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March 2020 e-Bulletin

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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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BAKER BOTTS LAUNCHES MULTIDISCIPLINARY COVI-19 TEAM, WITH RESOURCE KIT AND DAILY UPDATES FOR COMPANIES

11 March, 2020 – To help address the concerns of its clients, colleagues and friends affected by the outbreak of coronavirus (COVID-19), Baker Botts L.L.P. has assembled a multidisciplinary Coronavirus (COVID-19) Crisis Response Group, compiled an accompanying resource kit, and is providing daily social media updates on the rapidly evolving situation.

The firm is advising clients on a number of fronts related to the outbreak, including on issues related to crisis response, business interruption, cybersecurity/data privacy, impact on SEC disclosures for public companies, force majeure clauses, employee/human resources issues and leadership succession. A link to the firm's resource kit, which will be updated regularly, can be found here.

Daily updates can be found on Baker Botts' LinkedIn https://www.linkedin.com/company/baker-botts-llp/ and Twitter https://twitter.com/bakerbotts pages.

The multidisciplinary Coronavirus (COVID-19) Crisis Response Group is co-led by Baker Botts partners Scott Janoe, Steve Solow and Nadira Clarke of the firm's Environmental, Safety & Incident Response Section.

"These resources draw from the experience of our global, cross-practice and multidisciplinary group of attorneys," Mr. Janoe said. "In the recent past, our firm has helped clients in dealing with large-scale industrial accidents and environmental disasters and in addressing the rapidly evolving cybersecurity and data privacy landscape, among other things."

"In addition to the firm's company-side experience, we are also fortunate to be able to rely on lawyers with extensive government experience as leaders and members of teams charged with responding to environmental crises, privacy issues and international acts of terrorism," Mr. Solow said.

Below is an overview of some of the Crisis Response Group's areas of focus.

Crisis Response: Companies – regardless of geography – are faced with the daunting task of making critical decisions with imperfect information. Baker Botts has distilled advice from its crisis response team that may be useful as companies engage in response planning.

Cybersecurity/Data Privacy: COVID-19 raises a host of potential cybersecurity and data privacy concerns. These include: (i) potential increased cybersecurity risk as a result of more employees working remotely; (ii) COVID-19 based "phishing" scams in which malicious actors send emails or other electronic messages purporting to be government, health care or charitable organizations; and (iii) potential privacy concerns related to an employer's solicitation or collection of employees' personal health and/or travel information.

Potential Impact on SEC Disclosures for Public Companies: The U.S. Securities and Exchange Commission has recognized that COVID-19 raises "potential compliance issues" for companies with SEC reporting obligations. To help alleviate such issues, on March 4, 2020, the SEC announced that, subject to certain conditions, companies impacted by COVID-19 would have an additional 45 days to file certain disclosure reports and schedules that would otherwise have been due between March 1 and April 30, 2020. Among other conditions, companies must file a Form 8-K or Form 6-K summarizing why the relief is needed in their particular circumstances.

Force Majeure Clauses: In the coming months, the firm expects to see claims that the COVID-19 outbreak prevents parties from performing their obligations under a contract, because the outbreak is an "act of God."

Employee/Human Resources Issues: As COVID-19 spreads, employers will need to navigate a complex web of issues to protect their workforce as employees become ill, employees' family members become ill, and as employees continue to travel to countries under a CDC travel alert.

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BAKER BOTTS CONTINUED

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At the same time, employers must tread carefully. Discrimination based on national origin is prohibited by federal and state anti-discrimination laws such as Title VII.

Employers should also review their sick leave, paid time off, and short-term disability policies to determine whether any special adjustments should be made in the event their workplace is part of the outbreak.

Key Personnel: With increasing travel restrictions, potential quarantines, and government-encouraged social distancing, the coronavirus increases the risk that companies may be without key leaders for an extended period. Baker Botts has regularly advised clients on leadership succession and similar issues.

For additional information visit www.bakerbotts.com

CLAYTON UTZ WELCOMES INVESTIGATIONS AND EDISCOVERY SPECIALISTS TO FORENSICS TEAM

Sydney, 13 March 2020: Clayton Utz has recruited ***Chelsea Hosking*** and ***Pavan Kotha*** to the firm's national Forensic & Technology Services (FTS) team. The appointments reflect the continued strong growth of the FTS practice in response to client demand for a range of specialist FTS services.

Chelsea joins Clayton Utz from EY, where she was a Manager in the Forensic and Integrity Services Division. With a background as a Chartered Accountant and holding a Masters of Fraud and Financial Crime, Chelsea has many years' experience advising and consulting to both private and public sector clients, specialising in fraud and non-compliance investigations.

Chelsea will be based in Clayton Utz's Canberra office, where her experience consulting to Government clients will be particularly valuable.

Also joining Clayton Utz is Certified eDiscovery Specialist Pavan Kotha, from Deloitte. With a similar background in computer science, Pavan holds the highest level of qualification in the Relativity e-discovery platform and was named a Lit-Support All Star at the 2019 Relativity Innovation Awards. Reflecting his reputation as a leader in eDiscovery, Pavan was recently announced as member of the 2020 Global Advisory Council of the Electronic Discovery Reference Model. Pavan's global eDiscovery knowledge and experience will give added weight to the services Clayton Utz provides to its clients, particularly in relation to regulatory and litigation requests.

Clayton Utz FTS National Practice Group Leader Paul Fontanot said Chelsea and Pavan were welcome additions to the practice. "Chelsea brings rich experience in fraud and forensic investigations, which is in high demand by our clients and which nicely complements our team's expertise. Her being based on the ground in Canberra also reflects our continued investment in our clients based in the capital," he said. "Pavan will also boost our capability in a key area of our practice. He is a self-described eDiscovery enthusiast who enjoys solving problems, so he is the perfect fit for our team."

For additional information visit www.claytonutz.com

HAN KUN WELCOMES NEW TAX PARTNER

BEIJING, 17 February 2020: Han Kun Law Offices is pleased to announce that ***Mr. Yuan Shiye*** has joined the firm as a partner. Mr. Yuan focuses his practice on tax, including tax optimization for private equity and venture capital, tax risk management and minimization for mergers and acquisitions and tax optimization for wealthy individuals.

Before joining Han Kun, Mr. Yuan previously worked in Big 4 accounting firms and served as an M&A tax partner. Mr. Yuan has extensive experience in private equity and venture capital tax optimization projects, enabling him to assist clients through the entire investment management lifecycle of investment institutions and stakeholders. In addition, Mr. Yuan has substantial expertise in advising on tax matters regarding capital markets and wealthy individuals. In terms of industries, Mr. Yuan routinely advises TMT, healthcare and consumer products companies.

Mr. Yuan graduated from Tsinghua University with an LL.B. degree and later from London School of Economics with a master's degree in law and accounting.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS ADDS LEADING FINANCE LAWYER TO NEW YORK OFFICE

New York, 24 February 2020 – Global law firm Hogan Lovells is pleased to announce that Ben Garcia has joined the firm's Finance practice as a partner in New York.

Garcia joins the firm from Milbank, where he was special counsel in the Capital Markets Group. He advises leading financial institutions, investment banks, private equity sponsors and corporate issuers in domestic and cross-border offerings of debt and equity securities. As part of his practice, he advises financial institutions and multinational companies on a wide range of infrastructure-related projects in Latin America.

"We are expanding our finance capabilities in New York to meet the growing needs of our clients, said Matthew Cottis, Global Head of Hogan Lovells' Finance practice. "Ben, with whom we have worked before, is a great fit for our practice, and adds significant strength to our bench, particularly with regard to project bond work in Latin America."

Garcia has led a number of the most prominent recent capital markets transactions in Latin America. He has represented major sponsors and investment banks in project financings in the oil and gas, transportation and renewables sectors in Mexico, Peru, Chile and Colombia. He has worked on transactions ranging from investment grade offerings of debt and equity securities to high yield and structured bonds throughout Europe and Latin America, as well as sovereign offerings by the Dominican Republic and Guatemala. Additionally, Garcia has experience advising on M&A transactions, commercial financings and leveraged buyouts. He is fluent in Spanish and German.

"The Hogan Lovells Finance team in New York has extensive experience working with clients on financings in Latin America," Garcia said. "Together we are well positioned to assist financial institutions, investment banks, private equity sponsors and corporate issuers on a wide range of matters."

Garcia's arrival follows several high-profile additions to the New York office last year, including leading sports transactions lawyer Michael Kuh, and Peter Marta, former global head of the legal cybersecurity team at JPMorgan Chase.

"We are very happy to welcome Ben, who strengthens our ability to deliver on high-end project financing, high yield and corporate transactions in Latin America. He also brings the energy and enthusiasm that we think is a hallmark of Hogan Lovells," said Michael DeLarco, Office Managing Partner for the firm's New York office. "This hire is in line with our strategy to continue to build out the New York office in key business areas."

For additional information visit www.hoganlovells.com

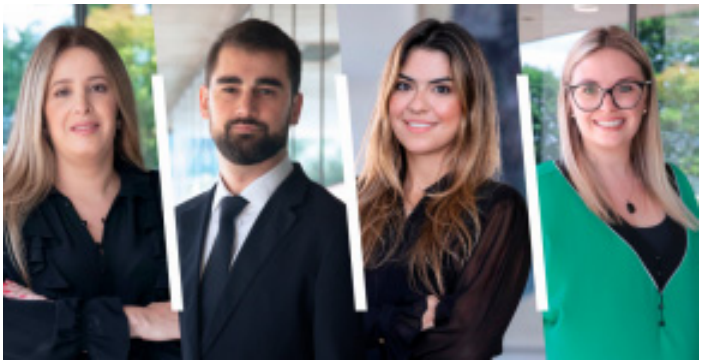
TOZZINIFREIRE ANNOUNCES FOUR NEW PARTNERS

Sao Paulo, 02 March 2020: It is our pleasure to announce the promotion of four associates to partners. They are:

Bruna Borghi Tomé, in the Litigation practice;
Liv Machado, in Restructuring and Insolvency;
Mario Pati, in Antitrust; and
Silvia Martins Castro Cunha Zono, in Corporate/M&A.

The promotions aim to meet the market's demands and contribute to the teams' growth and businesses expansion.

We wish our new partners much success!



(L-R)
Bruna Borghi Tome Liv Machado, Mario Pati, Silvia Martins Castro CunhaZono

For additional information visit www.tozzinifreire.com.br

BAKER BOTTS

SECURES PRECEDENTIAL WIN ON PATENT ELIGBILITY FOR DISH NETWORK

PALO ALTO, 09 March, 2020: On Friday, the U.S. Court of Appeals for the Federal Circuit ruled in favor of Baker Botts client DISH Network by holding that merely configuring a computer to implement an improvement to an abstract concept is not patent-eligible. In the case, Customedia Technologies v. Dish Network, the court determined that patent owners have been "latching onto" language from the U.S. Supreme Court's Alice v. CLS Bank decision, which suggests that claims that "purport to improve the functioning of the computer" are eligible.

The Court affirmed the Patent Trial Appeal Board's decision to strike down claims directed to an improvement to user-targeted advertising in a media network such as a set-top box and content network. The precedential decision provides much-needed guidance to courts and the USPTO when facing the difficult problem of applying the Alice decision to computer-implemented inventions.

DISH's co-lead counsel, Baker Botts partner, Eliot D. Williams, stated: "The court clarified that although inventions directed to improvements in computer functionality are eligible for patenting, merely configuring a computer to provide functionality that is itself an abstract idea is insufficient to support patent eligibility."

As Baker Botts argued in its pleadings, patentees, like Customedia, often latch on to language from Alice and contend that their claims "improve the functioning of the computer itself." Customedia argued that its claims were eligible because they "provide for improvements to the operation and functioning of computer systems." Baker Botts successfully argued that the claims at issue are directed to the abstract idea of using a computer to deliver targeted advertising to a user, not to an improvement in the functioning of a computer.

"This is not what the Supreme Court meant by improving the functioning of the computer itself nor is it consistent with our precedent applying this concept," the court stated in its opinion. The Court also reviewed all significant, prior precedent since Alice in support of the concept that an improvement in the abstract concept itself does not confirm eligibility under Alice.

DISH is represented by Baker Botts partners Eliot Williams, Ali Dhanani, G. Hopkins Guy and Michael Hawes.

For more information visit www.bakerbotts.com

CAREY

ASSISTS FINIX SERVICES IN FUND MANAGEMENT TIE-UP

SANTIAGO, 11 March 2020: Carey has helped Chilean fund manager Finix Services join forces with US investor Compass Group to create Finix Group, which will provide back office financial services.

Compass Group completed the transaction through its subsidiary Fund Services Chile and relied on Barros & Errázuriz Abogados for the deal, which closed on 10 January. Compass and Finix will each hold a 50% interest in the new entity.

