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September 2020 e-Bulletin

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68th International Conference - New Zealand Hosted by Simpson Grierson TBA
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Coronavirus
COVID-19

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

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

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MEMBER DEALS MAKING NEWS

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►CAREY Assists Irish Energy Company Mainstream Renewable Power in United States
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BAKER BOTTS WELCOMES FIRST-CHAIR PATENT TRIAL LAWYER IN PALO ALTO

PALO ALTO, September 8, 2020 – Baker Botts L.L.P., a leading international technology, energy and life sciences law firm, announced today that Peter Kanghas joined the firm as a partner in its Intellectual Property Department and as co-chair of the firm's Korea-based IP practice.

Mr. Kang is a first chair patent and IP trial lawyer, having tried dozens of bench and jury trials during his career. In addition to trials in district courts and hearings at the International Trade Commission, he also represents clients before the Patent Trial & Appeal Board. He advises in all areas of intellectual property law for clients that range from Silicon Valley startups to multinational electronics manufacturers, especially from Asia.

"Pete's impressive patent and IP trial experience will help us even further in meeting the increasing demands of our technology clients globally," said Baker Botts Managing Partner John Martin. "Pete has strong relationships with a range of technology clients and will add to our world-class capabilities in IP, trial and technology, which are a few of our premier specialties."

"Pete has 30 years of patent and IP trial experience and has devoted his career to working with prominent technology clients on many of their most complex cases," said Rob Scheinfeld, Chair of Baker Botts' IP Department. "He and the clients he serves are perfect strategic fits, and we are excited to welcome him to Baker Botts."

Mr. Kang joins Baker Botts from Sidley Austin, where he served as a first-chair IP trial lawyer for 17 years, representing a range of clients in the technology sector. He was also the IP lead for that firm's Korea practice and currently serves as President of the International Association of Korean Lawyers Charitable Foundation. After completing a clerkship with the Hon. Ernest C. Torres of the U.S. District Court for the District of Rhode Island, he began his career with Skjerven Morrill, an IP boutique firm in Silicon Valley, where he eventually assumed the role of Managing Partner of that firm's San Francisco office. He joined Sidley in San Francisco in 2003 and was a founding partner of Sidley's Palo Alto office since it opened there in 2009. He served as Chair of the Sidley Palo Alto office's Diversity Committee, and was the senior IP partner in that office.

Mr. Kang's arrival comes less than a month after another lateral IP partner joined Baker Botts. In August, Christopher Palermo, founding and named partner of the IP boutique Hickman Palermo Becker Bingham L.L.P., joined the firm's Palo Alto office.

Among other awards, Mr. Kang has been recognized by *Chambers* every year since 2012. *Chambers Global* has ranked him in Band 1 in the field of Intellectual Property: South Korea (Experts Based Abroad). The *Daily Journal* ranked him as one of the Top IP Lawyers in California. He is the author of *Intellectual Property Litigation in the United States International Trade Commission*, which at one point was ranked No. 1 on Amazon in Intellectual Property, International Law, and Foreign & International Law.

Mr. Kang earned undergraduate degrees in Classics and Industrial Engineering from Stanford University in 1986 and 1987, respectively. He received his J.D. *cum laude* from Georgetown University Law Center in 1990.

"I am delighted to be joining Baker Botts' first-rate team of IP and technology lawyers with strong ties to the Silicon Valley community," said Mr. Kang. "I look forward to bringing ever greater resources to serving clients from this key global technology center and in IP matters worldwide."

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

For additional information visit www.bakerbotts.com

HAN KUN WELCOMES TWO NEW PARTNERS

Ms. Fang Rong joins Firm as a partner, further strengthening Han Kun's real estate, financial and investment management practice

BEIJING – 02 September: Han Kun Law Offices is pleased to announce that Ms. Fang Rong has joined the firm as a partner, further strengthening Han Kun's real estate, financial and investment management practice. She will mainly be based in the firm's Beijing office.

Ms. Fang is a leading lawyer in real estate investment and financing. Her practice focuses on real estate and infrastructure, including real estate financing, regular acquisition investment, public-private partnerships (PPPs), franchise and project financings, real estate funds, area development, and block trading. Ms. Fang has advised on large number of single-type REITs and CMBS/CMBN projects in respect of their establishment, issuances, and exits, accounting for about 60% market share of similar products, including many landmark projects with innovation. Ms. Fang also provides legal services for multiple public REIT projects.

Ms. Fang is an expert in advising on infrastructure and PPP-related issues, covering a broad range of industries, including water services, area development, rail transit, highways, hydropower, wind power, garbage disposal, etc. Ms. Fang has provided legal services for clients including local governments at all levels, various state-owned enterprises, private enterprises, multinationals, investors, and financial investors in various industries. Ms. Fang serves as a PPP expert for the Ministry of Finance and was hired by the Asian Development Bank as a legal expert on its domestic PPP policy research projects. Ms. Fang has also been involved with the legislative work of multiple PPP- and franchise-related policies and regulations in China.

Before joining Han Kun, Ms. Fang practiced for 18 years with a leading Chinese law firm. She has been repeatedly rated as a leading lawyer in the real estate and construction fields by The Legal 500 and China Law & Practice, and was recognized as a noted practitioner in the field of financial derivatives by Chambers and Partners.

