

Pacific Rim Advisory Council  
**December 2020 e-Bulletin**

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**CONFERENCES & EVENTS**

**PRAC - Let's Talk!**

upcoming virtual meetings

January 25/26, 2021 | February 22/23, 2021

- 67th International Conference - New Delhi Hosted by KOCHHAR & Co. TBA
- 68th International Conference - New Zealand Hosted by Simpson Grierson TBA
- 69th International Conference - Mexico City Hosted by Santamarina y Steta TBA
- 70th International Conference - Paris Hosted by GIDE TBA

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**Coronavirus**  
COVID-19

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

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

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- ▶ **ARIFA** | Simon Property Group in Sale of LatAm Operations of Forever 21
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## **BAKER BOTTS CONTINUES TO EXPAND WEST COAST IP PRACTICE WITH ADDITION OF PROMINENT PARTNER**

**SAN FRANCISCO, 14 December 2020:** Baker Botts L.L.P., a leading international technology, energy and life sciences law firm, announced today that leading IP and California-based lawyer Ted Chandler has joined the firm as a partner in the Intellectual Property Department.

"Ted's addition to the firm will bolster our world-class IP platform as we continue to meet the needs of our technology and life sciences clients and expand our deep bench of capabilities on the West Coast," said Baker Botts Managing Partner John Martin. "Ted's exceptional background and experience will help us stay ahead of key industries that are rapidly evolving."

Mr. Chandler, who joins the firm from Sidley Austin, is a seasoned IP litigator with more than 20 years of patent counseling experience, including patent, copyright and trade secret litigation. He handles cases involving software, electronics and medical devices for clients in the technology and life sciences sectors. He has tried cases in federal court and the International Trade Commission (ITC) and appealed cases to the Federal Circuit and Ninth Circuit. Mr. Chandler is also registered to practice before the U.S. Patent Office, where he handles challenges to the validity of patents in reexaminations and Inter Partes Review (IPR) proceedings in parallel to litigation.

"We are excited to welcome Ted to the firm," said Rob Scheinfeld, Chair of Baker Botts' IP Department. "His wealth of trial and litigation experience will help us continue our strategic growth. Based on his case load and following, we know he will hit the ground running."

Mr. Chandler's arrival comes on the heels of the addition of first-chair patent and IP trial lawyer Pete Kang, who joined Baker Botts' Palo Alto office in September from Sidley Austin. In August, Christopher Palermo, founding and named partner of the IP boutique Hickman Palermo Becker Bingham L.L.P., also joined the firm's Palo Alto office. Baker Botts' San Francisco office welcomed tax partner Will Gorrod in February and litigation partner Chris Rillo in November – bringing the total lateral hires on the West Coast to five in 2020.

Mr. Chandler earned a B.S.E. undergraduate degree in Computer Science from Princeton University, summa cum laude, in 1997. He received his J.D. from Harvard Law School, magna cum laude, in 2000. In 2001, he clerked for William G. Young of the U.S. District Court in the District of Massachusetts.

Baker Botts provides a large team of focused and technically trained intellectual property lawyers who work with clients to provide creative solutions for their toughest challenges across every industry and technology. With over 200 attorneys and patent professionals dedicated to IP from coast to coast and across the globe, Baker Botts has one of the largest and most highly regarded IP practices of any general practice law firm. Its lawyers collectively hold over 240 scientific and technical degrees, including over 20 PhDs.

Visit us online at [www.bakerbotts.com](http://www.bakerbotts.com)

## DAVIS WRIGHT TREMAINE CONTINUES ITS CALIFORNIA GROWTH WITH NEW LATERAL PARTNER HIRE IN LOS ANGELES

**LOS ANGELES – 09 December 2020:** Davis Wright Tremaine continues its 2020 lateral hiring campaign with a new partner in Los Angeles who expands the firm's litigation team focused on technology companies. Rasheed McWilliams, who joins the firm from Zuber Lawler & Del Duca, is a trial lawyer focused on IP infringement litigation and the defense of California Consumer Privacy Act (CCPA) and Telephone Consumer Protection Act (TCPA) cases.

Prior to his time at Zuber, McWilliams was president and general counsel of iPEL Inc., where he spearheaded the implementation of the company's strategy for the enforcement and licensing of its large portfolio of patented technologies in the U.S. and China.

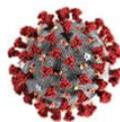
"Rasheed brings first chair trial experience and extensive work with technology companies in California, nationally and in China," said Wendy Kearns, co-chair of the Technology, Communications and Privacy & Security practice at DWT. "He has corporate experience that gives him a strong client perspective, and an entrepreneurial sensibility that is a perfect fit with our firm."

McWilliams' practice complements those of two leading technology litigators who joined the firm earlier this year: David Gossett, former head of litigation at the FCC, and Spencer Persson, who focuses primarily on privacy and security class actions in California and across the country. "We're continuing to build a litigation practice that handles the whole array of cutting-edge litigation that technology companies face, and Rasheed's addition is central to that vision," said Gossett. "Rasheed adds a significant depth of experience to our technology and litigation practices and is a perfect fit for our strong and expanding team," added Persson.

"DWT is a great platform for me to continue to build my practice," said McWilliams. "The firm has a strong technology practice representing many of the world's leading companies, and an excellent litigation practice that is growing rapidly in California. It is a place where lawyers with ambition and energy are welcomed and can succeed."

McWilliams received his J.D. from New York University School of Law in 2003 where he was a member of the Black Allied Law Students Association. He received his B.S., magna cum laude, from Morehouse College in 1999. He is the 12th new partner to join the firm this year. All of this year's additions have been in the firm's targeted industries: technology, healthcare, media/entertainment, energy, financial services and restaurants/food and beverage.

For more information, visit [www.dwt.com](http://www.dwt.com)



### Coronavirus COVID-19

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Visit us online for full coverage

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**DENTONS RODYK APPOINTS GERALD SINGHAM AS MANAGING PARTNER**

**SINGAPORE - 07 December 2020:** Dentons Rodyk, a member of the world's largest law firm, announced today that the firm's Deputy Managing Partner, **Gerald Singham**, has been appointed Managing Partner of Dentons Rodyk & Davidson. This change takes effect from 1 January 2021. This follows an announcement by the Prime Minister's Office that the Firm's Global Vice Chair and ASEAN CEO Philip Jeyaretnam SC has been appointed a Judicial Commissioner of the Supreme Court, with his term commencing 4 January 2021.

"Philip's appointment to the Supreme Court brings immense pride to Dentons Rodyk. Philip has been instrumental in making us a cornerstone of the leading global law firm. Together with his judicious temperament and insightful mind, I am confident that in his commitment to public service he will serve Singapore with distinction," said Gerald Singham, Managing Partner-elect of Dentons Rodyk. "I look forward to continuing our cutting-edge approach to driving value for our clients, creating innovative legal solutions and advancing our expansion plans across the ASEAN Region and look forward to continuing Philip's legacy."

Gerald has spent his entire professional career with Dentons Rodyk, and has served as Deputy Managing Partner since 2011. One of his core priorities has been to advance the Firm's commitment to nurturing future leaders of the firm and fostering an environment in which everyone has an opportunity for challenging work and professional growth in an effort to continue to meet and exceed client expectations. Gerald will continue to lead the firm's Competition Practice in Singapore. z

For additional information visit [www.dentons.rodyk.com](http://www.dentons.rodyk.com)

**HOGAN LOVELLS ADDS LEADING CORPORATE LITIGATOR**

**PHILADELPHIA and NEW YORK - 07 December 2020:** Global law firm Hogan Lovells announced today that Courtney Devon Taylor has joined the firm as a partner in the Litigation, Arbitration, and Employment practice in Philadelphia and New York. Taylor joins the firm from Schnader Harrison Segal & Lewis, where she was vice-chair of the firm's Securities Litigation Practice Group.

"The addition of Courtney aligns well with our strategy to continue to build on our strong litigation capabilities in Philadelphia and New York," said Des Hogan, Head of Hogan Lovells' global Litigation, Arbitration, and Employment practice group. "Courtney's clients span a number of important sectors for the firm, so her practice is a great fit."

Licensed to practice in New York, New Jersey and Pennsylvania, Taylor represents global and U.S. based clients in commercial litigation and regulatory enforcement matters. Her experience includes securities class action defense, shareholder derivative suits, M&A related litigation, and litigation emanating from other transactions involving contests for corporate control. She has tried a variety of cases to verdict. She has represented broker-dealers in significant disputes, including a rare and successful FINRA Enforcement Hearing. Taylor earned her J.D., with honors, from Emory University School of Law, and a B.A. in Government from Wesleyan University. Taylor's clients operate in industries that include financial services, insurance, technology and sports. She joins the firm's Financial Institutions and Insurance Sector, and the Sports, Media & Entertainment team.

"With her reputation for skillfully and strategically navigating high-stakes disputes, we are happy to welcome Courtney and expect that she will be a key part of our team," said Jon Talotta, global co-leader of the firm's Securities, Shareholder, and M&A Litigation group. "She will be a great resource to our corporate clients."

"I am honored to join Hogan Lovells. The firm's breadth of practice and global platform offer true advantages to my clients," Taylor said. "So much of what I do involves building trust, helping clients tell their stories, and minimizing negative impact on business and reputation," she added. "I am excited to be part of a litigation powerhouse that can tackle any business challenge, no matter how large or complex."

For additional information visit [www.hoganlovells.com](http://www.hoganlovells.com)

**ARIAS**

ADVISES INTERNATIONAL FINANCE CORPORATION IN ITS SUPPORT OF BANCO AGROMERCANTILE FOR FINANCING SMES IN GUATEMALA

**GUATEMALA CITY - November 2020:** After the economic instability for small and medium-sized companies due to the contingency generated by the COVID-19 pandemic, and several months of negotiation, the granting of a loan of US \$ 20 million was achieved by International Finance Corporation (IFC), to the Agromercantil bank, to be used exclusively in the development area.

Arias represented IFC, in what was the first transaction of this type, since it is the first granting of funds in Guatemala, as part of a global economic rescue plan, to mitigate the impact of the pandemic on the global economy.

The representation of this initiative, which seeks to promote the sustainable development of the economy for the well-being of all Guatemalans, was carried out by the banking and finance team of Arias Guatemala, with Jorge Luis Arenales founding partner of the country's office, along with Arias associate, Manuel Montenegro.

For additional information visit [www.ariaslaw.com](http://www.ariaslaw.com)

**ARIFA**

ADVISES SIMON PROPERTY GROUP IN SALE OF LATIN AMERICAN OPERATIONS OF FOREVER 21

**PANAMA - 10 October 2020:** Arias Fabrega & Fabrega acted as Panamanian Counsel to Simon Property Group in the sale of the Panamanian and Latin American operations of Forever 21 to AR Holdings, member of the Promerica Group.

Under the terms of the deal, AR Holdings will distribute the brand across all channels in the region s including e-commerce, wholesale and 26 retail stores in in Panama, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala and Peru.

Acting in the transaction on Estif Aparico, lead partner, Fernando Arias F., senior associate.

For additional information visit [www.arifa.com](http://www.arifa.com)

**PRAC EVENTS**  
UPCOMING EVENTS



Like millions around the globe, the COVID-19 pandemic has impacted our members and how we work.

We pivot. We adapt.

We continue to meet and talk virtually face to face

Across the miles, oceans and regions

In varying places and hours of the day and night.

It isn't the same . We can all admit to that.

What remains the same is our commitment to continue forming new bonds  
and strengthening our long-standing ties with our friends and colleagues around the world.

**Together, we will see it through.**

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Stay Safe. Stay Well.

**BENNETT JONES**

ADVISES APOLLO GLOBAL MANAGEMENT ON \$200 MILLION JOINT VENTURE

**CALGARY - 16 October 2020:** Bennett Jones acted for Apollo Global Management, Inc., in connection with its joint venture investment in Great Bay Renewables, a subsidiary of Altius Minerals Corporation, a publicly traded company listed on the TSX.

Apollo expects to invest up to US\$200 million and will have the opportunity to acquire up to a 50% stake in Great Bay, the proceeds of which will be used by Great Bay to invest in prominent renewable energy development platforms in North America. Through the investment, Apollo's infrastructure strategy becomes the first in its asset class to fund renewable royalties and expects to establish a leadership position in the space.

The Bennett Jones team was led by John Mercury and included John Lawless and Colin Perry.

For additional information visit [www.bennettjones.com](http://www.bennettjones.com)

**BRIGARD URRUTIA**

ASSISTS COLOMBIA'S INTERCONEXION ELECTRICA ACQUIRE 4G TOLL ROAD CONCESSION FOR US\$528MILLION

**BOGOTA - 06 November 2020:** Brigard Urrutia in Bogotá have helped the Chilean subsidiary of Colombian transport operator Interconexión Eléctrica (ISA) buy a toll road concession in northern Colombia for US\$528 million.

The deal was announced on 30 October.

The 146-kilometre motorway connects the northern port cities of Barranquilla and Cartagena and is part of Colombia's 4G programme, which aims to renovate the country's road network. The nationwide infrastructure project includes around 50 motorways, accounting for some 10,000 kilometres in total.

It is understood that this is the first time that a Colombian 4G project – which has previously received international financing – has been acquired. The project has previously raised over US\$435 million, which includes a US\$235 million bond offering back in 2016.

Through the acquisition of the 25-year concession, ISA's Chilean subsidiary Intervial has entered the Colombian infrastructure market for the first time. Intervial will operate and maintain the toll road, which is 98% complete.

Counsel to ISA and Intervial Clifford Chance LLP (New York, London); Brigard Urrutia (Bogota) Partner Darío Laguado and associates Laura Ricardo and Elisa Escobar.

For additional information visit [www.bu.com.co](http://www.bu.com.co)

**CAREY**

ASSISTS MESOAMERICA ACQUISITION REMAINING STAKE IN CHILEAN FOOD CHAIN OPERATOR

**SANTIAGO - 15 December 2020:** Chile's Carey has helped private equity investor Mesoamerica acquire the remaining 25% stake in Chilean food chain operator Unifood, becoming its sole stakeholder. Unifood was represented by Gamboa, Fuenzalida, Sanfeliú y Ugarte Abogados. The deal closed on 21 October for an undisclosed value.

Mesoamerica acquired a 75% interest in Unifood in 2016.

Unifood is the largest restaurant platform in Chile, operating brands such as Pedro, Juan & Diego, Pollo Stop, Fuente Nicanor, Heladerías Savory, Fajitas Express and XS Market.

Counsel to Mesoamerica: Carey Partners Francisco Ugarte, Francisca Corti and Jessica Power, counsel Alejandra Risso, and associates Alejandra Daroch and Carla Karzulovic in Santiago.

For additional information visit [www.carey.cl](http://www.carey.cl)

**DENTONS RODYK**

SUCCESSFULLY REPRESENTS INDONESIAN SHIPBUILDER IN ITS INTERNATIONAL ARBITRATION CLAIM AGAINST A SINGAPORE BUYER CONCERNING A BUSINESS EMAIL IMPERSONATION SCAM

**SINGAPORE - 19 October, 2020:** Business email impersonation scams are on the rise. Scammers utilise highly sophisticated means to hack or spoof business email accounts, or create new accounts that closely mimic genuine ones. The scammers lurk within the email database of their unsuspecting victims to learn about business practices and transactions, and the personal email traits of employees. The scammers then use these fraudulent spoof accounts to issue fraudulent payment instructions to victims, for funds to be transferred to a new bank account controlled by the scammers.

In the legal context, would payment based on fraudulent instructions discharge a buyer's payment obligation? Much would depend on the facts, but in an ad hoc international arbitration, Dentons Rodyk successfully represented a prominent Indonesian shipbuilder (Client) in persuading the Tribunal that the answer ought to be a firm 'no'.

Our Client had commenced arbitration for an unpaid milestone payment of about S\$900,000 for new vessels under a shipbuilding contract. The buyer (Buyer) claimed it had already paid based on (fraudulent) payment instructions that "emanated" from our Client. The case involved highly technical features which, in the Tribunal's words, allowed the unknown fraudster(s) to be "well aware of the parties' practices and exchanges".

Nevertheless, the Tribunal ultimately rejected, amongst other things, the Buyer's pleas that the fraudulent payment instructions were issued by email accounts allegedly under our Client's control, and that our Client had owed the Buyer a duty of care to protect it from third party fraud, finding in our Client's favour.

The case is a timely reminder for companies and their employees to remain vigilant in their online business dealings, particularly where payment instructions are concerned.

The Dentons Rodyk team was led by Senior Partner Rodney Keong, and assisted by Partner Terence Wah and Associate Chong We Feng.

For additional information visit [www.dentons.rodyk.com](http://www.dentons.rodyk.com)

**GIDE**

ADVISES ON THE FIRST GREEN BONDS ISSUANCE BY VINCI FOR A TOTAL AMOUNT OF €500 MILLION

**PARIS - 08 December 2020:** Gide has advised Crédit Agricole CIB, Barclays, BNP Paribas, Deutsche Bank and Société Générale on the first issuance of Green bonds by Vinci, for an amount of EUR 500 million, admitted to trading on Euronext Paris.

This issuance will bear a fixed interest of 0% and will mature on 2028.

According to the issuer, this transaction "has the longest maturity ever achieved by a corporate issuer with a negative return".

Gide's team was led by partner Hubert du Vignaux, assisted by senior associate Bastien Raisse and associate Mariléna Gryparis. Vinci were advised by Clifford Chance Paris.

For additional information visit [www.gide.com](http://www.gide.com)

**HAN KUN**

ADVISES SINOVAQ LS ON ITS US\$500 MILLION FINANCING FOR COVID-19 VACCINE PROJECT

**BEIJING - 07 December 2020:** Sinovac Biotech Ltd. (NASDAQ: SVA), a leading provider of biopharmaceutical products in China, recently announced that Sinovac Life Sciences Co., Ltd. ("Sinovac LS"), a subsidiary of Sinovac Biotech Ltd., has secured approximately US\$500 million in funding for further development, capacity expansion and manufacturing of CoronaVac, its COVID-19 vaccine candidate, as well as to conduct other development and operational activities.

Han Kun, acting as PRC legal counsel to Sinovac LS, provided legal services throughout the transaction, including providing legal advice on the transaction structure, drafting and negotiating transaction documents, and assisting Sinovac LS in closing the transaction.

For additional information visit [www.hankunlaw.com](http://www.hankunlaw.com)

**HOGAN LOVELLS**

ADVISES LINKBANCORP ON STRATEGIC COMBINATION WITH GNB FINANCIAL SERVICES

**WASHINGTON, D.C. - 14 December 2020:** Global law firm Hogan Lovells has advised LINKBANCORP on its strategic combination with GNB Financial Services (GNB) in a stock and cash transaction, creating a leading Pennsylvania community bank with assets in excess of US\$800 million and a network of nine offices throughout South Central Pennsylvania.

