

Pacific Rim Advisory Council
September 2011 e-Bulletin

MEMBER NEWS

- ▶ Baker Botts Adds Leading Corporate & Finance Partner to Dubai Office
- ▶ Clayton Utz Perth Appointment Adds Oil & Gas Expert
- ▶ Hogan Lovells Welcomes Former Acting Solicitor General of USA to Washington Office
- ▶ King & Wood Adds IP Counsel in Beijing
- ▶ Luce Forward Adds to San Diego Litigation Team
- ▶ Wilson Sonsini Opens Georgetown, DE office

COUNTRY ALERTS

- ▶ **AUSTRALIA** High Court Says There Is No Double Insurance If There Is No Common Burden
CLAYTON UTZ
- ▶ **BRAZIL** New Rules for Work Permit/Visa for Foreign Managers
TOZZINI FREIRE
- ▶ **CANADA** Proposed National Instrument 51-03 CSA Proposes to Simplify Venture Issuer Regulation
FRASER MILNER CASGRAIN
- ▶ **CHINA** Certain Provisions on Implementation of PRC Social Insurance Law Promulgated
KING & WOOD
- ▶ **COLOMBIA** New Consumer Protection Regime
BRIGARD & URRUTIA
- ▶ **HONG KONG** Shareholder Granted Order to Inspect Listed Company Documents
HOGAN LOVELLS
- ▶ **INDONESIA** New Regulation Requires Permit for Large Sellers of Pharmaceutical Products
ABNR
- ▶ **NEW ZEALAND** First Annual Report on New Zealand Emissions Trading Scheme
SIMPSON GRIERSON
- ▶ **TAIWAN** Key Points of Amendment to Company Act
LEE & LI
- UNITED STATES**
 - ▶ Texas Supreme Court Clarifies Requirements for Proving Causation with Clinical Trial Evidence
BAKER BOTTS
 - ▶ CMS Announces Bundled Payment Demonstration Project
DAVIS WRIGHT TREMAINE
 - ▶ Medical Device Alert FDA Issues Draft Guidance for in vitro Companion Diagnostic Devices
HOGAN LOVELLS
 - ▶ The Next Great American Land Rush
LUCE FORWARD
 - ▶ New California Security Breach Notification Requirements to Take Effect January 1, 2012
WILSON SONSINI GOODRICH & ROSATI
 - ▶ **VIETNAM** Legal Developments in Mobile Services and Mobile Phone Industry
TILLEKE & GIBBINS

Reach. Reliability. Resources.

CONFERENCES & EVENTS

- 2011 October 15-18 - 50th International PRAC Conference - Singapore
Hosted by Rodyk & Davidson
- 2011 October - PRAC Members Gathering @ IBA Dubai
- 2012 April 21-24 - 51st International PRAC Conference - Houston
Hosted by Baker Botts LLP
- 2012 May 5 - PRAC Members Gathering @ INTA Washington
- 2012 October 20-23 - 52nd International PRAC Conference - Buenos Aires
Hosted by Allende Brea

Details at www.prac.org

PRAC Conferences and Events are open to PRAC Member Firms only

MEMBER DEALS MAKING NEWS

- ▶ BAKER BOTTS Bankruptcy Court Applauds Performance in Multi-Billion ASARCO file
- ▶ CAREY Y CIA Assists Electrolux AB in US\$670 Million Acquisition of Compania Tecno Industrial
- ▶ CLAYTON UTZ Acts on Tiger Real Coal A\$37.5 Million IPO
- ▶ FRASER MILNER CASGRAIN Acts for Premier Gold Mines Limited C\$104 Million Acquisition of Goldstone Resources
- ▶ GIDE Advises Carlsberg Group in Joint Venture With Chongqing Xinghui Investment Co Ltd
- ▶ HOGAN LOVELLS Closes \$1 Billion in Financing for NextEra Energy Resources Solar Project
- ▶ KING & WOOD Acts in Beijing Automotive €210 Million Acquisition of Inalfa Roof Systems Group BV
- ▶ LUCE FORWARD Assists Security Business Bancorp with US\$8.95 Million Investment from US Federal Small Business Lending Fund
- ▶ NAUTADUTILH Acts for Vodafone in Appeal Against OPTA Decision on Call Termination on Mobile and Fixed Networks
- ▶ RODYK Acts in S\$43 Million Collective Purchase of Cai Garden
- ▶ SKRINE Acts for Australia 's Roc Oil Company in Petronas Balai Cluster Fields Development in Malaysia
- ▶ TOZZINIFREIRE Advises Puras do Brazil in 100% Acquisition by Sodexo Inc.

PRAC TOOLS TO USE

- [PRAC Contact Matrix](#) [PRAC Member Directory](#) [Conferences & Events](#)

Visit us online at www.prac.org

BAKER BOTTS ADDS LEADING CORPORATE FINANCE PARTNER TO DUBAI OFFICE

DUBAI, UAE, September 4, 2011 -- Vanessa Abernethy, who has extensive experience representing clients in capital markets transactions throughout the Middle East, joined Baker Botts L.L.P. today as a partner in the firm's Dubai office.

Abernethy specializes in transactional and advisory work. She has advised clients raising capital through equity securities in the region, both privately and through IPOs, and counseled clients on mergers and acquisitions and listings on NASDAQ Dubai, the Dubai Financial Market and the Abu Dhabi Securities Market.

"Vanessa's wealth of experience in the corporate and financial sectors of the Middle East further strengthens our capabilities there," said Baker Botts Managing Partner Walt Smith. "The addition of Vanessa to our team demonstrates our commitment to providing highly-skilled lawyers who can handle some of the most complex transactions in the Middle East."

Baker Botts now has 25 lawyers working out of three offices in the region -- Abu Dhabi, Dubai and Riyadh. During the past 12 months, the firm has added seven new lawyers -- including Abernethy -- to its Middle East operations. These lawyers have a wealth of experience in counseling on Islamic financing, conventional lending and project finance, construction and nuclear energy issues.

Even during recent economic unrest in the Middle East, Baker Botts has experienced increased client demand for its services. Two of the more visible recent representations involved project development and financing work for the Saudi Electric Company (SEC), as well as counsel to Mitsubishi Corporation on its South Gas Project.

On the SEC matter, firm lawyers provided counsel in all aspects (international and Saudi law) for the company's Independent Power Project (IPP) Program. Project Finance magazine recognized a portion of this work -- the \$2.1 billion financing for Saudi Arabia's PP-11 project -- as its 2010 "Middle East Deal of the Year."

"Since opening in Riyadh more than 10 years ago, in Dubai in 2005 and Abu Dhabi in 2009, our Middle East portfolio has expanded beyond energy industry issues," said Robert W. Jordan, Partner in Charge of the Middle East practice for Baker Botts. "While we remain heavily involved in energy, we are now regularly working on complex and novel projects and sophisticated transactions throughout the region, particularly involving government entities. We will continue to expand our capabilities to support the needs of clients either based in the region or looking to do business here."

Abernethy has advised clients on a number of high-profile matters. She counseled a sovereign-owned entity in the hospitality industry with its proposed acquisition of a 33 percent stake in a global hotel chain. She also represented a Lebanese group in the mining industry in connection with its acquisition of a 70 percent stake in a UAE-based company with mining operations in Guinea.

She is a member of the NASDAQ Dubai Practitioners' Committee, which is a panel of capital markets experts from the legal, financial and banking industries who assist the exchange with various matters and meet as a Committee for discussion on strategy and new initiatives.

Prior to joining Baker Botts, Abernethy was a corporate partner in the Dubai office of Simmons & Simmons. She earned her Bachelor of Laws degree from the University of Canterbury in Christchurch, New Zealand and a Stock Exchange diploma from the Securities Institute of Australia. She is admitted as a Solicitor in England and Wales.

For more information about Baker Botts' Middle East practice please visit us at www.bakerbotts.com

KING & WOOD ADDS IP COUNSEL IN BEIJING

Beijing, Aug 15 2011 – Mr. Jiang Zhipei has joined King & Wood's Beijing office as a senior consultant in the intellectual property litigation group.

Mr. Jiang has many notable legislative and scholarly accomplishments along with extensive judicial experience in the field of intellectual property. He participated in the drafting and amendment of Chinese civil law, intellectual property law, and civil procedure law. He also edited and drafted many publications including: Intellectual Property Litigation, Internet and E-commerce Law and Post WTO Accession Intellectual Property Protection Research in China. Mr. Jiang is a former member of the Judicial Committee of the Supreme People's Court, former Chief Justice of the Supreme People's Court Intellectual Property Rights Tribunal, and founder of Chinaiprwlw website. He has been recognized several times as one of the "50 Most Influential People in IP," and he was also named "the most outstanding contributor to IP protection in China" at the CAEFI Quality Brands 9th anniversary in 2009. In 2011, Mr. Jiang received a lifetime achievement award from Managing IP magazine.

Ariel Ye, King & Wood's managing partner for dispute resolution, commented: "King & Wood has been focusing on the promotion and development of our Intellectual Property group. The addition of Mr. Jiang, a specialist with extensive IP litigation experience, will definitely enhance our team and promote the development of King & Wood's IP legal services."

For additional information visit www.kingandwood.com

CLAYTON UTZ PERTH APPOINTMENT ADDS OIL & GAS EXPERT

Perth, 05 September 2011: Clayton Utz is pleased to announce the appointment of leading oil and gas expert John King as partner, effective 15 November 2011.

John was previously Senior Legal Counsel with Eni Australia and VICO, an Eni-BP joint venture and a leading supplier of Indonesian LNG. John has over 15 years experience advising major participants in the petroleum and petrochemical sectors on a wide range of energy related matters including upstream exploration and production projects, offshore contracting, pipeline projects, processing and long-term marketing arrangements, asset sale and purchase (mergers & acquisitions), and independent power projects.

John has extensive experience in Australia, the United Kingdom, Indonesia and North-Asia.

The national head of Corporate, Graham Taylor, said John's appointment would add significant strength to the firm's highly regarded Energy and Resources team. "John's appointment reflects strong growth in the oil and gas sector in Western Australia and the region and reflects our commitment to, and longer-term growth strategy for, our Energy and Resources practice. John has advised on virtually all aspects of the oil and gas sector and his substantial experience advising on Asia-Pacific LNG projects will be a significant asset."

Perth managing partner Paul Fitzpatrick said John's appointment reflected the firm's commitment to delivering excellence in legal services. "Clayton Utz remains committed to providing our clients with the very best legal talent. John's appointment reflects this commitment and we look forward to him joining the Clayton Utz team in November."

For additional information visit www.claytonutz.com

HOGAN LOVELLS WELCOMES FORMER ACTING SOLICITOR GENERAL OF USA TO WASHINGTON OFFICE

Former Acting Solicitor General Neal Katyal Joins Hogan Lovells as Partner and Co-Head of Appellate Practice

WASHINGTON, D.C., 6 September 2011 – Hogan Lovells announced today that Neal Katyal, former Acting Solicitor General of the United States, has joined its Litigation, Arbitration and Employment practice as a partner in the Washington, D.C. office. Neal will be Co-Head of Hogan Lovells' Appellate practice alongside Washington, D.C. partner Cate Stetson.

"Neal's career is most impressive by any standard. His recent service to the United States as Acting Solicitor General and his success in many notable Supreme Court cases over the course of his career have given him insight into some of the most complex and important legal issues facing our country today," said Warren Gorrell, Co-CEO of Hogan Lovells. "They also have given him great practical insights into the various ways our clients' critical matters can be addressed through the judicial process, from beginning to end. Neal is widely regarded as an exceptional lawyer and a prominent legal scholar, and our clients will immediately benefit from his deep knowledge of constitutional, administrative, and patent law, among many other areas."

"Hogan Lovells has one of the most prominent appellate and litigation practices in the nation," said Katyal. "With world-class lawyers experienced in handling oral arguments in sophisticated cases before the Supreme Court and federal and state courts of appeals across the country, Hogan Lovells is uniquely positioned to serve clients across all industries and geographies."

As Acting Solicitor General, Katyal was responsible for representing the federal government in all appellate matters before the U.S. Supreme Court and the Courts of Appeals throughout the nation. He served as Counsel of Record in hundreds of cases and orally argued 15 U.S. Supreme Court cases, as well as numerous cases in lower courts. Katyal has also served as a law professor for nearly 15 years at Georgetown University Law Center and was Director of the Georgetown Center on National Security and the Law until his appointment as Principal Deputy Solicitor General. He has extensive experience in matters of patent, securities, tort, commercial, and constitutional law.

"Neal is intimately familiar with the complex legal issues involved in the healthcare reform case now pending on a petition for *certiorari* before the Supreme Court, having argued all of the major federal appeals in which the healthcare reform legislation was challenged. Neal also has argued and won several notable Supreme Court cases during his illustrious career, including *Hamdan v. Rumsfeld*, the landmark case that ruled military tribunals at Guantánamo Bay to be unconstitutional. Neal also argued the major defense-industry case of *General Dynamics v. United States*, making him one of very few people who have argued in the Supreme Court with \$6 billion on the line. The breadth and depth of his experience in a wide variety of appellate matters is unparalleled," said Stephen Immelt, Co-Chair of Hogan Lovells' Litigation, Arbitration and Employment practice.

