact us if you have questions about this topic.

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Adoption of the CSRD: sustainability, a new pillar of businesses' performance?

20 July 2022

The topic of non-financial information as such is not new; the so-called "Non-financial Reporting Directive" (Directive 2014/95/EU) already requires a number of companies to disclose and include in their management reports a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters.

Transposed into French law in 2017,[1] the companies[2] in scope are required to publish a "*declaration of extra-financial performance*" (the "**DPEF**"), integrated into their management report, which presents information regarding how they take into account the social and environmental consequences of their activities.

However, the implementation of these requirements has highlighted significant shortcomings: many companies do not provide reliable, comparable and relevant information on sustainability risks, opportunities and impacts.

These shortcomings prove all the more problematic in light of the European Green Deal and the European Commission's objectives of promoting sustainable finance and investment, and ensuring a just transition.

This is the context in which the European Commission published its legislative proposal (April 2021) which aimed to thoroughly revise applicable rules on non-financial reporting (renamed "corporate sustainability reporting") in view of improving the flow of information on sustainability matters. On 21 June, after several months of negotiations, the Council and the European Parliament reached a political agreement on this new directive - the *Corporate Sustainability Reporting Directive*) (the "**CSRD Directive**").

The CSRD, which broadens the scope of non-financial reporting, will oblige more companies to disclose precise information, on the basis on harmonised standards and subject to reinforced control. Thus, the CSRD will require companies to communicate with respect to both sustainability risks to which they are exposed as well as and about their own impact on people, the environment and society at large. In that respect, sustainability can be of relevance for the measure of companies' performance.

1. **Extending the scope of non-financial reporting**

The CSRD will require the following entities to disclose information on sustainability matters :

- all companies listed in EU regulated markets (with the exception of micro-companies[3]), including those not established in the Union but whose securities are listed on a European regulated market;

- non-listed companies with more than 250 employees and either a balance sheet total or a turnover of more than EUR 20 million or EUR 40 million, respectively.

European subsidiaries and sub-groups whose parent company is not established in an EU Member State will also be required to disclose sustainability information. Small and medium-sized companies[4] are also encouraged to publish sustainability information according to simplified standards. Finally, all parent companies of large groups will have to publish sustainability information.

As a result, it is estimated that an additional two thousand French companies will have to publish sustainability information.

2. **Towards more granularity and greater comparability of sustainability information**

The CSRD strengthens significantly the list of sustainability indicators that companies will be required to report on.

From now on, companies will notably have to provide information about i) their business strategy and the resilience of the undertaking's business model and strategy to risks related to sustainability matters; ii) any plans they have developed to ensure that their business strategy and model are compatible with the transition to a sustainable and climate-neutral economy; iii) their targets related to sustainability matters and the progress made towards achieving those targets; as well as iv) the role of the administrative, management and supervisory bodies with regard to sustainability matters.

This information will have to be clearly identifiable in a specific section of the management report and will have to include precise descriptions, including for example the plans defined by the company to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and climate-neutrality.

Although certain derogations may apply in exceptional cases (impending developments, matters under negotiation, information seriously prejudicial to the commercial position of the company) and transitional periods are provided for, the spirit of the reform is undeniably to move towards greater transparency and comparability of the information provided by companies in scope of the CSRD.

In this respect, sustainability reporting standards[5] will be prepared on the basis of technical advice and contributions from the working group set up by the European Financial Reporting Advisory Group (EFRAG). They will be adopted by the European Commission by means of delegated acts and will aim to ensure that the information disclosed is understandable, relevant, verifiable, comparable and is represented in a faithful manner.

The adoption of these standards will face both opportunities and challenges: the standards could pave the way to the emergence of a sustainability data ecosystem, and contribute to the coherence of the legal and regulatory framework relating to the European Taxonomy and the so-called SFDR[6], all while striving to find the right balance by taking into account to the greatest extent possible the work of global standard-setting initiatives for sustainability reporting, as well as existing standards and frameworks.[7]

The CSRD will therefore result in a double upheaval: an amendment of the current non-financial reporting provisions under French law, in particular the Commercial Code, and the emergence of a new body of harmonised standards at EU level. The new legal framework is bound to have strategic implications and be demanding for companies, under the guise of the concept of "sustainability", and will require all activities of companies in scope to factor in the objective of sustainable development. It is therefore a real revolution which companies face, which they will have to adapt to and prepare for by 2024.[8]

3. **Strengthening the audit and assurance of sustainability reporting**

The absence of an assurance requirement on sustainability reporting would undermine their credibility and fail to meet the needs of the investors and other users of sustainability information for whom they are intended. It is therefore appropriate to consider a gradual increase in the level of assurance required for sustainability disclosures, starting with a requirement for the statutory auditor or audit firm to give an opinion on the compliance of sustainability disclosures with EU requirements, based on a limited assurance engagement.

The co-legislators also wanted to offer undertakings a broader choice of independent assurance services providers for the assurance of sustainably reporting. Member States should, therefore, be allowed to accredit independent assurance providers to provide an opinion on published sustainability information.

It should be noted that French law already provided such an assurance mechanism for a certain number of companies.

Conclusion

The European Commission's ambition, with the proposed CSRD, was to ensure a consistent flow of sustainability information within the financial system, in order to achieve the transition objectives and prevent greenwashing.

The broader scope of CSRD, the principle of greater comparability through common benchmarks for sustainability reporting, and the assurance mechanism agreed by the co-legislators should all be welcomed and will contribute to deliver on the Commission's objectives. Companies may now start preparing and assessing the operational impacts resulting from the CSRD.

That said, the reform is not complete yet: the Union is still to adopt the European sustainability standards which will have to further transcribe the principle of double materiality and provide a common framework for the latest waves of sustainability-linked rules and regulations. This will be the true test that will determine whether the EU can become a front-runner in setting global sustainability reporting standards, and whether sustainability can become a new pillar of businesses' performance.

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[1] Article L.225-102-1 of the French Commercial Code.

[2] These are companies which employ, on average, more than 500 employees and whose turnover or balance sheet total exceeds (i) for companies listed on a regulated market, their turnover or balance sheet total must exceed 40 million euros or 20 million euros respectively and (ii) for other companies, their turnover or balance sheet total must exceed 100 million euros.

[3] Namely, companies that employ less than 10 people and whose annual turnover or annual balance sheet total does not exceed 2 million euros.

[4] These are companies that employ less than 250 people and whose annual turnover does not exceed 50 million euros or whose balance sheet total does not exceed 43 million euros.

[5] Simplified standards will apply to SMEs.

[6] Cf. Regulation (EU) 2019/2088.

[7] Including existing standards and frameworks for natural capital accounting and for greenhouse gas accounting, responsible business conduct, corporate social responsibility, and sustainable development.

[8] From 1st of January 2024 for companies already subject to the non-financial reporting directive; from 1st of January 2025 for large companies that are not presently subject to the non-financial reporting directive; and from 1st of January 2026 for listed SMEs, small and non-complex credit institutions and captive insurance undertakings.

Hong Kong government policy announcement on virtual asset exchanges - Hong Kong FinTech Week 2022

03 November 2022

On 31 October 2022, at the launch of Hong Kong's Fintech Week, the Financial Services and the Treasury Bureau released a policy statement (the "Policy Statement") providing some additional detail on the Government's plans for the development of a regulatory regime for virtual assets ("VA") in Hong Kong.

On 31 October 2022, at the launch of Hong Kong's Fintech Week, the Financial Services and the Treasury Bureau released a policy statement (the "**Policy Statement**") providing some additional detail on the Government's plans for the development of a regulatory regime for virtual assets ("**VA**") in Hong Kong.

Many are closely watching developments in this space. On one hand, Hong Kong is one of the region's leading financial hubs, having made significant investment in recent years in digital banking infrastructure and various policy initiatives directed at fostering a stronger environment for fintech start-ups. On the other hand, commentators are concerned that Hong Kong will lack the freedom to properly champion VA, given mainland China's successive crackdowns on cryptocurrencies and its prioritization of its state backed digital currency, the e-CNY. Hong Kong's conservative regulatory environment for financial services, in many respects a benefit, also stands as a potential weakness for policy development in the VA space, where regulatory innovation is thought to be critical for success.

The Policy Statement provides a sound basis to believe that Hong Kong will be in a position to continue to chart its own course for VA trading. Critically, the Policy Statement suggests that the Government may take a more flexible approach in allowing a retail market to emerge (albeit gradually), with initial scope to offer exchange traded funds ("**ETF**") dealing in Bitcoin and Ether futures. A critical sticking point for VA development in Hong Kong has been the Government's proposal to restrict the VA service providers ("**VASP**") licensed to deal in or advise on VA to clientele who are professional investors (i.e., individuals having portfolios of at least HK$ 8 million (approximately US$ 1 million)). We discuss this restriction and the latest Government commentary on this point in more detail below.

A Quick Recap on the Current Status of Hong Kong VA Regulation

Under the existing regulations, virtual asset trading platforms operating in Hong Kong can opt into a licensing regime regulated by the Securities and Futures Commission ("**SFC**"), provided that at least one of the virtual assets traded on the platform falls within the definition of " securities " under the Securities and Futures Ordinance ("**SFO**"). Whilst Bitcoin is not currently regulated in Hong Kong and have been labelled by the regulators as just a virtual commodity, tokens which represent underlying economic rights, such as a share of profits or revenue, would be regarded as "securities".

The Bill

On 24 June 2022, the Anti-Money Laundering and Counter-Terrorist Financing (Amendment) Bill 2022 (the "**Bill**") was gazetted. The Bill introduces a new licensing regime for virtual asset exchanges which will take effect on 1 March 2023.

