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Van Beckwith Named Partner in Charge - Recruiting at Baker Botts L.L.P.

DALLAS, July 26, 2012 -- Baker Botts L.L.P. has named Van Beckwith to a new firmwide position -- Partner in Charge - Recruiting. Beckwith has been actively involved with the firm’s recruiting efforts for more than a decade, serving as Hiring Partner for the firm’s Dallas office the last five years.

Beckwith will lead and expand firmwide efforts to recruit outstanding new lawyers from top law schools and will provide support and coordination on the firm’s efforts to attract and recruit lateral partners and practice groups across its offices. He will coordinate these efforts with the firm’s Partners in Charge and Department Chairs throughout the Baker Botts global network.

"Continued growth at both the entry and lateral partner levels is critical to maintaining our competitive edge,” said Baker Botts Managing Partner Andrew M. Baker. "We will continue to see opportunities for lateral partner and partner group expansion to further enhance our firm’s exceptional depth and breadth of client service. We will also continue to grow through law school hiring and to seek out law students with leadership skills and exceptional academic performance.

“Van will provide leadership, strategic thinking, support, and coordination to these efforts that will prove essential to our success.”

For more information, please visit www.bakerbotts.com

ALLENDE & BREA TO HOST PRAC 51ST INTERNATIONAL CONFERENCE IN BUENOS AIRES

October 20—23, 2012
Alvear Palace Hotel

Business Session Include:

Banking & Workouts - "Future of Bank Bailouts and Restructuring – Global Perspectives:” Changes for International Co-Operation” with featured guest speaker Alfonso Pat Gray, former President of The Argentine Central Bank and widely recognized economist.

Energy, Mining & Natural Resources - "Opportunities, Challenges & Threats for Miners, Explorers and Investors Interested in South America"

Litigation/Dispute Resolution - "Litigation Funding - Opportunities & Challenges"

One on One Law Firm Meetings

PRACTice Management - "Lawyer Retention - Great People Decisions" with special guest facilitator and speaker Claudio Fernández-Aráoz, top global expert on hiring and promotion decisions.

On line Registration Now Open.
http://www.prac.org/events.php
CARLOS URRUTIA APPOINTED COLOMBIA AMBASSADOR TO WASHINGTON

July 19, 2012  Colombia President Juan Manuel Santos has confirmed Carlos Urrutia as Colombia’s new ambassador to Washington.

Santos described his childhood friend as a man, “who has all the qualities to represent our country at this special moment” with the U.S. The new ambassador’s main challenge will be to highlight Colombia’s relevance to U.S. lawmakers in Washington, following a decade of strong collaboration between the two countries.

Urrutia replaces Gabriel Silva as Colombia’s top representative in the U.S. Silva announced his resignation in June.

Urrutia is a partner and co-owner of the top tier law firm Brigard & Urrutia in Bogota. In addition to his native Spanish, Urrutia speaks fluent English and French.

For additional information visit www.bu.com.co

CLAYTON UTZ APPOINTS 6 PARTNERS

We congratulate our new partners on their appointments:

Angus Foley
1 July
Project Finance, Sydney

Ilan Freiman
14 June
Haley & Co, Hong Kong

Jonathan Li
6 July
Corporate Advisory /

Clive Luck
1 July
Construction and Major Projects, Perth

Stephen Moulton
1 June
Corporate Advisory / M&A, Melbourne

Robbie Walker
1 June
Workplace Relations, Employment & Safety, Sydney

For additional information visit us at www.claytonutz.com
LOS ANGELES JULY 9, 2012 — Kevin A. Corbett, a lawyer with more than three decades of experience handling complex real estate matters throughout the U.S., has joined the Los Angeles office of Davis Wright Tremaine LLP as a partner.

Corbett is the fourth lawyer, and third partner, to join Davis Wright’s real estate practice in Los Angeles since January, when the firm added Mark Nelson, Tiffany Switzer and Nancy Clapp from DLA Piper.

"We’re happy to announce that we’re continuing to grow our office and the real estate practice," said Mary Haas, partner-in-charge at Davis Wright’s L.A. office. "The firmwide group now includes more than 40 attorneys who provide a full range of real estate counsel for our clients throughout the U.S."

Corbett was most recently a partner at Locke Lord LLP in Los Angeles, and prior to that, he was a partner at Allen Matkins and of counsel at Mayer Brown. Earlier in his career, he served for 12 years as in-house counsel at CBRE Global Investors, formally known as CB Richard Ellis Investors, one of the world’s largest real estate investment services firms. He has extensive experience with all types of commercial property and has handled a full range of transactions, with particular focus on institutional and tax-exempt clients.

"Kevin’s skill set aligns extremely well with the work of our current team in L.A. and the Northwest, and his experience will help us to further expand relationships with institutional investors," said real estate and land use practice co-chair Don Percival. "His addition fits our growth plan in terms of both geography and expertise."

Corbett received his J.D. from Boston University and his M.B.A. from the Anderson School of Management at UCLA. He earned his B.A. at Cornell University.

LOS ANGELES, JULY 9, 2012 – Sarah Fallows (formerly Sarah Nelson), a health care attorney with five years’ experience in regulatory compliance, acquisitions, and other transactions, has joined Davis Wright Tremaine LLP as an associate in the firm’s Los Angeles office.

The addition of Fallows to the firm’s 75 other health care attorneys is part of a national expansion of Davis Wright’s health care practice group. Last year the firm added a top HIPAA expert to its Washington, D.C., health care group.

"We’re delighted to have Sarah on our team," said Mary Haas, Los Angeles partner-in-charge. "Her background will be an asset in providing our well-established health care practice with additional strength."

Fallows most recently served as in-house legal director for IPC, a hospitalist group that manages health-care delivery to patients in over 900 medical facilities across the country. Her work at IPC focused on managing the acquisition of physician groups.

Before IPC, Fallows was an associate at McDermott Will & Emery LLP in Los Angeles, where she worked on health care-related transactions, regulatory compliance involving HIPAA, Stark and anti-kickback laws, and litigation.

Fallows earned her J.D. from Harvard Law School and a bachelor’s degree in molecular biology from the University of California, Los Angeles.

For more information, visit www.dwt.com
McKenna Long & Aldridge LLP (MLA) is pleased to announce that we continue the expansion of our Intellectual Property & Technology and Real Estate & Finance Departments.

Litigator William Long joined the firm’s partnership, and Joshua Curry and Tara Stuart have joined the firm as associates in MLA’s Atlanta office. Mr. Long’s litigation practice focuses on complex commercial matters involving patents and other intellectual property rights. He has successfully tried and arbitrated numerous cases involving a wide range of intellectual property and technology issues, including, for example, patent disputes involving computer software and hardware, pharmaceutical products, chemicals, medical devices, industrial machines, and consumer products. Mr. Long works closely with Mr. Curry and Ms. Stuart. Mr. Curry focuses his practice on intellectual property litigation involving patent, trade secret, copyright, trademark, unfair competition, antitrust and other technology-related disputes. Ms. Stuart is experienced in litigating patent claims through trial in the pharmaceutical industries, including Hatch-Waxman litigation.

Litigator Robert C. Nissen joins the firm’s partnership from Nissen & Associates where he was the managing partner focusing on patent, trademark and copyright litigation. Mr. Nissen has practiced in state courts, federal district courts, federal appellate courts and before the United States Supreme Court. Prior to law school, he had more than a decade of experience in the telecommunications industry in both technical and management positions.

MLA is excited about the continued growth of our IP group and the experience that these attorneys bring to our international practice will further support and expand the exceptional service we provide to our clients.

Justin B. Kleinman has joined McKenna Long & Aldridge LLP (MLA) as a partner in the real estate and finance practice in the firm’s New York office. Mr. Kleinman’s practice is focused on acquisitions, dispositions, mortgage and mezzanine loan financing, joint venture and preferred equity investments, debt restructuring, workouts and distressed transactions.

“It is great to have Justin on our national real estate team and we are excited to welcome him to our New York office,” said Chris Graham, MLA New York Office Managing Partner. “His knowledge and experience in a wide range of real estate and finance issues will further strengthen the excellent services we provide to our clients in New York and throughout the U.S.”

Mr. Kleinman has nearly a decade of experience representing privately and publicly held corporations, REITs, private equity funds, financial institutions, joint ventures and other investors and operators in the acquisition, financing, development and sale of commercial property and other real estate-related assets. He has extensive experience in financing and debt restructuring of multi-asset portfolios on behalf of widely recognized lender/investor clients and owner/developer clients in the U.S. and abroad.

Mr. Kleinman received his J.D. from Brooklyn Law School and B.S., cum laude, from Syracuse University. He is a member of the American Bar Association and the New York Bar Association.

The MLA Real Estate team offers clients a multi-disciplinary experience that spans the spectrum of real estate development, investment and finance. MLA has particular strength in financial restructurings—consistently focusing on problem debt resolution. We have represented clients through many capital markets cycles and understand their needs in responding to—and succeeding within—those cycles. Particularly valuable to our clients is our ability to draw from our industry-leading Government Contracts, Governmental Affairs and Private Equity practices—helping our clients confidently navigate the challenges and opportunities of both the distressed capital markets and governmental intervention.

For additional information visit www.mckennalong.com
Tilleke & Gibbins is proud to announce the hiring of Ms. Linh Thi Mai Nguyen, effective July 16, 2012. Linh joins Tilleke & Gibbins as an attorney in the firm’s Trademark Practice Group in Hanoi, bringing her unique qualifications to a strong team that was recently named Intellectual Property Firm of the Year for Vietnam by Managing Intellectual Property.

Before joining Tilleke & Gibbins, Linh was a Legal Program Officer for the USAID-funded STAR (Support for Trade Acceleration) Project in Vietnam. At STAR, Linh coordinated with Vietnamese government agencies to draft laws, regulations, and reports in intellectual property and other areas of the law, such as advertising law, to help Vietnam ensure that its legal regime complies with international commitments under the WTO and bilateral trade agreements. She also organized training and workshops for government officials on the WTO, international integration, and commercial diplomacy in relation to IP law and other areas of the law.

Prior to her time with STAR, Linh spent seven years with Pham & Associates and InvestConsult Group, two of Vietnam’s strongest local IP firms, where she advised and represented well-known brand owners such as Adidas, Honda, and Procter & Gamble.

“We’re delighted to add Linh to our Trademark team,” said Thomas J. Treutler, Partner and Managing Director of the firm’s Vietnam offices. “She has a great understanding of Vietnamese IP law, both from a lawyer’s perspective and from the viewpoint of Vietnam’s legislators and judiciary, and her level of international experience, from STAR and Franklin Pierce, is not easy to find in Vietnam. We’re therefore confident that Linh will prove to be an excellent advocate for our Trademark clients in Vietnam.”

Linh can be contacted at +84 4 3772 5559 or mailinh.n@tilleke.com.

For additional information visit www.tilleke.com
CAREY

CAREY acted as local counsel to Marubeni LP Holding in the acquisition of a 30% of the Antucoya copper project from Antofagasta Minerals for US$360 million. The project will involve an investment of app. US$1.8 billion.

CAREY advised Marubeni LP Holding through a team led by partner Juan Francisco Mackenna and associates Francisco Corona, José Tomás Hurley, Cristóbal Correa, Carmenmaría Poblete, Nicole Solís, Christian Chadwick and Tomás Echenique.

For additional information visit www.carey.cl

ARIFA
ADVISES GRUPO MEXICO IN ZACATECAS SELF-ELEVATING DRILLING UNIT DEAL

Panama, July 2012. ARIFA represented Grupo Mexico in connection with the sale and transfer of the newly built "Zacatecas" self-elevating drilling platform. A subsidiary of Grupo Mexico, Perforadora Mexico (PEMSA), will operate the unit in Mexico to provide services inherent to the oil industry.

The drilling unit was originally registered in Panama under the ownership of Lamprell's subsidiary, Marine Investment Holdings Co. Ltd. Inc., whilst under construction, and upon the delivery thereof it was re-documented in favor of Grupo Mexico’s subsidiary, Zacatecas Jackup S.A. de C.V., and further re-flagged to the Mexican registry.

The negotiations required several relevant issues to be considered to guaranty a smooth transaction: for the delivery of the drilling unit by Lamprell’s subsidiary in favor of Zacatecas Jackup S.A. de C.V., the release of a Panamanian naval mortgage originally granted by Marine Investment Holding Co. Ltd. Inc. in 2011, before the transfer in favor of Zacatecas Jackup S.A. de C.V., and the deletion of the drilling unit from the Panamanian registry, to be re-flagged to Mexico on schedule to comply with the conditions of a Loan Agreement by PEMSA, which required, inter alia, the granting of Mexican naval mortgage over the drilling unit.

Key attorneys who handled the matter: Roy C Durling, partner; Jorge Loaiza, senior associate; Pilar Castillo, associate; Alfredo Fonseca, associate (London office)

About Grupo Mexico - In February 2010, Grupo Mexico, one of the major copper producers in the world, ventures in the oil drilling business by acquiring the Compañía Perforadora México (Pemsa) for US$240 million. The company announced an investment through its subsidiary Pemsa of Mex$5 billion (about USD$367 million) for the purchase of two oil platforms. The first platform, Haffar 1, was presented on February, 2012.

For additional information visit www.arifa.com

GIDE LOYRETTE NOUEL
ADVISES EVRAZ ON AMENDING ITS BANK FACILITIES

10 July 2012 - Gide Loyrette Nouel has acted as English and Russian legal counsel to Evraz Group S.A. ("Evraz"), a subsidiary of EVRAZ plc and one of the largest steel producers in the world with operations in the Russian Federation, Ukraine, Europe, North America and Africa, on amendments to its US$950 million syndicated structured credit facility maturing in 2015, as well as a number of bilateral facilities.

The amendments were completed in June 2012 and included, among other things, changes to Evraz's maximum net leverage ratio and minimum EBITDA to interest expense ratio. The amendments were made to all credit facilities under which financial covenants are tested on the basis of the consolidated financials of Evraz, which is the borrower under the syndicated facility and guarantor under the bilateral facilities. The total amount of these facilities is approximately US$1.4 billion.

Evraz team managing the amendments was led by Rostislav Rozbitsky (Director, Bank Financing and Capital Markets), Valentin Koval and Elena Ermolaeva.