In addition to *Hamdan v. Rumsfeld*, Katyal has argued numerous Supreme Court cases during his career. He successfully defended the constitutionality of the Voting Rights Act of 1965 in the landmark case, *Northwest Austin v. Holder*, and secured a unanimous win in a Supreme Court case defending former Attorney General John Ashcroft against alleged abuses of civil liberties in the war on terror. In 2011, Katyal secured a unanimous Supreme Court win in *American Electric Power Company v. Connecticut*, a major decision that rejected attempts to litigate, through common-law "nuisance" lawsuits, issues related to greenhouse gas emissions. He also is the only head of the Solicitor General's Office to argue a patent appeal in the U.S. Court of Appeals for the Federal Circuit; Katyal presented arguments in a high-profile case posing the question whether certain aspects of the human genome were patentable.

"We are absolutely thrilled to have Neal join Hogan Lovells," said Cate Stetson, Co-Head of the Appellate practice. "He will significantly deepen our appellate practice at all levels and across all areas. Neal is not only brilliant; he is a thoughtful and creative counselor, and he will be a wonderful colleague."

For additional information about **Neal Katyal** visit www.hoganlovells.com

WILSON SONSINI FURTHER EXPANSION TO IP LITIGATION PRACTICE

Wilson Sonsini Goodrich & Rosati Opens Georgetown, Delaware, Office

-- Chancellor William B. Chandler III to Lead New Office --

PALO ALTO, CA (August 17, 2011) - Wilson Sonsini Goodrich & Rosati, the premier provider of legal services to technology, life sciences, and other growth enterprises worldwide, is pleased to announce that it has opened an office in Georgetown, Delaware.

"As a seat of the Delaware Court of Chancery, Georgetown is home to the nation's leading court for corporate law cases," said CEO Steve Bochner. "Although our firm has tried many cases before the Court of Chancery, having an official office in Georgetown gives us an increased presence in this important judicial hub. We are especially fortunate to have William Chandler, the former Chancellor of the Delaware Court of Chancery, based in the new office, as his extensive expertise and familiarity with the court and corporate governance issues will afford our clients unparalleled insight and representation."

Chancellor Chandler recently became a partner at Wilson Sonsini Goodrich & Rosati after a distinguished 22-year-long career at the Court of Chancery. During his tenure at the court, he issued more than a thousand opinions and presided over some of the most contentious and high-profile corporate law disputes in the country, including those involving The Walt Disney Company, Yahoo, Microsoft, Hewlett-Packard, eBay, Citigroup, Dow Chemical, and, most recently, the Air Products/Airgas dispute. His opinions and analyses have made him one of the most influential and well-respected jurists in the world on issues of corporate law and governance.

The new office is located at Eight West Laurel Street, Georgetown, DE 19947-1424. The main phone number is 302-856-4235 and the fax number is 866-974-7329.

For more information, please visit www.wsgr.com

LUCE FORWARD ADDS TO SAN DIEGO LITIGATION TEAM

Jessica "Jessie" L. Mackaness has joined Luce, Forward, Hamilton & Scripps LLP, one of California's leading litigation law firms, as an associate in the Firm's San Diego office. Mackaness will join Luce Forward's Insurance Litigation practice group.

Luce Forward's experienced litigation team defends the nation's largest insurance carriers and related entities against class actions, unfair competition suits and lawsuits alleging bad faith or other tort theories arising out of first-party and third-party insurance claims. The 2011 edition of *Chambers USA* ranked Luce Forward as one of the top firms in the Insurance: Insurer Firms category in California. Mackaness will work closely with partners Peter H. Klee and John T. Brooks, both of whom were individually recognized in the same category.

"Jessie brings to Luce Forward extraordinary talent we look for in order to help grow our already successful litigation practice groups," said Kurt L. Kicklighter, Luce Forward's Managing Partner. "The Firm's Insurance Litigation group has long been considered one of the top in the nation, so Jessie will gain the experience not typically made available to someone so early in their career. We're happy to have Jessie as part of our team and look forward to the added value she brings to the Firm."

Prior to Luce Forward, Mackaness was an associate at Keesal, Young & Logan, where she represented a number of high profile financial services institutions in securities litigation matters. In addition to her insurance and securities experience, Mackaness's practice also involved employment, maritime, and business litigation. She received her J.D. from the University of San Diego School of Law, *Magna Cum Laude*, where she was elected to the Order of the Coif, and received her bachelor's degree from the University of Florida, *Cum Laude*.

For additional information visit www.luce.com

BAKER BOTTS LLP

BANKRUPTCY COURT APPLAUDS PERFORMANCE IN MULTI-BILLION ASARCO FILE

HOUSTON, August 19, 2011 -- The Honorable Richard S. Schmidt, United States Bankruptcy Judge for the Southern District of Texas, Corpus Christi Division, has entered an order approving the fees previously paid, and awarding additional fees, in recognition of Baker Botts' role as Chapter 11 counsel to ASARCO LLC.

Judge Schmidt wrote in his supporting opinion that the ASARCO bankruptcy was "truly a rags-to-riches story" and "probably the most successful Chapter 11 of any magnitude in the history of the [Bankruptcy] Code." Creditors in the ASARCO bankruptcy received more than \$3.5 billion, which represented payment in full of all claims, plus interest and attorney's fees.

Judge Schmidt wrote that: "Baker Botts lawyers conducted themselves with the utmost professionalism and commitment, addressing an array of challenging legal issues with sophistication, creativity, and skill. . . . Few firms in the country have the breadth and depth of experience in different disciplines necessary to handle these cases with the skill demonstrated by Baker Botts" and "no other firm could have achieved the results in these cases at the rates charged by Baker Botts" during the fee application period.

Originally organized in 1899, ASARCO initially held diverse smelting, refining and mining operations throughout the United States and now operates as a Tucson-based fully integrated copper mining, smelting and refining company. Judge Schmidt wrote that when ASARCO filed bankruptcy in August 2005, "the [C]ompany had essentially run out of cash and was saddled with massive environmental liability, financial debt, potential asbestos-related liability, falling copper prices, and a striking workforce." Creditors were expected to receive cents on the dollar." Ultimately, Americas Mining Corporation (AMC), a subsidiary of Mexican mining giant Grupo Mexico, retained the ownership of its wholly-owned subsidiary, ASARCO, in the bankruptcy by funding a plan that resulted in payment in full to creditors.

"That ASARCO resolved all of these issues, cleansed its balance sheet of billions of dollars of debt, and confirmed a chapter 11 plan that paid creditors in full is an exceptional result that no one could have predicted at the time ASARCO filed bankruptcy in 2005," said Jack Kinzie, the lead bankruptcy lawyer in the case and the head of Baker Botts' bankruptcy and restructuring group.

Judge Schmidt wrote that the "pivotal event" in the bankruptcy was Baker Botts' successful prosecution of a multi-billion-dollar fraudulent transfer lawsuit (the SCC Litigation) against AMC, the parent of ASARCO. "Through its creativity, tenacity, and legal talent, Baker Botts was able quickly and efficiently to prosecute the [I]itigation, prevail at trial, and obtain and secure a judgment . . . valued in excess of \$6 billion"—likely the largest fraudulent transfer judgment in United States history. Judge Schmidt found that the "results obtained by Baker Botts in the SCC Litigation are rare and extraordinary."

"The fraudulent transfer litigation was particularly challenging and unique," said Irv Terrell, the lead Baker Botts trial lawyer in the case, "not only because of its fast pace, which was essential to accommodate the needs of the restructuring proceedings in Corpus Christi, but also because, as Judge Schmidt noted in his opinion, we had to decipher millions of pages of documents and use those documents to tell a compelling story out of the mouths of adverse witnesses in the courtroom."

Judge Schmidt also recognized Baker Botts' "outstanding achievements" in other areas of the case, which has been described by the United States Department of Justice, Environmental and Natural Resource Division (DOJ) as "the largest environmental bankruptcy in U.S. history." Regarding ASARCO's environmental liabilities, for example, Judge Schmidt wrote that "Baker Botts managed to craft a global environmental settlement that resolved billions of dollars of environmental liabilities. And the Firm did it in a demanding, compressed time frame." The environmental settlement will help fund clean-up efforts at over 80 sites in 19 different states (Alabama, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Texas, Utah, and Washington).

Judge Schmidt also found that Baker Botts "conceived, recommended, and commenced an innovative auction of the multi-billion-dollar judgment against AMC that, under the Debtors' unique plan structure, exposed [Grupo Mexico] to the possibility that it could lose the Company and have to pay the judgment in full."

"ASARCO was an extraordinary case," said Kinzie. "I am thankful and proud of many things about it, but I think I am proudest of the positive impact the successful reorganization had on ASARCO stakeholders. Nearly 2,000 union and non-union workers depend on ASARCO for their livelihood. In some Arizona towns, such as Hayden, ASARCO is the primary source of tax revenues to keep schools and other public service functions going. Federal and state regulators received funding for many of the largest, oldest and most complex Superfund sites in the country. That ASARCO, a company that has operated for over 112 years, exited chapter 11 financially sound and cleansed of billions of dollars of liabilities proves that chapter 11 works."

In his order and supporting opinion, Judge Schmidt awarded Baker Botts approximately: (a) \$113 million in fees and \$6 million in expenses incurred during the 52 months of the ASARCO bankruptcy, virtually all of which have previously been paid; (b) \$5 million in fees and \$450,000 in expenses incurred in preparing and defending the firm's final fee application after confirmation of the bankruptcy plan; and (c) an additional \$4 million in fees because he found "Baker Botts' services were instrumental in producing the exceptional results that were unanticipated at case commencement."

For additional information visit www.bakerbotts.com

CAREY Y CIA

ASSISTS ELECTROLUX AB IN US\$670 MILLION ACQUISITION OF COMPANIA TECNO INDUSTRIAL

Carey y Cía. acted as Chilean legal counsel to Electrolux AB, a Swedish company and the world's second- biggest appliances maker, in the acquisition of Compañía Tecno Industrial (CTI), the biggest manufacturer of home appliances in Chile and, indirectly, its subsidiary in Argentina Frimetal. Chilean conglomerate Sigdo Koppers, controlling shareholders of CTI, committed to sell all its shares to Electrolux. The acquisition process involve simultaneous public tender offer in Chile for 100% of the shares in the publicly traded corporations CTI and Somela. The value of the deal was of US\$670 million.

Carey y Cía. partners Jorge Carey, Salvador Valdés and Cristián Eyzaguirre led the team, formed also by associates Teresita García de la Huerta y Giannina Veniú.

For additional information visit www.carey.cl

SKRINE

ACTS FOR AUSTRALIA'S ROC OIL COMPANY IN PETRONAS BALAI CLUSTER FIELDS DEVEVELOPMENT

August, 2011 – Kuala Lumpur SKRINE, led by Oil & Gas Partner, Faizah Jamaludin, represented Australia's Roc Oil Company Limited (ROC) in the Small Field Risk Service Contract (SFRSC) entered into by Malaysia's national oil company, PETRONAS, on 16 August 2011 with a contractor group comprising Roc Oil Malaysia (Holdings) Sdn. Bhd, Dialog D & P Sdn. Bhd. and PETRONAS Carigali Sdn. Bhd. for the pre-development and development of the Balai Cluster fields, offshore Sarawak.

The Balai Cluster SFRSC is the second contract to be awarded under PETRONAS' new petroleum arrangement for the development and production of marginal hydrocarbon reserves in Malaysia.

For additional details visit www.skrine.com

CLAYTON UTZ

ACTS ON TIGER REAL COAL A\$37.5 MILLION IPO

Melbourne, 29 August 2011: Clayton Utz has advised coal explorer Tigers Realm Coal as issuer in connection with its A\$37.5 million Initial Public Offering and listing on the Australian Stock Exchange today.

Tigers Realm Coal, which is part of the Tigers Realm Minerals Australian based resources group, is focused on developing two coking coal projects, the Amaam coking coal project in Far Eastern Russia and the Landazuri coking coal project in Colombia, South America. It listed today with a market capitalisation of approximately A\$182 million.

The Company's vision is to become a significant participant in the seaborne coking coal market by advancing its projects through resource delineation and scoping studies.

Clayton Utz Melbourne partner Charles Rosedale led the firm's team, with support from partner Brendan Groves and lawyers Warrick Louey and Sarah Pfeiler and Graduate-at-Law Peter Hamblin.

Commenting on today's listing Charles said: "We are delighted to have assisted Tigers Realm Coal with its listing on the Australian Stock Exchange in these challenging market conditions. This continues the firm's recent IPO success having recently advised Collins Foods on its successful Initial Public Offering and listing on the Australian Securities Exchange on 5 August."