Pursuant to the Bill, any person who carries on a business of providing (or holding out himself as providing) a VA service in Hong Kong is required to be licensed with the SFC. The prohibition is extended to persons who actively market a VA service from outside of Hong Kong to the Hong Kong public. The details of the scope of licensing regime can be found in our July publication - *Do you need a licence? The SFC to licence virtual asset service providers in Hong Kong*.

Timing

VA service providers who are operating in Hong Kong prior to 1 March 2023 will be able to continue their operations under a transitional arrangement until 29 February 2024. Thereafter, they must obtain a licence from the SFC in order to continue their business.

Professional investor restriction

During the meetings of the Bills Committee on Anti-Money Laundering and Counter-Terrorist Financing (Amendment) Bill 2022 after the gazettal of the Bill, significant concerns were raised with respect to the proposal that VASPs would only be able to offer their services to professional investors, which would prevent VASPs in Hong Kong from engaging in retail business. The SFC was asked to consider relaxing this restriction to allow VASPs to provide VA services to retail customers in low risk situations, including where the products are not complex, or where a customer, despite not meeting the HK$ 8 million (US$ 1 million) monetary threshold required, is an investor who demonstrates sufficient knowledge of VAs to effectively manage risks. There was a concern that the professional investor restriction might drive the Hong Kong retail public to overseas VA exchanges, resulting in a potential loss of capital and talent from Hong Kong, and also leave inadequate protection for Hong Kong investors if the market moves offshore. The SFC has indicated that it will conduct a public consultation to further explore this suggestion. Note that this professional investors requirement is not a statutory restriction, but rather, a condition which the SFC is seeking to impose on all licensed VASPs.

Active marketing

The Bill extends the licensing requirement to persons who actively market a VA service from outside of Hong Kong to the Hong Kong public. There are similar provisions in the Securities and Futures Ordinance (the "**SFO**") which prohibit the active marketing of regulated activities to Hong Kong investors. It is expected that the current uncertainty with the interpretation of "public" and "active marketing" in the context of the SFO would apply similarly to the new VA licensing regime due to the similar concepts and provisions.

Application

As the details of the VASP licensing regime were compiled with reference to the existing regulations for automated trading services under the SFO (Type 7 regulated activity), many application requirements for a VASP licence are similar to those which apply to applicants for a licence to conduct regulated activities under the SFO. For example:

- All VASP licence applicants and their directors must be fit and proper.
- All VASP licence applicants must either be incorporated in Hong Kong, or registered as a Part 16 non-Hong Kong company under the Companies Ordinance.
- The premises to be used for record keeping purposes must be approved by the SFC. The SFC is yet to confirm the VASP's ability to use offshore service providers to store regulatory records, but if the VASP regime falls in line with current SFC policy, VASP managers would need to provide undertakings that arrangements will be in place ensuring that records will remain available for inspection.
- All VASP licence applicants must appoint at least two responsible officers ("**ROs**") to supervise the VA business. The SFC also requires that at least one RO ordinarily reside in Hong Kong and be available at all times. This is similar to the requirement which applies to persons with the SFC to conduct regulated activities. Applicants should bear in mind that although the requirement is to have two responsible officers, in practice, to ensure business continuity, at least three responsible officers are recommended. Where one RO ceases his/her appointment for whatever reason (for example due to resignation or death), if a VASP licensee does not appoint a replacement on or before the departure of the existing RO, the SFC will very likely request the VASP to suspend its business until a new RO is appointed.

The Policy Statement

The Policy Statement contains promising initiatives to take the Hong Kong VA market and regulatory framework forward to align with international standards and practices. Key points include:

- In respect of the potential of allowing the retail public to access VA under the new VASP licensing regime, the Government indicated that the SFC will soon launch a public consultation to explore how retail investors may be given access to VA under the new licensing regime. As an initial step, exchange traded funds on VA authorised by the SFC will be made available to the public in Hong Kong. On the same day, the SFC announced a new authorisation regime for ETFs providing exposure to Bitcoins futures and Ether futures traded on the Chicago Mercantile Exchange. A Circular on Virtual Asset Futures ETFs, which sets out the details and criteria for such exchange traded funds to obtain authorisation under section 104 and 105 of the SFO, has also been issued.
- The Government indicated that it is ready to engage with global VA exchanges and invite them to enter Hong Kong for new business opportunities.
- In the Policy Statement, the Government also indicated it is open to future review on property rights for tokenized assets and legality of smart contracts, and referred to the discussion paper which the Hong Kong Monetary Authority published

in early 2022 on the regulation of payment-related stable coins which might not fall under the stored value facility licensing regime.

- To demonstrate its support of the global VA community, the Government has announced certain pilot programs which it is exploring to launch, including the issuance of NFTs for Hong Kong FinTech Week 2022 which offer holders a chance to create their own avatar to experience the Metaverse, tokenizing Government Green bond issuance for subscription by institutional investors and the issuance of the Hong Kong Central Bank Digital Currency, e-HKD, in three phases.

Conclusions

The Policy Statement is a welcome move for those interested in the development of the VA market in Hong Kong. Hong Kong's "opt-in" approach to VA regulation resulted in few successful applications and raised concerns that Hong Kong was focused on developing an awkward halfway house for VA regulation, driving a number of key players to Singapore and other destinations regionally.

With Singapore moving in recent months to tighten its VA regulatory regime, the Policy Statement suggests that the two financial hubs are drawing closer in their approach to regulation, marking a concerted effort by Hong Kong to re-establish itself as a leading fintech hub regionally. Much remains to be settled in the detail, but if there were an opening in Hong Kong's retail market and this became recognized as an accepted destination for Chinese crypto investment, Hong Kong would have clear line of sight for successful development of a VA market.

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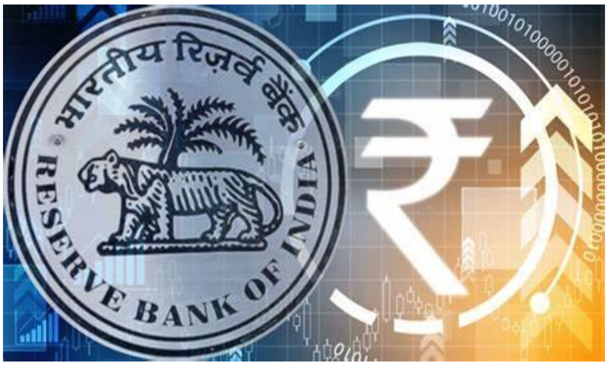
CBDC Concept Note – India's move towards digitalizing currency



The Reserve Bank of India ("**RBI**") has released a concept note on Central Bank Digital Currency ("**CBDC**") on October 7, 2022 ("**Concept Note**"). The Concept Note sets out the objectives, motivations, benefits, risks, designs, and other features of the digital rupee and highlights considerations such as technology and design choices, security and anonymity, impact on monetary policy, banking systems, financial market systems, etc. The Concept Note takes India a step forward towards digitizing its currency and is released with an aim of creating awareness of e-rupee ("**e-₹**"). A brief snapshot of the Concept Note is set out below:

Motivations for e-₹: In India, there has been a shift in adaptation of the present payment systems such as NEFT, RTGS, UPI, etc. that are affordable, accessible, convenient, efficient, and secure. RBI has maintained that private virtual currency is at odds with the historical concept of money. It has consistently noted that cryptocurrency is not a commodity and has no intrinsic value and de-centralized finance will disrupt the traditional financial system and destabilize the fiat economy. e-₹ is intended to leverage on the benefits of digital currency *viz.* innovations in payments, financial inclusion, reduction in costs associated with physical cash management, cross-border payment efficacy, etc. without the associated risks of private currencies such as price volatility and proliferation of crypto assets.

What is e-₹: The digital rupee will be legal tender issued by the RBI in a digital form. It will be a sovereign currency exchangeable at par with existing fiat currency. Similar to the paper currency, e-₹ will be acceptable as a medium of payment, store of value and legal tender. The difference between CBDC and commercial bank money will be that CBDC will be issued by RBI and will be a liability in the books of RBI. This would ensure that RBI can meet its obligations using its own non-redeemable money. e-₹ promises to offer the public access to digital money free from credit and liquidity risk.

Design and architecture: RBI proposes the following design considerations for a resilient, secure, and scalable infrastructure for the digital currency:

- *Type*: RBI is considering launching two broad types of e-₹: retail CBDC ("**CBDC-R**") and wholesale CBDC ("**CBDC-W**"). CBDC- R could be made available to all users in the private sector, non-financial consumers and business. The primary use of CBDC-R would be akin to paper currency. CBDC-W could be used for wholesale payments such as interbank payments or securities settlement. Case-in-point is Project Jasper in Canada and Project Ubin in Singapore. Adoption of CBDC-W will depend on integration with and upgrade of the existing exchanges and trading infrastructure and whether the cost of CBDC-W is less than the cost of existing settlements.

- *Model*: RBI has considered multiple models for CBDC, including a Direct Model, Two Tier Model and Hybrid Model. A Direct Model which makes RBI responsible for managing all aspects of CBDC has been currently ruled out due to the burden on RBI for onboarding customers, KYC, etc. The Intermediate/ Two Tier Model has been considered to be the most relevant in India wherein the issuer of CBDC would be RBI, but the distributors would be intermediaries such as commercial banks. The customer onboarding, KYC, ledger maintenance etc. would be done by intermediaries and RBI would only track the wholesale CBDC balances of the intermediaries.

- *Remunerated vs. Non-remunerated CBDC*: RBI is considering whether CBDC should be interest bearing. While this would certainly incentivize the shift from paper currency to digital currency, designing CBDC like a 'deposit (bearing interest)' is likely to disrupt the financial system resulting in loss of deposits with banks, impeding their credit creation capacity and increasing lending rates. Contrastingly, while non-remunerated CBDC is likely to hinder the switch from bank deposits to CBDC, it could still be an attractive medium of payment. RBI is currently considering non-remunerated CBDC as it would be least disruptive.