Gide team advising Evraz was led by partner Grigory Marinichev, Tim Theroux (Counsel), Evgeny Rodionov (associate) and George Williams (trainee associate).

For additional information visit www.gide.com
Clayton Utz congratulates Exemplar Health on its Successful Sunshine Coast University Hospital PPP bid

Melbourne, 6 August 2012: Clayton Utz continues to demonstrate its credentials as one of Australia’s leading legal advisers on major health infrastructure developments, with its client Exemplar Health Consortium (Exemplar Health) announced as the successful bidder for the Sunshine Coast University Hospital (SCUH) PPP project in Queensland.

A Clayton Utz team, led by partners Dan Fitts and Jo Pugsley and including special counsel Sarah Neaves and senior associates Elliot Raleigh and Elissa Tobin, advised Exemplar Health – comprising Capella Capital, Lend Lease, Siemens and Spotless – on legal aspects of its successful bid to design, build and maintain the SCUH project at Kawana on Queensland’s Sunshine Coast, which reached contractual close on 18 July 2012 and financial close on 31 July 2012.

To be delivered as a Public Private Partnership (PPP) with Queensland Health, the SCUH project will comprise a 450 bed facility which will expand to a 738 bed facility by 2021. The project’s capital budget is $1.8 billion, with the facility scheduled to open in late 2016.

Dan and Jo said a number of the project’s features required an innovative approach to structuring given the staged nature of the project, the adjacencies to the private hospital also being constructed and the transfer of demand risk to the Exemplar Health in respect of the carparking facilities. Despite its size, the project was closed in an extremely short period of time and almost five months ahead of the announced programme. "We have been privileged to work on such an important project with such dedicated and focused teams, both on our client's and the government's side of this transaction. The procurement process was run with incredible efficiency by both parties but without compromising the overall solution," they said.

The project adds to Clayton Utz's significant experience in PPP health infrastructure, which includes advising the South Australian and Victorian governments on the New Royal Adelaide and Bendigo hospital projects, as well as the successful Plenary consortium on the $1 billion Victorian Comprehensive Cancer Centre project.

For additional information visit www.claytonutz.com

Rodyk is acting for SGX listed Elite KSB Holdings Limited in the divestment of its meat-processing business to Kendo Trading Pte Ltd, which is part of an integrated poultry breeding, farming, processing and marketing group, for S$62 million. The deal is expected to close in August 2012.

Corporate partner Valerie Ong leads the matter.

For additional information visit www.rodyk.com
On June 28, 2012, Southern Legacy Minerals, Inc. (“Southern Legacy”) completed its business combination with Sinchao Metals Corp. (the “Company”) by way of a merger pursuant to the Idaho General Business Corporations Act between Southern Legacy and Sinchao Idaho, Inc., a wholly-owned subsidiary of the Company (the “Transaction”). In connection with the Transaction, the Company changed its name to “Southern Legacy Minerals Inc.” and commenced trading on the TSX Venture Exchange on July 3, 2012 under the symbol “LCY”.

A share consolidation of the Company was effected immediately prior to the completion of the Transaction, wherein the common shares of the Company were consolidated on a six to one basis. Pursuant to the Transaction, each of the shares of Southern Legacy were exchanged for 0.8352 post-consolidation shares of the Company for an aggregate of approximately 34,808,598 post-consolidation shares, representing approximately 59.9% of the issued and outstanding post-consolidation shares of the Company. As such, the Transaction constitutes a Reverse Take-Over of the Company within the meaning of the policies of the TSX Venture Exchange.

As part of the Transaction, the Company closed a $7.1 million financing on May 14, 2012 by way of private placement consisting of the issuance of 7,108,617 subscription receipts priced at $1.00 per subscription receipt for gross proceeds of $7,108,617. On completion of the Transaction, each of the 7,108,617 subscription receipts automatically converted into one unit of the Company, each unit consisting of one common share (on a post-consolidation basis) and one-half of one share purchase warrant, with each whole warrant exercisable into one common share of the Company at a price of $1.30 until June 29, 2014.

The combined property holdings of Sinchao and Southern Legacy has resulted in a portfolio of base and precious metals projects spanning along the Andes in Peru, Colombia and Chile.

Southern Legacy Minerals, Inc. was represented by Fraser Milner Casgrain LLP with a team that included Alan Hutchison, Daniel Katzin and Michael Serebriakov (securities), Gordon Funt and Lori Mathison (tax).

For additional information visit www.fmc-law.com

On May 25, 2012, Guangdong Sunwill Precising Plastic Co., Ltd. (Sunwill) successfully completed initial public offering and listed on the SME Board of Shenzhen Stock Exchange. Sunwill issued a total of 40,000,000 shares at CNY 15.80 per share, raising approximately CNY 571,767,900 capital.

Sunwill is a manufacturing company that is engaged in manufacturing and selling air conditioner fans with a core on product R&D and design. Sunwill is the largest professional manufacturer of plastic fans for air conditioners with the highest market share in China. It is the largest supplier to leading domestic air conditioning companies such as Gree and Midea.

King & Wood Mallesons provided legal advice to the issuer. The project was led by partners Lai Jianglin and Zhang Dongcheng.

For additional information visit www.kingandwood.com
ULAANBAATAR, 31 July 2012 – Hogan Lovells advised General Electric (“GE”) on the financing and equity aspects of a US$122 million 50MW wind farm in Salkhit, Mongolia, the first renewable energy independent power project in Mongolia.

The 50MW wind farm is located 70km southeast of the Mongolian capital Ulaanbaatar and is part of a renewable energy programme intended to reduce the country’s dependence on coal. The project, which is expected to become operational in 2012, will supply almost 5% of Mongolia’s electricity.

The project is being developed and sponsored by Mongolia-based Newcom LLC, which retains a majority interest in the Mongolian project company, Clean Energy LLC. GE Pacific Private Limited acquired an equity interest in Clean Energy LLC in March 2012 and debt financing for the project closed in July 2012.

Hogan Lovells’ role included drafting and revising Mongolian law-governed transaction documents, review of financing agreements, issuing legal opinions, and advising on applicable legislation and general matters of Mongolian law.

The cross-border team advising GE was led by Michael Aldrich, managing partner of the Ulaanbaatar office, and included partners Jamie Barr and senior associate Laurence Davidson in Hong Kong, partner James Harris and senior associate Lawrence Low in Singapore, and partner Chris Melville, senior associate Anthony Woolley and associate Solongoo Bayarsaikhan in Ulaanbaatar.

Commenting on the transaction, Ulaanbaatar office managing partner Michael Aldrich said:

"We have a long-standing relationship with GE in the USA and across our international network and we are pleased to augment this relationship with our capabilities in Mongolia. We have extensively advised clients on their energy projects in Asia, establishing a prominent reputation for ourselves as a trusted advisor in the region. Representing GE on this landmark transaction further reinforces our position as the leading international firm based in Mongolia."

For additional information visit www.hoganlovells.com

SKRINE
SUCCESSFUL DEFENSE DENYING DIRECTOR’S APPLICATION FOR LEAVE TO FILE APPEAL IN RE

Tan Sri Dato’ Haji Lamin Hj Mohd Yusuf v Bursa Malaysia Securities Berhad

SKRINE, led by Dispute Resolution Head Leong Wai Hong as counsel with associate Kwan Will Sen successfully resisted the directors' applications for leave to appeal to the Federal Court on 16 July 2012.

The Federal Court dismissed the directors’ leave to appeal against the Court of Appeal’s decision which held that notwithstanding the appointment of a provisional liquidator in respect of a company listed on the stock exchange, the directors must still comply with the Listing Requirements of Bursa Malaysia Securities Berhad (“LR”). This decision has significant impact on the duties of directors of a public listed company to comply with the LR.

The Court of Appeal had held that the Listing Requirements derive statutory force from the Capital Markets and Services Act 2007 and thus, must be strictly complied with. Further, the Court of Appeal held that the directors’ duties under the CMSA vis-à-vis compliance of the LR are separate from their duties under the Companies Act 1965.

The Court of Appeal’s judgment is reported in [2012] 3 CLJ 837 and [2012] MLJU 192. Counsel for Bursa at the Court of Appeal was Lim Chee Wee with associate Kwan Will Sen.

The High Court’s judgment is reported in [2012] 7 MLJ 85. Counsel for Bursa at the High Court was Preetha Pillai with associate Deepa Nambiar.

For additional information visit www.skrine.com

NAUTADUTILH
ASSISTS INTEGRATED DEVICE TECHNOLOGY IN ITS ACQUISITION OF NXP HIGH SPEED DATA CONVERTER BUSINESS

31 July 2012 - NautaDutilh assisted NASDAQ listed Integrated Device Technology, Inc. (IDT) in its acquisition of the NXP high speed data converter business from NXP B.V.

IDT develops and provides complete application-optimized, analogue/digital mixed-signal solutions for the communications, computing and consumer segments. Headquartered in San Jose, California, IDT has design, manufacturing and sales facilities throughout the world.

The key members of the NautaDutilh team involved were Ruud Smits, Christiaan de Brauw and Homme ten Have.

For additional information visit www.nautdutilh.com
The deal is closed and the value is confidential.

The acquisition is part of BrasilPrev’s strategy to expand its services in the State of São Paulo, Brazil.

About BrasilPrev - Brasilprev is one of the largest private pension company in Brazil, controlled by Principal Financial Services Group and Banco do Brasil Group.

About Mapfre Nossa Caixa - Mapfre Nossa Caixa was the result of a partnership between the financial institution Nossa Caixa SA and the Spanish insurance company Mapfre. The company offers different types of pension.

TozziniFreire assisted Principal Financial Services Group.

Partner Marcio Mello Silva Baptista and associates Maria Beatriz Bueno Siqueira Nunes Kowalewski and Jacques Abi Ghosn acted in the transaction.

For additional information visit www.tozzinifreire.com.br

WILSON SONSINI GOODRICH & ROSATI
PALO ALTO NETWORKS PRICES INITIAL PUBLIC OFFERING

On July 19, 2012, network security company Palo Alto Networks announced the pricing of its initial public offering of 6,200,000 shares of its common stock at a price to the public of $42 per share. The shares began trading on the New York Stock Exchange on July 20 under the symbol "PANW." Wilson Sonsini Goodrich & Rosati served as company counsel in connection with the transaction.

The Wilson Sonsini Goodrich & Rosati team that represented Palo Alto Networks in the offering included Jeff Saper, Jon Avina, David Thomas, and Peter Hennessey.

For additional information visit www.wsgr.com
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Buenos Aires Business Session Include:


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**On line Registration Now Open.**
http://www.prac.org/events.php

UPCOMING PRAC EVENTS

**PRAC @ IBA Dublin 2012**
October 1
PRAC Members Gathering

**PRAC Buenos Aires Conference 2012 - October 20-23**
Hosted by Allende & Brea

**PDAC March 5 Toronto 2013**
PRAC Members Gathering

**PRAC Jakarta Conference 2013 April 13 –16**
Hosted by ABNR

**PRAC @ INTA Dallas May 4 2013**
PRAC Members Gathering

**PRAC Washington, D.C. Conference 2013 September 28 - October 1**
Hosted by HoganLovells

**PRAC @ IBA Boston October 6 2013**
PRAC Members Gathering

Visit www.prac.org/events.php for details and to register for these and other events
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.

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.
Clayton Utz Insights

02 August 2012

Basel Committee addresses concerns over capital charges for CCP exposures

By Louise McCoach and Alex Chernishev.

Key Points:

From 1 January 2013 an amount equal to 2% of a bank’s derivatives exposure to certain central clearing counterparties will be added to the total risk-weighted assets of that bank for regulatory capital purposes.

Capital requirements for bank exposures to central clearing counterparties (CCPs) are recognised as one of the final pieces of the incoming Basel III capital framework for banks, and are part of the broader G20 derivatives reform agenda aimed at reducing systemic risk in global banking.

As part of the reform process, the Basel Committee on Banking Supervision (Basel Committee) last week released interim rules for the risk-weighting of exposures to CCPs. The rules are designed to create a financial incentive for banks to clear standardised over-the-counter (OTC) derivatives through CCPs, while at the same time ensuring that banks' exposures to CCPs are adequately capitalised.

The decision to publish the rules on an interim basis suggests that the Basel Committee will monitor the capital effect of the new rules and make further changes if necessary.

2% Capital Charge

From 1 January 2013, an amount equal to 2% of a bank’s derivatives exposure to “qualifying” CCPs will be added to its total risk-weighted assets for regulatory capital purposes. A “qualifying” CCP is a CCP that meets the new “Principles for Financial Market Infrastructures” published by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions.

Importantly, the paper clarifies that the 2% risk-weight will be calculated on the basis of a member's cleared exposures, rather than to trade exposures it has cleared on behalf of clients, unless the member has also guaranteed the trade against CCP default losses. This clarification has been welcomed by the dealer community and means that banks offering clearing services as intermediaries for non-members will not need to hold capital against non-guaranteed customer trades as though they were the bank’s own positions.

This contrasts with the capital charges that will apply to non-CCP cleared trades. Exposures under non-cleared trades will be assigned a risk-weight in accordance with the Basel III rules for bilateral counterparty credit risk published in June last year, which is likely to result in a more onerous risk-weight for the affected trades.
CCP Default Fund Charge

Basel III will also impose a capital charge on a bank's exposure to a CCP's default fund. CCP default funds consist of contributions made by clearing members which are designed to protect the relevant CCP from losses caused by the default of a clearing member. Banks will have the option of applying a 1,250% risk-weighting to this exposure (effectively treating the exposure as a deduction from capital) or, in the case of a qualifying CCP, employing a risk-sensitive approach detailed in the interim rules that the Basel Committee has previously consulted on. For qualifying CCPs, the risk-weight of 1,250% will be capped at 20% of the total trade exposures to the relevant CCP.

The cap is another welcome development and was introduced in response to dealer concerns that earlier versions of the rules would generate a capital cost at levels that would discourage banks from providing intermediary clearing services to other derivatives users.

Implications for Australia

APRA is yet to release details of its intended treatment of bank exposures to CCPs. However, given the recent release by the Government of its proposed legislative framework to allow for mandatory clearing of OTC derivatives in Australia, it is likely that Australia will adopt similar incentives to encourage OTC derivatives exposures to be cleared through CCPs.