Announced on 10 December, GNB will merge with and into LINKBANCORP. Shareholders of GNB will have the opportunity to elect to receive US\$87.68 per share in cash or 7.3064 shares of LINKBANCORP common stock for each share they own, representing a total valuation of approximately US\$62.6 million based on the trading price of LINKBANCORP as of December 7, 2020.

A Washington D.C. team representing our client LINKBANCORP on the transaction comprises Head of U.S. Financial Institutions partner Richard Schaberg, capital markets partner Les Reese, M&A counsel Sara Lenet, tax, pensions & benefits counsel Mike Applebaum, and capital markets associate Brendan Oldham.

The parties expect to complete the transaction in mid-2021, after satisfaction of customary closing conditions, including required regulatory and shareholder approvals.

Cedar Hill Advisors LLC acted as financial advisor to LINKBANCORP, Inc. and Boenning & Scattergood, Inc. acted as financial advisor to GNB Financial Services, Inc. Pillar + Aught acted as legal counsel for GNB Financial Services, Inc.

For additional information visit [www.hoganlovells.com](http://www.hoganlovells.com)

**KOCHHAR & CO**

ADVISES FINICITY ON ITS ACQUISITION BY MASTERCARD IN A US\$825 MILLION ALL CASH DEAL

**NEW DELHI - 10 December 2020:** MasterCard has acquired the leading American Fintech company - Fincity Corporation along with its wholly owned subsidiaries in India and Australia.

Kochhar & Co. team led by its Senior Partner, Rajarshi Chakraborty and Corporate Partner, Sameena Jahangir, advised Fincity on the Indian leg of the global transaction and assisted in all pre closing, closing and post-closing formalities.

Under the terms of the agreement, Mastercard acquired Fincity for USD 825 million upfront, with the potential of USD 160 million in additional earn-out payments contingent on meeting performance targets.

Fincity is one of the leading North American providers of real-time access to financial data and insights. This was a strategic move for MasterCard as Fincity acquisition will give the global payments giant an advantage in digital money management capabilities, bolstering its competitiveness against both banks and its competition.

Fincity's open banking prowess will help Mastercard offer a digital money management experience that integrates consumers, fintechs, other banks, and now payments services.

The transaction was closed in November 2020.

For additional information visit [www.kochhar.com](http://www.kochhar.com)

**MULLA & MULLA & CRAIGIE BLUNT & CAROE**

ADVISES MINNOW FILMS FOR DOCU-SERIES BAD BOY BILLIONAIRES INDIA

**MUMBAI – 01 December 2020:** Mulla & Mulla & Craigie Blunt & Caroe proudly advised its clients Minnow Films, London on extensive IP issues for its docu-series, "Bad Boy Billionaires - India" released worldwide on Netflix.

The docu-series held the No. 1 position on Netflix in India and No. 7 worldwide for several weeks.

The standalone episodes cover the story of three highly prominent Indian billionaires, Vijay Mallya, Nirav Modi and Subarata Roy.

For additional information visit [www.mullaandmulla.com](http://www.mullaandmulla.com)

**NAUTADUTILH**

ASSISTS COMMONWEALTH BANK OF AUSTRALIA IN OBTAINING BANKING LICENSE IN THE NETHERLANDS

**AMSTERDAM - 08 December 2020:** NautaDutilh successfully assisted the Commonwealth Bank of Australia (CBA) in obtaining a banking license in the Netherlands. The newly established Amsterdam branch will serve as the European headquarters of Australia's largest bank. In addition to the banking license held in the UK, CBA Europe N.V. will support institutional clients based in Europe through a strong EU presence regardless of the outcome of Brexit.

NautaDutilh assisted CBA throughout the license application process. The NautaDutilh core team was led by Larissa Silverentand and consisted of Lisette Simons, Nikki Dekker, Rutger Goudswaard, Sven Uiterwijk, Marrit van Eijck van Heslinga, Geert Raaijmakers, Wijnand Bossenbroek, Jules van de Winckel and Elodie Smits.

The team was further assisted by Edger Kleijer, Stefan Wissing, Christiaan Roeterdink, Frans van der Eerden, Jasha Sprecher, Roderick Watson, Juliët de Graaf, Marjolein van Well, Michael van der Sande, Alex Draaisma, Merle de Vries, Rob Heslenfeld, Dewi Walian, Jochem Polderman, Pieternel van den Brink, Peter de Kock, Marleen Velthuis, Sascha Allertz, Paul Deza de Massiac.

For additional information visit [www.nautadutilh.com](http://www.nautadutilh.com)

**SIMPSON GRIERSON**

ADVISING MIGHTY APE SHAREHOLDERS ON \$A122M SALE TO KOGAN.COM

**AUCKLAND - 08 December 2020:** We're pleased to have advised the shareholders of Kiwi e-commerce retailer Mighty Ape on their recently announced \$A122m sale to Australian retailer Kogan.com.

We advised on all aspects of the deal including the term sheet, sale and purchase agreement and ancillary documentation effecting the sale of shares as well as regulatory aspects of the transaction.

Our team on this work was led by commercial partner James Hawes, and included senior solicitor Rob Bryson and solicitor Viktoriya Pashorina-Nichols.

This deal is a great outcome for the iconic Kiwi business and will ensure access to the backing and expertise required to continue to grow strongly.

For additional information visit [www.simpsongrierson.com](http://www.simpsongrierson.com)

PRAC 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 28 top tier independent member law firms.

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

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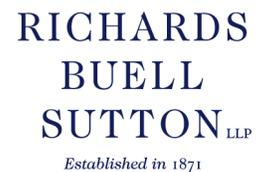
With over 12,000 lawyers practicing in key business centers around the world, including Latin America, Middle East, Europe, Asia, Africa and North America, these prominent member firms provide independent legal representation and local market knowledge.



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MUÑIZ OLAYA MELÉNDEZ CASTRO ONO & HERRERA Abogados



## Access to the foreign exchange market by companies that participate in the plan for promotion of natural gas production in Argentina

On November 19, 2020, through Communiqué No. "A" 7168, the Argentine Central Bank (the "Central Bank") established the conditions to access to the foreign exchange market (the "FX Market") for companies that participate in the plan for the promotion of natural gas production in Argentina, known as "Plan de Promoción de la Producción del Gas Natural Argentino – Esquema de Oferta y Demanda 2020-2024" (the "Plan"), approved by Executive Decree No. 892/2020 (the "Decree"). The Decree established that, in case there are any rules that limit the access to the FX Market, the Central Bank must provide suitable mechanisms in order to facilitate said access.

In this sense, the Central Bank established that – as a result of the transfers made through the FX Market as of November 16, 2020 and allocated to the financing of projects under the Plan -, financial institutions may give access to the FX Market to such companies for the following purposes:

### **Distribution of profits and dividends**

These companies will be allowed to access the FX Market to distribute profits and dividends abroad to non-resident shareholders, without the prior written authorization from the Central Bank, provided that the following requirements are met: (i) the profits and dividends correspond to closed and audited financial statements; (ii) the amount for which the access to the FX Market is required does not exceed the amount that corresponds according to the distribution set by the shareholders' meeting; (iii) the access to the FX Market takes place after two years from the investment in the Plan and; and (iv) the debt was included, if applicable, in the last presentation due of the reporting information regime regarding foreign debt and direct investment (*Relevamiento de activos y pasivos externos*).

### **Repayment at maturity of principal and interests**

These companies will be allowed to access the FX Market to repay, at maturity, principal and interests of foreign indebtedness to the extent that such indebtedness has an average term of not less than two (2) years and the requirements set forth in Section 3.5 of the Central Bank's foreign exchange regulations are met.<sup>[1]</sup>

### **Repatriation of direct investments from non-residents**

Lastly, non-residents will be allowed to access the FX Market to repatriate their direct investments up to the amount of direct investment transferred to Argentina and exchange for Argentine pesos in the FX Market as of November 16, 2020, provided that the following conditions are met:

1. The intervening financial entity is given the corresponding documentation that evidences the effective transfer of the direct investment in the local company;
2. The access to the FX Market takes place after two years since the investment was transferred and exchange for Argentine pesos in the FX Market;
3. In the case of a capital reduction and/or refund of contributions made by the local company, access to the FX Market will be allowed if the intervening financial entity is given the documentation that evidences that the company has been complied with the applicable legal mechanisms and has included, if applicable, in the last presentation due of the reporting information regime regarding foreign debt and direct investment (*Relevamiento de activos y pasivos externos*), the debt in Argentine pesos owed to the foreign party since the date that the contributions were rejected or the capital reduction was decided, as applicable.

Finally, the Central Bank establishes that the intervening financial entity must be given the corresponding documentation that evidence: (i) the legitimacy of the operation to be carried out; (ii) that the funds were used to finance projects included in the Plan; and (iii) the compliance with

the other requirements provided in the Central Bank's foreign exchange regulations not modified by this Communiqué.

This report should not be considered as legal or any other type of advice by Allende & Brea.

[\[1\]](#) (i) The funds disbursed as from September 1, 2019 were transferred to Argentina and exchanged for Argentine pesos through the FX Market; (ii) The debt was included, if applicable, in the last presentation due of the reporting information regime regarding foreign debt and direct investment (*Relevamiento de activos y pasivos externos*); and (iii) It does not imply a pre-payment of more than 3 business days before its maturity.

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**BRAZIL  
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DIGITAL**



# BRAZIL GOES DIGITAL

## Document digitalization is regulated

Decree No. 10,278/2020 regulates the excerpt of the Economic Freedom Law that allows the archiving of any documents by microfilm or digital means, making them equivalent to the physical document for all legal purposes.



It includes contracts, purchase orders, proof of delivery and other types of commercial documents, and sets forth general requirements for their digitalization.

### Example: POD (Proof of Delivery)

A retailer that relies on slips signed by vendors, distributors or customers as proof of delivery (POD) of their goods will be able to digitalize the respective POD slips.



As long as the company agrees with its vendor/distributor/customer that their agreements or PODs slips will be scanned and converted into legible PDF file, they will have the same value as their original version.

## Requirements

*General:* (a) integrity and trustworthiness of the digitalized document; (b) traceability and auditability of the processes employed; (c) image quality, legibility and use of the digitalized document; (d) confidentiality (if applicable); and (e) accessibility through different systems.



Any commonly used method of digitalization/scanning that produces a legible PDF made from an original/physical document will be in compliance.

*Specific:* concerning digitization involving public entities, including the use of digital certificate through the Brazilian Public Key Infrastructure (ICP-Brasil) and other minimum technical requirements.

## Cutting costs and red tape

Once digitalized, the original document can be discarded. This process saves companies costs associated with physically collection and maintaining thousands (if not millions) of paper documents. This is precisely the purpose of the Economic Freedom Law: cutting red tape and streamlining business processes in the country.



# New law makes it easy for companies to store documents in its digital form

## 1. Introduction

Law No. 13,874/2019 - also known as the Economic Freedom Law - lists as one of the rights of any individual or legal entity "the archiving - pursuant to technical requirements set forth by regulation - of any document by microfilm or by digital means, which will make such document equivalent to the physical document for all legal purposes"<sup>1</sup>.

The regulation mentioned by the Economic Freedom Law was brought by Decree No. 10,278, of March 18, 2020, which specifies how documents can be digitalized, so that they can produce the "same legal effects of original documents"<sup>2</sup>.

<sup>1</sup> Article 3, X, of the Economic Freedom Law reads as follows: "The following rights are granted to any individual or entity, which are essential to the country's economic development and growth, pursuant to the sole paragraph of Article 170 of the Federal Constitution: (...) X - the archival - pursuant to technical requirements set forth by regulation - of any document by microfilm or by digital means, which will make such document equivalent to the physical document for all legal purposes, and to attest any public law act;"

<sup>2</sup> Article 1 of Decree No. 10,278.

## 2. Decree No. 10,278: scope and application

Decree No. 10,278 applies to physical documents that are digitalized by either (a) public entities (including in transactions involving private parties)<sup>3</sup>, as well as (b) private parties (companies or individuals) that are used as proof/evidence against public entities<sup>4</sup> or against other private parties<sup>5</sup>.

Therefore, the digitalization of contracts, purchase orders, proof of delivery and other types of commercial documents falls within the scope of Decree No. 10,278<sup>6</sup>. This certainly streamlines the process of generating and collecting routine paperwork thereby saving companies money with physical storage.

That is the case, for example, of a retailer that relies on slips signed by

<sup>3</sup> Article 2, I, of Decree No. 10,278.

<sup>4</sup> Article 2, II, a, of Decree No. 10,278.

<sup>5</sup> Article 2, II, b, of Decree No. 10,278.

<sup>6</sup> Article 2, II, b, of Decree No. 10,278, which states that "This Decree applies to physical documents that are digitalized and produced by (...) II -private entities or individuals that are used as evidence against: (...) b) other private entities or individuals."

vendors, distributors or customers as proof of delivery (POD) of their goods. In this scenario, the retailer, a private party, would be digitalizing the respective POD slips signed by another private party, its vendors/distributors/customers, and these documents will serve as proof/evidence of delivery.

It is important to note that Decree No. 10,278 does not apply to documents in microfilm, audiovisual, mandatory identification, or those relating to operations and transactions conducted within the national financial system<sup>7</sup>. However, the PODs produced in the example above and signed by the vendors/distributors/customers are not deemed transactions “within de national financial system”, as they merely attest proof of delivery between private parties. Therefore, Decree No. 10,278 remains applicable to the case.

### 3. Requirements for digitalization of document

The Decree sets forth general requirements<sup>8</sup> for the digitalization of documents, which include methods/technology that ensure (a) the integrity and trustworthiness of the digitalized document; (b) the traceability and auditability of the processes employed; (c) the use of technical means that safeguard the quality of the image, the legibility and use of the digitalized document; (d) the confidentiality (if applicable) and (e) the

interoperability within different systems (accessibility through different systems).

Thus, any commonly used method of digitalization/scanning that produces a legible “PDF” made from an original/physical document will be compliant with the general requirements of Decree No. 10,278.

The Decree contains specific requirements<sup>9</sup> concerning digitalization involving public entities, including the use of digital certificate through the Brazilian Public Keys Infrastructure (ICP-Brasil) and other minimum technical requirements that are listed in annexes to the regulation.

However, the Decree leaves for private parties the definition of any method to attest authorship and the integrity of the digitalized document<sup>10</sup>. In other words, for documents issued by private sector entities – such as contracts, purchase orders, or proof of delivery – as long as the parties agree in advance, there is no need to use digital certificate, or even employ the minimum technical requirements, which are only required for public entities.

As per the sole paragraph of Article 6 of Decree No. 10,278, such prior agreement between private parties regarding the digitalization of documents is absolutely required, otherwise the minimum technical requirements would still apply.

Therefore, as long as the company agrees with its vendor/distributor/customer that their agreements or POD slips will be scanned and converted into a legible PDF file, the respective digitalized

7 Article 2, sole paragraph, II, of Decree No. 10,278.

8 Article 4 of Decree No. 10,278.

9 Article 5 of Decree No. 10,278.

10 Article 6 of Decree No. 10,278.

contracts and POD will have the same value as their original version. That is the express command of Article 6 of Decree No. 10,278<sup>11</sup>

This agreement/consent of business partners or consumers can be perfectly obtained by including some language at the beginning of a commercial relationship - whether in the agreement itself, the purchase order or the POD slips – such as: “Parties hereby agree and expressly consent that this contract/purchase order/POD will be scanned and converted into a PDF document and that this digitalized version shall have the same effects of the original, pursuant to Decree No. 10,278/2020, and there will be no need to keep the original (physical) versions.”

## 4. Digitalization and storage

The digitalization of documents can be done by the company itself, or through contractors<sup>12</sup>. The party holding the physical/original document remains liable to third parties for the compliance with the technical requirements outlined in Decree No. 10,278<sup>13</sup>.

The storage of digitalized documents must ensure: (a) protection against alteration, destruction and, when applicable, non-authorized access and reproduction; (b) indexation of

the respective metadata<sup>14</sup>, which allows for the search and management of the digitalized document and audit of the respective digitalization process used<sup>15</sup>.

Digitalized documents that have no historical value should be preserved, at a minimum, until the respective statute of limitations runs out<sup>16</sup>.

## 5. Conclusion

As per Article 9 of Decree No. 10,278<sup>17</sup>, once digitalized, the original document can be discarded. This process saves companies costs associated with physically collecting and maintaining thousands (if not millions) of paper documents. That is precisely the purpose of the Economic Freedom Law: cutting the red tape and streamlining business processes.

<sup>11</sup> Article 6 of Decree No. 10,278: “In case of documents exchanged between private parties, any method to attest authorship, integrity and, if necessary, confidentiality of the digitalized documents will be deemed valid, as long as chosen by agreement between the parties or accepted by the person against whom the document is presented.”

<sup>12</sup> Article 8 of Decree No. 10,278.

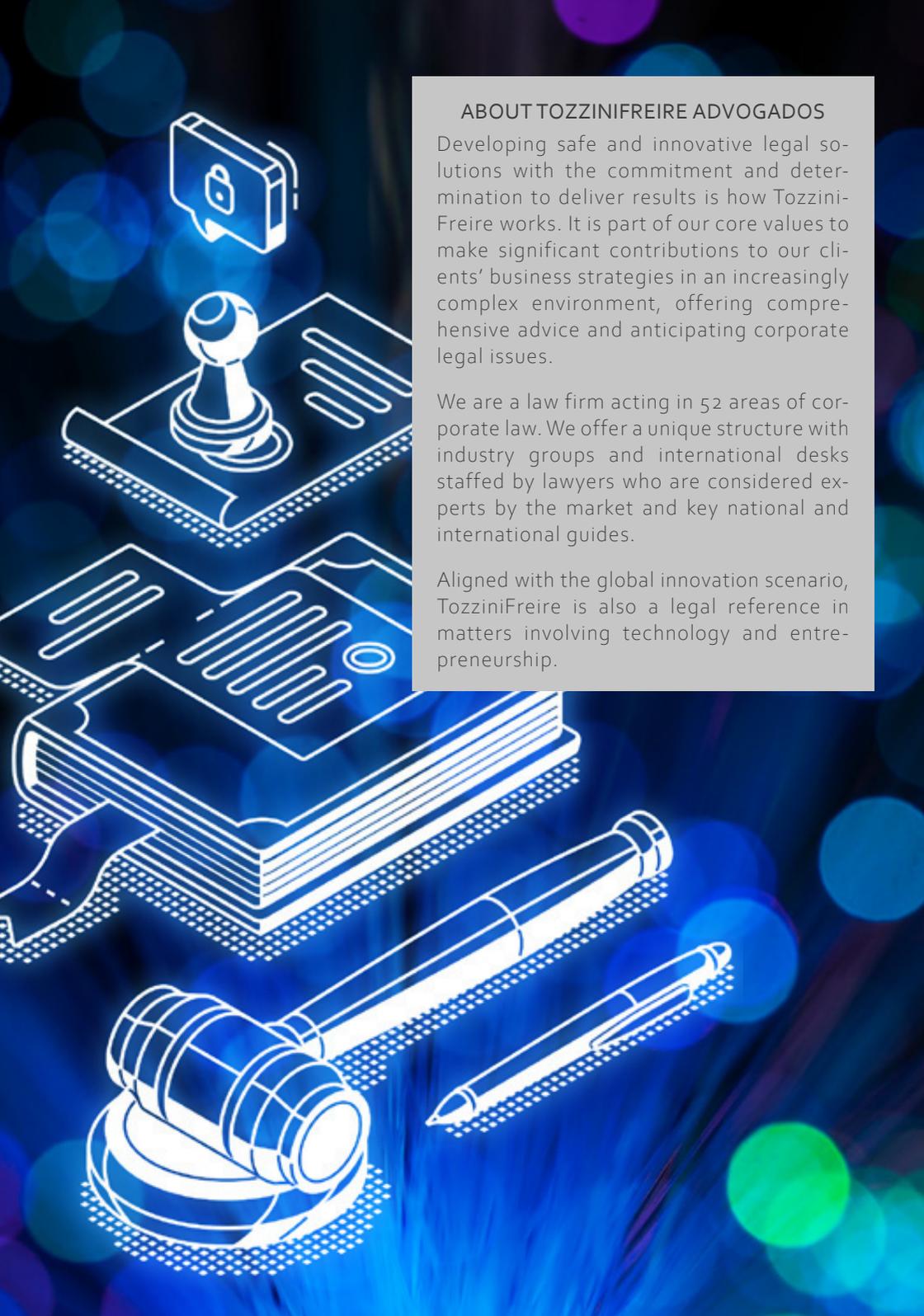
<sup>13</sup> Article 8, §4, of Decree No. 10,278.