- *Account vs. token based*: A token based CBDC system would involve a type of digital token issued by and representing a claim on RBI. A token CBDC is a 'bearer-instrument' like banknotes, meaning that whoever holds the tokens at a given point in time would be presumed to own them. In contrast, an account-based system would require the keeping of a record of balances and transactions of all holders of the CBDC and indicate the ownership of the monetary balances. The verification of both systems would also differ, i.e. a person receiving a token will verify that his ownership of the token is genuine, whereas an intermediary verifies the identity of an account holder. RBI is considering token-based CBDC for CBDC-R and account-based system for CBDC-W.

- *Technology*: Technology considerations will be the focal point for developing a scalable, stable, tamper-proof financial system that offers cross-platform support and is able to integrate with other IT platforms, has configurable workflows and uses highly evolved fraud monitoring framework. The basic requirements of the technology architecture include zero downtime, zero frauds, able to handle high volume of transactions and zero loss due to cyberattacks. The options include conventional centrally controlled database or distributed leger technologies.

Recoverability: In account-based models, recoverability is not an issue as the identity of user is available. In a token-based system, the model can support two types of wallets, a custodian based where the wallet is held with a token service provider and is recoverable with the wallet pin, address etc. and user held model where the responsibility of the key is with the user and its device.

Offline Functionality: As financial inclusion is one of the key drivers of e-₹, offline functionality will be a key design consideration. The use of offline transactions would be beneficial in remote locations and offer availability and resilience benefits when electrical power or mobile network is not available. For offline transactions, the wallets must be able to independently verify the authenticity of any CBDC transaction without communicating with the server during the transactions.

Interoperability: RBI's aim is that e-₹ should be able to utilise the current payments infrastructure like UPI, digital wallets like Paytm, Gpay etc. Integrating CBDC into the broader payments landscape of India would possibly help drive end user adoption (both for the public and merchants) and will obviate the need for the creation of a parallel infrastructure. Collaborating with central banks of other countries would also be required to test the cross-border efficacy of CBDC. Case-in-point is Project Dunbar which brings together the central banks of Australia, Malaysia, Singapore and South Africa with the BIS Innovation Hub to test the use of CBDCs for international settlements.

Resource Intensiveness: The resource intensiveness also needs to be factored in while designing CBDC. For centralised systems, the resource consumption is comparable with that of existing payment systems. For distributed systems, it depends on whether there is any consensus protocol. CBDCs would not be 'mined' unlike private cryptocurrencies; CBDC will be issued by RBI and for account-based systems, users can simply opt for conversion of the bank's existing balances to CBDC balances. However, in the case of token-based systems, unique tokens based on agreed techniques would need to be created, which may be slightly resource intensive.

Privacy and data protection: CBDC ecosystems may be at similar risk for cyber-attacks that the current payment systems are exposed to. The token creation process should ensure the highest levels of the cryptography and the transaction of tokens also needs to be secured to ensure trusted environment.

Consumer Protection: CBDT will generally come with the risks of other digital currency including digital fraud, data breaches, lack of privacy, etc. The development of a secure system, countering of accountability risk and the establishment of an efficient grievance redressal system is likely to combat the risks associated with e-₹.

Anonymity v. AML/CFT: Degree of anonymity would be a key design decision for any CBDC. While digital currency should promise to maintain certain anonymity, recent trends have demonstrated the use of digital assets for money laundering and financing terrorism. The balance between Anti-Money Laundering and Combating Finance of Terrorism and anonymity is the principle of 'managed anonymity' i.e. anonymity for small value and traceable for high value, akin to anonymity associated with physical cash.

Launch and next steps: RBI is currently engaged in working towards a phased implementation strategy, going step by step through various stages of pilots followed by final launch. RBI will build a prototype, test the idea in a controlled environment, perform test cases with positive and negative scenarios to evaluate the durability and resilience of e-₹ and finally conduct pilot projects with a diverse user based.

With the advent of cutting-edge technologies, digital currency will be the next milestone in monetary history. RBI notes that a sovereign digital currency issued by the central bank stands to offer the benefits of virtual currency without the potential risks associated with private virtual currencies.

For further information, contact Mr. Rajarshi Chakrabarti (rajarshi@mumbai.kochhar.com) and Ms. Dhvani Shah (dhvani@mumbai.kochhar.com).

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

The act of 28 October 2022 on the procedure of administrative dissolution without liquidation comes into effect on 1st February 2023

07-11-2022

The Luxembourg act of 28 October 2022 introducing the procedure of administrative dissolution without liquidation (*procédure de dissolution administrative sans liquidation,* the "**Administrative Dissolution Procedure**") (the "**Act**") has just been published and will enter into force on 1st February 2023.

Background and objective

The purpose of the Act is to dissolve empty shell companies within a short timeframe at reduced costs for the Luxembourg State.

The Administrative Dissolution Procedure will enable the administrative dissolution of certain companies without having to go through a formal procedure of judicial liquidation.

Scope of application

Luxembourg companies must meet the following three cumulative conditions in order to be subject to the Administrative Dissolution Procedure:

1. they have no assets;
2. they have no employees; and
3. they pursue activities contrary to criminal law or which seriously contravene the provisions of the Luxembourg Commercial Code or the laws governing commercial companies, including the laws governing authorisations to do business.

Certain companies are, however, excluded from the scope of the Act, such as entities that are subject to prudential supervision (which do not fall within the scope of bankruptcy regulations either).

Procedure

Where there are clear and concordant indications that a company meets the aforementioned conditions, the Public Prosecutor (*Procureur d'Etat*) may request the administrator of the Luxembourg Trade and Companies Register (*gestionnaire du Registre de Commerce et des Sociétés, Luxembourg*, the "**RCS Administrator**") to start the Administrative Dissolution Procedure regarding such company.

Only the Public Prosecutor can request the RCS Administrator to start the Administrative Dissolution Procedure, to the exclusion of the company itself or an interested third party.

The RCS Administrator must notify the decision to initiate the Administrative Dissolution Procedure to the company and proceed to publish this decision in two newspapers published in the Grand Duchy of Luxembourg as well as in the Luxembourg Official Gazette (*Recueil Electronique des Sociétés et Associations, Luxembourg,* the "**RESA**").

The RCS Administrator shall then verify that the relevant conditions are met, including the absence of assets and employees, and shall to that effect request information on the financial and administrative situation of the company from certain entities and administrations (e.g. banks and government authorities). These entities and administrations have one month to disclose the requested information.

If all conditions are met, the RCS Administrator will give confirmation to the Public Prosecutor. The Administrative Dissolution Procedure will then be concluded, which will be published in the RESA, and the company will be dissolved.

If the conditions are not met, the Administrative Dissolution Procedure will automatically be suspended. Such decision is also published in the RESA.

Recourse against the decision

The concerned company or any interested third party who considers that the conditions are not met, may lodge an appeal against such decision with the Luxembourg District Court (*Tribunal d'Arrondissement, Luxembourg*) (the "**Court**") within one month of the publication in the RESA.

If the Court considers that the conditions had not been met, the Administrative Dissolution Procedure will be revoked, which decision will be published in the RESA.

It must finally be noted that in the event assets appear after the conclusion of the Administrative Dissolution Procedure, the Court may, at the request of the Public Prosecutor, revoke the decision to close the Administrative Dissolution Procedure and order the liquidation of the company through a formal procedure of judicial liquidation.

Written by

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Related articles

SKRINE

Can a shareholder or contributory oppose an application to wind up a company?

08 November 2022

Introduction

In the recent case of ***Atlas Equifin Pte Ltd v Electronic Cash and Payment Solutions (S) Pte Ltd (Andy Lim and others, non-parties)*** [2022] SGHC 258 ("***Atlas Equifin***"), the Singapore High Court had the opportunity to consider the unexplored issue of whether shareholders/ contributories have legal standing to oppose a creditor's winding up application.

Facts

The case of ***Atlas Equifin*** concerned a winding up application filed by the Claimant against the Defendant on the basis of a guarantee ("**Guarantee**") given by the Defendant. Pursuant to the Guarantee, the Defendant had guaranteed to pay the Claimant all sums due and payable by the Defendant's subsidiary ("**Subsidiary**"), arising from a Loan Credit Facility entered between the Subsidiary and the Claimant.

Due to the Subsidiary's failure to repay the sums due under the Loan Credit Facility, the Claimant had then demanded for payment from the Defendant pursuant to the Guarantee. As the Defendant failed to make payment to the Claimant, the Claimant issued a statutory demand to the Defendant and thereafter, proceeded to file a winding up application against the Defendant.

A shareholder and contributory of the Defendant, one Ms Monica Kochhar, a 36.2% shareholder and contributory of the Defendant, sought and obtained leave to oppose the winding up application of the Defendant on the basis that the debt owed by the Defendant to the Claimant is disputed, that the Defendant remains a going concern, and the Claimant's winding up application is an abuse of process by the Claimant to impose illegitimate pressure on the Defendant.

Decision of the Singapore High Court

Having concluded that the Claimant had made out the ground for the Defendant to be wound up under section 125(1)(e) read together with section 125(2)(a) of the Insolvency, Restructuring and Dissolution Act 2018 ("**IRDA**") the Singapore High Court also then held that shareholders/ contributories had the legal standing to oppose winding up applications.

Firstly, the Singapore High Court was cognisant of the fact that while there is no explicit conferral of a right on shareholders/ contributories to oppose a winding up application in the IRDA, the relevant subsidiary legislation, being the Insolvency and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 ("**CIR Rules 2020**"), is also not inconsistent with such a right. In this regard, Rule 69 of the CIR Rules 2020 specifically provides "contributory of a company" with the right to be provided with a copy of the winding up application and the affidavit in support. In this regard, Rule 69 of the CIR Rules 2020 reads as follows:

"*Copy of winding up application and supporting affidavit to be provided to creditor or contributory*

69. Every creditor or contributory of a company is entitled to be provided, by the applicant of a winding up application in respect of the company, with a copy each of the [*winding up*] *application and the affidavit supporting the application within 48 hours after requiring the same, upon payment of $1 per page of such copy."*

For clarity, in Singapore, the term "contributory" refers to a person liable to contribute to the assets of the company in the event of the company being wound up and includes the holder of fully paid shares.