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Energy

RECENT NEWS

The Brazilian power sector still awaits a governmental decision on the rules applicable to the renewal of the concessions that will expire by 2015. The federal government has made some statements indicating that the contracts will be renewed for another 20 years, and that there will be a reduction in the charges and taxes levied on the cost of electricity. The sector expects a formal governmental statement by the end of August.

Relevant News

- Extension of Concessions and Reduction of Charges
- Research on Solar Energy
- Increase in Alternative Sources in Power Generation

Relevant decisions

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- Rules for the use of Coal by Thermoelectric Plants

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Pedro G. Seraphim
Partner - São Paulo
pseraphim@tozzinifreire.com.br

Heloísa Ferreira Andrade Scaramucci
Partner - São Paulo
handrade@tozzinifreire.com.br

WWW.TOZZINIFREIRE.COM.BR  T 11 5086-5000  F 11 5086-5555
A Midsummer Round-Up of Recent Competition and Foreign Investment Developments

By Sharon Seung, Morgan Deacon and Sandy Walker

Competition Bureau Approves Proposed Maple-TMX Transaction

On July 4, the Competition Bureau approved the takeover by Maple Group, whose investors are the key financial institutions and institutional investors in Canada (including the Canada Pension Plan Investment Board, Ontario Teachers’ Pension Plan, CIBC World Markets Inc., Scotia Capital Inc., Alberta Investment Management Corporation, Caisse de dépôt et placement du Québec, among others) of Canada’s biggest stock exchange operator, which includes TMX Group, Alpha Group and Canadian Depository Services. The Maple Group’s bid followed the proposed merger between London Stock Exchange Group PLC and the TMX Group Inc. in the first half of 2011 which was defeated by shareholders last summer.

Background

The stock exchange sector began consolidating in 1999, when the Vancouver, Alberta, Montréal and Toronto Stock Exchanges agreed to restructure the Canadian capital markets, with exchanges specializing in different types of securities (junior companies on an exchange headquartered in Calgary, and derivatives on the Montréal Exchange with larger companies on the Toronto Stock Exchange). The Competition Bureau concluded there were no grounds to challenge the proposed merger given the intention of the Canadian Securities Administrators to remove regulatory barriers allowing for Alternative Trading Systems (“ATS”). The creation of ATSs would promote competition by offering a wide variety of trading options not offered by a centralized exchange.
Further consolidation occurred in 2001 when the TSX Group (formerly TSE) acquired the Canadian Venture Exchange, and in 2007 when the TSX Group and the Montreal Exchange merged, creating a new entity, TMX Group Inc. This latter merger was also cleared by the Competition Bureau, one of the reasons being that Alpha Trading Systems, an ATS organized by nine of Canada’s leading financial institutions, was poised to enter the market in 2008 and would likely be a significant competitor to the TSX Group.

The Bureau and the Ontario Securities Commission ("OSC")

The Commissioner of Competition had expressed serious concerns about Maple Group’s takeover as it would effectively combine the TMX Group and Alpha Group, the two competitors in the equities trading market that control approximately 85% of all stock trades in Canada, as well as the Canadian Depository Services clearing house.

However, after a lengthy review and in light of the OSC’s “recognition order”, also issued on July 4, which allows the proposed transaction to proceed on certain conditions, the Bureau concluded that it did not intend to make an application to the Competition Tribunal to challenge the proposed transactions. The Bureau stated in its press release that “while the Bureau conducted its own review of the proposed transactions, the measures contained in the OSC’s final recognition orders materially change the regulatory environment sufficient to substantially mitigate [its] competition concerns.” No competition remedies were imposed in this proposed transaction, and it will fall to the Canadian securities law regulators to monitor and regulate the proposed transaction.

The Bureau issued a “no action letter” to Maple Group, which means that the Bureau can still challenge the merger once completed for up to one year post-closing.

The Bureau’s press release can be found here.

Glencore Receives Investment Canada Approval for Viterra Takeover

On July 15, Glencore International PLC (“Glencore”) received approval under the Investment Canada Act to acquire Canadian company Viterra Inc. (“Viterra”), bringing it one step closer to closing the deal. Glencore is a Swiss commodities producer and trader with worldwide activities, and Viterra is an agri-business company with operations across Canada and other countries.

Glencore released a statement emphasizing the commitments it made as part of its application for approval under the ICA, including agreeing to increase Viterra’s projected capital expenditures in Canada by more than $100 million over five years, contribute to “grain industry initiatives” in Manitoba, maintain Viterra’s head office located in Regina, invest $8 million in Viterra’s projected expenses in research and development, and work with the Saskatchewan government to establish a Global Institute for Food Security in the province.

Another regulatory closing condition of the proposed transaction was clearance under the Competition Act, which Glencore received in May 2012. The Bureau issued a “no action letter”, concluding that it would not challenge the proposed transaction before the Competition Tribunal under the merger provisions of the Competition Act.

As part of the proposed transaction, Glencore had struck side deals under which Winnipeg-based Richardson International would purchase a number of Viterra’s Canadian grain elevators, and Calgary-based Agrium Inc. would acquire most of Viterra’s retail stores. According to a press release, the Bureau is expected to begin a 45-day review of Glencore’s deals with Agrium and Richardson after the deal between Glencore and Viterra closes.
Competition Bureau Clears United Technology Corporation’s Acquisition of Goodrich Corporation

On July 26, the Competition Bureau issued a “No Action Letter” to United Technology Corporation ("UTC") regarding its acquisition of Goodrich Corporation ("Goodrich"). UTC and Goodrich entered into an agreement in September 2011, by which Goodrich is to merge with and become a wholly-owned subsidiary of UTC. Both companies are engaged in the global aerospace industry, supplying various parts and components to aircraft manufacturers. The Bureau worked together with the U.S. Department of Justice’s Antitrust Division and the European Commission in reviewing the international merger.

As a result of remedies obtained by the U.S. and European antitrust authorities, which included divestitures of some of UTC and Goodrich’s operations in the U.S. and Europe, the potential for anti-competitive effects for the manufacture, sale and supply of electrical generators and engine controls in Canada was addressed. One of the divestitures included the sale of certain assets at Goodrich’s Montréal facility that were already in the process of being transferred to its facility in Connecticut. Under these circumstances, the Bureau concluded that the remedial orders issued by the foreign antitrust authorities would sufficiently mitigate any potential anti-competitive effects in Canada and as there were no Canadian assets involved, the Bureau concluded that it would not challenge the proposed transaction.

The Bureau’s press release can be found here.

Bid-Rigging

Quebec’s Construction Industry

On June 21, the Competition Bureau released details of an investigation that was conducted in concert with the Sûreté du Québec’s Corruption Investigations Unit (Unité permanente anticorruption or “UPAC”), which was set up by the Government of Quebec in 2011. The investigation has led to a total of 77 charges against eleven individuals, two of which are municipal officials, and nine companies in the construction industry. The Bureau and UPAC uncovered an alleged "scheme of collusion, breach of trust and corruption" that began in 2007, allegedly giving preferential treatment to a group of contractors for lucrative municipal contracts, mainly for infrastructure projects in the Saint-Jean-sur-Richelieu region.

Among the criminal charges laid were charges of corruption in municipal affairs, breach of trust, influencing a municipal official, extortion and conspiracy, as well as bid-rigging charges under the Competition Act.

The Bureau’s press release can be found here.

Bid-Rigging Charge in Ventilation Sector

In another bid-rigging case, an individual was charged for his alleged role in rigging bids for a private sector ventilation contract for a residential high-rise building in the Montréal area. The first charges were laid in December 2010, as a result of a Bureau investigation that allegedly uncovered evidence of secretly coordinated bids by several companies specializing in ventilation, air conditioning and heating services. So far eight companies and six individuals have been charged.

The Bureau’s press release can be found here, and its announcement at the time charges were laid in 2010 can be found here.

Colmatec Inc. Pleads Guilty to Bid Rigging

On June 22, Colmatec Inc. (“Colmatec”) and its operations director, Mr. Réné Drouin, pleaded guilty for their role in a conspiracy to rig bids to obtain municipal contracts for specialized sewer services in the Province of Quebec. Colmatec agreed to pay a fine of $50,000 and is subject to a court order. Mr. Drouin agreed to perform 100 hours of community service and is subject to probation for a period of two years.

The guilty pleas come as part of a larger investigation commenced by the Competition Bureau in 2009, resulting in bid-rigging charges in November 2011 against six companies and five individuals. Given that the bid-rigging activities took place before the amendments to the...
Competition Act came into force in March 2009, the accused companies and individuals face a less severe penalty, a possible prison sentence of up to 5 years and/or a fine at the discretion of the court, as opposed to a fine at the discretion of the court and/or a prison sentence of up to 14 years, as provided in the amended bid-rigging provisions of the Competition Act.

The Bureau’s press release can be found here.

Conspiracies

Korean Air Pleads Guilty to Price Fixing

On July 19, Korean Air Lines Co., Ltd. (“Korean Air”) pleaded guilty and was fined $5.5 million for its participation in an air cargo price fixing cartel between April 2002 and February 2006. The conviction is the seventh conviction to date arising from the Competition Bureau’s air cargo investigation.

The investigation also saw guilty pleas since 2009 for conspiracy to fix air cargo fuel surcharges from each of Cargolux Airlines International S.A. (“Cargolux”), Société Air France (“Air France”), Koninklijke Luchtvaart Maatschappij N.V. (“KLM”), Martinair Holland N.V. (“Martinair”), British Airways PLC (“British Airways”) and Qantas Airways Limited (“Qantas”).

To date fines in excess of $22 million have accumulated: Korean Air - $5.5 million, Cargolux - $2.5 million, Air France - $4 million, KLM - $5 million, Martinair - $1 million, British Airways - $4.5 million and Qantas - $155,000.

The Bureau’s press releases can be found here.

Commissioner of Competition Resigns

On June 28, the Commissioner of Competition, Melanie Aitken, announced that she will be stepping down, effective September 21, 2012. Commissioner Aitken was appointed in 2009 for a five year term. It will likely take at least several months to appoint Ms. Aitken’s successor.

Ms. Aitken is known for pursuing high profile litigation against a number of targets, including the Canadian Real Estate Association (for abuse of dominance), Visa and Mastercard (for price maintenance in relation to merchant restrictions), Rogers (in connection with advertising relating to its Chatr wireless brand) and a non-notifiable merger involving potential competitors. The Bureau’s announcement can be found here.

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New Trends in Legislation on the Adjudication for Copyright Related Legal Liability for Internet Service Providers

by Dang Zhe and Jiang Zhipei

This spring has witnessed several important moves in copyright law related legislation in China. On March 31, the National Copyright Administration issued the draft of the PRC Copyright Law (Revised Draft) (the "Draft") to gauge public opinion. Indeed the articles on copyright liability for ISPs caused heated discussion. On April 22, the Supreme People’s Court, in a similar attempt to gauge public opinion, issued the exposure draft of the Regulation of the Supreme People’s Court on Several Issues Concerning the Application of Law Involving Civil Disputes over Cases of Information Network Dissemination Right Infringement (Exposure Draft) (the "Exposure Draft"), which contains more comprehensive and specific provisions on the copyright infringement liability of Internet Service Providers ("ISPs"). Although these two documents are not in force yet, they can be assessed to better understand the legislative and judicial intent of the national copyright administration and the highest judicial organ on the copyright related legal liability for ISPs. The documents are expected to have a significant impact on the trend of application and adjudication of copyright related legal liability of ISPs.

I. Understanding Article 69 of the Draft

With the third, and most comprehensive amendment to the PRC Copyright Law (1) imminent, it is clear that unlike the previous two amendments which were implemented as a result of China’s commitment to the WTO or enforcing the ruling from WTO dispute settlement body, the Draft reflects a truly proactive effort for progress. Following Article 36 of the PRC Tort Liability Law (2), the Regulations on the Protection of Rights to Information Network Dissemination (3), and the Supreme People’s Court’s relevant judicial interpretation, Article 69 of the Draft provides three principles for ascertaining infringement by ISPs.

A. The Principle of "No Obligation of Prior Review"

The first provision of Article 69 (4) of the Draft stipulates that certain ISPs do not have an obligation to review the information. That is to say, providers of storage, search or linking services are not obliged to review information relating to copyrights or related rights (neighboring rights). This principle should be understood as follows: First, it only applies to certain types of ISPs engaged in certain types of technical services, i.e. those who provide simple services including storage, search, linking and point-to-point services. It does not apply to content service providers ("SPs") or where content services are involved. Second, this principle refers to the lack of an obligation
on the part of service providers to actively conduct a review, but does not mean that they are free of a duty of care to take necessary measures when infringement is discovered or discoverable. Such duty is stipulated in the 3rd provision. Finally, this principle only applies to the review of copyright and related rights. Where the laws and regulations impose other review obligations, SPs shall abide by them. However, these obligations should not negate the principle of "no obligation of prior review". In other words, SPs should not be held liable for failing to discover the copyright infringement when conducting the review.

B. The Principle of "Notice and Deletion"

Paragraph 2 of Article 69 of the Draft stipulates the principle of notice and deletion, which means that where the users commit infringing activities by utilizing the Internet service, if the Internet service provider does not take any necessary measures in a timely manner upon receiving the notice from the owner, he/she shall be jointly liable with the infringing user. This principle contains four key features: First, it applies only when the ISP commits no act of infringement, and only provides storage, search, linking, and other neutral technical services. It does not apply to those who themselves have committed such acts. Secondly, where an Internet service provider violates this principle, he/she shall be jointly liable with the actual infringer. The scope of such joint liability should be determined in accordance with Paragraph 2 of Article 36 of the Tort Liability Law, which means that the ISP shall be liable for the damages over and above the portion of infringement damages, which arises out of his/her failure to take necessary actions upon receiving such notice. Such liability shall not include damages that have already happened before notice is received, or damages not caused by the defendant regardless of the timing of notice. In deciding on the specific amount of damages, the court should essentially consider the portion of damages that are caused by the service provider's failure to act after receiving the notice. Third, once joint liability is found, the service provider has the right to recover compensation from the infringing user over and above the amount for which he/she is liable in accordance with Article 14 of the Tort Liability Law. Finally, when applying the principle of notice and deletion, the validity of the notice should be determined in accordance with the Dissemination Regulations and the Supreme People's Court's relevant judicial interpretation.