<sup>14</sup> Pursuant to Article 3, II, of Decree No. 10,278 metadata refers to “structured data that allows for the classification, description and management of the [digitalized] documents”.

<sup>15</sup> Article 10 of Decree No. 10,278.

<sup>16</sup> Article 11 of Decree No. 10,278.

<sup>17</sup> Article 9 of Decree No. 10,278: “After the process of digitalization is carried out according to this Decree, the respective physical document may be discarded, except for those documents with historical value.”



## ABOUT TOZZINIFREIRE ADVOGADOS

Developing safe and innovative legal solutions with the commitment and determination to deliver results is how Tozzini-Freire works. It is part of our core values to make significant contributions to our clients' business strategies in an increasingly complex environment, offering comprehensive advice and anticipating corporate legal issues.

We are a law firm acting in 52 areas of corporate law. We offer a unique structure with industry groups and international desks staffed by lawyers who are considered experts by the market and key national and international guides.

Aligned with the global innovation scenario, TozziniFreire is also a legal reference in matters involving technology and entrepreneurship.



**BLOG**

# Alberta Launches New Public-Private Partnership and Unsolicited Proposal Frameworks

December 09, 2020

**Written by Jason Roth, Geoffrey Stenger, Mark Kortbeek, Charlene Hiller and Parker Mckibbin**

On December 1, 2020, the Alberta Ministry of Infrastructure released the new Public-Private Partnership Framework and Guideline (P3 Framework) and the new Unsolicited Proposal Framework and Guideline (USP Framework), with the aim of finding alternative ways to deliver infrastructure projects, while enticing the private sector to come forward with creative financing solutions. Both the P3 Framework and USP Framework seem to indicate a heavy shift towards the usage of the public-private partnership (P3) model in Alberta on capital projects. Further, the USP framework presents a structured approach to submitting USPs for capital projects. This blog post will provide an overview of the new frameworks.

## **P3 Framework**

The P3 Framework is a detailed guide, designed as a tool to assist Government of Alberta public servants and elected officials with assessing potential P3 projects and delivering them in accordance with established P3 practices. The P3 Framework also expands the definition of the P3 model in Alberta, to include variations such as design-build-finance and build-operate-transfer, to help increase the usage in Alberta.

### **Overview**

The P3 Framework applies to capital projects that meet certain conditions, such as projects that:

- require capital and/or operating financial support from the Government of Alberta;
- involve private financing;
- provide capital assets; and
- may have long term services associated with the project.

## **Definition of P3 Projects**

The P3 Framework defines a P3 project as an infrastructure project where the proponent provides some or all of the financing for the project, designs and builds the project (at times also providing operations and maintenance) and receives payments over an extended period of time. The definition of a P3 under the P3 framework does not include design-build projects, but may include design-build-finance, build-finance, or other alternative variations of P3s, due to the inclusion of private financing within these models. This broad definition was utilized to encourage increased usage of the P3 model in Alberta, while allowing the Government of Alberta to benefit from the advantages of alternative procurement models.

The enumerated characteristics of a P3 Contract under the P3 framework include:

- provision/enhancement of capital assets/services by an operator from the private sector;
- a long term service contract between the governmental or public sector procuring party and the operator;
- monthly payments covering investment, operations, maintenance and/or services;
- integrating design, building, financing and often operations and maintenance;
- allocation of risk to the party that is best suited to manage and price the risk;
- service delivery measured against specific performance standards set out in performance/output specifications; and
- a performance-related payment mechanism.

## **Principles/Framework**

The principles forming the P3 Framework are segregated into different sections based on the different stages of a P3 project. We provide an overview of the main sections below.

### **P3 Project Assessment**

During the capital planning process, projects are reviewed to determine whether value could be generated using the P3 approach and projects that meet the enumerated characteristics

are required to be first considered using the P3 approach. This decision will be made after evaluating the quality, cost, schedule, value and delivery consistency, set out in the Business Case that is developed in the initial planning stage of the project. The P3 approach may not be suitable for all capital projects and in those circumstances, a more traditional procurement approach (e.g., design-bid-build, construction management) will be utilized.

During the Project Assessment phase, the procurement approach and financing methods for a P3 project will be structured to provide the best Value for Money. Value for Money is determined through a net present value comparison of comparable costs and risk of a P3 project against the 'Public Sector Comparator', being the cost of the traditional procurement approach.

### **P3 Review and Approval**

The Treasury Board and Finance and Provincial Cabinet are tasked with approving a P3 project. The Business Case will provide the parameters for delivery of the infrastructure, providing some flexibility for the Ministries to include minor adjustments. The Treasury Board will make their approval decision based on the risk profile and project cost as determined in the Business Case. Ministries are required to return to the Treasury Board when project approvals are required, or material changes, such as reallocation of a significant risk, change in ownership of the project, or changes to the construction, are made to the project. If the project is approved at this stage, the Treasury Board and Cabinet will authorize the procurement of the project.

The P3 Framework requires the Treasury Board and Cabinet to authorize the procurement of the project and execution of the Project Agreement subject to certain conditions that must be met. These include that the lowest compliant bid must be less than or equal to the cost to do the project traditionally, the book value of the lowest compliant bid plus other project costs must be equal to or less than the approved budget and that there are no significant changes to the business deal. If these conditions are met, the project can move to project execution. If the conditions are not met, the project is referred back to the Treasury Board and Cabinet.

### **Project Execution**

The P3 Framework states that the procurement process must be open, competitive, timely, fair and transparent, with ideally three proponent teams shortlisted to assure sufficient competition.

The Project Agreement should reflect the risk allocation set out in the Business Case, with certain amendments to reflect agreed-upon changes arising during the procurement process. Risks are assigned in the Project Agreement to the parties best able to manage them. Finally,

specifications are structured so that the successful proponent has flexibility in determining how the specifications will be met, while still providing the required deliverables.

If the evaluation method includes a price-based approach, the P3 Framework states that the compliant bidders submitting the lowest bid on a net present value basis, shall be the preferred proponent. Under a value-based approach, the P3 Framework states that the compliant bidder scoring the highest score based on solutions and pricing will be the preferred proponent. Once a proponent is selected, the P3 project will shift to execution of the Project Agreement and Financial Close.

## **P3 Office**

In June 2019, the Public-Private Partnerships Office (P3O) was established as the P3 arm of the Ministry of Infrastructure. The P3O is the central authority for P3s in Alberta, it reports to the Minister of Infrastructure and is responsible for the overall P3 portfolio within Alberta. The P3O is also the 'Centre of Excellence' for P3 delivery in Alberta, being one of the main parties involved in the development of the P3 Framework. The framework states that the P3O should be consulted when any interpretation or direction is required for the P3 Framework or P3 projects.

## **Unsolicited Proposal Framework**

The USP Framework is another new detailed guide aimed at encouraging private sector involvement in infrastructure delivery, while ensuring that projects initiated as USPs follow a similar process as P3 projects that are initiated publicly.

## **USP Definition**

The USP Framework defines a USP as a proposal for a project submitted by a private entity without an explicit request from the Government of Alberta. A USP shall not involve a project that has been approved under the governmental capital plan, is already under procurement, or has been substantially developed for procurement by the Government of Alberta.

## **Principles of Review**

In the initial review of a USP, the Government of Alberta will focus on whether the USP meets key principles including:

- whether the USP project conforms with one or more public needs and whether it is in the public interest;
- whether the project provides value for money;

- whether the project is affordable for the government, based on direct or indirect government support;
- whether contracts resulting from the USP reflect market prices, reasonable private sector returns and include appropriate risk allocation; and
- transparency and accountability.

## **Submission of a USP**

In the submission of a USP, proponents are required to submit certain information on the potential project and themselves, as the proponent for the project. This includes:

- a description of the proposed project, a preliminary assessment of the public need for the project, a description of the environmental and social features of the project and a preliminary assessment of economic feasibility or a cost-benefit analysis;
- a preliminary technical description of the proposed project, a preliminary assessment of financial feasibility and a preliminary service and operating plan;
- a preliminary assessment of project risks and proposed risk allocation and a preliminary assessment of competitive or negotiated P3 suitability;
- a description of the type and range of governmental support required; and
- reports on the project demonstrating the capability and capacity of the proponent to develop the project such as design and feasibility studies, economic studies, and/or legal studies.

If a proponent proceeds to the Stage 3 - Project Development phase, they will be required to pay a non-refundable review fee of \$20,000.

## **Evaluation**

The USP will then be evaluated based on certain criteria detailed in the USP Framework. The criteria includes: public interest criteria determining if a USP advances the public interest and is aligned with infrastructure priorities; project feasibility criteria evaluating a project's technical, financial, economic, environmental and social feasibility; P3 suitability criteria assessing whether a project will be suitable for development, looking at factors such as risk allocation; and affordability assessing the project's implications for government support.

If a project is approved after the evaluation stage, it will then shift to the project development and procurement stages, where it will undergo further evaluation and may ultimately result in the signing of the Project Agreement or abandonment of the project.

## Takeaways

The Ministry of Infrastructure is emphasizing their commitment to new and innovative methods of delivering infrastructure, while trying to minimize risk through the announcement of the new frameworks. The P3 Framework and USP Framework present opportunities for members of the infrastructure industry such as contractors, designers, financiers, and lenders. Understanding these processes will provide entities wishing to participate in future infrastructure projects that fall within these frameworks a competitive advantage.

Notably, the USP Framework also presents an opportunity for proponents such as Indigenous groups to submit USPs for infrastructure needed in Indigenous or rural communities. USPs involving water, broadband and social infrastructure projects would be in line with the Government of Alberta and Government of Canada's recent infrastructure investments and commitments.

Our **Capital Projects team** has extensive experience in **Public Infrastructure Projects, Construction, Infrastructure & Project Development, Project Finance and Aboriginal Law**. If you have questions about the P3 Framework or USP Framework, or about a potential project, please contact a member of our team.

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Posted on: October 29, 2020

## UPCOMING CHANGES TO TRUST FILING REQUIREMENTS

By: Alexander Pedlow

**Are you the trustee of an express trust? Be prepared for significant changes to your CRA reporting requirements.**

### **Changes to Trust Filing Requirements**

As part of the 2018 federal budget, the Canadian government introduced new tax return and information reporting requirements for trusts. Previously, a trust that had no activity during the year or no income tax payable was not required to file a trust income tax and information return (also called a “T3 Return”). This meant that some trusts, such as those simply holding a vacation property or those created on an estate freeze which hold shares in a private company, may have never filed a T3 Return. However, for certain trusts with taxation years ending on or after December 31, 2021, these exemptions may no longer apply and these trusts will now be required to file a T3 Return as well as certain additional information.

Trustees should be mindful of these new reporting requirements as the penalties for non-compliance could be substantial.

### **New Information Required to be Filed**

While the earliest a trust will have to file a T3 Return under the new rules will be 2022, it is important to get ahead of these changes and to begin to collect the information that will be required for these returns. These new rules will require express trusts, including those trusts created by a testator in his or her will, to report, along with the T3 Return, the:

- name;
- address;
- date of birth (for individuals);
- jurisdiction of residence; and
- taxpayer identification number (TIN)

for each of the following:





- the settlor;
- the trustee(s);
- the beneficiary(ies); and
- any person who has the ability to exert influence over trustee decisions regarding the distribution of income or capital from the trust (i.e. trust protector).

A TIN includes a social insurance number, a business number, and an account number issued to a trust. A schedule of the above information **MUST** be filed with the trust's T3 Return and **CANNOT** be filed on its own.

This information must be provided for any trustee or beneficiary in any given tax year even if that individual was only a trustee or beneficiary for a single day in that tax year. If any trustee or beneficiary does not want this information provided to the CRA then steps must be taken to remove that individual from the trust before December 31, 2020. Note that this may have unintended tax consequences especially if the trust owns a controlling interest in a company.

### **Penalties**

Penalties for non-compliance with the new reporting requirements will include a \$25 per day fine (with a minimum fine of \$100) up to a maximum penalty of \$2,500. Where the party filing the return knowingly or negligently makes a false statement on the return, those penalties increase up to 5% of the fair market value of the trust property (with a minimum penalty of \$2,500).

It is important to note that while it may not always be possible to ascertain who a beneficiary of a trust is, much less collect that person's information, the trust's reporting requirements do not end there. Where the identity of a beneficiary is not ascertainable, steps must be taken to provide the CRA with detailed information in order to determine, with certainty, whether any particular person is a beneficiary of the trust.

### **Exemptions**

Non-express trusts are excluded from these new filing requirements. In addition, certain express trusts will also be exempt, including:

- trusts governed by registered plans (i.e. RRSPs, TFSAs, and RESPs);
- graduated rate estates and qualified disability trusts;
- trusts that qualify as non-profit organizations or registered charities;
- trusts that have been in existence for less than three months; and
- trusts that hold less than \$50,000 in assets throughout the taxation year (provided that the trust holdings are confined to one or more of cash, certain debt obligations, listed securities, and a few





other types of assets).

Therefore, based on the wording of the proposed legislation, if there are two express trusts, one settled with a \$20 bill and one settled with a silver ingot, and neither trust holds any other asset, the trust holding the \$20 bill would appear to be exempt from the new reporting requirements while the trust holding the silver ingot will likely need to file the required information. For trusts caught by this anomaly, a simple solution would be to sell the ingot for cash and have the trust continue to hold the cash as the settlement property. Note however that this would need to be done before December 31, 2020, to fall within the exemption.

While many bare trusts would fall within the meaning of an “express trust” and are not specifically exempt by the wording of the proposed legislation, subsection 104(1) of the *Income Tax Act* would appear to continue to exclude bare trusts from the application of the proposed changes.

#### **Considerations for Professionals and/or Trustees**

Estate planners should be especially aware of these changes as these changes will likely affect recommendations for estate planning. For example, where the intention was to use a trust as a Will substitute, the client must be made aware of these additional information collection and reporting requirements which they would not have if the distributions are made under a Will. This could pose a potential problem where the client does not want the beneficiaries of their estate to be known prior to their death.

Trustees, and those acting in a fiduciary capacity, need to be especially mindful of these changes to the filing requirements as the new rules place the onus on such fiduciaries to collect and file this information. If there is any doubt, the settlement indenture should be reviewed by a lawyer to determine what, if any, obligation there may be to report.

Note that non-resident trusts which are already required to file a T3 Return must also file the additional information set out above with the trust’s annual return.

#### **Next Steps**

Trustees should begin to take steps to collect the required information.

Where a trust has sat dormant or for trusts which no longer serve a purpose, trustees should consider winding these trusts up before December 31, 2020.

If any trustees or beneficiaries need to be removed from the trust prior to December 31, 2020, the





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settlement indenture should be reviewed by a lawyer and advice sought on the possible consequences of removing such a person.

The proposed changes present many potential issues. The lawyers in our Wealth Preservation Group are available to assist and advise on these matters.



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News Alerts

# New regulation on information security and cybersecurity for banks and financial institutions comes into force

December 10, 2020

On past December 1st, new chapter 20-10 of the Updated Regulations Compendium of the Financial Market Commission (the “**FMC**”), on information security and cybersecurity management, came into force (the “**New Rule**”), whose main provisions can be summarized as follows:

## I. Regulatory scope

The New Rule is applicable to banks, their subsidiaries and supporting companies (*sociedades de apoyo al giro*), loans and savings cooperatives supervised by the FMC and payment cards issuers and operators (the “**Supervised Entities**”).[\[1\]](#)

## II. Definitions

Considering the eminently technical character of this matter, the FMC has defined a series of concepts used throughout the New Rule, including “cyberspace”, “cybersecurity”, “cyber incident”, “denial of services” and even “information”.

## III. General topics of management

The New Rule entrusts the Supervised Entities’ board a key role on these matters, having the obligation to approve the institutional strategy, a proper budget for risk mitigation and the maintenance of a system for information security and cybersecurity management, as per the best existing international practices.

The New Rule sets, on a non-restrictive basis, a series of topics that shall be deemed as necessary for a proper management system of such aspects.

## IV. Risk management

The New Rule sets, as minimum guidelines on management of risks related to these matters, at least, the identification, assessment, processing and acceptance or tolerance of risks the relevant entity's information assets are exposed to, as well as their permanent monitoring and review.

## V. Specific elements for cybersecurity management

Considering their relevance, the New Rule particularly refers to two aspects that Supervised Entities shall consider in their management processes:

- 1 The identification of the critical assets of the financial industry and the payment system, and the exchange of technical information on cybersecurity incidents with other members of this critical infrastructure, implementing policies for this purpose, and
- 2 The response and recovery of the activities upon incidents.

This New Rule was enacted on July 6, 2020, after a [public consultation process](#) opened by the FMC.

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[1] By mandate of: (i) Rule No. 8 of the FMC, for banks' subsidiaries; (ii) Rule No.3 of the FMC, for bank supporting companies; (iii) Rule No. 108 of the FMC, for loans and savings cooperatives supervised by the FMC, and (iv) Rule No. 2 of the FMC, for payment cards issuers and operators, respectively.