Compass Group is an asset and wealth manager specialising in Latin American investments in Argentina, Colombia, Mexico and Peru, among others.

Finix Services (headquartered in Santiago), provides financial advice to investors.

Counsel to Finix Carey Partners Cristián Eyzaguirre and Francisco Guzmán and associates Carlos Alcalde and Benjamín García.

For additional information visit www.carey.cl

CLAYTON UTZ

ADVISES VIETNAMESE AGRIBUSINESS ON MILESTONE $130 MILLION INVESTMENT INTO AUSTRALIA

DARWIN, 06 March 2020: With Clayton Utz as legal advisers, Vietnamese owned Clean Agriculture and International Tourism (CAIT) has now successfully completed its acquisition of three cattle stations from private cattle producer Consolidated Pastoral Company.

Announced to the market in January 2019, the $130 million deal represents the largest investment in Australia by a Vietnamese business to date.

Clayton Utz partner Margie Michaels led the firm's advisory team, which included special counsel Scott Girdler, senior associate Tatiane Kelly and Lauren Evans, lawyer. The transaction is an example of strong foreign appetite for premium agricultural assets with long-term growth potential.

CAIT has acquired two Northern Territory properties – the Auvergne and Newry Stations in the Victoria River district, south-west of Darwin – and the Argyle Downs Station in the East Kimberly region of Western Australia. Combined, the stations span more than 740,000 hectares of land. Other assets included in the sale are more than 50,000 head of cattle and station plant and equipment.

CAIT is considering plans to diversify the stations, which have been mainly used for breeding and growing cattle, into high-value cropping and other non-pastoral use.

For additional information visit www.claytontuz.com

DENTONS RODYK

SUCCESSFULLY DEFENDS GROUP LEASE HOLDINGS PTE LTD AND MITSUJI KONOSHITA

SINGAPORE, 26 February 2020: Dentons Rodyk successfully defended Group Lease Holdings (GLH) and Mitsuji Konoshita (MK) in a High Court trial where JTrust Asia Pte Ltd (JTA) sued our client for alleged fraudulent misrepresentations and conspiracy in relation to certain investments made by JTA into GLH's parent company, Group Lease Public Co Ltd ("GL"), and claimed more than USD 230 million in damages. The month-long High Court trial was heard in October 2019 and the court found that JTA failed in its claims for deceit and conspiracy against GLH and MK. Consequently, JTA's claims against our clients and the other defendants were dismissed entirely.

The Dentons Rodyk team was led by Senior Partners Lawrence Teh and Edric Pan, along with team members Senior Partner Melvin See, Partner Melissa Thng, Senior Associate Chia Huai Yuan and Associates Elias Arun and Sean Sim.

For additional information visit www.dentons.rodyk.com

GIDE

COUNSELS COUNSEL TO AGENCE DES PARTICIPATIONS DE L'ETAT ON THE SALE OF SFIL TO CAISSE DES DÉPÔTS ET CONSIGNATIONS

PARIS, 05 March 2020: Gide has advised Agence des Participations de l'Etat (the French state investments agency) on the sale of its 75% stake in the share capital of SFIL (formerly Dexia), a public development bank, to Caisse des Dépôts et Consignations.

The sale of SFIL to Caisse des Dépôts aims to continue rationalising the organisation of public financial institutions around Caisse des Dépôts, by associating it with a public development bank, seventh French bank in terms of balance sheet size, and leading secured bonds issuer in the public sector in Europe.

The Gide team that advised the state was headed by partner Guillaume Rougier-Brierre working with associate Arthur Lemaitre on Mergers & Acquisitions / Corporate aspects, and partner Thomas Courtel working with associate Cyrille Rollin, on aspects of public law.

Allen & Overy advised Caisse des Dépôts et Consignations.

For additional information visit www.gide.com

HOGAN LOVELLS

SECURES SUPREME COURT VICTORY IN CASE ADDRESSING OWNERSHIP OF CORPORATE TAX REFUNDS

WASHINGTON D.C., 27 February 2020 – Hogan Lovells secured a unanimous victory before the Supreme Court yesterday in Rodriguez v. Federal Deposit Insurance Corporation, an important case concerning the rules for determining who owns a tax refund.

The case was argued by Mitchell Reich, a senior associate on the appellate team and a former law clerk to Justice Elena Kagan.

Hogan Lovells represented petitioner Simon Rodriguez, the Chapter 7 Trustee for the bankruptcy estate of United Western Bancorp, Inc. During bankruptcy proceedings, Rodriguez and the Federal Deposit Insurance Corporation (FDIC) disagreed as to who owns a $4 million tax refund that the IRS paid to United Western Bancorp. To resolve that disagreement, the Tenth Circuit applied a rule of federal common law, known as the "Bob Richards rule," under which the Tenth Circuit presumed that the refund belongs to the FDIC. Hogan Lovells successfully petitioned the Supreme Court to review that decision, arguing that the Bob Richards rule is an invalid exercise of federal common lawmaking authority, and that courts should apply to state law to resolve disputes over the ownership of tax refunds.

In a unanimous decision, the Supreme Court agreed with petitioner's argument and invalidated the Bob Richards rule. It held that this rule fails to satisfy "one of the most basic" requirements for the creation of federal common law because it serves no "uniquely federal interest." The Bob Richards rule, the Court explained, "supplies no rule of decision, only a cautionary tale." The Court then remanded the case to the Tenth Circuit to determine who owns the refund "under state law."

The Supreme Court's decision gives petitioner Rodriguez an opportunity to recover the refund. It resolves a significant and longstanding split among the circuit courts. And it will have significant economic consequences: For decades, courts applied the Bob Richards rule to determine who owned tax refunds that sometimes reached into the tens or hundreds of millions of dollars. That rule hindered tax planning and affected the ability of creditors to recover assets in bankruptcy. The Supreme Court's decision will ensure that these important ownership questions are resolved according to ordinary rules of state law, rather than through application of a judge-made presumption.

Reich led the appellate team that handled the case. That team also included partner Neal Katyal, former Acting Solicitor General of the United States, and Tom Schmidt, a counsel in the appellate group.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ADVISES BIDDING CONSORTIUM LED BY ADVENT, CINVENT AND RAG-STIFTUNG ON ACQUISITION OF ELEVATOR BUSINESS OF THYSSENKRUPP

AMSTERDAM, 03 March 2020: NautaDutilh advises a consortium led by international private equity firms Advent, Cinven and RAG-Stiftung on the Dutch aspects of the acquisition of the elevator division of thyssenkrupp AG. The transaction with a value of €17.2 billion is expected to be the largest-ever European buyout transaction to date. The transaction is expected to close by the end of the third quarter of 2020, subject to customary closing conditions and regulatory approvals.

thyssenkrupp's elevator division is a leading international provider of elevator technology with worldwide operations including the Netherlands. Its product portfolio includes passenger and freight elevators, escalators and moving walkways, passenger boarding bridges, stair and platform lifts as well as a customised service business including maintenance of its entire product portfolio.

The NautaDutilh team was led by Private Equity/M&A partner Joost den Engelsman and counsel Joost Kloosterman. The team also included Jules van de Winckel, Alex Draaisma (Corporate/M&A), Homme ten Have (Employment), Sjuul Jentjens (Tax), Lesley Van Cappellen (Finance) and Frans Overkleeft (Corporate Advice).

NautaDutilh is working alongside law firm Kirkland & Ellis on the transaction.

For additional information visit www.nautadutilh.com

SANTAMARINA Y STETA

ASSISTS WITH MEXICAN FINTECH EQUITY INVESTMENT AND LOAN

MONTERREY October, 2019: Thompson & Knight LLP in New York, Santamarina y Steta in Monterrey and Cuatrecasas in Barcelona have helped Mexican conglomerate Grupo Industrial Saltillo obtain a US$245 million loan from a group of lenders led by HSBC.

Santamarina y Steta acted as lead counsel for Grupo Industrial Saltillo.

The deal closed on 11 September and includes a six-year US$195 secured term facility and a US$50 million revolving credit facility. The loan also involved collateral governed under Spanish law.

Saltito will use the proceeds to refinance the company’s existing debt and for general corporate purposes.

Counsel to Grupo Industrial Saltillo Thompson & Knight LLP (New York); Cuatrecasas (Barcelona); and Santamarina y Steta Partner Carlos Argüelles and associate Bárbara Asiain in Monterrey.

For additional information visit www.s-s.mx

NAUTADUTILH

ASSISTS IN RAISING UP TO USD $627.6 MILLION FOR THREE BIOTECH COMPANMIES WITHIN 48 HOURS

AMSTERDAM, 07 November 2019: On November 5 and 6, NautaDutilh assisted argenx and Merus in their follow-on offerings and Centogene in its Nasdaq IPO, raising a total of up to USD 627.6 million for these companies within 48 hours.

On November 5 and 6, NautaDutilh assisted argenx and Merus in their follow-on offerings and Centogene in its Nasdaq IPO, raising a total of up to USD 627.6 million for these companies within 48 hours. Antonia Netiv and her team acted as underwriters' counsel in the up to USD 484 million argenx global follow-on offering. Paul van der Bijl and his team acted as issuer's counsel to Merus and Centogene on their up to USD 79.2 million follow-on offering and up to USD 64.4 million Nasdaq IPO, respectively.

With these transactions, NautaDutilh demonstrates its position as market leader in these types of deals, having been Dutch counsel in 65% of initial public offerings of all current Nasdaq-listed Dutch companies and more of their follow-on offerings than any other Dutch law firm.

For additional information visit www.nautadutilh.com

SANTAMARINA Y STETA

ASSISTS CONGLOMERATE GRUPO INDUSTRIAL SALTILO OBTAIN US$245 MILLION LOAN FROM A GROUP OF LENDERS LED BY HSBC

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For additional information visit www.s-s.mx

TOZZINIFREIRE

ASSISTS FARO ENERGY IN LANDMARK SUSTAINABLE BONDS ISSUANCE IN BRAZIL

SAO PAULO – 14 February, 2020: TozziniFreire has helped Faro Energy issue the first ever sustainable bonds (combining green and social aspects) in Brazil The firm also advised the underwriters BTG Pactual and Gaia Securitizadora. The 15 million reais (US$3.4 million) transaction closed on 1 January.

Faro Energy will use the proceeds to fund investments in renewable projects in Minas Gerais and Rio de Janeiro and to finance schools in the state of São Paulo, which provide education to children in deprived communities. The bonds were structured to comply with the Climate Bond Standards version 2.1 and Social Bonds Principles certifications, provided respectively by London-based organisation Climate Bond Initiative and the International Capital Market Association, two institutions recognised for certifying these types of bonds.

TozziniFreire was also involved in Brazil's first social bond issuance, in 2018. The firm worked pro bono for securitisation company Gaia, raising money to renovate 8,000 homes in some of the poorest areas of São Paulo, which benefitted more than 32,000 people.

Counel to Faro Energia, BTG Pactual and Gaia Securitizadora: TozziniFreire Advogados Partners Alexei Bonamin and Luiz Rafael de Vargas Maluf, and associates Marcus Fonseca, Leonardo Medeiros Braghetto and Ligia Pereira Schlittler

For additional information visit www.tozzinifreire.com.br

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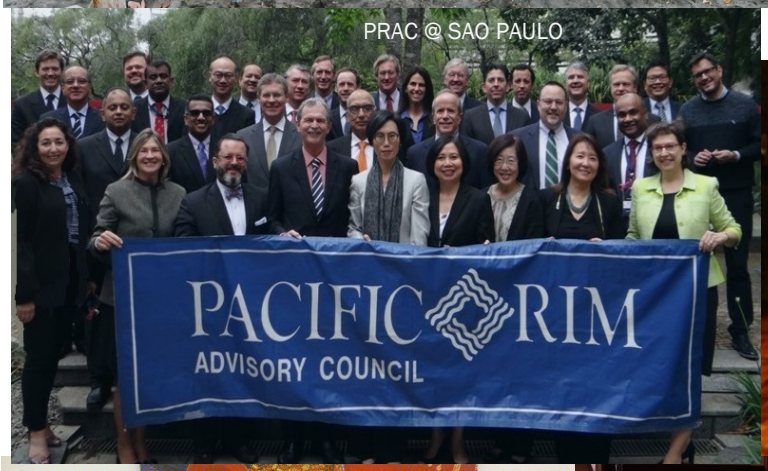

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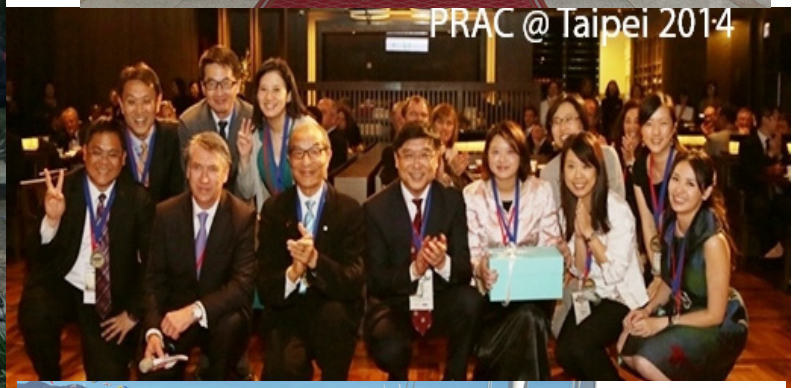

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ALLENDE
ALLENDE & BREA

Argentinean government initiates dumping investigation against certain types of tape metric rulers from India

On March 3, 2020, the government of Argentina initiated a dumping investigation against exports of certain types of tape metric rulers from the Republic of India, products which are exported to Argentina under MERCOSUR's Common Nomenclature (N.C.M.) 9017.80.10.