The Singapore High Court further concluded that the purpose of Rule 69 of the CIR Rules 2020 was to give shareholders/ contributories the relevant information on a winding up application so that they can, if they so wish, oppose the application.

Secondly, the Singapore High Court further referred to Rule 72(1) of the CIR Rules 2020, a provision which concerns the filing of affidavits in opposition of a winding up application which does not limit the right to oppose a winding up application to only the company facing the winding up. In this regard, Rule 72(1) of the CIR Rules 2020 reads as follows:

"*Affidavits opposing winding up application and affidavits in reply*

1. *Every affidavit in opposition to a winding up application must be filed and a copy of the affidavit must be served on the applicant at least 5 days before the day appointed for the hearing of the application*."

Thirdly, the Singapore High Court was also of the view that the proposition that shareholders/ contributories have legal standing to oppose a winding up application is supported by English authorities. In this regard, the Singapore High Court had regard to the following English authorities ("**English Authorities**"):

i. ***Re Camburn Petroleum Products Ltd* [1979] 3 All ER 297** ("***Re Camburn***") where Slade J, held that a court hearing a creditor's winding up application could "*pay regard to the wishes of contributories*", albeit "*little weight*" is attached "*to the wishes of contributories, in comparison with the weigh it attaches to the wishes of an* [*unpaid*] *creditor*".

ii. *McPherson & Keay's Law of Company Liquidation* (Sweet & Maxwell, 5th Ed, 2021) where the authors explained that "[*o*]*pposition to winding up may proceed from the petitioner's fellow creditors…or from the company or (what is virtually the same thing) from the shareholders"*;

iii. ***Re Rodencroft Ltd* [2004] 1 WLR 1566** ("***Re Rodencroft***") where Evans-Lombe J endorsed ***Re Camburn*** and held that a contributory has the "*prima facie right to appear on the* [*winding up*] *petition and file evidence in opposition" provided that "he could demonstrate that* [*the*] *company was solvent*."; and

iv. Goode on Principles of Corporate Insolvency Law (Sweet & Maxwell, 5th Ed, 2018) where the authors wrote that “*contributories also have the right to be heard in opposition*”.

The Singapore High Court also acknowledged that with such a finding, the courts may be inundated with frivolous applications to oppose winding up applications, which may be too disruptive to the winding up process and unnecessarily increase costs. On that basis, the Singapore High Court went on to set out a non-exhaustive basket of factors to be taken into account in determining whether leave should be granted by the court to shareholders/ contributories to oppose a winding up application. These factors are as follows:

i. the shareholder/ contributory owns a significant portion of the company’s shareholding such that they have a substantial interest in opposing the winding up application;

ii. the shareholder/ contributory is able to demonstrate that the company is solvent. The rationale for this is so that the winding up petitioner should not be “*put to the cost of a contested petition where the only opposition is from a contributory who cannot demonstrate that the company is solvent so that he has a genuine interest in the result*”;

iii. the shareholder/ contributory must be acting *bona fide*; and

iv. the court must weigh the interest of the shareholder/ contributory against the wishes of an unpaid creditor. In this regard, the court would ordinarily attach little weight to the wishes of shareholders/ contributories in comparison to the weight it would attach to the wishes of any creditor in the situation where the creditor proves both that he is unpaid and that the company is “*unable to pay its debts*”.

The applicability of *Atlas Equifin* and the English Authorities

While the Companies Act 2016 does not explicitly confer upon shareholders/ contributories, the right to oppose a winding up application, it is likely that the decision in ***Atlas Equifin*** would be applied here by the Malaysian courts to the effect that shareholders/ contributories would be held to have legal standing to oppose winding up petitions.

Firstly, as in the case in Singapore, the relevant subsidiary legislation here, the Companies (Winding Up) Rules 1972 (“**Winding Up Rules**”), is also not inconsistent with such a right. In fact, Rule 27 of the Winding Up Rules reads “*Every contributory or creditor of the company shall be entitled to be furnished by the petitioner or his solicitor with a copy of the petition within forty eight hours after requiring the same on payment at the rate of fifty cents per folio of 100 words or part thereof*”. This is similar to Rule 69 of the CIR Rules 2020.

Secondly, Rule 30(1) of the WUR which also concerns the filing of affidavits opposing winding up petition, similarly does not prohibit contributories from filing affidavits in opposition. In this regard, Rule 30(1) of the WUR provides that “*Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition*”. This is similar to Rule 72(1) of the CIR Rules 2020.

Thirdly, Rule 28 of the WUR which concerns the notice of intention to be filed by those who intend to appear on the hearing of the winding up petition also does not prohibit contributories from appearing at the hearing of the winding up petition. In fact, Form No.8 of the WUR explicitly provides that a contributory can express an intention to appear and oppose a winding up application. In this regard, Form 8 to the WUR is identical to Form CIR-15, found in the First Schedule of the CIR Rules 2020, which was also taken into consideration by the Singapore High Court in ***Atlas Equifin.***

Fourthly, there are also similarities between the English and Malaysian legislation in this context. For example, the English High Court in ***Re Rodencroft*** referred to section 195(1)(a) of the Insolvency Act 1986 as the only provision which hints at the possible legal standing of a contributory to oppose a winding up petition. In this regard, section 195(1)(a) of the Insolvency Act 1986 provides as follows:

"(1) The court may—

(a) as to all matters relating to the winding up of a company, have regard to the wishes of the creditors or contributories (as proved to it by any sufficient evidence)…"

Similarly, section 521 of the Companies Act 2016 reads "*the Court may as to all matters relating to the winding up of a company, **have regard to the wishes of the** creditors or **contributories** as proved to the Court by sufficient evidence…*" [Emphasis added].

Conclusion

The decision of ***Atlas Equifin*** certainly tilts the balance of the law in favour of debtors which appears to depart from the nearly strict common law position that an unpaid creditor has a right to wind-up a company as of right. Even so, ***Atlas Equifin*** is no doubt a much-welcomed decision as it provides clarity on this issue. There is also no doubt that ***Atlas Equifin*** would very likely be applied by the Malaysian Courts as well. However, it is prudent that the Malaysian Courts do tread carefully on this issue lest they be inundated with waves of frivolous applications to oppose winding up petitions. Importantly, the Malaysian Courts must ensure that the shareholders/ contributories put forth sufficient evidence to demonstrate that the company in question is solvent.

Case summary by Wong Chee Lin (Partner) and Janice Ooi (Senior Associate) of the Restructuring and Insolvency Practice of Skrine.

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S+S UPDATES

COFECE FINES FOR PRICE MANIPULATION AND ROUTE SEGMENTATION

OCTOBER 2022

COFECE fines 18 companies and 31 individuals with more than $1,200 million MXN (approximately $60 million USD) for manipulating prices and segmenting routes in the market of passenger land transport.

In the opinion of COFECE, the sanctioned economic agents committed per se monopolistic practices from 2000 to 2020 in the market of passenger land transportation service on different service routes of Mexico, with a estimated damage to users due to payment of surcharges of more than 3 thousand 384 million MXN. Said behaviors consisted in manipulating and fixing prices in the collection of the service, dividing and distributing routes through agreements among carriers to avoid competition, in some cases even compensating income and expenses.

COFECE imposed the maximum possible fines for each offender in accordance with the Law, considering the conduct and economic capacity of each economic agent, the damage caused, the impact on users, and the deterioration of the conditions of supply of a service of public interest and special relevance for the economy and public in general.

Sanctioned economic agents have the right to challenge COFECE's Resolution through an indirect amparo proceeding before Federal Courts.

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The SyCipLaw PPP Update
OCTOBER 2022

2022 Revised Implementing Rules for the Build-Operate-Transfer Law

On 1 September 2022, the Build-Operate-Transfer Law Implementing Rules and Regulations (IRR) Committee approved the Revised 2022 IRR of Republic Act No. 6957, as amended by Republic Act No. 7718, otherwise known as the Build-Operate-Transfer (BOT) Law (the Revised 2022 IRR).

The Revised 2022 IRR seeks to address the concerns raised by the private sector with the amendments introduced by the 2022 BOT IRR approved on 31 March 2022. The Revised 2022 IRR was published on 27 September 2022 and will take effect on 12 October 2022.

EXPANDED SCOPE OF ELIGIBLE PROJECTS

The Revised 2022 IRR includes the construction, rehabilitation, improvement, betterment, expansion, modernization, operation, financing and maintenance of the following types of projects: (i) land transportation systems, including railways, road-based transportation systems, bus rapid transit, high priority public utility vehicle systems, active transportation, transit-oriented developments, public utility vehicle stations, transport plazas, intermodal terminals, park & ride, and related facilities; (ii) transport and traffic management projects, including transportation databases, automated fare & toll collection systems, traffic signaling, traffic monitoring systems, traffic enforcement systems, congestion and management systems; (iii) energy efficiency and conservation, renewable energy, and electric vehicle charging stations with related infrastructure; (iv) flood control projects; (v) urban redevelopment, townships, and housing projects; and (vi) heritage preservation and adaptive reuse projects.

FLEXIBILITY IN ESTABLISHING BIDDER QUALIFICATION

The Revised 2022 IRR permits a bidder to establish the required track record through (i) its own experience; (ii) the experience of the member firms, in case of a consortium; or (iii) through contractors, nominated affiliates, proposed facility operators and/or entities bound by a technical services agreement (collectively, Nominated Entities). Certain required key personnel may also come from these Nominated Entities.