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# Legal Commentary

December 3, 2020

## Dispute Resolution Law

### Guarantee or Independent Contract? — The Nature of Keepwell Deeds under PRC Law and Remedies for Breach

Authors: Andy LIAO | Yuxian ZHAO

The Shanghai Financial Court recently recognized a judgment<sup>1</sup> rendered by a Hong Kong court, which has become a widely watched development. The judgment originated from a lawsuit filed by a Hong Kong investment fund against a Shanghai company arising from a keepwell deed the Shanghai company provided for offshore bonds issued by its overseas affiliate. It was also previously reported that in a bankruptcy reorganization case the receiver rejected the creditor claims of certain bondholders that were based on the keepwell deed of a well-known Beijing company, which had offered the deed for bonds issued by its overseas subsidiary. Against this background, the Shanghai court's recognition of this judgment may to some extent alleviate anxiety in the financial industry concerning the effectiveness of keepwell deeds. While there is yet to be a published PRC court judgment addressing the nature and effectiveness of keepwell deeds, this issue and related questions such as foreign bond investors' remedies based on keepwell deeds under PRC law remain a worthwhile topic for discussion.

Legal discussions regarding keepwell deeds mostly focus on the relationship between keepwell deeds and guarantees. The conclusions drawn are highly consistent – a keepwell deed does not constitute a guarantee. In recent years, asset management product defaults have increased and disputes arising from credit enhancements have emerged in quick succession, such as third-party commitments to repay the balance of the agreed proceeds under the asset management products. Third-party credit enhancements are generally not structured as guarantees, given the unique legal structure of asset management products and the fear that the authorities could deem such products as guaranteeing principal and return on investment (which is prohibited by law). As such, PRC courts have generally viewed these arrangements as independent contracts as opposed to guarantees. Relevant judicial

<sup>1</sup> [2019] Hu 74 Ren Gang No. 1.

rulings concerning independent contracts are reflected in the Minutes of the National Court Work Conference for Civil and Commercial Trials (“**Ninth Civil and Commercial Minutes**”)<sup>2</sup>, a highly authoritative guideline on judicial practice. In light of this, it is necessary to reexamine – from the perspective of independent contracts – the nature and effectiveness of the keepwell deed and judicial remedies available to foreign bondholders in China.

In sum, a keepwell deed, as a third-party credit enhancement, may be recognized as an independent contract under PRC law. Where bonds mature or are declared mature and the party providing the keepwell deed (“**Keepwell Party**”) fails to perform under the deed, the bondholders – if not fully paid – may directly request the Keepwell Party to compensate for the bondholders’ resulting losses (by way of making up the balance of repayment), or commence a subrogation action against the Keepwell Party, demanding it to pay the bondholders the amount it should have paid to the issuer/guarantor for breach of the deed.

### **What a keepwell deed is and why it exists**

Keepwell deeds generally refer to a type of credit enhancement document that PRC companies provide for the issuance of offshore bonds. A keepwell deed is generally signed jointly by the PRC company, the bond issuer, the guarantor, and the trustee (see Figure 1 for a typical bond issuance structure involving keepwell deeds). Such deeds typically stipulate, among other things, that the PRC company undertakes to procure that the issuer and the guarantor have adequate liquidity to repay the bonds upon maturity and that they maintain a certain level of net assets. Many keepwell deeds are also accompanied by an equity interest purchase undertaking (EIPU)<sup>3</sup> or the undertaking of liquidity support<sup>4</sup>. Keepwell deeds often express that they “shall not be deemed a guarantee.”

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<sup>2</sup> See Article 91 of the Ninth Civil and Commercial Minutes. “[Nature of Credit Enhancement Documents] Where the parties concerned which are not under a trust contract provide similar undertaking documents such as the third party making up the balance of repayment, performance of matured buyback obligations on behalf, liquidity support, etc. as credit enhancement measures, and the contents thereof comply with the provisions of the laws on guarantees, the People’s Court shall rule that a guarantee contract relationship is concluded between the parties concerned. If their contents do not meet the requirements of a guarantee, the corresponding relationship of rights and obligations shall be determined in light of the specific contents of the commitment documents, and the corresponding civil liabilities shall be determined in light of the facts of the case.”

<sup>3</sup> It is generally stipulated that the Keepwell Party undertakes to purchase the equity of the issuer or the guarantor’s subsidiary in order to provide the issuer or the guarantor with sufficient capital to repay the bond when the issuer and guarantor default.

<sup>4</sup> It is generally stipulated that the Keepwell Party undertakes to provide loans and other support to the issuer or the guarantor to repay the bond when the issuer and the guarantor defaults.

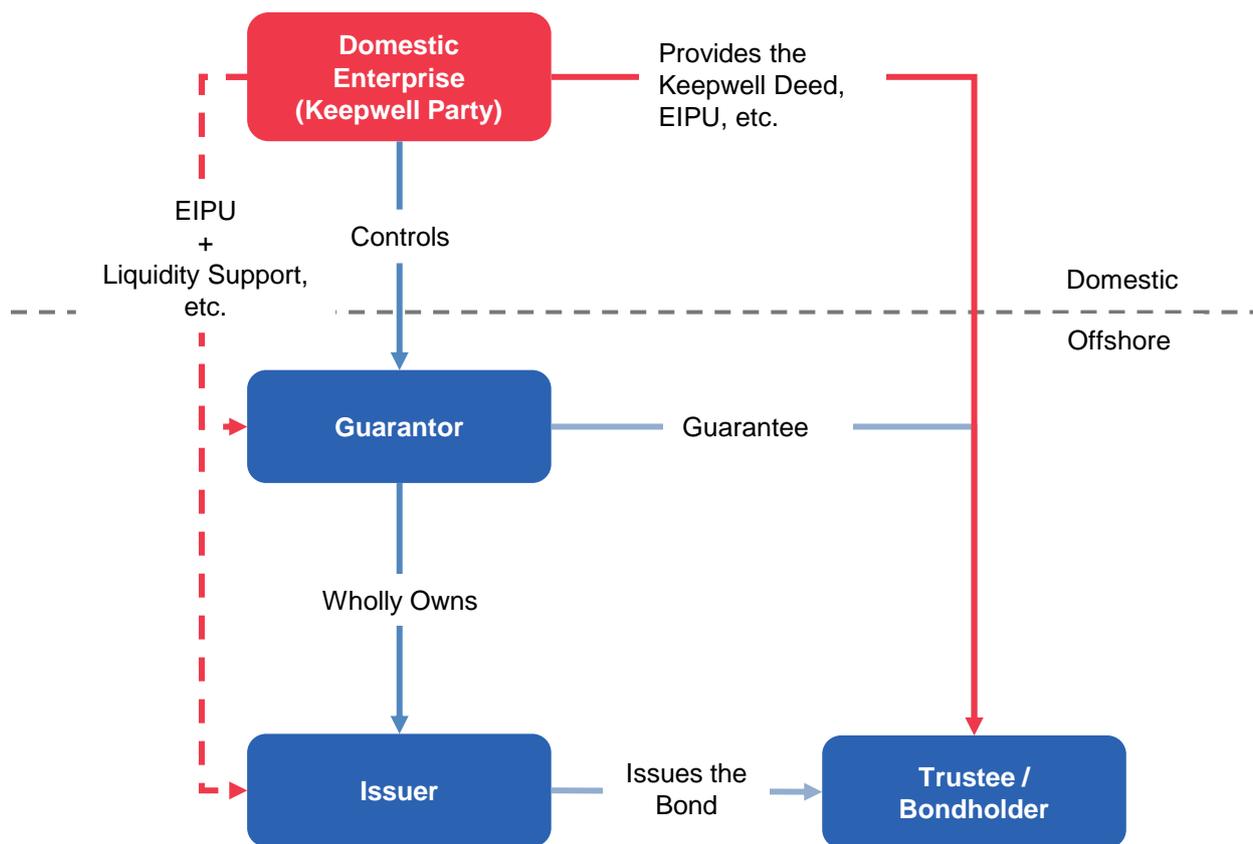


Figure 1: Typical bond issuance structure involving keepwell deeds

It is generally believed that keepwell deeds began to be adopted for offshore bond issuances in 2012 to bypass certain limitations PRC companies confronted when attempting to directly issue or guarantee bonds in offshore markets. Previously, when PRC companies wished to directly issue bonds in offshore markets, they had to obtain potentially burdensome approvals from the National Development and Reform Commission (“**NDRC**”) and even the State Council<sup>5</sup>. If an issuer wished to otherwise “indirectly” issue offshore bonds, i.e., guaranteeing bonds issued by their offshore subsidiaries, they would have to complete registration formalities with the State Administration of Foreign Exchange (“**SAFE**”) and satisfy corresponding regulatory requirements. Moreover, funds raised by their subsidiaries in this way could not be remitted back to the PRC companies/guarantors but instead could only be used for overseas projects in which they had equity interests<sup>6</sup>. By contrast, keepwell deeds provided by PRC companies are not subject to NDRC or SAFE supervision<sup>7</sup> and can thus pave the way for conducting offshore financing. For

<sup>5</sup> See Article 2 of the Notice of the National Development and Reform Commission on Matters concerning Issuance of RMB Bonds by Domestic Non-financial Institutions in the Hong Kong Special Administrative Region, Fa Gai Wai Zi No. [2012]1162 (国家发展改革委关于境内非金融机构赴香港特别行政区发行人民币债券有关事项的通知, 发改外资[2012]1162号); Article 2(2) of the Circular of the General Office of the State Council on Issuing the Proposals of the State Development Planning Commission and the People’s Bank of China on Enhancing the Administration of the Issuing of Bonds on Overseas Markets, Guo Ban Fa No. [2000]23 (国务院办公厅转发国家计委、人民银行关于进一步加强对外发债管理意见的通知, 国办发[2000]23号).

<sup>6</sup> See Article 11 of the Provisions on Foreign Exchange Administration for Cross-border Guarantees, Hui Fa No. [2014]29 (跨境担保外汇管理规定, 汇发[2014]29号).

<sup>7</sup> See Part 4, Article 5 of Operational Guidelines for Foreign Exchange Administration of Cross-border Guarantees, Hui Fa No. [2014]29 (跨境担保外汇管理操作指引, 汇发[2014]29号).

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this reason, PRC companies have widely adopted keepwell deeds in offshore bond issuances.

### Viewing keepwell deeds as guarantees

Our research of public sources has not revealed any decision in which a PRC court ruled on the nature or effectiveness of a keepwell deed. That said, disputes over other credit enhancements are not uncommon. PRC court rulings on such enhancements may still suggest their view as to whether keepwell deeds constitute guarantees.

Under PRC law, a guarantee refers to a guarantor's promise to a creditor to assume the debtor's obligation and liability when the debtor defaults. On this basis, a guarantee must "attach" to a principal debt; by performing a guarantee, the guarantor is effectively performing the debtor's obligation to the creditor with respect to the debt. Any commitment without this characteristic does not constitute a guarantee. In determining whether a commitment constitutes a guarantee, a court will look to the wording of the commitment and see whether it explicitly demonstrates a party's intent to perform the debtor's obligation in the case of default.

In the case [2004] Min Si Zhong Zi No. 5 (which the Supreme People's Court (the "SPC") has compiled into its gazette, a non-binding but highly persuasive authority), the SPC maintained that where a third party unrelated to the loan agreement issued a letter of commitment to the creditor without clearly stating it would guarantee repayment, the letter of commitment would not be deemed a guarantee under the PRC Guaranty Law. In [2014] Min Si Zhong Zi No. 37, concerning a guarantee contract dispute, the SPC denied that the letter of commitment at issue satisfied the requirements of a guarantee under Article 6 of the PRC Guaranty Law, as the Government of Liaoning Province issued that document without expressing an intent to satisfy the debts of the debtor. The government instead stated only that it would provide "*assistance*" in repayment of the debts. In [2011] Min Shen Zi No. 1412, concerning a guarantee contract dispute, the Guangzhou Bureau of Foreign Trade and Economic Cooperation issued a letter of commitment to overseas creditors. The SPC held that the letter of commitment did not constitute a guarantee as it did not specify the bureau's intent to guarantee payment of the loan by the debtor. Instead, the document merely stated the bureau's commitment to urge the debtor to faithfully and timely repay the principal and interest on the loans, and to resolve problems and prevent creditors from suffering economic losses if the debtor defaulted on its obligations.

Given the above, whether a keepwell deed constitutes a guarantee ultimately depends on whether the deed manifests an express intent to perform the issuer's obligations. PRC courts are not likely to treat keepwell deeds as guarantees under the PRC Guaranty Law, considering that the Keepwell Party's commitment is generally not to repay the bonds for the issuer/guarantor but rather to maintain the issuer/guarantor's capability to repay such bonds, and that a keepwell deed usually states that it "shall not be deemed a guarantee<sup>8</sup>."

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<sup>8</sup> The USD Bond CEFCIG 5.950% 25Nov2018 contains a description of the keepwell deed in the offering circular that includes "[t]he Keepwell Deed is not, and nothing therein contained and nothing done pursuant thereto by the Company shall be deemed to constitute, a guarantee by the Company of the payment of any obligation, responsibilities, indebtedness or liability, of any kind or character whatsoever, of the Issuer or the Guarantor under the laws of any jurisdiction."

## Keepwell deeds as independent contracts

While not being regarded as guarantees by PRC courts, keepwell deeds nonetheless do not constitute ordinary comfort letters or merely impose non-binding moral obligations on the Keepwell Party.

A typical keepwell deed usually states that it “shall not be deemed a guarantee.” However, it also usually requires the Keepwell Party to perform certain seemingly binding obligations. Take for example the keepwell deed in the offering circular of a USD bond – the Keepwell Party’s undertakings include but are not limited to holding a certain proportion of shares of the issuer and the guarantor and maintaining the net worth of the issuer and the guarantor as well as their liquidity and solvency<sup>9</sup>. Other keepwell deeds for USD bonds contain similar provisions<sup>10</sup>. In light of this, the assertion that a keepwell deed merely imposes non-binding moral obligations on the Keepwell Party contradicts the principle of interpreting a contract based on its plain wording.

Article 91 of the Ninth Civil and Commercial Trial Minutes further indicates that a credit enhancement could be binding even where it does “*not meet the requirements of a guarantee.*” Courts must still determine the rights and obligations of the parties based on the wordings of the documents. In respect of keepwell deeds, courts must determine the rights and obligations of the Keepwell Party and the counterparty based on the content of the keepwell deed. When doing so, reference could be made to prior judicial decisions on asset management disputes, in which courts have frequently ruled that a “*commitment to make up the balance of repayment constitutes an independent contract.*” A typical form of such a commitment usually provides that a third party often promises to pay the investor the difference between the amount the investor should have received and that which it actually received.

Prior judicial decisions on such commitments reveal that creditors were entitled to request the promisor to make up the balance of repayment when the creditors were not fully paid upon the automatic or declared maturity of the bonds. Depending on its content, courts may deem such a commitment a guarantee, an accession to indebtedness (meaning that a third party to the contract actively assumes a party’s contractual obligations jointly with that party), or an independent contract. If a commitment explicitly manifests the promisor’s intent to guarantee the loan and the commitment meets the requirements of a guarantee, it is likely to be deemed a guarantee. The court may also deem the commitment to be a guarantee where such intent is not explicitly demonstrated but the commitment is made for the debtor’s interest. By contrast, if the commitment is not made for the debtor’s interest, the court may find it constitutes an accession to indebtedness to the extent of the balance of repayment. Where the content of the “commitment to make up the balance of repayment” is not identical to but only in parallel with the debtor’s obligation under the contract, such commitment may be deemed an independent contract.

For instance, in [2018] Zui Gao Fa Min Zhong No. 127, concerning a contract dispute, the plaintiff had

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<sup>9</sup> See <https://www.bondsupermart.com/main/file-depository/download-file?paramCategory=bondDocument&paramDocumentNo=3572>, last accessed on November 17, 2020.

<sup>10</sup> For example, GRNCH 5.650% 13Jul2025 (link: <https://www.bondsupermart.com/main/file-depository/download-file?paramCategory=bondDocument&paramDocumentNo=4996>, last accessed on November 17, 2020); CCBL 1.990% 21Jul2025 (link: <https://www.bondsupermart.com/main/file-depository/download-file?paramCategory=bondDocument&paramDocumentNo=4970>, last accessed on November 17, 2020); GUAMET 1.507% 17Sep2025 (link: <https://www.bondsupermart.com/main/file-depository/download-file?paramCategory=bondDocument&paramDocumentNo=5174>, last accessed on November 17, 2020).

entered into an asset purchase agreement with the purchaser on the transfer to the purchaser of shares in the target company. Pursuant to the agreement, the purchaser was to pay the plaintiff a bonus if the target company achieved a performance commitment. At the same time, the defendant issued a letter of commitment to the plaintiff, setting forth that if the target company failed to achieve the performance commitment and rendered the plaintiff unable to receive the bonus, the defendant would pay an amount to the plaintiff equivalent to that of the bonus. The SPC found that the obligations under the letter of commitment were parallel to, rather than attached to, those under the asset purchase agreement. Therefore, when the payment condition under the letter of commitment was triggered (i.e., the target company's performance failed to reach the committed level), the defendant (the promisor) was obligated to pay the unreceived bonus to the plaintiff.

Another example is [2019] Zui Gao Fa Min Zhong No. 1524, which concerned a commercial trust dispute. In this case, natural person A granted a loan to company B in the name of a trust. A and the controller of B entered into an agreement on making-up the balance of repayment and transfer of beneficiary rights. Under this agreement, should B fail to fully perform its payment obligations, the controller is obliged to pay A the balance of the trust principal in conjunction with 13% annualized interest and to purchase from A the corresponding trust beneficiary rights. The SPC found that the controller's obligations under this Agreement did not guarantee the debts of B. Instead, the agreement was an independent and effective contract that manifested the genuine intent of the parties and complied with mandatory provisions of law. Therefore, the controller was obligated to make up the aforesaid balance and purchase the trust beneficiary rights from A.

Keepwell deeds could be regarded as "commitments to make up the balance of repayment" to bondholders, the issuer, or the guarantor. Such deeds were devised to help PRC companies raise funds overseas by bypassing certain domestic regulations and restrictions. They provide for Keepwell Parties' commitment to maintaining the liquidity and solvency of its overseas subsidiaries serving as issuers or guarantors, so that bondholders can receive the balance of payments due that issuers/guarantors are unable to repay on their own. This is similar to a "commitment to make up the balance of repayment" discussed above. Given the aforementioned judicial decisions, keepwell deeds are likely to be deemed independent contracts as they neither directly require Keepwell Parties to make payments to bondholders nor manifest the intent of Keepwell Parties to repay bonds for issuers/guarantors.

### **Remedies bondholders may obtain from PRC courts**

Given that PRC courts may treat keepwell deeds as independent contracts, bondholders can pursue the following court remedies when an issuer/guarantor defaults and the Keepwell Party also fails to perform its obligations under the keepwell deed. First, bondholders can request the court to terminate the bond subscription/issuance agreement as well as the keepwell deed and to hold the issuer, the guarantor, and the Keepwell Party jointly and severally liable for the bondholders' losses. Second, bondholders can also commence a subrogation action against the Keepwell Party, demanding it to pay the amount it should have paid to the issuer/guarantor for breach of the deed.