C. The Principle of Fault Liability: Know or Should Have Known

Paragraph 3 of Article 69 of the Draft imposes on ISPs a duty of vigilance on infringement. Where the users commit infringing activities that are open and obvious such that the ISPs are deemed to know or should have known such activities, the latter should take necessary measures to prevent the expansion of the infringement or otherwise should be held liable, and cannot be exempted by asserting the defenses of no notice received from the owner or no obligation to review. This is called the red flag principle. Note that the "red flag" should be clear enough in order to trigger the duty of care. In determining the "know or should have known" liability, the court should adopt an ordinary, reasonable person standard, and take into account the cognizance level of the individual service provider as well as factual context of the case, so that the service provider will not be unfairly burdened by a duty of overt vigilance or forced to play the role of cyber police. The provision restates the principle of fault liability as stipulated in the Tort Liability Law, and prevents the abuse of the principles of "no obligation of prior review" and "notice and deletion", integrating Article 69 into a systematic framework.

Article 69 of the Draft demonstrates the balanced interests of the creators of intellectual works as well as the information users and disseminators, equality between rights and obligations, the neutrality of technology, and the principle of fault liability stipulated in the higher ranking law.

II. Understanding the Exposure Draft

On April 22, the Supreme People's Court issued an Exposure Draft that contains 20 articles. Most of the provisions of the Exposure Draft were already stipulated in the First Guidance Rules on Several Issues over Cases of Internet Copyright Disputes (Trial Implementation) (the "Trial Rules of Beijing Higher Court"), which was
issued by the Beijing Higher People’s Court in May 2010. The articles in this Exposure Draft still remain unrevised two years since the implementation of the Trial Rules of Beijing Higher Court, which may be a testament to their durability.

A. Scope of Infringement of Information Network Dissemination Rights

Article 3 and 4 (7) of the Draft delineate the specific infringement activities on information network dissemination rights, which provides significant guidelines for adjudicating infringement. Article 3 defines infringing activities as those which provide the works, performance and audio-visual products, through information networks and without prior permission from the rights owners. It defines the activities of "providing" as to "put such works, performance and audio-visual products to the information network open to the public through uploading to network servers or otherwise, rendering the public ability to download, browse or obtain otherwise such works, performance and audio-visual products". The Supreme People’s Court here avoids using the controversial expression of "interactive dissemination". It is clear that "uploading" refers to "transmitting" digital works from local hardware and other storage devices to the network servers, which is identical in nature to the act of copying as stipulated in the Copyright Law. The question is how to define "otherwise". This should not include services such as information storage, searching, or linking. Such SPs would have become direct infringers had we defined "otherwise" this way, which is inconsistent with our current laws and provisions. The "otherwise" should nonetheless refer to the activities, uploading excluded, of connecting storage devices with the Internet, such as connecting an information-loaded hardware with an internet server, or connecting a flash drive with an internet terminal so that internet users can access such information. Such actions are essentially identical to uploading in that they both allow information to come into being, gain entry into the network world, and enable network users to obtain such information. This is precisely why such actions fall within the scope of "providing" activities under the control of information network dissemination rights. Future means of providing such works and information that are yet to be introduced shall also be included so long as they resemble the copying activities in nature.

B. Nature of Deep Link Services

It is worth discussing whether providing deep links should be categorized as a "providing" activity as stipulated in Article 3. Simply providing deep links in the absence of other activities should not be regarded as "providing" those works, because it is technically still a type of search and link service. The target information is uploaded to the network server by someone other than the link provider. It is not copied to the link provider’s server. Rather, users still need to visit the information server that contains the target information. Deep link service is legally indistinguishable from ordinary link providing service. In particular, a lot of sharing videos (sourcing websites, etc.) add the codes before the video files so as to direct search engines to those deep links automatically, which could help boost their site visits. Such deep link service should be treated in compliance with Article 4 of the Exposure Draft which stipulates that no works, performances, or audio-visual products are provided so long as the "network service provider has the appearance of the provided works, performance or audio-visual products . . . (but) the network service provider has the evidence to prove that it only provided the works, performance and audio-visual products in dispute with automatic access, automatic transmit, information memory space, search, links, P2P technology, etc.). As for the potential unfair competition among information sourcing website operators arising from the deep link services with the appearance of the provided works, this is a separate issue that ought to be regulated by the PRC Anti-Unfair Competition Law (8), not the Copyright Law. The above understanding is in compliance with Article 4 of the Trial Rules of the Beijing Higher Court.

However, it is worth noting that when some highly popular artistic works such as hit movies, TV programs, literature, and music works are involved, where deep link providers actively guide web users to browse around by creating billboards, catalogs, and indexes, such actions would be adjudicated as "should have known" infringement, namely the ISPs should have known that providing such deep links services will be used for infringement, but fail to take necessary steps to prevent its expansion. This is reflected in Paragraph 1 of Article
11. (9) It intends to make two points: First, this Exposure Draft is consistent with the principle of fault liability by distinguishing pure search and link-providing activities from fault-based activities that facilitate infringement; Second, it confirms that deep link providing activities are not within the scope of infringing actions on right to network dissemination of information. Even in the circumstances of "should have known" infringement, deep link providers are jointly liable for expanding the infringement only, but are not considered direct infringers.

C. Nature of Snapshot and Thumbnail Services

Article 5 (10) of the Draft defines the nature of snapshot and thumbnails. Snapshot and thumbnails are born in their SPs' network servers, and remain there if not deleted or updated in agreement with the corresponding changes in the source websites. In general, the snapshot and thumbnail services are regarded as a type of "providing" service, subjecting their SPs to scrutiny on information network dissemination rights. However, it is also recognized that sharpshooting and thumbnailing services can enhance web users' searching efficiency, and can be recognized as reasonable use. Paragraph 2 of Article 5 thus borrows the three-step method from the TRIPS to evaluate the reasonableness of their use, namely when they "have neither affected the normal use of works, performance and audio-visual products, nor jeopardized in any unreasonable way the lawful rights and interests of right holders in works, performance and audio-visual products". In recent years, copyright disputes involving sharpshooting and thumbnailing services are growing globally. The United States and European countries have ruled differently. Continental legal systems historically enumerate all circumstances of "reasonable use", but such circumstances are limitless. Although some judges may recognize the reasonable use of the sharpshooting and thumbnailing services (shown by the ruling on the Google snapshot infringement in Germany), no sufficient statutory basis is available to support its reasonable use when a judgment is rendered. In China, a similar three-step assessment can be found in Article 21 of the Copyright Law, but it is generally regarded as a supplemental provision to Article 22 which enumerates the circumstances of reasonable use, so that is not widely applied in determining their reasonableness. It wasn't until the end of 2011 that the Supreme People's Court officially brought in the abstract three-step test for evaluating reasonableness called Opinions on Issues on Promoting IP Adjudication, Cultural Prosperity, and Balanced Development of Economy. (11) TheDraft further takes a proactive step by setting up the three-step principle in the first Article (Article 39) of Chapter 4 ("Limitations of Rights"). Coupled with the Paragraph 2 of Article 5 in Exposure Draft, such changes demonstrate that the legislative "balance of interests" principle is being carried out in network copyright infringement disputes.

D. Factors in the Application of "Know or Should Have Known" Principle

Article 8 of the Draft stipulates that six factors should be taken into account when determining whether an ISP has knowledge of or should have knowledge of the infringement, including: "the expected information management capability of the ISP; types, reputation and appearance of infringement of the disseminated works, performance and audio-visual products; direct benefits of the network service provider obtained from disseminating the works, performance and audio-visual products; whether the network service provider proactively selects, edits, amends or recommends the works, performance and audio-visual products; whether the network service provider adopts the technical measures generally accepted in the industry to prevent infringement, and whether it makes reasonable response; whether the network service provider takes the reasonable corresponding measures toward the repeated infringement of the same works."

The Supreme People's Court also lists other relevant circumstances in determining the fault of ISPs based on the different types of network services in Article 11, 12, 13 and 14. These are important guidelines for the operation of Internet businesses.

E. Applying the "No Obligation of Prior Review" Principle

Article 9 of the Draft stipulates that "the ISPs' failure to actively examine the activities of network users of infringing others' rights to network dissemination of information shall not generally be regarded by the people's
court as a fault of such ISPs. Where an ISP actively takes the relevant technical measures to prevent infringement of the right to network dissemination of information, the people's court may take that into account when determining the fault of such ISP. Where an ISP has taken reasonable and effective technical measures, but fails to find the activity of infringement, it shall not be generally regarded by the people's court as fully aware or should have known the infringement of information network dissemination rights by its network users."

This article echoes and elaborates on the “no obligation of prior review” principle in Article 69 of the Draft. They are essentially consistent.

F. Determining the Validity of Notice

Article 17 (12) provides some guidelines in evaluating the validity of notice from right holders. On the one hand, right holders must provide the specific network address of the works and information in dispute, pursuant to the Dissemination Regulations. On the other hand, exceptions are available. Where no specified address is provided, but the notice is such that ISPs are able to locate the address accurately, such notice should be regarded as sufficient and valid. This provision is consistent with Article 28 (13) of the Trial Rules of Beijing Higher Court. In determining the sufficiency to locate the address accurately, this article lists several factors for consideration, including the type of the network service in dispute, as well as file type and special features of the works, performance and audio-visual products requested to be deleted or cut off with links.

To conclude, the Draft and Exposure Draft are consistent on issues including fault principle and scope of infringement activities. These drafts reflect the rising consensus on the adjudication of copyright infringement between academia, judicial and administrative bodies, which is rational and well balanced.

Notes:
1. The first amendment was made by the National People’s Congress on October 27, 2001, and the second was made on February 26, 2010.
2. The PRC Tort Liability Law was promulgated by the National People’s Congress on December 26, 2009, and became effective as of July 1, 2010.
3. The Regulations on the Protection of Rights to Information Network Dissemination was promulgated by the State Council on May 18, 2006, and became effective as of July 1, 2006.
4. Article 69 of the Draft provides that ISPs who provide storage, search or linking services are not obliged to review information relating to copyrights or related rights. This will make it easier for network service providers to avail themselves of the safe harbor rules, thus causing concern among copyright proprietors. National Copyright Administration issued the 2nd draft of the PRC Copyright Law on July 6, 2012, in which Article 69 remains essentially the same.
5. Cessation of infringement refers to prohibition of infringing activities that are going to occur or continue to occur. Strictly speaking, cessation of infringement is different from liability for infringement, and is not premised on fault.
6. The First Guidance Rules on Several Issues over Cases of Internet Copyright Disputes (Trial Implementation) was promulgated by the Beijing Higher People’s Court on May 19, 2010.
7. Article 3: “Where network users or service providers provide through information network without prior permit, the works, performance and audio-visual products whose rights are available to others, the people’s court shall order them to take the civil-law responsibilities arising from infringing the right to network dissemination of information. Where network users or service providers put such works, performance and audio-visual products to the information network open to the public through uploading to network servers or otherwise, rendering the public able to download, browse or obtain otherwise such works, performance and audio-visual products, the people’s court shall determine that such users and service providers have ‘provided’ the works, performance and audio-visual products.”
Article 4: "Where the plaintiff has evidence to prove that the network service provider has the appearance of the provided works, performance or audio-visual products, the people's court may rule that such network service provider has 'provided' the works, performance and audio-visual products, unless the network service provider has the evidence to prove that it only provided the works, performance and audio-visual products in dispute with automatic access, automatic transmit, information memory space, search, links, P2P technology, etc."

8. The PRC Anti-Unfair Competition Law was promulgated by the National People's Congress on September 2, 1993, and became effective as of December 1, 1993.

9. Article 11: "Where a network service provider provides links to search results only through a search engine automatically based on network users’ instructions, the people's court generally shall not regard it as should have known that others are using its network service to infringe the right to network dissemination of information. Where a network service provider commits any of the following activities, the people's court generally may regard it has infringed the rights as it should have known such infringement:

1. Set list, catalog and index for hit films and TV programs, literature and music, and provide deep linking services …"

10. Article 5: "In order to provide search service, if a network service provider caches and thumbnails works, performance and audio-visual products and provides to the public with certain technical arrangement, the people's court shall determine that such service provider has committed the activities of 'providing'. Where the aforesaid activities have neither affected the normal use of works, performance and audio-visual products, nor jeopardized in any unreasonable way the lawful rights and interests of right holders in works, performance and audio-visual products, and such network service provider claims that they are used reasonably, the people's court shall sustain."

11. The Opinions on Issues on Promoting IP Adjudication, Cultural Prosperity, and Balanced Development of Economy were promulgated by the Supreme People's Court on December 16, 2011.

12. Article 17: "The notices from right holders to network service providers about deleting or cutting off the links shall comply with the special provisions in laws and administrative regulations. Where no network address of the works, performance and audio-visual products in dispute is specified in such a notice sent by a right holder, provided that the network service provider may accurately locate the address according to such notice, such notice shall be regarded as consistent with the laws and administrative regulations.

When determining whether it is sufficient to locate the address on an accurate basis, the type of the network service in dispute, as well as file type and special features of the works, performance and audio-visual products requested to be deleted or cut off with links shall be taken into account. Where a network service provider fails to take necessary measures within reasonable time limit, such as deleting, screening and cutting off links, after receiving the notice from a right holder which complies with laws and administrative regulations, the people's court shall regard that such service provider is fully aware or should have known the infringing activities mentioned in the notice."

13. Article 28 of the First Guidance Rules on Several Issues over Cases of Internet Copyright Disputes (Trial Implementation) issued by the High People's Court of Beijing on May 19th, 2010: "Where no network address of the works, performance and audio-visual products in dispute is specified in such a notice sent by a right holder, provided that the network service provider may accurately locate the address of the works, performances, and audio-visual products according to such notice, such notice shall be regarded as the ‘warning with evidence’ stipulated in Article 4 of the Explanations of Several Issues on Applicable Laws in Adjudicating Network Copyright Disputes issued by the Supreme People's Court."

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Law No.20,600 on Environmental Courts

On June 28, 2012, Law No.20,600 that creates Environmental Courts was published on the Official Gazette.