In relation to financial capability, the Revised 2022 IRR permits for the ability of the bidder to provide equity to be measured in terms of the latest net worth of the bidder and, in case of a consortium, of the lead member or the combined net worth of member firms. Thus, in computing net worth, it is no longer required (i) to deduct from the net worth of an entity its equity commitments to other projects; and (ii) to pro-rate the net worth of member firms based on the proposed ownership structure.

The Revised 2022 IRR seeks to address the concerns raised by the private sector with the amendments introduced by the 2022 BOT IRR approved on 31 March 2022

UNSOLICITED PROPOSALS

The Revised 2022 IRR clarifies that it is the grant of a Direct Government Guarantee, Direct Government Subsidy or Direct Government Equity (as these terms are defined therein) that is not permitted in unsolicited proposals. Previously, the scope was ambiguous since what was prohibited was a "Direct Government Guarantee, subsidy or equity," which did not use the defined terms.

It also relaxes the requirements for New Concept or Technology, which is required to support an unsolicited proposal. It is described as a concept or technology that is new or pioneering where the project is intended to be implemented" and no longer requires that it be "untried in the Philippines." Further, the track record showing successful implementation may now be established not only by the bidder but also by any consortium member or Nominated Entity, which shall be subject to a lock-in period pursuant to the contract.

The Revised 2022 IRR further provides that the 80-day negotiation period for unsolicited proposals may be subject to extension pursuant to rules and procedures to be issued by the PPP Governing Board.

DIRECT GOVERNMENT SUBSIDY

The Revised 2022 IRR has recognized the concept of Availability Payments, which refer to predetermined payments by the agency or local government unit to the project proponent in exchange of delivering an asset or service in accordance with the contract. It is expressly states that Availability Payments shall not be construed as Direct Government Subsidy.

The Revised 2022 IRR also provides that, if the final approval of the franchise by the regulator shall result in a decrease in the amount of tolls, fares, fees, rentals, and/or charges stipulated under the contract, the government shall ensure that the project proponent recovers the difference between the amount stipulated under the contract and the amount approved by the regulator (or appropriate regulatory body) through measures consistent with the Constitution and other applicable laws. The payment of such difference between the amounts shall also not be considered as Direct Government Subsidy.

MATERIAL ADVERSE GOVERNMENT ACTION (MAGA)

The Revised 2022 IRR widens the scope of MAGA to refer to any act of the government (and not just the executive branch) and has deleted the carve-out for (i) acts of the agency or local government unit and approving body; (ii) acts of the executive branch, made in the exercise of regulatory powers; and (iii) acts of the legislative and judicial branches of government. The deletion of the carve-outs is a very welcome development as it gives project proponents real and meaningful recourse against acts of the government. However, the requirement that "the project proponent had no, or could not reasonably be expected to have had, knowledge of the MAGA prior to the effectivity of the contract" has been retained.

Further, for a MAGA to occur, the act of the government must specifically discriminate against the "sector, industry or project," which is broader in scope compared to the previous requirement that the act must specifically discriminate against the project proponent. The Revised 2022 IRR, however, requires that the contract provide for rules, including materiality or amount threshold, nature and manner of recourse, and a cap in case of monetary compensation.

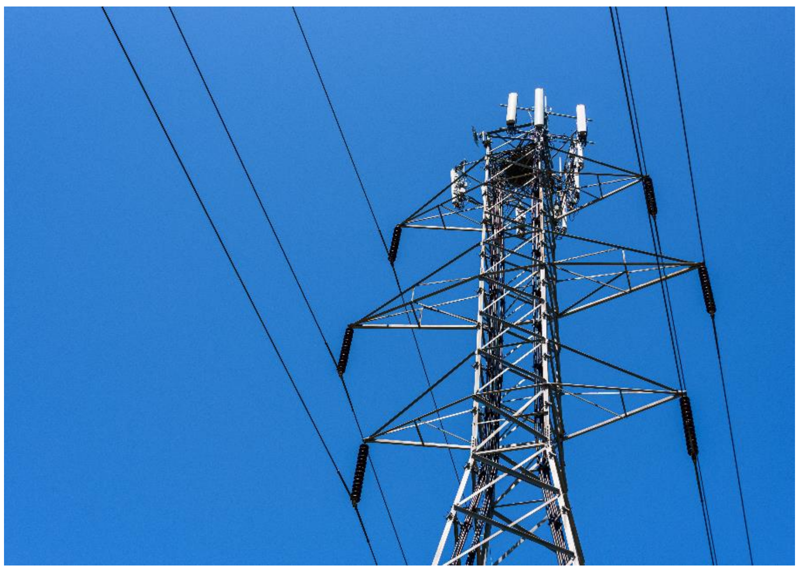
ALLOWABLE CONCESSIONAIRE ACTIVITIES

The Revised 2022 IRR has deleted the prohibition against the concessionaire (which is a special purpose company) from engaging in other concessions, businesses, or undertakings not approved by the relevant regulator, which may conflict with the approved project or otherwise lead to anti-competitive behavior or abuse of dominant position.

The Revised 2022 IRR widens the scope of Material Adverse Government Action (MAGA) to refer to any act of the government (and not just the executive branch) and has deleted the carve-out for (i) acts of the agency or local government unit and approving body; (ii) acts of the executive branch, made in the exercise of regulatory powers; and (iii) acts of the legislative and judicial branches of government.

RELAXATION OF NATIONALITY REQUIREMENT

For Public Utilities



The Revised 2022 IRR retains the requirement that, for projects requiring a public utility franchise for its operation, the operator must be (i) a Filipino, or (ii) if a corporation, must be duly registered with the Securities and Exchange Commission and owned up to at least 60% by Filipinos; or (iii) if a consortium of local and foreign firms, Filipinos must have at least 60% interest in said consortium.

Given the passage of Republic Act No. 11659, which amended Commonwealth Act No. 146, otherwise known as the Public Service Act, the term "public utility" now has a narrower definition and refers only to a public service that operates, manages or controls for public use any of the following: (i) distribution of electricity; (ii) transmission of electricity; (iii) petroleum and petroleum products pipeline transmission systems; (iv) water pipeline distribution systems and wastewater pipeline systems, including sewerage pipeline systems; (v) seaports; and (vi) public utility vehicles. Thus, other activities that previously required a franchise, including the operation of railways and airports, are no longer considered public utilities and do not require any minimum Filipino ownership.

For Solar, Wind and Hydro Power Projects

The Philippine Department of Energy (DOE) has announced that it is preparing the necessary amendments to Rule 6, Section 19 of the implementing rules and regulations (IRR) of the Renewable Act of 2008 to lift the 40% cap on foreign ownership of renewable energy project proponents.

This development came after the Philippine Department of Justice (DOJ) issued on 29 September 0222 DOJ Opinion No. 21 opining that the exploration, development, and utilization of inexhaustible renewable energy sources are not subject to the 40% foreign equity limitation provided under Section 2, Article XII of the 1987 Constitution of the Philippines. Said provision reads that "[a]ll lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least 60% of whose capital is owned by such citizens."

In said opinion, the DOJ said that the enumeration accompanying the term "natural resources" are properties that are within the State's power of dominium pursuant to the Regalian Doctrine (such as lands, fisheries, forests, and wildlife), which are all susceptible to appropriation and, thus, excludes the sun, the wind, and the ocean. The DOJ also said that constitutional debates centered on the strong concern and fear against fully opening to foreign exploitation the natural resources in Section 2, Article XII as it may lead to the possibility of running out of these limited and exhaustible resources. Thus, this compelling reason behind the imposition of the foreign ownership cap finds no application to inexhaustible renewable energy sources.

The DOJ further noted that limiting participation in these renewable energy projects will work only to the detriment of the country as there is no clear evil to be remedied and the adoption of these inexhaustible renewable energy source technologies would not only help in the attainment of a healthful and balanced ecology but also provide clean energy that would not be subject to price fluctuations and market forces similar to fossil fuels. Finally, the DOJ noted that the technical knowledge and experience, as well as the immense capital required to set up these inexhaustible renewable energy power stations to utilize solar, wind, hydro and ocean or tidal energies is akin to large-scale exploration, development and utilization of minerals, petroleum, and other mineral oils, which necessitates the aid of foreign capital, technology and/or expertise.

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Launch of buy now, pay later code of conduct

DENTONS RODYK

October 21, 2022

A. Introduction

A code of conduct outlining best practices for “buy now, pay later” (BNPL) providers (the BNPL Code) was introduced on 20 October 2022 following seven (7) months of discussions among industry players, and will take effect on 1 November 2022.

Since 2020, BNPL transactions in Singapore have more than tripled, with the latest figures valuing BNPL transactions in Singapore at S$440 million. In response, a working group (consisting of BNPL providers such as Atome, Grab Financial Group and ShopBack) was formed by the Singapore FinTech Association, under the guidance of the Monetary Authority of Singapore (MAS), to develop the new and industry-led BNPL Code to promote best practices with respect to BNPL offerings.

B. Need for consumer protection in the BNPL industry

Under BNPL financing, consumers typically make an upfront payment towards the purchase, then pay the remainder off in a predetermined number of instalments. BNPL financing is convenient for consumers as BNPL plans generally do not charge interest, and are easier to get approved for, as compared to traditional credit cards. Further, BNPL does not affect the consumer’s credit score.

Notwithstanding the attractiveness of BNPL financing, consumers must keep themselves informed of its pitfalls. BNPL payments may not be easily trackable and may continue even if the purchased item is returned due to the need for the merchant to inform the BNPL provider of the refund. Missing or late payments may result in late fees which may be substantial.

To mitigate the risk of debt accumulation and protect the interests of users, the BNPL Code is slated to be introduced this year to regulate the BNPL industry.