## 1. Request the issuer, the guarantor, and the Keepwell Party to jointly and severally compensate for the bondholders' losses

This remedy derives from Keepwell Parties' obligations owed to bondholders. As mentioned above, a keepwell deed is usually signed jointly by the trustee (on behalf of the bondholders), the issuer, the guarantor, and the Keepwell Party. Also, an offering circular may set out that bond issuance documents including the trust deed and the keepwell deed apply to bondholders, which makes each bondholder a party to those documents.

Although Keepwell Parties' commitments typically target issuers and guarantors (for example, the provision of liquidity support), they are actually made and performed for the benefit of bondholders. Thus, bondholders should be the counterparties of these commitments. If an issuer/guarantor defaults and the Keepwell Party fails to fulfill its commitments, bondholders may directly request the issuer, the guarantor, and the Keepwell Party to jointly and severally compensate the bondholders' losses resulting from their breach. The amount of losses should be equivalent to the balance of the principal and interest to be received by the bondholders<sup>11</sup>.

It is worth noting that the legal basis for the issuer, the guarantor, and the Keepwell Party to bear liability in this manner is not a joint-and-several guarantee (as discussed above, a keepwell deed is not generally deemed a guarantee). In PRC judicial practice, this kind of joint and several liability is usually called "disguised joint and several liability." It means – according to prior SPC decisions – each of the multiple debtors is required to fully perform similar obligations due to *different* reasons and such obligations would be wholly extinguished by any of the debtors' full performance<sup>12</sup>. Under this theory, each debtor becomes liable for its own – as opposed to someone else's – breach. The creditor has *independent* claims against each of the debtors. When an issuer/guarantor defaults and the Keepwell Party meanwhile breaches the keepwell deed, bondholders would have separate claims for losses against the issuer/guarantor based on bonds and against the Keepwell Party based on the deed. The total amount of such claims would be equivalent to the balance of the principal and interest to be received by the bondholders. Thus, the issuer, the guarantor, and the Keepwell Party are not genuinely severally and jointly liable to the bondholders as each of their breach has to be established, as opposed to a genuine joint and several liability under which only one party's breach has to be established. In other words, the issuer, the guarantor, and the Keepwell Party's bearing of liability in this manner has only the pretext (and not the nature) of joint and several liability.

## 2. Initiate a subrogation action against the Keepwell Party

This remedy derives from the Keepwell Parties' obligations owed to the issuers/guarantors. When an issuer/guarantor defaults, bondholders would have a claim to demand repayment of the bond principal

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<sup>11</sup> For example, the offering circular for USD bonds CHMINV 3.800% 02 Aug2021. "Noteholders (as defined below) and the holders of the related interest coupons, if any, (the "Couponholders" and the "Coupons", respectively) are bound by, and are deemed to have notice of, all the provisions of the Trust Deed, the relevant Deed(s) of Guarantee, the Keepwell and Liquidity Support Deed, the Deed of Equity Interest Purchase Undertaking and the Agency Agreement applicable to them." (link: <https://www.bondsupermart.com/main/file-depository/download-file?paramCategory=bondDocument&paramDocumentNo=1649>, last accessed on November 17, 2020).

<sup>12</sup> See, for example, [2014] Min Min Zhong Zi No.266; [2014] Min Shen Zi No.1589.

and interest. In the meantime, as the Keepwell Party had failed to perform under the keepwell deed, the issuer/guarantor would also be entitled to request the Keepwell Party to, among other things, provide liquidity support and/or inject capital to the issuer/guarantor.

Under the PRC Contract Law<sup>13</sup> and its judicial interpretation<sup>14</sup>, if an issuer/guarantor fails to pursue its claims against the Keepwell Party, bondholders could directly claim against the Keepwell Party on behalf of the issuer/guarantor, requesting the Keepwell Party to pay the bondholders the amount the Keepwell Party should have paid to the issuer/guarantor due to breach of the keepwell deed. In particular, merely giving notice to the Keepwell Party to perform its obligations is not sufficient for the issuer/guarantor to avoid triggering the bondholders' right of subrogation. Instead, the issuer/guarantor must at least initiate litigation or arbitration against the Keepwell Party. Moreover, in a subrogation action, the Keepwell Party will bear the burden of proving that the issuer/guarantor has actively pursued its claim against the Keepwell Party<sup>15</sup>. If the Keepwell Party is in bankruptcy proceedings, the bondholders may also declare their subrogation claims to the receiver (depending on the probability of success in the subrogation action).

## Obstacles caused by forum selection clauses and solutions

In practice, the dispute resolution clause of a keepwell deed typically provides for the exclusive jurisdiction of overseas courts (such as courts of Hong Kong or the United Kingdom). When bondholders wish to seek damages from the Keepwell Party, they must first obtain a favorable judgment rendered by the overseas court, then apply to a competent PRC court for recognition and enforcement of the judgment against the Keepwell Party. If the keepwell deed provides for the exclusive jurisdiction of a UK court, it would be difficult for bondholders to enforce such a judgment before PRC courts due to the lack of a treaty or a precedent on mutual recognition of civil judgments between China and the United Kingdom.

That said, if the Keepwell Party has entered bankruptcy proceedings, claims against the Keepwell Party – whether for direct damages or a subrogation – should be filed with the court before which the bankruptcy proceedings are conducted, regardless of the forum selection clause<sup>16</sup>. In such case, the bondholders may under such circumstance obtain meaningful and enforceable remedies from the court in charge of the

<sup>13</sup> Article 73 of the Contract Law reads, “[i]f a debtor causes losses to the creditor concerned by being indolent in exercising its matured claims, the creditor may apply to the competent people’s court to subrogate the debtor to exercise the latter’s claims under the creditor’s name, except for claims that belong exclusively to the debtor.”

<sup>14</sup> Article 11 of the Interpretation I of the Supreme People’s Court on Several Issues concerning the Application of the Contract Law of the People’s Republic of China sets forth that, “[w]here a creditor is to institute an action of subrogation pursuant to Article 73 of the Contract Law, the following requirements shall be satisfied: (1) The creditor’s right against a debtor is lawful; (2) A debtor’s indolence to exercise the matured claims as a creditor harms the creditor’s interest; (3) The creditor’s claims are matured; and (4) A debtor’s right as a creditor is not a creditor’s right exclusive to the debtor.”

<sup>15</sup> Article 13 of the Interpretation I of the Supreme People’s Court on Several Issues concerning the Application of the Contract Law of the People’s Republic of China sets forth that, “[f]or the purposes of Article 73 of the Contract Law, the provision ‘a debtor causes losses to the creditor concerned by being indolent in exercising its matured claims’ shall mean that a debtor neither performs the debtor’s due obligation toward a creditor nor asserts against its debtor a matured claim which involves the payment of money either through a lawsuit or through arbitration, thereby frustrating the realization of the creditor’s due right. Where the secondary debtor (i.e. the debtor of the original debtor) denies the existence of the original debtor’s indolence to exercise the matured claims, the secondary debtor shall bear the burden of proof.”

<sup>16</sup> Article 21 of the Enterprise Bankruptcy Law of the People’s Republic of China sets forth that, “[a]fter the people’s court accepts a petition for bankruptcy, civil actions concerning the debtor may only be brought in the people’s court that accepts the petition for bankruptcy.” See also [2020] Ji Min Zhong No. 659.

bankruptcy proceedings despite the forum selection clause granting exclusive jurisdiction to the UK court.

If the Keepwell Party does not enter bankruptcy proceedings, bondholders subject to such a forum selection clause may consider a subrogation action as the preferred option, because judicial interpretations provide that a subrogation action is subject to the jurisdiction of the court at the defendant's domicile<sup>17</sup>. Such a provision would prevail over the forum selection clause between the parties<sup>18</sup>.

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<sup>17</sup> Article 14 of the Interpretation I of the Supreme People's Court on Several Issues concerning the Application of the Contract Law of the People's Republic of China sets forth that, "[w]here a creditor institutes an action of subrogation pursuant to Article 73 of the Contract Law, the action shall be under the jurisdiction of the people's court of the place where the defendant is domiciled."

<sup>18</sup> See [2018] Zui Gao Fa Min Xia Zhong No.107. The Supreme People's Court held that the court's jurisdiction over the subrogation action against the creditor is a special kind of territorial jurisdiction provided by judicial interpretations, and its effect prevails the agreement between the parties.

## ***Important Announcement***

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

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## Colombia Mining Round

The Government of Colombia, through the National Mining Agency ("**ANM**") has published for comments the terms of reference of the objective selection process ("**Mining Rounds**") that it plans to carry out next year for the award of Mining Strategic Reserve Areas ("**AEM**")

### I. PROCESS

The Mining Round will be carried out through ANNA MINERIA, the platform created by the ANM for the management of mining contracts. It shall have a maximum duration of six (6) months and shall be divided into the following stages:

1. Presentation of the Offer.
2. Offer Evaluation.
3. Publication of the Offer Evaluation Report.
4. Presentation of Counteroffers.
5. Evaluation of the Counteroffers presented.
6. Publication of the Counteroffer evaluation report.
7. Offer Improvement Presentation (by the Offeror) - Once the Counteroffer evaluation report has been published; the initial Offeror will have a term of fifteen (15) days to exercise its Opportunity for Improvement.
8. Evaluation of Improved Offer
9. Final evaluation report.
10. Award of the Contract.

### II. DISPUTE RESOLUTION

For the purposes of dispute resolution, national commercial arbitration has been established in accordance with the Rules for National Arbitration of the Arbitration and Conciliation Center of the Bogota Chamber of Commerce

### III. BID BOND

For the purposes of submitting Offers and Counteroffers, the participant shall submit a Bid Bond, which may be presented in the following forms: (i) insurance policy; (ii) trust; (iii) bank guarantee; or (iv) stand-by letter of credit.

When the Offer is submitted by a Plural Structure, the guarantee must be granted on behalf of each of its members.

The insured value must correspond to ten per cent (10%) of the total value corresponding to the Mandatory Exploratory Program.

Foreign bidders without domicile or branch in Colombia may grant a stand-by letter of credit issued by financial institutions abroad, confirmed by a local bank and payable in Colombia. A Plural Structure will be considered foreigner for this purpose, when its Foreign Members without domicile or branch in Colombia have at least 50% of the total participation in the Plural Structure.

The Bid Bond will be enforced in the following cases:

- (i) Non-subscription of the Agreement in the terms and within the time limits and conditions provided for in the Terms of Reference.
- (ii) Failure to extend the term of the Bid Bond when the term provided for in the Terms of Reference for the Award of the Contract is extended or when the term provided for the subscription of the Contract is extended.
- (iii) Failure to establish a branch or domicile in Colombia in the case of foreign persons not domiciled in Colombia.
- (iv) Failure by the Successful Bidder to grant the contractual guarantees required by the ANM in the Contract, in full compliance with the applicable conditions and requirements, in accordance with the terms of the Contract and as required by applicable law.
- (v) Withdrawal of the Offer.
- (vi)** The non-submission by a Participant with Restricted Qualification (*Habilitacion Restringida*) of the first-demand bank guarantee or the irrevocable investment commitment of a Private Equity Fund, within five (5) days of the date of issuance of the administrative act containing the final evaluation report in which the Participant with Restricted Qualification (*Habilitacion Restringida*) is selected.

#### **IV. EXPLORATION PROGRAM**

The exploration activities subject to the contracts are subdivided into two programmes:

- (i) Mandatory Exploratory Program.
- (ii) Additional Exploratory Program.

#### **V. TECHNICAL EVALUATION PLAN**

The Technical Evaluation Plan is intended to enable the Bidder to assess the potential of the AEM for which an Offer is presented and to identify the elements that allow it to define whether it wishes to continue the exploration and production stage of the Contract over all or part of the AEM.

Through this Annex, the Offeror shall inform the ANM of the exploration activities it hopes to carry out in the year, which can be extended for up to one (1) more year. The Plan shall contain its work programme, which will be developed under exclusive operational responsibility.

This element of the Offer will not be considered for evaluation purposes. Its content will be essential for the ANM to verify the progress of the Successful Bidder's activities and to administer the information obtained in development from this first stage of the Contract.

#### **VI. INCENTIVES FOR SUCCESSFUL BIDDER**

##### **a. Early Technical Evaluation**

The Contract provides for the possibility of including a previous phase to the start of the Exploratory Program that will allow the exploration of the AEM for the benefit of the Successful Bidder.

During this phase, the Successful Bidder may have the following benefits:

- (a)** It will be able to advance different exploration activities to assess the technical feasibility of the Project.
- (b)** In the event in which the Successful Bidder does not obtain the expected technical feasibility, the Successful Bidder shall have the power to terminate the Contract without continuing with the stage of operation.

- (c) This stage may have a maximum duration of one (1) year, extendable for up to an additional (1) year, provided that the ANM considers that there are sufficient reasons to extend it.
- (d) Additional investments made by the Successful Bidder at this stage shall be taken into account for the fulfilment of commitments at the exploration stage.
- (e) In the event in which the Successful Bidder chooses to advance the Technical Evaluation Plan, it will be exempted from cancelling the value of the land use fee (*canon superficiario*) for the first year of technical evaluation.

#### **b. Incentives for accelerated exploration**

The Contract provides for certain benefits for the Successful Bidder that achieve a reduction of the time of the exploration stage and start operating activities in a shorter time.

These benefits include staggered payment of land use fee (*canon superficiario*) as follows:

- (a) **First year:** The Successful Bidder will only pay 25% of the value of the land use fee (*canon superficiario*).
- (b) **Second year:** The Successful Bidder will only pay 50% of the value of the land use fee (*canon superficiario*).
- (c) **Third year:** The Successful Bidder will pay only 75% of the value of the land use fee (*canon superficiario*).
- (d) **Fourth and fifth year:** the Successful Bidder will pay one 100% of the value of the land use fee (*canon superficiario*).
- (e) **Sixth and seventh year:** the Successful Bidder will pay 125% of the value of the land use fee (*canon superficiario*).
- (f) **Eighth and ninth year:** the Successful Bidder will pay 150% of the value of the land use fee (*canon superficiario*).
- (g) **Tenth and eleventh year:** the Successful Bidder will pay 200% of the value of the land use fee (*canon superficiario*).

#### **c. Discount on land use fee (*canon superficiario*)**

The Contract includes the Successful Bidder's ability to recover payments made due to land use fee (*canon superficiario*) during the exploration stage up to 100% for the first five (5) years.

Once the Successful Bidder initiates its operating activities, it may deduct from the payment of the additional considerations set out in the Contract up to 100% of the value corresponding to the land use fee (*canon superficiario*) during the exploration stage in the first five (5) years of development of operating activities.

This discount shall be made in proportion to the paid value for those years.

## VII. OFFER ASSESSMENT and COUNTEROFFER

### a. Qualifying Elements

Once compliance with the requirements set out in the previous veritory for the Mandatory Exploratory Program has been verified, the ANM will proceed to evaluate the Offer **made for additional royalty consideration and the Additional Exploratory Program**

### b. Evaluation Factors

EVALUATION AND QUALIFICATION FACTORS OF THE INITIAL PROPOSAL	COUNTEROFFER EVALUATION AND QUALIFICATION FACTORS		OPTION TO IMPROVE THE MOST FAVORABLE COUNTEROFFER
	Primary Factor	Secondary Factor (Tiebreaker )	
First offer to enter the system (ANNA Mining) with equal or higher score over the Minimum Exploratory Program established by the ANM, equal to or higher Percentage of participation in Production (X%)	Greater Additional Exploration Activity than offered in the Proposal minus 100 points.	Increased Production Participation (X%) Offered. It must correspond to an integer, equal to or greater than the minimum offered in the Initial Proposal.	Increased Additional Exploration Activity than offered in the Most Favorable Counteroffer, at least 50 points and equal to or higher Percentage of Production Participation (X%) offered in the latter, under penalty of rejection.
First offer to enter the system (ANNA Mining) with equal or higher score over the Minimum Exploratory Program established by the ANM, and equal to or higher Percentage of Production Participation (X%).	Greater Additional Exploration Activity than offered in the Proposal minus 100 points.	Increased Production Participation (X%) Offered. It must correspond to an integer, equal to or greater than the minimum offered in the Initial Proposal.	Increased Additional Exploration Activity than offered in the Most Favorable Counteroffer, at least 50 points and equal to or higher Percentage of Production Participation (X%) offered in the latter, under penalty of rejection.

First offer to enter the system (ANNA Mining) with equal or higher score over the Minimum Exploratory Program established by the ANM, and equal to or higher Percentage of Production Participation (X%).	Greater Additional Exploration Activity than offered in the Proposal minus 100 points.	Increased Production Participation (X%) offered, it must correspond to an integer, equal to or greater than the minimum offered in the Initial Proposal.	Increased Additional Exploration Activity than offered in the Most Favorable Counteroffer, at least 50 points and equal to or higher Percentage of Production Participation (X%) to the one offered in this last one, so sorry for rejection.
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**c. Evaluation Procedure:**

**i. Mandatory Exploratory Program**

The ANM will assign the corresponding score for each unit of exploratory activity included by the Offering. The Offerer shall meet the minimum score required for the relevant AEM, in accordance with the provisions of the Annex.

Once the ANM verifies compliance with the minimum score required for the Mandatory Exploratory Program, the other qualifying elements of the Offer will be assessed.

The following is an example of the table to be taken to express the proposal to the Mandatory Exploratory Programme

**Table 1 Consolidated activities and minimum scores required (example – indicative only)**

Activity	Unit	Points	Proposed Quantity	Total score
<b>Phase 1</b>				
Sampling Active sediments	Und	0.18		
Rock Sampling	Und	0.18		
Soil Sampling	Und	0.18		
Terrestrial geophysics	Km	7.18		

<b>Minimum Required Phase I</b>				<b>1,378</b>
Phase II				
Hunched perforations	M	0.57		
Sampling and quality analysis	Und	0.21		
<b>Minimum Required Phase II</b>				<b>14,87</b>
<b>Total Required AFM</b>				<b>16,165</b>

### 1. Of the activities

The activities and assumptions to be included in this Annex should not be interpreted as the exploration programme, but as a benchmark for determining the scoring system based on the approximate value of the basic investments to be implemented in the early stages of exploration of the project against which the Offering will be submitted

For the purposes of the preparation of this Annex, the ANM defined the most relevant activities to be carried out in *a greenfield exploration campaign* in an area with the potential to house polymetallic deposits, which are:

#### PHASE I

- **Sampling of active sediments:** defined as a representative portion of the detritic and classic material (less soluble meteorized product), which is transported by the water and deposited in different parts along the bed or channel of a current. For the purposes of this Annex, only the cost of laboratory analysis for the determination of the score is considered, which for this case corresponds to 0.18 points per sample.
- **Rock samples:** corresponds to a piece of rock taken from an outcrop and considered representative, in its entirety, of all the petrographic characteristics of a rocky body. For the purposes of this Annex, only the cost of laboratory analysis for the determination of the score is considered, which for this case corresponds to 0.18 points per sample.
- **Soil sampling:** a sample of unsorted material located in the area closest to the ground surface and consisting of meteorized rock material to a greater or lesser degree, including organic matter that supports plant life. For the purposes of this Annex, only the cost of laboratory analysis for the determination of the score is considered, which for this case corresponds to 0.18 points per sample.