On March 3, 2020, the government of Argentina by means of Resolution No. 23/2020 issued by the Secretariat of Industry, Economy of Knowledge, and Foreign Trade Management, initiated a dumping investigation against exports of tape metric rulers (except those used for tailoring, and non-metal metric rulers of the type used for anatomical measurement purposes) from the Republic of India, products which are exported to Argentina under MERCOSUR's Common Nomenclature (N.C.M.) 9017.80.10.

The opening of the antidumping investigation was requested by the local manufacturer Mediciones Evel S.A., and pursuant the information submitted by said company, the alleged dumping margin was calculated at 327.77%.

Exporters from the Republic of India, as well as local companies importing the investigated products can appear before the Secretariat of Industry, Economy of Knowledge, and Foreign Trade Management and request the questionnaires to participate in the dumping investigation. Otherwise, questionnaires will be available at https://www.argentina.gob.ar/cnce/cuestionarios as from March 6, 2020.

The Spanish text of the Resolution opening the investigation is available at the following link: https://www.boletinoficial.gob.ar/detalleAviso/primera/226161/20200303

For further information on this topic please contact Julián Peña and Federico Rossi

CLAYTON UTZ

17 MAR 2020

Australia unveils new licensing regime for foreign financial services providers, and transition starts soon

Australia unveils new licensing regime for foreign financial services providers, and transition starts soon

ASIC has released its new licensing framework for foreign financial services providers (**FFSPs**) to regulate FFSPs providing financial services in Australia.

The new regime is somewhat consistent with what was proposed in the drafts ASIC released in mid-last year, but there have been some significant changes which we would like to point out to you.

Relief of funds management services in Australia to professional investors

ASIC has published ASIC Corporations (Foreign Financial Services Providers - Funds Management Financial Services) Instrument 2020/199) (**Funds Management Services Relief**).

At the centre of this instrument is the definition of "funds management financial services". This definition has been amended in a number of significant ways.

A person provides a funds management financial service by:

- dealing in offshore fund financial products;
- providing financial product advice in relation to offshore fund financial products;
- making a market for offshore fund financial products as a result of redeeming or buying back those financial products; or
- providing a custodial or depository service in relation to offshore fund financial products,

to eligible Australian users.

The inclusion of custodial of depository services is a new addition which expands the types of financial services that FFSPs will be able to provide while relying on this relief. However, ASIC has also changed the scope of the recipients to whom financial services may be provided from "professional investors" to "eligible Australian users" which further limits to whom these services will be able to be provided to. Broadly, an "eligible Australia user" is defined under the Funds Management Services Relief as a person in Australia who is either:

- a responsible entity of a registered scheme;
- a trustee or body regulated by APRA of a superannuation fund, approved deposit fund, pooled superannuation trust or public sector superannuation scheme;
- a trustee of a wholesale trust; or
- an exempt public authority.

In order to extend the scope of the definition to include other types of professional investors, FFSPs will need to apply to ASIC.

The concept of "portfolio management services" (as a subset of funds management financial services) has been replaced with a "portfolio management services mandate" concept, meaning an agreement or arrangement to provide the following financial services to eligible Australian users:

- dealing in financial products;
- providing financial product advice in relation to a financial product;
- making a market for financial products in or issued by managed investment schemes as a result of redeeming or buying back those financial products; or
- providing custodial or depository services under or in relation to the services provided under a portfolio management services mandate.

In addition, "portfolio management services" now need not be confined to managing assets that are outside Australia. This is a significant change as the previous exclusion would have been particularly restrictive to a number of FFSPs which offered a diversified portfolio of assets who managed Australian assets.

The conditions that an FFSP must meet in order to be eligible for the relief have changed to a shorter and less prescriptive list. Broadly, under the new relief, the FFSP:

- cannot have a place of business in Australia;
- must provide notice to ASIC that it intends to rely on the relief instrument;
- can only carry out financial services in Australia that would not contravene the laws of its home jurisdiction if they if were provided there;
- must be appropriately regulated in their home jurisdiction;
- must enable and assist in the transfer of disclosures between the overseas regulator and ASIC in relation to any information or document that is requested that relates to the FFSP; and
- must comply with notices for information issued by ASIC.

Limited connection relief

The transitional period for limited connection relief has been extended to 31 March 2022 (from 21 September 2020). In order to receive the benefit of the limited connection relief at any time until the transition period is over, it is not required that the FFSP already currently rely on the relief.

Implementation of foreign AFS licence and extension of sufficient equivalence relief

It is still the case that FFSPs currently relying on 'sufficient equivalence relief' (referring to the seven mutual recognition class orders ASIC made in 2003 and 2004 (applicable to the US, UK, Singapore, Hong Kong and Germany) and the one made in 2016 for Luxembourg fund managers) (**Sufficient Equivalence Relief**) will have a 24 month transition period from 1 April 2020 to comply with the new regime. This includes for example, submitting an application for a foreign AFS licence and having that application assessed by ASIC.

Under the new ASIC Corporations (Foreign Financial Services Providers - Foreign AFS Licensees) Instrument 2020/198 ASIC has recognised additional regulatory systems in Denmark, France, Sweden and Canada as sufficiently equivalent to those in Australia. Please note that FFSPs in these jurisdictions will not be eligible to rely on Sufficient Equivalence Relief. They will however be able to apply for a foreign AFS licence under the new regime.

Next steps for FFSPs to transition to the new licensing framework

As we enter into the transition period, you will need to consider what will happen ahead of 1 April 2022. To keep you informed along the way we'll be updating our Foreign Financial Service Provider Hub as the regulatory position evolves.

As a start, please consider the following:

- If you are eligible for and don't currently rely on Sufficient Equivalence Relief, consider applying before 31 March 2020 to ensure you have the benefit of the 24 month transition period.
- After 1 April 2020, if you wish to provide financial services in Australia, consider whether you can rely on the new Funds Management Services Relief or otherwise apply for a new foreign AFS licence or domestic AFS licence.
- Prior to 1 April 2022, if you currently have the benefit of Sufficient Equivalence Relief, consider whether you will need to apply for a new foreign AFS licence or domestic AFS licence whether you will be able to apply for Funds Management Services Relief.

If you would like to discuss strategies to ensure compliance with the Australian licensing regime or require assistance with any application for relief or for an AFS licence, please contact us.

GET IN TOUCH

Matthew Daley

PARTNER, SYDNEY
+61 2 9353 4675
mdaley@claytonutz.com

Vanessa Pallone

SPECIAL COUNSEL, SYDNEY
+61 2 9353 4749
vpallone@claytonutz.com

Erik Setio

SPECIAL COUNSEL, SYDNEY
+61 2 9353 5667
esetio@claytonutz.com

Claudia Silano-Malouf

LAWYER, SYDNEY
+61 2 9353 4547
csilano-malouf@claytonutz.com

CONTACT US

Sydney	+61 2 9353 4000	**Melbourne**	+61 3 9286 6000
Brisbane	+61 7 3292 7000	**Perth**	+61 8 9426 8000
Canberra	+61 2 6279 4000	**Darwin**	+61 8 8943 2555

Belgium

Your ID for a loyalty card: no data protection fine in the end?

Thursday, 5 March 2020

In a decision handed down on 19 February 2020 and published only today, the Belgian Market Court has quashed a previous decision by the litigation chamber of the Belgian Data Protection Authority (BDPA) in relation to the use of the Belgian electronic identity card (called "eID") as a means of obtaining a loyalty card at a liquor store.

The decision of the Market Court (only available in Dutch) is interesting in that it covers a range of topics, albeit not always in a manner one might have expected.

How far do the Market Court's powers go?

According to the Act creating the BDPA, the Market Court (in Brussels) has "full jurisdiction" over appeals against the decisions of the BDPA's litigation chamber, the body within the BDPA that has the power to hand down fines.

Before the Market Court, the question of the precise extent of this jurisdiction arose, because the liquor store owner requested the Market Court to quash the fine (and order reimbursement by the BDPA of the fine) and (i) say that there was no infringement and close the case or (ii) in the alternate (i.e. if the Market Court did not agree that there was no infringement), to replace the fine with a reprimand, i.e. a lighter sanction.

According to the BDPA, though, this went beyond the scope of the Market Court's authority.

The Market Court examined this argument in depth and, quoting various sources including the GDPR itself (in particular its Article 78 and its references to "effective judicial remedy"), concluded that its authority is not limited to confirming or annulling the decision of the BDPA's litigation chamber, but also extends to the power to order any sanction of its own choosing (e.g. a reprimand rather than a fine), provided this complies with the rights of defence.

Was a fine justified for forced eID use to get a loyalty card?

Next came the actual question: was the liquor store rightfully fined for requiring a customer to provide her eID in order to offer her a loyalty card?

Surely it must be excessive!

First, the Market Court looked at whether requiring an eID is excessive in the context of offering a loyalty card.

The discussion on this point is largely focussed on a **change of law** that occurred in Belgium not long after the initial complaint.

The complaint underlying the whole case was sent to the BDPA on 28 August 2018. On 23 December 2018, a new law (voted in the Belgian Parliament on 25 November 2018) came into effect that made the use of the eID easier in certain circumstances, but also specifically stated that "*where an advantage or service is offered to a citizen via his electronic identity card in the framework of an IT application, an alternative that does not require the use of the electronic identity card must be offered to the relevant person*" (rough translation).

Yet this new legal provision was precisely what the BDPA's inspection service had used as a basis for its assessment of the liquor store's system, and the BDPA's litigation chamber had taken its decision on the same basis.

The Market Court moreover mentioned that "it had not been demonstrated" (read: by the BDPA) that at the time of the complaint such an alternative had to be offered.

Finally, the Market Court noted that in this particular case, the data subject (the plaintiff) had not given her eID card – in other words, there was no processing of her personal data.

The Market Court considered that the BDPA made two unproven assumptions:

- the BDPA assumed that the loyalty card would not be used to prevent the sale of alcohol to minors, and notably claimed on this basis that the use of the date of birth was excessive;
- more interestingly: the BDPA considered that the data subject's consent to the processing of the eID was not "free" because refusing consent would lead to an undisputed detriment, i.e. non-enjoyment of the benefits of the loyalty card. The Market Court considered that **potential additional advantages of a loyalty card (e.g. discounts) were not an undisputed detriment** – a point that became even more relevant in relation to the discussion on legal grounds.

In other words, the Market Court concluded that the BDPA was wrong to consider that the processing in this particular case was excessive.

Surely that consent is not freely given!

The BDPA's litigation chamber devoted considerable attention to the conditions for consent to be valid under the GDPR. Some of its arguments are useful to see how the BDPA applies the rules on consent:

> "[…] if a data subject does not have any actual choice, feels forced to give consent or it will have negative consequences for him/her if he/she does not give consent, the consent in question is not valid.
> If consent is added as a non-negotiable part of conditions, it will be presumed not to have been freely given.
> As a result, consent is not deemed to be freely given if the data subject cannot refuse or withdraw his/her consent without detrimental consequences.
> As in the present case the plaintiff, and by extension all customers, could only benefit from discounts by way of their electronic identity card, and because the [liquor store owner] does not offer any alternative whatsoever for the creation of a loyalty card in order to enjoy this benefit, it is clear that one cannot speak of free consent in this case." (rough translation)

However, the Market Court rejected this argument, simply considering that:

- to the extent the BDPA refers to the lack of any alternative, it was referring to a law that had not been applicable at the time of the facts;
- on the question of freely given consent, as it had stated previously, potential additional advantages were not an undisputed detriment (i.e. could not be used to question the freely given nature of consent).

Conclusion of the Market Court: no infringement proven, and fine insufficiently justified

The Market Court concluded that the BDPA's litigation chamber does not sufficiently justify its decision, notably because the arguments made by the BDPA are sometimes in contradiction with the facts and the then applicable legislation.

For this reason, it quashed (cancelled) the decision of the litigation chamber.

