PACIFIC RIM ADVISORY COUNCIL

Pacific Rim Advisory Council

April 2024 e-Bulletin

MEMBER NEWS

- ►DAVIS WRIGHT TREMAINE Names Wendy Kearns PIC Seattle
- ►GOODSILL TwoPartner Announcements
- ►HOGAN LOVELLS Adds to Environemental Capabilities In Washington
- ►MUNIZ Promotes 6 to Partner; Welcomes New Regulatory Partner
- ►RBS Welcomes Two New Partners
- ►TOZZINI Promotes 3 to Partnership

COUNTRY ALERTS

►ARGENTINA Ministry of Justice of Buenos Aires launches "Artificial Intelligence Program" ALLENDE BREA

►BRAZIL Upcoming Sportbetting Regulations TOZZINIFREIRE

►CANADA Public Interest - Rare Cases Where Patent Injunctions Declined RICHARDS BUELL SUTTON

►CHILE Cybersecurity Framework Law is published in the Official Gazette CAREY

►CHINA CIBM Bond Repo to be Further Opened to Overseas Investors HAN KUN

►COLOMBIA New Regulation on Controlled Products BRIGARD URRUTIA

►COSTA RICA Guide to Notification and Analysis of Economic Transactions ARIAS

►FRANCE USA—France Tax Treaty - Can Foreign Tax Credits Offset Net Investment Income Tax?GIDE

►HONG KONG Is the Writing on the Wall for the Shareholder Principle? Privilege Update. HOGAN LOVELLS

►MEXICO Amendments to General Law of Credit Instruments and Transations, Organizations and Auxiliary Activities SANTAMARINA

►NETHERLANDS Developments in Environmental Crime Legislations NAUTADUTILH

►PHILIPPINES Tax Tips Update SyCip Law

►SINGAPORE Feedback on Repeal of Regulatory Regime for Registered Fund Management Companies DENTONS RODYK

►TAIWAN Difference between Functional Designs and Use of Trademarks LEE and LI

►UNITED STATES California Privacy Regulator Issues First Enforcement Advisory DAVIS WRIGHT TREMAINE

►UNITED STATES Center for Clinical Trial Innovation furthers FDA's diversity goals, rare disease drug development HOGAN LOVELLS

CONFERENCES & EVENTS

PRAC 2024 Conferences

PARIS, FRANCE - May 25 - 28, 2024
Hosted by GIDE LOYRETTE NOUEL
Registration Now Open

VANCOUVER, CANADA - September 21 - September 24, 2024
Hosted by RICHARDS BUELL SUTTON LLP
Registration Now Open

PRAC 2024 - Event Connect

Let us know your plans to attend upcoming industry events and connect with other attending PRAC Delegates.

IPBA Annual Conference April 24 – 27, Tokyo
ABA Intellectual Property Law Annual Conference -April 17-19, Bethesda MD
ABA International Law Section Annual Conference - May 7-10-, Washington DC
INTA Annual Meeting -May 18 – 22, ATLANTA USA

Get On The List!

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MEMBER DEALS MAKING NEWS

►ARIAS | Advises Hoshizaki on Stratetig Acquisition of Shares in Fogel

►ALLENDE BREA | Miami Based Apex Capital Purchases Clorox subsidiaries

►BRIGARD URRUTIA | Assists Expofaro in Levi Strauss Distribution

►CAREY | Assists Chilean miner CAP invest in rare earth metals project

►GIDE | Advises bank syndicate EU 700 million issue hybrid notes and concurrent EU 699 million buyback

►HAN KUN | Counsel to Lucas GC's listing on Nasdaq

►HOGAN LOVELLS | Kaiser Foundation Hospitals launch of Risant Health and in its acquisition of Geisinger

►KOCHHAR | Advises Spectris Group on its Strategic Divestiture

►LEE AND LI | WT Group US$1.9 Billion Syndicated Loan Project

►MUNIZ | Agricola Atlas in agribusiness acquisition

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DAVIS WRIGHT TREMAINE NAMES WENDY KEARNS SEATTLE PARTNER-IN- CHARGE

SEATTLE, APRIL 16, 2024 – Wendy Kearns, a lawyer with decades of experience serving the technology industry and a long record of dedication to mentorship and DEI, has been selected as partner-in-charge (PIC) for the Seattle office of Davis Wright Tremaine LLP.

Kearns takes over from Pete Johnson, who was recently named Davis Wright's interim firmwide managing partner.

"Wendy is everything we could want in a PIC," said Camilo Echavarria, chair of the Davis Wright executive committee. "She's deeply embedded in the technology sector that's driving growth in and around Seattle. She is widely respected for her substantive expertise as well as her generosity in sharing it. And she lives the values that guide our firm—excellence, collegiality, and a commitment to inclusion. She is perfectly equipped to build on the top-of-market position that Pete has been strengthening for us in Seattle."

Kearns began her career in Silicon Valley as a software developer, software product manager, and business development manager. She then proceeded directly to law school without a college degree. She came to Davis Wright in 2013 and has built a cutting-edge practice helping clients structure and negotiate complex agreements and launch products in the fields of AI, cloud, internet of things, and other evolving enterprise and consumer technologies, including deals with a significant regulatory component.

Kearns has taken on a wide range of leadership roles at the firm. Most recently, she served as chair of Davis Wright's technology practice, helping drive the team's national growth trajectory, tripling its size, and significantly expanding its capabilities. She was also co-chair of the technology, communications, and privacy & security (TCPS) practice and served on Davis Wright's executive committee, the firm's highest decision-making body.

Kearns' commitment to advancing DEI has been a hallmark of her career. She was as a ten-year member of the firm's Diversity Executive Council, helping lead Davis Wright's overall DEI strategy. She's also widely known for centering DEI in her client engagement efforts and for being a dedicated ally within the firm to lawyers from groups historically un-derrepresented in the legal profession. As co-chair of the TCPS group, she helped build the most diverse practice team in the firm.

"Coming from a nontraditional background, I know that creating diverse teams and pathways to success in the law is essential," said Kearns. "I look forward to further bolstering our strong culture of inclusion here in Seattle."

Davis Wright was founded in Seattle and the city remains home to the firm's largest office, with 207 lawyers.

"This region has long been a world leader in innovation—and never more so than today," said Kearns. "Davis Wright has extraordinary opportunities in front of us and I am thrilled and honored to be able to help us make the most of them."

About Davis Wright Tremaine
Davis Wright Tremaine LLP is an AmLaw 100 law firm with more than 600 lawyers representing clients based throughout the United States and around the world. Learn more about the firm at www.dwt.com

GOODSILL PROMOTES TWO TO PARTNERSHIP

HONOLULU, 01 January 2024: Goodsill is proud to announce that Bryan Harada and Kristie Kutaka have both been promoted to partner, effective January 1, 2024.

Bryan is a partner in the Civil Litigation; Trust & Estate Litigation; and Intellectual Property practice groups. He has extensive experience in helping clients understand their rights, duties, and obligations in order to allow them to make informed decisions. Bryan served as law clerk to the Honorable Rhonda A. Nishimura (ret.) before working as an associate at two intellectual property boutique firms and one general service firm. He also served as a session attorney for Representative (now Senator) Karl Rhoads of the Hawaii House of Representatives during the 2014 session. Bryan holds a B.A. in molecular and cell biology from the University of California, Berkeley, and received his J.D. from the University of Hawaii William S. Richardson School of Law. Born and raised in Hawaii, Bryan is a graduate of Punahou School.

Kristie concentrates her practice in the areas of insurance defense, premises liability, commercial litigation, real estate disputes, and trust and estate litigation. She received her Juris Doctor degree from the William S. Richardson School of Law and Bachelors in Business Administration with an emphasis in Human Resource Management from the University of Hawaii at Manoa. Kristie clerked for the Honorable Gary W. B. Chang and worked for two civil litigation law firms in Honolulu before coming to Goodsill. Kristie has been an annual guest speaker for the Hawaii Judicial Education and Resource Development Program, is a 2013 Hawaii State Bar Association Leadership Institute Fellow, and served as a Barrister with the James S. Burns Aloha Chapter, American Inns of Court IV.

About Goodsill:

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

HOGAN LOVELLS ADDS TO ENVIRONMENTAL CAPABILITIES IN WASHINGTON, D.C.

Katherine Vanderhook-Gomez adds to Hogan Lovells environmental capabilities in Washington, D.C., building on recent momentum

Washington, D.C., 8 April 2024 – Global law firm Hogan Lovells announced today that Katherine (Kathy) Vanderhook-Gomez has joined as a partner in the firm's Global Regulatory & Intellectual Property, Media, and Technology (IPMT) practice in Washington, D.C.

Vanderhook-Gomez joins from 3M Company, where she served as Director and Assistant General Counsel in the Enterprise Risk Management group, advising on environmental compliance and enforcement matters, including those arising from the continuing and intense focus on PFAS.

"Kathy is one of the most in-demand environmental lawyers in the industry," said Janice Hogan, Global Practice Group Leader for the Global Regulatory & IPMT group. "With deep private and public sector experience on some of the nation's toughest environmental challenges, including clean-ups under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA), and matters related to per- and polyfluoroalkyl substances (PFAS), we know that clients will benefit greatly from her strategic counsel. We are thrilled to welcome her to the firm."

Over nearly two decades, Vanderhook-Gomez has built her practice advising on compliance and civil litigation matters arising under the Clean Air Act, Clean Water Act, CERCLA, RCRA, and other federal environmental statutes. At 3M, she principally advised on the company's environmental compliance and risk management, including leading the company's response to PFAS litigation and enforcement matters arising from chemical manufacturing. Prior to her tenure at 3M, Kathy served as the Director of Legal Affairs for the Greenfield Environmental Multistate Trust, providing compliance and strategic advice related to CERCLA and RCRA implementation, as well as representing the Trust before the Department of Justice (DOJ), Environmental Protection Agency, and state agencies on liability matters including property transfers, remediation, and construction.

Prior to this, Vanderhook-Gomez worked at the U.S. Department of Justice for fifteen years as a trial attorney and then as senior counsel. In these capacities, she led civil enforcement matters on behalf of EPA under the Clean Air Act, RCRA, Clean Water Act, CERCLA, and other environmental statutes. She achieved the highly favorable settlement of a Remedial Design and Remedial Action CERCLA enforcement matter involving forty-two signatories, including large private corporations, the City of Baltimore, state agencies, and federal and state natural resource trustees. She served as a core member of a team of attorneys on several high-impact Clean Air Act matters, and earned DOJ's John Marshall Award, the highest award given by DOJ to attorneys.

"With capabilities across many of the strategic priorities for our practice area, including on PFAS, Clean Air Act, and environmental compliance and civil litigation matters, she is a natural addition here, and we are eager to have her aboard," said Adam Kushner, Co-Practice Area Lead of Hogan Lovells' Environment and Natural Resources practice area. "Our environmental practice is experiencing tremendous growth, particularly across the Americas region, and we look forward to the continued expansion of our U.S. offering."

HAN KUN LLP OPENS IN NEW YORK CITY

Since 2020, Hogan Lovells' Environment and Natural Resources practice has welcomed nearly two dozen lawyers, including at least six partners and counsel with first-chair trial experience, to its offices in Houston, Northern California, Washington, D.C., Denver, Mexico City, and Paris. The firm also announced last week that Energy Regulatory partners Christine Le Bihan-Graf and Laure Rosenblieh joined the Global Regulatory & IPMT practice, based in Paris.

"We welcome Kathy at a key time for our global Energy Transition platform, which has experienced rapid growth in the past 18 months in offices across the U.S., as well as in Paris, London, Germany, and Singapore," said Brian Chappell, Co-Leader for the Energy & Natural Resources sector. "Building on Kathy's experience in environmental litigation and compliance, a key priority for clients across a number of sectors, we are extremely well positioned to continue strengthening our energy capabilities globally."

Washington, D.C. Office Managing Partner Ajay Kuntamukkala added: "Kathy is a pillar in the D.C. legal community, with extensive experience both in-house and in government. She has also been an effective mentor of junior lawyers, including diverse lawyers, throughout the community, and has led on several ESG-related and Continuing Legal Education initiatives. Her arrival comes at a time of continued growth and success in our firm's largest U.S. office."

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Vanderhook-Gomez said, commenting on her arrival: "I have long admired and respected Hogan Lovells' environmental practice, which is one of the strongest in the nation. Following on the heels of several high-profile additions, I look forward to building upon this momentum and further expanding both my practice and the firm's environmental capabilities in the U.S. and globally."

Vanderhook-Gomez previously served as a judicial clerk for the Honorable Bruce W. Kauffman, United States District Judge for the Eastern District of Pennsylvania. She earned her J.D. from Harvard Law School, as well as a Master's in Public Administration from Harvard University's John F. Kennedy School of Government, and her B.A. from Swarthmore College.

For additional information visit www.hoganlovells.com

MUNIZ PROMOTES 6 TO PARTNER; HIRES REGULATORY PARTNER IN PERU

LIMA, 28 March 2024: Peruvian firm Muñiz, Olaya, Meléndez, Castro, Ono & Herrera has promoted six associates to partner, appointments that boost its labour, IP, disputes and regulatory practices.

The Highly Recommended firm announced on 25 March that Johana Calderón Valencia, Claudia Quispe Gonzales, Julissa Yamani Fernández, Oxal Víctor Ávalos Jara, Guillermo Gonzales Zevallos and Percy Eduardo Suazo Carmelo had been promoted to partner earlier in the samethis month.

Johana Calderón Valencia, Claudia Quispe Gonzales and Julissa Yamani Fernández Oxal Víctor Ávalos Jara, Guillermo Gonzales Zevallos and Percy Eduardo Suazo Carmelo

Muñiz now has a total of 79 partners.

The firm's labour practice gained two new partners: Ávalos and Gonzales. The former joined Muñiz in 2014 as a senior associate, following a spell as a lawyer in the Ministry of Labour. Between 2010 and 2012, Ávalos ran his own law firm, Ávalos Jara Abogados & Asociados.

Fellow labour partner Gonzales has experience advising clients on judicial proceedings before the Ministry of Labour. He has spent the last 13 years as an associate at Muñiz, following a year as an associate at Elite firm Rodrigo, Elías & Medrano Abogados.

Calderón has more than 13 years of experience in the IP field, assisting clients on trademark and copyright matters. She has worked at Muñiz for the last five years as head of its international trademark practice, while she also counts an earlier stint at the firm from 2009 and 2012. In between the two spells at Muñiz, Calderón gained valuable experience working at the Peruvian antitrust and IP regulator, Indecopi, for almost seven years.

Quispe has been appointed partner in the arbitration area. She rejoined the firm in 2022 following four years at fellow Highly Recommended firm Rebaza, Alcázar & De Las Casas. Prior to that, Quispe had an 11-year spell at Muñiz, which included a year as a foreign associate in the Paris office of Dechert.

Focusing her practice on litigation, new partner Yamani first joined the firm back in 2010. Her previous experience includes a year as a lawyer at Peruvian government-backed development bank Corporación Financiera de Desarrollo (Cofide).

The sixth newly promoted partner, Suazo, practises in the administrative law team. He has been at Muñiz since 2012, when he joined from Banco Financiero del Perú.

The promoted lawyers will play a "key role" in meeting increased client demand across several practice areas at a time when the market is facing challenges due to the "difficult political and economic circumstances" in Peru at the moment, says founding partner Jorge Muñiz.

Muñiz is Peru's largest law firm by headcount. Last month, it added to its energy and infrastructure offering by hiring a partner from DLA Piper (Peru). Back in November, the firm hired a partner from Rubio Leguía Normand to boost its M&A practice.

Its expansive team provides the firm with breadth and depth across several practice areas. It recently helped Agrícola Atlas acquire a majority stake in Danper Trujillo, shortly after it represented Agrokasa in its sale to Guatemalan agribusiness Grupo Hame. The latter transaction has been shortlisted in the public M&A category of Latin Lawyer's annual Deal of the Year Awards. The winners will be announced on the night of our charity awards ceremony at Hotel Unique in São Paulo on Thursday 9 May.