- **Terrestrial geophysics:** includes methods of measuring the physical properties of rocky bodies located underground, such properties include electrical conductivity, gravity, magnetometry, among others. For the purposes of this Annex, the required score is based on the Induced Polarity (IP) methodology as it is one of the most widely used in the sector, each kilometer of acquisition corresponds to 7.18 points.

## PHASE II

- **Hunch perforations:** is the realization or elaboration of gaps in the subsoil, using suitable equipment and bits, used in technical surveying or exploration tasks, including core recovery. For the purposes of this Annex, only the cost of core extraction is considered for the determination of the score, which for this case corresponds to 0.57 points per meter.
- **Sampling and quality analysis–** This sampling considers the core sample each given interval and its corresponding laboratory analysis. For the purposes of this Annex, only the cost of laboratory analysis for the determination of the score is considered, which for this case corresponds to 0.21 points per sample.

The Offerer must prepare his proposal based on the activities described above complying with the minimum scores established per exploration phase for the AEM of interest (to be defined)..

The total score and each activity will be converted to Colombian pesos (COP) by multiplying the points by the value corresponding to the Current Legal Monthly Minimum Wage (SMMLV) at the date of submission of the Offer, not including VAT.<sup>1</sup>

Finally, this value is converted to US Dollars (USD), in accordance with the Representative Market Rate (TRM) certified by the Colombian Financial Superintendency or by the entity that replaces or assumes the function of certifying this rate, for the day of submission of the Offer.

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<sup>1</sup> Cop \$980,657 /US\$270 aproximadaly.

## ii. Additional Exploratory Program

For the Additional Exploratory Program, the score will be allocated in accordance with the activities Offered in line with annex 9 of these Terms of Reference, in a format such as the following:

Additional Exploratory Program				
Phase	Activity	Score by Exploration Activity Unit	Units Offered	Assigned Score
<b>Total Score</b>				

## d. Additional Royalty Consideration

The Additional Royalty Consideration (Annex 5) is in the process of being developed

## VIII. THINGS TO KEEP IN MIND

1. The ANM will only accept the Offer submitted first in time in this case, the others will be rejected. Therefore, the same person or Member of a Plural Structure may not:
  - a. submit or be part of more than one Offer for this Objective Selection.
  - b. participate through a subsidiary company, or through its parent company, of persons or companies that have the status of Royal Beneficiary of the Offerer, its members, associates, partners or Royal Beneficiaries; or through third parties with whom you have a relationship of insanguinity up to the second degree of affinity or first civilian if the Bidders or their members were natural persons.

## Colombia Mining Round – Part II

In order to promote the growth and sustainable development of the Colombian mining sector within a framework of technical, environmental and social responsibility, in which the Minerals of Strategic Interest that the country possesses are extracted rationally, under the best operational standards, the National Government through the National Mining Agency (“ANM”) publishes for comments the tender documents related to an objective selection process (“**Rondas Mineras**” or “**Mining Rounds**”) for the allocation of Exploration and Exploitation Special Contracts for Minerals in Strategic Mining Reserve Areas.

Interested parties must obtain a Qualification (*Habilitacion*) by meeting certain capacity requirements set in the ToR of the Mining Rounds, which include, legal, financial, technical, environmental, and social corporate responsibility capacity requirements

We highlight herein the prospected financial and technical capacity requirements to obtain the qualification, as established in the draft ToR:

### I. FINANCIAL CAPACITY.

Criteria	Type A	Type B	Type C
Liquidity	≥ 1	≥ 1.25	≥ 1.5
Indebtedness	≤ 70%	≤ 65%	≤ 60%
Interest coverage ratio or Adjusted Net Worth (plural structures)	≥ 1	≥ 1.5	≥ 2

### II. TECHNICAL CAPACITY.

The Participant must present a certificate for each of the following items:

Criteria	Type A	Type B	Type C
Participation in mining projects	1. Certification for at least one (1) mining exploration project indicating: <ol style="list-style-type: none"> <li>a. Name of the company that developed the project and its relationship <i>or linkage</i> with the Participant;</li> <li>b. Area, in hectares or square kilometers;</li> <li>c. Types of deposits and/or minerals explored and identified;</li> <li>d. That during the exploration of mining projects the following phases were taken:                             <ol style="list-style-type: none"> <li>i. Geological Surface Exploration</li> <li>ii. Geological exploration of the subsoil</li> <li>iii. Geological Assessment and Model and Resource Estimation.</li> </ol> </li> <li>e. That the exploration phases indicated above have been carried out in the last twenty (20) years.</li> </ol>		
Reports of exploration results and resource estimation under any national or international standard.	Certification that confirms that they reports of exploration results and resource estimation reports have been made under any national or international standard.		
That it has run minimum drilling campaigns of a certain number of meters, in view of the rating range	Certificate issued by the participant's legal representative evidencing that the participant has carried out minimum drilling campaigns of two thousand six hundred meters (2,600 m).	Certificate issued by the participant's legal representative evidencing that the participant has carried out minimum drilling campaigns of twelve thousand meters (12,000 m).	Certificate issued by the participant's legal representative evidencing that the participant has carried out minimum drilling campaigns of thirty thousand meters (30,000 m).

Please refer to our newflash for further information on the Mining Rounds

<https://bu.com.co/en/noticias/preparing-mining-round-2021>

### Colombia Mining Round – Part III

The Government of Colombia, through the National Mining Agency ("**ANM**") has published for comments the terms of reference of the objective selection process ("**Mining Rounds**") that it plans to carry out next year for the award of Mining Strategic Reserve Areas ("**AEM**").

Although documents are not final yet, we have summarized the main principles and conclusions.

#### III. PROCESS

The Mining Round will be carried out through ANNA MINERIA, the platform created by the ANM for the management of mining contracts. It shall have a maximum duration of six (6) months and shall be divided into the following stages:

1. Presentation of the Offer.
2. Offer Evaluation.
3. Publication of the Offer Evaluation Report.
4. Presentation of Counteroffers.
5. Evaluation of the Counteroffers presented.
6. Publication of the Counteroffer evaluation report.
7. Offer Improvement Presentation (by the Bidder) - Once the Counteroffer evaluation report has been published; the initial Bidder will have a term of fifteen (15) days to exercise its Opportunity for Improvement.
8. Evaluation of Improved Offer
9. Final evaluation report.
10. Award of the Contract.

#### IV. DISPUTE RESOLUTION

For the purposes of dispute resolution, national commercial arbitration has been established in accordance with the Rules for National Arbitration of the Arbitration and Conciliation Center of the Bogota Chamber of Commerce

## V. BID BOND

For the purposes of submitting Offers and Counteroffers, the participant shall submit a Bid Bond, which may be presented in the following forms: (i) insurance policy; (ii) trust; (iii) bank guarantee; or (iv) stand-by letter of credit.

When the Offer is submitted by a Plural Structure, the guarantee must be granted on behalf of each of its members.

The insured value must correspond to ten per cent (10%) of the total value corresponding to the Mandatory Exploratory Program.

Foreign bidders without domicile or branch in Colombia may grant a stand-by letter of credit issued by financial institutions abroad, confirmed by a local bank and payable in Colombia. A Plural Structure will be considered foreigner for this purpose when its Foreign Members without domicile or branch in Colombia have at least 50% of the total participation in the Plural Structure.

The Bid Bond will be enforced in the following cases:

- (i) Non-subscription of the Agreement in the terms and within the time limits and conditions provided for in the Terms of Reference.
- (ii) Failure to extend the term of the Bid Bond when the term provided for in the Terms of Reference for the Award of the Contract is extended or when the term provided for the subscription of the Contract is extended.
- (iii) Failure to establish a branch or domicile in Colombia in the case of foreign persons not domiciled in Colombia.
- (iv) Failure by the Successful Bidder to grant the contractual guarantees required by the ANM in the Contract, in full compliance with the applicable conditions and requirements, in accordance with the terms of the Contract and as required by applicable law.
- (v) Withdrawal of the Offer.
- (vi)** The non-submission by a Participant with Restricted Qualification (*Habilitacion Restringida*) of the first-demand bank guarantee or the irrevocable investment commitment of a Private Equity Fund, within five (5) days of the date of issuance of the administrative act containing the final evaluation report in which the Participant with Restricted Qualification (*Habilitacion Restringida*) is selected.

## VI. EXPLORATION PROGRAM

The exploration activities subject to the contracts are subdivided into two programs:

- (i) Mandatory Exploratory Program.
- (ii) Additional Exploratory Program.

## VII. TECHNICAL EVALUATION PLAN

The Technical Evaluation Plan is intended to enable the Bidder to assess the potential of the AEM for which an Offer is presented and to identify the elements that allow it to define whether it wishes to continue the exploration and production stage of the Contract over all or part of the AEM.

Through this Annex, the Bidder shall inform the ANM of the exploration activities it hopes to carry out in the year, which can be extended for up to one (1) more year. The Plan shall contain its work program, which will be developed under exclusive operational responsibility.

This element of the Offer will not be considered for evaluation purposes. Its content will be essential for the ANM to verify the progress of the Successful Bidder's activities and to administer the information obtained in development from this first stage of the Contract.

## VIII. INCENTIVES FOR SUCCESSFUL BIDDER

### a. Early Technical Evaluation

The Contract provides for the possibility of including a previous phase to the start of the Exploratory Program that will allow the exploration of the AEM for the benefit of the Successful Bidder.

During this phase, the Successful Bidder may have the following benefits:

- (a) It will be able to advance different exploration activities to assess the technical feasibility of the Project.
- (b) In the event in which the Successful Bidder does not obtain the expected technical feasibility, it shall have the power to terminate the Contract without continuing with the stage of operation.
- (c) This stage may have a maximum duration of one (1) year, extendable for up to an additional (1) year, provided that the ANM considers that there are sufficient reasons to extend it.
- (d) Additional investments made by the Successful Bidder at this stage shall be taken into account for the fulfilment of commitments at the exploration stage.
- (e) In the event in which the Successful Bidder chooses to advance the Technical Evaluation Plan, it will be exempted from cancelling the value of the land use fee (*canon superficiario*) for the first year of technical evaluation.

### **b. Incentives for accelerated exploration**

The Contract provides for certain benefits for the Successful Bidder that achieve a reduction of the time of the exploration stage and start operating activities in a shorter time.

These benefits include staggered payment of land use fee (*canon superficiario*) as follows:

- (a) **First year:** The Successful Bidder will only pay 25% of the value of the land use fee (*canon superficiario*).
- (b) **Second year:** The Successful Bidder will only pay 50% of the value of the land use fee (*canon superficiario*).
- (c) **Third year:** The Successful Bidder will pay only 75% of the value of the land use fee (*canon superficiario*).
- (d) **Fourth and fifth year:** The Successful Bidder will pay one 100% of the value of the land use fee (*canon superficiario*).
- (e) **Sixth and seventh year:** The Successful Bidder will pay 125% of the value of the land use fee (*canon superficiario*).
- (f) **Eighth and ninth year:** The Successful Bidder will pay 150% of the value of the land use fee (*canon superficiario*).
- (g) **Tenth and eleventh year:** The Successful Bidder will pay 200% of the value of the land use fee (*canon superficiario*).

### **c. Discount on land use fee (*canon superficiario*)**

The Contract includes the Successful Bidder's ability to recover payments made due to land use fee (*canon superficiario*) during the exploration stage up to 100% for the first five (5) years.

Once the Successful Bidder initiates its operating activities, it may deduct from the payment of the additional considerations set out in the Contract up to 100% of the value corresponding to the land use fee (*canon superficiario*) during the exploration stage in the first five (5) years of development of operating activities.

This discount shall be made in proportion to the paid value for those years.

## **IX. OFFER ASSESSMENT and COUNTEROFFER**

### **a. Qualifying Elements**

Once compliance with the requirements set out for the Mandatory Exploratory Program has been verified, the ANM will proceed to evaluate the Offer in respect to the **Consideration Additional to Royalty** and the **Additional Exploratory Program**.

**b. Evaluation Factors**

EVALUATION AND QUALIFICATION FACTORS OF THE INITIAL PROPOSAL	COUNTEROFFER EVALUATION AND QUALIFICATION FACTORS		OPTION TO IMPROVE THE MOST FAVORABLE COUNTEROFFER
	Primary Factor	Secondary Factor (Tiebreaker )	
First offer to enter the system (ANNA Mining) with equal or higher score over the Minimum Exploratory Program established by the ANM, equal to or higher Percentage of participation in Production (X%)	Higher Additional Exploration Activity than offered in the Proposal minus 100 points.	Higher Production Participation (X%) Offered. It must correspond to a whole number, equal to or greater than the minimum offered in the Initial Proposal.	Higher Additional Exploration Activity than offered in the Most Favorable Counteroffer, in at least 50 points, and equal to or higher Percentage of Production Participation (X%) offered in the Most Favorable Counteroffer, under penalty of rejection.
First offer to enter the system (ANNA Mining) with equal or higher score over the Minimum Exploratory Program established by the ANM, and equal to or higher Percentage of Production Participation (X%).	Higher Additional Exploration Activity than offered in the Proposal minus 100 points.	Higher Production Participation (X%) Offered. It must correspond to a whole number, equal to or greater than the minimum offered in the Initial Proposal.	Higher Additional Exploration Activity than offered in the Most Favorable Counteroffer, in at least 50 points, and equal to or higher Percentage of Production Participation (X%) offered in the Most Favorable Counteroffer, under penalty of rejection.
First offer to enter the system (ANNA Mining) with equal or higher score over the Minimum Exploratory Program established by the ANM, and equal to or higher Percentage of Production Participation (X%).	Higher Additional Exploration Activity than offered in the Proposal minus 100 points.	Higher Production Participation (X%) offered, it must correspond to a whole number, equal to or greater than the minimum offered in the Initial Proposal.	Higher Additional Exploration Activity than offered in the Most Favorable Counteroffer, in at least 50 points, and equal to or higher Percentage of Production Participation (X%) offered in the Most Favorable Counteroffer, under penalty of rejection.

**c. Evaluation Procedure:**

**i. Mandatory Exploration Program**

The ANM will assign the corresponding score for each unit of exploratory activity included in the offer. The Bidder shall meet the minimum score required for the relevant AEM, in accordance with the provisions of the Annex.

Once the ANM verifies compliance with the minimum score required for the Mandatory Exploratory Program, the other qualifying elements of the Offer will be assessed.

The following is an example of the table to be submitted to express the proposal to the Mandatory Exploratory Program

**Table 1 Consolidated activities and minimum scores required (example – indicative only)**

<b>Activity</b>	<b>Unit</b>	<b>Points</b>	<b>Proposed Quantity</b>	<b>Total score</b>
<b>Phase 1</b>				
Sampling Active sediments	Unit	0.18		
Rock Sampling	Unit	0.18		
Soil Sampling	Unit	0.18		
Terrestrial geophysics	Km	7.18		
<b>Minimum Required Phase I</b>				<b>1,378</b>
<b>Phase II</b>				
Core perforations	M	0.57		
Sampling and quality analysis	Und	0.21		
<b>Minimum Required Phase II</b>				<b>14,87</b>
<b>Total Required AFM</b>				<b>16,165</b>

The activities and assumptions to be included in this Annex (in development) should not be interpreted as the exploration program, but as a benchmark for determining the scoring system based on the approximate value of the basic investments to be implemented in the early stages of exploration of the project.

The Bidder must prepare its proposal based on the activities described listed and complying with the minimum scores established per exploration phase for the AEM of interest (to be defined).

The total score of each activity will be converted to Colombian pesos (COP) by multiplying the points by the value corresponding to the Current Legal Monthly Minimum Wage (SMMLV) at the date of submission of the Offer, not including VAT.<sup>2</sup>

Finally, this value will be converted to US Dollars (USD), in accordance with the Representative Market Rate (TRM) certified by the Colombian Financial Superintendency or by the entity that replaces or assumes the function of certifying this rate, for the day of submission of the Offer.

#### ii. Additional Exploratory Program

For the Additional Exploration Program, the score will be allocated in accordance with the activities offered in Annex 9 (to be developed) of the Terms of Reference, in a format such as the following:

Additional Exploration Program				
Phase	Activity	Score by Exploration Activity Unit	Units Offered	Assigned Score
<b>Total Score</b>				

#### d. Additional Royalty Consideration

The structure of the Additional Consideration to Royalty (Annex 5) is in the process of being developed.

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<sup>2</sup> Cop \$980,657 /US\$270 approximately.

## **X. THINGS TO KEEP IN MIND**

1. The ANM will only accept the Offer submitted first in time, the others will be rejected.
2. One same person or member of a Plural Structure cannot:
  - a. submit or be part of more than one Offer.
  - b. participate through a subsidiary, or through its parent company, in persons or companies that have the status of Real Beneficiary of the Bidder, its members, associates, partners or Real Beneficiaries.

Please refer to our previous newsflash for further information on the Mining Rounds:

<https://bu.com.co/en/noticias/preparing-mining-round-2021>

<https://bu.com.co/en/noticias/preparing-mining-round-2021-part-ii>



Foulques de  
Rostolan



Astrid Jalladaud



Maxime Houles

# Covid-19 | Adaptation of rules relative to staff representative meetings

7 December 2020

**Commentary of Ordinance no. 2020-1441 of 25 November 2020 relative to the adaptation of the rules relative to staff representative meetings and decree no. 2020-1513 of 3 December 2020 relative to the procedures for consulting employee representative bodies during the period of a state of public health emergency.**

**Article updated on 7 December 2020**

Law no. 2020-1379 of 14 November 2020 authorizing the extension of the state of public health emergency has enabled the French Government to reinstate, by way of ordinances, certain derogation measures implemented during the first lockdown.

During the first phase of the public health emergency, Ordinance no. 2020-389 of 1 April 2020 had authorized the unlimited use of video conferencing, audio conferencing and instant messaging for social and economic council (*comité social et économique – CSE – i.e. works council*) meetings, even in the absence of an agreement. Decree No. 2020-419 of 10 April 2020 had provided the details necessary for the implementation of these provisions.

Ordinance no. 2020-1441 of 25 November du 25 2020 reiterates this mechanism and authorizes video and audio conferencing, and failing such, instant messaging, for staff representative meetings, subject to simply informing the employer, while creating a right of opposition for elected members, which did not exist before. A decree no. 2020-1513 of 3 December 2020 specifies the methods for implementing these alternative methods of meeting, which is identical to the decree of 10 April 2020 taken within the framework of the first lockdown.