C. The BNPL Code

The BNPL Code aims to put in place certain standards and best practices (the Best Practices) including:

- credit worthiness safeguards;
- fair and transparent fees, and clear disclosures;

- ethical marketing practices;
- accommodation for voluntary exceptions; and
- financial hardship assistance.

To encourage the adoption of, and ensure compliance with, the BNPL Code, BNPL providers will be required to undergo an audit and accreditation process. Under the process, they will be given the opportunity to display an accredited trustmark to demonstrate their compliance with the BNPL Code to their customers. The accredited trustmark would indicate compliance with the BNPL Code for three (3) years where BNPL providers would have to be re-accredited again thereafter. The process of accreditation and awarding the trustmark is expected to be completed in late 2023.

An independent oversight committee will also be formed to enforce the BNPL Code. It will have the power to request for written submissions from a BNPL provider with respect to suspected violations and remove an accredited BNPL provider from the BNPL registry.

D. Best Practices under the BNPL Code

The Best Practices that will adopted by BNPL providers under the BNPL Code are set out below:

1. Creditworthiness safeguards

Each BNPL provider will permit customers to accumulate no more than S$2,000 in outstanding payments at any given time, unless they complete an additional credit assessment. This assessment must consider *inter alia*:

i. customer income information; and
ii. customer credit information shared across all BNPL firms.

BNPL providers will also suspend a customer's access and use of its BNPL services, upon his/her failure to meet any of his/her payment obligations.

2. Fair, transparent fees, and clear disclosures

BNPL providers will cap all fees, including late fees and other charges. Fees and interests, if any, will not be compounded. All fees and fee-related structures will also be communicated in a manner that is clear and transparent to customers.

Customers are entitled to make full repayment with BNPL providers at any given time, without any early repayment fees. Each BNPL provider will ensure that customers have access to account statements, which consolidate the total outstanding balance of purchases made through its services.

While BNPL providers will offer their terms and conditions primarily in English, they will also provide explanations in Chinese, Malay and Tamil at the request of the customers. At least two (2) weeks' notice will be given before new fees are introduced, existing fees are increased, or other material changes are made to their terms and conditions.

3. Ethical marketing practices

BNPL providers will ensure that advertisements of their products and services comply with the Consumer Protection (Fair Trading) Act 2003 and the industry-regulated advertising codes set out by the Advertising Standards Authority of Singapore. Their advertising and promotional materials will be clear and will not be misleading and/or deceptive, including not omitting or hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.

4. Accommodation for voluntary exceptions

BNPL providers will allow customers to voluntarily exclude themselves from BNPL services and promotion materials once this has been communicated by the customers in writing. BNPL providers will retain a list of the customers who have voluntarily excluded themselves from the services of the BNPL providers.

5. Financial hardship assistance

BNPL providers will consider extending assistance to customers facing financial hardships to work out a mutually acceptable payment arrangement with such customers. In the meantime, BNPL providers will bar any further transactions.

BNPL providers will further commit to abstaining from initiating bankruptcy proceedings against their customers. However, they will not provide their services for high-risk or illegal activities such as sale of narcotics, gambling and/or firearms.

6. Dispute resolution process

BNPL providers will handle complaints promptly and aim to provide a fair resolution to all parties. All complaints received through their designated channels will be acknowledged within three (3) working days, with an initial response provided within 14 working days from the date of the complaint.

E. Concluding remarks

Existing BNPL providers are given 12 months to come into full compliance with the BNPL Code. The MAS has said that it will continue to monitor developments in the BNPL sector and work with the industry to address any risks to consumers; it therefore behoves businesses operating BNPL platforms to keep themselves informed of the upcoming developments in the regulations governing BNPL transactions and consider how their operational practices should be updated.

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Legal Issues in the Internet Age: Whether Collecting and Crawling Other People's Websites or APPs Information Constitutes an Illegal Act of Unfair Competition

10/31/2022 Audrey Liao/ Wei-Ting Liao

I. Introduction

Due to the vigorous development of Internet technology, today's society has entered an era of information explosion. There is almost no doubt that the business model of "collecting and organizing Internet data or websites, and to correspond with relevant information (such as restaurants, tourism, real estate, etc.) then present them to consumers for easy and convenient access, and earning advertising fees or profit sharing through advertising" has economic value. Therefore, if anyone collects and crawls the website data collected and organized by others, and use it as content of our own websites or APPs of the same type, does the collection and crawling constitute plagiarism of unfair competition? This should be examined in accordance with the Fair Trade Act.

In September 2022, the Fair Trade Commission (hereinafter referred to as the FTC) issued a decision of Gong-chu-zi No. 111070, which dealt with plagiarized information collected and organized by competitors' websites and APPs, and mixed them with the content of their own websites and APPs. The FTC concludes that such behavior constitutes the obvious unfair behavior of exploiting others' efforts in a way that affects the order of the transaction violating Article 25 of the Fair Trade Act and imposes a fine. The case is hereby briefly analyzed as follows:

II. Relevant regulations and Case facts

The Fair Trade Act was enacted to maintain the order of trade and the interests of the consumers. Among them, Article 25 of the Fair Trade Act stipulates that "[i]n addition to what is provided for in this Act, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order." The term "obviously unfair" in this article can be referred to in the Fair Trade Commission's guidelines for handling cases in Article 25 of the Fair Trade Act (hereinafter referred to as the "Guidelines") refers to those who engage in a competition or business transaction in a manner that is obviously unfair. Examples of the type of behavior that is obviously unfair are as follows: exploiting the fruits of others' work. For instance, plagiarize the website information of other who has invested considerable amount of efforts on the website or database, and commingle with the content of one's own website or database in order to increase one's own trading opportunities."

In this case, the complainant, the operator of the "ifoodie.tw" website and the APP (hereinafter referred to as "ifoodie") claims that the food record information contained in it was authorized by the author of the food record and included by the staff who contacted and negotiated with the author, or submitted and included by bloggers themselves. After the articles are included, ifoodie will collect, organize, and edit them into structured data. This requires investing a lot of time, manpower, and money to maintain the data over a long period of time. The complainant believes that the respondent, the operator of the ''ihungrybear.com'' website and the APP (hereinafter referred to as the "ihungrybear") crawls, uses, and displays the website information of the complainant's without permission and reduces the commission of the restaurant and advertisers to promote their business via ifoodie, which violates Article 25 of the Fair Trade Act.

III. FTC decision

1. Both parties have a competitive relationship

The FTC believes that there is a competitive relationship between the complainant and the respondent. Both parties provide websites and Apps with food reviews and restaurant information, combining restaurant information, maps, and mobile device positioning functions to provide users with the service of searching for nearby restaurants. There is also a function to rate and write reviews for restaurants, as well as providing hyperlinks to the food records article with the title and thumbnail of the restaurant information page. Furthermore, both parties are food websites and Apps, and the main business model is to monetize the collected Internet traffic, that is, to sell advertising space to restaurants or advertisers to earn advertising fees or to earn profits through advertising companies.

2. The complainant's food records are the economically valuable results of considerable efforts

For Internet users, there are many articles on the Internet that provide restaurant information and record dining experiences. Even if they rely on search engines, users still need to check the content one by one according to the search results in order to learn about the correlation between the records and restaurants. The complainant, ifoodie manually screens or chooses from a submission system the food record articles on the Internet. After analyzing the articles and structuring the data with a program, they are compared with the ifoodie database. After sorting, the Internet links of each food record article are matched with the restaurant information in the ifoodie database, and manual inspection is used to ensure correctness. ifoodie provides users with convenient and complete restaurant information, so that users can click on the title of each food record and browse the pictures and texts while viewing the information in order to understand the experiences and evaluations of different writers. A certain amount of time and manpower is needed to achieve this, and it demonstrates that process to curate the website information requires considerable efforts and has certain economic value.

3. The respondent's act of plagiarizing the website information, commingling it with the content of its own website, constitutes the obviously unfair act of exploiting the results of other people's efforts

The respondent, ihungrybear, does not deny the information on its website is collected from the ifoodie domain and ifoodie's website on the Google Cloud Platform. But ihungrybear believes that it is collected from public information so it is not illegal nor is it plagiarism since it did not use food record content from other websites. The FTC believes that the respondent's behavior in this case is that, "ihungrybear plagiarized the internet links of the food record articles on the ifoodie website, and the plagiarized object was the result of ifoodie putting in considerable efforts to collect, sort, and classify into webpages containing restaurant information." The types of behavior that constitute the obviously unfairness disclosed by the above mentioned Guidelines are examples of "exploiting the fruits of others' work", "plagiarizing the website information of other who has invested considerable amount of efforts on the website or database and commingling with the content of one's own website or database." The behavior of ihungrybear is not justified, and has nothing to do with whether the content of ifoodie is public internet information.

4. The behavior of the respondent is enough to affect the trading order

The FTC believes that ihungrybear plagiarized the content of the competitor ifoodie's website and commingled it as the content of its own website and APP. By freeloading off ifoodie's efforts put into building and maintaining the website data, such that users who were originally attracted by the food records from ifoodie turn towards its website and APP, ihungrybear divided the network traffic and download rate of the ifoodie website and APP. In addition, through the economic characteristics of the multilateral platform of food websites, the economic value and advertising revenue of ifoodie's advertising space is reduced, which creates unfair competition for ifoodie and other competitors who rely on their own efforts and legitimate methods to enrich their websites and APPs. Therefore, ihungrybear's behavior is obviously deemed as unfair and apparently affecting the trading order.