The Market Court also criticised the BDPA's litigation chamber for not justifying the amount of the fine it had imposed, considering that "in the absence of a clear qualification and quantification of the potential sanctions in a publicly available document [made public by the BDPA] **before any specific complaint**" (emphasis ours), the BDPA had to provide clear justifications as to why (in this particular case) a sanction other than a fine of 10.000 EUR would have been insufficient to stop the infringement.

This element will likely be very useful to organisations currently facing proceedings before the BDPA's litigation chamber, and may force the BDPA to adopt transparent guidelines on fines.

Does this mean organisations can force the use of eID cards to obtain a loyalty card?

No, this decision does not state that. Instead, the Market Court's decision contains many elements that suggest that as from 23 December 2018, the rules were clearer and the case would have led to another conclusion.

If you want to use an eID in the course of your business, though, our experts will be glad to help you along the way.

Contact me

Peter Craddock | Brussels | +32 2 566 8246

TOZZINIFREIRE
ADVOGADOS

March 06, 2020

CADE REEVALUATES WHETHER MANAGERS ARE PART OF INVESTMENT FUNDS' ECONOMIC GROUPS FOR PURPOSES OF CALCULATING GROSS TURNOVER

Antitrust

On March 4th, 2020, the Tribunal of the Administrative Council for Economic Defense (CADE) upheld a General Superintendence's decision that may impact the thresholds for mandatory notification of transactions involving investment funds.

The General Superintendence's decision raised concerns for possibly having set forth a new interpretation of CADE's Resolution No. 2, which does not consider managers as part of investment funds' economic groups for purposes of calculating a group's gross turnover. This rule was enacted in 2014 to reduce the large volume of notifications involving investment funds.

In the case at issue, involving the purchase of a minority stake in Kepler Weber S.A. by Profit 1552 Multimarket Investment Fund (managed by Tarpon Gestora), the General Superintendence concluded "under a cautious approach" that the manager should be considered part of the investment fund's economic group. The authority highlighted that the information submitted by the parties indicated that the "will of the manager" was determinant in the fund's regular course of business.

By upholding the General Superintendence's decision, CADE's Tribunal underlined that this understanding is in line with CADE's Resolution No. 2 insofar it implies no reexamination of the authority's case law. According to the agency's President, whenever a manager acts as "controller" over the investment fund the turnover of its economic group shall be considered.

Our recommendation is that any transactions involving investment funds should be carefully assessed. It is also important to keep track of developments on this matter, mainly in view of CADE's announced plan to set up a working group to propose amendments to the current regulation.

Our Antitrust team has extensive experience on the matter and is available for any clarifications.

Bennett Jones

Blog

Privacy Considerations when COVID-19 Screening

March 16, 2020

Written by Stephen Burns, Sebastien Gittens and Byron Tse

As Canada's federal and provincial health authorities address the novel coronavirus (COVID-19), various questions have arisen regarding the role that organizations should play in balancing the privacy of its employees, contractors, and guests against the overall safety of the workplace and the broader general public. In particular, organizations are determining:

1. if and to the extent they should adopt screening procedures to help identify whether someone attending a workplace may potentially be carrying COVID-19; and
2. how to navigate Canada's complicated patchwork of privacy legislation that would apply to any personal information collected from the adoption of any such procedures.

While the COVID-19 response represents uncharted waters, the analytical framework to collect, use and disclose personal information remains the same—organizations seeking to adopt any COVID-19 screening should answer the following four questions:

1. Is the collection, use or disclosure of the personal information for a reasonable purpose?

An organization typically has an obligation to take reasonable steps to protect the health and safety of its employees, contractors and guests. In light of the current COVID-19 outbreak, it may be reasonable for an employer to adopt certain screening methods that are designed to assess the risk of any individual attending the workplace carrying COVID-19. Such methods may include: (i) taking an individual's temperature at the time they enter into the workplace; or (ii) a questionnaire asking, for example, if the individual or someone in their household has recently traveled outside of Canada, or is experiencing any COVID-19-related symptoms.

2. Is the personal information to be collected, used or disclosed limited to that necessary to meet the purpose?

The type of information an employer gathers should be strictly limited to assessing whether an individual attending the workplace may be carrying COVID-19. Care should be taken to ensure that the personal information collected would be effective in meeting the organization's need. To this end, an organization should consult with a recognized resource (e.g., a medical consultant) to design or verify any screening method to be adopted. As it does so, it should consider whether there are less invasive means of achieving the same ends (at comparable cost and with comparable benefits).

3. Is the collection, use or disclosure of the personal information authorized by law without the need to obtain consent from or provide notice to the individuals in question?

Canadian private sector privacy legislation generally permits an organization to collect, use and disclose personal information about an individual without consent in certain situations. In Alberta, for example, an organization is not required to obtain consent where the *use* or *disclosure* of information is necessary to respond to an emergency that threatens the life, health or security of an individual or the public.

But, care needs to be exercised as these exemptions are not uniform within each statute. For example, the aforementioned "life, health or security" exemption in Alberta applies to the *use* and *disclosure* of personal information—it does *not* apply to the *collection* thereof. It is also important to note that such exemptions are not uniform among each of these "substantially similar" privacy laws in Canada. For example, the federal privacy legislation differs from Alberta in that the "life, health or security" exemption *does not expressly include the public*.

As a result, it will be important for each organization to:

1. identify which private sector privacy law applies in the circumstances; and
2. assess the applicability of any exemption therein with respect to the collection, use and (potential) disclosure of any personal information collected in connection with its COVID-19 screening activities.

To the extent that an organization cannot rely on the aforementioned exemption to collect, use or disclose an individual's personal information, it will need to provide notice and, if required, obtain consent to do so.

4. Where collection, use or disclosure without consent from or notice to the individuals in question is not authorized by law, has the organization obtained consent from or provided notice to the individuals in question?

A jointly issued Guidance from the Office of the Privacy Commissioner of Canada and the Offices of the Information and Privacy Commissioner of Alberta and British Columbia identified several principles underlying meaningful consent, including the need to provide an individual with information about:

1. what personal information is being collected;
2. the purpose for which personal information is collected, used or disclosed; and
3. the potential risk of harm and other consequences from the collection, use or disclosure.

The commissioners stressed that it is important for organizations to consider the appropriate form of consent to use (express, deemed or implied) for any collection, use or disclosure of personal information for which consent is required. When making this determination, organizations need to take into account the sensitivity of the information and the reasonable expectations of the individual. Both of these will depend upon context.

Given the potential limitation in the exemption discussed above, we recommend that appropriate notices be present at the point of any COVID-19 screening to ensure that notice is given, and where consent is required, consent is obtained from each individual by their participation in such screening.

The impact of COVID-19 could be very significant to organizations. If you have any questions regarding the information in this article, please contact a member of the Bennett Jones Privacy and Data Protection team. In addition, please visit our COVID-19 resource centre for other COVID-19-related materials.

AUTHORS


Stephen D. Burns, *Partner, Trademark Agent*


J. Sébastien A. Gittens, *Partner, Trademark Agent*


Byron Tse, *Associate*

BLOG

An Employer's Guide to Responding to the COVID-19 Pandemic

MARCH 13, 2020

BLOG

COVID-19 Considerations for Directors

MARCH 12, 2020

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Voluntary Disclosure to CRA—It Ain't What It Used To Be

MARCH 12, 2020

BLOG

New Privacy Guidance for Businesses Operating in British Columbia

MARCH 11, 2020

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BC Workplace Blog

Authored By Michelle Quinn & Colleagues

29
February

Duty to Accommodate – Perfection Not Required

By Michelle Quinn

This post will take less than 2 minutes to read.

In *Gaucher v. Fraser Health Authority and others*, 2019 BCHRT 243, Carrie Gaucher ("Ms. Gaucher") worked as a nurse for the Fraser Health Authority ("Fraser Health") since 2007 at the Royal Columbian Hospital. In June 2017, Ms. Gaucher sustained a workplace injury and was off work for a few months.

In November 2017, she commenced a gradual return to work plan ("GRTW"). In total, Ms. Gaucher participated in three separate attempts to gradually return to work. Ultimately, she completed her return in April 2018.

Ms. Gaucher filed a human rights complaint (the "Complaint") with the BC Human Rights Tribunal (the "Tribunal") against Fraser Health and several management employees alleging that they harassed her and negatively treated her throughout her GRTW. She alleged that she was discriminated against on the basis of her disability contrary to the BC *Human Rights Code* (the *"Code"*).

She did not allege that the substantive terms of her GRTW were discriminatory. Rather, she believed that, throughout the process, her managers failed to treat her fairly and with due respect to her dignity.

Fraser Health applied to have the Complaint dismissed on the grounds

that there was no reasonable prospect of success under the *Code*.

The Decision

The Tribunal determined that, based on all the evidence before it, there was no reasonable prospect that the Complaint will succeed at a hearing.

With specific regard to the GRTW plan and, while the conditions in the workplace were *"not optimal"* for Ms. Gaucher's successful return, it did not amount to a failure to accommodate. Her experience of the GRTW was difficult, and it was not perfect. However, the standard for accommodation is not perfection. It is reasonableness (para. 87).

The Tribunal held (at para. 95):

> *I will consider this process, as the parties have, as three separate attempts to return to work. This approach helps understand the chronology but would not permit the Tribunal to isolate certain events in its assessment of the Respondents' efforts to accommodate Ms. Gaucher. Rather, I agree with the Respondents that the adequacy of their accommodation must be based on "the entire history of the matter… considered on a global basis". Hydro-Quebec at para, 404; Neumann v. Lafarge Canada Inc. (Richmond Cement Plant), 2009 BCHRT 197 at para. 370. Again, I will accept Ms. Gaucher's version of events for the purpose of this application. Even accepting this version, however, taking a global approach to the evidence, I find it reasonably certain that the Respondents will prove they reasonably accommodated her.*

If you have any questions about this case or the duty to accommodate generally, please contact any member of the Employment and Human Rights Group.

Vancouver Office:
700 – 401 West Georgia Street
Vancouver, BC Canada V6B 5A1
TEL: 604.682.3664 **FAX**: 604.688.3830

Surrey Office:
200 – 10233 153 Street
Surrey, BC Canada V3R 0Z7
TEL: 604.582.7743 **FAX**: 604.582.7753

/Carey

CHILEAN CENTRAL BANK ESTABLISHES NEW ONLINE SYSTEM TO REPORT FOREIGN EXCHANGE TRANSACTIONS

March, 2020

On December 30, 2019, the Central Bank of Chile ("Central Bank") issued ruling No. 984, whereby amendments were made to Chapters VIII (Foreign exchange transaction not regulated elsewhere), IX (Derivatives transactions), XII (Investments, deposits and credits made from Chile), XIII (Credits and investments made by banks established in Chile), and XIV (Credits, deposits, investments and capital contributions made from abroad) of the Handbook (*Manual de Procedimientos y Formularios de Información*) of the Foreign Exchange Regulations Compendium ("CNCI").

The ruling eliminates reception by the Central Bank of hardcopies of documents and introduces a new mechanism to report the foreign exchange transactions described in the CNCI. In fact, **starting on March 1, 2020, such foreign exchange transaction will need to be digitally reported to the Central Bank** by means of the electronic system available in the following website: https://siweb.bcentral.cl/cnci/.

This new mechanism applies to Chapters VIII, IX, XII, XIII, y XIV of the Handbook of the CNCI, except to report amendments to foreign exchange transactions set forth in paragraph 6 of Chapter XII and paragraph 6 of Chapter XIV of the CNCI, which shall be reported in writing to the Central Bank by email sent to the following address: cnci_solicitud_info@bcentral.cl.

In order to comply with their reporting obligations digitally, the Central Bank has indicated that each reporting entity shall obtain a username and password to operate within the Central Bank's electronic system. A username and password can be requested by sending a written request and sworn affidavit duly notarized to the same email address above indicated (cnci_solicitud_info@bcentral.cl), with a copy to halvarez@bcentral.cl and vramírez@bcentral.cl, members of the Department of Statistical Information of the Central Bank.

The ruling does not amend the substance of the applicable regulations but only the manner of reporting the different actions to the Central Bank.

If you have any questions regarding the matters discussed in this news alert, please contact the following attorneys or call your regular Carey contact.