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MUNIZ PROMOTES 6 TO PARTNER; HIRES REGULATORY PARTNER IN PERU

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Muñiz has nabbed a partner from fellow Highly Recommended outfit DLA Piper (Peru), adding firepower to its energy and infrastructure offering.

The firm welcomed Jorge Córdova to its partnership on 23 February. With the hire, Muñiz counts 79 partners.

Muñiz's newest partner brings extensive knowledge of infrastructure and energy law, with a particular focus on regulatory matters. Córdova frequently advises local and international clients on the corporate, regulatory and finance aspects of energy projects, including gas pipelines, hydroelectric power plants and electricity transmission systems. Córdova joins Muñiz after six years in the partnership of DLA Piper's Peruvian office. Previously, he spent just under five years at Peruvian Elite Miranda & Amado and one year at Recommended firm Osterling Abogados.

"I joined this family to [contribute] my experience and help the firm reach its goals," says Córdova, adding that he is "happy and proud to be part of one of the largest Latin American legal firms."

A spokesperson from DLA Piper tells Latin Lawyer that the firm wishes Córdova all the best in this new chapter of his career.

Muñiz is one of the largest firms in Latin America by headcount – counting over 300 lawyers across its 13 offices in Peru. It is noted for its work within an array of areas, including banking and finance, corporate and M&A, labour, litigation and trade. The firm hired a partner from local outfit Rubio Leguía Normand back in November, strengthening its corporate practice.

Recent deals have seen the firm serve clients in Peru's sizeable agribusiness industry. In December, it guided local agribusiness Agrícola Atlas in its acquisition of a majority stake in Danper Trujillo. This came just two months after it helped Peru's Agrokasa sell its business to Guatemalan counterpart Grupo Hame.

For additional information visit us at www.munizlaw.com

RICHARDS BUELL SUTTON WELCOMES TWO NEW PARTNERS

VANCOUVER, 05 January 2024: "We are pleased to welcome and announce these amazing lawyers, Winsome Glover and Eryn Jackson, to the partnership. They each bring incredible expertise to our clients in their respective areas." – Mark Baron, RBS Managing Partner

TOZZINI PROMOTES THREE TO PARTNER

SAO PAULO, 12 March 2024: Brazil's TozziniFreire Advogados has elevated three lawyers to the partnership in its intellectual property, tax and environmental practices, the firm's first partner appointments of 2024.

Stephanie Consonni, Carlos Renato Vieira and Danilo Lambert

The Elite firm named Stephanie Consonni, Carlos Renato Vieira and Danilo Lambert as partners on 4 March. The promotions take the firm's partner total to 95.

Consonni and Lambert are based in São Paulo, whilst Vieira works out of the firm's Campinas office.

Fernando Serec, TozziniFreire's CEO, says the appointments are "part of our people development process and is in line with our strategy to expand our practices," adding that the trio have "demonstrated outstanding performance over the years in delivering solutions to our clients."

In the IP practice, Consonni manages large portfolios of brands and patents for clients. She joined TozziniFreire as an associate in 2018, following a short spell at local firm Caio Mariano Advogados. Prior to that, Consonni worked for four years at at Highly Recommended IP boutique Gusmão & Labrunie.

According to IP partner Marcela Ejnisman, Consonni's promotion "is based on her relationship with our clients and the recognition she already has … we believe that she will further consolidate the firm's initiatives in the practice."

Vieira is new partner in the firm's tax department, where he focuses on tax regimes, tax recovery programmes and regularisation of certificates, among other matters. Vieira arrived at TozziniFreire in 2021 after two years as counsel at fellow Elite firm Stocche Forbes Advogados. His previous experience includes a spell at the tax boutique now known as Brigagão Duque Estrada Advogados and a two-year stint as an associate at SiqueiraCastro Advogados.

Renata Emery, head of the firm's tax practice, describes the newly minted partner as "an extremely talented and competent lawyer," adding that "his promotion to partner will further enhance our performance in tax litigation."

The promotion of Vieira comes just a few months after the Brazilian Congress passed a historic tax reform, which is set to replace a complex structure of consumption taxes with a dual VAT system and spark a rise in demand for advice in the field.

The third new partner, Lambert, practises in the environmental group, where he advises clients on greenfield projects, contamination cases and issues related to the industrial, agricultural and mining sectors.

"Danilo has been working with us for over 10 years since he was an intern," comments Adriana Mathias Baptista, head of the environmental team. "His promotion to partner recognises his work in the area, where he will form strategic forces with our team to provide continuous excellent service to our clients."

The three promotions mark TozziniFreire's first partner appointments of 2024 and add to a list of partner additions in the year prior. In 2023, the firm boosted several practice areas through lateral hires for example. In July, it hired an associate from Mattos Filho and a public prosecutor as partners in its M&A and white-collar crime practices, respectively. That came just a month after a counsel from Pinheiro Neto Advogados joined its senior ranks in the tax department, following the hire of an in-house lawyer from Itaú BBA as a restructuring partner.

For additional information visit www.tozzinifreire.com.br

ARIAS

ADVISES HOSHIZAKI ON STRATEGIC ACQUISITION OF SHARES IN FOGEL

SAN JOSE - April 2024 : ARIAS is pleased to announce its role as legal advisor to Hoshizaki in the strategic alliance with Fogel through the acquisition of the shares in Fogel Company Inc. This transaction is a significant achievement for all stakeholders involved, especially for Hoshizaki, as it marks the beginning of its business growth strategy in the region.

As a leading global manufacturer of commercial equipment for the food and beverage service industry, Hoshizaki aims to deepen its penetration into the refrigeration market across America, with a keen focus on the fast-growing Latin American market.

This transaction represents Hoshizaki's first investment in the Central American region, facilitating strategic entry into a variety of markets with high growth potential. During the negotiation process, ARIAS played a key role as Hoshizaki's lead legal advisor in Central America. With its six regional offices, ARIAS provided legal advice in Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama, facilitating Hoshizaki's first investment in the Central American region.

We extend our congratulations to Hoshizaki on the acquisition of shares in Fogel and wish them success in their future projects. It has been an honor to serve as their legal advisor during this transaction. Our sincere gratitude goes to our client for trusting our firm, and we extend the most heartfelt congratulations to our exceptional team!

For additional information visit www.ariaslaw.com

ALLENDE BREA

MIAMI BASED APEX CAPITAL PURCHASES CLOROX SUBSIDIARIES

BUENOS AIRES, 08 April 2024

Allende & Brea helped Miami-based private equity fund Apex Capital purchase the Latin American subsidiaries of US manufacturer The Clorox Companyin the deal, which closed on 20 March.

Estudio Garrido was lead Argentine counsel on the transaction, while Allende & Brea also provided advice on Argentinian law aspects of the acquisition.

The value of the deal was not disclosed.

Through the deal, Apex acquired Clorox's assets in Argentina, Paraguay and Uruguay, which previously collectively traded under the umbrella of Clorox Argentina. That includes two of Clorox's production plants in Argentina, as well as the rights and intellectual property of its Argentine, Paraguayan and Uruguayan operations.

Clorox will retain a Latin American-focused research team based in Argentina. A group of 450 employees will remain at Clorox Argentina, which will rebrand to Grupo Ayudín following the divestment of its Latin American assets.

The sale is expected to help Apex Capital boost the profitability of its Latin American portfolio.

Counsel to Apex Capital Allende & Brea Partners Julian Peña, Marcos Patrón Costas and Nicolás Procopio and associates Gonzalo Gandara and Bautista Dasso in Buenos Aires

Hogan Lovells LLP , Estudio Garrido Abogados, Guyer & Regules (Montevideo)

Counsel to Clorox Cleary Gottlieb Steen & Hamilton LLP, Bruchou & Funes de Rioja; Posados (Montevideo)

For additional information visit www.allendebrea.com

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BRIGARD URRUTIA

ASSISTS EXPOFARO IN LEVI STRAUSS DISTRIBUTION RIGHTS

BOGOTA - 01 February 2024

Colombian textile manufacturer Expofaro has enlisted Brigard Urrutia in Bogotá to sell the distribution rights of Levi Strauss products in Colombia to the US jeans manufacturer.

The deal was announced on 22 January and is expected to close by the end of next month. No value has been disclosed.

Brigard advised Expofaro in the negotiation and sale of certain business assets to Levi Strauss, including the warehousing, marketing, distribution and sale of Levi products in Colombia.

With the deal, the US manufacturer created a new subsidiary, Levi Strauss Colombia. Expofaro will continue to produce Levi Strauss products in Colombia under the new entity.

Founded in 1853, Levi Strauss is headquartered in San Francisco and operates 2,800 stores worldwide. It is estimated that 1.25 billion pairs of Levi's are sold every year.

Counsel to Expofaro Brigard Urrutia Partner Tomás Holguín and associates Paola Ordoñez and Juanita Calderón in Bogotá.

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

CAREY

ASSISTS CHILEAN MINER CAP INVEST IN RARE EARTH METALS PROJECT

SANTIAGO, 27 March 2024

Chilean iron ore producer CAP has called onCanadian firm Cassels Brock & Blackwell LLP and Carey in Santiago to invest up to US$80 million in the local operations of Toronto-listed miner Aclara Resources.

Stikeman Elliot LLP in Toronto and Philippi Prietocarrizosa Ferrero DU & Uría (Chile) advised Aclara. The deal was signed on 12 March.

Listed on the Chilean stock exchange since 1987, CAP is part of local conglomerate CAP Group, which operates in several industries, including iron ore mining.

Aclara has been listed on the Toronto stock exchange since 2021. In addition to its operations in Chile, the company owns a mining project in the central Brazilian state of Goiás.

Counsel to CAP Cassels Brock & Blackwell LLP

Local counsel to CAP Carey Partners Rafael Vergara and Cristián Eyzaguirre, and associates Carla Karzulovic, Ignacio Alfaro, Maximiliano Urrutia, Josefa Contreras, Javiera Álvarez, Sofía Delporte, Joaquín Granados, Javiera Chacón, Maximiliano Barrenechea and Santiago Edwards in Santiago

Counsel to Aclara Resources Stikeman Elliot LLP (Toronto)

Local Counsel Philippi Prietocarrizosa Ferrero DU & Uría (Chile)

For additional information visit www.carey.cl

GIDE

ADVISES BANK SYNDICATE IN EU700 MILLION ISSUE HYBRID NOTES AND CONCURRENT EU699 MILLION BUY-BACK

PARIS - 12 April 2024

Gide assisted a bank syndicate composed of BofA Securities Europe SA, CaixaBank, S.A., Crédit Agricole Corporate and Investment Bank, Crédit Industriel et Commercial S.A., Deutsche Bank Aktiengesellschaft, HSBC Continental Europe, Morgan Stanley Europe SE, NatWest Markets N.V., RBC Capital Markets (Europe) GmbH and Société Générale on the issuance by Orange of €700 million undated 6.9-year non-call deeply subordinated fixed to reset rate notes. The issue was carried out under the Euro Medium Term Note (EMTN) programme of Orange and the notes have been listed on the regulated market of Euronext Paris.

Concurrently, Gide advised a bank syndicate composed of Crédit Agricole Corporate and Investment Bank and Société Générale in connection with a tender offer initiated by Orange on two series of hybrid notes for an amount of EUR699 milllion.

Gide's team was led by partner Laurent Vincent, assisted by counsel Louis Ravaud, and associates Emilie Radisson and Bianca Nitu.

For additional information visit www.gide.com

HAN KUN

PROVIDES DATA COMPLIANCE COUNSEL TO LUCAS GC'S LISTING ON NASDAQ

BEIJING , 06 March 2024 Han Kun has advised and acted as the PRC data compliance counsel to Lucas GC Limited ("Lucas GC", stock symbol: LGCL) in connection with its U.S. initial public offering and listing on the Nasdaq Capital Market.

Based on its AI+ PaaS platform, Lucas GC is a provider of recruitment, healthcare management solutions, and career training services. Lucas GC was one of the first batch of "specialized, innovative and sophisticated SMEs" in Beijing in 2022. Lucas GC's "Star Career" is a PaaS integrated service platform servicing 400 million professionals who can start their own business with a few clicks.

For more information visit www.hankunlaw.com

HOGAN LOVELLS

REPRESENTS KAISER FOUNDATION HOSPITALS IN ITS LAUNCH OF RISANT HEALTH AND IN ITS ACQUISITION OF GEISINGER HEALTH

WASHINGTON,D.C., 09 April 2024 – Global law firm Hogan Lovells represented Kaiser Foundation Hospitals in its launch of Risant Health and in Risant's acquisition of Geisinger Health, a US$10 billion health system with ten hospitals, multiple health insurance companies, and a medical school.

Risant is a new nonprofit organization formed by Kaiser whose goal is to expand and accelerate the adoption of value-based care in diverse, multipayer, multiprovider, community-based health system environments and improve the health of millions of people across the country. Risant will create a new value-based care platform that includes best practices, tools, technology, and services to support leading community-based health systems.

Geisinger is the first health system to join Risant and Risant expects to acquire 4 to 5 additional leading community-based health systems over the next 4 to 5 years.

The cross-office Hogan Lovells team, led by partners Cliff Stromberg (Health, Washington, D.C.) and Michael Snow (M&A, Washington, D.C.), with invaluable support from associate Nicole Park (M&A, New York), included attorneys from twenty practice areas including, Antitrust, Competition and Economic Regulation; Environment and Natural Resources; Real Estate; Health; Privacy and Cybersecurity; Mergers and Acquisitions; Banking and Loan Finance; Communications, Internet and Media; Employment; Benefits; Tax; Education; Government Contracts; Litigation; Intellectual Property, Media and Technology; Transportation; Energy; Insurance; Government Relations and Pharmaceuticals and Biotechnology. The Hogan Lovells team worked closely with the talented team of Kaiser in-house attorneys.

For additional information visit www.hoganlovells.com

KOCHHAR & CO.

ADVISES SPECTRIS GROUP IN ITS STRATEGIC DIVESTITURE

NEW DELHI, 5 April 2024: Kochhar & Co. is pleased to announce its role as a legal advisor to the Spectris Group, a global leader in high-tech precision instrumentation and controls, in the Indian leg of its strategic divestiture of the Red Lion Controls business to HMS Networks.

The transaction involved the transfer of the Red Lion Controls division from Spectris Technologies Private Limited to HMS Industrial Networks India Private Limited.

Kochhar Delhi Partner Nishant Arora led the transaction, with support from Associate Akhil Verma. The team advised the Spectris Group on all legal aspects of the transaction, including reviewing, drafting, negotiating, and finalizing transaction documents and other legal formalities requisite for the successful closure of the transaction.

For additional information visit www.kochhar.com

LEE AND LI

HONORED TO CONTRIBUTE TO WT GROUP'S US$1.9 BILLION SYNDICATED LOAN PROJECT

TAIPEI, 15 February 2024: The signing of WT Group's US$1.9 Billion syndicated loan facility agreement was completed on February 2, 2024. This syndicated loan is arranged by Mega Bank, DBS Bank, First Commercial Bank, Fubon Bank and HSBC and participated by 14 financial institutions. This syndicated loan is the largest loan to semiconductor component distributors in the history of Taiwan. WT Group will use the syndicated loan to acquire Future Electronics.

We are proud to have served as the legal advisor to the lenders, offering professional and comprehensive legal services that contributed to the successful financing project.

For additional information visit www.leeandli.com

MUNIZ

ADVISES AGRICOLA ATLAS IN AGRIBUSINESS ACQUISITION

LIMA - 09 January 2024

Muñiz, Olaya, Meléndez, Castro, Ono & Herrera has helped Peruvian agribusiness Agrícola Atlas acquire a majority stake in local counterpart Danper Trujillo.

The deal closed on 22 December for a confidential amount.

In the deal, Agrícola purchased a 54% stake in Danper from an unnamed Danish individual acting as a majority shareholder in the company. The remaining 46% share in Danper is held by a Peruvian entity.