For additional information visit www.claytontuz.com

PRAC 50th International Conference

October 15 -18, 2011

Hosted by
Rodyk & Davidson

www.prac.org



RODYK & DAVIDSON LLP

RODYK

FRASER MILNER CASGRAIN

ACTS FOR PREMIER GOLD MINES \$104 MILLION ACQUISITION OF GOLDSTONE RESOURCES INC.

On August 16, 2011, Premier Gold Mines Limited ("Premier") completed the previously announced acquisition of Goldstone Resources Inc. ("Goldstone") for approximately \$104 million. Each Goldstone shareholder received 0.16 of one Premier common share and a nominal cash payment of \$0.0001 for each Goldstone share held.

The acquisition consolidates 100% ownership of the Hardrock Project in Canada that is host to a multi-million ounce NI 43-101 compliant resource estimate.

Premier is a Canadian-based mineral exploration and development company with several projects and deposits in Northwestern Ontario, Nevada and Mexico.

Goldstone is a gold exploration and development company operating in the historically significant Geraldton-Beardmore camp of Northwestern Ontario and focused on gold exploration and deposit delineation at its Key Lake, Brookbank, Northern Empire and Leitch-Sand River gold properties, and as a partner in the Hardrock Project joint venture with Premier.

Premier was represented by a team from Fraser Milner Casgrain LLP that included Abbas Ali Khan, Peter Danner and Jessica Palter (corporate/securities), Young Park and Chloe Snider (litigation), Matthew Peters and Jonah Mayles, Neil Bass, Jonah Mayles and Zahra Nurmohamed (tax), Sonja Homenuck (real estate) and Blair McCreadie and Andy Pushalik (employment).

For additional information visit us at www.fmc-law.com

RODYK

ACTS IN S\$ 43 MILLION COLLECTIVE PURCHASE OF CAI GARDEN

Rodyk is acting for a related company of Tong Eng Brothers Pte Ltd in its collective purchase of the 26-unit Cai Garden, a residential development at Foo Kim Lin Road, for S\$43 million. The collective sale was made by private treaty with the agreement of all owners.

Real estate partner Norman Ho led this transaction assisted by partner Chou Ching.

For additional information visit www.rodyk.com

LUCE FORWARD

ASSISTS SECURITY BUSINESS BANCORP WITH US\$ \$8.95 MILLION INVESTMENT

San Diego, August, 2011 Luce, Forward, Hamilton & Scripps LLP assisted San Diego-based Security Business Bancorp close an \$8.9 million investment from the United States federal government's Small Business Lending Fund.

For additional information about this transaction, visit www.luce.com

KING & WOOD

ACTS IN BEIJING AUTOMOTIVE GROUP €210 MILLION ACQUISITION OF INALFA ROOF SYSTEMS GROUP BV

Beijing Hainachuan Automotive Parts Co. Ltd, a subsidiary of the Beijing Automotive Group, has successfully completed a €210 million acquisition of Inalfa Roof Systems Group B.V. The deal was closed in the Netherlands in July, 2011. This deal is Beijing's largest overseas acquisition to date, and the largest acquisition to date by a Chinese auto parts company based on value. Inalfa Roof Systems is the world's second largest supplier of vehicle roof systems for the automotive industry. It has eight factories and three R&D centers in eight countries. Beijing Automobile Group is the fifth largest automobile group in China.

As legal adviser to the Beijing Automotive Group and this project's lead counsel, King & Wood provided legal services on transaction structure design, due diligence, negotiation, antitrust filling, government review, project finance and project delivery.

The deal was led by partners Wang Kaiding, Zhang Xiaolian of the Corporate Group and Cai Yongmei of the Banking & Finance Group.

For additional information visit www.kingandwood.com

GIDE LOYRETTE NOUEL

ADVISES CARLSBERG GROUP IN JOINT VENTURE WITH CHONGQING XINGHUI INVESTMENT CO. LTD.

Gide Loyrette Nouel (GLN) has advised the Carlsberg Group (Carlsberg) on the formation of a joint venture with Chongqing Brewery Co. Ltd (CBC) and Chongqing Light Textile Holdings (Group) Co. Ltd (CLT). This transaction follows Carlsberg's recent acquisition of an additional shareholding in CBC, a Chinese company listed on the Shanghai Stock Exchange. In late 2010, GLN advised Carlsberg on increasing its stake in CBC from 17.46% to 29.71%, a transaction which made Carlsberg the largest shareholder in CBC. CLT is CBC's other main shareholder.

The establishment of a joint venture with CBC and CLT reflects Carlsberg's desire to continue to expand its Chinese operations. The joint venture, Chongqing Xinghui Investment Co. Ltd (CXI), will be owned 51.42% by CBC, 18.58% by CLT and 30% by Carlsberg. The joint venture parties intend that CXI will operate 12 breweries in China, across the Chongqing municipality, Sichuan, Guangxi, Guizhou and Hunan provinces. In terms of contributions to the joint venture, CBC will contribute ownership of five breweries, CLT will contribute ownership of seven breweries and Carlsberg will make a cash contribution of approximately RMB 204m (USD 31m). The transaction is conditional upon various approvals.

GLN is advising Carlsberg on all aspects of the joint venture transaction including structuring, negotiation, documentation and regulatory formalities. The GLN team advising Carlsberg is led by Warren Hua, Partner, with assistance from partner Zheng Yu and senior associate Sun Jin.

For additional information visit www.gide.com

HOGAN LOVELLS

CLOSES \$1 BILLION IN FINANCING FOR NEXTERA ENERGY RESOURCES SOLAR PROJECT

NEW YORK, 29 August 2011 – Hogan Lovells announced today that it closed approximately \$1 billion in project financing on behalf of NextEra Energy Resources subsidiary Genesis Solar for the development of a 250 MW utility-scale solar thermal electric generating facility.

The construction and term financing was secured with a multi-tranche capital markets offering and bank facility that is 80-percent guaranteed by the U.S. Department of Energy (DOE) under its Financial Institutions Partnership Program (FIPP) under Title XVII of the Energy Policy Act, which was expanded by the 2009 American Recovery and Reinvestment Act to cover commercially viable renewable technologies. The construction and term financing consists of \$702 million of 144A-issued trust certificates purchased by Credit Suisse Securities, as initial purchaser, a \$150 million bank term loan facility, and an \$83 million project letter of credit facility. Proceeds from the DOE financing will be used primarily for the construction of the Genesis Solar facility in Riverside County, CA, which features parabolic trough solar thermal technology.

"Given the scale and complexity of this program, which brought together significant public and private financing components, closing the deal is a considerable achievement and an important step forward in the development of the Genesis Solar project," said lead Hogan Lovells partner Edith Webster. "We assembled a skilled, interdisciplinary team from across multiple Hogan Lovells offices to advise NextEra on the financing for this landmark project."

The Hogan Lovells Infrastructure and Project Finance practice team was led by partner Edith Webster (New York) and included partners Christine Pallares (New York), Mary Anne Sullivan (Washington, D.C.), Scott Lilienthal (Washington, D.C.), and John Lilyestrom (Washington, D.C). Construction and development matters relating to the Genesis Project were handled by partners Jorge Diaz-Silveira and Tom Woolsey (Miami). The team also included corporate and securities, FERC, tax, environmental, creditors' rights, real estate, and energy lawyers.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ACTS FOR VODAFONE IN APPEAL AGAINST OPTA DECISION ON CALL TERMINATION ON MOBILE AND FIXED NETWORKS

8 September 2011 - On 31 August 2011, the Dutch Trade and Industry Appeals Tribunal (CBb) quashed the decision of the Independent Post and Telecommunications Authority (OPTA) regarding call termination on mobile and fixed networks. The case was brought by a number of telecom providers, including Vodafone.

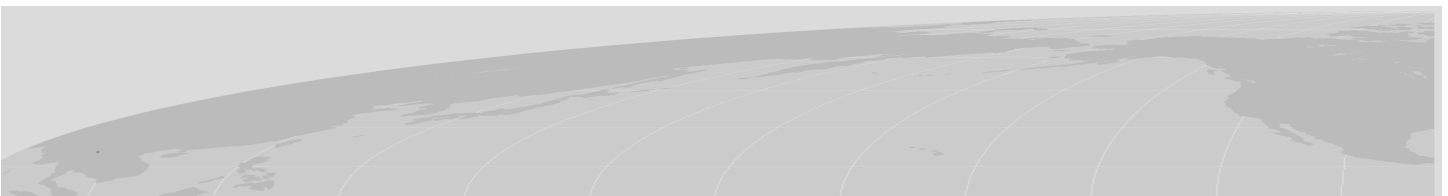
Call termination is the service in which telecom providers ensure that a telephone call from the network of one provider (e.g. KPN) is transferred to the network of another provider (e.g. Vodafone) and is the most important cost component in fixed and mobile telephony. OPTA can, in principle, fix the rates that telecom providers charge for this as each telecom provider is deemed to enjoy a monopoly on its own telephone network.

Originally, OPTA had decided that the mobile termination rate would have to be reduced to 1.2 cents per minute, effective from 1 September 2012. However, the CBb has now ruled that the rate should not be 1.2 cents but 2.4 cents per minute. The CBb also ruled that the Pure BULRIC cost model used by OPTA – although recommended by the European Commission – was in conflict with the proportionality requirement of the Dutch Telecommunications Act.

With this ruling, the CBb has ended years of legal conflict (and resulting uncertainty) regarding mobile call termination rates. Moreover, the CBb has ruled that the European Commission's so-called proportional rate rule for all EU countries does not bear scrutiny in the Netherlands at least.

The NautaDutilh team that advised Vodafone in this case consisted of Paul Waszink, Jolize Lautenbach and Harald Wiersema.

For additional information visit www.nautadutilh.com



PRAC Member Firms Advance Event Notice

Planning to attend the October IBA Annual Meeting in Dubai?

Join your fellow PRAC members at a causal gathering

For further details contact
events@prac.org

Invitation is open to PRAC Member Firms only

TOZZINI FREIRE

ACTS FOR PURAS DO BRAZIL IN 100% ACQUISITION BY SODEXO INC

Sao Palo – September, 2011 Tozzini Freire assisted Puras do Brasil in its 100% acquisition by Sodexo Inc.. The status of the deal is completed and its value is R\$1,2 billion.

As a result of the acquisition, the new company will be the leader in on-site service solutions in the Brazilian and Latin American markets. The new group will provide a growth of 15% per year after the deal.

Puras is the second largest company in the on-site service solutions operator market in Brazil.

Sodexo is a leading provider of integrated food and facilities management services in the U.S., Canada, and Mexico.

Partners Gustavo Nygaard, Roberto Bersch, Vinicius Berni, Rafael Mallmann and Maria Elisa Verri and associates Maria Medeiros Bofill and Luciana Xavier acted in the transaction.

For additional information visit www.tozzinifreire.com.br



Hosted by
Rodyk & Davidson

Business Sessions Include:

One on One Meetings
Series of prescheduled half hour meetings between firms

Litigation/Dispute Resolution PRACTice Group
"Negotiating the Arbitration Clause in an International Contract- What Is the Best Seat Selection?"

Banking & Workouts PRACTice Group
"Creditor Workouts in Asia—How They Work or Don't Work"

PRACTice Management - Strategic Planning for Law Firms
"National v. International Law Firms - Strategies and Challenges in a Global Market"

Public Seminar Topic co-sponsored by Business Investment & International Trade PRACTice Group
"New Developments in Privacy Laws - The Public Fights Back"

Register online at www.prac.org



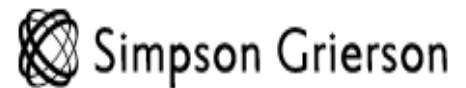
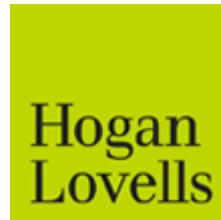


The Pacific Rim Advisory Council is an international law firm association with a unique strategic alliance within the global legal community providing for the exchange of professional information among its 30 top tier independent member law firms.

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

www.prac.org

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



Gide Loyrette Nouel



PRAC e-Bulletin is published monthly.
Member Firms are encouraged to contribute articles for future consideration.
Send to editor@prac.org.
Deadline is 10th of each month.

06 September 2011

High Court says there's no double insurance if there's no common burden

You make a deal which requires you to indemnify the other party, so you take out insurance. Now there are two insurance policies to cover one loss – or are there? Which insurer pays – and can it get the other one to pay up too? The High Court has once again looked at double insurance, and shed some more light on this complex issue, although its answers won't please all insurers (*HIH Claims Support Ltd v Insurance Australia Ltd* [2011] HCA 31).

Oh no, my insurer has gone broke

Mr Steele's scaffolding business was sub-contracted to erect a scaffold as part of the 1998 Australian Grand Prix. One of his scaffolds collapsed, and as a result one of the "jumbotron" video screens operated by Screenco Pty Limited was damaged.

The Australian Grand Prix Corporation had insured itself, its contractors and its sub-contractors (including Mr Steele) with another policy issued by SGIC General Insurance Limited, which is now owned by Insurance Australia.

As any prudent business person would, Mr Steele had taken out his own general liability insurance policy. Unfortunately, it was issued by a company in the HIH Group.