Environmental Courts are superior tribunals, subject to the Supreme Court’s supervision, in charge of hearing and deciding on environmental disputes. Special courts follow a national trend as to creating courts in charge of reviewing complex and technical matters. In doing so, courts are not composed only by lawyers but also by specialists in other areas of expertise. In this case, Environmental Courts are composed of two lawyers and a scientist specialist on environmental matters.

Law No.20,600 created three Environmental Courts with jurisdiction over the national territory: the first tribunal situated in Santiago1, the second on Antofagasta2, and the third one in Valdivia3. The first tribunal will start functioning six months after the publication of the Law, that is, on December 28, 2012; the other tribunals will start twelve months after such publication.

Environmental Courts will have exclusive jurisdiction over controversies of environmental nature, specially the following:

(i) Actions to obtain the restoration of the damaged environment4;
(ii) Reclamations against the Bureau of the Environment’s decisions;
(iii) Authorize the most burdensome measures taken by the Bureau such as facilities temporary closure, functioning stopping and temporary suspension of environmental approvals;
(iv) Authorize measures taken by the Bureau to protect the environment for imminent damage;
(v) Authorize the most burdensome sanctions imposed by the Bureau such as facilities temporary or definite closure, and environmental approvals revocation;
(vi) Reclamations against the executive Director of the Environmental Assessment Service and the Committee of Ministers’s decisions taken within the scope of the Environmental Impact Assessment System; among others.

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1 The First Environmental Tribunal will have jurisdiction over the Regions of Arica, Tarapacá, Antofagasta, Atacama and Coquimbo.
2 The Second Environmental Tribunal will have jurisdiction over the Regions of Valparaíso, Metropolitan of Santiago, General Bernardo O’Higgins, and Maule.
3 The Second Environmental Tribunal will have jurisdiction over the Regions of Biobío, La Araucanía, Los Ríos, Los Lagos, Aysén and Magallanes.
4 As opposed as the system established by Law No.19,300 or Framework Law on the Environment, by which both the action to repair the damaged environment and to recover the monetary damages caused were known by the same tribunal, Law No.20,600 confers Environmental Courts a declarative function to determine the damage to the environment and the measures required for its restoration, being regular courts in charge of determine monetary damages.
Among the innovations introduced by Law No. 20,600, it is worth noting the figure of the *amicus curiae* or “court’s friend”. This is a new institution in Chilean law by which any individual or legal entity, that is not a part of a judicial procedure, of a recognized professional and technical expertise over a matter being known by the court, may provide its expert opinion invoking the public interest.

In terms of procedure, Environmental Courts function as a “unique instance” since their decisions are subject to appellation in exceptional cases\(^5\), and their final ruling is only subject to nullity actions before the Supreme Court in restrictive circumstances.

With no doubt, the creation of specialized courts to decide on environmental matters is by itself, a milestone in our judicial system. However, it also entails several consequences for projects since from the courts start on, the Bureau of the Environment’s supervision and sanctioning powers will start being operative.

The creation of courts specialized on environmental controversies was the result of a political agreement that allowed the restructuration of Chilean environmental authorities by Law No.20,417 of 2010\(^6\). Considering the wide range of supervision and sanctioning powers granted to the newly created Bureau of the Environment, it was agreed the suspension thereof until specialized courts that could counterbalance such powers were created. After a two-year legislative discussion, Law No.20,600 comes to end such process.

For illustrative purposes, Law No.20,417 confers the Bureau exclusive powers to supervise the compliance with projects environmental approvals, the measures of decontamination and prevention plans, the content of quality and emission standards, and management plans. Likewise, it is granted with powers to take on preventive measures in case of imminent damage to the environment.

In terms of sanctions, they were substantially increased with respect to what was established by Law No.19,300 or Framework Law on the Environment\(^7\). As that, the Bureau may impose sanctions that range from reprimands in writing and fines of up to 10,000 UTA (US$9,700,000 app.), to facilities temporary or definite closure, and the revocation of the environmental approval.

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5 There can be appellate only those Environmental Courts’ decisions that do not admit the claim, the one that open a period to prove the parties’ allegations, and the one that terminates the procedure.

6 Law No.20,417 creates the Ministry of the Environment, the Sustainability Council of Ministers, Environmental Assessment Agency and the Bureau of the Environment.

7 Currently, Law No.19,300 establishes that sanctions for non-complying with the Environmental Law range from reprimands in writing and fines up to 500 UTM (app US$40,000) to the revocation of the environmental approval.
The Ministry of Commerce, Industry and Tourism, through Resolution number 0186 of June 20, ordered the commencement of an administrative investigation to determine the existence, degree and effects of an alleged dumping in conventional and radial tires for trucks or buses in the domestic industry.

The petition to initiate the investigation was filed on March 9 by the Asociación Colombiana de Autopartes (ACOLFA), who acted on behalf of the companies Goodyear S.A. and Industria Colombia de Llantas S.A. (ICOLLANTAS) and requested the enactment of provisional and definitive anti-dumping measures to the imports of radial and conventional tires for trucks or buses of Chinese origin classified under the tariff subheadings 4011.20.10.00 and 4011.20.90.00.

Among the subjects covered in Resolution 0186 of June 20 there are the likeness between the products of national production and the ones subject to dumping investigation, the representation of the domestic industry, the evaluation of the dumping evidence, the causation link, and the absolute margin of dumping for radial tires (Colombian tariff code 4011.20.10.00) and conventional tires (Colombian tariff code 4011.20.90.00) under investigation.

The Secretariat of Trade Practices of the Ministry of Commerce, Industry and Tourism found that the necessary elements for the opening of an administrative investigation were fulfilled. The term to respond the corresponding questionnaire is until August 4th of 2012, which can be extended at the request of interested parties.

Our Customs and International Trade team will gladly provide more information about this matter, and it is in full capacity to provide all the assistance and advice necessary regarding this process.

For further information, please contact:

Carlos Fradique-Méndez  cfradique@bu.com.co
José Francisco Mafla  jmafla@bu.com.co
José Alejandro Quintero  jquintero@bu.com.co
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EXPORT PROCEDURES FOR MINING PRODUCTS
In an effort to curb raw mineral exports, the government of Indonesia through the Minister of Trade has issued Regulation No. 29/M-DAG/PER/5/2012 regarding Provisions of Mining Products Export (the “Regulation”). The mining products that are subject to the Regulation as listed in Appendix I comprise 65 metal minerals, non metal minerals and rocks (the “Regulated Products”).

Under the Regulation, these Regulated Products may only be sourced from parties that hold a mining permit, and their export may only be conducted by exporters that are licensed as a registered exporter (“Registered Exporter”). The Registered Exporter license is issued by the Directorate General of Foreign Trade of the Ministry of Trade, and is valid for two years. In addition to the Registered Exporter license, a Registered Exporter is also required to obtain the approval of the Minister of Mine and Energy (“MME”) for every intended export of any Regulated Products. For the approval, the recommendation of the Directorate General of Mineral and Coal (the "DGMC") is required. The procedure and requirements for this recommendation are detailed in Regulation of the DGMC No. 574.K/30//DJB/2012 dated 11 May 2012.

Regulated Products bound for export must also undergo verification by a licensed surveyor before being loaded onto a ship. The Regulation stipulates the requirements that must be fulfilled by a surveyor in order to become a licensed surveyor. Licensed surveyors can only conduct the required verification in areas that have been designated as its ‘work area’, and are prohibited from working in what is called “Wilayah Kosong”, or area that has a mining potential but is not designated as their work area.

The lengthy verification procedure and tighter export regulations and requirements have triggered comments and criticisms from interested parties.

The Regulation revokes two previous Minister of Trade regulations that were issued in 2007 and 2008. It became effective on the day of its issue on 7 May 2007. (by: Hamud M. Balfas).

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Lower house of Dutch parliament passes Corporate Governance Bill

On 5 July 2012 the lower house of the Dutch parliament passed the Corporate Governance Bill. The purpose of the Bill is to strengthen the corporate governance of listed companies by curbing shareholder activism and promoting dialogue between shareholders and the management board. The Bill contains the following changes to the rules on corporate governance:

- The threshold for the right of shareholders of both listed and unlisted public limited liability companies (‘NVs’) to have items placed on the agenda of the general meeting of shareholders will be raised: in future only shareholders who have a holding of 3% or more will have this right. The current limit is 1%. Under the Bill the present alternative requirement of a € 50 million shareholding in the case of listed companies is also to be abolished.
- A new lower minimum threshold of 3% will be introduced for the disclosure of capital interests and/or voting rights in a listed company.
- In future, an investor in a listed company will be required to disclose not only his capital interests and/or voting rights but also his gross short positions.
- An arrangement will be introduced enabling listed companies to trace the identity of their ‘ultimate investors’. In addition to information on the investors’ identity, the company will also be able to obtain information about their individual positions. To safeguard the privacy of small investors, the company’s right to access information will be restricted to shareholders with an interest of at least 0.5%.

The Bill must still be debated by the upper house of the Dutch parliament and is expected to enter into force on 1 January 2013 at the earliest.

Background

The Bill was introduced in 2009 following recommendations of the Corporate Governance Monitoring Committee in May 2007. The recommendations were a direct consequence of the acquisition of ABN AMRO by a consortium of three banks, which occurred following an activist campaign by hedge fund TCI, which held only about 2% of the shares. The main aim of the recommendations was therefore to curb shareholder activism and promote cooperation between shareholders and the management board.

The Bill reflects this aim, although fairly far-reaching amendments were made while it was under consideration by the lower house of parliament. For example, the controversial requirement of strategy and intention disclosure was dropped. Under this requirement, the company would have been obliged to publish its strategy on its website, and shareholders who had a duty to disclose capital interests and/or voting rights would have had to indicate whether or not they objected to this strategy. The Monitoring Committee itself retracted this recommendation when it updated the Corporate Governance Code at the end of 2008. The lower house too now considers that the provision would not be effective and would merely result in polarisation, partly because it wrongly gives the impression that shareholders have control over corporate strategy. Since the judgment of the Dutch Supreme Court in the ASMI case, it has been clear that primary responsibility for determining a company’s strategy and policy lies with the management board of the company. On this subject see our newsletter of 6 August 2010.

Higher threshold for placing items on shareholders’ meeting agenda

The Bill raises the shareholding threshold for the right to have items placed on the agenda of the general meeting of shareholders from 1% to 3%. This right, known as the ‘agenda right’, may also be exercised jointly by a group of shareholders, provided they represent at least 3% of the issued capital. The provision relates to both listed and unlisted NVs. The alternative shareholding threshold of € 50 million, which applies to shareholders of listed NVs, is to be abolished. These changes will substantially restrict the right of shareholders to have items placed on the
agenda of the general meeting of shareholders. However, an NV may provide in its articles of association for a lower threshold for the exercise of this agenda right.

Introduction of lower threshold for the disclosure of capital interests

At present an investor in a listed NV is obliged to notify the Dutch Authority for the Financial Markets (Autoriteit Financiële Markten) if the total capital interest and/or voting rights which he holds (or is deemed to hold) reaches or crosses (in an upward or downward direction) certain thresholds. The present thresholds are 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95%. The Bill adds a new lowest threshold of 3% on the grounds that this would be more in line with what is customary elsewhere in Europe and with the increase in the threshold for the ‘agenda right’ referred to above.

Obligation to disclose gross short positions

In addition to this lower threshold for the disclosure of capital interests, i.e. gross long positions (whose value appreciates if the share price rises), the Bill introduces an obligation to disclose gross short positions (whose value moves in the opposite direction to the share price). The same disclosure thresholds as referred to above will apply here. The aim of this new disclosure obligation is to increase transparency in relation to the actual net economic interest of the holder of a significant long position, who may also possibly have taken a short position in the same listed company. At the same time, this will help to shed more light on ‘empty voting’, i.e. voting by a person who is legally entitled to exercise the voting rights in the general meeting of shareholders but has little or no corresponding economic interest.

This new disclosure obligation was added to the Bill by amendment at the very last moment during the plenary debate in the lower house of parliament. The explanatory note to the amendment gives the example of an investor who has acquired a 4% shareholding, but also holds a short position of 3.99%. Such an investor will exercise his voting rights on the basis of, on balance, a very limited economic interest. The new obligation does not seem to be properly thought through in all respects. For example, in view of the rationale for the amendment, it is hard to see why a holder of 3.1% of the shares need not disclose a short position of 2.9% whereas a holder of 3.3% of the shares must disclose a short position of 3.1%.

Identification of shareholders

The Bill contains a complex arrangement enabling listed companies to trace the identity of their ‘ultimate investors’. This will apply to Dutch listed companies and foreign companies with a listing on a Dutch stock market or multilateral trading facility. The arrangement was revised during its passage through the lower house.

In brief, the procedure now takes the following form:

Identification request: in the run-up to its annual or extraordinary general meeting of shareholders, a company may request Euroclear Netherlands and its member institutions and other intermediaries to provide the names and addresses of those investors for whom they administer shares (or depositary receipts for shares) together with details of their positions. The idea is that the company can proceed through the entire chain of custody until the last link, the investor, is identified. In addition, one or more shareholders who, either alone or together, have a capital interest of at least 10% have the right to request the company to institute an identification procedure. The procedure can only be used to identify investors with an interest of at least 0.5%. This limitation is intended to protect the privacy of small investors.

Procedure and sanctions: the company must submit the request within 60 days before the general meeting. The bank or other institution to which the identification request is made must reply within three working days and, if possible, supply the requested information. If no reply is forthcoming, the company may apply to a district court for an order directing compliance. Initially the Bill included a sanction for non-compliance - a three-year suspension of the voting rights on the relevant shares - but this has now been dropped. The provision for the reimbursement of costs has also been dropped.

Duty of secrecy: the company has an obligation to keep the information obtained secret and to handle it with due care. The company must also organise the information in such a way as to ensure that it is protected from loss and unlawful processing.

Passing on of information

An investor who, either alone or together with other shareholders, holds at least 1% of the shares or holds shares or depositary receipts for shares with a market value of at least € 250,000 will have the right to request the company to pass on certain information to the other shareholders. The information must be connected with an item that is on the agenda of the general meeting. The company must send the information or post it on the company’s website with the utmost speed, in any event within three working days. A company that decides to send the information must also post it on its website. The company is not obliged to accede to such requests in all circumstances. If the information
is supplied too late or gives an incorrect or misleading impression, the company may refuse to pass it on. This also applies if the information is of such a nature that it would not be reasonable or fair to expect the company to pass it on. Examples mentioned in the explanatory memorandum to the Bill are offensive criticism or unduly large documents.