Peru has harvested several agribusiness-related deals recently. For example, last October, the Peruvian and Colombian branches of Lima-based agribusiness Camposol secured a loan worth US$40 million to increase its working capital, just one month after Guatemala's Grupo Hame acquired Peru's Agrokasa. Peruvian agribusiness Icatom also instructed Muñiz to obtain a loan worth US$14 million last March.

Established in 2019 and headquartered in the Peruvian region of La Libertad, Agrícola Atlas specialises in the cultivation of fruits, roots and vegetables.

Based in Peru's northwestern city of Trujillo, Danper has been operating since 1994 and is considered one of Peru's leading agribusinesses. The company owns some 90 square kilometres of farmland across Peru, on which it produces asparagus, artichokes, peppers, mangos and other food products. It exports the majority of its products to consumers in North America and Europe.

Counsel to Agrícola Atlas Muñiz, Olaya, Meléndez, Castro, Ono & Herrera Partners Mauricio Olaya and Ricardo de la Piedra and associates Diego Muñiz and Diego García Sayán

Counsel to the Danish shareholder in Danper Rebaza, Alcázar & De Las Casas

For additional information visit www.munizlaw.com

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Like millions around the globe, the COVID-19 pandemic impacted our members and how we work.
Our industry follows others with a mix of restart and pause.
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In varying places and at all hours of the day and night.
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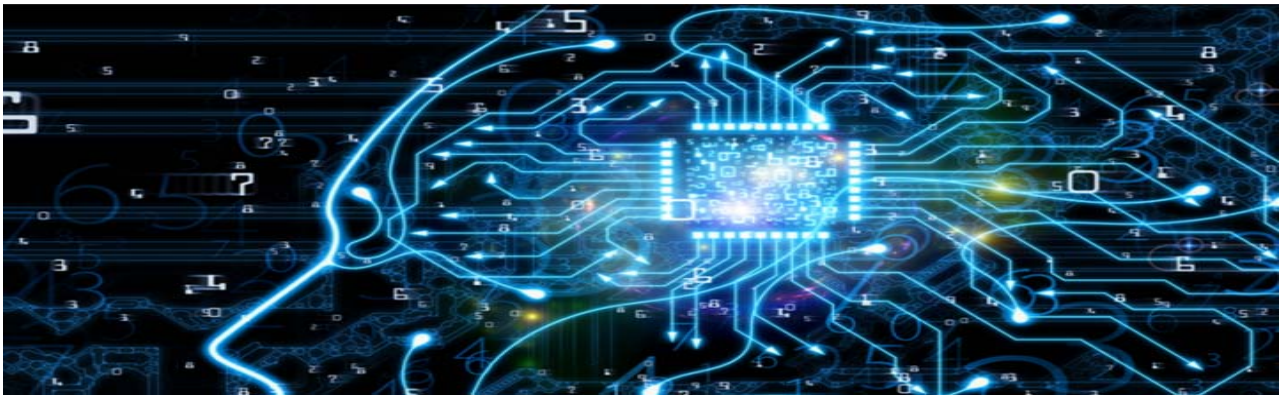
ADVOGADOS

Ministry of Justice of Buenos Aires launches “Artificial Intelligence Program"



15 April 2024

The Ministry of Justice of the City of Buenos Aires established the “National Comprehensive Program of Artificial Intelligence in Justice”. The program seeks to harness emerging technologies, such as artificial intelligence, to expedite judicial processes, improve access to justice and ensure transparent and efficient management.

Within the framework of this program, the coordinator must submit an annual plan of activities that includes the following aspects:

a) Impact assessment through studies and pre-implementation audits in any area of the Ministry or Justice.
b) AI implementation projects in different areas of the Ministry and Justice.
c) Risk control of the use of AI.
d) Training in the Ministry and the Judiciary on ethics in the use of AI.
e) Meetings with different social claimants interested in the use of AI.

This program, with the aim of modernizing and optimizing the judicial system, will focus on the responsible implementation of artificial intelligence in the judicial field, ensuring respect for fundamental rights and promoting equity in access to justice.

Sports betting upcoming regulation

April 12, 2024

On April 10th, 2024, the Brazilian Ministry of Finance published Ordinance no. 561/2024 (available here in Portuguese), establishing the Regulatory Policy of the Secretariat of Prizes and Betting ("SPB" – or "SPA," acronym in Portuguese) and the Regulatory Agenda for 2024.

The new ordinance aligns with the Ministry of Finance's efforts to regulate the "blurry lines" of Federal Law no. 14,790/2023, enacted by President Lula on December 30th, 2023. This law provided especially for the taxation, compliance, advertising, and inspection aspects that will be applicable to sports betting operators.

SPB proposes a four-phase schedule, following an order of priorities, and intends to fully implement it by the end of July 2024.

TozziniFreire's Gaming & E-sports team prepared the chart below with the agenda of the following Ordinances to be issued by SPB and a few comments on the key aspects of the long-awaited regulation:

Phase 1 - Until April 2024

Subject matter of the next ordinances

- **Qualification of certification entities**
  - **Provision -** Requirements and procedures for recognizing the operational capacity of entities when certifying betting systems used by sports betting operators, live gaming studios and games.
  - **TozziniFreire comments -** *Ordinance no. 300/2024 – already published here*.
- **Payments methods**
  - **Provision -** General rules for payment transactions carried out by the companies authorized to operate sports betting in Brazil.
  - **TozziniFreire comments -** The Ordinance may clarify the use of *Bank as a Service* (BaaS) and the intermediation of payment institutions ("IPs") authorized by the Brazilian Central Bank (Bacen).
- **Betting System**
  - **Provision -** Technical and security requirements for betting systems used by sports betting companies.
  - **TozziniFreire comments -** The Ordinance may define the requirements that the systems must comply with, including obtaining the certification in compliance with the law.
- **Authorization**
  - **Provision -** Rules, conditions, and procedure for sports betting operators to apply for authorization.
  - **TozziniFreire comments -** In addition to the procedures for requesting, analyzing, and granting the authorization, the Ordinance may clarify open issues, such as the minimum holding of a Brazilian partner in the capital stock of the authorized company and the deadlines for interested parties to comply with the requirements for the issuance of the authorization. It is even possible that the Ministry of Finance should consider granting a temporary authorization, granting a period for all requirements to be complied with as a condition for permanent authorization.

Phase 2 - Until May 2024

Subject matter of the next ordinances

- **Anti-money laundering and fraud prevention policies**
  - **Provision -** Policy, procedures, and controls aimed at preventing money laundering, terrorist financing, proliferation of weapons of mass destruction, and other frauds related to the commercial exploitation of sports betting.
  - **TozziniFreire comments -** In addition to the provisions on the obligations, it is essential to define the form of interaction with the other monitoring bodies and entities – Bacen, Financial Activities Control Council ("COAF"), Brazilian Federal Revenue O
    etc.

- **Rights and obligations**
  - **Provision -** Set of rules to be observed by authorized operators to comply with legal provisions and safeguard the rights of bettors.
  - **TozziniFreire comments -** An essential aspect of this future Ordinance is the definition of the elements of mandatory internal policies provided in the norms. Besides, this Ordinance must define the prerogatives of sports betting operators to block accounts/users and other issues that could lead to conflict between regulation and consumer protection.

Phase 3 - Until June 2024

Subject matter of the next ordinances

- **Online gaming**
  - **Provision -** Technical and security requirements for online gaming that may be made available to bettors by the authorized sports betting operators.
  - **TozziniFreire comments -** Considering the recent inclusion of online games in authorized activities, their regulation is even more open than that of sports betting. It is essential that this Ordinance provide the details of online gaming and, besides that, give a solid legal definition, specifying what practices can or cannot be considered online gaming for the regulation to be enforced.
- **Inspection**
  - **Provision -** Rules and procedures for monitoring and inspecting the commercial exploitation of sports betting.
  - **TozziniFreire comments -** Setting limits to the Ministry of Finance's prerogatives and defining the operators' processes and obligations is essential to ensure an efficient inspection. It is also vital to establish how other bodies and entities of the Government can participate and collaborate on this.
- **Penalties**
  - **Provision -** Procedure for enforcing administrative penalties against sports betting operators.
  - **TozziniFreire comments -** Regulating the Federal Law of Administrative Procedure (Law no. 9,784/1999) for sports betting/online gaming is crucial. It is desirable to have proper rules adapted to the specificities of the operation and that ensure due process.

Phase 4 - Until July 2024

Subject matter of the next ordinances

- **Guidelines for responsible gaming**
  - **Provision -** Regulation of actions to promote responsible gambling, regarding measures,

guidelines, and practices to prevent pathological gambling disorder in the scope of fixed-odds betting, rules for monitoring and preventing players from falling into debt and additional rules concerning responsible advertising.
    - **TozziniFreire comments -** Limiting operators' responsibilities—as a preventive approach—is essential to ensure legal security, preventing them from being forced to adopt measures outside their competence. Correctly delimiting the operators' obligations is relevant to avoid having them liable for acts that cannot be imputed to them.
- **Social allocations**
    - **Provision -** Procedures to effectively allocate funds to legal recipients as provided for in paragraph 1-A of Section 30 of Federal Law No. 13,756/2018.
    - **TozziniFreire comments -** It is essential to define the transfer procedures and to establish the obligations of operators and those in charge of the financial aspects of transfer operations.

PUBLICATION PRODUCED BY OUR GAMING & E-SPORTS

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Location: São Paulo

Posted on: April 15, 2024

PUBLIC INTEREST – RARE CASES WHERE PATENT INJUNCTIONS DECLINED

By: Jonathan Woolley

In patent litigation, when a defendant is found to have infringed a plaintiff's patent, the court typically awards a monetary remedy, either in the form of damages or an account of profits. Damages are measured by the plaintiff's loss, while profits are measured by the defendant's gain. The court will also usually issue an injunction by which the infringing defendant is ordered to stop the infringing activity. The court's authority for issuing an injunction is found in Section 57 of the *Patent Act*:

> *57*(1) In any action for infringement of a patent, the court, or any judge thereof, may, on the application of the plaintiff or defendant, make such order as the court or judge sees fit,
>
> *(a)* restraining or enjoining the opposite party from further use, manufacture or sale of the subject-matter of the patent, and for his punishment in the event of disobedience of that order, or
>
> ...
>
> *and generally, respecting the proceedings in the action.*

The language of Section 57 is permissive, not mandatory. So, when would a court decline to issue an injunction, and allow the defendant to carry on the activity that was found to be infringing? In a recent decision, *Abbvie Corp. v. Jamp Pharma Corp.[1]*, the Federal Court of Canada declined to issue an injunction against an infringing defendant when it found it would be against the public interest to do so.

The case concerned the defendant, Jamp's pharmaceutical product known as SIMLANDI. It was alleged to have infringed certain patents pertaining to the plaintiff AbbVie's drug HUMIRA, which was used to treat a range of autoimmune disorders. Jamp was found to have infringed one of the patents, and AbbVie sought an injunction that would have barred Jamp from making, using, promoting, or selling SIMLANDI in Canada until the relevant patent expired in 2028. AbbVie also sought an order requiring existing SIMLANDI patients to transition to an appropriate alternative within a 6-month period, and for Jamp to deliver up or destroy its

inventory of infringing products.

The Federal Court confirmed that Section 57 of the *Patent Act* gives the Court the discretion to grant an injunction, meaning that the Court could decline to grant an injunction even where infringement is found. However, that discretionary power is usually granted unless there is an equitable reason not to, such as delay, a lack of clean hands, unconscionability, and triviality.

The Court found that this was one of the rare cases in which an injunction would be inappropriate in view of the public interest. Among the relevant considerations was that Jamp's SIMLANDI product was the only 80 mg formulation among biosimilar products that was available in Canada, and removing it from the market would force all SIMLANDI patients to switch to an alternative drug with a higher injection volume and possibly containing citrate, a buffer thought to cause injection site pain. The Court accepted Jamp's argument that it was not in the public interest to force SIMLANDI patients to switch to another product. The Court observed that AbbVie could be compensated by a reasonable running royalty, and this was preferable to taking SIMLANDI off the market.

AbbVie's royalty was to be determined in the next phase of the bifurcated trial. However, the Court noted that the royalty rate should be easily determined by reference to licensing agreements that AbbVie had negotiated with seven other biopharmaceutical companies.

AbbVie has appealed the Federal Court's decision. The anticipated decision of the Federal Court of Appeal will likely provide further guidance on the extent to which a court can consider the public interest in exercising its discretion to grant an injunction. In the meantime, the Federal Court's decision stands as a useful illustration of the discretionary nature of the Court's jurisdiction under Section 57 of the *Patent Act*, and the type of considerations that may be brought to bear.

/Carey

NEWS ALERT

Cybersecurity Framework Law is published in the Official Gazette

April 4, 2024

On April 8th, 2024, Law No. 21,663 Cybersecurity Framework Law (the "Law") was published in the Official Gazette, after being enacted by the President of the Republic on March 26th, 2024..

The new Law entails the implementation of relevant aspects and changes in cybersecurity, which includes a series of effects and consequences, which are detailed below:

I. The Law: Five points to keep in mind

1.- New institutionality

First, the Law implements a new institutional framework in this area, by creating the (i) *National Cybersecurity Agency* ("ANCI"); (ii) *Multisectoral Council on Cybersecurity* ("Council"); (iii) *the Interministerial Committee on Cybersecurity* ("Committee"); and (iv) *Computer Security Incident Response Teams* (each, "CSIRTs"), including the National CSIRT, the National Defense CSIRT, and other CSIRTs of State Administration agencies.

Regarding the **ANCI**, it will correspond to a decentralized public service, of a technical and specialized nature, whose main objectives will be to advise the President of the Republic on matters of cybersecurity, collaborate in the protection of national interests in cyberspace, coordinate the different institutions with competence in cybersecurity, ensure the protection, promotion and respect for computer security, among others.

In order to comply with the objectives indicated, the ANCI will have various attributions, among which are, **(i) regulatory powers; (ii) supervisory powers; and (iii) sanctioning powers;** among others.

The Law also provides for regulatory coordination mechanisms between the ANCI and sectoral entities in the event that the protocols, technical standards or general instructions it issues in the exercise of its functions have effects in the areas of competence of such sectoral entities. Sectoral authorities may also issue general regulations, technical standards, and instructions necessary to strengthen cybersecurity of institutions of their sector, in accordance with the respective regulation and in coordination with ANCI.

2.- Principles governing cybersecurity regulation

The Law introduces several principles that obligated institutions (indicated in point 3 below) must observe in their conduct. Some of these principles are: (i) damage control; (ii) cooperation with the authority; (iii) responsible response; (iv) computer security; (v) reasonableness; and (vi) security and privacy by default and by design.

3.- Scope of application

The Law will apply to institutions providing **services classified as "Essential"**, on the one hand, and to those classified as **Operators of Vital Importance**, on the other.

As for Essential Services, these correspond to:

1. Those that are provided by the State Administration Bodies and by the National Electricity Coordinator.
2. Those provided under a concession under public law.
3. Those that are provided by private institutions that carry out the following activities:

    a. Generation, transmission or distribution of electricity;

    b.Transport, storage or distribution of fuels; supply of drinking water or sanitation;

    c.Telecommunications;

    d.Digital infrastructure;

    e.Digital services, information technology services managed by third parties;

    f.Land, air, rail or maritime transport, as well as the operation of their respective infrastructure;

    g.Banking, financial services and means of payment;

    h.Administration of social security benefits;

    i.Postal and courier services;

    j.Institutional provision of health care by entities such as hospitals, clinics, doctors' offices and medical centers;

    k.Production and/or research of pharmaceutical products.

    l.Other services that the ANCI may qualify as "Essential" by means of a reasoned decision of the National Director when their affectation may cause serious damage to the life or physical integrity of the population or its supply, to relevant sectors of the economic activities, to the environment, to the normal functioning of society, of the State Administration, to the national defense, or to the security and public order.