Ms. Yuan Jiani joins Firm as a partner boosting Han Kuns domestic and overseas capital markets'practice

SHENZEN – 21 August, 2020: Han Kun Law Offices is pleased to announce that Ms. Yuan Jiani has joined the firm as a partner. She will mainly be based in the firm's Shenzhen office. The addition of Ms. Yuan is a further boost to Han Kun's domestic and overseas capital markets practice.

Ms. Yuan has nearly 14 years of legal practice experience. Prior to joining Han Kun, Ms. Yuan practiced for many years with a leading Chinese law firm. She is well experienced in domestic and overseas listings and merger and acquisition, and has advised on dozens of listing deals and many merger and acquisition deals. Ms. Yuan serves clients from a broad range of industries, including manufacturing, chain businesses, infrastructure, financial services, insurance, healthcare, and tourism, among others.

Ms. Yuan graduated from the Law School of Nanjing University with an LL.B. degree in 2004. She later graduated from Transnational Law and Business University with an LL.M. degree in 2006.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS ADDS LEADING CAPITAL MARKETS PARTNER IN NEW YORK

NEW YORK – 14 September 2020: Global law firm Hogan Lovells is pleased to announce that Richard Aftanas has joined the firm as a partner in the Corporate practice in New York and as a member of the Firm's global Capital Markets leadership team with a focus on expanding the New York and US capital markets practice. Aftanas joins from Kirkland & Ellis LLP, where he was a partner in the Capital Markets group for six years.

"The addition of Richard to our New York Capital Markets team is another critical step in our focussed effort to strengthen our corporate and finance offerings in key markets," said David Gibbons, Global Head of the Corporate & Finance Practice at Hogan Lovells. "Richard's depth of experience in sophisticated capital raising transactions will be an asset to our national and global clients, and he will fit in well with our collaborative culture."

Richard has worked on numerous initial public offerings and other public and private equity securities offerings, as well as high-yield and investment-grade debt offerings for companies in a wide range of industries. He also advises U.S. and international clients with respect to corporate and securities law matters, as well as spin-offs, debt tender offers, exchange offers and other refinancing transactions. In addition, Richard regularly advises publicly-traded corporations and their executive officers and directors on corporate governance, SEC compliance and disclosure matters. Before joining Kirkland, Richard was a partner at Skadden, Arps, Slate, Meagher & Flom LLP.

"Hogan Lovells' global reach, top-notch corporate finance practice, depth of regulatory and industry expertise and collaborative approach is ideal for serving clients and I'm very excited to join the firm," said Aftanas. "The firm is committed to enhancing its offering in key markets and I look forward to working with the team to continue to grow the firm's Corporate & Finance practice in the New York office and beyond."

Over the past year, the firm has made several high-profile additions to the New York office, including former Bristol Myers Squibb vice president Jonathan Wasserman, Latin America finance partner Ben Garcia, leading sports transactions lawyer Michael Kuh, and Peter Marta, former global head of the legal cybersecurity team at JPMorgan Chase.

"Richard is a fantastic addition to our New York team," said Michael DeLarco, Office Managing Partner of Hogan Lovells New York office. "We have been actively expanding our Corporate & Finance team in New York to keep up with the increase of client demand."

Aftanas earned his B.A. from the University of Manitoba and his LL.B. from McGill University Faculty of Law. He also is a member of McGill University Leaders' Advisory Board and was the Secretary of the Securities Regulation Committee for the Association of the Bar of the City of New York from 2003–2006.

For additional information visit www.hoganlovells.com

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

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Visit us online for full coverage
http://www.prac.org/member_publications.php

IN MEMORY OF VINAYAGA RAJARATNAM

In Memory of Vinayaga

KUALA LUMPUR—07 September 2020: Vinag, as he was affectionately known, was an avid cricketer and represented his school in the sport in his younger days. Also known as Geoff Boycott during his time in school, he often opened the batting. One could always count on him to hold one end and frustrate bowlers.

He played both in the Lall Singh Trophy and Vanderholt Trophy, helping his school ACS become state level champions in both these tournaments. Besides being a batsman, he occasionally kept wickets as well. Vinag played for the Combined Schools of Selangor and also toured India with the Selangor Youth Squad in 1983. He also played hockey regularly and represented his school in this sport as well.

Vinag was called to the English Bar in 1989 after completing his LLB with honours from Manchester the preceding year. After being called to the Malaysian Bar in 1990, he commenced his legal practice in Skrine in 1991, and he was made partner in 2000. In between, he managed to find time for his favourite sport cricket, and he represented the Malaysian Bar between the years 1990 and 1992.

Through the engagement of his two talented boys, Karthik and Rahul in the Royal Selangor Club Junior Development Programme, Vinag played an active role in the support of the programme since 2014. Vinag's engagement in cricket took on a more formal role when he was elected as a committee member in the Kuala Lumpur Cricket Association in 2016, serving in various capacities with the KLCA from year 2016 until his untimely demise in August 2020.