Diego Peralta
Partner
+56 2 2928 2216
dperalta@carey.cl

Fernando Noriega
Partner
+56 2 2928 2216
fnoriega@carey.cl

Fernanda Valdés
Associate
+56 2 2928 2231
fvaldes@carey.cl

Carey y Cía. Ltda.
Isidora Goyenechea 2800, 43rd Floor.
Las Condes, Santiago, Chile.
www.carey.cl

Banking & Finance Law

Aiming Shanghai towards International Financial Center Status

Author: TieCheng YANG | Yin GE | Ting ZHENG | Eryin YING

Overview

On 14 February 2020, the People's Bank of China (PBOC), the China Banking and Insurance Regulatory Commission (CBIRC), the China Securities Regulatory Commission (CSRC), the State Administration of Foreign Exchange (SAFE) and the Shanghai Municipal Government jointly issued the *Opinions on Further Accelerating the Building of Shanghai into an International Financial Center and Financial Support for the Integrated Development of the Yangtze River Delta* (《关于进一步加快推进上海国际金融中心建设和金融支持长三角一体化发展的意见》) (the "**Opinions**")[1]. The Opinions provide 30 initiatives to accelerate building Shanghai into a leading international financial hub. 11 of these initiatives aim to further open up Shanghai's financial sector, including expanding market access for foreign financial institutions, promoting the asset management business, facilitating the establishment of an RMB financial asset allocation and risk management center, and cultivating a high-quality financial business environment in line with international standards.

This note sets out some of the key initiatives relating to opening up the financial markets.

Supporting the set-up of wealth/asset management presence in Shanghai

The Opinions support foreign institutions to set up joint venture wealth management companies with Chinese banks and insurance asset management companies, which restates the opening-up policies in the financial sector announced in 2019, such as the *Relevant Measures for Further Opening Up the Financial Sector* issued by the Financial Stability and Development Committee of the State Council on 20 July 2019 (the "**11 Measures**"). The 11 Measures, amongst others, encourage foreign financial institutions to invest in wealth management subsidiaries of commercial banks, and allow foreign asset management companies to establish foreign-controlled wealth management companies with the wealth

[1] English translation of the Opinions is available upon request.

management subsidiaries of Chinese banks or insurers.

The Opinions also encourage the establishment of insurance asset management presences in Shanghai and provide that the approval for foreign financial institutions to set up or invest in pension fund management companies in Shanghai will be granted on a case-by-case basis.

Expediting removal of the foreign equity cap for life insurance companies

The 11 Measures stipulate the deadline for removing the foreign equity cap for life insurance and health insurance business has been brought forward to 2020, a year earlier than the previous deadline. China has further committed to remove the foreign equity cap for the life, pension, and health insurance industries no later than 1 April 2020 in its phase one economic and trade agreement with the United States. The Opinions further encourage the removal of the foreign equity cap for the life insurance and health insurance industries to be first implemented in Shanghai, which indicates the foreign equity cap may be removed in Shanghai even earlier than 1 April 2020.

Further opening up of the bond market and improving foreign exchange risk management

The Opinions restate the principle of opening-up of the Chinese bond market as provided in the 11 Measures, and further provide for promoting the gradual transformation of domestic settlement agency banks into custodian banks so as to provide diversified services to foreign investors in the China Inter-bank Bond Market (CIBM). Detailed opening-up measures still await further clarification by the competent authorities.

The 11 Measures lift the restrictions on rating agencies and underwriting licences. Foreign rating agencies can now provide ratings for all types of bonds that are traded on the CIBM and exchanges. Foreign-invested banks are eligible to apply for Type A lead underwriting licenses in the CIBM and to act as lead underwriters for domestic bonds. As of today, Standard & Poor's has been allowed to provide rating services in China, and Deutsche Bank and BNP Paribas have received Type A lead underwriting licences.

The Opinions also provide for optimizing the foreign exchange rate risk management of financial investments by foreign institutions, and facilitate the entry of foreign institutions into the China Inter-bank Foreign Exchange Market to hedge their investment positions in the CIBM. In that regard, SAFE has promulgated the *Circular on the Improvement of Foreign Exchange Risk Management by Foreign Institutional Investors in the Interbank Bond Market* on 13 January 2020, which allows foreign investors to conduct over-the-counter (OTC) foreign exchange derivatives transactions with up to three financial institutions, or to directly trade in the China Inter-bank Foreign Exchange Market as a client of a prime broker.

Developing the RMB interest rate and foreign exchange derivatives market

The Opinions provide for the development of the RMB interest rate and foreign exchange derivatives market, launching RMB interest rate options, and further expanding product types such as foreign

exchange options. It is expected that the launch of various risk management products will help foreign investors to effectively hedge and manage RMB financial asset risks.

Clarifications on legal documentation for OTC derivatives transactions

The Opinions indicate that foreign institutions may freely choose and sign the following master agreements to conduct OTC derivatives transactions:

I. **NAFMII Master Agreement**: the master agreement published by the National Association of Financial Market Institutional Investors and commonly used in China. Chinese inter-bank market participants are required to sign NAFMII agreements to conduct OTC derivatives transactions in the inter-bank market, which include interest rate derivatives, exchange rate derivatives, bond derivatives, credit derivatives and gold derivatives, as well as a combination of the foregoing derivatives transactions.

II. **SAC Master Agreement**: the master agreement published by the Securities Association of China, the China Futures Association and the Asset Management Association of China. Market participants in the Inter-agency Quotation and Service System for Private Placement Products need to sign SAC agreements to engage in OTC derivatives transactions in the market, which mainly include equity and commodities derivatives transactions. These markets are currently not available to foreign investors.

III. **ISDA Master Agreement**: the most commonly used OTC derivatives agreement in the world, published by the International Swaps and Derivatives Association. Currently, only foreign central banks, monetary authorities, international financial organizations, and sovereign wealth funds are explicitly permitted to sign ISDA agreements with Chinese counterparties to conduct OTC foreign exchange derivatives transactions in the Chinese inter-bank market.

The Opinions, for the first time, explicitly make clear that all foreign institutions may choose ISDA agreements instead of NAFMII agreements to conduct OTC derivatives transactions with Chinese counterparties in the Chinese inter-bank market. The Opinions are high level and it is unclear whether PBOC and/or NAFMII will revise the existing rules or issue new rules to implement the Opinions in this regard.

Developing a high-quality business environment for foreign investors

The Opinions focus on establishing a financial business environment in Shanghai recognized by international markets. Specifically, the Opinions provide that Shanghai will pay particular attention to rule of law in the financial sector, increase penalties for illegal financial activities, establish a system of financial rules that are in line with international standards, remove “invisible barriers” to market access, and foster a fair market environment. Shanghai will also promote the Shanghai Financial Court and the Shanghai Bankruptcy Court to improve their professional skills and increase their international credibility and influence by taking reference of high-standard practices in international markets.

Outlook

Since last year, China A-shares have been included in MSCI, FTSE and S&P Dow Jones Indices, and China bonds have been included in Bloomberg Barclays and JPMorgan indices. China has also become

the second largest bond market in the world as of late 2019. China's financial markets are set on an irreversible journey towards further internationalization and Shanghai will undoubtedly play an important role in this process. The Opinions demonstrate the national and Shanghai local authorities' determination to give Shanghai greater support in establishing the city as an international financial and asset management center.

It is expected that the opening of the Chinese market will attract more foreign investors to share in the broadening opportunities. Implementation of the Opinions may make Shanghai a more favorable choice in terms of location while benefiting China's overall financial industry development.

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.

If you have any questions regarding this publication, please contact:

TieCheng YANG

Tel: +86 10 8516 4286
Email: tiecheng.yang@hankunlaw.com

Yin GE

Tel: +86 21 6080 0966
Email: yin.ge@hankunlaw.com

Brigard Urrutia

Decree 328 of 2020 sets the guidelines for the development of PPII

Decree 328 of 2020 establishes the guidelines to carry PPIIs by using Multistage Hydraulic Fracturing with Horizontal Drilling

After receiving and incorporating comments and proposals from citizens, the academia, experts, and public and private entities, on February 28, 2020, the Ministry of Mines and Energy issued Decree 328, by means of which the guidelines to carry out Pilot Projects of Integral Research - PPII (from its acronyms in Spanish) on Unconventional Hydrocarbon Deposits by using the Multistage Hydraulic Fracturing Technique with Horizontal Perforation, are established.

Decree 328 of 2020 sets the guidelines for the development of PPII

After receiving and incorporating comments and proposals from citizens, the academia, experts, and public and private entities, the Ministry of Mines and Energy ("MME") issued Decree 328 (the "Decree") on February 28, 2020, by means of which it establishes the guidelines to carry out Pilot Projects of Integral Research ("PPII" from its acronyms in Spanish) on Unconventional Hydrocarbon Deposits ("UHD") by using the Multistage Hydraulic Fracturing Technique with Horizontal Perforation.

The Decree, among others, establishes that:

● Companies interested in developing a PPII must request it before the National Hydrocarbons Agency ("ANH") and comply with the requirements established by said entity for such purpose. The ANH will also determine the contractual mechanisms for the development of these projects.

● The PPII will require the issuance of the environmental license by the National Environmental Licensing Authority ("ANLA").

● The PPII will be developed in the following three stages:

1 Precondition stage: this is the stage of evaluation and diagnosis of social, environmental, technical and institutional conditions and environmental licensing.

2 Concomitant Stage: stage in which the activities of drilling, completion, fracturing, stimulation, and sizing of the deposit will be carried out.

3 Evaluation Stage: As the name implies, at this stage the information of each of the PPII will be evaluated in order to determine if the commercial production of UHD is possible. This evaluation will be carried out by the Evaluation Committee.

● The Evaluation Committee will be in charge of analyzing the information provided by the Institute of Hydrology, Meteorology and Environmental Studies ("IDEAM"); the Colombian Geological Service ("SGC"); the Alexander Van Humboldt Institute; the Ministry of Public Health; the ANH; the ANLA; and the Intersectoral Commission for Technical and Scientific Accompaniment (the "Commission"), regarding the development of each of the PPII in order to recommend the actions to be carried out for the PPII execution and define whether the PPII, individually considered, are viable or not. The Evaluation Committee will be formed by: the Government; an expert on environmental issues; an expert on hydrocarbons issues; and a civil society representative.

● Now, since the implementation of the PPII requires the participation of different entities, the Commission is created to be in charge of guiding and coordinating the follow up of the PPII development, based on the information and alerts received from the intersectoral subcommittees Technicians and scientists. The Commission will be formed by: (i) the Vice Minister of Energy; (ii) the Vice Minister of Environmental Policy and Standardization; (iii) the Vice Minister of Public Health; (iv) the Vice Minister of Knowledge, Innovation and Productivity; (v) the Vice Minister for Equal Rights; (vi) the Vice Minister of the Ministry of Finance and Public Credit; (vii) the ANH President; (viii) the SGC Director; (ix) the ANLA Director; (x) the Director of IDEAM; (xi) the Alexander Von Humboldt Institute Director; and, (xii) the Secretariat of Transparency of the Presidency of the Republic, or its delegates.

● Transparency and due access to public information must be ensured during all the PPII stages, which is why the Transparency Center is created in which all the information related to the PPII will be centralized and disseminated, in order to generate a channel of communication with citizens The Transparency Center will be managed and operated by the MME.

The Decree can be found in the following link:
https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%2520328%2520DEL%252028%2520DE%2520FEBRERO%2520DE%25202020.pdf+&cd=1&hl=en&ct=clnk&gl=co

For more information : info@bu.com.co

Arias

PRESS ROOM

HOW CAN COSTA RICAN COMPANIES FACE THE LABOR CHALLENGES OF A POSSIBLE CORONAVIRUS INFECTION?

March, 2020

In order to strengthen the containment of the spread of COVID-19 virus, the Executive has issued several guidelines for the public sector by which it declares, among other things, the preventive measures that must be applied at the workplace to avoid a further spread of the Coronavirus among the inhabitants of the Republic.

In this regard, the private sector is not exempt from obeying the health and safety provisions demanded by this health situation, so all companies must adopt specific actions in which their productive activity can be carried out hand in hand with the provisional measures to guarantee their employees optimal health and safety conditions during the working day.

However, even though employers strive to create healthy and safe working environments for their employees, through preventive strategies in terms of personal hygiene and cleanliness of work areas, the truth is that the occupational transmission of diseases caused by infectious diseases at work is a reality to which we are all exposed.

Therefore, given of the scenario we are facing, every employer must anticipate and determine on the best way to avoid a situation of contagion in the company, for which we suggest that the following measures to be taken can be assessed:

- Taking advantage of the teleworking regulations that were enacted last year in our country, it is extremely important to try to apply the teleworking in those positions whose functions allow it. For this, we suggest training employees about this modality beforehand (as regards the use of IT and communication resources as well as the terms and obligations that must be complied with), so that the nature of the employment relationship do not be affected.

- If it is not possible to apply teleworking for a certain position, the company can consider sending the employees on a vacation period or agree with the employee an absence leave with or without salary payment, this as an alternative security measure. If any of these measures were chosen, consider that the employees will not be banned from carrying out personal or collective activities, since it will not be a medical leave.

Now, in case of possible scenario of infection of one of the employees Costa Rica's Social Security Authorities determined that, depending on the symptomatology, the doctors will proceed to issue the medical leave.