For its part, ANCI will be responsible for determining the providers of essential services that are qualified as operators of vital importance by means of a reasoned decision, that complies with the following requirements: (i) that the provision of such service depends on the networks and information systems; and (ii) that the affectation, interception, interruption or destruction of its services has a significant impact on security and public order; on the continuous and regular provision of essential services; on the effective fulfillment of the functions of the State; or, in general, of the services that the State must provide or guarantee.

Likewise, ANCI shall have the power to qualify private institutions that, although they do not have the quality of providers of essential services, also meet the requirements set forth in the preceding paragraph under certain assumptions.

4.- Cybersecurity obligations

Regarding the obligations contemplated by the Law, on the one hand, there are the **general duties**, applicable to both providers of Essential Services and those considered Operators of Vital Importance, which are obliged to:

1. **Duty to report to the National CSIRT cyberattacks and cybersecurity incidents that may have significant effect**s under the terms of the Law, as soon as possible, within a maximum period of three hours, and in accordance with the other criteria and formalities established by the Law.

2. **Duty to permanently apply measures to prevent, report and resolve cybersecurity incidents,** which requires the implementation of the protocols and standards established by the ANCI, and the respective sectoral regulation.

On the other hand, the Law introduces **specific duties for Operators of Vital Importance**, who will be obliged, among other duties, to the following:

1. Implement an information security management system;

2. Develop and implement operational continuity and cybersecurity plans;

3. Carry out review operations, exercises, drills and analysis of computer networks and systems that compromise cybersecurity;

4. Take the necessary measures to reduce the impact and spread of a cybersecurity incident;

5. Obtain the cybersecurity certifications provided for by law; and

6. Have training, education and continuous education programs for its workers and collaborators, including cyber hygiene campaigns.

5.- Infractions and associated penalties

The Law provides for various penalties for non-compliance with its provisions, which are classified into 3 categories: minor, serious, and very serious.

By way of example, the law will consider as minor the late delivery of the information required by the ANCI that is not necessary for the management of a cybersecurity incident, as serious as the failure to comply with the obligation to report and as a very serious infraction, the delivery of manifestly false or erroneous information to the ANCI, and that it has been necessary for the management of a cybersecurity incident.

The Law also provides for specific infractions and penalties for non-compliance with the specific duties of Operators of Vital Importance.

As for the penalties provided for in the Law, these translate into the imposition of a fine for tax benefit:

1. Minor offences: Fine of up to 5,000 Monthly Tax Units (“UTM”);

2. Serious offences: Fine of up to 10,000 UTM; and

3. Very serious offences: Fine of up to 20,000 UTM.

In the case of Vital Operators of Vital Importance, these fines can even be up to double.

II. Next Steps & Effective Date (What's Coming)

The President of the Republic must issue, within one year of the publication of the future law, one or more executive law decrees to determine a period for the entry into force of the rules of the future law, which may not be less than six months from the publication of the future law, the date of initiation of the activities of ANCI, among other matters.

***AUTHORS**: Guillermo Carey, José Ignacio Mercado, Stefano De Cristofaro, Iván Meleda. Ricardo Alonso*

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CIBM Bond Repo to be Further Opened to Overseas Investors

Authors: Ting ZHENG | Raymond YAN | Eryin YING | Lin ZHU | Shirley LIANG

Background

On 24 January 2024, to deepen the opening-up of the bond market and further facilitate the liquidity management of overseas institutional investors, the People's Bank of China ("**PBOC**") and the State Administration of Foreign Exchange published the *Announcement on Further Supporting Overseas Institutional Investors Engaging in Bond Repurchase Business in the China Interbank Bond Market* (draft for comments) (the "**Announcement**") (*《关于进一步支持境外机构投资者开展银行间债券市场债券回购业务的公告(征求意见稿)》*) to solicit public opinion. On the basis of the opening-up of cash bond trading to overseas institutional investors, the Announcement aims to further open up the onshore bond repo business in the China Interbank Bond Market ("**CIBM**") to overseas institutional investors to meet their liquidity management needs.

CIBM opening-up history

Since 2005, the CIBM has been advancing its reform, innovation and development processes, steadily promoting the opening -up, and progressively introducing overseas investors. In line with the market development needs, it has launched the CIBM Direct / settlement agent model and the Bond Connect model.

In August 2010, the PBOC issued the *Notice of the People's Bank of China on Issues Concerning the Pilot Program on Investment in the Interbank Bond Market with RMB Funds by Three Types of Institution Including Overseas RMB Clearing Banks* (Yin Fa No. 217 [2010])(*银发[2010]217 号《关于境外人民币清算行等三类机构运用人民币投资银行间债券市场试点有关事宜的通知》*), allowing overseas central banks or monetary authorities, RMB business clearing banks in Hong Kong and Macao regions, and overseas participating banks for RMB settlement in cross-border trade to engage in bond investment business in the CIBM.

In May 2015, the PBOC issued the *Notice of the People's Bank of China on Bond Repo Trading by Overseas RMB Business Clearing Banks and Overseas Participating Banks in the Interbank Bond Market* (Yin Fa [2015] No.170) (*《银发[2015]170 号<关于境外人民币业务清算行、境外参加银行开展银行间债券*

市场债券回购交易的通知>》), permitting overseas RMB business clearing banks and overseas participating banks to carry out bond repo trading in the CIBM.

In July 2015, the PBOC promulgated the *Notice on Issues Concerning Investment of Overseas Central Banks, International Financial Institutions and Sovereign Wealth Funds with RMB Funds in the Inter-bank Market* (Yin Fa [2015] No.220) (《*银发[2015]220 号*<*关于境外央行、国际金融组织、主权财富基金运用人民币投资银行间市场有关事宜的通知*>》), allowing overseas sovereign institutions to conduct cash bond trading and bond repo business, among other types of transactions, in the CIBM.

In February 2016, the PBOC issued the PBOC Announcement [2016] No. 3 (《*中国人民银行公告[2016]第 3 号*》) to allow overseas commercial institutions to entrust a settlement agent competent in international settlement business to carry out cash bond transactions (excluding bond repo) in the CIBM under the settlement agent model.

In June 2017, the PBOC released the *Interim Measures for the Administration of Mutual Bond Market Access between Mainland China and Hong Kong SAR* (《*内地与香港债券市场互联互通合作管理暂行办法*》). According to PBOC's Q&A, cash bond trading is available for overseas investors through the Northbound Trading under the Bond Connect model for the moment. In the future, the trading instruments of bond repo, bond lending and borrowing, bond forwards, interest rate swaps and forward rate agreements will gradually be available to overseas investors.

Upon the official implementation of the Announcement, all overseas institutions that have entered the CIBM, including overseas sovereign and commercial institutions under the CIBM Direct / settlement agent model and the Bond Connect model, may participate in the bond repo transactions.

Key points and interpretation of the Announcement

I. Scope of overseas investors

According to Article 1 of the Announcement, any overseas institutional investor that has engaged in cash bond transactions in the CIBM may conduct bond repo transactions in the CIBM. As mentioned in Section II above, prior to the issuance of this Announcement, only overseas sovereign institutions, overseas RMB business clearing banks and overseas participating banks can participate in bond repo transactions under the settlement agent model. The Announcement will significantly broaden the scope and trading channels of investors for trading in the CIBM repo market. Specifically, in addition to the existing overseas RMB business clearing banks and participating banks, overseas central banks, international financial organizations and sovereign wealth funds, various financial institutions (such as commercial banks, insurance companies, securities companies, fund management companies, futures companies, trust companies, and other asset management institutions), and medium and long-term institutional investors (such as pension funds, charitable funds and endowment funds) will be granted access to bond repo transaction through the CIBM Direct / settlement agent model or the Bond Connect model.

Since the Announcement has not addressed bond repo transactions under the Southbound Trading under Bond Connect, it remains uncertain whether domestic investors will be able to trade overseas

bond repo through the Bond Connect in the future.

II. Repo transaction mechanism

According to Article 2 of the Announcement, the bond repo business mentioned in the Announcement, including pledged repos and outright transfer repos, refers to the transaction under which the cash borrower (the repo party) sells bonds to the cash lender (the reverse repo party) and simultaneously receive funds, and both parties agree that the repo party will repurchase the underlying bonds from the reverse repo party at an agreed price on a certain future date and pays funds. The PBOC further clarified in the explanatory drafting note of the Announcement that the Announcement aims to support the convergence of the CIBM repo market with international practices, explicitly stating that when overseas institutional investors engage in bond repos in the CIBM, the underlying bonds should be transferred by purchase and sale, regardless of pledged repos or outright transfer repos, to facilitate the disposal of the bonds by the reverse repo party.

Based on the Announcement and its explanatory drafting note, the Announcement should cover both types of pledged repo and outright transfer repo. The arrangement in the Announcement aims at bridging the gap between the CIBM bond repo market and the overseas bond repo market, i.e., pledged repos account for over 90% of the bond repo transactions in the CIBM while the majority of the bond repo transaction in overseas markets are outright transfer repos. However, the following issues of the bond repo transaction mechanism under the Announcement still need clarification:

1. Title of bonds under pledged repo: title transfer by way of security vs nominal holding?

According to Article 3 of the *Measures for the Administration of Bond Transactions in the National Interbank Bond Market* (《*全国银行间债券市场债券交易管理办法*》), Article 2 of the *Provisions for the Administration of Bonds Outright Repurchase Business in the National Interbank Bond Market* (《*全国银行间债券市场债券买断式回购业务管理规定*》) and Article 24 of *China's National Association of Financial Market Institutional Investors Bond Repurchase Master Agreement (2013 Version)* ("**NAFMII Bond Repo Master Agreement**")(《*中国银行间市场债券回购交易主协议(2013 年版)*》), CIBM repo market includes two types of bond repo transactions, namely pledged repos and outright transfer repos. The pledged repo means the transaction under which one party (repo party) pledges the repurchased bonds to the other party (reverse repo party) and the reverse repo party pays the purchase amount on the purchase date to the repo party simultaneously, and both parties to the transaction agree on a certain date (i.e. the repurchase date) on which the repo party pays the repurchase amount to the reverse repo party and the reverse repo party release the pledge over the repurchased bonds. The outright transfer repo means the transaction under which one party (repo party) sells the repurchased bonds to the other party (reverse repo party) and the reverse repo party pays the purchase amount on the purchase date to the repo party simultaneously, and both parties to the transaction agree on a certain date (repurchase date) on which the repo party will repurchase the repurchased bonds from the reverse repo party at an agreed price(repurchase amount).

Given the above, the core difference between pledged repo and outright transfer repo in the current CIBM lies in whether the title of the underlying bond has been transferred. Under the pledged repo, the title of the underlying bonds remains vested in the repo party and the underlying bonds are not

transferred to the reverse repo party but marked as pledged in the repo party's bond account. But under an outright transfer repo, the title of the underlying bond shall be completely transferred to the reverse repo party before the repurchase.

However, according to the Announcement and its explanatory drafting note, the underlying bonds shall be transferred anyway regardless of pledged repos or outright transfer repos, which raises a question as to the belonging of the title to the underlying bonds. We tend to take a view that there are two possible interpretations of the pledged repo transaction mechanism under the Announcement:

Title transfer by way of security

Article 68 of the *Interpretation of the Supreme People's Court on the Application of the Security System of the Civil Code of the People's Republic of China* (*《最高人民法院关于适用<中华人民共和国民法典>有关担保制度的解释》*) confirms the validity of title transfer by way of security. The pledged repo under the Announcement contemplates the transfer of title to the underlying bonds onto the reverse repo party by way of security and as the collateral for the repurchase obligation of the repo party. Where the repo party fails to pay repurchase amount upon the repurchase date, the reverse repo party may, by referring to the provisions on security interests in the PRC Civil Code (*《中华人民共和国民法典》*), enforce the underlying bonds by way of conversion into value, auction or private sale and get repaid in priority from the proceeds therefrom, but the reverse repo party cannot claim title to the underlying bonds without the enforcement procedure given the prohibition of strict foreclosure under PRC laws.

Although the aforesaid mechanism of title transfer by way of security can achieve similar security effect as the pledged repo, on the one hand, title transfer by way of security is not equivalent to pledge, and it poses uncertainty to whether such repo transaction can still fall in the scope of pledged repo as it cannot fit into the definition of pledged repo; on the other hand, where the title to the underlying bonds are transferred by way of security, some issues need to be further clarified, such as how to ensure that the reverse repo party, as the secured party and owner of the underlying bonds, does not dispose of the underlying bonds during the repurchase period, how to ring-fence the self-owned bonds of the reverse repo party from the underlying bonds as collateral, and how to protect the underlying bonds held by the reverse repo party from enforcement by the creditors of the reverse repo party.

Nominee holding

Under the pledged repo transaction under the Announcement, despite the title transfer of underlying bonds, the reverse repo party only serves as the nominal holder of the underlying bonds to hold the underlying bonds on behalf of the repo party, while the repo party remains the beneficial owner of the underlying bonds. The bond registration, custody and settlement institutions may facilitate the pledge registration over the underlying bonds by means of registering the beneficial owner, the pledgor, the pledgee and creating pledge mark on the bonds.

The nominal holding system allows the pledged repo under the Announcement to align with the existing definition of pledged repo to the greatest extent, but the bond registration, custody and settlement institutions need to make adjustments to the existing pledge registration system.

The title transfer by way of security and nominal holding above represent our speculation, based on the limited available information, on the potential operational models of the pledged repo contemplated under the Announcement. The specific operational model of the pledged repo contemplated under the Announcement is still subject to further clarification by regulatory authorities and bond registration, custody and settlement institutions.

2. Pledge registration

In accordance with Article 441 of the PRC Civil Code, where a pledge is created over bonds, the pledge shall be perfected upon the delivery of documents of title to the pledgee. Where there is no document of title, the pledge shall be perfected upon the registration of the pledge. Under the pledged repo stipulated in the Announcement, the underlying bond is transferred to the reverse repo party, similar to an outright transfer repo. However, how the repo party can conduct pledge registration over the bond already transferred to the reverse repo party needs further clarification by the bond registration, custody, and settlement institutions.

In addition, the Northbound Trading under Bond Connect adopts the internationally prevalent multi-layer custody structures, i.e., the Central Moneymarkets Unit of the Hong Kong Monetary Authority ("**CMU**") opens nominee holder accounts with the Shanghai Clearing House (**"SHCH**") and the China Central Depository & Clearing Co., Ltd. ("**CCDC**"), overseas investors open Bond Connect sub-accounts with CMU through CMU members, and overseas investors' accounts are held by CMU members. The bonds purchased by overseas investors through the Bond Connect channel are registered under the nominee account opened by CMU with SHCH or CCDC. Under the aforementioned multi-layer custody structure, the procedures for completing pledge registration for pledged repo transactions between overseas investors and domestic counterparties, and how the reverse repo party can dispose of the underlying bonds smoothly in the event of default by the repo party, require further clarification in detailed business rules.

According to Article 4 of the Announcement, the relevant CIBM infrastructures shall formulate or revise the business rules and detailed operating rules and report them to PBOC as required, and properly carry out the service and monitoring work for the relevant transactions, custody, settlement and clearing, and timely handle and report significant problems and abnormal situations to the PBOC. Therefore, we anticipate that the bond registration, custody and settlement institutions will review their business rules to adapt to the special transaction mechanism under the Announcement.

3. Coordination with the existing bond repo market

The pledged repo transaction mechanism under the Announcement differs significantly from the current pledged repo trading mechanism, in particular with respect to the title transfer of the underlying bonds and the pledge registration. Further observation is needed to determine whether and how adjustments to the existing bond repo market are necessary after the Announcement takes effect.

III. Transaction documentation

In December 2012, the PBOC promulgated the *Announcement on Promulgating the Master Agreement on Bond Repurchase Transactions in the Interbank Bond Market (PBOC Announcement [2012] No.*

17) (*《关于发布<中国银行间市场债券回购交易主协议>的公告》(中国人民银行公告(2012)第 17 号)*), requiring market participants to sign the NAFMII Master Repo Agreement when engaging in bond repo transactions and file the executed NAFMII Master Repo Agreement and its supplemental agreements to National Association of Financial Market Institutional Investors ("**NAFMII**") in a timely manner.