Screenco sued Mr Steele and won. Mr Steele had already put in a claim to HIH and received \$80,000 for his legal costs, but by the time the case was actually heard, HIH had collapsed, so he was on the hook for the actual damages and the other side's costs.

The Federal Government established a scheme to sort out the HIH mess. As one of HIH's policyholders (and hence an unsecured creditor), Mr Steele was able to assign his rights as a policyholder to HIH Claims Support Ltd; in return he got 90 percent of the judgment sum and other parties' costs that he'd been ordered to pay. Exit Mr Steele, no doubt a wiser, sadder man.

HIH Claims Support Ltd then turned to SGIC, for equitable contribution of half of the amount it had just paid out.

Why the High Court said HIH Claims Support Ltd had to carry the entire payment

HIH Claims Support Ltd is not an insurer, so [section 45 of the Insurance Contracts Act](#) or "other insurance" clauses don't come into play here. The decision here turned entirely on whether HIH Claims Support Ltd and Insurance Australia had co-ordinate liabilities.

The crux of HIH Claims Support Ltd's argument was that the HIH policy and the SGIC policy involved co-ordinate liabilities. While it hadn't issued the HIH policy, it had discharged a burden which was **in substance** the same burden. That should be enough.

For the High Court, however, it wasn't. HIH Claims Support Ltd did not step into the shoes of HIH and become exposed to all the claims under policies issued by HIH and to contribution claims from co-insurers of HIH. Instead, it stepped into Mr Steele's shoes because he had assigned his rights to it, which meant that HIH Claims Support Ltd became an assignee creditor which could lodge a proof of debt in HIH's liquidation.

It was not **in substance** in the same position as HIH. Its obligations to Mr Steele were not "of the same nature and to the same extent" as Insurance Australia's obligation in its capacity as co-insurer of HIH in respect of Mr Steele's liability, and they had no common interest or common burden because:

- if SGIC had paid out under its insurance policy before Mr Steele assigned his rights, MrSteele would not then have been able to assign his rights, and no issue of double indemnification would have arisen;
- since HIH Claims Support Ltd undertook no enforceable obligations under the Scheme until a payment or the first in a series of payments was made, Insurance Australia would never have had an opportunity to bring a claim for contribution against it; and
- Mr Steele only got paid under the scheme once he had assigned his rights to HIH Claims Support Ltd, covering events which had already occurred. HIH Claims Support Ltd's risk was therefore not the same as SGIC's, entered into before anything had occurred. HIH Claims Support Ltd's contract to indemnify Mr Steele and SGIC's policy were not the one insurance. The obligations here are qualitatively different.

What does this mean for you?

The decision itself should not be a significant cause for concern on the part of insureds or insurers. It turns on the strict application of principles of equitable contribution based upon co-ordinate liabilities.

It represents a return to basics by the High Court and is to be contrasted with the so-called "extended contribution principle" on the determination of when liabilities are co-ordinate, for the purposes of establishing double insurance, in cases such as AMP Workers Compensation (NSW) Ltd v QBE Insurance Ltd [2001] NSWCA 267 and Zurich Australian Insurance Ltd v GIO General Ltd [2011] NSWCCA 47.

The High Court's strict line on contribution means that it will be harder for insurers to call on insurance policies issued by others unless there is a common burden, and not just a common interest.

You might also be interested in...

- [Double insurance, double the fun? Double insurance and section 45 ICA](#)
- [One insured + one loss + two insurers = section 45 Insurance Contracts Act](#)

Disclaimer

Clayton Utz communications are intended to provide commentary and general information. They should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this bulletin. Persons listed may not be admitted in all states or territories.



LATEST ISSUES

Immigration

BRAZIL: WORK PERMIT/VISA FOR FOREIGN MANAGERS - NEW RULES

A new resolution from the Brazilian National Immigration Council was published altering one of the requirements for the concession of permanent visas to foreigners that will hold a managerial position in a Brazilian company.

According to this resolution, a Brazilian company that intends to have a foreigner holding a managerial position (officer/administrator) must evidence a foreign investment (i) of at least BRL 600,000 (approximately USD 357,000) per foreigner, or (ii) of at least BRL 150,000 (approximately USD 93,750) per foreigner and the commitment to create at least 10 new positions in Brazil during the following 2 years. The prior requirement was USD 200,000 and USD 50,000, respectively.

The new requirement does not apply to work permit/visa requests that are already under analysis by the Ministry of Labor.

Marta Mitico Valente
Partner - Brasília
mmitico@tozzinifreire.com.br

Mihoko Sirley Kimura
Partner – São Paulo
mkimura@tozzinifreire.com.br

Marcelo Pereira Gômaro
Partner - São Paulo
mgomara@tozzinifreire.com.br

Mauricio Mitsuru Tanabe
Partner – Rio de Janeiro
mtanabe@tozzinifreire.com.br

SEPTEMBER 2011

- 1 Proposed National Instrument 51-103: CSA Proposes to Simplify Venture Issuer Regulation
- 2 Contact Us

Proposed National Instrument 51-103: CSA Proposes to Simplify Venture Issuer Regulation

By Bill Gilliland and Dan Shea

On May 31, 2010, the Canadian Securities Administrators (the “CSA”) released a consultation paper detailing a proposal to overhaul the securities regulatory regime applicable to venture issuers (other than issuers that fall within the definition of “venture issuer” under securities legislation by virtue of issuing only debt or preferred shares). The proposal was intended to initiate a consultation with market participants with the goal of developing an approach to venture issuer regulation that better reflects the needs and expectations of venture issuer investors and makes regulatory compliance more manageable.

This initial proposal included some significant departures from the current governance and disclosure regime including: the consolidation of venture issuer governance and disclosure requirements into one national instrument; replacing interim MD&A and financial reports with a semi-annual report; streamlining annual disclosure into one core disclosure document; and modifying disclosure obligations for prospectuses and other offering documents. The proposal also intended to focus disclosure on information believed to be more relevant to venture issuers, such as annual biographical information about executive officers, comparative information regarding executive compensation and business development expenditures, and enhanced periodic reporting.

After a 14 month consultation process, the CSA has now published for comment rules and amendments that would introduce a new regulatory regime applicable to venture issuers.

Although there were different levels of support for each of the CSA's proposals, the consultations indicated strong overall support for pursuing a more tailored approach and for the development of a separate national instrument containing the main governance and disclosure obligations applicable to venture issuers.

The Proposed Rules

The CSA's proposed rules contain most of the significant aspects of the original proposal, while abandoning some of the more contentious ideas such as the introduction of a securities law standard of care and fiduciary duty applicable to directors and officers of venture issuers. The proposed rules are designed to eliminate certain disclosure obligations that may be of less value to venture issuer investors, provide supplemental disclosure thought to be more relevant, and make regulatory compliance more manageable.

Applicable securities laws define a "venture issuer" as a reporting issuer that does not have any of its securities listed or quoted on the Toronto Stock Exchange, an exchange registered as a "national securities exchange" under the *U.S. Securities and Exchange Act of 1934*, or a marketplace outside of Canada or the U.S. other than the AIM of the London Stock Exchange and the PLUS markets operated by PLUS Markets Group. The proposal would apply to all venture issuers other than debt-only issuers, preferred share-only issuers and issuers of securitized products – in other words the proposal is focused on public companies listed on a junior exchange. Debt-only, preferred share-only and issuers of securitized products would continue to be subject to the current venture issuer requirements if they meet the venture issuer definition in NI 51-102 *Continuous Disclosure Obligations*.

The principal features of the proposed rules are:

- **Consolidation of Venture Issuer Regulation:** Canada's current governance and disclosure regime already recognizes many important variations to

accommodate the differences between venture and senior issuers; however, these variations are scattered throughout the broader securities regulatory regime. The CSA's proposed rules would streamline and consolidate the main governance and disclosure requirements applicable to venture issuers into one new national instrument (NI 51-103 *Ongoing Governance and Disclosure Requirements for Venture Issuers*), providing venture issuers with one main reference point for securities compliance.

- **Annual Report:** The proposal introduces an annual report requirement that combines business, corporate governance and executive compensation disclosure, along with MD&A, annual financials and CEO/CFO certifications. The annual report would be the core disclosure document for venture issuers. It would also have the effect of broadening the concept of the CEO/CFO certifications, as the certifications would apply to all of the material in the annual report.
- **Mid-year Report:** In place of interim MD&A and financial reports, venture issuers would file a mid-year report that would include an interim financial report, the associated MD&A and CEO/CFO certifications.
- **Interim Filings:** The new rules would make interim MD&A and financial reports voluntary; however, if a venture issuer decided to file voluntary interim reports, it would be required to do so for a minimum of two years. This modification, and in particular the move away from the U.S. approach to quarterly filings, has been the most contentious aspect of the proposal. Although other respected jurisdictions (including the U.K. and Australia) have adopted semi-annual filings, there are concerns about diverging

from the U.S. practice; and those jurisdictions that have semi-annual filings do not differentiate between the senior and junior segments of the market.

- **Information Circular:** The proposed rules would streamline information circular disclosure to information directly pertaining to the matters to be acted upon at the meeting. This would include enhanced biographical information about directors and the relocation of corporate governance and executive compensation disclosure to the new annual report.
- **Business Acquisition Report (“BAR”):** BARs would be replaced with enhanced material change reporting, and the significance tests triggering financial statement disclosure would be increased from acquisitions that are 40% significant to acquisitions that are 100% significant.
- **Enhanced Material Change Reporting:** The proposal would broaden the scope of events caught by periodic reporting, including enhanced reporting of material related entity transactions and major acquisitions. Venture issuers will continue to have access to the confidential filing procedures for material change reports, except in respect of material related entity transactions.
- **Initial Public Offerings:** The disclosure required in a long-form prospectus would be conformed to the annual report disclosure. This would remove the requirement for business acquisition reports in connection with an offering (although financial statements would be required for reverse take-overs and acquisitions that are 100% significant), would eliminate three and nine month interim financial reports and associated MD&A, and would require only two years of audited annual financial statements.

- **Short-form Offerings:** Venture issuers would also be permitted to use their annual reports in place of an annual information form in order to qualify as short-form eligible under NI 44-101 *Short Form Prospectus Distributions*. As a result, venture issuers would essentially have the same access to the short form regime as senior issuers. This is an important feature of the proposed rules given the constraints venture issuers face in timing the market, the costs and time associated with preparing a long-form prospectus, and venture issuer reliance on capital market financing.

Venture issuers would also be subject to new substantive corporate governance requirements relating to conflicts of interest, related entity transactions and insider trading; with the proposed rules requiring that venture issuers will develop policies relating to these issues. Director and executive compensation disclosure would be more tailored and streamlined, including the introduction of a simplified compensation table. New audit committee composition requirements would be introduced that largely codify the current corporate law requirements. The proposed rules would not impact other core disclosure instruments including: NI 51-101 - *Standards of Disclosure for Oil and Gas Activities*; NI 43-101 *Standards of Disclosure for Mineral Projects*; NI 52-107 *Acceptable Accounting Principles and Auditing Standards*; NI 52-108 *Auditor Oversight*; and NI 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer*.

We recognize the importance of this development to the venture industry and the impact it could have on your business. We would be delighted to discuss these proposals further and to help you formulate any comments you may have for submission to the CSA. The comment period is open until October 27, 2011. Please feel free to contact [Bill Gilliland](#) at (403) 268-6826 or

[Dan Shea](#) at (403) 268-3060 at any time to further discuss this proposal.

Contact Us

For further information, please contact a member of our [National Securities | Corporate Finance Group](#).



[Home](#)>[Publications](#)>[Labor Law](#)>[Labor Law](#) | No.6 2011

Certain Provisions on Implementation of the PRC Social Insurance Law is Promulgated

The *Certain Provisions on Implementation of PRC Social Insurance Law* (hereinafter the "Implementation Provisions") was issued by the Ministry of Human Resources and Social Security on June 29, 2011. The Implementation Provisions is divided into 7 chapters and 30 articles covering basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance, management of social insurance funds and social insurance services, and was effective as of July 1, 2011.

In respect of basic pension insurance, the Implementation Provisions makes clear that if an individual's payment years for employee basic pension insurance do not reach 15 years in accumulation upon the individual's retirement, such individual may choose to continue paying employee pension insurance premiums until reaching 15 years, or have his/her employee pension insurance transferred into the new rural pension insurance system or the urban resident pension insurance system, or apply in writing for termination of his/her employee pension insurance relationship. In addition, if an individual dies, the balance in his/her individual employee basic pension insurance account can be inherited according to law.

In respect of work-related injury insurance, the Implementation Provisions stipulates clearly that if an individual works for more than one employer simultaneously, each employer shall pay work-related insurance premium for the individual separately. If a work-related injury occurs, the employer for which the individual was working at the time of the injury shall assume the responsibilities of work-related injury insurance according to law.