The Ordinance of 25 November 2020 shall apply up to expiry of the current public health emergency, i.e. up to 16 February 2021 included, as the current texts stand.

## **AUTHORIZATION OF REMOTE MEETINGS DURING PUBLIC HEALTH EMERGENCY**

With effect from 27 November 2020, subject to the employer informing the council members, remote meetings are authorized for all social and economic council and central social and economic council (*comité social et économique central - CSEC*) meetings, as follows:

- by video conference;
- by audio conference;
- by instant messaging, where video or audio conferencing is not available or where provided for by a company agreement.

These terms and conditions for organizing remote meetings are also authorized "for all meetings of other staff representative bodies governed by the provisions of the Labor Code". This most likely refers to the group works council, European works council, European company (*societas europaea*) works council and CSE commissions such as the Health, Safety and Working Conditions Committee (*Commission santé, sécurité et conditions de travail - CSSCT*).

## **TERMS AND CONDITIONS FOR MEETINGS VIA AUDIO CONFERENCING AND INSTANT MESSAGING**

Decree no. 2020-1513 of 3 December 2020 provides the conditions in which meetings can be held by audio conferencing and instant messaging, which are identical to those set forth during the first public health emergency period. As regards meetings held in videoconferencing, their conditions are already provided for under French Labor Code (art. D.2315-1 and D.2315-2).

Whether the meeting is held by conference call or instant messaging, the technical system implemented must guarantee the identification of its members, as well as their effective participation by ensuring the instant communication of written messages during the deliberations. It must be possible to suspend the meeting.

For secret ballot voting, the system implemented must meet the conditions provided for in paragraph 3 of article D. 2315-1 relating to videoconferencing, guaranteeing the secrecy of the identity of the voter, the confidentiality of the data transmitted and the security of the addressing of the means of authentication, of the signing, recording and counting of the votes.

Specificities applicable to each type of meeting are also provided for.

### **Conference call meetings**

The president must inform the members of the CSE of the meeting by conference call in accordance with "the rules applicable to convening meetings of the body", i.e. at least three days in advance in the case of CSE meetings (Labor Code., art. L. 2315-30) and eight days in advance in the case of central CSE meetings (Labor Code., art. L. 2316-17).

Prior to beginning the deliberations, it is necessary to verify that all members have access to satisfactory technical means.

Voting must take place simultaneously and the participants must have the same amount of time to vote as from the opening of the voting operations (Labor Code, art. D. 2315-2).

Instant messaging meetings

As with conference call meetings, the employer must inform CSE members of the meeting by instant messaging in accordance with "the rules applicable to convening meetings of the body" (Labor Code, art. L. 2315-30 and L. 2316-17). It must specify the date and time of its beginning and the date and time at which it will be closed at the earliest.

The meeting must take place in four stages:

- verification that all the members have access to the appropriate technical means before launching the deliberations;
- closing the debate by message from the president of the staff representative body, but not before the cut-off time set for the end of the deliberations;
- simultaneous vote of the participants, who are given an equal amount of time to vote with effect from the opening of the voting operation as indicated by the president of the staff representative body;
- announcement of the results by the president of the staff representative body to all the members once the casting of votes has ended.

## **ELECTED MEMBERS' RIGHT OF OPPOSITION**

Ordinance no. 2020-1441 of 25 November 2020 has introduced a major innovation: elected staff representatives now have the possibility to object, by a majority vote and within 24 hours before the start of the meeting, to the use of audio conferencing or instant messaging.

This right of opposition concerns information and consultation procedures carried out within the scope of the implementation of:

- collective redundancy procedures, as set forth in Chapter III of Heading III of Book II of the first section of the French Labor Code;
- collective performance agreements (accords de performance collective – APC), as mentioned in Article L.2254-2 of the French Labor Code;
- agreements on collective common-consent termination (rupture conventionnelle collective – RCC), as mentioned in Article L.1237-19 of the French Labor Code;
- the specific long-term partial activity mechanism (activité partielle de longue durée – APLD), as set forth in Article 53 of Law no. 2020-734 of 17 June 2020.

The report submitted to the French President indicates that "in such cases, the meeting must be held in-person, unless the employer has not yet exhausted its option to hold three annual meetings via videoconference, as authorized under common law".

Moreover, the elected members can object, in the same conditions and within the scope of the information and consultation procedures having the same object, to the use of videoconferencing when the limit of three meetings that can be conducted this way per calendar year has been exceeded.

The Ordinance does not specify the form in which such right of opposition must be carried out.



Gide's **Employment practice group** is available to answer any questions you may have in this respect. You may also get in touch with your usual contact at the firm.

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## **The Proposed Indian Copyright Amendment Rules and Suggestions for Further Amendment**

**Lynn Lazaro, Partner, Kochhar & Co.**

The Copyright Office of the Department for Promotion of Industry and Internal Trade (DPIIT) has invited comments and suggestions to amend the Copyright Act before November 30, 2020. Mid last year, the DPIIT proposed a set of amendments to the Indian Copyright Rules. While these amendments sought to increase transparency and provide clarity for right holders, many other essential modifications were overlooked. This raised questions and concerns in the industry of the gap between the rule makers and the current global climate. Not only the Rules but the Act itself in India requires precision on many of its provisions with new well drafted provisions to ensure a comprehensive updated Act. Therefore, the invitation to provide our comments for further amendments is an opportunity to discuss the real concerns of the Copyright Act and its corresponding Rules.

### **Highlights of the Proposed Rules**

According to the Ministry of Commerce and Industry, the “Copyright Amendment Rules have been introduced to ensure smooth and flawless compliance of Copyright Act in the light of technological advancement in digital era and to bring them in parity with other relevant legislations.”<sup>1</sup> The key amendments include:

1. Replacement of the words “by way of radio broadcast or television broadcast” with “for each mode of broadcast”, thereby including statutory licensing for internet broadcasting as well.
2. Permitting electronic means for the payment of fees, communication with the office and license holders.
3. Only the source code to be submitted for registration of a computer program as opposed to the requirement for both the source and object code to be submitted.
4. Increased accountability of Copyright Societies by requiring the Societies to create an Annual Transparency Report (65A) to include financial information of the rights revenue and refusals to grant licenses among others, and publish this report on their websites.
5. The words “The Copyright Board” amended to “Appellate Board” and the qualifications of the chairman of the Board and its members amended to be consistent with the Trade Marks Act 1999.

### **Suggestions for Further Amendment**

The Indian Copyright Act in its current form, requires far more edits than proposed by the DPIIT. There is a lack of clarity and the right holders are not being adequately represented under the Act. Technology has always been a few steps ahead and our laws have been unable to anticipate and catch up. Some suggestions in this regard are,

#### **1. An AI Author**

The Act has no provision to regulate disruptive technology, in particular, artificial intelligence that is capable of creating content protectable by copyright. The common

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<sup>1</sup> Press Release dated June 3, 2019.

argument that AI belongs to a human author and hence the rules and protections of copyright pertain to the human involved with the AI's creation, does not hold weight. With AI developing content on its own without human interference, it is apparent that there needs to be amendments to the Act and Rules to regulate this IP. Contrary to popular belief AI while revolutionary is not new. In the 1900s, Leonardo Torres y Quevedo, a Spanish civil engineer and mathematician built El Ajedrecista an automaton capable of playing chess<sup>2</sup>. It was considered the first computer game in history. Inventions like the original calculator and El Ajedrecista incorporate at the foremost, elements and concepts of artificial intelligence, although it was still early years then. Today, we have autonomous cars, Siri, Alexa and Sophia. Sophia is the world's first humanoid robot and the UNDP's innovation champion. Sophia is the first non-human to be given a title by the United Nations<sup>3</sup>. She is also the first non-human to be given citizenship. Sophia is a citizen of Saudi Arabia<sup>4</sup>. Interestingly, Sophia has the capability to create and innovate. This android has proven capable of having a conversation with human beings, making jokes and providing creative works. In the year 2019, Sophia learnt how to sketch drawings and portraits<sup>5</sup> and she sketched the portrait of the Prime Minister of Malaysia as a gift to him on his 94th birthday<sup>6</sup>. All of this raises the questions of who owns the copyright and who takes responsibility. Regulation is the need of the hour to ensure accountability and transparency.

## 2. Data Mining

Data Mining or data analysis driven by AI, machine learning and deep learning is now the go to technology to automate research. Essentially, large packets of data are mined to generate patterns and solve complex problems. While this has transformed the access to information, there needs to be more clarity within regulations to protect the owners/ authors of such data. Again, some may argue that this becomes a privacy and data security issue but there are elements of copyright ownership that are being forgotten and must be policed. If prior permission from the copyright owner has not been taken, there may be a clear case of infringement. For example, if a published work has been mined to extract certain data or information, and then the work is circulated, the distribution rights of the copyright owner are being infringed if due permission has not been granted. The argument of fair use for research and educational purposes in such a situation is often called upon as a defence but this is open ended since there are no clear regulations to govern these types of situations.

## 3. Co-ownership

While the Act provides for a "work of joint ownership", the Act is silent on the workings of such co-ownership of copyright. We are thus forced to look at the courts

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<sup>2</sup> McCorduck, Pamela (2004), *Machines Who Think* (2nd ed.), Natick, MA: A. K. Peters, Ltd., ISBN 978-1-56881-205-2, pp. 59–60.

<sup>3</sup> UNDP in Asia and the Pacific Appoints World's First Non-Human Innovation Champion". UNDP Asia and the Pacific. Retrieved July 29, 2020.

<sup>4</sup> "Meet the first-ever robot citizen — a humanoid named Sophia that once said it would 'destroy humans'". Business Insider. October 27, 2017. Retrieved July 29, 2020.

<sup>5</sup> <https://www.hansonrobotics.com/the-making-of-sophia-how-sophia-draws/>, Hanson Robotics, Nov 11, 2019. Retrieved July 29, 2020.

<sup>6</sup> "<https://www.thestar.com.my/news/nation/2019/07/17/dr-mahathir-tonguetied-yes-when-he-met-sophia-the-social-humanoid-robot>", The Star, July 20, 2019. Retrieved July 29, 2020.

for an interpretation. The courts of Mumbai<sup>7</sup> and Allahabad<sup>8</sup> have provided that in India a joint owner cannot exploit the copyright individually. They require the permission of the other copyright owner(s) before assigning, transferring, licensing or sub-licensing any part of the product so jointly owned. This is contrary to the laws in other jurisdictions and serves as a hindrance in doing business in India. Many are of the view that this issue can be contractually taken care of, however, there is no clarity in the Act or subsequent Rules and it would be interesting to see if this addressed in the amendments to the Act.

#### **4. Intermediary liability**

The degree of liability for intermediaries has been a question of great debate. Under Section 79 of the Information Technology Act, intermediaries are given safe harbour. However, apart from the “Fair Use” exception, the Copyright Act has no clarity on this. In addition, with regard to user generated content websites such as networking sites like Facebook, Instagram, Twitter, Tumblr, Snapchat, TikTok, etc., the blanket safe harbour exemption needs to be looked at again. Many are also of the view that intermediaries should be given higher responsibility including the obligation to restore the content once removed if no proof of copyright infringement is provided within a time frame.

#### **5. Statutory Licensing and Fixed Royalties**

By way of a public notice last month, the Intellectual Property Appellate Board (IPAB) intends to fix the royalties for communication of Sound Recordings to the public by way of broadcast through Radio under section 31D of the Copyright Act, 1957 and has invited suggestions from the public in this regard. While this move could be considered arbitrary and an overreach of the government’s role in what should essentially be a contractual decision, Section 31(D) of the Act requires a broadcasting organisation to obtain a statutory license to communicate any literary or musical work and sound recording works to the public and pay the royalties to the copyright owner at the rate fixed by the IPAB. The copyright owner consequently has no say in their royalty amount. A suggested amendment would be that the IPAB fix a minimum rate and allow the parties to negotiate a tangible amount to avoid rock bottom prices.

Many are also against statutory licensing in general and strongly of the view that it should not apply to streaming services. However, the proposed amendment to the rules, as mentioned earlier includes “each mode of broadcast” thereby bringing internet streaming services firmly within its gambit.

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<sup>7</sup> Angath Arts Private Limited v. Century Communications Ltd. and Anr. 2008(3)ARBLR197(Bom) | 2008(4)BomCR838.

<sup>8</sup> Nav Sahitya Prakash v. Anand Kumar, AIR 1981 All 2000

# SKRINE

## Beware the Potential Pitfall when Dealing with a Sub-Delegate of Trustees

11 December 2020

The recent decision by the Court of Appeal in *Manuan a/l K Marappan & Anor v Sinwufu Enterprise Sdn Bhd (Mashudan bin Kamar, Bustani bin Nador & Khairil bin Sulaiman (selaku pengamanah Persekutuan Guru-Guru Melayu Johor, Cawangan Batu Pahat) & 2 Ors – Third Parties) (and Another Appeal)* [2020] 8 AMR 325 is a timely reminder on legal limits that may apply to the sub-delegation of powers by trustees.

### Background

In essence, the two appeals turned on the validity of the transfer of five pieces of land in Batu Pahat, Johor owned by one of the respondents, *Persekutuan Guru-Guru Melayu Johor, Cawangan Batu Pahat*, i.e. the Federation of Malay Teachers Johore, Batu Pahat Branch ('PGMJ') to the appellants pursuant to a power of attorney ('PA') granted by the trustees of PGMJ to one Omar bin Kassim ('Omar').

The High Court had granted a declaration that the sale and purchase agreement for the five pieces of land was null and void and ordered the appellants to deliver vacant possession of the lands to PGMJ.

### Decision

The Court of Appeal upheld the decision of the High Court and dismissed the appeals.

According to the Court of Appeal, the primary issue in the appeals is the legal issue of the validity of the PA.

The Court of Appeal took the view that the decision of the Federal Court in *Letchumanan Chettiar @ L Allagappan (sebagai perlaksana wasiat (executor) kepada SL Alameloo Achi Alsia Sona Lena Alameloo (si mati) menurut geran probet bertarikh 3/6/1966 menurut Petisyen No. 32-05-1996, Mahkamah Tinggi di Alor Setar, Kedah Darul Aman) & Anor v Secure Plantation Sdn Bhd* [2017] 3 AMR 625 ('Letchumanan Chettiar') is authority for the proposition that the validity of a power of attorney is fundamental and if the power of attorney is invalid, then the transfer is invalid.

The Court of Appeal held that in equity the principle of *delegatus non potest delegare* (non-delegation) by a trustee is a strict rule that may be mitigated or modified by express provision in the trust instrument or by statute.

The Court noted that PGMJ's constitution vests immovable properties of the association in the names of the trustees, which was in line with section 9(b) of the Societies Act 1966. The Court observed that there were no provisions in PGMJ's constitution or the Societies Act 1966 which permit delegation whether by PA or otherwise. Hence, PGMJ has no power under its constitution to appoint an agent and everything must be carried out by PGMJ and its office bearers and trustees.

The Court of Appeal agreed with PGMJ's contention that the provisions of sections 28(2) and 30 of the Trustee Act 1949 are statutory exceptions to the equitable rule of *delegatus non potest delegare* and allow for delegation by power of attorney in two limited situations, namely (a) where the trustee wants to deal with property outside Malaysia (section 28(2)); and (b) where the trustee is leaving the country (section 30), and that outside of these two situations, the trustee cannot delegate.

Based on the facts of the case, the Court of Appeal concluded that PGMJ fell within the equitable rule of *delegatus non potest delegare* but not within the statutory exception under section 28(2) of the Trustee Act 1949.<sup>1</sup>

For the reasons stated above, the Court of Appeal found that the PA is not valid on two grounds, namely that it breaches the non-delegation rule, and is *ultra vires* the constitution of PGMJ.

In light of its finding that the PA is void, the Court of Appeal affirmed the decision of the High Court. The Court of Appeal further ordered PGMJ to refund the sum of RM94,200.00 paid by the first and second appellants to PGMJ.

## Comments

In coming to its decision, the Court of Appeal accepted *Letchumanan Chelliah* as authority for the proposition that the validity of the PA is fundamental and if the PA is invalid, then the transfer is also invalid. The Court held that the arguments raised by the appellants to distinguish *Letchumanan Chelliah* (where the issue of fraud had been raised) on, inter alia, the grounds that based on evidence by the last surviving Committee Member of PGMJ, there was clear intent on the part of PGMJ to give the PA to Omar and that PGMJ's lawyer had testified that he drafted the PA on the instruction of PGMJ to appoint Omar as attorney, were not relevant to the legal argument at hand as they impinged on factual matters.

Based on the application of *Letchumanan Chelliah* in this case, the absence of express power for the trustees to appoint a sub-delegate is fatal and renders the instrument of appointment of the sub-

delegate and the purported exercise of powers under the instrument by the sub-delegate to be invalid even if the sub-delegation may have been made in good faith and in the absence of misconduct by the trustee.

This decision is a timely reminder that trustees who seek to sub-delegate their powers should ensure that they have express powers to do so under the relevant documents, such as the instrument of trust, the constituent document of the settlor or under the relevant laws. Similarly, a person dealing with a counterparty who is represented by a sub-delegate of the trustees should take steps to confirm that the trustees have the necessary powers to appoint sub-delegate.

A person who wishes to create a trust should also consider whether to confer powers in the trust instrument for the trustees to delegate any of their powers to sub-delegates in addition to the circumstances provided under section 28(2) and 30 the Trustee Act 1949.

For enquiries, please contact the following members of our Wealth Management, Trusts and Charities Practice:

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<sup>1</sup> As the Court did not make any finding in relation to the exception under section 30 of the Trustee Act 1949, it is presumed that the said provision did not apply to the facts of the case.



December 11, 2020 | 3 min read

[Water management \(/resources/water-management\)](#)

**The Water Services Bill (Bill) received its first reading on Tuesday 8 December 2020 and has been referred to the Health Select Committee for consideration. It proposes to repeal Part 2A of the Health Act 1956 and replace it with a standalone Act to regulate drinking water.**

The Bill is a companion to the Taumata Arowai - the Water Services Regulator Act 2020 which was passed earlier in the year, and provides the new drinking water regulator Taumata Arowai with significant new powers.

In this FYI we outline some of the features of the Bill.

#### **Key Points:**

- The Bill proposes a new regulatory regime for managing drinking water supply;
- The obligations on drinking water suppliers proposed by the Bill are more onerous than those under the existing Health Act regime; and
- The Bill is a part of a broader Three Waters reform programme.

#### **Context for the Bill: ensuring that drinking water suppliers provide safe drinking water to consumers**

The Bill is a part of the Government's response to the Havelock North Drinking Water Inquiry, which found the contamination that caused 5000 people to become ill was the result of systemic failure across service provision, regulation and source protection.