According to the *Business Process for Overseas Commercial Institutional Investors' Access to the Chinese Interbank Bond Market* (*《境外商业类机构投资者进入中国银行间债券市场业务流程》*)and the *Business Process for Overseas Central Bank Type Institutions' Access to the Chinese Interbank Bond Market* (*《境外央行类机构进入中国银行间债券市场业务流程》*), overseas central banks and sovereign institutions, overseas RMB business clearing banks and participating banks that participate in bond repo transactions through CIBM Direct / settlement agent model are required to sign the NAFMII Master Repo Agreement.

Based on the above, before the issuance of the Announcement, all participants in the CIBM repo market need to sign the NAFMII Master Repo Agreement to conduct bond repos. The Global Master Repurchase Agreement ("**GMRA**") issued by the International Capital Market Association ("**ICMA**") is commonly used to document repo transactions in the international market. Several associations and overseas institutions expressed their wishes that the PBOC would allow overseas institutions to use the GMRA to document their onshore bond repos.

Article 5 of the Announcement provides that the overseas institutional investors shall enter into the bond repo master agreement with their counterparties, and the relevant self-regulatory organization shall file such master agreement with the PBOC. The following points regarding the transaction documentation of the master agreement for the bond repo under the Announcement need to be further clarified:

1. Whether the GMRA can be used

The Announcement does not clarify whether the bond repo master agreement mentioned in Article 5 only refers to the NAFMII Master Repo Agreement. Considering that overseas central banks and sovereign institutions, overseas RMB business clearing banks and participating banks are still required to enter into the NAFMII Master Repo Agreement, we tend to believe that once the Announcement comes into effect, overseas commercial institutions will also be subject to the same rules and cannot use GMRA.

Notwithstanding the above, on the one hand, in 2020, several financial regulatory authorities including the PBOC jointly issued the *Opinions on Accelerating the Building of Shanghai into an International Financial Hub and Financially Supporting the Integrated Development of the Yangtze River Delta* (*《关于进一步加快推进上海国际金融中心建设和金融支持长三角一体化发展的意见》*), permitting that overseas institutions may sign the NAFMII Master Agreement, Securities Association of China Master Agreement and International Swaps and Derivatives Association Master Agreement for derivatives transactions at their sole discretion. The PBOC may adopt a similar approach to allow overseas institutions to sign GMRA at their sole discretion; on the other hand, Article 5 of the Announcement requires that the relevant self-regulatory organizations should make a record filling of the master agreement with the PBOC, while the NAFMII Master Repo Agreement has already been filed with the

PBOC. Whether this clause is intended to leave room for ICMA to file the GMRA with the PBOC, and allow overseas agencies to use the GMRA to document bond repos, requires further clarification from the PBOC.

2. Filing requirements

Whether the filing requirements of the master agreement under Article 5 of the Announcement shall apply to the executed bond repo master agreements by various overseas institutions or to the master agreement templates promulgated by various self-regulatory organizations, including ICMA's GMRA, remains to be further clarified by the PBOC. If overseas institutions are permitted to use the GMRA to document bond repos, it remains to be seen how to make a record filing of the GMRA.

3. Coordination with the transaction mechanism of the announcement

As mentioned in Section 3.2 above, the transaction mechanism of the pledged repo under the Announcement is different from the currently prevailing pledged repo. Whether and how the terms of the NAFMII Master Repo Agreement need to be adjusted to align with the transaction mechanism under the Announcement remains to be seen.

Outlook

The Announcement expands the scope of overseas institutions (i.e., overseas commercial institutions) and the channels (i.e., Bond Connect) through which they can participate in the bond repo business, thereby increasing the liquidity of CIBM and satisfying overseas investors' risk management needs. However, there are still many ambiguities about the bond repo transaction mechanism under the Announcement, which are inconsistent with the existing bond repo transaction mechanism and still need to be further clarified by the regulatory authorities, relevant financial market infrastructures and self-regulatory organizations, including but not limited to the bond transfer mechanism under the pledged repo, pledge registration arrangement, and execution and recording filing requirement of the master agreement. We will closely monitor the further development of relevant transaction mechanisms in the Announcement and promptly share our insights.

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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Brigard Urrutia

New regulation on controlled products

15 of April

Article 4 of Resolution 1 of 2015 (the "Resolution") lists the substances and chemical products that are controlled by the Ministry of Justice and Law (the "Ministry"), as they may be used or intended, directly or indirectly, in the extraction, transformation, and refining of illicit drugs. Among these controlled substances and chemical products are Diesel, gasoline, sulfuric acid, sodium carbonate, among others.

The activities with controlled substances that are subject to control are: storage, purchase, consumption, distribution, importation, and production. Therefore, anyone intending to engage in any of these activities with a controlled substance or chemical product must obtain the corresponding authorizations from the Ministry and comply with all obligations of the subjects of control as set forth in the Resolution, as well as Decree 585 of 2018.

In the case of mixtures containing at least one controlled substance or chemical product, the Resolution establishes that anyone intending to engage in any of the controlled activities with such mixture must request a technical concept from the Ministry to determine whether the mixture is subject to control or not.

Regarding this matter, on February 23, 2024, the Ministry issued circular MJD-CIR24-0000017-GCSQ-30320, by means of which stipulated that if the sum of the weight percentages (w/w) of all controlled substances present in a mixture does not exceed 5% of the total, the mixture will not be subject to control. This means that the interested party will not need to request the technical concept from the Ministry or obtain the Certificate of Lack of Reports on Drug Trafficking - CCITE, for its handling. This exception will not apply to dilutions in water of any controlled substance and/or chemical product as well as all mixtures containing hydrochloric acid, sulfuric acid, acetic anhydride, or potassium permanganate, in any quantity.

Finally, regarding the importation of controlled products or substances or their mixtures, Decree 925 of 2013 provides that the interested party must request an import registration from the Ministry of Commerce, Industry, and Tourism. This request must be submitted through the Single Foreign Trade Window ("VUCE") and must be accompanied by the Ministry's approval for the respective importation.

However, on March 21, 2024, the Ministry issued circular MJD-CIR24-0000020-SCF-30320, by means of which established that controlled substances or products or their mixtures used in the sectors of (i) fragrances and flavors; (ii) human medicinal products; and (iii) human food, are complex formulations, difficult to separate, and with low percentages of controlled chemical products. Therefore, they represent a low risk of diversion for illicit drug production, and as such, they will not require the Ministry's approval through VUCE for import registration. This is without prejudice to special requests that may require the mentioned approval due to their nature.

For more information on these circulars, please refer to the following links:

CIRCULAR No MJD-CIR24-0000017-GCSQ-30320
CIRCULAR No MJD-CIR24-0000020-SCF-30320

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COSTA RICA

GUIDE TO NOTIFICATION AND ANALYSIS OF ECONOMIC TRANSACTIONS

April 2024 | Costa Rica

The Commission to Promote Competition of Costa Rica ("COPROCOM") presented the **"GUIDE FOR NOTIFICATION AND ANALYSIS OF ECONOMIC TRANSACTIONS."**

The Guide's objective is to inform on the concepts, regulations and criteria associated with the merger control process and analysis of economic transactions used by said Authority; as well as the methodology used for the analysis of economic transactions in a manner consistent with the provisions of the applicable legislation.

The Guide defines essential elements to determine whether a transaction requires antitrust clearance, such as change of control, presence in Costa Rica and compliance with thresholds.

Likewise, this Guide establishes the elements for the analysis carried out by COPROCOM, such as: relevant market, measurement of market shares, estimation of the level of concentration, substantial power and evaluation of damages or effects of transactions.

Finally, the Guide offers visual supports, such as schemes and diagrams on the relevant processes, as well as the phases of the standard analysis and the simplified procedure.

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US – FRANCE TAX TREATY | CAN FOREIGN TAX CREDITS OFFSET NET INVESTMENT INCOME TAX?

This alert discusses recent developments with respect to the 3.8% U.S. net investment income tax ("**NIIT**") and the potential for U.S. citizens to use foreign tax credits ("**FTC**") to offset NIIT liability pursuant to the U.S.-France income tax treaty (the "**Treaty**").

On October 23, 2023, the U.S. Court of Federal Claims held that U.S. citizens are permitted pursuant to the Treaty to use FTC arising from French income tax liability to offset their NIIT liability. However, the U.S. government filed a notice of appeal in December 2023, so it remains to be seen what the final verdict will be on this issue.

WHAT IS THE NET INVESTMENT INCOME TAX (NIIT)?

Since 2013, pursuant to Chapter 2A of the U.S. Tax Code, the United States has imposed the 3.8% NIIT on the "net investment income" of certain U.S. taxpayers with income above specified thresholds. More specifically, the NIIT applies to individuals who are U.S. citizens or U.S. residents (including green card holders and tax residents), and to domestic trusts and estates that have both net investment income and income above specified thresholds.

For individuals, the NIIT is 3.8% of the lesser of:[1]

- Net investment income for the taxable year; or
- The excess of the individual's modified adjusted gross income, over the threshold amount. For 2024, the threshold amounts are as follows:

Filing Status	Threshold Amount
Married filing jointly	$250,000
Married filing separately	$125,000
Single	$200,000
Head of household (with qualifying person)	$200,000
Qualifying widow(er) with dependent child	$250,000

Net investment income can generally be divided into three categories of income:

1. Gross income from interest, dividends, annuities, royalties, and rent (except if the income is derived in the ordinary course of a trade or business);
2. Other gross income from a trade or business that is a passive activity or a trading business; or

[1] IRC § 1411(a)(1) and (b).

3. Net gain (to the extent taken into account in computing taxable income) from the disposition of property other than property held in a trade or business.

Income included in any of these three categories and earned by an individual, trust, or estate, either directly or through a pass-through entity for U.S. tax purposes, is included in calculating net investment income. However, net investment income does not include wages, unemployment compensation, nonpassive business income, Social Security benefits, alimony, tax-exempt interest, and distributions from some tax-preferred retirement accounts.

CHRISTENSEN V. UNITED STATES

On October 23, 2023, the U.S. Court of Federal Claims ruled in *Christensen v. United States*[2], that U.S. citizens are permitted to use FTCs arising from French income tax liability to offset their NIIT liability. Although FTCs cannot offset NIIT liability under U.S. domestic law, the Court concluded that the Treaty should be read to override the domestic rule, offering broader FTC coverage and protection against double taxation for U.S. citizens residing in France.

In 2015, the Christensens, married U.S. citizens residing in France, sold their shares in a French company and paid a 30% French income tax on capital gains. By virtue of their U.S. citizenship, they remained U.S. taxpayers required to report and pay U.S. income tax on their worldwide income, including the gain from their sale of the French shares. Consequently, the gain was also subject to U.S. federal income tax at the long term capital gain rate of 20% plus the additional 3.8% NIIT. To avoid being subject to double taxation on the gain, pursuant to the FTC rules under the U.S. domestic tax regime and the Treaty, the Christensens applied their FTCs to offset the 20% U.S. tax against the 30% French income tax. However, the couple also sought to offset their NIIT liability with the excess FTCs arising from the 30% French tax. While the IRS accepted that their FTCs could be used to offset the 20% U.S. tax, it denied use of the FTC to offset the 3.8% NIIT. This resulted in an effective tax rate of 33.8% on the gain (*i.e*., the higher French tax plus the NIIT).

To claim the FTC against their NIIT liability, the Christensens relied on two paragraphs of Article 24 of the Treaty: Article 24(2)(a) and 24(2)(b). Article 24(2)(a) is a general provision providing that the U.S. will grant its citizens a credit against U.S. federal income tax for French income taxes paid "*in accordance with the provisions and subject to the limitations of the law of the United States*." Under U.S. domestic tax rules, FTCs are allowed as credits only against taxes imposed by Chapter 1 of the U.S. Tax Code (*i.e.,* regular income tax). Because the NIIT is administered under Chapter 2A of the U.S. Tax Code, and not under Chapter 1, the Court held that Article 24(2)(a) does not permit U.S. taxpayers to use FTCs to offset NIIT liability. This holding was consistent with holdings in two other recent cases that also addressed the interaction of FTCs and NIIT: *Toulouse v. Commissioner*, 157 T.C. 49 (2021)[3], and *Kim v. United States*, 2023 WL 3213547 (C.D. Cal. Mar. 28, 2023).

However, the Court turned its attention to Article 24(2)(b) which specifically addresses U.S. citizens residing in France and provides generally that the U.S. will grant such persons a credit against U.S. federal income tax for French income taxes paid. Importantly, unlike Article 24(2)(a),

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[2] *Christensen v. United States*, No 20-935T (2023).

[3] The Tax Court was not asked to consider Article 24(2(b) of the Treaty, focusing its analysis only on Article 24(2)(a) of the Treaty.

Article 24(2)(b) is not drafted to be interpreted "*in accordance with the provisions and subject to the limitations of the law of the United States*." On that basis, the Court held that because Article 24(2)(b) is not similarly restricted by the limitations under the U.S. Tax Code, Article 24(2)(b) should permit the taxpayers to use their FTCs to offset their NIIT liability.

Similar provisions granting FTCs to U.S. citizens residing abroad and which do not include an "in accordance with U.S. law" restriction can be found in several other U.S. tax treaties such as with the United Kingdom, the Netherlands and Germany. Consequently, the Christensen decision, if it holds on appeal, potentially offers expanded FTC relief covering NIIT liability for a broader group of U.S. citizens residing abroad.

On December 18, 2023, the United States filed a notice of appeal against the Christensen decision[4]. Therefore, it remains to be seen if the Christensen decision is the final word on this issue. While U.S. citizens residing in France or other treaty countries with similar treaty provisions may consider filing amended returns or protective refund claims under the 10 year extended statute of limitation for FTC claims, it is likely that the IRS will suspend the processing of any such claims until the appeal process is complete[5].

We continue to monitor these and other topical U.S. and cross-border tax issues, and would be happy to answer any U.S. tax questions you may have.

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[4] *Christensen v. United States*, 168 Fed.Cl. 263 (U.S. Ct. Fed. Claims 2023), appeal docketed, No. 24-1284 (Fed. Cir. Dec. 22, 2023).
[5] IRC § 6511(d)(3)(A).

Hogan Lovells

Is the writing on the wall for the shareholder principle? Privilege update in Hong Kong

19 April 2024

The concept of the "shareholder principle" in English law provides that a company cannot assert privilege against its own shareholders, unless the privileged documents in question were created for the dominant purpose of actual or threatened litigation between the shareholders and the company. However, an English court has recently suggested the principle be reconsidered due to its "shaky foundation". In Hong Kong, the principle remains good law for the time being.

The foundation of the principle is that the relationship between shareholders and the company is analogous to that between a trustee and beneficiary: a trustee who pays for advice concerning his duties as to the management of a trust out of trust assets cannot assert privilege over this advice, as the beneficiary has indirectly paid for it.

This is widely known as the "common fund" rationale, and was first recognised in the 1914 English Court of Appeal case of *Woodhouse and Co (Limited) v Woodhouse* [1914] 30 TLR 559. However, the shareholder principle emerged before other English cases[1] which have established that a company is separate from its shareholders, holds property for itself, and that shareholders have no direct interest in the company's property, meaning this analogy is, in the words of Mr Justice Michael Green in *Various Claimants v G4S PLC* [2023] EWHC 2863 (Ch) last November, "now dubious".

Although the judge suggested that the foundation of the principle might be open to attack now as there is no "common fund", as such, to which shareholders are entitled - and because the analogy with trustees and beneficiaries is not a particularly strong one - he conceded that because the shareholder principle has become so well established it would be up to the United Kingdom Supreme Court to overturn it.

Therefore, the issue for the judge to decide was the breadth of the principle - namely, whether it should be confined to (i) registered shareholders only, or whether it extended to non-registered shareholders; and (ii) legal advice privilege only, or whether it extended to litigation privilege and without prejudice privilege.