IV. Conclusion

In the era of information explosion, those who can systematically collect information that people are interested in and attract people's attention has become king. However, the collection and crawling program technology has been continuously improved and the systematically aggregated information produced by the industry that has invested a lot of time and resources is easy to be captured. Therefore, it is necessary for the industry to take legal action in a timely manner to protect its rights and interests. Amended Business Mergers and Acquisitions Act to Take Effect on December 15, 2022

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BLOG POST / EMPLOYMENT ADVISOR

Employment Counseling

California Court of Appeal Reverses Summary Judgment in Time-Rounding Case Involving Electronic Timekeeping System

By Patricia Kinaga and Evelyn Wang

11.03.22

In *Camp v. Home Depot*, a Sixth Appellate District panel recently found against an employer that—although its electronic system recorded employee work-time to the minute—rounded daily totals to the nearest quarter-hour for determining wages. The Court of Appeals panel emphasized that its decision was limited to the specific facts before it. It invited the California Supreme Court to weigh in on the debate involving time-rounding practices in view of recent technological advances that allow employers to track employee time worked more precisely.

Background

Plaintiffs Delmer Camp and Andriana Correa filed a putative class action against their employer, Home Depot, for unpaid minimum and overtime wages. Home Depot used the electronic timekeeping system "Kronos" which captured actual worktime by the minute. Despite this fact, Home Depot rounded its hourly employees' total daily worktime to the nearest quarter hour. The timekeeping records revealed that Mr. Camp had lost a total of 470 minutes over approximately four and a half years as a result of Home Depot's rounding policy. Ms. Correa conceded the records showed she was actually overpaid as a result of the employer's rounding policy, and her appeal was ultimately dismissed.

Home Depot moved for summary judgment, contending its time-rounding practice was neutral on its face and neutral as applied, and therefore lawful under the standard articulated in *See's Candy Shops, Inc. v. Superior Court*, a 2012 California Court of Appeals (4th Appellate District) decision. The trial court agreed and granted Home Depot's motion based on *See's Candy*.

Court of Appeal Decision

Mr. Camp appealed. On October 24, 2022, a panel for the Sixth Appellate District reversed the trial court's summary judgment order.

Noting that the California Supreme Court has never rendered a decision on the validity of the rounding standard articulated in *See's Candy*, the Sixth Appellate District chose to take guidance and direction from two more recent California Supreme Court opinions, *Troester v. Starbucks Corp*. (2018) and *Donohue v. AMN Services, LLC* (2021). In *Troester*, the Supreme Court found that the California Labor Code and wage order provisions clearly emphasize that employees must be paid for all work performed and all hours worked. In *Donohue*, the Supreme Court acknowledged that technological advances in timekeeping have helped employers track time more precisely and diminished the practical advantages previously associated with time-rounding.

The Sixth Appellate panel concluded Home Depot did not meet its burden on summary judgment to show that there was no triable issue of material fact regarding Mr. Camp's claims for unpaid wages, because Home Depot did track—to the minute—the exact time an employee worked, and those records did show that Mr. Camp was not paid for all the time he worked. Emphasizing that its decision is limited to the particular facts of this case, the panel specifically acknowledged that its analysis did not reach other circumstances, such as "when an employer uses a neutral rounding policy due to the inability to capture the actual minutes worked by an employee" or "whether an employer who has the actual ability to capture an employee's minutes worked is required to do so." However, the Sixth Appellate panel invited the Supreme Court to decide the validity of the rounding standard articulated in *See's Candy* with regard to both the limited circumstances in *Camp* as well as generally, given the technological advances in timekeeping.

Next Steps for Employers

It appears likely that the California Supreme Court will weigh in on the validity of the state's time-rounding standard, given that there are now arguably conflicting decisions at the court of appeal level between *See's Candy* and *Camp*. In the meantime, California employers who use time-rounding policies would be wise to consult with legal counsel and, if they also use electronic timekeeping systems that capture actual time worked, discontinue use of any time-rounding policies until a final decision is rendered.

Employers can refer to the following advisories previously published by DWT:

- California Supreme Court Rules Against Rounding Meal Periods
- "Rounding" Employees' Hours Worked Remains Risky in California

DWT will continue to monitor this case to see if the California Supreme Court accepts review and will provide updates on all developments as they arise. In the meantime, if you have any questions about your company's timekeeping polices and compliance, please contact a member of DWT's Employment Services Group.

Seeking harmony: FDA to align its human subject research regulations with Common Rule

Some divergence between the regulations would remain intact

8 November 2022

Recently, the U.S. Food and Drug Administration (FDA) released two proposed rules that aim to clarify inconsistencies between FDA's human subject protection regulations and the Federal Policy for the Protection of Human Subjects, known as the "Common Rule." The proposals aim to harmonize FDA's human subject projection rules with the Common Rule, except where not allowable due to differences in statutory authority, and would promulgate a single IRB requirement under FDA's regulatory authority.

HHS seeks comments on the proposed rules through November 28.

Background

FDA's rules on human subject protection govern clinical investigations under sections 505(i) and 520(j) of the Federal Food, Drug, and Cosmetic Act (FDCA), as well as studies used to support applications for research or marketing permits for FDA-regulated products. Meanwhile, the "Common Rule" applies to research supported by HHS—including by the National Institutes of Health—and by other federal agencies that apply the Common Rule to research. Although the Common Rule underwent a significant revision in 2017 (that largely took effect two years later), FDA's human research protection rules have remained largely aligned with the elements of the original Common Rule, which dates to 1991.

As a result, in October 2018, FDA published guidance on its expectations for clinical research that is subject to both the FDA's human subject protection regulations and HHS' revised Common Rule. This guidance made clear that research subject to FDA rules must continue to abide by FDA's regulations, even when they are more restrictive than the Common Rule, as we summarized online here. At that time, FDA stated its plans to propose human subject protection rules to align FDA's human subject protection regulations with the now-revised Common Rule. Now almost 4 years later, FDA has done so.

FDA's rules governing the "Protection of Human Subjects" are found at 21 CFR Part 50, and the rules for Institutional Review Boards (IRBs) at 21 CFR Part 56. The rules for Investigational New Drugs (INDs) are at 21 CFR Part 312 and for Investigational Device Exemptions (IDEs) are at 21 CFR Part 812. The Common Rule is located at 45 CFR Part 46.

Proposal for protection of human subjects

The first proposed rule titled "Protection of Human Subjects and Institutional Review Boards" seeks to harmonize, where possible, FDA's human subject protection regulations and the Common Rule. The proposal provides the following table to summarize the proposed changes to 21 CFR Part 50 that would harmonize with the revised Common Rule.

Section No.	FDA Proposes to:	Harmonizes with Revised Common Rule Section:
50.3(l)	Add a sentence to the definition of legally authorized representative (LAR) to address situations in which there is no applicable State or local law governing who may act as a LAR.	46.102(i)
50.3(t)	Add a definition of "written or in writing" that includes both physical and electronic formats.	46.102(m)
50.3(u)	Add a definition of "private information."	46.102(e)(4)
50.3(v)	Add a definition of "identifiable private information."	46.102(e)(5)
50.3(w)	Add a definition of "identifiable biospecimen."	46.102(e)(6)
50.20	Add provisions (d) and (e) for organizing and presenting information about the research to subjects; redesignate or make minor editorial changes to other portions of the paragraph.	46.116(a)(1) -(6)
50.25(a)	Add "or legally authorized representative" to clarify to whom informed consent information must be provided.	46.116(b)
50.25(a)(9)	Add a basic element of informed consent that would require a description of how information or biospecimens may be used for future research or distributed for future research.	46.116(b)(9)
50.25(b)	Add "or the legally authorized representative" to the end of the sentence to clarify to whom informed consent information must be provided.	46.116(c)
50.25(b)(2)	Add "or legally authorized representative's" to clarify that the investigator may terminate the research without the consent of the subject or the LAR.	46.116(c)(2)
50.25(b)(7)-(9)	Add three new additional elements of informed consent, including a statement as to how private information or biospecimens collected during the research may be used for commercial profit and whether the subject will or will not share in this commercial profit, whether clinically relevant	46.116(c)(7)-(9)

Section No.	FDA Proposes to:	Harmonizes with Revised Common Rule Section:
	results will be disclosed to study subjects, and for research involving biospecimens, whether the research involves whole genome sequencing.	
50.25(d)	Add a reference to tribal law of American Indian or Alaska Native tribes, to clarify that the reference to “Federal, State, or local law” is intended to include tribal laws; make minor editorial changes.	46.116(i)
50.25(e)	Add a reference to tribal law of American Indian or Alaska Native tribes, to clarify that the reference to “Federal, State, or local law” is intended to include tribal law.	46.116(j)
50.27(a)	Add a parenthetical to provide for consent forms in an electronic format and add “informed consent” before “form.”	46.117(a)
50.27(b)(1)	Add “or the subject’s legally authorized representative” (to clarify that the subject or LAR shall have the opportunity to read the informed consent form); reorder the sentences and make minor editorial changes.	46.117(b)(1)
50.27(b)(2)	Add a sentence to clarify that when using a short form written informed consent, the key information must be presented first to the subject before other information, if any, is provided, and add “legally authorized representative” in three places; reorder sentences and make minor editorial changes.	46.117(b)(2)

Notable elements of the first proposed rule that aim to ***harmonize*** FDA rules with the revised Common Rule are listed below:

- ***Informed consent***. FDA proposes to require that informed consent begin with a brief presentation of the key information that helps a subject understand the reasons why the subject might or might not want to participate in the research. FDA also proposes to add three new additional elements of informed consent to harmonize with the revised Common Rule. These elements would a) require a statement that the subject’s biospecimens (even if identifiers are removed) may be used for commercial profit and whether the subject will or will not share in this commercial profit, b) require a statement on whether clinically relevant research results, including individual research results, will be disclosed to subjects, and if so, under what conditions, and c) require that subjects be informed whether research involving biospecimens will (if known), or might, include whole genome sequencing (WGS).
- ***“Minimal risk” informed consent waiver***. FDA proposes adding an exception to the requirement for documentation of informed consent, to harmonize with the revised Common Rule at 45 CFR 46.117 (c)(1)(iii). The new provision would allow the IRB to waive documentation of informed consent for a study that presents no more than minimal risk of harm to the subjects, if the subjects or legally authorized representatives are members of a distinct cultural group or community in which signing forms is not the norm, and there is an appropriate alternative mechanism for documenting that informed consent was obtained.