When introducing the Bill, Local Government Minister Nanaia Mahuta was clear that the Bill is designed to give Taumata Arowai the powers it needs to give effect to the Government's expectation that New Zealanders are "able to drink the water that comes out of the tap knowing that it is safe".<sup>[1]</sup>

#### **The Bill creates a new and more onerous regulatory regime**

The Bill will replace the existing regime set out in Part 2A of the Health Act 1956 and will replace it with a new regulatory regime that applies to all drinking water suppliers (except individual household suppliers). The Health Select Committee will no doubt look closely at clause 8 and the meaning of "drinking water supplier" in terms of who will be captured by the legislation.

As currently drafted the Bill requires all drinking water suppliers to:

- provide safe drinking water and meet drinking water standards, along with clear obligations to act when drinking water is not safe or fails to meet standards;
- ensure that there is a sufficient quantity of drinking water to support the ordinary needs of consumers, with clear obligations to act where supply is interrupted or restricted for any reason;
- have a drinking water safety plan that contains a multi-barrier approach to drinking water safety; and
- notify Taumata Arowai and take action where there are risks to public health arising from drinking water, breaches of drinking water standards, or other significant risk events.

The Bill also proposes new arrangements regarding sources of drinking water:

- drinking water suppliers must have a source water risk management plan, which identifies and manages any risks to a source of drinking water;
- local authorities must contribute to source water risk management plans; and
- drinking water suppliers must monitor source water quality, and regional councils must assess the effectiveness of regulatory and non-regulatory interventions relating to source water every 3 years.

Taumata Arowai is also responsible for approving & monitoring compliance with drinking water safety plans and source water risk management plans.

Cabinet Papers make it clear that Taumata Arowai is expected to take an active role in compliance and enforcement, including by providing support, assistance and guidance, and taking appropriate action to address non-compliance.<sup>[2]</sup>

The Government has acknowledged it will be challenging for smaller drinking water suppliers to comply with the new regulatory framework. However, the Government is also clear that it is determined that rural communities are not “second-class citizens” when it comes to drinking water quality.<sup>[3]</sup>

### **The Bill is part of the Government’s broader Three Waters Reform programme**

As noted during the Bill’s first reading, New Zealand does have a significant Three Waters infrastructure deficit, with as much as \$574 million and \$4.3 billion being required to upgrade water treatment plants and wastewater treatment systems respectively. Furthermore, the ability for local authorities to meet those costs is low.<sup>[4]</sup> This will no doubt be a challenge for Taumata Arowai as it means that some local authorities may struggle to comply with the more rigorous regulatory regime created by the Bill.

To address these challenges, the Government has initiated a Three Waters Reform programme and local authorities are currently working with the Government on potential models for reform. It is expected that that reform will be accompanied by significant central Government investment into Three Waters infrastructure (in addition to the \$761 million announced in July 2020).

### **Next Steps**

A deadline for making submissions on the Bill will be announced in due course. If you would like assistance in making a submission on the Bill, or would like to know about its implications for your council or business, please contact one of our experts above.

- [1] Nanaia Mahuta Press Release *New water services bill for safe drinking water* (<https://www.beehive.govt.nz/release/new-water-services-bill-safe-drinking-water>) (28 July 2020).
- [2] Cabinet Paper *Water Services Bill: Approval for Introduction*, Office of the Minister of Local Government (21 July 2020) at [33].
- [3] Nanaia Mahuta Press Release *The Water Services Regulator Bill - Taumata Arowai a milestone for drinking water safety* (<https://www.beehive.govt.nz/release/water-services-regulator-bill-taumata-arowai-milestone-drinking-water-safety>) (12 December 2019).
- [4] Cabinet Paper *Three waters service delivery and funding arrangements: approach to reform*, Office of the Minister of Local Government (28 January 2020) at 5.



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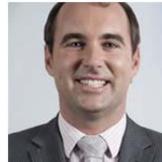


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## Newsletter

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# "Patent Examination Pilot Program for Startup Companies"; Effective 1 January 2021

11/30/2020

Hsiu-Ru Chien/Elina Yu

In recent years, the government has paid greater attention to startups. To further provide the startups having R&D capabilities with a more active and positive examination so as to better improve their patent portfolios, on 14 October 2020, the Intellectual Property Office (hereinafter "IPO") announced a "Patent Examination Pilot Program for Startup Companies" (hereinafter "pilot program"), effective 1 January 2021.

According to the pilot program, eligible applicants are those startups established less than five years before the patent filing date (or priority date if claimed), provided that said startup was the applicant of the invention patent concerned at the time of filing. A petition form for the pilot program may be submitted online with the IPO after the startup receives official notice that the IPO is about to conduct substantive examination of the invention patent, and prior to receipt of the first office action.

For those complying with the mentioned requirements, the IPO will apply the pilot program to its examination. The specific steps are summarized as follows.

- 1. The IPO will hold an interview based on its authority:** Within one month after the pilot program application is filed, the IPO will provide the applicant(s) with interview materials, including a search report and a brief summary of their opinions on the reasons for not granting a patent, and arrange a time for interview with the applicant. In principle, said interview will be held within one month after the applicant receives the interview materials. In the interview, the IPO will not only inform the applicant the reasons for not granting a patent, but also provide constructive suggestions on amendment.
- 2. The applicant shall submit a response or amendments in due time:** The applicant shall submit a response or amendments within one month after the interview. If the applicant fails to submit the response or amendments in due time, the examination will be continued on the basis of the existing file under the general examination procedure.
- 3. A notice of the examination result will be issued within one month after receipt of the response or amendments:** In principle, if the applicant submits the response or amendments within the designated period of time, within one month after the receipt of the same, the IPO will issue a notice of the examination result, including the decision to grant or an office action.

In view of the above, the pilot program reduces the wait for the first office action from an average of 12-18 months to only one month.

However, it should be noted that pilot program has trial period of merely half a year, and is limited to 30 cases. The IPO will evaluate whether to continue or amend the program based on the results. Startups can take the above information into consideration to formulate their plans of patent portfolio which are the most beneficial to development of their enterprises.

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# PATIENT HEALTH RECORDS

## ADVISORIES

Technology + Privacy & Security

# HIPAA May Apply to Employer COVID-19 Testing Programs

By Adam H. Greene

12.11.20

When COVID-19 first began to spread in the United States, a recurring question we received was whether employers become subject to HIPAA by taking employee temperatures or collecting medical information. The answer generally is that HIPAA does not apply to employers, and that this medical information is instead subject to other laws, such as the Americans with Disabilities Act (ADA).

But the days of employers relying solely on temperature checks and questionnaires are behind us, as an increasing number of employers

have launched COVID-19 testing programs. Employers who conduct COVID-19 testing of employees should consider whether their testing program qualifies as a "group health plan" under ERISA and HIPAA, creating new privacy, security, and breach notification obligations.

## **Employers May Not Be Subject to HIPAA Privacy Regulations, but Their Group Health Plans Are**

The HIPAA privacy, security, and breach notification obligations only apply to "covered entities"—certain healthcare providers, health plans, and healthcare clearinghouses—and the "business associates" who handle protected health information on their behalf. HHS has always been open about the fact that the HIPAA privacy and security regulations do not regulate employers.

While an employer is not subject to the HIPAA privacy, security, and breach notification rules, a health plan is. And HIPAA defines "health plan" to include an employee "group health plan."

Under ERISA and HIPAA, an employer and its group health plan are considered to be separate legal entities. So, while an employer is not subject to HIPAA privacy, security, and breach notification regulations, the employer's group health plan usually is. And because group health plans are not living, breathing creatures, it typically falls on an employer as sponsor of the plan, or a third party administrator, to ensure that the group health plan is compliant with its HIPAA requirements.

Employers often do not want to be involved in complying with HIPAA. They may be "hands off" with respect to protected health information, relying on a third party administrator to handle the plan's protected health information and the associated HIPAA compliance obligations.

This can help the employer avoid, for example, needing to build out a robust HIPAA Security Rule compliance program.

## **Is COVID-19 Testing a "Benefit" Under ERISA?**

And then COVID-19 comes along, with more and more employers testing their employees. In fact, California has begun to legally require employers to provide free COVID-19 testing of employees in certain situations (see our blog [Cal/OSHA Adopts Emergency COVID-19 Prevention Rule](#)). Employee testing, however, might create ERISA and HIPAA issues.

ERISA defines a "group health plan" as an employee welfare benefit plan to the extent that the plan provides "medical care," which is defined as including "amounts paid for – the diagnosis ... of disease." Paying for COVID-19 testing seems to qualify as paying for the diagnosis of disease. But is an employer's COVID-19 testing program an "employee welfare benefit plan?"

An employee welfare benefit plan includes any program that an employer establishes or maintains for the purpose of providing medical benefits. This takes us further down the rabbit hole to the question of whether COVID-19 testing, when the employer mandates the testing as a condition to return to the office, qualifies as a "medical benefit." Certainly, being required by your employer to wrestle a swab up your nasal passage in order to return to work, when you have no reason to believe that you have COVID-19, does not feel like a "benefit" at the time. But common sense and the law often diverge.

The Department of Labor has issued an [advisory opinion](#) that an employer paying for mandatory employee drug testing does not provide the employee "with benefits that are in the nature of medical

benefits or benefits in the event of sickness." At first blush, COVID-19 testing seems closely analogous. It is mandatory testing intended to benefit the employer, rather than the employee.

But the 9th Circuit in [\*Aloha Airlines, Inc. v. Ahue\*](#) has held that FAA-mandated medical examinations of pilots, paid for by an employer, constitute a "medical benefit" that creates an ERISA plan. The court held that it is a medical benefit because it "provides the pilot with a direct and immediate assessment of his personal medical condition," notwithstanding that the purpose of the test is to ensure the safety of the general public.

This logic seems equally applicable to COVID-19 testing, which is focused on public safety but results in the employee learning if she likely has a specific medical condition. The court dismissed arguments that "medical benefits" under ERISA are limited to those that solely benefit the employee or that Congress intended to distinguish between voluntarily obtained benefits and compelled benefits.

When COVID-19 testing is compared to drug testing and FAA-mandated medical examinations, the latter seems to be the closer analogy. The medical examinations of pilots are focused on a medical condition. Drug testing, in contrast, is focused on whether the employee has taken drugs recently.

While we recognize that a substance use disorder also is a medical condition, drug testing does not identify whether someone has such a disorder—it may only show that an employee took a drug once recently. And while the mandatory medical examinations provide new health information to the pilot about any medical conditions, drug testing is not providing "new" information to the employee (unless the

test is wrong or the employee does not realize that they have taken prohibited drugs). Accordingly, employers may find the holding in *Aloha Airlines* to be more on point than the Department of Labor guidance on drug testing.

If an employer treats COVID-19 testing as an employee medical benefit, then the employer may need to treat the testing program as a group health plan. Note that an exception may apply if the testing is done through an employer's onsite medical clinic, since an onsite clinic is an "excepted benefit" under ERISA and excluded from the definition of "health plan" under HIPAA.

On the ERISA side, the COVID-19 group health plan may need to be "wrapped" into a more general group health plan (the primary medical plan) in order to comply with Affordable Care Act requirements. An exception may be if the COVID-19 testing program is part of an employee assistance plan, which is an "excepted benefit" under ERISA (but, in contrast to onsite clinics, may not be excluded from the definition of "health plan" under HIPAA).

On the HIPAA side, the COVID-19 testing program, with respect to payment to a healthcare provider for the testing, may need to comply with the HIPAA privacy, security, and breach notification rules. This could require the employer to create a HIPAA Security Rule program with respect to the information.

### **To Illustrate the Point**

Despite all this, it remains true that HIPAA generally does not apply to employers. Confusingly, HIPAA should not apply to an employer with respect to a COVID-19 testing program, other than with respect to payment to the healthcare provider who performed the testing. It is

best to think about the COVID-19 testing program as involving three parties:

- (1) The lab that performs the testing;
- (2) The employer's group health plan (the COVID-19 testing program with respect to paying for the testing); and
- (3) The employer that receives the test results and makes employment decisions accordingly.

HIPAA usually applies to the lab (depending on its billing practices), in which case the lab usually would need a patient's HIPAA-compliant authorization to disclose the test results to the employer. HIPAA would apply to the group health plan that is paying for the testing (but which likely does not need to receive the test results). But HIPAA would not apply to the employer who receives the test results for purposes of making employment decisions. Instead, the employer will be subject to the ADA with respect to the test results, and may be subject to state laws such as [Section 56.20 of the California Confidentiality of Medical Information Act](#).

To make this a bit more real, imagine an employer with two HR employees, Fred and Wilma. Fred is responsible for paying a lab to conduct COVID-19 testing of employees. Wilma is responsible for ensuring that only employees who have recently tested negative return to the office.

Fred will coordinate with the lab to learn who has been tested and to pay the lab accordingly. These exchanges between Fred and the lab may be subject to HIPAA, including HIPAA "transaction standards" that govern how requests for payment for healthcare are formatted. Fred's

files showing who has received tests may be subject to HIPAA, including its Security Rule.

But Fred likely does not need to know the test results—only that the tests happened and were paid for. In contrast, Wilma does not need to know everyone who has been tested—she only needs to know the results for those who are seeking to return to the office. Her information likely is outside of HIPAA, but subject to the ADA and potentially other laws.

If you think that this is a lot to wrap your head around, you are not alone. COVID-19 testing programs raise very complex ERISA and HIPAA issues. Admittedly, reasonable minds will differ on how the laws apply. What is most important is that employers enter this space with eyes wide open, carefully analyzing what activities likely fall outside of HIPAA, and what activities may introduce new HIPAA obligations.

## **Epilogue**

And next year, we are likely to see employer vaccination programs begin. These will likely raise many of the same issues, potentially creating ERISA and HIPAA obligations to the extent that an employer pays for vaccinations of employees.

For more information, contact [Adam Greene](#), [Lisette Sell](#), [Dipa Sudra](#), [Becky Williams](#), or the DWT attorney with whom you normally work.



## News & Knowledge

### Employment Law Update: Hawaii Legislature Shortens Lookback for Criminal History to 7 Years for Felonies and 5 Years for Misdemeanors

Nov 10, 2020

Hawaii employers who consider criminal history in hiring and other employment decisions may now only consider felony convictions that occurred in the most recent 7 years and misdemeanors that occurred in the most recent 5 years, excluding periods of incarceration. This was reduced from 10 years by the Hawaii legislature, effective September 15, 2020.

The Hawaii State Legislature made this change citing a finding that meaningful employment opportunities for people with criminal records were necessary for their economic stability and that ensuring greater employment opportunities for them would reduce crime and improve public safety in the long run. The Legislature found that the current 10 year lookback “may continue to facilitate employment discrimination against individuals who have a criminal history, but who have long since paid their debt to society and pose little or no risk to an employer or the public.”

Employers conducting criminal history checks on job applicants should not

make inquiries or consider an individual's criminal history until after making a conditional offer of employment. An employer may rescind a conditional offer or take other employment action when a conviction occurring within the applicable lookback period "bears a rational relationship to the duties and responsibilities of the position." In order to assess this "rational relationship," Hawaii employers need to identify the statutory elements of the offense of which the individual was convicted and compare those elements to the duties and responsibilities of the position.

Employers with questions or concerns about whether a particular conviction may be properly considered in making an employment decision should consult qualified employment law counsel.

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## Final FDA combination product guidance encourages application-based feedback pathways

14 December 2020

The U.S. Food and Drug Administration (FDA) recently finalized its **guidance** entitled “Requesting Food and Drug Administration Feedback on Combination Products,” stressing as it did in the draft version that “**application-based mechanisms,**” such as the pre-submission process used by both CDRH and CBER, and the formal meetings used by CDER and CBER, are generally the most efficient and effective approach for combination product developers to obtain agency feedback. The final guidance casts doubt on the agency’s preference toward Combination Product Agreement Meetings (CPAMs), saying they are “**unlikely to be productive**” in certain cases.

The final guidance describes the methods by which combination product sponsors can obtain FDA feedback on scientific and regulatory issues and further outlines best practices for agency-sponsor interactions on combination products. Included in this draft guidance is specific information about CPAMs, a new pre-submission meeting mechanism, specifically intended to provide a means for sponsors of combination products to obtain certainty on issues related to marketing authorization requirements and standards, as well as requirements for postmarket modifications to combination products. CPAMs were established by the 21st Century Cures Act of 2016, and we recently analyzed this FDA feedback mechanism [online here](#). The guidance provides a framework for how CPAMs relate to the other methods for interacting with FDA, what information should be submitted in CPAM requests, and the form and content of agreements reached through a CPAM.

The primary difference between the draft and final versions of the guidance is that FDA added into the final guidance a section on when CPAM requests are appropriate, writing: “The Agency encourages combination product sponsors to interact through application-based mechanisms to provide FDA an opportunity to evaluate technical data or engage in scientific discussion before considering a CPAM.” While “[a]pplication-based mechanisms are generally appropriate for requesting feedback on scientific issues, study design, testing approaches, or application preparation considerations for combination products or clarifying topics for which FDA has already published technical guidance,” CPAMs “may be appropriate for seeking agreement from FDA on an approach if previous feedback under an application-based mechanism has not provided sufficient certainty.” In this new section in the guidance, FDA notes that “**more information and data may be needed in a CPAM request**, as compared to an application-based mechanism submission, to increase the likelihood of reaching an agreement.” (emphasis added).

Separately in the final guidance, FDA also clearly states the purpose for a CPAM: “to address the standards and requirements for marketing authorization of a combination product and other issues relevant to a combination product, such as requirements related to postmarket modification of the product or CGMPs.” In contrast, the dispute resolution and appeals process through the lead FDA Center is appropriate to address disagreement or disputes over constituent part or combination product issues identified as part of an FDA action, the final guidance adds. These disputes may include disagreements over determinations that a product cannot be marketed, complete response actions, clinical holds, or refusal to receive.

In March, we had [summarized](#) how comments on the draft version of the guidance asserted FDA should clarify the timeline for CPAM requests, and add in parameters for how long the agency has to respond. Seemingly in response to these comments, FDA added into the final guidance that “[i]f the sponsor requests a face-to-face meeting or teleconference, FDA intends to provide the sponsor preliminary responses to the CPAM request no later than 5 calendar days before the meeting/teleconference,” and “[i]f the sponsor then determines that a meeting/teleconference is not needed or is needed to discuss only certain issues...FDA’s preliminary response will represent the Agency’s final written feedback (on all or the resolved issues) on a CPAM.” In addition, if the meeting/teleconference is held, “FDA intends to provide final written feedback to the sponsor within 30 calendar days following the meeting,” the final guidance states.

While adding this new timeline recommendation for FDA actions, the final guidance also poses a new parameter for CPAM sponsors, stating that after a sponsor receives a preliminary response from the agency, the sponsor “should notify the FDA no later than 3 calendar days following receipt that a face-to-face meeting or teleconference is not needed or identifying the issues which the sponsor wants to further discuss at the meeting/teleconference.”

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