Regarding asymptomatic cases or as consequence of mandatory quarantines imposed by the health authorities, the Ministry of Health said yesterday - at a press conference –that a special medical leave will be issued for home isolation. Nevertheless, the country is still for the formal publication of the regulations to clarify all the details regarding this medical leave.

Likewise, all employers must consider that, upon reasonable suspicion that one of their employees is infected with Coronavirus, due to or as a consequence of the work they perform, this will be covered by the occupational risk policy issued by the National Insurance Institute. Therefore, the company must immediately notify the event through the virtual platform of said institution (RTVirtual) or send the information to the health centers of the Health Services Network, so that it is this institution analyzes the case accordingly.

Is evident in this exceptional context the importance for every company to have an internal policy that provides the company's measures and procedures to prevent and contain infectious diseases among its employees. It is even extremely important to delimit the actions that can be interpreted as discriminatory to avoid generating harmful consequences derived from this reality that our country is facing.

On their behalf, the Ministry of Health has implemented a series of mandatory guidelines in all workplaces operating in the national territory, which can be consulted in the following link: https://www.ministeriodesalud.go.cr/sobre_ministerio/prensa/docs/lineamientos_centros_trabajo_revision_05032020.pdf.

If you require any additional information on this matter, please contact Carolina Soto, our Partner in charge of labor practice, to carolina.soto@ariaslaw.com.

GIDE
GIDE LOYRETTE NOUEL

Gide 255 contributes to regulatory discussions on the blockchain as part of a study conducted for the European Commission

4 March 2020

The Gide 255 team contributed to the study conducted on behalf of the European Commission to identify concrete courses of action that will further intensify the development of the use of blockchain technology in the European Union.

The study, entitled "**Study on Blockchains - Legal, governance and interoperability aspects"**[1], was carried out by a consortium of experts[2] on behalf of the European Commission's Directorate-General for Communication Networks, Content and Technology (**DG CONNECT**). It aims in particular at **providing evidence of legal blockages or resistance** likely to hinder developments based on a blockchain protocol. The study highlights issues relating to the burden of compliance and legal liability which, in the world of distributed networks, must necessarily be reconsidered.

The study also points out the legal barriers to the development of projects based on a blockchain protocol that exist within sectoral regulations, such as GDPR[3] or the 5th anti-money laundering directive**[4]**.

Lastly, the report devotes entire sections to the new legal issues raised by **smart contracts** (with regard, for instance, to contract law and consumer law) and **utility tokens** (with regard, in particular, to financial regulation). As part of the presentation of the regulatory considerations relating to utility tokens, the French example in the form of the law of 22 May 2019 (the "**PACTE law**", France's corporate reform law for business growth and transformation), which establishes an innovative and optional regime for public offers of tokens, is explained at length.

Based on this analysis of regulatory hurdles, the study sets forth several strategic options that could be applied by the European Commission: **(i)** a "wait-and-see" approach; **(ii)** the enactment of guidelines by national regulators to provide legal clarity on the scope of applicability of existing rules; **(iii)** the adoption of a new European regime to tackle the fragmentation of the single market. In terms of regulatory arrangements, the report mentions optional regimes (as provided for in the French framework) and experimental arrangements (sandboxes).

The Gide 255 team was contacted as part of this study in consideration of its expertise on regulatory issues pertaining to crypto-assets, which it handles every day on behalf of its clients.

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To view this Alert in it entirety, visit **https://www.gide.com/en/news/gide-255-contributes-to-regulatory-discussions-on-the-blockchain-as-part-of-a-study-conducted?destination=views/news/search**

For additional information visit wwwgide.com

1. https://ec.europa.eu/digital-single-market/en/news/study-blockchains-legal-governance-and-interoperability-aspects-smart-20180038
2. Spark Legal Network, Michèle Finck, Tech4i2, Datarella.
3. EU Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("**GDPR**").
4. EU Directive 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (**5th Anti-Money Laundering Directive**).

Santamarina + Steta

LEGAL UPDATE

February, 2020

Amendment to the Audiovisual Content Classification Guidelines

On February 14, 2020, the Official Gazette of the Federation (*Diario Oficial de la Federación*) published the Amendment to the Classification Guidelines for audiovisual content of radio and restricted television and audio services, published on August 21, 2018 (*Modificación a los Lineamientos de clasificación de contenidos audiovisuales de las transmisiones radiodifundidas y del servicio de televisión y audio restringidos, publicados el 21 de agosto de 2018*). This amendment derived from resolution No. 227/2018 issued by the Fourth Collegiate Court of Administrative Matters of the First Circuit, whereby it became clear that the criteria for classifying contents in its three elements (categorization, time slots and warning elements) needed to be changed in order to prevent children and teenagers being exposed to content unsuitable for their age.

Regarding the first element of the contents system, categorization, it was decided to modify the criteria for the "B" and "B15" ratings, restricting types of contents and making changes to the Tenth Guideline in order to include a more specific categorization concerning violence, addictions, sexuality and language contents. This includes more specific descriptions of what the concepts of "violence", "addictions", "sexuality" and "language" mean. The concessionaires will have a period of 60 (sixty) business days after the entry into force of the reform to adapt their content programming to the criteria set forth in these Guidelines.

Regarding the second element, time slots, the type of content that can be transmitted in the designated time slots for "B" (4 pm to 5:59 am) and "B15" (7 pm to 5:59 am) ratings was restricted.

Regarding the third element, warning elements, two paragraphs were added to the Ninth Guideline in order to compel the General Direction of Radio, Television and Cinematography (*Dirección General de Radio, Televisión y Cinematografía*) to announce a guide on parental supervision of content consumption within a period

no longer than 90 (ninety) business days after the entry into force of the Amendment to the Guidelines.

In case you require additional information, please contact the partner responsible of your account or any of the following attorneys:

Mexico City Office: **Mr. Jorge León Orantes B., jleon@s-s.mx (Partner)**
Phone: +52 (55) 5279-5400

Monterrey Office: **Mr. César Cruz A., ccruz@s-s.mx (Partner)**
Phone: +52 (81) 8133-6000

Queretaro Office: **Mr. José Ramón Ayala A., jayala@s-s.mx (Partner)**
Phone: +52 (442) 290-0290

Simpson Grierson

Rejected Heathrow expansion could have future implications for NZ climate change litigation

Contributors olliver.maassen@simpsongrierson.com

In a ground-breaking case for global climate change litigation, the UK Court of Appeal recently concluded that the decision to construct a third runway at Heathrow airport was made unlawfully.

The House of Commons had voted in favour of the expansion in June 2018. However, following judicial review proceedings, the Court said the Secretary of State's failure to give consideration to the Paris Agreement was "legally fatal" to the decision.

In this FYI we discuss the key points of the case and consider whether decisions under the Resource Management Act 1991 (**RMA**) could be at similar risk of challenge based on New Zealand's climate obligations.

Summary - key points

- This decision centred on a statutory obligation to consider government policy. It was held that government policy included obligations under international law and, in particular, the Paris Agreement.
- It is unlikely that the same outcome would occur in New Zealand in relation to decisions under the RMA unless similar provisions are made in the RMA requiring decision makers to have regard to government policy.
- If the current RMA reform process removes the Act's inconsistencies with the Zero Carbon Act, then the Heathrow case will have greater bearing upon RMA decision-makers and we could see similar litigation here.

30 second background: proposed expansion of Heathrow Airport

The proposed expansion of Heathrow Airport has been a matter of recent political debate and controversy in the United Kingdom. This controversy has been intensified by concerns over the environmental cost, and more recently, the concerted global effort to combat climate change by reducing carbon emissions.

In June 2018, the House of Commons voted on the Airports National Policy Statement (**ANPS**) in favour of the construction of a third runway at Heathrow Airport. This policy was designated by the Secretary of State under the Planning Act 2008. Four claims for judicial review challenging the designation decision were dismissed before the Divisional Court, then appealed to the Court of Appeal.

UK Court of Appeal's Ruling

On 27 February 2020, the UK Court of Appeal found that the UK Government's policy in favour of the development of a third runway at Heathrow Airport was decided unlawfully.

Section 5(8) of the Planning Act (under which the ANPS was designated) requires the policy to give an explanation of how the Secretary of State has taken into account **Government policy** relating to the mitigation of, and adaption to, climate change. It was contended that the Paris Agreement was part of "Government policy" within the meaning of that provision.

This argument was accepted by the Court. The Government's commitment to the Paris Agreement was held to be clearly part of "Government policy" by the time of the designation of the ANPS, because of a) the UK's ratification of that international agreement, and b) firm statements re-iterating a Government policy of adherence to the Paris Agreement by relevant Ministers.

As such, the Secretary of State's failure to give an explanation of how the Paris Agreement had been taken into account was deemed "legally fatal" to the ANPS in its present form.

While Heathrow Airport has stated its intention to appeal the decision to the UK Supreme Court, the case has already been heralded as a ground-breaking result for climate change issues.

Limits on applicability of this decision

However, as an action in judicial review, there are clear limits to the applicability of the judgment outside of this particular decision.

As acknowledged by the Court of Appeal, their decision does not decide, and could not decide, that there will be no third runway at Heathrow. Nor does it decide that a national policy statement supporting this project is necessarily incompatible with the United Kingdom's commitment to reducing carbon emissions and mitigating climate change under the Paris Agreement.

The consequence of the decision is that the Government will have the opportunity to reconsider the ANPS in accordance with the statutory requirements under section 5 of the Planning Act (assuming the Supreme Court does not overturn the decision).

Could New Zealand's climate obligations be a mandatory relevant consideration under the RMA?

Current situation

The UK decision centred on a statutory obligation to consider government policy. It was held that government policy included obligations under international law and, in particular, the Paris Agreement. It is unlikely that the same outcome would occur in New Zealand in relation to decisions under the RMA unless similar provisions are made in the RMA requiring decision makers to have regard to government policy.

Local authorities unable to consider climate change

Notably, while decision-making under the RMA is primarily undertaken at local and regional levels, the Resource Management (Energy and Climate Change) Amendment Act 2004 restrains local authorities' ability to consider the effects of activities *on* climate change.

The Amendment Act was designed to make it clear that regional councils do not have the mandate to control greenhouse gas emissions through resource consents and regional plans. It required local authorities *not* to consider the effects on climate change of discharges into air of greenhouse gases.

Rather, policies to address greenhouse gas emissions would be implemented at a national level. Therefore, local authorities are effectively prohibited from considering New Zealand's climate obligations under the RMA.

There has been recent support for changes to be made to the RMA to empower local authorities to consider climate change.

Inconsistencies between the Zero Carbon Act and RMA

Following the enactment of the Zero Carbon Act (**ZCA**), inconsistency has developed between this Act and the RMA. Specifically, there is tension between the ZCA and sections 70A and 104E of the RMA, which require planning and consenting authorities to disregard the effects of a greenhouse gas discharge on climate change.

This means that the RMA effectively prevents the 2050 emissions reduction target and emissions budgets from being a consideration in RMA decision-making.

The Resource Management Review Panel has been established to undertake a comprehensive review of the RMA and other significant legislation comprising the resource management system. The issues and options paper was published in November 2019, and considers a key issue to be how the RMA might be aligned with the ZCA to contribute to the national effort to address climate change.

One of the options highlighted in the paper is regulation under the RMA to control particular emissions-intensive activities in cases where an emissions price is unlikely to be effective.

Next steps

The Government's proposal for RMA reform is due mid-2020. If the restrictions in sections 70A and 104E of the RMA are removed, then the UK case will have greater bearing upon RMA decision-makers and we could see similar situations here.

Get in touch

Get in touch with our contacts to discuss this topic or any aspect of the RMA reform in more detail.

What employers need to know — the Fair Consideration Framework (FCF)

DENTONS RODYK

March 13, 2020

Introduction

In our previous article, 'What employers need to know — Increases in local qualifying salary and employment pass minimum qualifying salary', we discussed how the local qualifying salary and employment pass minimum qualifying salary will be raised as part of efforts to maintain the effectiveness of foreign workforce controls. These measures are in line with the country's strategy, which is that while Singapore welcomes talent from overseas to work alongside Singaporeans in globally competitive teams, Singapore will continue to develop the skills of its local workforce and maximise the potential of the best in the country. In this article, we will discuss the Fair Consideration Framework (FCF), its requirements and the penalties for non-compliance.

Requirements under the FCF

Under the FCF, employers who wish to apply for employment passes (EP) to hire foreign employees must first advertise job vacancies on MyCareersFuture.sg (formally the Jobs Bank) for at least 14 days and must consider all candidates fairly before submitting an application.