Background

The case concerned a claim brought under section 90A and Schedule 10A of the United Kingdom Financial Services and Markets Act 2000 (FSMA). The claimants were, or claim to have been, institutional shareholders in the defendant, of which three were registered shareholders and 87 were non-registered shareholders (i.e. they were the ultimate beneficial owners of shares held in uncertified form through the CREST system, a centralised clearing and settlement system similar to the Central Clearing and Settlement System, CCASS, in Hong Kong).

The claimants issued an application seeking disclosure and inspection of the defendant company's documents that had been withheld on the basis of legal advice privilege, litigation privilege and without prejudice privilege. They sought to rely on the shareholder principle, citing the cases of *Sharp v Blank* [2015] EWHC 2681 (in which the principle was applied) and *Woodhouse*. The application was issued around three months before the start of the six week trial.

The parties' arguments

The defendant's starting position was that privilege is "such a fundamental right that the court should be wary of making inroads into it". It argued that the principle should be confined to directly registered shareholders who were registered shareholders at the time the obligation of disclosure arose or, alternatively, at the outset of proceedings. The defendant further argued that the principle should just apply to legal advice privilege - that is legal advice paid out of company funds - and not litigation privilege or without prejudice privilege.

The claimants relied on the fact that FSMA recognises that a claim under the relevant section of FSMA can be brought not only by registered shareholders, but also by ultimate beneficial owners through the CREST system. They said it would be odd if unregistered shareholders had a right to bring such a claim but did not have the right to privileged documents to assist them in the claim. The claimants also suggested that any practical difficulties could be overcome by case management directions and the imposition of a "confidentiality club".

The court's decision

The judge found that the shareholder principle entitles shareholders to company material that is subject to both legal advice privilege and litigation privilege, but does not extend to without prejudice privilege (i.e. communications between the defendant company and a third party, exchanged in an attempt to settle a dispute between the company and the third party). This is because the third party's right to privilege must be respected.

Although the judge found that the principle could be applied to registered shareholders, he held it did not extend to the non-registered shareholders, who comprised the overwhelming majority of the claimants in this case. As to the question of timing, he decided that it made sense for the principle to apply to claimants who were direct registered shareholders at the time the privileged documents came into existence.

On the basis of the judge's reasoning, only the three direct registered shareholders were entitled to disclosure of the privileged documents. That said, the judge considered that it would be impossible to manage disclosure of the material in question to such a small number of claimants and would potentially be very disruptive to the imminent trial and he was not convinced that a imposing confidentiality club would solve "this intractable problem". Accordingly, he dismissed the claimants' application.

Hong Kong

In Hong Kong, the shareholder principle was affirmed in *Re NDT (BVI) Trading Ltd* [2009] 2 HKLRD 409. The Honourable Madam Justice Susan Kwan dismissed counsel's arguments that the English decisions had not been considered by a Hong Kong court and that the court should be "slow in adopting these decisions on a shareholder's right to inspect privileged documents." The judge said she did "not consider this to be a reason for not following the English decisions, provided of course the basis for the principle established is sound."

Commentary

A shareholder generally has no right to access the privileged documents of the company. The right that arises from this line of cases has been described by Charles Hollander as "not a right of access but a disapplication of privilege" that only arises in the course of litigation.[2]

Shareholders posses a narrow common law right to inspect company documents where there is a dispute between the shareholder and other members, the dispute concerns a matter personal to the shareholder and access to the documentation is necessary to resolve the dispute. The company's articles generally govern the position and Hollander notes there is "no modern recorded case of any shareholder successfully obtaining such access not provided for by statute other than in the course of disclosure in litigation against the company." The English line of cases raise the hypothetical possibility that a shareholder could purchase a single share in a company and then claim the right to inspect privileged documents.

This decision in *G4S*, if followed in Hong Kong, will be particularly relevant to banks and listed issuers facing disclosure applications in securities litigation. The implication is that claimants in such claims who hold shares indirectly, such as through CCASS, will not be permitted to see the company's privileged material (or, at least, will have a challenge on their hands).

There are also case management issues where claimants are both registered and unregistered shareholders (as acutely demonstrated in G4S) and the court reminded the parties that recipients of privileged material have a "positive duty not to breach that privilege further and not to allow those documents to go to any sort of wider audience".

Legal advisers to potential plaintiffs therefore need to consider any logistical issues up front, well before trial, to try and find a solution that is workable, otherwise they risk an application for disclosure being refused on case management grounds, if G4S is followed.

Throughout the decision, the judge emphasised the fundamental nature of the right of privilege, stating that it is "an important substantive right" and "it is better to err on the side of caution and preserve privilege unless there is good reason not to".

Higher courts in England and Hong Kong may, in time, agree with this sentiment and, picking up on the judge's suggestion that the foundation to the principle is now "shaky", may seek to re-examine it - and potentially do away with it altogether.

Authored by Maeve Rowley-O'Donnell, Daniela Vella, Jennifer Dickey, and Nigel Sharman.

Next steps

If you would like to discuss this article, or any of the issues raised, please get in touch with any of the contacts listed, who would be happy to help.

References

1 For example, Salomon v A Salomon & Co [1897] AC 22 and BTI 2014 LLC v Sequana SA [2022] UKSC 25

2 Documentary Evidence in Hong Kong, Second Edition 2020

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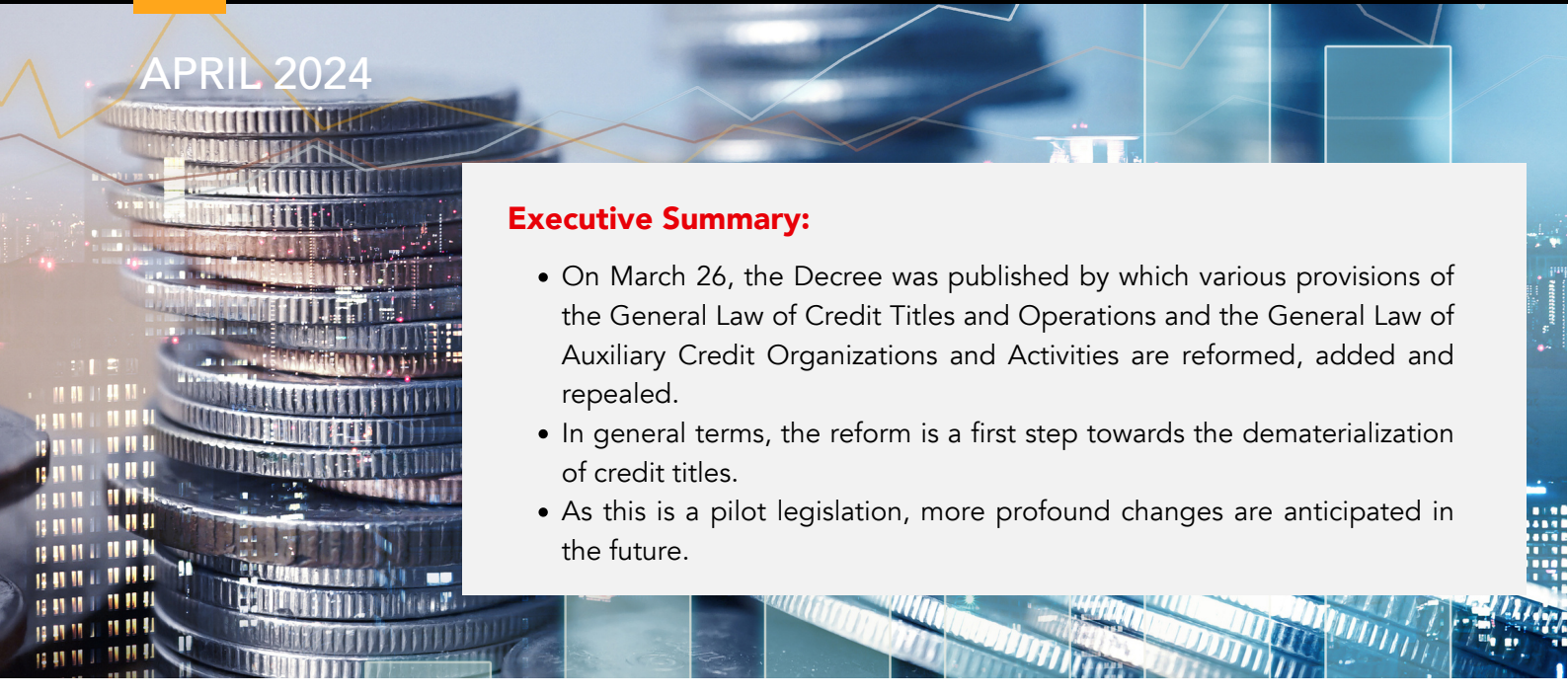
Santamarina + Steta

S+S UPDATES

AMENDMENTS TO THE GENERAL LAW OF CREDIT INSTRUMENTS AND TRANSACTIONS AND THE GENERAL LAW OF CREDIT ORGANIZATIONS AND AUXILIARY ACTIVITIES

APRIL 2024



Executive Summary:

- On March 26, the Decree was published by which various provisions of the General Law of Credit Titles and Operations and the General Law of Auxiliary Credit Organizations and Activities are reformed, added and repealed.
- In general terms, the reform is a first step towards the dematerialization of credit titles.
- As this is a pilot legislation, more profound changes are anticipated in the future.

Last Friday, March 26, 2024, the Decree amending, adding and repealing several provisions of the General Law of Credit Instruments and Transactions ("LGTOC" for its acronym in Spanish) and the General Law of Credit Organizations and Auxiliary Activities ("LGOAAC" for its acronym in Spanish) (the "Decree") was published in the Official Gazette of the Federation. In general terms, the reform is a first step towards the dematerialization of credit instruments.

Article 5 of the LGTOC now defines negotiable instruments as "the documents necessary to exercise the literal right set forth therein, regardless of whether they are issued by written or electronic means." Electronic instruments will be considered data messages under the terms of the Code of Commerce, and therefore must be issued through technological tools that allow for such issuance and their transfer, reception, delivery or processing.

In turn, the foregoing must be carried out in an electronic system that allows to confirm, with certainty, the identity of the intervening parties, the information contained in the instrument, and in the case of transfers, the continuity of endorsements and the existence and circulation of the instrument. For purposes of the delivery of the instrument, it will be deemed to have been made through said system; regarding the signature, this requirement will be deemed to have been complied with when it is attributable to the signer in accordance with the Code of Commerce.

As it is a pilot legislation, anticipating more profound changes in the future, the first institution to be homogenized is that related to the general deposit warehouses and their deposit certificates, which now must also be issued through the electronic systems determined by each warehouse, complying with the requirements contained in the LGTOC and the LGOAAC.

In addition, the Decree creates the RUCAM (The Sole Registry of Certificates, Warehouses and Merchandise for its acronym in Spanish) as a new registry in which the general deposit warehouses must record the issuance and cancellation of deposit certificates, as well as the merchandise covered by such certificates. In addition, the notices of sale and other annotations indicated by the LGOAAC and other applicable laws will be registered in the RUCAM.

Pursuant to the Transitory Articles of the Decree, the Federal Executive Branch and the National Banking and Securities Commission ("CNBV" for its acronym in Spanish) have 180 business days from the effective date of the Decree to adjust all secondary regulations (circulars, regulations, provisions) in accordance with the Decree. In addition, the CNBV must issue the appropriate rules in light of the content of the Decree within the same term.

General deposit warehouses have a period of 18 months from the effective date of the Decree to adjust their operations and issue electronic deposit certificates. They may continue issuing physical certificates only until they begin to issue electronic certificates or until the aforementioned term is met, at which time they will not be able to continue issuing physical certificates.

At Santamarina + Steta we can gladly advice you in the analysis and decision making considering this information.

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NautaDutilh

Developments in environmental crime legislation

In this update, we discuss two developments in the area of environmental crime, illustrating the increasing attention to criminal prosecution of environmental crimes both in the Netherlands and abroad.

In March 2024, the European Union revised the Directive on the protection of the environment through criminal law. In addition, in the same month, the Advisory Division of the Council of State advised on a Bill submitted to the House of Representatives in November 2023 regarding the Criminalisation of Ecocide (*Wetsvoorstel strafbaarstelling ecocide*).

EU Directive

On 26 March 2024, the Council of the European Union adopted the revision of Directive 2008/99/EC on the protection of the environment through criminal law. The revised Directive ('the Directive') will be published shortly in the Official Journal of the European Union and will enter into force 20 days later. EU Member States will have two years to translate the Directive into national law.

After evaluating the old directive from 2008, the European Commission concluded that the impact of the directive was limited. Only a small number of cases were successfully investigated and resulted in the imposition of a sanction. Moreover, the penalties imposed were too low to be a deterrent, and there was no systematic cross-border cooperation. The European Union has also noted an increase in criminal environmental offences and their consequences. In December 2021, the Commission therefore submitted a proposal to make the directive more effective. The revised Directive contains new environmental offenses and stricter sanctions to increase the deterrent effect. In addition, the Directive aims to improve the effectiveness of the investigation, prosecution, and adjudication of criminal environmental offences. Pursuant to the preamble, with reference to, inter alia, the European Green Deal, there will in certain cases also be a preference for settlement through criminal law instead of administrative law.

The number of environmental offences in the Directive has increased from 9 to 20, a significant expansion of the material scope. New offences include illegal timber trade, illegal recycling of polluting parts of ships and serious violations of chemicals legislation. The Directive also contains a provision on qualified crimes, which applies when a criminal offence referred to in the Directive is committed intentionally and causes destruction or irreversible or long-term damage

to the environment. This means that ecocide is included in the Directive as an aggravating circumstance. In addition, for the first time, the Directive harmonises the penalties for legal persons in the EU Member States. For the most serious offences, legal persons are subject to a minimum maximum fine of at least 5% of the legal person's total worldwide turnover or an amount of EUR 40 million. The Dutch Criminal Code already provides for the possibility of imposing a fine of up to 10% of the legal person's turnover. At the beginning of this year (ECLI:NL:RBOBR:2024:306), the District Court of East Brabant applied that possibility for the first time by imposing a record fine of EUR 10 million on a petrochemical company, related to the turnover of the parent company of the company in question.

Dutch bill

Parallel to this European development, the Ecocide Criminalisation Bill was submitted to the House of Representatives of the Netherlands on 30 November 2023. The purpose of the bill is to include ecocide in the Dutch Criminal Code as a new criminal offence. Although current legislation already contains provisions criminalizing environmental crimes (articles 173a and 173b), these provisions focus on the protection of human health. The proposed criminal offense of ecocide focuses on the protection of the environment.

On 27 March 2024, the Advisory Division of the Council of State advised on the bill. The Council of State notes that this proposal is in line with national and international developments, in which the natural environment is increasingly recognised constitutionally, but it also notes a number of fundamental objections to the current proposal. According to the Council of State, the criminalisation of ecocide is now described in such a general manner that it is insufficiently clear precisely what behaviour is considered punishable, which is contrary to the *lex certa* principle. In addition, the Council of State recommends that, when amending the proposal, attention should also be paid to the connection with the revised Directive.

We therefore expect that the entry into force of the Directive will influence the further refinement and definition the proposed criminal offence of ecocide. That offence will have to be described as specifically as possible, so that legal and natural persons can foresee and know which acts or omissions are punishable under which circumstances.

Please do not hesitate to contact us or our Corporate Crime team members if you have any questions about these developments or environmental offences (or the prevention thereof).

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SyCipLaw TIPS
Tax Issues and Practical Solutions
INTERNATIONAL EDITION | MARCH 2024 | VOL. 11

1. Are informal settlement agreements between the Commissioner of Internal Revenue and the taxpayer valid and binding?

Yes. In *Commissioner of Internal Revenue ("CIR") v. Toledo Power Company* (G.R. No. 259309, dated February 13, 2023), the Supreme Court held that the informal settlement agreement entered into between the taxpayer and the CIR was valid and binding.