In respect of unemployment insurance, the Implementation Provisions stipulates that if an unemployed individual is re-employed after receiving unemployment insurance benefits and he/she continues to participate in unemployment insurance, his/her unemployment insurance premium payment years shall be counted from the start again; if an unemployed individual does not meet the requirements for receiving unemployment insurance benefits at the time of unemployment, his/her previous premium payment years shall remain effective; when he/she is re-employed afterwards and continues to participate in unemployment insurance, his/her previous premium payment years will continue to accumulate.

King & Wood: The *Social Insurance Law of the People's Republic of China* (hereinafter the "Social Insurance Law") which took effect on July 1, 2011, clarifies that the state establishes a comprehensive social insurance system which consists of basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance and maternity insurance, and safeguards the citizens' rights to obtain material assistance from the state and society when they get old, sick, injured for work, unemployed, and give birth, etc. The Implementation Provisions supplements and clarifies certain provisions in the Social Insurance Law and thus makes it more enforceable. To avoid legal risks, employers should pay attention to the Implementation Provisions and other supporting regulations of the Social Insurance Law which are released recently.

[Careers](#) | [Disclaimer](#) | [Privacy](#)



New Colombian Consumer Protection Regime

Thursday, 18 August 2011 00:00

NEWS

BRIGARD &
URRUTIA

Corporate Law

News Flash Número: 128

New Colombian Consumer Protection Regime

After nearly 30 years, the Colombian Congress is about to enact a new consumer protection regime aimed at updating the current Consumer Protection Statute (Decreto 3466 of 1982). The new regime strengthens the protection to the consumer rights as per international standards on consumer protection legislation. This new regime will come into force twelve months as of its enactment. During this transitional period, manufacturers, merchants, and consumers may prepare for the changes that the new regime entails. We present a summary of some of the new issues set forth by the new consumer protection regime:

- **Default warranty period for products/services:** Unless expressly set forth by the manufacturer or retailer, the new law provides the following default warranty periods of one (1) year for new products, three (3) months for second-hand products, and three (3) months for services involving the delivery of the goods for repair.
- **Product Liability:** The new regime sets forth rules on product liability in the case of defective products that cause damages to the health, life, or safety of a person. Among other rules, the new statute provides for new procedures to claim such damages and sets forth that manufacturers and retailers are strictly, jointly, and severally liable for damages arising out of defective products.
- **Protection against standard form contracts:** The new regime provides for a set of rules intended to protect consumers against unconscionable clauses in standard form contracts. Among others, producers, manufacturers, and retailers will be prevented from including clauses that allow them to unilaterally modify the contract or that entitle them to refrain from complying with their obligations.
- **Invalidity of abusive clauses:** The consumer protection regime sets forth a list of abusive and unconscionable clauses that will be void in a contract with a consumer. Some of the provisions classified as abusive are: clauses intended to limit the liability of the manufacturer or retailer below certain standards; clauses that entail a waiver by the consumer of the rights granted by the consumer protection rules; and clauses whereby the consumer agrees to submit the resolution of disputes arising out of the contract to an arbitration tribunal.
- **Right to rescind the contract:** Under certain circumstances, the new regime provides for the right of the consumer to rescind some types of contracts, such as sale of goods contracts and provision of services contracts in which the producer or supplier provides financing to the consumer; contracts for the purchase of timeshare units; sales advertised and perfected by means of non-traditional methods, among others.
- **E-commerce:** As to transactions conducted through online and electronic systems, the new consumer protection regime establishes that consumers will be entitled to order the bank to reimburse the payment made by online or electronic systems in several events, such as: (i) if the consumer was defrauded; (ii) if the transaction was not requested by the consumer; (iii) if the purchased product was not received by the consumer; (iv) if the delivered good does not correspond to the requested product; or (v) if the product is defective.
- **Sanctions:** The new regulation grants to the Superintendence of Industry and Commerce (SIC) the power to impose sanctions in case of violation of the new consumer protection regime. Among other penalties, the SIC may impose fines equivalent to up to 2,000 Colombian minimum monthly wages (approximately US\$600,000 in 2011).

For further information, please contact:

Alvaro Cala acala@bu.com.co
Richard Galindo rgalindo@bu.com.co
Giovanni Acosta gacosta@bu.com.co

Litigation, Arbitration and Employment Newsflash: Shareholder Granted Order to Inspect Listed Company Documents

This week, the Court of First Instance handed down its decision in the first application under s.152FA of the Companies Ordinance (the "Ordinance") in *Wong Kar Gee Mimi v Hung Kin Sang Raymond and Applied Development Holdings Limited* (HCMP 1602/2010). This was an application by a shareholder to inspect the records of a listed company. Hogan Lovells acted for the applicant.

Section 152FA was incorporated into the Ordinance through the Companies (Amendment) Ordinance 2004 and came into effect in July 2005. It essentially codifies and expands upon the common law right of a company's members to examine the company's records. The provision affords qualifying shareholders a statutory right of access to corporate information in order to protect their economic interests in the company.

Section 152FA provides that the court may make an order authorizing the applicant (or another on the applicant's behalf) to inspect any records of the specified corporation (s.152FA(1)). The court may only make an order under s.152FA(1) if the court is satisfied that (a) the application is made in good faith and (b) the inspection applied for is for a proper purpose (s.152FA(3)).

The court found in the applicant's favour and ordered production of some of the categories of documents sought. In coming to its decision the court considered the following questions of construction:

Do "good faith" and "proper purpose" constitute a single requirement?

The first question considered by the court was whether "good faith" and "proper purpose" created one single requirement. On this point, the court considered and rejected the Australian approach that the two requirements expressed a "composite notion"¹. The court preferred the approach taken in the recent unreported case of *Lehman & Co Management Limited v Effiscient Limited* (HCCW 377/2010), that "good faith" and "proper purpose" required two separate and independent tests. "Good faith" requires a subjective test of whether the applicant believes his purpose in applying for an inspection order is proper. "Proper purpose" requires an objective test of whether the court believes the circumstances are such that the inspection is applied for a proper purpose.

¹ *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Limited* (1989) 15 ACLR 151

www.hoganlovells.com

What constitutes a "proper purpose"?

In considering what constitutes a "proper purpose", the court noted that a member's right to inspection of company documents flows from his proprietary interest in the company and that therefore, a purpose would be proper if it is relevant to the applicant's status as a stockholder or reasonably related to the interest of a member or stockholder. Diverging from the view expressed in *Lehman & Co Management Limited v Effiscient Limited*, the court held that a "proper purpose" should not be confined only to circumstances where the applicant has a specific or personal right which can only be protected through the inspection of company records. It was considered that a "proper purpose" may also be established where an applicant has a credible belief that there has been corporate mismanagement which adversely affects the company or where the member seeks to ascertain the fair market value of his shareholding.

However, the court noted that s.152FA is not without limits and that a balance needs to be struck in order to prevent encroachment on managerial decisions by members of the company or the opening of floodgates to frivolous applications by disgruntled shareholders. The court has the discretion whether to make an inspection order or not, and should ultimately consider whether there is a sufficient prospect of anything useful resulting from the grant of such an order. An inspection order should not be used as a fishing expedition and an applicant would need to establish a reasonable case for investigation. In addition, the burden of proof of establishing good faith and proper purpose rests entirely with the applicant.

Do company records include records of the company's subsidiaries?

Section 152FA permits inspection of any "records of the specified corporation". The question arose as to whether and to what extent the member of the company was entitled to inspect records of the company's subsidiaries.

The court held that under s.152FA documents which the subsidiary had provided to the company (whether to enable the company to comply with its obligations arising under statute, delegated legislation, Stock Exchange Rules or for other commercial reasons) constitute records of the company for the purposes of the section. However, s.152FA does not cover a subsidiary's documents if the parent company does not have a copy or is not obliged and able to obtain a copy from the subsidiary at the time the order is made.

Conclusion

Section 152FA affords shareholders a potentially powerful right to obtain access to a company's documents. The decision, however, highlights an important limitation of s.152FA in that it does not permit the member a right to inspect documents of subsidiaries that have not otherwise become records of the holding company. In view of the fact that most listed companies in Hong Kong operate their business through subsidiaries, the effectiveness of the section may be limited.

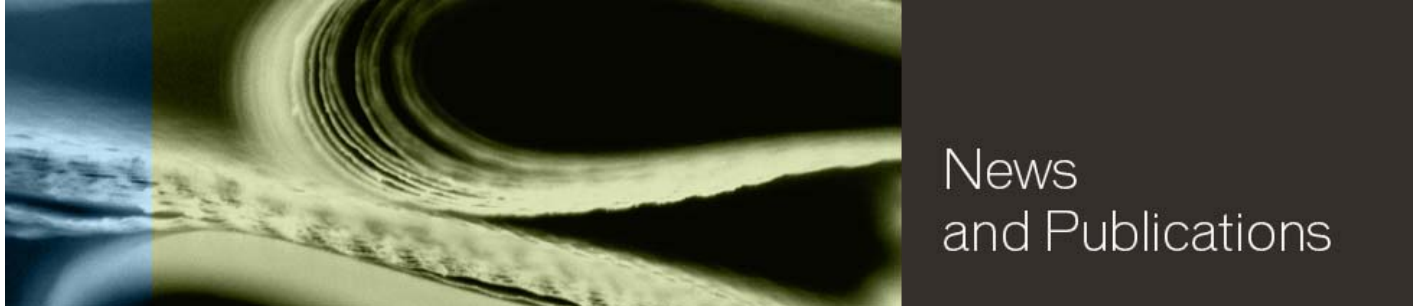
For more information, please contact a person mentioned below or the person with whom you usually deal:

Chris Dobby, Partner
chris.dobby@hoganlovells.com
+852 2840 5629

Allan Leung, Partner
allan.leung@hoganlovells.com
+852 2840 5061

Mark Lin, Partner
mark.lin@hoganlovells.com
+852 2840 5091

September 2011



NEWS DETAIL

18/08/2011

THE NEW REGULATION ON LARGE SELLERS OF PHARMACEUTICAL PRODUCTS

Citing the necessity to protect the community from the circulation of drugs and drug material that do not pass the quality, safety and benefit standard requirements, the Minister of Health issued in June 2011 her Regulation Number 1148/MENKES/PER/VI/2011 regarding Large Sellers of Pharmaceutical Products (the "Regulation")

The Regulation defines "large sellers of pharmaceutical products" (Pedagang Besar Farmasi or "PBF") as "legal entities which hold a permit for the procurement, storage, and distribution of drugs and/or drug ingredients in large amounts, in accordance with the provisions of the prevailing laws and regulations".

Under the Regulation:

- All PBFs must obtain a permit for their establishment from the Director General, and the establishment must be acknowledged by the Head of the Provincial Chief Medical Officer and Head of Food & Drug Institution;
- A PBF permit is valid for 5 years, with an extension possibility;
- A PBF may have branches that are acknowledged by the authorities; the validity period of the acknowledgment is in line with the validity of the permit of the principal PBF;
- PBFs and PBF Branches are obliged to submit a quarterly report to the Director General regarding their activities, but the Director General may ask for such a report from a PBF or a PBF Branch at any time.

This ministerial regulation came into force on June 28, 2011. (By: Evelyn Irmea Sinisuka)

CLIMATE CHANGE & EMISSIONS TRADING

FIRST ANNUAL REPORT ON THE NEW ZEALAND EMISSIONS TRADING SCHEME

The first annual report on the New Zealand Emissions Trading Scheme has been hailed by the Government as indicating that the scheme is “working as intended”, implementation has gone smoothly and New Zealand is on target to meet its Kyoto obligations. Elisabeth Welson and Joanna Lim comment on some of the key points from the report.

The Government’s positive spin on the Ministry for the Environment’s first annual report on the New Zealand Emissions Trading Scheme¹ has been greeted by cynicism from some, although this arguably just reflects entrenched positions around whether or not New Zealand should have any form of emissions trading scheme.

The overall message, however, of both the report and the Minister’s comments at the time of its release suggests that we can expect emissions trading to continue to be an important part of the New Zealand response to climate change.

This message is bolstered by comments about the potential for linkage between the future Australian emissions trading scheme and the New Zealand scheme. Release of a separate report by the Government appointed Review Panel (required by the scheme’s establishing legislation) has been delayed to allow the Review Panel to consider the Australian developments, and we expect to see it released in the next month.

Some of the key points from the Ministry for the Environment’s annual report are discussed below.

POPULARITY OF NZUs

Trading has clearly been embraced as the preferred approach to managing the costs of compliance with the New Zealand emissions trading scheme, with NZUs being the unit of choice. NZUs are units especially created under the scheme for New Zealand purposes (with some limited international transferability).

NZUs comprised nearly 95% of all units surrendered to the Government for the last compliance period, with a small number of internationally tradable CERs and NZ AAUs also surrendered, and less than 1% choosing the \$25 fixed price option offered under the transitional arrangements in the scheme. The \$25 fixed price option is currently available until the end of 2012. It will be interesting to see whether the Review Panel recommends extending this, or any of the other transitional aspects designed to soften the initial impacts of the scheme, beyond 2012.

FORESTRY

One of the features of the emissions trading scheme is the inclusion of forestry, allowing some post-1989 forests to earn

¹ (Hon Dr Nick Smith, the Minister for Climate Change media release 1 August 2011)

credits for forest growth (but likewise to be liable for deforestation).