    - However, the revised Common Rule also retains an exception to the requirement for documentation of informed consent at 45 CFR 46.117(c)(1)(i) for situations in which the only record linking the subject and the research would be the informed consent form and the principal risk would be potential harm resulting from a breach of confidentiality. FDA is not proposing to add this in the rulemaking because it asserts the exception is "not relevant to FDA-regulated research."
    - The proposed rule requests comment on whether this provision is relevant to FDA-regulated research and any examples of situations when it would be useful.

Notable elements of the first proposed rule that would have FDA rules ***differ from*** the revised Common Rule are listed below:

- "***Identifiable biospecimen***." Under the Common Rule, identifiers may be removed from information or biospecimens collected as part of a study and the information or specimens could then be used for some secondary research without informed consent or IRB review. Under the FDA's proposed rule, the element of informed consent at 45 CFR 46.116(b)(9) would similarly inform subjects of that possibility when applicable. However, FDA's proposed new element would require a description of how information or biospecimens may be used for future research or distributed to another investigator for future research, which is not limited to the two situations [1] addressed by the statements required under the corresponding element of the revised Common Rule.
    - In distinguishing itself from the revised Common Rule here, FDA said it is "concerned about the practicability of limiting this proposed element of informed consent to the two situations addressed by the statements required under the Common Rule at this time."
    - Nevertheless, the proposed rule asserts that "the research community would be able to develop informed consent forms and processes that comply with both sets of regulations."
    - FDA requests comment on whether its proposed new basic element of informed consent at § 50.25(a)(9) would provide adequate notice to potential subjects regarding the possible future research use of their information and biospecimens or whether the Common Rule's provision at 45 CFR 46.116(b)(9) would better inform potential subjects about the possible future use of their information and biospecimens in research, as well as on whether the research community anticipates challenges in implementing FDA's proposed new element and whether an alternative approach could lessen such challenges.
- ***"Identifiable private information."*** FDA proposes to define "identifiable private information" as private information for which the identity of the subject is or may readily be ascertained by the sponsor or investigator or associated with the information. This definition differs from the text of the revised Common Rule provision by including information for which a subject's identity is or may be readily ascertained by the "sponsor" in addition to information that is or may be readily ascertained by the investigator. FDA would consider these types of information to be "identifiable private information" under this proposed definition.
- ***Criteria for IRB approval of research***. FDA is proposing to add updated language consistent with the revised Common Rule describing categories of subjects who are considered vulnerable to coercion or undue influence, specifically "...children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons." However, purportedly to "simplify [the] regulatory text," FDA is also proposing to delete the phrase "to the extent required by" from § 56.111(a)(5), so that the requirement would read: "Informed consent will be appropriately documented or appropriately waived, in accordance with § 50.27 of this chapter." FDA's proposed revision differs slightly from the revised Common Rule at 45 CFR 46.111(a)(5), which states that informed consent will be appropriately documented or appropriately waived in accordance with 45 CFR 46.117.
- ***Limited IRB review***. FDA is not proposing to adopt provisions from the revised Common Rule related to limited IRB review at this time, including 45 CFR 46.109(f)(1)(ii), but FDA notes that it "may take additional steps to harmonize with such provisions at a later time."

- ***Recordkeeping for expedited review***. FDA is not proposing add the revised Common Rule's requirement that an IRB maintain a record of the rationale for conducting continuing review for review of research found on the HHS Expedited Review List, citing how, for studies on that list, a determination must have been made that the specific circumstances of the proposed research involve no more than minimal risk to human subjects.

Investigational Device Exemption (IDE) reporting requirements

The first proposed rule would also revise the current FDA requirement that sponsors submit progress reports to all reviewing IRBs "at regular intervals, and at least yearly." Instead, under the proposed rule, sponsors would be required to submit such progress reports to the reviewing IRB to the extent that continuing review is required by the revised Common Rule. FDA states that it "does not believe that submission of progress reports to the IRB remains necessary when continuing review of the research by the IRB is not required," noting the proposed removal of the requirement that IRBs maintain a record of the rationale for conducting continuing review. However, the proposed rule maintains the requirement that sponsors must submit progress reports to all reviewing IRBs at regular intervals, and at least yearly.

In addition, under the proposal, sponsors of an IDE will continue to submit progress reports to FDA at regular intervals and at least yearly under § 812.150(b)(5), and as may be requested under § 812.150(b)(10), regardless whether there is continuing IRB review. Justifying this continued requirement, FDA says that it aims "to ensure the Agency receives information regarding the IDE investigation." FDA is not proposing to amend the requirements for treatment of IDEs at § 812.36(f), which require semi-annual progress reports to both FDA and the IRB(s) until a marketing application is filed.

FDA proposes "single IRB" requirement

The second proposed rule titled "Institutional Review Boards; Cooperative Research," proposes a requirement for single IRB review for research that is conducted in the U.S., with some exceptions. Such a requirement would align with the Common Rule and "streamline the IRB review process and decrease administrative burdens and inefficiencies for investigators and IRBs without compromising human subject protections".

The revised Common Rule's "single IRB" requirement mandates that U.S. institutions engaged in cooperative research rely upon a single IRB review, with two exceptions:

1. cooperative research for which more than single IRB review is required by law (including tribal law passed by the official governing body of an American Indian or Alaska Native (AI/AN) tribe) or
2. research for which any Federal Department or Agency supporting or conducting the research determines and documents that the use of single IRB review is not appropriate for the particular context (45 CFR 46.114(b)).

FDA proposes the same first exception, but not the second, stating that the agency does "not believe it is practicable for FDA to adopt the same regulatory text…because most of the research that FDA regulates is not conducted or supported by FDA or by any Federal Department or Agency," and therefore, "this exception would have no applicability to the majority of FDA-regulated research." However, FDA invites comments on whether it should add into the final rule an exception analogous to the second Common Rule exception, in order to help address potential challenges to use of a single IRB review model for FDA-regulated cooperative research.

FDA proposes specific exceptions that aim to reflect circumstances where requiring the use of a single IRB for oversight of multisite research may not be appropriate for FDA-regulated research (items 2, 3, and 4 below):

1. Cooperative research for which more than single IRB review is required by law

2. Cooperative research involving a highly specialized FDA-regulated medical product for which unique, localized expertise is required
3. Cooperative research on drugs that is exempt from the requirements for an IND application under § 312.2(b) (21 CFR 312.2(b))
4. A device investigation conducted under the abbreviated requirements at § 812.2(b) (21 CFR 812.2(b)) for a nonsignificant risk or "NSR" study, or other cooperative research on medical devices that meet requirements for exempted investigations

In addition to these four proposed specific exceptions to the single IRB requirement, FDA has requested public comment on whether the following exceptions should be included in the final rule (although the proposed exceptions below are not included in the proposed rule):

1. Cooperative research for which use of a single IRB is unable to meet the needs of specific populations
2. Cooperative research with a small number of investigational sites

FDA further requests public comment on the impact that differences in exceptions to the single IRB review requirement may have on stakeholders, and on possible approaches to avoid or minimize any potential negative effects of such differences, such as whether additional exceptions from the proposed single IRB review requirement should be included or whether providing guidance on the application of FDA's proposed exceptions might help avoid or minimize the differences in exceptions. FDA also requests comment on whether there are unique challenges to use of a single IRB review model for FDA-regulated cooperative research that could not be addressed by FDA's proposed exceptions.

Another difference between the proposed rule and the revised Common Rule is that the latter requires the reviewing IRB "to be identified by the Federal Department or Agency supporting or conducting the research, or to be proposed by the lead institution subject to the acceptance of the Federal Department or Agency supporting the research." FDA says it is not practicable for FDA to propose this same requirement "because, unlike research subject to the revised Common Rule, most of the research that FDA regulates is not conducted or supported by FDA or by any Federal Department or Agency."

The proposed rule includes a lengthy defense of the single IRB requirement, citing a Clinical Trials Transformation Initiative (CTTI) study that identified several "perceived" barriers to the use of single IRB review, including concerns about potential noncompliance by the single IRB, potential loss of local context, and the quality of the single IRB's review. FDA defends the single IRB requirement in pointing out that the study found that the "perceived barriers to single IRB review resulted from a conflation of institutional responsibilities with the ethical review responsibilities of the IRB, among other factors." FDA further asserts that "multiple IRB reviews could result in recruitment differences between sites, leading to difficulty recruiting subjects with the condition of interest, and in some cases, an impact on the generalizability of the study results."

Consistent with the Common Rule, the proposed single IRB rule also establishes a recordkeeping requirement to require documentation of an institution's reliance on an external IRB for oversight of research.

Next steps

The changes in the first proposed rule would have an effective date of 180 days after the date of publication of the final rule, and the changes in the "single IRB" proposed rule would have an effective date of one year after the date of publication of the final rule. HHS seeks comments on these proposed timeframes.

FDA invites comments on the proposed rules through November 28, 2022. If you wish to submit a comment, or have any questions on human subject protection rules or clinical trials more generally, please contact the Hogan Lovells attorney with whom you regularly work or any of the authors of this alert.

Authored by Heidi Gertner, Robert Church, Meredith Manning, and William Ferreira

[1] This may be either: (1) a statement that identifiers may be removed from the identifiable private information or identifiable biospecimens, and the information or biospecimens may be used for future research studies or distributed to another investigator for future research studies, without obtaining additional informed consent from the subject or legally authorized representative if this might be a possibility or (2) a statement that the subject's information or biospecimens, even if the identifiers are removed, will not be used or distributed for future research

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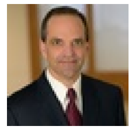

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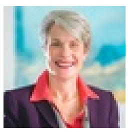

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