His love of cricket was passed on to his sons as well, and it is notable that Karthik captained the winning Malaysia U16 team in the inaugural 'Belt and Road China U16 Boys Cricket International Tournament'.

On the work front, Vinag had contributed greatly to our firm and had always been present to offer advice and insights on client matters and legal practice, and he was always ready to lend a willing ear to listen to and counsel those of us who sought advice from him. He was a capable and formidable advocate who had the rare skill of grasping the essence of a matter and resolving disputes quickly. He was named as a 'Leading Lawyer' in insolvency and restructuring by Asia Law Leading Lawyers in 2009, 2010 and 2011. He was listed in the International Who's Who of Business Lawyers (Commercial Litigation) in 2012 and 2013. He was an accredited mediator and a member of INSOL, the International Association of Insolvency Restructuring Practitioners. He was included in Benchmark Asia Pacific 2013 as one of the 'preeminent' litigation practitioners in Malaysia.

As a friend, Vinag was always a great conversationalist, full of fun and laughter. To quote a message received by the firm on his passing:-

"Some persons who come into our lives are larger than life – Vinayaga was certainly one of them. Even though he is no longer with us, he remains with us for all that he has done, shared with us and his warm, helpful, friendly, extremely likeable and cheerful disposition. He was a man of strong principles, a decent degree of discipline and hard work ethic and diligence. He achieved a lot and yet remained humble. Most of all, he was a loving, devoted and doting husband and father."

We will indeed miss him dearly and he will always be cherished as a dear unforgettable Skrine Partner, a skilful lawyer, a keen sportsman, and a great friend.

www.skrine.com

ARIAS

ADVISED IFC ON A LOAN FACILITY TO BANCO AGRICOLA FOR $330M

SAN SALVADOR - September, 2020: Arias advised and assisted the International Finance Corporation (IFC) in a loan facility to Banco Agrícola, S.A. (borrower) for $330,000,000.00.

The funds will be used to finance the borrower´s operations for housing loans and other projects such as climate smart assets, including green building (300 MM) and for micro, small or medium-sized enterprises (MSMEs) especially to women owned businesses (30 MM).

This transaction is relevant because IFC (financial arm of the World Bank for the private sector) has granted two credit lines to Banco Agricola, S.A. to contribute to the recovery of the economy, mainly helping businesses that are unable to access bank credit to restart operations after the pandemic lockdown, according to experts in the country, 30% of the workforce belong to MSEM.

Our lawyers involved in this transaction were: Roberta Gallardo, lead Partner, Mario Lozano, Senior Associate and Rolando Alvarenga, Associate.

We are proud for our team to have participated in such an important transaction that will benefit multiple economy sectors affected by the pandemic.

For additional information visit www.ariaslaw.com

BAKER BOTTS

REPRESENTS VALERO ENERGY CORPORATION IN A42.5 BILLION SENIOR NOTES OFFERING

HOUSTON - 08 September 2020:

Deal Description: On September 8, 2020, Valero Energy Corporation (NYSE: VLO) (“Valero”) announced the pricing of its public offering (the “Offering”) of $575,000,000 aggregate principal amount of its Floating Rate Senior Notes due 2023, $925,000,000 aggregate principal amount of its 1.200% Senior Notes due 2024, $400,000,000 aggregate principal amount of its 2.850% Senior Notes due 2025 (the “2025 notes”) and $600,000,000 aggregate principal amount of its 2.150% Senior Notes due 2027. The 2025 notes will constitute an additional issuance of Valero’s 2.850% Senior Notes due 2025, of which $650,000,000 aggregate principal amount was issued on April 16, 2020. The Offering is expected to close on September 10, 2020, subject to customary closing conditions.

Valero intends to use the net proceeds from the Offering for general corporate purposes.

J.P. Morgan Securities LLC, Citigroup Global Markets Inc., MUFG Securities Americas Inc. and Scotia Capital (USA) Inc. acted as joint book-running managers for the Offering.

Baker Botts L.L.P. represented Valero in the Offering.

Value: $2.5 billion

For more information, please see Valero’s news release here: https://investorvalero.com/news/news-details/2020/Valero-Energy-Corporation-Announces-Pricing-of-Notes-Offering-f7e8e5652/default.aspx

For additional information visit www.bakerbotts.com

BRIGARD URRUTIA

ADVISES IN US$343 MILLION CANADIAN POWER FINANCING SYNDICATE LOAN

BOGOTA - August, 2020: Brigard Urrutia advised a syndicate of lenders comprising Export Development Canada, Canadian Imperial Bank of Commerce and Japanese bank Sumitomo Mitsui to Canada's Northland Power in a US$343 million loan to pay off debt held by its Colombian subsidiary. The deal closed on 7 July. The funds will be released in two tranches, one in Colombian pesos and the other in Canadian dollars.

Local Counsel to Export Development Canada, Canadian Imperial Bank of Commerce and Sumitomo Mitsui Banking Corporation Brigard Urrutia

Partner Manuel Quinche and associates Sebastián Luque and Pedro Muñoz in Bogotá.