Transitional law: practical aspects

The rules described above will apply from the date on which the legislation enters into force. An exception is the increase in the threshold for the agenda right, which will not apply in so far as an agenda item (requested by a shareholder with an interest of less than 3%) has already been included in the notice calling the general meeting.

Of greater importance in practice is that the higher threshold for the agenda right will not apply in so far as the present lower threshold of 1% is still explicitly included in the company's articles of association after the entry into force of the legislation. The articles of association will therefore have to be altered in this respect if the company wishes to apply the higher threshold.

Finally, the Bill provides that shareholders who are obliged to disclose their capital interests and/or voting rights as a result of the introduction of the new 3% threshold will have four weeks within which to do so after the date of its entry into force.

Contact

Geert Raaijmakers (T +31 (0)20 71 71 992)
Petra Zijp (T +31 (0)20 71 71 865)
Jochem Prinsen (T +31 (0)20 71 71 750)

Tweede Kamer aanvaardt Wetsvoorstel corporate governance (“Frijns”)

De Tweede Kamer heeft op 5 juli 2012 het Wetsvoorstel corporate governance aanvaard. Het wetsvoorstel beoogt de corporate governance van beursvennootschappen te versterken door beteugeling van aandeelhoudersactivisme en bevordering van de dialoog tussen aandeelhouders en bestuur. Het voorstel bevat de volgende wetswijzigingen:

- De drempel voor het agenderingsrecht van aandeelhouders van NV’s (met en zonder beursnotering) wordt verhoogd: het recht zal voortaan alleen toekomen aan aandeelhouders met een belang van 3% of meer. Die grens ligt nu op 1%. Daarnaast zal de huidige alternatieve drempel van € 50 miljoen kapitaalbelang bij beursvennootschappen vervallen.
- Er wordt een nieuwe laagste drempel van 3% geïntroduceerd voor het melden van kapitaalbelang en/of zeggenschapsrechten in een beursvennootschap.
- Voortaan zal de belegger in een beursvennootschap naast zijn kapitaalbelang en/of zeggenschapsrechten ook zijn bruto short-posities moeten melden.
- Er wordt een regeling ingevoerd die beursvennootschappen in staat stelt hun aandeelhouders te identificeren. Naast gegevens omtrent de identiteit van beleggers, zal de vennootschap ook informatie over de individuele positie van die beleggers kunnen opvragen. Om de privacy van de kleinere belegger te waarborgen mag alleen informatie worden verstrekt over aandeelhouders met een belang van ten minste 0,5%.

Het wetsvoorstel moet nu door de Eerste Kamer worden behandeld. Het wetsvoorstel zal op zijn vroegst op 1 januari 2013 in werking treden.

Achtergrond

Het wetsvoorstel werd in 2009 ingediend naar aanleiding van aanbevelingen van de toenmalige Monitoring Commissie Corporate Governance in mei 2007. De aanbevelingen waren een direct gevolg van de overname van ABN AMRO door een consortium van drie banken, die plaatsvond na aandeelhoudersactivisme van hedgefonds TCI dat slechts over circa 2% van de aandelen beschikte. De aanbevelingen waren er dan ook vooral op gericht het activisme van aandeelhouders te beteugelen en de samenwerking tussen aandeelhouders en bestuur te bevorderen.

Het wetsvoorstel weerspiegelt deze gedachte, al is het gedurende de parlementaire behandeling door de Tweede Kamer vrij ingrijpend gewijzigd. Zo is de omstreden strategie- en intentiemelding bij amendement geschrapt. Deze hield in dat de vennootschap verplicht werd haar strategie op haar website te publiceren, en dat aandeelhouders die kapitaalbelang en/of stemrechten moesten melden, verplicht werden om daarbij aan te geven of zij al dan niet bezwaar hadden tegen die strategie. De Monitoring Commissie kwam zelf al terug op dit advies bij de actualisering van de Corporate Governance Code eind 2008. Ook de Tweede Kamer is nu van mening dat de bepaling niet effectief zal zijn en slechts tot polarisatie zal leiden, mede omdat zij de onjuiste suggestie wekt dat aandeelhouders zeggenschap zouden hebben over de strategie van de vennootschap. Sinds de ASMI-beschikking van de Hoge
Raad is duidelijk dat het primaat van de bepaling van strategie en beleid bij het bestuur van de vennootschap ligt. Zie hierover onze *nieuwsbrief van 6 augustus 2010*.

**Verhoging drempel agenderingsrecht aandeelhouders**

Het wetsvoorstel verhoogt de drempel om het agenderingsrecht te kunnen uitoefenen van 1% naar 3% aandelenbezit. Het recht kan ook door een groep aandeelhouders gezamenlijk worden uitgeoefend, mits deze ten minste 3% van het geplaatste kapitaal vertegenwoordigt. De bepaling heeft betrekking op NV's met en zonder beursnotering. De huidige alternatieve drempel die nu nog geldt voor aandeelhouders van beursgenoteerde NV's, namelijk een aandelenbezit met een beurswaarde van € 50 miljoen zal vervallen. Met deze ingrepen wordt het recht van aandeelhouders om onderwerpen voor de agenda van de algemene vergadering aan te dragen aanzienlijk beperkt. Wel kan de NV in de statuten een lagere drempel opnemen voor de uitoefening van het agenderingsrecht.

**Introductie lagere drempel melding belangen**

Op dit moment moet de belegger in een beursvennootschap een melding doen bij de Autoriteit Financiële Markten (AFM), indien zijn totale kapitaalbelang en/of de zeggenschapsrechten waarover hij beschikt (of geacht wordt te beschikken) bepaalde drempelwaarden bereiken, overschrijden of onderschrijden. De huidige meldingsdrempels zijn: 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 en 95%. Het wetsvoorstel voegt daaraan een nieuwe lagere drempel toe van 3%. De gedachte is dat daarmee beter wordt aangesloten op wat elders in Europa gebruikelijk is, en op de hierboven genoemde verhoging van de drempel voor het agenderingsrecht.

**Meldingsplicht bruto short-posities**

Naast deze lagere drempel voor de melding van totale kapitaalbelangen, dat wil zeggen bruto *long*-posities (die in waarde stijgen als de koers van het aandeel stijgt), introduceert het wetsvoorstel een verplichting om ook een melding te doen van *short*-posities (waarvan de waarde juist tegengesteld aan de koers beweegt). Daarbij zullen dezelfde meldingsdrempels van toepassing zijn als hiervoor vermeld. De achtergrond van deze nieuwe meldingsplicht is dat zo de transparantie kan worden vergroot met betrekking tot het werkelijke - netto - economische belang van een houder van een substantiële *long*-positie, die wellicht ook een *short*-positie in dezelfde beursvennootschap heeft ingenomen. Ook kan op deze wijze meer duidelijkheid ontstaan over het zogenaamde ‘empty voting’: het ontbreken van economisch belang bij degene die juridisch wel gerechtigd is stemrecht uit te oefenen in de algemene vergadering van aandeelhouders.

Deze nieuwe meldingsplicht is bij de plenaire behandeling in de Tweede Kamer op de valreep bij amendement aan het wetsvoorstel toegevoegd. In de toelichting wordt het voorbeeld gegeven van een belegger die een aandelenbelang van 4% heeft verworven, maar daarnaast een *short*-positie van 3,99% heeft, en die derhalve per saldo een zeer gering economisch belang bij de uitoefening van zijn stemrechten heeft. De regeling lijkt overigens niet op alle punten goed doordacht. Zo valt bijvoorbeeld, gelet op de ratio van het amendement, niet goed in te zien waarom een houder van 3,1% van de aandelen een *short*-positie van 2,9% niet zou hoeven te melden, maar een houder van 3,3% van de aandelen wel een *short*-positie van 3,1%.

**Identificatie aandeelhouders**

Het wetsvoorstel bevat een (complex) regeling die ertoe moet leiden dat de beursvennootschap de identiteit van beleggers in haar kapitaal (de zogenoemde ‘ultimate investor’) kan achterhalen. De regeling zal gelden voor Nederlandse beursvennootschappen en buitenlandse vennootschappen met een notering aan een Nederlandse beurs of multilaterale handelsfaciliteit. Gedurende de parlementaire behandeling is de regeling ingrijpend herzien. Kort samengevat ziet de voorgestelde regeling er nu als volgt uit:

**Identificatieverzoek:** in de aanloop naar de jaarlijkse of een buitengewone algemene vergadering van aandeelhouders kan de vennootschap aan Euroclear Nederland, bij deze aangesloten instellingen en andere intermediairs verzoeken om naam-, adres- en positiegegevens te verstrekken van degenen voor wie zij tegoed in aandelen (of certificaten) hebben geadministreerd. De idee is dat de vennootschap zo de gehele bewaarketen kan doorlopen, zodat de laatste schakel, de belegger, wordt geïdentificeerd. Daarnaast hebben één of meer aandeelhouders die alleen of gezamenlijk een kapitaalbelang van ten minste 10% houden, het recht om een identificatieprocedure door de vennootschap te instigeren. De procedure mag uitsluitend worden gebruikt ter identificatie van aandeelhouders met een belang van ten minste 0,5%. Daarmee wordt beoogd de privacy van kleinere beleggers te beschermen.

**Procedure en sancties:** de vennootschap moet het verzoek binnen een periode van 60 dagen voor de algemene vergadering doen. De instelling bij wie het identificatieverzoek is gedaan, dient binnen drie werkdagen te reageren en zo mogelijk de gegevens aan te leveren.

Als het verzoek niet wordt beantwoord kan de rechtbank op vordering van de vennootschap een bevel tot nakoming opleggen. De aanvankelijk opgenomen sanctie tot schorsing van het stemrecht op de aandelen gedurende een
periode van maximaal drie jaar is komen te vervallen. Ook de kostenvergoeding is bij amendement geschrapt.

**Geheimhouding**

De vennootschap is verplicht de verkregen gegevens geheim te houden en zorgvuldig te verwerken. Daarnaast moet zij de organisatie zo inrichten dat de gegevens beveiligd zijn tegen verlies of onrechtmatige verwerking.

**Doorgifte informatie**

Een investeerder die alleen of gezamenlijk met andere investeerders ten minste 1% kapitaalbelang houdt of (certificaten van) aandelen houdt met een marktwaarde van ten minste € 250.000, krijgt het recht de vennootschap te verzoeken om bepaalde informatie door te geven aan de andere aandeelhouders. De informatie moet verband houden met een onderwerp dat op de agenda van de algemene vergadering staat. De vennootschap moet de informatie met de meeste spoed - in elk geval binnen drie werkdagen - doorzenden of op haar website plaatsen. Als zij besluit de informatie te verzenden, moet deze ook op de website worden geplaatst. De vennootschap is niet onder alle omstandigheden verplicht in te gaan op het verzoek. Als de informatie te laat is aangeleverd of als er een onjuist of misleidend signaal vanuit gaat jegens de vennootschap, kan zij weigeren de informatie te verspreiden. Dat geldt ook als de informatie van zodanige aard is dat verzending naar maatstaven van redelijkheid en billijkheid niet van de vennootschap kan worden verlangd. Volgens de toelichting valt hier te denken aan beledigende kritiek of een te omvangrijk document.

**Overgangsrecht; aandachtspunten voor de praktijk**

De hierboven genoemde regels zullen toepassing vinden vanaf de datum van inwerkingtreding van de wet. Uitzondering is de verhoging van de drempel voor het agenderingsrecht, die niet zal gelden voor zover een agendapunt (op verzoek van een aandeelhouder met een kleiner belang dan 3%) al in de oproeping voor de algemene vergadering is opgenomen.

Voor de praktijk is verder van belang dat de hogere drempel voor het agenderingsrecht niet zal gelden voor zover de huidige, lagere drempel van 1% na inwerkingtreding van de wet nog expliciet in de statuten is opgenomen. De statuten zullen daarom op dat punt moeten worden aangepast, indien de vennootschap de hogere drempel wenst te hanteren.

Ten slotte is geregeld dat aandeelhouders die door de invoering van de nieuwe 3% drempel verplicht worden hun kapitaalbelang en/of zeggenschapsrechten te melden, na de datum van inwerkingtreding van de wet vier weken de tijd krijgen de melding te doen.

**Contact**

Geert Raaijmakers (T +31 (0)20 71 71 992)
Petra Zijp (T +31 (0)20 71 71 865)
Jochem Prinsen (T +31 (0)20 71 71 750)
COMPETITION LAW ALERT

Information Exchange Between Ferry Operators Infringed The Section 34 Prohibition

On 18 July 2011, the Competition Commission of Singapore (the “CCS”), completed its investigations (as a result of a complaint filed) and published an infringement decision against two ferry operators which operated ferry services from Harbourfront ferry terminal in Singapore to Batam. Batam Fast Ferry Pte Ltd (“Batam Fast”) and Penguin Ferry Services Pte Ltd (“Penguin”) were found to have infringed section 34 of the Competition Act, Chapter 50B of Singapore (the "Competition Act") as they had exchanged sensitive and confidential price information which the CCS considered to be harmful to competition. This decision is noteworthy as this is the first time that the CCS had considered the act of exchanging information of itself to be an infringement. Previous decisions by the CCS in respect of the Section 34 Prohibition involved elements of information exchange as supportive evidence to price-fixing or bid-rigging arrangements.

Batam Fast and Penguin had exchanged sensitive and confidential price information on ferry tickets sold to corporate clients and travel agents for passenger routes between Harbourfront ferry terminal and Sekupang ferry terminal, and Harbourfront ferry terminal and Batam Centre ferry terminal. Batam Fast and Penguin were the only two ferry operators that provided services in the relevant market defined, and therefore operated in a highly concentrated duopolistic market where their interactions affected each other significantly.

The CCS took the position that Batam Fast and Penguin entered into a concerted practice in relation to their ferry tickets which required assessment under the Section 34 Prohibition. In the respect, the CCS decided that Batam Fast and Penguin had substituted practical cooperation between them in place of competition and the risk that competition entails. In making such assessment, the CCS again reiterated its strict position it took in its earlier decisions that liability for a party to an agreement or concerted practice is presumed even if the party is merely a passive recipient of sensitive and confidential information. Such liability is presumed unless the recipient distances itself from the unlawful initiative.