Both the report and the Minister credit the scheme with turning what had been a deforestation trend around to a trend to afforestation. It should be borne in mind however that past deforestation decisions were often influenced by the need to deforest before the emissions trading scheme came into force, to avoid the loss of flexibility over land use.

Transfers of NZUs to the forestry sector have been lower than expected. However this position could change, as post-1989 forests have until 31 December 2012 to register under the scheme and pre-1990 forestry owners who are entitled to an allocation of NZUs as a one-off compensation for loss of land use flexibility have up until 30 November 2011 to apply.

TRANSPORT FUELS

One of the sectors most affected by the emissions trading scheme is the transport fuels sector.

The estimated impact of the emissions trading scheme on fuel prices expressed in the report is 3.5 cents per litre.

We understand that in the transport sector, there may be pressure on the Government to consider allowing more voluntary participation in the emissions trading scheme and the Review Panel's recommendations in this regard will be watched with particular interest. At the moment, only large purchasers of jet fuel can voluntarily opt into the scheme. Otherwise responsibility for fuel emissions rests with mandatory participants (fuel importers and refiners).

RENEWABLES

Putting a price on carbon in the economy is seen by the Government as "the most credible and lowest cost way to reduce emissions" and enable New Zealand to meet its Kyoto obligations at the least overall cost to the economy. With a price on carbon, the idea is that "green" technologies become more viable.

The report states that in the scheme's first year there have been 11 new resource consents granted for renewable power stations, whereas in the past decade, most new power plants have been fossil-fuelled.

Whether, and to what extent, the emissions trading scheme has been a major factor in an increase in the development of renewable energy to date is a subjective assessment. These projects typically take years of planning preceding the granting of resource consents and a number of these will have been in the pipeline prior to the emissions trading scheme.

ALLOCATIONS

One of the most frequently heard criticisms of emissions trading schemes is the impact such schemes can have on industries exposed to overseas competitors who do not face a price for carbon, and the negative effect this can have on the overall economy. This has been a particular concern for New Zealand business. The response in New Zealand has been to identify such "trade exposed emissions intensive" industries, and allocate NZUs to them. The rate of allocation reduces over time, to incentivise those industries to improve efficiency and reduce emissions.

The report records that rather than just capturing industrial activities as originally anticipated, Government allocations of units to emissions intensive trade exposed industry have also been made to other sectors that use a lot of energy, for example, hothouse growers for the export market. This is an example of effective industry lobbying.

The Government has also made a one-off allocation of units to holders of fishing quota in recognition of the impact of the emissions trading scheme on fishing businesses, as large users of transport fuels.

EMISSIONS TRADING SCHEME REVIEW PANEL

The scheme legislation requires a formal review of the operation of the scheme to be undertaken in 2011. This review got underway at the start of the year. The Review Panel's report was provided to the Government just prior to the announcements in Australia around the Australian proposals for carbon pricing. It has not yet been publicly released as the Government has asked the Review Panel to update its report to take account of the Australian announcements. The outcome of the review and final report are expected to be announced sometime in September 2011.

CONTACT DETAILS



ELISABETH WELSON – PARTNER

T. 04 924 3400 M. 029 924 3400 E. elisabeth.welson@simpsongrierson.com



JOANNA LIM – SENIOR ASSOCIATE

T. 03 365 0958 M. 021 359 407 E. joanna.lim@simpsongrierson.com



CRAIG NELSON – SENIOR ASSOCIATE

T. 09 977 5185 M. 021 918 309 E. craig.nelson@simpsongrierson.com

A SIMPSON GRIERSON PUBLICATION

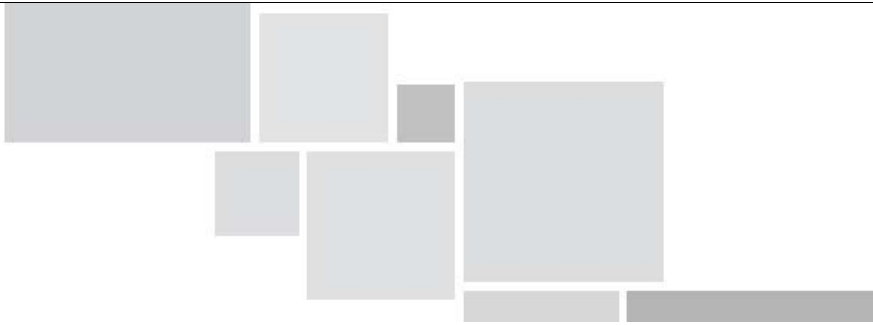
This newsletter is produced by Simpson Grierson. It is intended to provide general information in summary form. The contents do not constitute legal advice and should not be relied on as such. Specialist legal advice should be sought in particular matters. © Copyright Simpson Grierson 2011.

KEY POINTS OF AMENDMENTS TO COMPANY ACT

©Julia K.F. Yung

The latest amendments to the Company Act took effect on July 1, 2011. The key points of these amendments are summarized as follows:

- If a company is ordered by a court, in a final judgment, to discontinue the use of its name for reasons such as that its use constitutes a trademark violation, it should change its name and register its new name within six months of the date of the final judgment. If the company fails to do so even after the authorities instruct it to do so within another given timeframe, the authorities may issue an order to dissolve the company (Article 10).
- If a public issuing company intends to revoke its public issuing status, a special resolution thereon must be adopted at a shareholders meeting (Article 156).
- The restrictions that a company may redeem its special shares only with its earnings or the consideration received from issuing new shares are lifted (Article 158).
- After a company buys back its own shares for transfer to its employees, the company may prohibit its employees from transferring such shares to third parties within a period of up to two years of receiving such shares (Article 167-3).
- In addition to cash, a company may return the reduced capital to its shareholders in other forms of assets (Article 168).
- A public issuing company may distribute its shareholders meeting minutes by way of making a public announcement, regardless of how many shares that a shareholder holds (Articles 177 and 230).
- Subject to the consent of the party who is entitled to receive the notice for calling a board meeting, such notice can be delivered by means of electronic transmission (Article 204).
- A company may, pursuant to a special resolution adopted at a shareholders meeting, issue new shares to its employees with restricted rights (Article 267).



For more information, please contact:

Richard Josephson
+1.713.229.1460

Travis Sales
+1.713.229.1378

Stephen Tipps
+1.713.229.1543

LIFE SCIENCES UPDATE - AUGUST 29, 2011

Texas Supreme Court Clarifies Requirements for Proving Causation with Clinical Trial Evidence

In a significant win for pharmaceutical and other defendants in Texas product liability cases, the Texas Supreme Court on Friday, August 26, 2011 issued its opinion in *Merck & Co. v. Garza*, reaffirming its landmark decision in *Merrill Dow Pharmaceuticals, Inc. v. Havner*, in which the court set forth requirements for determining whether epidemiological evidence is sufficiently scientifically reliable to prove causation. The *Garza* opinion provides welcome clarification that *Havner* establishes bright-line, minimum criteria for reliability that apply to observational epidemiological studies and clinical trials alike.

The case arose from the April 2001 death of Leonel Garza, a 71-year-old heart patient who suffered a fatal heart attack while allegedly taking a 30-day prescription of Vioxx for left arm pain. Mr. Garza's family sued Merck in Starr County, Texas, and secured a \$7.75 million judgment. The San Antonio Court of Appeals rejected Merck's arguments concerning the scientific reliability of the Garzas' expert opinion evidence that Mr. Garza's short-term Vioxx use was a producing cause of his death but remanded the case for a new trial based on jury misconduct.

Merck petitioned the Texas Supreme Court for review, asking the court to clarify certain issues arising under *Havner*. Specifically, Merck asked the court to hold that its *Havner* causation requirements—that, as a matter of law, causation cannot be established with epidemiological studies unless the plaintiff presents evidence of at least two statistically significant studies showing a greater-than-doubling of the risk at the same or lesser dose and duration as the plaintiff's—constitute minimum requirements that must be satisfied in every case. Merck also asked the court to hold that the *Havner* requirements apply not only to observational epidemiological studies, like those at issue in *Havner*, but also to clinical trials, which generally are more reliable.

The Texas Supreme Court agreed with Merck, reversing the court of appeals' judgment and rendering judgment in Merck's favor. The court held expressly, for the first time, that *Havner's* requirements apply to all epidemiological evidence, including clinical trials. The court recognized that the controlled, experimental, and prospective nature of clinical trials makes them more reliable than retroactive, observational studies but concluded that clinical trials still are only capable of providing indirect proof of causation. Accordingly, clinical trials must satisfy *Havner's* requirements for such indirect proof.

The court also confirmed that *Havner's* requirements for epidemiological evidence are bright-line, minimum criteria. A plaintiff relying on epidemiological evidence as proof of general causation must come forward with at least two studies showing a statistically significant doubling of the risk at essentially same dose and duration as the plaintiff. Only if the studies meet these threshold requirements of reliability may a court go on to conduct the secondary reliability inquiry that examines the soundness of the study's findings using the totality of the evidence test. The law is now clear that two statistically significant studies showing a doubling of the risk are necessary but may not be sufficient if the totality of the evidence indicates that reliable conclusions about causation cannot be drawn from the studies.

Richard Josephson and Travis Sales, trial partners in the Houston office of Baker Botts, were lead trial counsel for Merck, and Stephen Tipps, an appellate partner in the Houston office of Baker Botts, was lead appellate counsel.

The materials in this document are made available by Baker Botts L.L.P. for informational purposes only and are not legal advice. The transmission and receipt of information contained in the document do not form or constitute an attorney-client relationship. If these materials are inconsistent with the rules governing attorney communications in a particular jurisdiction, and the materials result in a client contact in such jurisdiction, Baker Botts may be prohibited from assuming representation of the client contact.

Under the rules of certain jurisdictions, this communication may constitute 'Attorney Advertising'.

Attorney Advertising. © 2011 Baker Botts LLP. All rights reserved.

Baker Botts LLP

CMS Announces Bundled Payment Demonstration Project

08.31.11

By Robert G. (Bob) Homchick and Adam D. Romney

Last week the Centers for Medicare and Medicaid Innovation (CMMI) announced “The Bundled Payments for Care Improvement” initiative and published requests for applications to participate in the program. CMMI, a new agency created by the 2010 Affordable Care Act, established the basic parameters for four different bundled payment models but offers flexibility to participants to determine which services will be bundled together and how to allocate payments among participating providers. This means nimble providers—who develop proposals that are accepted—have an opportunity to try structures that otherwise might entail too much legal risk.

The first three bundled payment models are retrospective payment arrangements where providers are paid a discounted Medicare fee-for-service rate. Historical data would be used to set a target price for an episode of care and if the payments are less than the target the providers may share in the savings. Model 4 is based on prospective payments. Providers may choose to implement more than one model. Notably, the proposals specifically contemplate that gainsharing arrangements may be incorporated.

Model 1. The episode of care is an inpatient stay in a general acute care hospital. The hospital will be paid a discounted IPPS rate and physicians will be paid separately under the fee schedule. The discount rate imposed by the program starts at 0% in the first six months and then rises to 2% in the third year. The hospital and physicians would be able to share in any savings achieved.

Model 2. The episode of care involves an inpatient stay and post-acute care for a minimum of 30 or 90 days after discharge (at the provider’s election). The “bundle” would include physicians’ services, post-acute care services, related readmissions and other services proposed by the provider such as clinical laboratory services, durable medical equipment, and Part B drugs. The minimum discount to CMS will be 3% for the 30- to 89-day period after discharge, and 2% on and after day 90. At the end of the episode of care, the participating providers would be entitled to share in the amount by which total payments were less than the target price. However, if total payments exceed the target price, the provider will be responsible for paying the overage to CMS.

Model 3. The episode of care begins the day the patient is discharged from the hospital and ends no sooner than 30 days after discharge. The bundled payment methodology is structured as in Model 2. CMS, however, did not specify a minimum discount rate.

Model 4. This model contemplates *prospective* payment for an inpatient stay. CMS proposes to pay a single fixed amount for all services by all providers during the stay. The hospital (or some designee) would pay the physicians and all other providers out of the bundled payment and submit “no pay” claims to Medicare for record-keeping purposes. The minimum discount to CMS would be 3% of projected total costs for the episode of care.

All of the bundled payment models contemplate some sort of waiver of restrictions imposed by the federal Stark, anti-kickback and gainsharing civil money penalty laws. In fact, in the initiative’s “Frequently Asked Questions,” also published last week, the agency specifically highlights the opportunities for gainsharing. Historically, gainsharing programs have been severely restricted by the existing fraud and abuse laws. It appears that the precise scope of the waiver will be addressed in the award if CMS accepts a provider’s proposal.

To participate in any of the proposed bundled payment models, providers must submit a nonbinding letter of intent and application to CMMI. In addition to establishing the episode and time period of care, providers will also be required to implement quality improvement programs and to report specific quality metrics to CMS. Providers interested in the program should note that all bundled payment proposals are required to preserve Medicare patients’ right to seek care from the doctor or hospital of their choice.