For additional information visit www.bu.com.co

CAREY

ASSISTS IRISH ENERGY COMPANY MAINSTREAM RENEWABLE POWER IN UNITED STATES

Carey assists Irish Energy Company Mainstream Renewable Power in US$673 million facility

SANTIAGO - 07 September, 2020: Carey in Santiago assisted Irish energy company Mainstream Renewable Power get a US$673 million facility to build wind and solar farms in Chile.

Shearman & Sterling LLP (NY) and Morales & Besa (Santiago) advised lenders Inter-American Investment Corporation, CaixaBank, DNB ASA, KfW IPEX-Bank, Mitsubishi

UFJ Financial Group and Banco Santander Chile. The deal closed on 31 August.

The deal comprises a US$620 million syndicated loan from all the banks except Banco Santander Chile, which supplied a US$53 million VAT facility. Mainstream Renewable Power will use the funds towards construction of the Ckani and Llanos

BRIGARD URRUTIA

ASSISTS COLTEL IN USD2.5 BILLION LOAN AND DEBT DEALS

del Viento wind farms and Pampa Tigre and Valle Escondido solar plants – all in northern Chile – and the Puelche Sur wind farm in the south of the country. The combined capacity of the portfolio is 630 megawatts and construction is expected to be completed next year.

Local counsel to Mainstream Renewable Power Carey Partners Partner Felipe Moro and Juan Francisco Mackenna and associates Carmenmaría Poblete, Cristóbal Flores, Diego Ibarrola, Fernando Noriega, Fernanda Valdés, Julio Recordón and Rafael Mackaey in Santiago.

For additional information visit www.carey.cl

GIDE

ADVISES SDONOCO ON ITS ACQUISITION OF CAN PACKAGING

PARIS - 07 September 2020: Sonoco, a U.S. public company providing innovative consumer packaging, industrial products and protective packaging, has acquired 100% of the shares of Can Packaging. The purchase of the shares and intellectual property rights was made for a total consideration of €41.7 million.

Can Packaging is specialized in the design of machinery and the manufacture of sustainable packaging solutions, and provides sustainable paperboard packaging to a number of large consumer food brands distributed across Europe. The company is projected to produce sales of approximately €23 million in 2020.

Sonoco was advised by a multi-disciplinary team from Gide, comprising partner **Thomas Urlacher**, working with associates **Armelle Royer** and **Maroussia Jonglez** on corporate / M&A aspects; partner **Jean-Hyacinthe de Mitry** and associate **Célia Révy** on intellectual property aspects; and partner **Foulques de Rostolan** on employment law aspects.

For additional information visit www.gide.com

HAN KUN

TENCENT MUSIC ENTERTAINMENT GROUP ON USD $800 MILLION SENIOR NOTE OFFERING

BEIJING - 05 September, 2020: Han Kun advised and acted as the PRC counsel to Tencent Music Entertainment Group (NYSE: TME) on a USD 800 million senior note offering.

Tencent Music Entertainment Group is the largest online music entertainment platform in China, and currently operates several well-known brands, including QQ Music, Kugou Music, Kuwo Music and WeSing.

For additional information visit www.hankunlaw.com

HOGAN LOVELLS

REPRESENTS GILEAD SCIENCES IN STRATEGIC ONCOLOGY COLLABORATION WITH TANGO THERAPEUTICS

NEW YORK and WASHINGTON, D.C. - 27 August 2020: Hogan Lovells advised Gilead Sciences, Inc. in an expanded strategic collaboration with Tango Therapeutics focused on the discovery, development and commercialization of innovative targeted immune evasion therapies for patients with cancer.

Under the expanded multi-year collaboration, which builds on an agreement signed in 2018, Tango will continue to leverage its proprietary, CRISPR-enabled functional genomics target discovery platform to identify novel immune evasion targets. The number of targets covered will expand from five to 15. Gilead will have options to worldwide rights for programs directed at these targets over the next seven years. Gilead will also have the right to pay option extension fees for Tango to lead activities through early clinical development, to which Gilead will retain its option rights. Tango will have the option to co-develop and co-promote the lead products for up to five programs in the U.S.

Under the terms of the collaboration, Gilead will make a US$125 million upfront payment to Tango and a US$20 million equity investment in the company. In addition, Gilead will have the right to option up to 15 programs over the seven-year collaboration for up to US$410 million per program in opt-in, extension and milestone payments. Tango will also be eligible to receive up to low double-digit tiered royalties on net sales. For those products that Tango opts to co-develop and co-promote, the parties will equally split profits and losses, as well as development costs, in the U.S., and Tango will be eligible to receive milestone payments and royalties on ex-U.S. sales. The full company press release can be found here. https://www.businesswire.com/news/home/20200817005606/en/

The deal team was led by partners Adam Golden and Kevin Clayton, senior associate Jeff Jay and associate Chelsea Shrader.

For additional information visit www.hoganlovells.com

NAUTADUTILH

ASSISTS FRAMELCO WITH ITS SALE TO BLUESTAR ADISSEO COMPANY

ROTTERDAM – 11 September, 2020: NautaDutilh assists the founder and shareholders of Framelco Group, a family owned multinational feed additive company, with the international auction sale of FRAmelco to Bluestar Adisseo Company (Adisseo). The Framelco Group is headquartered in The Netherlands and operates 3 plants located in The Netherlands, Spain and Thailand.