In relation to the exchange of the prices, the CCS decided that such behaviour removed the uncertainty between Batam Fast and Penguin in relation to the prices they would be charging. The CCS considered price to be an important parameter to competition and the uncertainty upon which each party would set its future prices would be removed if exchanges of future price information took place between them. The removal of such uncertainties would be particularly damaging on competition in this case since Batam Fast and Penguin were in a highly concentrated duopolistic market where, in the event one party discloses the prices that it would be charging a customer, the other party would be the only other competitor which may provide an alternative price to the customer.

As a result of the infringement, the CCS imposed financial penalties of
S$117,906 and S$113,860 respectively on Batam Fast and Penguin. Apart from financial penalties, there was also a significant amount of financial resources as well as time and effort by senior management spent by both Penguin and Batam Fast during the investigation. Businesses in Singapore can learn from this decision that the CCS would not hesitate to act on complaints and that the Section 34 Prohibition would apply even in situations where it seems common business sense and should therefore be careful in their conduct vis-à-vis their competitors. Businesses in Singapore should ensure that all staff should be educated on such competition law risks to ensure that they comply with the Competition Act.

Section 34 of the Competition Act prohibits any agreements, decisions or concerted practices which have the effect of preventing, restricting or distorting competition in Singapore (the “Section 34 Prohibition”).

Competition Law

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The ROC (Taiwan) Patent Act passed the 3rd reading review by the Legislative Yuan on 29 November 2011 and the amended Patent Act was announced by the President on 21 December 2011, which include a total of 159 amended articles (108 amended articles, 36 newly added articles and 15 deleted articles). The date on which the amended Patent Act shall be decided by the Executive Yuan (Cabinet); it is expected that the amended Patent Act will take effect at around end of November 2012.

The amendment stated above involves a number of changes of patent practice. To cope with the implementation of the amendment, the Intellectual Property Office (IPO) under the Ministry of Economic Affairs are in the process of developing all the necessary supporting mechanisms, including amending the Enforcement Rules of Patent Act, amending and formulating the relevant patent regulations, amending the Patent Examination Guidelines and various patent application forms, adjusting the IPO's patent computer system etc.

According to the IPO's plan, the concerned patent regulations being amended or newly formulated include the following:

(1) Enforcement Rules of Patent Act

(2) Implementation Regulations for Handling Patent Applications Filed with Patent Specification, Claims and Drawings Prepared in Foreign Languages

(3) Regulations Governing Biological Material Deposit for Patent Application Purposes

(4) Regulations Governing Patent Term Extension

(5) Regulations Governing Patent Government Fees

(6) Regulations Governing Reduced Payment of Patent Annuities

(7) Regulations Governing Invention/Creation Sponsoring

The above-mentioned patent regulations are scheduled to be announced in around October
MIDDLE EAST UPDATE - 5 AUGUST 2012

Update on the Strategic Amendments to the NASDAQ Dubai Listing Process and Rules

Further to our update of 26 March 2012, on 5 July the DFSA’s new Markets Law came into effect.

There are few substantive changes from the consultation draft released late last year, the most significant details of which were discussed in our earlier update. We discuss below the changes from the original version after comments from the market.

Equal Treatment of Security Holders

A new rule has been added which requires listed issuers to ensure all holders of one class of securities are treated equally in respect of the rights attaching to their securities. This change is not too significant in practical terms as it is generally the case in any event.

Auditing Requirements

The proposed draft rules would have required applicants seeking admission to the Official List to have their financial statements audited in accordance with International Auditing and Assurance Standards Board requirements. This rule has been broadened to also permit the use of other auditing standards acceptable to the DFSA.

Depositary Receipts

New rules on the issue of depositary receipts have been added such that the issuer of depositary receipts may not treat the benefits it receives from the underlying securities as its own assets but must ensure those benefits are held only for the benefit of the depositary receipt holders. In addition the payment received for the depositary receipts must fully meet the payment required for the relevant underlying securities. These rules have generally been followed in the past in any event so the addition merely formalises the position.

Timing for Admission to the Official List and removal from the Official List

A guidance note has been added to the rules to indicate that the DFSA generally anticipates processing applications for admission within two days of receipt of all documentation in the case of equity securities and within one day in the case of securities which are not equity securities.

There has been an addition to the guidance note related to cancellation of a listing which urges issuers to submit applications for removal with sufficient time for the DFSA to consider and action the request.

Tender Offers

Additional guidance has been added in respect of tender offers. The top price in the range for tender offers must now be calculated in a certain way and specified, and directors of the issuer and their associates may not participate in any share transaction during the tender offer process. Share repurchases will not generally be required during any period when there is unpublished inside information about the issuer.

Timing for NASDAQ Dubai ADSs

NASDAQ Dubai has yet to publish its final Admission and Disclosure Standards but we would expect to see those in the coming few months. We will update the market again at that point.

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Advisories

FTC Proposes Revised Definitions for Its Previously Proposed COPPA Rule Changes

08.03.12
By David Silverman and Ronald G. London

The Federal Trade Commission (FTC) has issued a Supplemental Notice of Proposed Rulemaking seeking to augment, clarify, and in some cases expand rule changes it proposed in September 2011 for the update of its regulations implementing the Children’s Online Privacy Protection Act (COPPA) that we discussed here. These supplemental changes are part of an overall effort to have the COPPA rules reflect more recent technological developments and popular online practices, primarily, social networking sites, smartphone access to the Internet, and easy provision of location information. The proposed changes would expand the final rule so that it:

- Includes persistent identifiers that can be used for behavioral advertising and other tracking across websites, while permitting some “internal” operations such as contextual advertising and anti-fraud measures;
- Covers data collection by plug-ins, software downloads, or advertising networks integrated into websites; and
- Reaches websites that may not be directed to children, but are likely to draw children under 13.

The supplemental proposed changes also would scale back an earlier FTC proposal to restrict the collection of screen names that do not enable contact with the child, but at the same time, contain a recommendation that general interest websites age-screen all users. As COPPA is the primary statute affording FTC specific regulatory authority over the use of online personally identifiable information, these further proposed rule changes could have broader ramifications. Comments on these further proposed definitional changes must be filed by Sept. 10, 2012.

Background

COPPA is intended to provide notice to parents and secure verifiable parental consent prior to the collection of personal information from children under the age of 13. Because it was first enacted in 1998, and the FTC first adopted implementing rules in 1999, the rules have been due for updating for some time. The FTC thus issued a notice of proposed rulemaking covering five different areas: 1) the rule’s definitions, including what children’s “personal information” is covered, and what it means to “collect” it; 2) parental notice; 3) new parental consent mechanisms; 4) operational definitions. The primary proposals are summarized below.

“Personal Information”

Among the most significant potential changes in this rulemaking is a proposal to expand the definition of “personal information,” the collection of which animates COPPA and its implementing rules, and the Supplemental Notice continues this process. First, in its September rulemaking notice, the FTC proposed to treat children’s screen or user names as “personal information” requiring parental notice and consent, when used for more than one website or online service. Commenters noting that screen or user names are often used to avoid collection of personal information, while permitting children to transition seamlessly between devices or platforms, persuaded the FTC to reconsider. The Supplemental Notice thus proposes to modify the definition of “personal information” to include screen or user names, but only when they function “in the same manner as online contact information,” for example, as an email address that permits direct contact with the child.

Separately, the Supplemental Notice proposes to clarify the definition of “persistent identifiers” that are considered “personal information.” In September, the FTC proposed to include “persistent identifiers” such as IP addresses, unique device identifiers and customer numbers held in cookies, if used in any way other than “support for the internal operations” of a website or online service. This was a significant expansion of the definition, and thus of what the COPPA rules would cover.

Reacting to comments that this change would target information that identifies devices and not necessarily individuals, and that the phrase “support for internal operations” is vague, the Supplemental Notice proposes that, to be considered personal information, a “persistent identifier” must be something that “can be used to recognize a user over time, or across different websites or online services.” It also offers a definition for the “internal operations” exception so that it includes—but is limited to—steps necessary to permit user authentication, improve site navigation, maintain user preferences, serve contextual ads, and protect against fraud or theft. While these supplemental proposals mitigate somewhat the potential changes to the “personal information” definition, the overall proposed change, if adopted, would still be a considerable expansion of the rules.

“Operator”

The COPPA definition for “operators” of websites or online services directed to children determines who must give notice and obtain parental consent when children’s personal information is collected. Currently, it focuses on anyone “who operates a website . . . or an online service and who collects or maintains personal information from or about the users of visitors to such website or online service.” The Supplemental Notice reflects that many website operators may not themselves collect personal information, but rather integrate social networking or other plug-ins into their sites, which plug-ins do collect personal information.
Based on this, and on the notion that operators of child-directed websites benefit from such plug-ins via increased content, functionality, and/or ad revenue, the FTC proposes to modify the definition to include operators of websites where personal information is collected or maintained on behalf of an operator, and “in the interest of, as a representative for, or for the benefit of” the operator. If adopted, this definitional change will mean operators of child-directed sites or services that choose to integrate services of others that collect personal information from visitors would be subject to the parental notice and consent requirements applicable to a covered “operator” under the COPPA Rule.

“Website or Online Service Directed to Children”

The Supplemental Notice offers two modifications to changes in the definition of “website or online service directed to children” as proposed last year. First, in a departure from the original proposal that contemplated a form of strict liability for COPPA’s notice and consent requirements, the modified definition would reach the operators of ad networks or other downloadable plug-ins only if they “know or have reason to know” that they are collecting personal information through a site directed to children. This reflects the FTC’s acknowledgement of comments pointing out that many ad networks and social network plug-ins are incorporated into websites without their knowledge. The FTC notes, however, that “such sites and services will not be free to ignore credible information brought to their attention indicating that the collection of children’s personally identifiable information is occurring.

In addition, as to websites and online services directed to children and their families, the FTC proposes to further modify the definition of “website or online service directed to children” to mean sites that knowingly target or attract children under age 13 as their “primary” audience, or sites that attract “a disproportionately large percentage of children under age 13.” Under this approach, the latter (“mixed use” sites) will not be deemed as being directed to children if they do not collect personal information from any user prior to obtaining parental consent from “visitors who identify themselves as under age 13.” This would avoid unduly burdening website operators by requiring them to treat all users as children for notice and consent purposes for sites directed to adults and children alike.

The net effect of these further revisions would be that sites and services at the far end of the “child-directed” continuum—i.e., those that knowingly target, or have content likely to draw, children under 13 as their primary audience—must still treat all users as children, and provide notice and obtain consent before collecting personal information. Conversely, sites and services with child-oriented content that target mixed audiences, where children under 13 are likely to be an over-represented group, will not be “directed to children” if, prior to collecting any personal information, they age-screen all users. At that point, for users who identify themselves as under 13, the site or service will have actual notice and must obtain appropriate parental consent before collecting personal information from them, and comply with all other aspects of the Rule. In proposing this change, the FTC acknowledged that children sometimes misrepresent their ages to access websites they wish to visit, but implicit in that acknowledgement is that there is no practical way to overcome this while still having a workable COPPA rule.

As noted, comments on the Supplemental Notice must be submitted to the FTC online or in hard copy by Sept. 10, 2012. The online comment form can be found at https://ftcpublic.commentworks.com/ftc/2012copparrulereview/. If you have any questions regarding the potential impact of the FTC’s COPPA update proposals on your business, the proceedings at the FTC, or the submission of comments, please do not hesitate to contact us.

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See note below about Hogan Lovells
When an FTC Administrative Law Judge (ALJ) issues a 300+ page decision finding deceptive advertising of pomegranate juice it is wise to pay attention. The record included 14 experts, 24 witnesses, 3,200 pages of trial transcript, and nearly 4,000 pages of briefs and filings by the parties. If reading the Initial Decision has fallen to the bottom of your To-Do List, read on. We identify our “Top 5” take-aways most relevant to the daily challenges of developing and reviewing substantiation of diet-health related claims:

1. Randomized, double-blinded, placebo-controlled clinical studies are not the only scientific evidence that can establish sufficient scientific support for a disease/health-related claim.
2. A food’s safety had some bearing on the ALJ’s reasoning, but don’t expect this factor to lessen the rigor of the “competent and reliable evidence” standard.
3. Your claims are only as good as the science.
4. The FTC cannot condition compliance with an order on FDA claim pre-approval, in the ALJ’s view.
5. If you are uncertain as to precisely how the FTC views the “competent and reliable evidence” standard, you are in good company. Developments over the past two years offer important clues marketers should heed.

Both parties have appealed the ALJ’s decision, but regardless of a final outcome, the Initial Decision provides many insights on a range of issues that inevitably arise when highlighting the health benefits of foods.

Background

The FTC alleged in its 2010 false advertising lawsuit that POM Wonderful did not have enough scientific evidence to support claims that its pomegranate juice could prevent or treat heart disease, erectile dysfunction, and prostate cancer. Nearly every facet of the case was in dispute, from the implied claims conveyed and the meaning of the “competent and reliable scientific evidence” standard, to the weight of evidence, which involved a battle of the

Contacts

Steven B. Steinborn
Partner, Washington, D.C.
steven.steinborn@hoganlovells.com
+1 202 637 5969

Veronica Knapp
Associate, Washington, D.C.
veronica.knapp@hoganlovells.com
+1 202 637 6937

Visit us at
www.hoganlovells.com
experts. Further, the FTC sought to condition future compliance, in part, on FDA pre-approval of disease claims. This remedy was even more exacting than the heightened standard the FTC has increasingly used in recent orders, which requires two so-called “gold-standard” clinical studies to support claims of health-related benefits. 

The judge found that POM lacked adequate evidence to substantiate its claims that the juice (or dietary supplement) could prevent, treat, or reduce the risk of heart disease, prostate cancer, or erectile dysfunction. The ALJ found that there was some evidence to support claims that the POM products generally support prostate and erectile health. In fashioning the order, the judge held that "competent and reliable scientific evidence" was sufficient to substantiate POM's future advertising, rejecting the notion that future claims would require FDA pre-approval.