All job advertisements must comply with the requirements set out in the Tripartite Guidelines on Fair Employment Practices (Tripartite Guidelines). The advertising requirements include (but are not limited to) the following:

1. The selection criteria must be accurately stated and should primarily relate to qualifications, skills, knowledge and experience.
2. Discriminatory words and phrases (including words and phrases that could be perceived as such) should not be used.
3. Words or phrases that exclude Singaporeans or indicate that non-Singaporean candidates are preferred should not be used.
4. If the job being advertised requires candidates with a specific attribute that may be perceived to be discriminatory, the reasons for this requirement must be explained. For example, a spa may require a female masseuse to provide treatments to its female customers.
5. The salary range (a) must be stated clearly, (b) must be visible to all candidates, (c) cannot exceed two (2) times the minimum salary and (d) must contain the salary offered to the EP candidate.

Presently, an employer may be exempted from the abovementioned advertising requirements if (a) it has less than 10 employees and (b) the fixed monthly salary for the vacancy is S$15,000 or more. However, in her speech at the MOM Committee of Supply 2020, the Minister for Manpower, Mrs Josephine Teo announced that from 1 May 2020, the salary threshold will be raised to S$20,000 or more.

Penalties for non-compliance

Since January 2020, the FCF has been enhanced to increase the penalties for breaches. Employers who violate the FCF or the Tripartite Guidelines will now be barred from applying for new work passes and renewing existing work passes for a minimum of 12 months and up to a maximum of 24 months. Further, employers who falsely declare that they have complied with the Tripartite Guidelines and have fairly considered all candidates may face imprisonment of up to two (2) years and/or a maximum fine of S$20,000.

The MOM has made it clear that it will not take such breaches lightly. In her speech, the Minister for Manpower highlighted that the MOM will place employers suspected of nationality-bias in their hiring practices on a watchlist (FCF Watchlist) and will take action against errant employers. The Minister further added that the MOM "will also hold culpable key decision makers responsible, whether it is the CEO, Chief HR Officer, or line managers [and] are prepared to name them publicly, and revoke their work passes if they are foreigners."

On 10 March 2020, the MOM announced in a press release that a logistics company was convicted of making a false declaration to hire a foreign employee who had been pre-selected for the position of General Manager. While the company had posted an advertisement on the Jobs Bank, it failed to review or consider any of the 22 local candidates who had responded to the advertisement. Subsequently, the company falsely declared in its EP application for the pre-selected foreign employee that it had interviewed two (2) local candidates and one (1) foreign candidate for the position. This was found to be false and the company was fined S$18,000 and barred from hiring foreign employees for 24 months. The work pass of the pre-selected foreign employee was also revoked.

Concluding remarks

Employers looking to hire foreign employees should be aware of their obligations under the FCF and abide by the Tripartite Guidelines. They should ensure that local candidates are properly considered and should not merely "go through the motion" of posting the advertisements to fulfil the requirements of the FCF, not least because of the harsh penalties that they will face if found out.

Dentons Rodyk thanks and acknowledges Associate Gabriel Fang and Legal Executive Sean Gallagher for their contributions to this article.

Your Key Contacts

Marian Ho
Senior Partner, Singapore
D +65 6885 3610
marian.ho@dentons.com

The Ministry of Economic Affairs of Taiwan announced the feed-in-tariff for renewable energy projects for 2020

02/26/2020

Yi-Jiun Su/ I-Sha Liu/Ning Hsu

We set forth below the key features of the 2020 FiT related to solar energy facilities for your reference:

1. For a Type One or Type Two Facility, the FiT applicable at the issuance date of the Recordation Approval ("**RA**") applies if the construction of the facilities is completed within 6 months thereafter. For a Type Three Facility, the FiT at the issuance date of the RA applies if the construction of the facilities is completed within 4 months. For instance, for a Type Three Facility, if the RA is issued on June 20, 2020 and the construction is completed by October 19, 2020, the Phase 1 FiT will apply.

2. For those solar energy facilities connected to transmission lines with the voltage of 69 kV or above and for which a booster station is installed or which shares a booster station with another facility, the FiT applicable at the issuance date of the RA applies if the construction of the facilities is completed within 18 months after the issuance of the RA or before December 31, 2021, whichever is later. However, the foregoing does not apply if the construction of the booster station was completed before January 1, 2020.

3. Other incentives for 2020 FiT include:

(1)For those solar energy facilities using solar PV modules that have obtained certificates of “Voluntary Product Certification on Crystalline Silicon Modules/Thin Film Modules of the Solar PV System” issued by the Bureau of Standards, Metrology and Inspection under the MOEA, a markup of 6% shall be added to the applicable FiT.

(2)For the solar energy facilities installed on roof-top of school gyms, a markup of 6% shall be added to the applicable FiT.

(3)If a roof-top solar energy facility is installed in certain indigenous areas or remote areas, a markup of 1% shall be added to the applicable FiT.

4. On top of the markup tariff provided in Section 3 above, additional tariff shall be granted in the following circumstances:

(1)With regard to solar energy facilities for which the module recycling fees are paid according to Regulations Governing the Installation of Renewable Energy Power Generation Facilities, an additional tariff of NT$0.0656/kWh shall be granted.

(2)An additional tariff for connecting to ultra-high voltage grid is NT$0.4674 for roof-top facilities with an installed capacity of 500kW or higher, NT$0.4506 for ground-mounted facilities, and NT$0.4358 for floating facilities.

(3)For those solar energy facilities that contribute to the Power Development Assistance Funds, an additional tariff equivalent to the contribution rate shall be granted.

Below please find the 2020 FiT for solar energy facilities:

Classification	**Installed Capacity**		**2020 Feed-in-Tariff (NT$/kWh)**		**Fees for module recycling (NT$/kWh)**	**Fees for connecting to ultra-high voltage grid (NT$/kWh)**
			Phase 1	**Phase 2**		
Roof-top	1 kWh or more but less than 20 kWh		5.7132	5.7132	0.0656	-
	20 kWh or more but less than 100 kWh		4.4366	4.3701		-
	100 kWh or more but less than 500 kWh		4.1372	4.0722		-
	500 kWh or more	not connected to ultra-high voltage grid	4.0571	3.9917		-
		connected to ultra-high voltage grid				0.4674
Ground-mounted	1 kWh or more	not connected to ultra-high voltage grid	3.9383	3.8752		-
		connected to ultra-high voltage grid				0.4506
Floating	1 kWh or more	not connected to ultra-high voltage grid	4.3319	4.2709		-
		connected to ultra-high voltage grid				0.4358
Note: Phase 1 FiT applies during January 1 to June 30, 2020; Phase 2 FiT applies during July 1 to December 31, 2020.						

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BAKER BOTTS

Insights

Communicating with Investors - What Public Companies Impacted by Volatile Commodity Pricing or COVID-19 Related Demand Uncertainty Need to Know

17 March 2020
Firm Thought Leadership

Commodity price volatility, compounded by uncertainties surrounding the impact of the COVID-19 virus, have caused many business leaders to consider new plans and strategies. Analysts and investors are asking a lot of questions about the future. And the plaintiff's securities litigation bar is watching. In talking to our clients about their disclosure obligations and risks in these situations, several questions routinely arise.

Our stock price just dropped significantly. Should we be worried about a shareholder securities lawsuit?

Big stock price declines mean big potential securities lawsuit damages, so any time a company's stock price declines significantly the plaintiff's securities bar is looking to see if they can make a lawsuit out of it. But it's unlikely there will be any near-term uptick in lawsuits based on the recent declines.

Shareholder securities lawsuits are typically based on this alleged fact pattern: (a) the issuer misled investors, causing them to purchase the stock at an inflated market price; and (b) once the "truth" was revealed and the market realized the prior disclosure was misleading, the stock price dropped to more accurately reflect its real value. When the news that causes the stock drop is an industry-wide development impacting all players (like sinking oil prices), it's hard for a plaintiff to tie that stock drop to anything allegedly misleading that the issuer said, or to show that its damages were caused by anything company-specific as opposed to industry-wide trends. It's even harder when those stock-price-impacting developments were inherently unforeseeable (like collapsing commodity pricing or changes in customer behavior due to COVID-19). That's not to say viable shareholder lawsuits based on recent stock declines aren't possible - and the plaintiff's shareholder litigation bar is not shy about bringing lawsuits that aren't viable when they can claim colossal damages and exert settlement pressure. We are aware that plaintiff-side securities litigation firms are actively looking for cases in midst of the COVID-19-related volatility.

The one possible exception is for issuers whose IPO occurred less than 3 years ago, and whose stock is now trading below the IPO price; they could face claims under the Securities Act of 1933. Under Section 11 of the Securities Act, investors can sue issuers, officers, directors, underwriters, and others for damages caused by allegedly untrue statements of fact or material omissions of fact within registration statements involving initial or secondary public offerings. Claims of this nature do not face the same hurdles as a typical securities fraud case.

None of this means the plaintiff's shareholder litigation bar is sitting out this market drop. To the contrary, they're watching closely what issuers are saying now, and looking for the cases that will result in the future. *It's probably not the recent stock price drops that will form the basis of a new band of shareholder securities suits; it's the statements issuers are making now about how the current tumult is impacting them.* Months from now, following additional company-specific stock price drops, we will be seeing shareholder securities lawsuits based on statements being made by issuers this week that allegedly downplayed, gave false information about, or omitted material information concerning the impact of the recent developments on that issuer.

So how do we accurately talk about the impact this is having on our business when we don't fully know what impact this is having on our business?

While there's a lot you do know about how oil prices are impacting your business, as with any developing situation there's also a lot you don't yet know. How will this impact our credit lines? What is the risk of force majeure or defaults on our deals? How is this impacting our customers or other counterparties? What will pricing and demand look like tomorrow; next week; next month; next quarter? Disclosures

must be materially accurate, but how can you be sure your disclosures are accurate when you're not sure what the answer is - either because it's unknowable, or you don't have all of the information you'd need to know it?

One key principle to understand is the difference between disclosures of pure *facts* versus disclosures of *opinions*. The latter generally do not give rise to liability under the federal securities laws, which recognize that a statement such as "we remain in compliance with our debt covenants" is materially different from "*we believe* we remain in compliance with our debt covenants." The former is false whether the speaker honestly believes otherwise or not. The latter, however, only subjects a company to liability under the federal securities laws in certain limited circumstances, such as where the speaker does not honestly hold that belief (making the embedded "we believe" phrase literally false), or the speaker did not have a sufficient basis to even form a reasoned opinion on the matter (investors are entitled to believe the speaker is aware of facts justifying that opinion).

Understanding the place of opinion in public disclosure allows issuers to accurately and timely provide information to investors where they otherwise may not be able to do so. In making disclosures that are not of pure known facts, but rather opinions or beliefs based on known facts, it is important to send a clear signal that you're doing so, for example, by using language such as "we believe," "we think," "based on what we know we understand," or "we estimate." The absence of such signal words is not determinative of whether the statement was legally an opinion, but their inclusion is extremely helpful to issuers in making that argument (and also extremely helpful to investors in understanding precisely what you mean to convey).

Similarly, the federal statutory safe harbor provision and common-law bespeaks caution doctrine protect statements the issuer makes regarding financial projections, plans and objectives of management for future operations, and future economic performance. There is no private action for liability regarding statements that are both (1) clearly identified as forward looking, and (2) accompanied by meaningful and specific cautionary language, permitting the issuer to make meaningful disclosures on these subjects related to the future, which cannot be known with certainty, without fear of liability. For cautionary language to be meaningful it must identify the factors most likely to cause actual results to differ materially from those in the forward-looking statement. Care, of course, still must be taken to ensure that statements subject to these doctrines are accurate. And although the issuer's knowledge is not an element in determining whether the safe harbor applies, courts have held that cautionary language is inadequate where it states an event as a "risk" or "possibility" when the issuer knows with near certainty the event will occur.

What about our past disclosures, including past forward-looking statements? Do we need to look at what we said about our business over the past several months or years, and provides updates where we were in hindsight wrong?

In general, there is no duty to update past disclosures, provided that they fall under the protections for forward-looking statements and were correct when made. However, a duty to update may arise in certain situations. For example, if a forward-looking statement was made with the expectation that investors will rely on it, or if contains facts that remains "alive" in their minds, then new disclosure may need to be considered. So in the case of outdated descriptions of future business plans that can no longer be performed, there can be a duty to update those projections if they were stated in such a way that they remain "alive" in the mind of investors. Examples of statements that may be characterized as such continuous representations - and thus may require an update - include strategies (including strategic transactions) that the issuer no longer intends to pursue or projected new agreements or amendments to agreements that have since been abandoned. This duty would not typically apply to periodic projections, such as quarterly earnings forecasts.

The duty to update is distinct from any duty to correct. If an issuer later realizes that a statement was incorrect *at the time it was made*, it should correct the statement it now understands to have been untrue, as it would any other statement.

What else should I be thinking about when communicating with investors?