FRAmelco is specialized in the development, manufacturing and marketing of feed and drinking water additives worldwide. It provides the industry with additive solutions that allow both agriculture and aquaculture to increase productivity and profitability in a sustainable manner. FRAmelco's industrial footprint, its product range, its technologies and its target markets are highly complementary to Adisseo's. Adisseo is one of the world's leading experts in feed additives. The group relies on its 10 research centres and its production sites based in Europe, USA, and China to design, produce and market nutritional solutions for sustainable animal feed. Adisseo is one of the main subsidiaries of China National BlueStar, leader in the Chinese chemical industry with nearly 21,000 employees and a turnover of 6,8 billion USD.

Joost den Engelsman: "This was an exciting process for a number of reasons. Firstly, our client, family Snijders (father Frank Snijders and his two sons Lars and Benjamin), were great to work with in this intensive transaction process. Secondly, a broad auction with Dutch and international corporates and financial sponsors and, ultimately, a Chinese/French trade buyer. And thirdly and certainly not in the least, because the process and negotiations took place right in the middle of the COVID-19 pandemic. What makes me proud is that the client is very happy with our guidance. We are confident that we will bring this deal to closing soon."

The NautaDutilh team was led by Joost den Engelsman and Joost Kloosterman and consisted of Naomi Asscheman, Ernst van de Luijtgaarden, Olaf Baks (Corporate M&A), Mauricette Schaufeli, Jasmijn van Koetsveld, Arnout Koeman (Competition), Edward Rijnhout, Sjuul Jentjens (Tax) and Florine Kuipéri (Corporate).

For additional information visit www.nautadutilh.com

PRAC EVENTS

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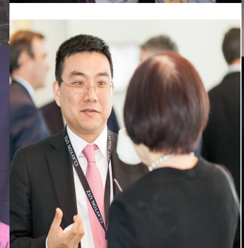
PRAC @ Taipei 2014

PRAC @ Vancouver

PRAC @ Brisbane

PRAC @ INTA



PRAC @ PDAC

PRAC @ IPBA

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Brigard Urrutia

/Carey

CITY-YUWA PARTNERS

GIDE GIDE LOYRETTE NOUEL

Davis Wright Tremaine LLP

DENTONS RODYK

Hogan Lovells

KOCHHAR & CO. ADVOCATES & LEGAL CONSULTANTS

GOODSILL

漢坤律師事務所 HAN KUN LAW OFFICES

KIM, CHANG & LEE

理律法律事務所 LEE AND LI ATTORNEYS-AT-LAW

LEGA ABOGADOS

Mulla & Mulla & Craigie Blunt & Caroe Advocates, Solicitors and Notaries

ESTUDIO MUÑIZ

MUÑIZ OLAYA MELÉNDEZ CASTRO ONO & HERRERA Abogados

NautaDutilh

Simpson Grierson

RICHARDS BUELL SUTTON LLP Established in 1871

Santamarina + Steta

SKRINE

SyCip Salazar Hernandez & Gatmaitan

TozziniFreire Advogados

ANTITRUST NEWS ALERT

The Secretariat of Domestic Trade implemented the TAD remote platform for mergers and requests for advisory opinions

On August 18, 2020, by means of Resolution No. 231/2020 (the ”Resolution”), the Secretariat of Domestic Trade implemented the *Trámites a Distancia* (“TAD”) remote platform for mergers and requests for advisory opinions under the Antitrust Law No. 27,442 (the ”Antitrust Law”) and its predecessor. The Resolution provides that the following must be channeled through the TAD platform: (i) requirements and/or presentations related to files corresponding to ongoing proceedings relating to the notifications of mergers and/or requests for advisory opinions; and (ii) notification of new mergers and/or requests for advisory opinions.

The TAD platform was implemented by the Argentinean government in 2016 by means of Decree No. 1,063/2016 to allow administrative proceedings to be carried out by electronic means. In particular, the TAD platform allows the parties to access the file, make submissions, review ongoing proceedings and be notified of any orders or resolutions issued by the administrative authorities.

In this regard, documents and files generated in electronic form and those reproduced in electronic form from first-generation originals are considered originals and have the same efficacy and evidential value as their paper-based equivalents.

The Resolution will enter into force on August 26, 2020. It is expected that in the near future the enforcement authority of the Antitrust Law will issue additional, specific clarifications relating to the use of the TAD platform in connection with mergers and requests for advisory opinions.

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1 This briefing does not contain a full analysis of the law nor shall it be deemed as a legal or any other type of advice by Allende & Brea.

NautaDutilh

General Data Protection Regulation

Belgium | Luxembourg | Netherlands

New controller-processor guidelines:
beware of impact on data processing agreements

Monday, 14 September 2020

Armed with useful flowcharts to help organisations determine their role, the European Data Protection Board (EDPB) has published new guidelines on the concepts of "controller", "processor" and "joint controller". Just over a month ago, the Litigation Chamber of the Belgian Data Protection Authority had published a decision in which it appeared to adopt an extensive interpretation of the concept of "controller"; now, thanks to extensive developments by the EDPB, that interpretation no longer seems to be relevant.