Lesson #1: Two “gold-standard” studies are not always required for so-called establishment/health claims

The FTC and POM Wonderful disagreed on whether “competent and reliable scientific evidence” requires so-called “gold-standard” human clinical studies (i.e., randomized, double-blinded, placebo-controlled human clinical trials or “RCTs”). The ALJ rejected the FTC’s formulation of the substantiation standard, ruling that: “…competent and reliable evidence must include clinical studies, although not necessarily RCTs, that show that the POM Products did treat, prevent, or reduce the risk of heart disease.” POM cited, and the judge considered, a great many studies that might not constitute RCTs, but the ALJ found the science to fall short of substantiating the claims in question.

So who wins? Well, perhaps food marketers. The decision sheds light on an age-old question: how many studies do I need? The Initial Decision underscores that the requisite proof is driven by the nature of the claim: “Having crossed the line from making general and highly qualified health claims to making implied disease claims, ‘the level of proof sufficient to satisfy the relevant scientific community of the claim’s truth’ and ‘the amount of substantiation experts in the filed would agree is reasonable’ were necessarily heightened.” The decision further emphasized that clinical studies must support claims that a food treats, prevents, or reduces the risk of a disease. The “competent and reliable evidence” standard ultimately turned on an assessment as to the level of evidence experts in the relevant field would deem adequate.

The ALJ ruling suggests that supporting science may consist of evidence other than RCTs, yet the level of proof needed to support disease-related claims remains high. The precise formulation of the legal standard does not alter the advertiser’s burden to demonstrate strong science in support of “clinically proven” or disease-related claims that advertise the nutritional benefits of conventional foods (and supplements).

Lesson #2: Do foods have a lower standard of proof than drugs?

There is some suggestion in the decision that a claim for a “food” may be subject to a lower level of substantiation than for drugs. According to the assessment of expert testimony, “RCTs are needed for a nutrient supplement if one makes a claim that the product causes the effect of treating, preventing, or reducing the risk of a disease and one offers the nutrient supplement as a replacement to medical care to treat, prevent, or reduce the risk of diseases.” The ALJ seems to attach some significance when a food is safe, there is no material harm, and the product is not marketed as an alternative to following medical advice.

So, do foods get a break under the FTC’s substantiation standard? Perhaps so, in terms of the ALJ’s willingness to examine evidence beyond RCTs, but don’t expect that the competent and reliable evidence standard will be applied with any less vigor. And, under FDA’s “intended use” doctrine, positioning a food for a use apart from taste, aroma, or nutritive value could create regulatory issues apart from the FTC.

Lesson #3: Your claims are only as good as the science

The POM decision provides detailed insight into how scientific evidence and competing expert opinions play out under the “competent and reliable evidence” standard. Here is a top-line summary, highlighting why the ALJ found that the science didn’t measure-up.
• Heart disease claims
  ◦ Due to flaws in its studies, POM lacked sufficient evidence to claim that POM products treat, prevent, or reduce the risk of heart disease.
    ▪ POM did not commission any human studies to examine the effects on cardiovascular health, but only relied on animal and cellular models.
    ▪ In its blood pressure studies, POM only examined 19 patients for two weeks, and five subsequent RCTs showed no benefit from POM products.
    ▪ POM-sponsored studies on arterial plaque used a small sample size, found positive results at 12 months but faced unfavorable results at 18 months, and focused on post hoc sub-group analysis.
    ▪ POM stopped its studies on blood flow after only three months, used a control group with lower baseline values than the test group, unblinded some patients midway through, and lacked data for some patients.

• Prostate cancer and prostate health claims
  ◦ POM presented human clinical research (not a RCT) showing that POM products prolonged prostate-specific antigen (PSA) doubling time in men who had already had prostate cancer. The two studies at issue were not placebo controlled. The ALJ noted some support related to prostate health.
  ◦ POM lacked sufficient evidence to support its implied claim that POM products treat, prevent, or reduce the risk of prostate cancer because it only presented pre-clinical research, rather than human research, on the effect of pomegranate juice on cancer cells. In addition, experts controverted the significance of PSA doubling time, no studies were conducted on cancer-free men, and the study authors themselves testified that they could not conclude that POM products treat, prevent, or reduce the risk of prostate cancer.

• Erectile dysfunction and erectile health claims
  ◦ Based on in vitro, in vivo, and human studies, expert testimony supported a beneficial effect on erectile tissue physiology, health, and function.
  ◦ Given the absence of studies specifically related to the medical condition of erectile dysfunction, and because the authors of the clinical study did not make conclusions about that medical condition, POM did not present sufficient evidence that its products treat, prevent, or reduce the risk of erectile dysfunction.

POM purported to rely upon a great deal of science, and even referenced its science in advertising. The ALJ’s findings reveal the rigor by which the “competent and reliable evidence” standard is applied.

Lesson #4: The FTC cannot require FDA pre-approval as remedy

The ALJ rejected the FTC’s proposed requirement of FDA pre-approval — as an over-the-counter or prescription drug, or via health claim pre-approval for a food — for future unqualified disease claims. The FTC argued that FDA pre-approval is an appropriate “fencing-in” provision, reasonably related to the violation, and is clear and concise, providing a “bright-line” rule to judge future POM claims under the proposed consent order.

According to the opinion, the required level of substantiation is a case-specific question of fact, and is often lower than that required for FDA pre-approval. Prior FDA approval as a precondition for claims permitted under an order would “impose a different and/or higher level of substantiation for future implied claims” and was rejected as not reasonably related to the violation. The FTC’s case for a “bright-line” standard did not justify creating “a new level of substantiation, through a cease and desist order against Respondents, a fortiori, considering the level of substantiation found to be required in this case.” The ALJ further clarified that the requirement that FTC orders be “clear and precise” is designed to ensure that the party subject to an order understands what conduct is covered; and not “for the benefit of the FTC in litigating potential enforcement actions.” Thus, the ALJ held that a bright line rule was inappropriate and implementing the proposed FDA pre-approval requirement “would constitute unnecessary overreaching.”

This question of remedies and restrictions on future speech raises a host of issues, and is included among the key issues on appeal. FDA approval as a pre-condition to a claim permitted by an order is novel and suspect for many reasons identified by the ALJ.
Lesson #5: Are heightened standards in FTC orders necessary?

The ALJ’s Initial Decision indirectly has a bearing on a recent trend in FTC orders to set a higher bar for substantiating future claims beyond the traditional “competent and reliable scientific evidence” standard. In four orders since 2010, the FTC has required “at least two adequate and well-controlled human clinical studies” as support for claims of health-related benefits. An “adequate and well-controlled human clinical study” is defined in the orders as one that is randomized, double-blind, and placebo controlled. The FTC has used this heightened, prescriptive standard for alleged weight loss claims in orders with Iovate Health Sciences and Central Coast Nutraceuticals. The FTC also applied the standard in consent decrees with Dannon, regarding alleged claims about relief of temporary irregularity and help with slow intestinal transit time, and with Nestlé, involving claims that a product reduces the duration of acute diarrhea in children up to age 13 and reduces absences from daycare or school due to illness.

In the POM case, unlike in other recent orders, the FTC did not seek the heightened “two adequate and well-controlled human clinical studies” requirement for future advertising claims. Rather, the FTC sought FDA pre-approval for claims of disease treatment, prevention, or risk reduction, and the traditional standard of “competent and reliable evidence” for claims about “the health benefits, performance, or efficacy of any Covered Product” in its proposed consent decree. Having rejected the FTC’s proposed FDA pre-approval standard for disease claims, the ALJ chose “competent and reliable evidence” as the required level of support for both disease and other health-related claims in its order granting injunctive relief against POM. The ALJ might have considered requiring the heightened two adequate and well-controlled human clinical studies as support for disease claims in the order, but did not, instead choosing to apply the traditional standard.

Depending on how the appeals are resolved by the Commission, the POM case could have a bearing on the suitability and application of the heightened substantiation standard currently in favor at the FTC.

* * *

The Commission will now weigh in on these and related issues raised by the parties’ appeals, with oral arguments scheduled for August 23, 2012. The ALJ’s Initial Decision should be consulted when evaluating nutrition and health related communications by food companies. Ever-growing consumer interest in diet and health places a premium on how the pieces of the FTC puzzle fit together, and on managing legal compliance accordingly.

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2/ FTC v. POM Wonderful (No. 9344, May 17, 2012).

3/ Establishment claims convey a certain type or level of support (e.g., product benefit clinically proven). The decision notes the distinct category of “efficacy” claims that tout a product’s attributes, performance, or efficacy, but do not communicate a particular level of support. Id. at 235.

4/ Id. at 253. The ALJ weighed the six Pfizer factors, which include “the amount of substantiation experts in the field would agree is reasonable.” Thompson Medical, 1984 FTC LEXIS 6, at 387. The remaining five factors are: (1) the products involved; (2) the type of claim; (3) the benefits of a truthful claim; (4) the ease of developing substantiation for the claim; and (5) the consequences of a false claim.

5/ Id. at 289 (citing FTC v. QT, Inc., 512 F.3d 858 (7th Cir. 2008)).

6/ Id. at 243.

7/ Id.

8/ Id. at 321.

9/ Id. at 323.

10/ Note that in the four recent consent decrees in which the FTC required two “gold-standard” clinical studies to substantiate specified health-related claims, the FTC also applied the FDA pre-approval standard to claims of disease treatment, prevention, or risk reduction.
New CA Commissions Law Takes Effect January 1, 2013

July 31, 2012

If you have employees rendering services in California on a commission basis (e.g., sales representatives), a new California law that takes effect on January 1, 2013 requires that you:

- memorialize your commission agreement in writing, specifically stating the method by which you will compute and pay the commissions;
- provide a signed copy of the written agreement to the employee; and
- obtain a signed receipt for the written agreement from the employee.

The law is unclear as to whether it applies to existing arrangements, so cautious employers will want to make sure existing arrangements are in compliance by January 1, 2013 as well. Most employers will need to take some action during 2012 to comply.

In addition, you should be aware that this new law also provides that if you do not take formal action to amend or cancel a commission agreement, and your employee continues to work for you (presumably in substantially the same position), your employee may have a continued right to be paid the same commissions. Thus, it will be extremely important for you to either amend or cancel a commission contract, in writing, prior to its expiration if you wish to change any of the terms or to end the arrangement with an existing employee.

Limited exceptions exist for certain short-term productivity bonuses and for more global bonus and profit-sharing plans, but you will need to assess your various arrangements on a case-by-case basis to see if each qualifies.

You should start taking steps now to make sure you are compliant when the law takes effect, especially if you anticipate that any board or other management approval will be required. MLA attorneys are available to provide any assistance that you may need.

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In July 2012, a California appellate court affirmed a trial court's award of attorneys' fees to a trade secret defendant, finding that the plaintiff had raised the claim of trade secret misappropriation in the case did so in “bad faith.” Most state enactments of the Uniform Trade Secrets Act (UTSA) allow an award of defense fees when a trade secret claim has been initiated or maintained in bad faith, and courts in several states have issued such awards in recent years. As a result, the potential for a trade secret defendant to recover fees and costs from a trade secret plaintiff is an important consideration in trade secret litigation.

In SASCO v. Rosendin Electric, Inc., the plaintiff sued three former employees and their new employer, alleging that the defendants misappropriated trade secrets relating to a software system for construction projects. The plaintiff argued that the defendants used the proprietary system to underbid the plaintiff and that the plaintiff lost a lucrative contract as a result. The defendants submitted declarations stating that they had not taken software from the plaintiff and that the plaintiff used an off-the-shelf software product. They also submitted a declaration from a third-party company explaining that the plaintiff lost the project bid because the plaintiff was the highest bidder. By contrast, the plaintiff's CEO testified, among other things, that he had no evidence that the former employees took anything. He further stated his belief that the defendants had to prove that they had not taken documents when they left the company. In response to a question about whether the plaintiff had actual evidence of trade secret misappropriation, the court noted, the company's CEO stated that “they either took it or they’re stupid.”

When the defendants moved for summary judgment, the plaintiff voluntarily dismissed the lawsuit. The defendants then moved for a finding of bad faith and an award of fees and costs under California Civil Code Section 3426.4. Relying in part on a 2009 decision (FLIR Systems, Inc. v. Parrish) in which Wilson Sonsini Goodrich & Rosati won a $1.6 million fee award for two prevailing trade secret defendants, the appellate court affirmed the trial court’s finding that the plaintiff had acted in bad faith because the lawsuit was objectively and subjectively unreasonable. The court held that trade secret defendants need not show that a case is frivolous in order to establish “bad faith.”

SASCO makes clear that to establish “bad faith” under California’s trade secret statute, subjective bad faith must exist on the part of the plaintiff (i.e., the plaintiff must have filed the lawsuit for an improper purpose such as harassment, delay, or to thwart competition). In addition, to prove bad faith, a defendant must demonstrate “objective speciousness,” which is present “where the action superficially appears to have merit but there is a complete lack of evidence to support the claim.” Because subjective bad faith was not an issue presented on appeal, the court’s analysis focused primarily on whether objective bad faith existed. The court held that it did, finding “no evidence in the record supporting the claim that defendant misappropriated SASCO’s trade secrets.”

The potential availability of attorneys’ fees for trade secret defendants in UTSA jurisdictions means that both sides must plan their litigation positions carefully. For a potential trade secret plaintiff, it is important to make sure that there is a colorable claim of trade secret misappropriation and to distinguish the legitimate goal of intellectual property protection from merely stopping former employees from engaging in competition against their former employer—a goal that trade secret law does not encompass. The SASCO court underscored that speculation that the individuals must have taken trade secrets based on their decision to join a competitor does not constitute evidence of misappropriation, nor does the mere fact that their former employer may lose (or has lost) business as a result of the employees’ change in employment. The court also noted the absence of (but did not require) any pre-litigation investigation or forensics work prior to the filing of the complaint.

For a trade secret defendant, if an early case investigation shows that the case lacks merit, it is important to put the plaintiff on notice of the defendant’s intention to seek attorneys’ fees early in the case and to point out the absence of supporting evidence continually as the case proceeds.

Wilson Sonsini Goodrich & Rosati is following developments around the country with respect to fees awards in trade secret cases actively, and the firm is available to assist companies, employees, newly formed businesses, and investors with every aspect of trade secret litigation and counseling. For more information, please contact Fred
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Alvarez, Rico Rosales, Marina Tsatalis, Laura Merritt, Charles Tait Graves, or another member of the firm’s employment and trade secrets litigation practice.