On July 30, 2015, Toledo received a Preliminary Assessment Notice (*"PAN"*) from the Bureau of Internal Revenue (*"BIR"*) assessing deficiency taxes in the amount of PHP 92,769,216.84 including deficiency value-added tax (*"VAT"*) in the amount of PHP 4,025,642.60 on its sale of power to Carmen Copper Corporation (*"CCC"*). On September 4, 2015, Toledo paid the assessed VAT deficiency based on the PAN with interest, in the total amount of PHP 6,971,071.10. Such payment was pursuant to an informal settlement agreement between the CIR and Toledo, where the parties agreed to the payment of a lower amount instead of the original assessed tax deficiency. On March 26, 2015, in a complete turnaround, Toledo filed an administrative claim for a refund of the assessed VAT deficiency that it had paid, on the ground that it was erroneously or illegally collected under Section 229 of the National Internal Revenue Code, as amended (*"Tax Code"*). On March 21, 2016, Toledo filed a Petition for Review with the Court of Tax Appeals (*"CTA"*) to meet the 2-year prescriptive period under Sections 204 (C) and 229 of the Tax Code. The CTA En Banc granted the claim for refund of PHP 6,971,071.10.

The Supreme Court reversed the CTA's ruling. It held that while the Tax Code provides the procedure for settlement and compromise of tax disputes including limitations on the BIR's authority, the Legislature has never prevented the BIR to use other less formal methods of resolving tax controversy, without going through the tedious process of litigation. As such, the CIR may enter into informal settlements to write *finis* to any of these cases within the parameters prescribed by law.

The Supreme Court further held that the informal settlement contained all the essential elements of a contract under Article 1318 of the Civil Code. Here, both parties entered into an informal settlement agreement to terminate the tax investigation and the BIR's right to pursue deficiency taxes in the total amount of PHP 92,769,216.84 in exchange for the taxpayer's payment of PHP 6,971,071.10 VAT deficiency. Toledo paid the amount as consideration and the CIR stopped its tax investigation constituting the object or subject matter of the informal agreement, thus, allowing his cause of action against Toledo to prescribe. When all the elements are present, the informal settlement between the parties is generally binding and cannot be undone except in case of falsity or fraud under Section 248 (b) of the Tax Code. Hence, Toledo was estopped from seeking a refund of the settlement amount especially after it had already benefitted therefrom in terms of being made exempt from an otherwise tedious litigation and the payment of the huge amount of PHP 92,769,216.84.

By way of *obiter dictum*,[1] the Supreme Court said that, even assuming there was no informal settlement, Toledo's claim for refund must still fail following the doctrine of estoppel under Article 1431 of the Civil Code. By paying the VAT deficiency, Toledo impliedly admitted the validity of the findings under the PAN. Had it truly believed that its sale of power to CCC was zero-rated, it should have contested the findings by filing a reply to the PAN or questioning the validity of the CIR findings after the issuance of a Final Letter of Demand/Final Assessment Notice ("*FLD/FAN*"); but instead, it chose to pay the amount without any reservation or protest. Toledo's misrepresentation hinged not only on its deafening silence on the real reason it paid the amount in the first place, but also on its inexplicable failure to categorically state or make of record that the payment made by the company was conditional or under protest. ■

SyCipLaw Tip No. 1

The taxpayer and the CIR may enter into informal settlements to agree on the payment of a lower tax deficiency assessment. As a general rule, such agreements constitute valid and binding contracts that cannot be undone by the taxpayer or the CIR. Once the lower tax deficiency has been paid pursuant to an informal settlement, the taxpayer is estopped from filing an administrative or judicial claim for refund of the amount paid on the ground that such tax had been erroneously or illegally collected unless the taxpayer has explicitly reserved its right to protest the assessment or seek a refund of what it paid.

2. While a tax case is pending in court, may the CIR and the taxpayer enter into a compromise agreement and request for judicial approval thereof?

Yes. In *CIR v. CTA-Third Division and Citysuper, Inc.* (G.R. No. 239464, dated October 10, 2022), the Supreme Court approved a compromise agreement between the CIR and Citysuper, even while the Supreme Court had already rendered a decision on the case, but the decision was pending a motion for reconsideration. The Supreme Court's decision dated May 10, 2021 upheld the tax assessment against Citysuper in the amount of PHP 2,083,016,072.43. On December 13, 2021, Citysuper wrote to the BIR, stating that it had been suffering from business losses exacerbated by the COVID-19 pandemic and offering to amicably settle its deficiency tax assessment, by paying PHP 600,000,000.00. Meanwhile, on December 21, 2021, Citysuper filed a motion for reconsideration of the Supreme Court's decision dated May 10, 2021.

On January 20, 2022, the CIR and Citysuper entered into a judicial compromise agreement where the taxpayer paid, and the BIR accepted, the amount of PHP 600,000,000.00 as full settlement of the taxpayer's tax liability for the taxable year 2011. The CIR and Citysuper jointly asked the Supreme Court to approve the judicial compromise agreement and to declare the case closed and terminated. After reviewing its terms, the Supreme Court, in a minute resolution, approved the compromise agreement upon finding that it was not contrary to law, morals, good customs, and public policy and that it appeared to be freely executed by the parties. ■

SyCipLaw Tip No. 2

The taxpayer may still enter into a compromise agreement with the CIR while a tax assessment is pending in court, even at the appeal stages. Under Section 204(A) of the Tax Code, the CIR is authorized to compromise the payment of any internal revenue tax at a minimum compromise rate of 10% in cases of financial incapacity or 40% in cases of doubtful validity. A compromise agreement is subject to the approval of the National Evaluation Board where: (1) the basic tax involved exceeds PHP 1 million; or (2) the settlement offered is less than the prescribed minimum rates. Notably, the minute resolution of the Supreme Court did not discuss compliance with the requirements of Section 204(A) of the Tax Code. However, please note that Revenue Regulations No. 30-02 implementing Section 204(A) of the Tax Code purports to apply to, among others, civil tax cases being disputed before the courts.

[1] *Obiter dictum* is an opinion expressed by a court upon some question of law that is not necessary to the decision of the case before it. It is a remark made, or opinion expressed, by a judge "by the way," that is, incidentally or collaterally, and not directly upon the question before him, and is not binding as precedent. *Delta Motors Corporation v. Court of Appeals*, (G.R. No. 121075, July 24, 1997).

3. May a corporation file a claim for a tax refund if it paid final withholding taxes on dividends, which were erroneously declared and paid?

Yes. In *Matex International, Inc. v. Commissioner of Internal Revenue* (CTA EB No. 2627, January 30, 2024), the CTA En Banc ruled that taxes paid on the excessive payment of dividends are considered erroneously paid taxes, which fall within the context of Section 229 of the Tax Code.

In this case, the taxpayer declared and paid cash dividends to its stockholders, and withheld and paid final withholding taxes ("*FWT*") at the rate of 10%, pursuant to the Philippines-Japan Tax Treaty ("*RP-Japan Treaty*"). Subsequently, the taxpayer discovered that the dividends declared exceeded its unrestricted retained earnings, and so it reversed and recalled the excessive dividends paid, which were returned by the stockholders, net of the 10% FWT. The taxpayer claimed that there was erroneously paid FWT arising from the excess dividend distribution.

The BIR argued that the taxpayer failed to prove that the FWT was erroneously paid. The BIR emphasized that the taxpayer failed to show that the dividends declared were returned and that the taxpayer failed to show it had insufficient unrestricted retained earnings at the time of declaration.

The CTA En Banc ruled that the term "erroneous" in Section 229 of the Tax Code must be construed in its ordinary meaning – that there has been a mistake or incorrect payment of tax. It cited *SMI-ED Phil. Technology, Inc. v. Commissioner of Internal Revenue* (G.R. No. 175410, November 12, 2014), where the Supreme Court held that "[t]axes are generally self-assessed. They are initially computed and voluntarily paid by the taxpayer. xxx The self-assessing and voluntarily paying taxpayer, however, may later find that he or she has erroneously paid taxes. Erroneously paid taxes may come in the form of amounts that should not have been paid. Thus, a taxpayer may find that he or she has paid more than the amount that should have been paid under the law."

Here, the CTA En Banc ruled that the FWT paid on the overpaid dividends is considered as an erroneously paid tax, which may be the subject of a claim for refund or credit. It further ruled that the taxpayer was able to prove that it had erroneously declared and paid dividends based on the amount of unrestricted retained earnings in its audited financial statements. Accordingly, the CTA En Banc considered the taxes paid on the excessive payment of dividends as an "erroneously paid tax" within the context of Section 229 of the Tax Code. ■

SyCipLaw Tip No. 3

Taxpayers who made excessive payments of taxes to the BIR, regardless of whether the mistake was due to an erroneous calculation of the tax or an erroneous calculation of the tax base, may file an administrative claim for tax refund or credit within two years from the erroneous payment of the tax to the BIR, pursuant to Section 204 of the Tax Code.

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

4. Does the Court of Tax Appeals have jurisdiction over a petition for review questioning a Final Notice Before Seizure issued by the Bureau of Internal Revenue?

Yes. In *Bureau of Internal Revenue v. Megaconstruct Group, Inc.* (CTA EB Case No. 2633, February 1, 2024), the CTA En Banc ruled that the CTA has jurisdiction over a petition for review questioning a Final Notice Before Seizure ("*FNBS*") issued by the BIR.

In this case, the taxpayer was initially registered with Revenue District Office ("*RDO*") No. 36 in Palawan. On August 3, 2011, the taxpayer notified the BIR of the change of its business address and the transfer of its

registration to RDO No. 25 in Bulacan.

The BIR issued a Letter of Authority ("*LOA*") dated November 3, 2015, authorizing the examination of the taxpayer's books of accounts and other accounting records for taxable year 2014. On March 27, 2018, the BIR issued a PAN against the taxpayer for deficiency income tax for the year 2014. Thereafter, the BIR issued a Final Letter of Demand, with the attached Final Assessment Notices ("*FAN*") dated April 13, 2018. The LOA, PAN, FLD, and FAN were all delivered to the taxpayer's former address in Palawan.

Subsequently, the taxpayer received a Preliminary Collection Letter dated October 23, 2018 ("*PCL*") from the BIR. The taxpayer also received an FNBS dated November 14, 2018. Notably, the PCL and the FNBS were delivered to the taxpayer's current address in Bulacan. On December 19, 2018, the taxpayer filed a letter with the BIR, protesting the PCL and FNBS. Subsequently, on December 21, 2018, the taxpayer filed a petition for review with the CTA.

The BIR argued that the CTA had no jurisdiction over the petition for review considering that the subject assessment has allegedly become final, executory, and demandable. The BIR pointed out that the reckoning period in determining whether the assessment has become final and executory should have been the date of the taxpayer's receipt of the PCL dated October 23, 2018, and not the taxpayer's receipt of the FNBS dated November 14, 2018.

On the other hand, the taxpayer argued that the petition for review was filed on time since the reckoning period to determine whether the assessment has become final and executory should be based on its receipt of the FNBS dated November 14, 2018.

The CTA En Banc ruled that Section 7(a)(1) of Republic Act No. 1125, as amended by Republic Act No. 9282, not only confers jurisdiction on the CTA to decide cases relating to decisions of the Commissioner on Internal Revenue on disputed assessments and refunds of internal revenue taxes, but also on "other matters" arising under the Tax Code. Thus, the appellate jurisdiction of the CTA also covers other cases that arise out of the Tax Code and related laws administered by the BIR.

Here, the CTA En Banc ruled that an FNBS is also a mode of collection by the BIR of the alleged deficiency tax assessments against the taxpayer, prior to the seizure of its property. As such, questioning the FNBS is covered under the phrase "other matters" under Section 7(a)(1) of Republic Act No. 1125, as amended, and the CTA properly acquired jurisdiction over the case. ■

SyCipLaw Tip No. 4

Taxpayers are not limited to filing a petition for review with the CTA to question decisions or inactions of the CIR on disputed assessments and tax refunds. They may also file a petition for review for other matters decided by the CIR arising from the Tax Code or related laws administered by the BIR, including the issuance of an FNBS by the BIR. However, taxpayers should be aware that the reckoning period for the 30-day period to file a petition for review before the CTA may be from receipt of the PCL, as held by the Supreme Court in *CIR v Avon Products Manufacturing, Inc.* (G.R. No. 201398-99 and 201418-19, October 3, 2018). The CTA acknowledged in *Yap v. BIR* (CTA Case No. 10019, March 9, 2023, discussed in the April 2023 issue of TIPS) that the Supreme Court is the final arbiter on the issue of whether the 30 days should be counted from the taxpayers' receipt of the PCL or the Warrant of Distraint and Levy ("*WDL*"), or as in this case, the FNBS. Until the Supreme Court finally settles the issue, it would be prudent for a taxpayer to consider receipt of the PCL as the reckoning point for filing the petition with the CTA.

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

5. Are all international service provisions or cross-border service agreements rendered by non-resident foreign corporations ("*NRFCs*") automatically subject to income tax and VAT pursuant to Revenue Memorandum Circular ("*RMC*") No. 5-2024?

No. The BIR issued RMC No. 38-2024 on March 15, 2024, to clarify and address the concerns identified in RMC No. 5-2024 (discussed in the February 2024 issue of TIPS). In RMC No. 38-2024, the BIR clarified that international service provisions or cross-border service agreements analogous to the services in *Aces Philippines Cellular Satellite Corp. v. Commissioner of Internal Revenue, G.R. No. 226680 dated August 30, 2022* ("*Aces*") (see discussion in the February 2023 issue of TIPS) and enumerated in Question No. 2 of RMC No. 5-2024, are not automatically subject to income tax and VAT.

The BIR expounded that the enumeration of activities within the scope of "international service provision" was merely intended to underscore that, akin to the scenario in Aces, these services are similarly performed, rendered, delivered, or supplied by NRFCs to a domestic or resident entity within the Philippines. The criterion for determining whether the source of income from the listed cross-border services resides within the Philippines hinges on whether the property, activity, or service generating the income is situated in the Philippines.

Furthermore, the BIR has emphasized that in ascertaining the source of income, it is imperative to consider all components of the activity, rather than isolating or segmenting any particular activity as the sole income-generating activity. This approach is consistent with the principle outlined in Article 1233 of the Civil Code, which states that there is performance when the thing or service in which the obligation consists has been completely delivered or rendered. The factors that are crucial in the determination of the source of income include: whether the cross-border services are dependent on the successful use, consumption, or utilization by the Philippine purchaser of the service for income to be accrued; whether the performance of the service depends on the facilities located in the Philippines; or whether the particular stages occurring in the Philippines are so integral to the overall transaction that the business activity would not have been accomplished without it.

Should the income-generating activities occurring within the Philippines be regarded as indispensable or essential, the income emanating from these activities will be classified as sourced within the Philippines for taxation purposes, regardless of the location of the receipt of payment.

The BIR asserts that the principles laid down in RMC No. 5-2024 are in alignment with, and do not contradict, the provisions concerning the sources of income as outlined in Section 42 of the Tax Code. According to this section, the source of income for services rendered is determined by the location where the service is performed. Nevertheless, the BIR has highlighted that the Supreme Court, in the case of Aces, established that merely identifying any property, activity, or service is insufficient for determining the source of income. It is necessary to specifically look into the property, activity, or service that generated the income or the origin of the wealth inflow. Consequently, the criterion outlined in Section 42 of the Tax Code is considered insufficient by itself and must be coupled with the determination of the location of the service that produces the income or where the inflow of wealth originates.

The BIR has further emphasized that should it be determined that the source of income from cross-border services resides within the Philippines, such transactions will consequently be subjected to VAT, under Sections 105 and 108 of the Tax Code. These sections state that services rendered or performed in the Philippines by NRFCs are subject to VAT.

a. On the applicability of tax treaties on international service provision

The BIR explained that RMC No. 5-2024 simply delineates guidelines to ascertain the source of taxation for cross-border services. Upon determining that the source resides within the Philippines, the affected taxpayer is

then entitled to invoke the application of a particular tax treaty. A taxpayer may assert that the income, which is derived from or sourced within the Philippines, is exempt from income tax or eligible for a preferential tax rate by filing a request for confirmation of treaty benefit.

b. Reimbursable or allocable expenses for cross-border services within the scope of "international service provision"

The BIR reaffirmed that RMC No. 5-2024 also encompasses reimbursable or allocable expenses pertaining to cross-border services between or among affiliated entities. To ascertain the source of income for charges levied by the parent company or its affiliates to a related domestic entity for the services rendered by the former to the latter, we must look into the property, activity, or service that produced the income, or where the inflow of wealth originated. ■

SyCipLaw Tip No. 5

Notwithstanding the RMC No. 38-2024 clarification that the services listed in RMC No. 5-2024 are not automatically subject to income tax and VAT, the principles laid down in RMC No. 5-2024 remain the same.