In this newsletter, however, we wish to focus on other aspects of the EDPB's controller-processor guidelines, namely its considerations regarding contractual arrangements between controllers and processors and their compliance with the General Data Protection Regulation (GDPR).

Controller-processor agreements: what do we see today?

In 2018, many organisations throughout the European Union and beyond were led to negotiate on data processing issues for the very first time. Evolving best practices and creative clauses have since led some to review their controller-processor agreements (typically called data processing agreements); now, the new EDPB guidelines may prompt many more organisations to adapt their agreements.

Today, data processing agreements take many forms, from a simple rehashing of the key requirements of Article 28 of the GDPR to detailed contractual provisions. Some have detailed security requirements included, while others merely repeat the general requirements of Article 32 of the GDPR; some refer to a service agreement to describe the key characteristics of the processing (subject-matter, duration, nature, purpose, etc.), while others contain a dedicated annex describing these items. We have seen organisations use short data processing agreements, with very little detail, for (in their view) low-risk processing activities entrusted to processors, and highly detailed data processing agreements for data-intensive or higher-risk activities. And not all of these agreements are deemed worthy by the EDPB.

"Strict minimum": insufficient according to EDPB

In its controller-processor guidelines, the EDPB states the following in relation to the content of data processing agreements:

> *"[t]he processing agreement should not […] merely restate the provisions of the GDPR; rather, it should include more specific, concrete information as to how the requirements will be met and which level of security is required for the personal data processing that is the object of the processing agreement".*

This suggests that **strict minimum clauses are insufficient** in the eyes of the EDPB. To a certain extent, this is not unexpected – certain local authorities had already suggested that this might come. However, it does raise the question of how much detail will be considered sufficient to be *"more specific, concrete information as to how the requirements will be met"* – and whether this will in practice make life more difficult for organisations that do not yet have a clear negotiating strategy regarding data processing issues.

General considerations on the contractual negotiation and lifecycle

The controller-processor guidelines contain various general considerations regarding the negotiation and further changes to data processing agreements:

- **Signatures:** In its guidelines, the EDPB states that *"[t]o avoid any difficulties in demonstrating that the contract or other legal act is actually in force, the EDPB recommends ensuring that the necessary signatures are included in the legal act"*. Signing remains important for enforceability and evidence reasons, but it is unclear what led the EDPB to raise this issue. Where the data processing agreement forms an annex to the (signed) service agreement, for instance, there is no reason under most laws (in particular Civil Law systems such as Belgium, Luxembourg and the Netherlands) to require this provided that the parties can **demonstrate the contents** of the data processing agreement at the time of signature – in particular if the service agreement itself provides that the annexes form an integral part of the agreement or otherwise foresees that signing the service agreement is deemed to be a signature of the agreement as a whole.

- **Changes to processors' standard terms:** While an imbalance of contractual power might permit certain processors to impose their terms for data processing agreements, without this changing their role as processor, the EDPB wishes to ensure that this imbalance of contractual power does not lead to unilateral changes without approval. According to the EDPB, *"[a]ny proposed modification, by a processor, of data processing agreements included in standard terms and conditions should be directly notified to and approved by the controller. The mere publication of these modifications on the processor's website is not compliant with Article 28"*.

Key EDPB requirements in terms of content

According to Article 28 of the GDPR, data processing agreements must include a description of the processing activities (subject-matter, duration, nature, etc.) as well as a range of specific obligations for processors. The EDPB discusses each of these requirements in turn in its guidelines:

- **Description of the processing activities:** The EDPB states that the description of the processing activities must *"be formulated with enough specifications"*. For instance, on the types of personal data processed, the EDPB states that they should be specified *"in the most detailed manner as possible"*, not limited to e.g. *"personal data pursuant to Article 4(1) GDPR"*. In relation to special categories of data, the EDPB states that the contract *"should at least specify which types of data are concerned, for example, 'information regarding health records', or 'information as to whether the data subject is a member of a trade union'"*. In practice, it may not always be possible to anticipate all categories of personal data and of data subjects perfectly, in particular in cases where a data subject might – on his or her own initiative – provide personal data belonging to categories not previously anticipated. However, the EDPB clearly expects organisations to consider these aspects carefully.

- **"Instructions":** While processors can offer a standardised service, they must also take into account any *"specific instructions on storage periods, deletion of data etc."* issued by the controller. Such instructions *"can include permissible and unacceptable handling of personal data, more detailed procedures, ways of securing data, etc."* and a mechanism should be foreseen *"for giving further instructions"* (which could e.g. be by e-mail, "as long as it is possible to keep records of such instructions"). The issue of "instructions" often gives rise to difficulties for controllers: does acceptance of an offer by a processor and the transmission of personal data with the request to perform the service constitute a sufficient "instruction"? The EDPB does not respond to this question directly, but its examples suggest this approach is indeed correct. In this context, we recommend being as detailed as possible, whether you are a controller (in the request for proposal or order sent to the processor) or processor (in the offer submitted to the controller).