The application deadlines are slightly different depending on which model the provider would like to participate in. For Model 1, a letter of intent must be submitted by Sept. 22, 2011, and a completed application is due by Oct. 21, 2011. Models 2, 3, and 4 require a letter of intent by Nov. 4, 2011, and completed applications must be submitted by March 15, 2012. The applications for each of the four models are available on the CMMI website: <http://innovations.cms.gov/areas-of-focus/patient-care-models/Bundled-Payments-%20Care-Improvement-Application.html>.

The following matrix summarizes the key elements of the four bundled payment models:

	MODEL 1: Inpatient Stay Only	MODEL 2: Inpatient Stay plus Post-Discharge Services	MODEL 3: Post-Discharge Services Only	MODEL 4: Inpatient Stay Only
Services Included in Bundle	Inpatient hospital services	Inpatient hospital services Physician services Related post-acute care services Related readmissions Other services defined in the bundle	Post-acute care services Related readmissions Other services defined in the bundle	Inpatient hospital services Physician services
Discount to Government	To be proposed by applicant CMS requires minimum discounts increasing from 0% in first six months to 2% in 3rd year	To be proposed by applicant CMS requires minimum discount of 3% for 30-89 days post-discharge episode, and 2% for episodes of 90 days or longer	To be proposed by applicant	To be proposed to applicant Subject to minimum discount of 3% Larger discount for MS-DRGs in ACE Demonstration
Payment from CMS to Providers	Acute care hospital: IPPS payment less pre-determined discount Physician: Traditional fee schedule payment (not included in episode or subject to discount)	Traditional fee-for-service payment to all providers and suppliers, subject to reconciliation with predetermined target price	Traditional fee-for-service payment to all providers and suppliers, subject to reconciliation with predetermined target price	Prospectively established bundled payment to admitting hospital Hospitals distribute payments from bundled payment
Prospective or Retrospective	Retrospective	Retrospective	Retrospective	Prospective
Deadlines for	LOI by Sept. 22,	LOI by Nov. 4, 2011	LOI by Nov. 4,	LOI by Nov. 4, 2011

Letters of Intent and Applications	2011 Completed application by Oct. 21, 2011	Completed application by March 15, 2012	2011 Completed application by March 15, 2012	Completed application by March 15, 2012
Duration	Bundled care agreements will include a performance period of three years, with the			

These new bundled payment models create a window of opportunity for experimenting with gainsharing and other types of innovative payment structures that have previously been plagued by regulatory limitations. If you are interested in learning more about the opportunities created by the Bundled Payments for Care Improvement initiative, contact Bob Homchick or your usual Davis Wright Tremaine lawyer.

Disclaimer

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

Medical Device Alert

12 August 2011

See note below about Hogan Lovells.

FDA issues draft guidance regarding in vitro companion diagnostic devices, an area of device regulation marked by ambiguity

The Food and Drug Administration (FDA or "the Agency") announced on 14 July the publication of an anticipated draft guidance on in vitro companion diagnostic devices. The draft guidance document follows the Agency's 2005 concept paper, which outlined FDA's preliminary views on the appropriate regulatory framework for companion diagnostics.¹ Stakeholders sharply criticized the 2005 concept paper as proposing unrealistic and inflexible regulatory requirements. In the draft guidance, FDA again outlines a policy position that if safe and effective use of a therapeutic product depends on a diagnostic device, then FDA generally will require approval or clearance of the diagnostic device at the same time that FDA approves the therapeutic product. That said, the draft guidance does allow for exceptions to the general rule of concurrent approval.

Proposed definition of "IVD companion diagnostic device": The draft guidance document defines an "IVD companion diagnostic device" as one that "provides information that is essential for the safe and effective use of a corresponding therapeutic product." It is important to note that the proposed definition excludes devices that provide useful information regarding a product's use, if that information is not a "determining factor" in that therapeutic product's safety and efficacy. This proposed definition draws a regulatory distinction between tests that are intended as adjunctive tools in treatment decision-making (i.e., tests that are not "companion diagnostics") and those tests that are critical in determining best responders or identification of patients at risk for serious adverse reactions to a drug/biologic (i.e., companion diagnostics).

An IVD companion diagnostic device that supports the safe and effective use of a particular therapeutic product may be: (1) a novel IVD device (i.e., a new test for a new analyte), (2) a new version of an existing device developed by a different manufacturer, or (3) an existing device that has already been approved or cleared for another purpose.



Contacts

Jonathan S. Kahan

Partner, Washington, D.C.
jonathan.kahan@hoganlovells.com
+1 202 637 5794

Susan D. Tiedy-Stevenson

Senior Director of Regulatory Sciences,
Washington, D.C.
susan.tiedy-stevenson@hoganlovells.com
+1 202 637 5459

Kelliann H. Payne

Associate, Washington, D.C.
kelliann.payne@hoganlovells.com
+1 202 637 6887

Visit us at

www.hoganlovells.com

Proposed review and approval process: For a new device, the Agency strongly recommends that a therapeutic product and its corresponding diagnostic device be developed and approved contemporaneously. According to the draft guidance, novel therapeutic products whose safe and effective use requires the results of a diagnostic test will not be approved unless FDA has determined that the IVD is "properly validated and meets the applicable standard for safety and effectiveness or for substantial equivalence for the use indicated in the therapeutic product's labeling."

While FDA expects that a companion diagnostic device and the associated therapeutic product will be approved at the same time, there are certain circumstances in which the Agency might approve a therapeutic product before the companion diagnostic designated in its labeling is cleared or approved. Specifically, FDA indicated that it may approve a therapeutic product that is intended to treat a serious or life-threatening condition for which no alternative treatment exists and where the benefits of the use of the therapeutic product far exceed the risks that may be presented with use of that product without an approved or cleared companion IVD.

In addition, the Agency states that it may approve a revision to the labeling of an already approved therapeutic product when it is necessary to include use of an unapproved or uncleared companion diagnostic device to address a serious safety issue. The draft guidance explains that the review and approval of a companion IVD and the corresponding therapeutic product will be a collaborative effort of the applicable offices at FDA. Specifically, approval via a premarket approval application or clearance via a 510(k) premarket notification of the diagnostic device will be subject to the applicable medical device regulations and approval of the therapeutic product will be subject to relevant drug or biologic product regulations.

Importantly, the proposed guidance notes that studies of companion diagnostics used to make critical treatment decisions (e.g., patient or treatment decisions) likely will be significant risk devices that will require an Investigational Device Exemption (IDE) unless the device is used in a matter already cleared or approved by the Agency. FDA states in the draft guidance that the agency "strongly encourages" sponsors to request meetings "with both relevant device and therapeutic product review divisions as early in development as possible."

Labeling: The draft guidance outlines labeling requirements for therapeutic products and their associated companion tests. In general, the draft guidance indicates that FDA will require companies to list the type of companion IVDs in a therapeutic product's label, rather than the brand name of the test, to "facilitate the development and use of more than one approved or cleared" test for a specific indication. With regard to a companion IVD, the diagnostic test's label will have to list the specific drug/biologic or therapeutic class for which the diagnostic device is intended to be used. Any change in a diagnostic test's intended use (i.e., if the sponsor wants to market the test in a different disease setting or to determine response to other drugs/biologics) likely will require a new marketing application.

Laboratory developed tests: On a related note, the draft guidance document does not specifically address FDA's regulation of laboratory developed tests (LDTs). While it has been the Agency's position that CLIA (Clinical Laboratory Improvement Amendment) laboratories that develop LDTs are subject to FDA oversight, this is still an area of ambiguity without any clear guidance from the Agency. As such, FDA has not provided any guidance to industry regarding the specific regulatory requirements that will be applied to LDTs, including those that are offered by laboratories as a service in providing information about the safe and effective use of any therapeutic products. There is precedent for FDA allowing the labeling of therapeutic products for use with LDTs that have not been cleared or approved by FDA, but the draft guidance is unclear regarding whether FDA will allow this practice to continue.

Conclusions: The draft guidance has been long-awaited by industry, which has sought guidance in this area of device regulation. Thus far, the Agency has been working with sponsors of therapeutic product/diagnostic test combinations on a case-by-case basis, and based on the initial draft guidance document, it appears likely to continue to do so. Dr. Elizabeth Mansfield, Ph.D., Director of Personalized Medicine in the Office of In Vitro Diagnostics has been quoted as saying that the Agency is "not expecting to change [its] approach. This guidance is intended to let stakeholders know what [the Agency's] favored approach is so that their expectations are matched to the regulatory approach."²

The industry and the Agency have acknowledged that companion diagnostics are critical to the

advancement of personalized medicine. However, given the different timelines associated with the development of drugs/biologics versus diagnostics, the general concurrent approval requirement outlined in the draft guidance could add significantly to the time required for commercialization of products (both drugs/biologics and diagnostics).

Public comments: FDA has opened a public docket for comments on this draft guidance and will be accepting comments until 12 September 2011. Stakeholders are encouraged to submit comments regarding this draft guidance. Electronic comments on Docket No. FDA-2011-D-0215 can be submitted at www.regulations.gov. Written comments can be submitted to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Room 1061, Rockville, MD 20852.

¹ The Food and Drug Administration, *Drug-Diagnostic Co-Development Concept Paper* (Draft—Not for Implementation) (April 2005).

² See Philippidis, A. Concurrent Dx/Rx Review Will Require More Collaboration at FDA and More Outreach by Industry. *Genetic Engineering and Biotechnology News*, 22 July 2011.

Note

"Hogan Lovells" or the "firm" refers to the international legal practice comprising Hogan Lovells International LLP, Hogan Lovells US LLP, Hogan Lovells Worldwide Group (a Swiss Verein), and their affiliated businesses, each of which is a separate legal entity. Hogan Lovells International LLP is a limited liability partnership registered in England and Wales with registered number OC323639. Registered office and principal place of business: Atlantic House, Holborn Viaduct, London EC1A 2FG. Hogan Lovells US LLP is a limited liability partnership registered in the District of Columbia with offices at 555 13th Street, NW, Washington, DC 20004, USA.

Disclaimer

This publication is for information only. It is not intended to create, and receipt of it does not constitute, a lawyer-client relationship.

So that we can send you this email and other marketing material we believe may interest you, we keep your email address and other information supplied by you on a database. The database is accessible by all Hogan Lovells' offices, which includes offices both inside and outside the European Economic Area (EEA). The level of protection for personal data outside the EEA may not be as comprehensive as within the EEA. To stop receiving email communications from us please [click here](#).

The word "partner" is used to refer to a member of Hogan Lovells International LLP or a partner of Hogan Lovells US LLP, or an employee or consultant with equivalent standing and qualifications, and to a partner, member, employee or consultant in any of their affiliated businesses who has equivalent standing. Rankings and quotes from legal directories and other sources may refer to the former firms of Hogan & Hartson LLP and Lovells LLP. Where case studies are included, results achieved do not guarantee similar outcomes for other clients.

New York State Notice: Attorney Advertising.

© Hogan Lovells 2011. All rights reserved.

The Next Great American Land Rush

By Robert J. Bell, Esq.*

In the Oklahoma Land Rush, the U.S. Government opened up more than two million acres of land for homesteading on a “first come, first served” basis. When the firing of a cannon officially started the rush at high noon on April 22, 1889, an estimated 50,000 people rushed to stake their claims. Within 24 hours, the entire area had been claimed. Fortunes were made.

The U.S. Government sponsored another kind of land rush in the early 1990’s, through the Resolution Trust Corporation (RTC) which sold off government assets seized from failing Savings & Loan Banks. Fortunes were made.

Following the U.S. financial crisis of 2008, and the seizure of failing banks by the Federal Deposit Insurance Corporation (FDIC), another rush was started and still continues with the sale of mostly commercial real estate assets and loan portfolios by the FDIC at rock bottom prices and often with “loss share” guaranties given by the FDIC. Fortunes are being made.

And now, the U.S. Government is considering another real estate rush opportunity. This new rush will be aimed at transferring some of the estimated 250,000 residential properties (one-to-four units) that are currently Real Estate-Owned (REO) assets of Fannie Mae, Freddie Mac and the Federal Housing Administration, the three agencies that hold a majority of America’s defaulted residential real estate mortgages. The dispositions of REO assets (the “REO Asset Dispositions”) will be a massive undertaking.

In connection with the REO Asset Dispositions, the U.S. Federal Housing Finance Agency (FHFA), in consultation with the U.S. Department of the Treasury and the U.S. Department of Housing and Urban Development, has issued a Request for Information (RFI). The purpose of the RFI is to solicit ideas “for sales, joint ventures, or other strategies to augment and enhance” the REO Asset Dispositions. As stated in the RFI, the “agencies are exploring alternatives that will facilitate the current and future disposition of REO [Assets], improve loss recoveries compared to individual retail REO sales, help stabilize neighborhoods and local home values, and where feasible and appropriate, improve the supply of rental housing.”