The basic principles don't change: companies must meet their disclosure obligations in the same way they always have. Take care to ensure your disclosures are materially accurate and complete. Think about whether recent events trigger any duties under Item 303 of Regulation S-K to disclose "known trends and uncertainties" that you reasonably expect will have a material impact on your revenues or income. If you're having discussions with individual investors, think about whether you also need to make a public disclosure of that information to comply with Regulation FD.

As always, we would be glad to assist you with your specific situation. If you have any questions regarding these issues, please contact any member of Baker Botts' Securities and Shareholder Litigation practice team.

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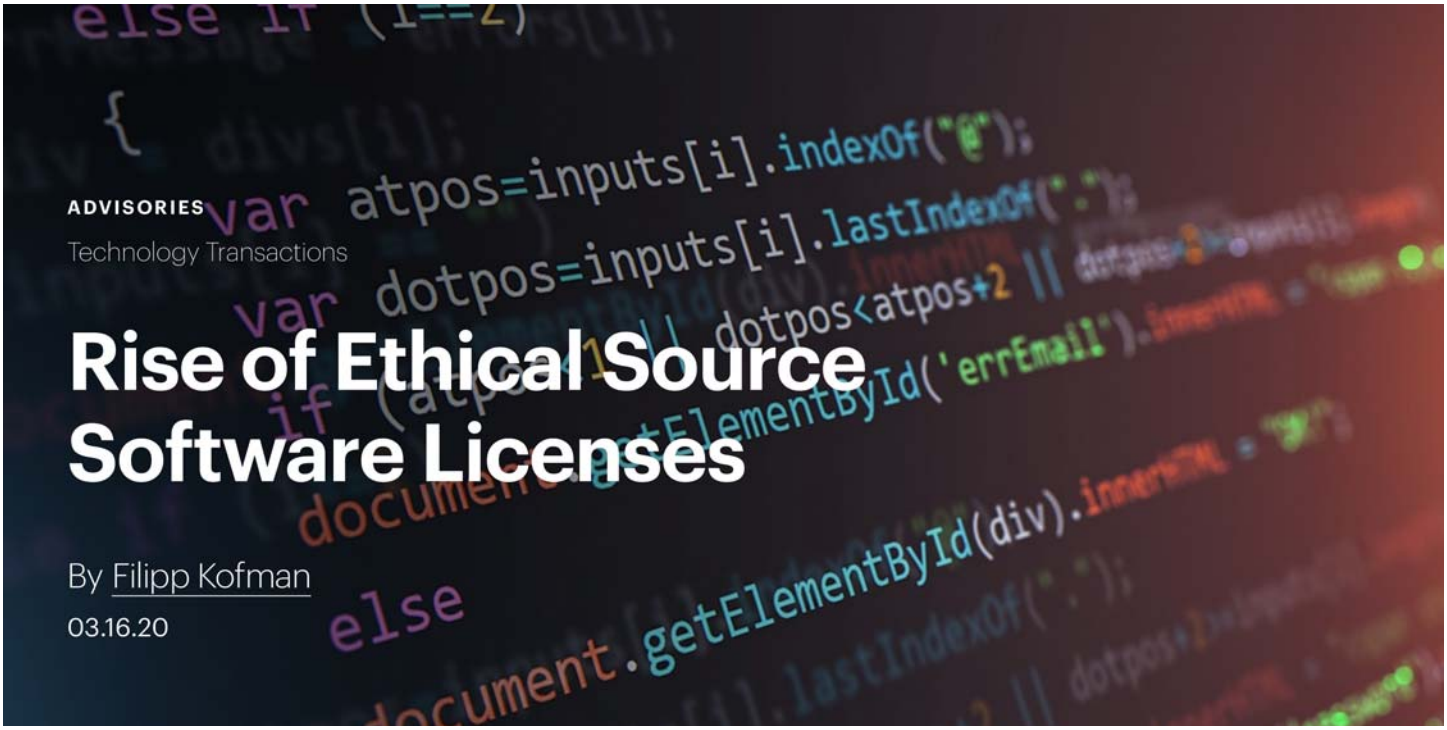

In spring 2018, Google quietly removed the company's unofficial motto "don't be evil" from the preface of Google's Code of Conduct. Although the tech giant retained the phrase in the Code of Conduct's concluding statement, to some industry watchers the move was indicative of the larger technology sector's shift away from ethical guiding principles.

In response to this perceived shift, software developers active in the free and open source software (FOSS) community began creating licenses that condition the use, modification, and distribution of free software on the licensee acting in an ethical manner. These "ethical source licenses" have sparked debate within the FOSS community about whether the licenses are consistent with open source software principles and whether commercial enterprises will use software licensed subject to ethical restrictions.

Three ethical licenses have garnered the most attention:

- The **Anti 996 License** requires the licensee to comply with all applicable laws, regulations, rules and standards relating to labor and employment, and prohibits the licensee from forcing its employees to weaken or relinquish the employee's remedies under such laws, and from restricting its employees or contractors from

reporting violations of these conditions.

- The **Vaccine License** requires the licensee to vaccinate himself or herself, as well as the licensee's children, and mandates that the licensee flow down this requirement to its employees if legally permissible.
- The **Hippocratic License** requires the licensed software not be used by any person or entity to violate human rights law.

Proponents of the ethical source movement argue that these licenses serve an important purpose of allowing developers to ensure that their work is being used for social good. They believe that public demand for ethical products will spur businesses to adopt these licenses or, at the very least, spark conversations about use or misuse of software within these organizations.

Criticism of Ethical Source Movement

Critics of the movement note that ethical source licenses may not fit the Open Source Definition (OSD) maintained by the Open Source Initiative and are contrary to the foundational principles of open source software. In order for a software license to be called an open source license, it must first be approved by the Open Source Initiative as compliant with the OSD through its license review process.

The OSD sets out the characteristics that each open source license must have. In particular, an open source license may not prohibit any person or group from using the licensed software and may not restrict use of the software in any particular field of endeavor. Critics argue that because ethical source licenses limit the scope of permitted use of the licensed software, they are not compliant with the OSD and should not be eligible to be considered open source software.

Critics also point to the difficulty of complying with the restrictions in these licenses. For instance, the Hippocratic License prohibits the licensee from using or allowing the use of the licensed software "for any systems, activities, or other uses that violate any applicable laws, regulations, or rules that protect human, civil, labor, privacy, political, environmental, security, economic, due process, or similar rights." This is a broad and subjective restriction.

Laws, regulations, and understandings of what is and is not ethical behavior differ wildly across jurisdictions throughout the world. It would be difficult for a commercial enterprise to be certain that it is in compliance the terms of many ethical source licenses, particularly a multi-national enterprise that is subject to the laws of multiple jurisdictions.

For example, a licensee that incorporates software licensed under the Hippocratic License in a customer-facing tool could violate the terms of the license if the customer is perceived to be engaging in activities that violate individuals' privacy rights, something that some of the largest technology companies in the world have been accused of doing. This uncertainty could delay or prevent adoption of ethical source licenses in the business world.

In addition, presence of ethical source licensed software in a company's software stack could raise questions during investment or M&A diligence, as investors and acquirers will likely be unfamiliar with and potentially alarmed by the terms of these licenses. Investors or acquirers may ask the company to replace these components, which could be costly for the company and could delay closing.

Implications for FOSS Community

It is not yet clear whether ethical source licenses will be broadly adopted in the FOSS community or the software industry. However, the movement appears to be gaining steam and may be adopted by more open source projects.

Companies involved in software development using FOSS should carefully consider the implications of deploying software under these licenses within their business environment. Companies should also consider updating their open source policies to flag ethical source licenses as requiring additional internal review prior to deployment.

Labor and Employment Law Practice Group
GOODSILL ALERT

February 25, 2020

NATIONAL LABOR RELATIONS BOARD RESTORES BUSINESS-FRIENDLY JOINT- EMPLOYER RULE

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In a trend reversing employee-friendly standards under the Obama administration, the National Labor Relations Board (NLRB) announced it is reverting back to a joint-employer rule that may benefit many companies, particularly franchisors and companies who utilize subcontractors. Under the new rule, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment, which includes wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction, of another company's employees to be deemed a joint-employer. "Substantial direct and immediate control" means that an entity needs to have regular or continuous consequential effect on an essential term of employment of another's employees. The control is not "substantial" if it is sporadic, isolated, or de minimis.

The rule provides further clarity regarding what constitutes "direct and immediate control" as to each "essential term and condition of employment." For example, "direct and immediate control" with regards to wages means that a company would need to actually determine the wage rate, salary, or other rate of pay to be paid to another employee's individual employees or job classifications. However, entering into a cost-plus contract with another entity would not constitute "direct and immediate control" over wages.

Under the prior *Browning-Ferris* standard, a business could be deemed joint employers by merely showing indirect evidence of control over working terms and conditions. With this reversal of *Browning-Ferris*, indirect evidence and/or contractually reserved control over essential terms of employment may be considered when determining joint-employer status, but it will not give rise to this status in itself. The final rule also clarifies that contractors will not be converted into a joint employer by routine elements of an arm's length contract.

NLRB Chairman John F. Ring announced the final rule on February 25, 2020, stating: "This final rule gives our joint-employer standard the clarity, stability, and predictability that is essential to any successful labor-management relationship and vital to our national economy." He added that the final rules will provide employer's certainty in structuring business relationships, while providing employees with a better understanding of their circumstances and unions clarity on whom they have a collective-bargaining relationship.

The final rule will go into effect on April 27, 2020.

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This Goodsill Alert was prepared by Ashley C. Chinen (achinen@goodsill.com or (808) 547-5715) of Goodsill's Labor and Employment Law Practice Group.

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The insight and analysis you need

FDA postpones foreign inspections amid growing concerns over coronavirus (COVID-19)

11 March 2020

On 10 March 2020, FDA announced that it is postponing most foreign inspections through April 2020. This action comes as the latest in a series of agency responses to the coronavirus (COVID-19) outbreaks in foreign countries. In its announcement, FDA stated this policy is effective immediately. Mission-critical inspections outside of the United States will still be evaluated on a case-by-case basis.

FDA intends to increase its utilization of alternative methods for ensuring imported FDA-regulated products comply with its regulations through increased product inspections and testing.

On 10 March 2020, as an updated response to the coronavirus (COVID-19) outbreaks in foreign countries, FDA announced that it is, effective immediately, postponing most foreign inspections through April 2020. Mission-critical inspections outside of the United States will still be evaluated on a case-by-case basis.

FDA stated that its position was based on various contributing factors, including:

- State Department Level 4 travel advisories prohibiting U.S. government employees from traveling abroad;
- Centers for Disease Control and Prevention travel recommendations;

- Denying entry of unsafe products in to the U.S.;
- Increasing physical examination at the U.S. border, which may include product sampling;
- Reviewing a foreign manufacturer's previous compliance history;
- Utilizing information sharing from foreign governments through mutual recognition; and
- Requesting records directly from manufacturers "in advance of or in lieu of" on-site drug inspections.

FDA's statement noted that the agency was aware that the decision to postpone foreign inspections could impact pending applications that require an FDA pre-inspection, however the statement did not provide any additional information on how the agency plans to proceed with pre-market review in such cases. It is possible FDA could exercise discretion on a case-by-case basis to approve products based exclusively on a desk review. This, and other creative alternatives FDA may utilize, are discussed in more detail in our coronavirus article series on Emergency Use Authorizations and supply chain challenges.

FDA also indicated that it will continue its work with U.S. Customs and Border Protection to seek out FDA-regulated products that are in violation of the Federal Food, Drug, and Cosmetic Act (FDCA) and applicable regulations. In doing so, FDA will rely on its authority to refuse the importation of any FDA-regulated products that "appear" to violate the FDCA or its implementing regulations. To aid the agency during this time, FDA stated that it will adjust risk scores generated by the agency's import screening tool (PREDICT), as necessary during the COVID-19 outbreak. This may lead to an increase in physical examination and/or sampling of products from high-risk areas. One consequence of this and something companies should take into account for the time being is an increase in the amount of time it takes for U.S. Customs and FDA to inspect, test, process, and release products entering the United States. FDA stated it would also continue to closely monitor indications of port shopping and cargo diversion.

As this situation evolves — particularly the extent of the spread of the Coronavirus in the U.S. — we will continue to monitor FDA's stance on foreign and domestic inspections, and the agency's response to the COVID-19 outbreak more broadly. Please contact us if you have any questions.

Authored by: Ted Wilson, Michael S. Heyl, James Johnson, Jodi K. Scott, Scott Kaplan, Seth Olson, Daniel Roberts

Contacts


Ted Wilson
Partner
Washington D.C.


Michael S. Heyl
Partner
Washington D.C.


Jim Johnson
Partner
Washington D.C.


Jodi K. Scott
Partner
Washington D.C.


Scott Kaplan
Counsel
Washington D.C.