- **Confidentiality:** According to the GDPR, the processor must ensure that the persons authorised to process the personal data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality. The EDPB states that *"the processor should make the personal data available only to the [employees, temporary workers, etc.] who actually need them to perform tasks for which processor was hired by the controller"*. Surprisingly, the EDPB adds that the confidentiality obligation *"must be sufficiently broad so as to encompass […] the details concerning the relationship"*, which if interpreted broadly could imply a prohibition for the processor's employees etc. to mention to anyone that they are processing personal data on behalf of the controller. From a security perspective, it is clear that talkative employees are an attack vector; we do not believe, however, that the EDPB meant to prevent (company) name-dropping for business development purposes.

- **Security:** Processors, just as controllers, are required to take *"appropriate technical and organisational measures to ensure a level of security appropriate to the risk"* in accordance with Article 32(1) GDPR, an obligation that covers

both cybersecurity and physical security. The EDPB states in this respect that *"[i]n order for the controller to be able to demonstrate the lawfulness of the processing, it is advisable to document at the minimum necessary technical and organisational measures in the contract"*. Later, the EDPB states that *"[t]he contract needs to include or reference information as to the security measures to be adopted"* – which the EDPB describes further as being either the *"minimum security objectives"* or detailed *"security measures"* depending on the specific circumstances. In any event, this information *"must be such as to enable the controller to assess the appropriateness of the measures pursuant to Article 32(1) GDPR"*. In practice, it has become over the past two years easier for controllers to require from processors a description of the security measures they apply in any case, but controllers must bear in mind that any additional or controller-specific requirements often lead to negotiations.
The EDPB includes in its guidelines various additional considerations on security, some of which may not even feature today in certain detailed data processing agreements. For instance, the contract should include *"an obligation on the processor to obtain the controller's approval before making changes, and a regular review of the security measures so as to ensure their appropriateness with regard to risks, which may evolve over time"*.

- **Appointing of sub-processors:** Under the GDPR, controllers can permit processors to appoint sub-processors in two ways: either a specific authorisation to work with a given sub-processor, or a general authorisation to appoint sub-processors in general. In the latter case, the processor must first inform the controller of any change of sub-processors (according to the EDPB, this is an obligation to *"actively [indicate] or [flag] such changes toward the controller"*) and give the controller the opportunity to object. The EDPB states that the data processing agreement should set out the process for dealing with this (in particular *"details as to the timeframe for the controller's approval or objection and as to how the parties intend to communicate regarding this topic"*). In practice, clauses regarding the conditions for objections have become commonplace (so that objections made without justification are disregarded), so the EDPB's recommendations here are unlikely to affect contracts that are already detailed in this regard.
The EDPB states further that *"[i]n order to make the assessment and the decision whether to authorise subcontracting, a list of intended sub- processors (including per each: their locations, what they will be doing and proof of what safeguards have been implemented) will have to be provided to the data controller by the processor"*. In other words, **there is no difference between a specific authorisation and a general authorisation at the start of the contract** in the eyes of the EDPB. Instead, the main difference is that during performance of the agreement, the processor with a general authorisation to appoint sub-processors can rely on silence to go ahead with its sub-processing plans (while a processor relying on a specific authorisation would need to have specific and written confirmation from the controller to go ahead). In any event, a list of approved sub-processors should *"be kept up to date"*, states the EDPB.

- **Assistance with data subject requests:** The EDPB does not wish contracts to merely indicate that the processor has to provide assistance *"by appropriate technical and organisational measures, insofar as this is possible"* (as per Art. 28(3) GDPR). Instead, the EDPB states that *"[t]he details concerning the assistance to be provided by the processor should be included in the contract".* In some cases, this might be limited to *"promptly forwarding any request received"*, but it might also lead to more technical duties (e.g. extracting data to assist in responding to a data subject access request). This means that when drafting a data processing agreement, the controller must anticipate the precise level of assistance – knowing that the processor will likely require compensation for such assistance if it is given a detailed description thereof.

- **Assistance with security requirements, data breaches and DPIAs:** According to Art. 28(3) GDPR, a data processing agreement must stipulate that the processor *"assists the controller in ensuring compliance with the obligations pursuant to Articles 32 to 36 taking into account the nature of processing and the information available to the processor"*. These articles cover security requirements (Art. 32 GDPR), the response to data breaches (Art. 33 & 34 GDPR), data protection impact assessments ("DPIAs", Art. 35 GDPR) and prior consultation of the supervisory authority in the event where a DPIA concludes that there is a high risk (Art. 36 GDPR). According to the EDPB, *"the agreement should contain details as to how the processor is asked to help the controller meet the listed obligations"*. In particular, on data breaches, *"[t]he EDPB recommends that there is a specific time frame of notification (e.g. number of hours) and the point of contact for such notifications be provided in the contract. The contract should finally specify how the processor shall notify the controller in case of a breach"*. In practice, data breach clauses with a specific timeframe (e.g. 48 or 72 hours as from the determination that a data breach relates to the personal data processed on behalf of a given controller) are commonplace today, but it remains important to ensure the rules are workable for both controller and processor.