Final regulations on the REO Asset Dispositions program will probably not be available until early next year. What is likely to emerge is something similar to the previous RTC and FDIC disposition programs, but with a residential twist. That twist would be to remove most of the REOs from the “for sale” market to the “for rent” market to help the residential market recover—and then sell the REO Assets at, hopefully, increased prices when that recovery occurs. The stated goals are:

- reduce the REO portfolios in a cost-effective manner;
- reduce average loan loss severities now occurring on individual distressed property sales;

* Robert Bell is a partner in Luce, Forward, Hamilton & Scripps, LLP. He specializes in complex real estate development and financing transactions.

- address property repair and rehabilitation needs;
- respond to economic and real estate conditions in specific geographic areas;
- assist in neighborhood and home price stabilization efforts; and
- determine disposition strategy for individual properties, whether sale, rental or, in certain instances, demolition.

The U.S. Government anticipates “that *joint ventures or similar structures* may be the most cost effective” way to accomplish the objectives of the REO Asset Dispositions. It is likely the U.S. Government will want to hold an interest in any such joint venture as a limited partner to avoid the losses currently being sustained from sales at tremendously depressed prices. “Loss share” guaranties will be offered as incentives in order to “involve investment of private capital.” In return, the private investors will be expected to manage the portfolios including property maintenance, rehabilitation, renting and sale activity.

The required holding periods for investors will probably be in the range of five to ten years in order to give the housing market an opportunity to improve. During that time, the acquired properties will have to be rented to the ever growing population of prior homeowners who have lost their homes to foreclosure. It is believed that renting the properties, instead of selling them to individual homeowners, will help to stabilize prices in the residential market with the added benefit of increasing the stock of affordable rental units. As stated in the RFI:

“A specific goal is to solicit ideas from market participants that would maximize the economic value that may arise from pooling the single-family REO properties in specified geographic areas. Under the management of a third-party, a joint venture or some other structure may respond to local economic and real estate conditions more effectively than individual sales. For instance, there may be certain metropolitan areas (or some narrower geographic designation) with a substantial number of REO properties and a strong rental market. In such locales economic value in REO disposition may be enhanced (and real estate markets begin to be stabilized) by turning a large number of REO properties into rental housing.”

The REO Asset Disposition portfolios will be large. Each will probably include at least US\$50,000,000 in residential properties. The returns may be significant as the market improves, but it will take quality real estate management skills to produce the best returns. Managing a large portfolio of one-to-four residential units as rentals will be a challenge. There are, however, a number of real estate management companies already managing large portions of the REOs currently held by Fannie Mae, Freddie Mac and the Federal Housing Authority.

Investor Funds with their own capital and experienced residential management companies will surely team together in order to be at the head of the line when the cannon is again fired. For investors who are interested in this next great American land rush, now is the time to get informed and get involved. Fortunes will be made.

WSGR ALERT

SEPTEMBER 2011

NEW CALIFORNIA SECURITY BREACH NOTIFICATION REQUIREMENTS TO TAKE EFFECT JANUARY 1

California recently amended its security breach notification law with changes that will take effect on January 1, 2012. The new law impacts owners and holders of personal information belonging to California residents. In 2002, California became the first state to enact security breach notification legislation with Cal. Civ. Code §§ 1798.29 and 1798.82 (effective July 1, 2003). Since then, a total of 46 states have enacted similar legislation, often using the California law as a model. Senate Bill 24 (SB-24)¹ amends Cal. Civ. Code §§ 1798.29 and 1798.80, mandating additional content for compulsory security breach notifications sent to California residents. In addition to new content requirements, the recent legislation requires notification of the California Attorney General in some instances.

History of California Breach Notification Law and Recent Changes

Prior to SB-24, California law required any owner or licensor of computerized data that includes personal information² belonging to a California resident to notify that California resident in the event that his or her personal information is, or is reasonably believed to be, acquired by an unauthorized person.³ Subject to very limited exceptions, any entity in possession of a California resident's personal information that it does not own must, upon discovering a breach of the security of such personal information, notify the owner so that it may notify affected California residents.⁴ Beyond requiring that a notice be sent, the law mandated only that it be sent in writing (with limited exceptions) and expeditiously, without unreasonable

delay, consistent with legitimate law enforcement needs and any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system on which the personal information resided.

SB-24 conforms California law to many of the more rigorous requirements that other states have added to the original California law model. For example, when it becomes effective on January 1, 2012, California law will require that electronic notification be sent to the California Attorney General when notification is sent to more than 500 California residents affected by the same security breach incident.⁵ Further, all notifications must include specific details, including the date or approximate date of the security breach, the date of the notification, a

¹ Senate Bill 24 is available for viewing at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_24_bill_20110819_enrolled.pdf.

² "Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted:

(1) Social Security number;

(2) Driver's license number or California Identification Card number;

(3) Account number, or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account;

(4) Any information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a healthcare professional; or

(5) An individual's health insurance policy number or subscriber identification number, any unique identifier used by a health insurer to identify the individual, or any information in an individual's application and claims history, including any appeals records.

Cal. Civ. Code. §§ 1798.29(g), 1798.82(h).

³ Cal. Civ. Code §§ 1798.29(a), 1798.82(a).

⁴ Cal. Civ. Code §§ 1798.29(b), 1798.82(b).

⁵ Cal. Civ. Code §§ 1798.29(e), 1798.82(f).

⁶ Cal. Civ. Code §§ 1798.29(d)(2), 1798.82(d)(2).

⁷ Cal. Civ. Code §§ 1798.29(d)(2), 1798.82(d)(2).

Continued on page 2...

New California Security Breach Notification Requirements . . .

Continued from page 1...

general description of the breach, what types of personal information were subject to the breach, and whether notification was delayed by law enforcement investigation.⁶

Additionally, the amended California statute requires that the notification include the toll-free telephone numbers and addresses of the major credit reporting agencies if the breach exposed a Social Security number or California Identification Card number.⁷ (The amended California statute also permits, but does not require, certain information that is required to be included in notices under certain other state laws.⁸)

Implications

The new legislation highlights the importance of a comprehensive information governance plan, including security incident identification and action preparation. These latest changes to the pathbreaking California law highlight

the constant and continuing changes to the law in this area and illustrate several compliance obligations arising under the multitude of state laws that may apply to any given data breach incident. While efforts to enact a single comprehensive federal breach notification statute are ongoing, no such law has been passed.⁹

Wilson Sonsini Goodrich & Rosati attorneys regularly assist clients with all aspects of their privacy and information governance needs, including incident response, remediation, and avoidance. For additional information about the new California legislation or any related questions, please contact Lydia Parnes at (202) 973-8801, Seth Silber at (202) 973-8824, Gerry Stegmaier at (202) 973-8809, Matthew Staples at (206) 883-2583, or Wendy Devine at (858) 350-2321.



Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

This WSGR Alert was sent to our clients and interested parties via email on September 7, 2011. To receive future WSGR Alerts and newsletters via email, please contact Marketing at wsgr_resource@wsgr.com and ask to be added to our mailing list.

This communication is provided for your information only and is not intended to constitute professional advice as to any particular situation. We would be pleased to provide you with specific advice about particular situations, if desired. Do not hesitate to contact us.

650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300 Fax: (650) 493-6811
email: wsgr_resource@wsgr.com

www.wsgr.com

© 2011 Wilson Sonsini Goodrich & Rosati,
Professional Corporation
All rights reserved.

⁶ The amended California statute specifies that notices may, at the discretion of the agency, person, or business making the notification, include information about what the agency, person, or business has done to protect individuals whose information has been breached, and advice on steps that the person whose information has been breached may take to protect himself or herself. Cal. Civ. Code §§ 1798.29(d)(3), 1798.82(d)(3). This information is required to be included under certain other state data breach notification laws. *See, e.g.*, N.C. Gen. Stat. § 75-65.

⁸ *See, e.g.*, S. 1207: Data Security and Breach Notification Act of 2011; S. 1408: Data Breach Notification Act of 2011; H.R. 1841: Data Accountability and Trust Act (DATA) of 2011; H.R. 2577: SAFE Data Act.



<< Left
Thom Thi Mai Nguyen
Attorney-at-Law
maithom.n@tillekeandgibbins.com

<< Right
Dzung Thi Thuy Nguyen
Consultant
thuydung.n@tillekeandgibbins.com

Legal Developments in Mobile Services and Mobile Phone Industry

Vietnam has seen a booming mobile services market. The mobile penetration rate has grown exponentially from just over 20% in 2006 to 80% by 2008. Vietnam has surpassed many of its peers in the sector after its WTO accession in 2007, and the introduction of Law on Telecommunication in 2009 has been an essential development. Just one year after passing the Law on Telecommunication, the government issued the Decree No. 25/2011/ND-CP (Decree 25) as an implementing regulation, which provides some groundbreaking changes to the regulation of the telecommunication sector.

Decree 25 – Telecom Sector Competition

The promotion of competition in Vietnam has helped break down the mobile market into three leading players: Viettel (33.82% market share), Mobiphone (27.15% market share), and Vinaphone (27.19% market share). Article 3 of Decree 25 introduces a new restriction that intends to further fuel competition in the telecom sector. Under the restriction, any entity or individual that already owns more than 20% of the charter capital or shareholding of a telecom enterprise is prohibited from holding more than 20% of the charter capital or shareholding in another enterprise in the same telecom services market.

This provision directly affects the biggest telecom player, Vietnam Post and Telecommunication (VNPT), which currently owns 100% capital of both Mobiphone and Vinaphone. Decree 25 is effective from June 1, 2011, but VNPT has not yet submitted its plan of action to the Ministry of Information and Communication (MIC). VNPT has the option of putting either Mobiphone or Vinaphone through an equitization process, or merging the two into one entity. If VNPT were to opt for the latter, it would undermine competition, as the merged entity would become a market leader by a large margin. It is more likely to go through with equitization, but the question is whether foreign telecom giants such as Orange France Telecom, which has persistently attempted to buy shares of Mobiphone in the past, will benefit from this regulation.

Decree 25 – Capital Requirements

Although previous regulations have set requirements for registered capital, Decree 25 for the first time outlines clear requirements for minimum legal capital and minimum level of committed capital for telecom players. The minimum legal capital varies depending on the service provided, ranging from VND 5 billion (approximately USD 240,000) for service with landline fixed telecom without a radio frequency band in a network of a province or city under central authority, to VND 500 billion (approximately USD 24 million) for service with landline mobile telecom network using a radio frequency band. The minimum level of committed investment is typically three or five times the minimum legal capital. Furthermore, Decree 25 requires each registering enterprise to deposit a fee of 5% of the level

of committed investment in the first three years, but not less than VND 3 billion into an escrow account with MIC before the telecom license is issued.

The provisions ensure that companies investing in the telecom sector are financially sound by setting a minimum legal capital, especially for entities providing services with facility-based infrastructures. However, since the regulation defines telecom services quite broadly, companies providing text message and e-mail services via mobile applications will fall under the scope of this regulation. The development of mobile applications with innovative user interfaces provides new ground for small companies to enter the market, yet imposing such a legal capital requirement may restrict market entry and hinder innovation in this area.

Decree 25 – Foreign Enterprises

Decree 25 also provides clear regulation of foreign enterprises with conditions consistent with WTO commitments. A foreign entity may form a joint venture or business cooperation contract with a Vietnamese entity to provide telecom services without network infrastructure. Where a foreign entity wishes to provide telecom services with network infrastructure, it must form a joint venture or business cooperation with a telecom enterprise already licensed to establish a telecom network in Vietnam. Currently all such enterprises are government owned. Since the regulation is silent on the maximum capital, existing limits set by WTO commitments still apply.

Other Legal Developments – Mobile Phone Import Restrictions

Despite developments in the telecom sector that will affect the mobile services sector, the government has also implemented a number of regulations that could potentially hinder the growth of the mobile phone market.

In an effort to curb inflation and reduce the trade deficit, the Vietnamese government is trying to reduce imports of luxury goods to slow the erosion of its foreign currency reserves by updating the regulation on the importation of certain goods, particularly mobile phones.

In Decision No. 1380/QD-BCT, mobile phones were placed on the import-discouraged list. All goods on the import-discouraged list already have tariffs set at or near the ceilings declared in WTO commitments.

Announcement No. 197/TB-BCT, which came into effect June 1, 2011, permits only a legalized distributor to import mobile phones, as it is required to present a legalized letter of appointment or authorization as a distributor, importer, or agent from the manufacturer of the products in order to clear customs. This means that parallel imports, which previously enjoyed vague legal status, have officially become illegal in Vietnam.

The regulation places further restriction by allowing an entity to import such goods only through three designated seaports of entry: Hai Phong, Da Nang, and Ho Chi Minh City. This is a serious limitation because given the delays in processing time and docking problems in seaports, precluding importers from using border crossings and airports can lead to substantially longer processing times and higher costs. This has already been proven in practice, which led the government to amend the regulation by excluding several items from the restricted list. Mobile phones, however, still remain under the restriction.

The regulations create a number of procedural and financial barriers to the importation of legitimate mobile phones, yet it remains to be seen how effective they are in protecting consumers from defective goods by controlling the parallel import of such goods. ⚖️