Philippine entities engaged in service agreements with NRFCs should evaluate whether their existing contracts may expose them to a risk of deficiency final withholding tax and VAT. Given the BIR's clarification that the services detailed in RMC No. 5-2024 are not automatically subject to income tax and VAT, the taxability of services provided by NRFCs to domestic entities will be assessed on a case-by-case basis.

Parties may want to obtain a tax ruling from the BIR to confirm the tax implications of their specific arrangements and clarify the requirement to withhold taxes on payments made to NRFCs. They may also want to file a request for confirmation of eligibility under an applicable tax treaty. However, filing such a request would mean an admission that the situs of income is in the Philippines.

For more information regarding the issuances discussed in this briefing, please contact:

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MAS responds to feedback received for consultation paper on repeal of regulatory regime for Registered Fund Management Companies

DENTONS RODYK

April 3, 2024

The Monetary Authority of Singapore (MAS) has responded to feedback received for the consultation paper, published on 24 October 2023, on its proposal to repeal the regulatory regime for Registered Fund Management Companies (RFMCs) and application of such RFMCs to become Licensed Fund Management Companies (LFMCs). This article sets out the timing of repeal and application process, details in relation to the application form, considerations in reviewing applications, continuity of operations, applicable requirements and unsuccessful applicants.

Timing of repeal and application process

MAS targets to repeal the RFMC regime on **1 August 2024**. Existing RFMCs intending to continue regulated fund management activity after this date must apply to be an A/I LFMC by completing and submitting the application form, Form 1AR, between **1 April 2024 and 30 June 2024**.

MAS will inform RFMCs of the application outcome within a month of submission. MAS expects to issue Capital Markets Services (CMS) licences to all successful applicants by **end July 2024**.

Exempt representatives of RFMCs that are licenced will become appointed representatives on the same date that the RFMC is licenced and there is no need for the RFMC to file any additional documents for this.

Application form and fees payable

RFMCs that wish to continue regulated fund management activity have to submit Form 1AR. No supporting documents are required at the point of submitting the Form 1AR, save for providing documentation in support of declarations made in Form 1AR that are requested by the MAS.

RFMCs applying to become A/I LFMCs during the prescribed application window will not have to pay any application fee for the corporate entity, nor any fee for the notification of their existing representatives. Upon being licenced, the prevailing CMS annual corporate licence fee and representative fees will apply on a pro-rated basis, to such A/I LFMCs and their representatives. Presently, the annual corporate licence and representative fees for CMS licence holders are S$4,000 and S$200 per representative respectively.

Consideration factors in reviewing Form 1AR applications

MAS will approve an RFMC's application to be an A/I LFMC if the RFMC:

a. has managed assets attributable to third-party investors in the six months immediately preceding the submission of the form to MAS. This requirement does not apply if the RFMC is registered for six months or less as at the submission date;
b. submits Form 1AR within the stipulated timeline; and
c. satisfactorily furnishes supporting documents to MAS, if requested.

Continuity of operations and applicable requirements during and after application

Throughout the application process, RFMCs can continue operating without disruptions. RFMCs should continue to meet existing RFMC requirements, for example, filing of notifications and annual declarations. Upon being issued a licence, the regulatory requirements for A/I LFMC will take immediate effect. In addition to the above, RFMCs that become A/I LFMCs will have to seek MAS' prior approval for certain changes, such as their shareholders and key appointment holders. Further, a small number of RFMCs that have been issued written directions and/or have specific conditions imposed on their regulatory status will continue to apply even after these RFMCs become A/I LFMCs.

RFMCs should familiarise themselves with the A/I LFMC regulatory requirements. Resources available on the MAS website that provide guidance include (a) Compliance Toolkit for Approvals, Notifications and Other Regulatory Submissions to MAS for Fund Managers; (b) Guidelines on Licensing, Registration and Conduct of Business for Fund Management Companies; and (c) FAQs on the Licensing and Registration of Fund Management Companies.

Unsuccessful applicants

Generally, RFMCs which have not conducted fund management activity as defined in the Securities and Futures Act 2001 for a continuous period of six months will cease to be registered as RFMCs. They would no longer be allowed to carry on regulated fund management activity and not be issued CMS licences. There will not be an appeal process for these entities.

Generally, fund management companies which intend to cease their fund management business should ensure an orderly winding down of their business operations and consider if it would be in their investors' interest to be notified of the RFMC's intentions ahead of the repeal of the regime. This applies to RFMCs which do not apply for or obtain CMS licences.

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Difference between Functional Designs and Use of Trademarks

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Alina Tang

Under Article 29(1)(1) of the Trademark Act, if a trademark consists exclusively of a description of the quality, intended purpose, material, place of origin, or relevant characteristics of the designated goods or the service, such trademark shall not be registered due to a lack of distinctiveness. Article 30(1)(1) of the same Act also states that a trademark which is exclusively necessary for the functionality of the goods or services shall not be registered. Furthermore, Article 36(1)(1) of the same Act states that a registered trademark shall not entitle the proprietor to prohibit a third party from indicating his/her own name, or the term, shape, quality, nature, characteristic, intended purpose, place of origin, or any other description in relation to his/her own goods or services, in accordance with honest practices in industrial or commercial matters and without using it as a trademark. According to the above, a trademark shall not be registered if it consists of merely the intended purpose or relevant characteristics of the goods, or is exclusively necessary for the goods to be functional. Even if it is registered, a third party may argue that his/her use of such trademark is to indicate the intended purpose and shall not be bound by effect of the trademark.

In this case, O-ONE INTERNATIONAL LIMITED COMPANY ("O-ONE") obtained trademark registration for the MagSafe wireless charger's magnet array pattern ("Trademark"). In order to cooperate with Apple's MagSafe wireless charging technology, EVOLUTIVE LABS CO., LTD. ("EVOLUTIVE") has installed magnets at relative positions on the back panel of its cell phone case products, called "RHINOSHIELD". This allows the cell phone, even when equipped with a cell phone case, to securely attach to the magnetic structure of the charger. The installation of magnets on the "RHINOSHIELD" cell phone case products has formed a pattern resembling the Trademark. The Intellectual Property and Commercial Court ("IPCC") stated in its civil judgment (Case No.: 112-Ming-Shang-Su-40) that the use of the Trademark pattern on the back panel of the "RHINOSHIELD" cell phone case is a functional design to match the MagSafe wireless charging technology of the cell phone. Furthermore, the packaging of "RHINOSHIELD" products are clearly labeled with the trademarks and brands of "Rhinoshield" or "RhinoShield," and the use of the Trademark is not for marketing purposes.

The IPCC further ruled that Apple had already launched the MagSafe wireless charging technology before the registration of the Trademark. Apple released the cell phone case and other accessories with the disputed pattern on the back panel in order to support the MagSafe wireless charging technology. Since the use of the disputed pattern on the back panel of the "RHINOSHIELD" cell phone case is to support the MagSafe wireless charging technology, and the disputed pattern was not used or originated by O-ONE first, the use of the disputed pattern on the "RHINOSHIELD" cell phone case is mainly for implementing the MagSafe wireless charging technology and is not bound by the effect of the Trademark.

In this case, EVOLUTIVE originally claimed that the Trademark should be revoked, but subsequently withdrew this claim and only sought to confirm that the "RHINOSHIELD" cell phone case was not bound by the effect of the Trademark. Therefore, whether the Trademark should not be registered due to a lack of distinctiveness or other reasons is still subject to the decision of the opposition and/or invalidation procedures.

Technology + Privacy & Security

California Privacy Regulator Issues First Enforcement Advisory

California Privacy Regulator's First Enforcement Advisory Emphasizes the Importance of Data Minimization

By Alexander Sisto

04.04.24

On April 1, 2024, the California Privacy Protection Agency (CPPA) issued its first enforcement advisory directing businesses to implement the data minimization principle when responding to consumer requests. The advisory was motivated by the CPPA's observation that "certain businesses are asking consumers to provide excessive and unnecessary

personal information in response to requests that consumers make under the [California Consumer Privacy Act (CCPA)]."

Data minimization is one of the cornerstone principles of the CCPA, which requires covered businesses to restrict their processing of personal data to that which is "reasonably necessary and proportionate to achieve the purposes for which the personal information was collected or processed." The regulations promulgated under the CCPA expand on this obligation and state that the necessity and proportionality assessment should be based on the following:

1. The minimum personal information that is necessary to achieve the purpose of processing that the business has disclosed to the customer.
2. The possible negative impacts on consumers posed by the business's processing of personal information.
3. Additional safeguards that the business uses to protect the personal information to specifically address possible negative impacts on customers.

As the enforcement advisory points out, the concept of data minimization is manifested throughout the CCPA. For example, when responding to a request to opt out of the sale or sharing of personal information, businesses *may not* require the customer to verify their identity and must restrict the personal information they collect to that which is necessary to process the opt-out request.

For other requests, including requests to access or delete personal information, businesses *are* required to verify the customer's identity. However, the regulations concerning identity verification require businesses, wherever feasible, to match the identifying information provided by the consumer to the information already maintained by the

business; and to avoid collecting particularly sensitive personal information, such as Social Security numbers, financial account numbers, or unique biometric data to verify identity. Furthermore, if it is necessary to collect additional information from a consumer to verify their identity, businesses should only use that information for identification, security, or fraud prevention purposes. Any newly collected information must be deleted as soon as practical after verifying the consumer's identity and responding to their request.

The enforcement alert contains illustrative examples of how businesses should assess the information required to respond to opt-out requests and requests to delete personal information. The examples emphasize the importance of ensuring that data minimization is embedded in all aspects of businesses' privacy compliance programs, including in processes and procedures for responding to consumer requests.

DWT's Privacy and Security team regularly advises businesses on how to structure and implement privacy compliance programs and will continue to monitor regulatory developments in this space.

Hogan Lovells

Center for Clinical Trial Innovation furthers FDA's diversity goals, rare disease drug development

Pilot program offers opportunity for enhanced interaction with FDA

19 April 2024

The U.S. Food and Drug Administration (FDA) has announced the establishment of the "Center for Drug Evaluation (CDER) Center for Clinical Trial Innovation" (C3TI). C3TI is intended to be a "central hub" within CDER aimed at enhancing clinical trial innovation for drug development and regulatory decision-making. The establishment of the center is part of FDA's broader efforts in fostering clinical trial innovation. More specifically, C3TI will serve as a nerve center for facilitating the sharing of important innovative lessons and insights across CDER's other existing programs and communicating those lessons with external parties.

C3TI's demonstration program is open to sponsors with active investigational drug developmental programs in the project areas of 1) point-of-care or pragmatic trials, 2) trials implementing Bayesian analyses, 3) trials using selective safety data collection. Over the next year, C3TI will select up to nine sponsors with innovative programs to participate in the program.

The C3TI demonstration program is an excellent opportunity for pharmaceutical and biotechnology companies to closely interact with FDA and have meaningful input into the agency's policy-making on clinical trial innovation. As such, we strongly encourage our clients to consider applying for this program.

Below we summarize the agency's plans for the new clinical trial innovation center, and how this program demonstrates FDA's goals of furthering the development of drugs to treat rare diseases, and enhancing the diversity of clinical trial participant populations.

Overview

In response to public comments regarding incorporating successful innovative clinical trial approaches, CDER announced this week plans to create C3TI: a central hub designed to enhance clinical trial innovation for drug development and regulatory decision-making. FDA said the C3TI will serve three main purposes:

1. Share lessons across CDER's existing clinical trial innovation programs

2. Communicate and collaborate with external parties regarding innovative clinical trials
3. Create and manage a C3TI demonstration program for sponsors of innovative clinical trials in the pre-IND or IND phase

C3TI aims to achieve these purposes through various goals including: updating stakeholders with current clinical trial innovations; improving the efficiency, effectiveness, and diversity of trials; enhancing quality of trial data; and accelerating the development of safe and effective new drugs. In addition to coordinating with external stakeholders regarding information sharing, C3TI will also support knowledge sharing within the agency through discussion forums and a centralized knowledge repository, which will curate knowledge about completed CDER clinical trial innovation activities.

C3TI's demonstration program is designed to enhance communication between CDER and innovative clinical trial sponsors. The program is currently open to sponsors conducting trials in the following 3 project areas:

1) **Point of care or pragmatic trials (Streamlined Trials Embedded in Clinical Practice (STEP)**: This program is applicable to sponsors of trials incorporating pragmatic design elements such as broad eligibility criteria, decentralized procedures, and limited safety data collection. The program is aimed at addressing issues relating to statistical analyses, incorporation of real world data, and endpoint selection.

2) **Trials implementing Bayesian analyses**: This program is applicable to sponsors of phase 3 efficacy, safety, or non-inferiority standalone trial who are willing to supplement their primary statistical analysis methods with Bayesian analyses in order to increase understanding of Bayesian approaches.

3) **Trials using selective safety data collection**: This program is applicable to sponsors conducting trials on products with well-established safety profiles late-stage pre-approval or post-approval trials, including but not limited to, trials for approved products, seeking new indication, or trials designed to provide additional evidence of efficacy. The program is aimed at streamlining and reducing safety data collection in those trials.

Selected sponsors will have the opportunity for enhanced communication and interaction with CDER. These trials and subsequent interactions will serve as case examples that can be shared both internally and externally to foster innovation across various therapeutic areas.

C3TI demonstrates FDA priorities

In a press release announcing the C3TI, CDER Director Patrizia Cavazzoni, M.D., touted the agency's "long-standing efforts to embed innovation in clinical trial design and conduct" in order to bring "new therapies to areas of unmet medical need." Viewed alongside recent FDA actions, we see this effort as part of the agency's work to promote drug development for rare diseases. For example, in October of last year, FDA announced the opportunity for a limited number of sponsors to participate in a new pilot program called Support for clinical Trials Advancing Rare disease Therapeutics (START), which offers additional meetings with FDA to sponsors of novel drugs that aim to treat rare diseases, as we summarized online here.

The creation of C3TI also demonstrates the agency's goal of assisting sponsors where novel data-analytics tools and approaches to bioequivalence (BE) may be used, and when these approaches cannot be effectively addressed under existing regulatory frameworks. For example, FDA recently launched a pilot program to offer meeting opportunities to generic drug applicants who intend to use model-integrated evidence (MIE) approaches to establish BE in their abbreviated new drug applications (ANDAs); we provided an overview of that program online here.

In addition, CDER said the C3TI aims to "help increase the participation of diverse populations in clinical trials," thereby enhancing the quality of trial data and providing more reliable information for underrepresented populations. Enhancing clinical trial diversity has been a major focus of FDA over the past few years, with the agency recently holding a clinical trial diversity workshop that revealed the agency's expectations for sponsors to enroll historically underrepresented populations, as

we discussed online here. And in February, FDA published a revision to its draft guidance "Collection of Race and Ethnicity Data in Clinical Trials," demonstrating that the agency is laying the groundwork for additional guidance in this space, as we explain online here.

Next steps

C3TI's web page is online here, and its demonstration program will accept up to nine proposals on a rolling basis within a 12-month period. Sponsors selected to participate in the program will have the opportunity for enhanced communication and interaction with FDA staff. Because the goal of the program is to share innovative information that has been gathered more broadly, sponsors will be required to share certain details of their development programs publicly. However, FDA has assured that necessary confidentiality will be maintained on proprietary information.

If you may be interested in applying to the C3TI program, or if you have questions on planning clinical trials with innovative designs, feel free to contact the Hogan Lovells attorney with whom you generally work or one of the authors of this alert.

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