- **Return or deletion of data upon termination:** A data processing agreement must state, according to Art. 28(3) GDPR, that *"at the choice of the controller, [the processor] deletes or returns all the personal data to the controller after the end of the provision of services relating to processing, and deletes existing copies"*. In practice, the provision of an up-to-date copy of all personal data (followed by secure destruction of the data by the processor) is the preferred avenue for most controllers at the end of a long relationship with their processor, but deletion without return of data is a simple solution for some cases (e.g. where a processor receives address lists to dispatch mailings, then deletes the address lists upon completion of the assignment). The EDPB states that the choice can be made at the beginning (in the contract), provided the controller retains the possibility *"to change the choice made before the end of the provision of services related to the processing"* – and that this is specified in the contract.

- **Evidence of compliance and audit possibilities:** Based on the general obligation of assistance in relation to compliance, the processor must *"[make] available to the controller all information necessary to demonstrate compliance with the obligations laid down in [Art. 28 GDPR] and allow for and contribute to audits, including inspections, conducted by the controller or another auditor mandated by the controller"*. A key practical issue that arose for processors related to their record/register of data processing activities (Art. 30 GDPR), as controllers started to demand a copy thereof. Processors do have other ways of showing compliance, though, and the EDPB suggests as much, stating that *"the relevant portions of the processor's records of processing activities may be shared with the controller"* (emphasis ours). The EDPB does go on to say, however, that *"such information should include information on the functioning of the systems used, security measures, retention of data, data location, transfers of data, access to data and recipients of data, sub-processors used, etc."*, showing that the amount of information to be made available can be fairly important.
  On audits, the EDPB's guidance is surprisingly limited, only stating that the parties *"should cooperate in good faith and assess whether and when there is a need to perform audits on the processor's premises"*. The EDPB does not address practical questions that controllers and processors have faced regarding the frequency of audits, the possibility of joint audits (on behalf of several controllers, to limit disruption for processors), the possibility for the processor to provide reports of audits carried out on its own behalf (several processors exclude the possibility for controllers to carry out an audit on their own initiative and force them to accept reports drawn up by auditors appointed by the processor), etc. In this respect, therefore, the EDPB guidance is in our view not likely to change the clauses that are commonplace today.

What about liability?

Given the extensive input given by the EDPB on all of these requirements, it appears surprising that the issue of liability barely features in these controller-processor guidelines. Article 82 GDPR contains various rules on liability between controller and processor and on liability of controllers and processors vis-à-vis data subjects, but the EDPB does not mention that provision of the GDPR, likely because it is composed of supervisory authorities (not courts or lawyers). However, it is crucial to bear liability in mind when negotiating and reviewing data processing agreements.

In other words, do not expect to see in this guidance any suggestions on the strategic choices to be made (going for unlimited or capped liability, which types of damage or loss to cover, etc.), but avoid using the EDPB's guidance as a comprehensive checklist precisely for that reason. For that, you will still need to determine your own strategy.

Don't agree with the guidance? Submit feedback to the EDPB

These controller-processor guidelines have been published online in the context of a public consultation that runs until **19 October 2020**.

As a result, if you feel as though these guidelines are too far-reaching or impose excessive requirements, there is always the option of voicing your concerns. Bear in mind that comments might be published on the EDPB website, so companies may wish to get in touch with peers and submit a sector-wide response, to avoid drawing too much attention to them individually.

In any event, these guidelines should prompt you to look over your data processing agreements. Do get in touch – it will be crucial to check whether all of the EDPB's concerns and recommendations are already taken into account; if not, it might be necessary to adapt your agreements in the light of this new guidance.

Contact us


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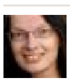
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August 28, 2020

LGPD Updates: Effectiveness and ANPD Structure

Cybersecurity & Data Privacy

After some back and forth, we have seen relevant legislative developments over the last days regarding the effectiveness of the Brazilian General Data Protection Law (Law No. 13,709/2018 – LGPD) and the definition of the structure and regulatory framework of the National Data Protection Authority (ANPD).

Effectiveness

The LGPD was enacted in 2018, with delayed effects. Some LGPD provisions are already effective, while others have yet to come into force. This week, the open points regarding the different effective dates of the LGPD provisions were finally determined, as indicated in the summary table below.

Provisions	Subject	Effective date
Articles 55-A, 55-B, 55-C, 55-D, 55-E, 55-F, 55-G, 55-H, 55-I, 55-J, 55-K, 55-L, 58-A and 58-B (ANPD Provisions)	These provisions relate to the ANPD.	December 28, 2018
Substantive LGPD provisions (Substantive Provisions)	These provisions cover, among others, data processing principles, lawful bases for the processing of personal data, and data subject rights. Therefore, once they are effective, individuals may submit access, rectification, erasure and other applicable requests to controllers, and controllers might be liable in the court sphere for the breach of substantive LGPD provisions, according to existing civil responsibility rules.	Up to September 17, 2020
Articles 52, 53 and 54 (Penalty Provisions)	These provisions relate to the administrative penalties provided in the LGPD. By “administrative penalties”, we refer to the fines and other penalties for the breach of the LGPD that the ANPD may apply in the administrative sphere, such as blocking of personal data, the temporary suspension or the prohibition of personal data processing activities.	August 1, 2021

Please refer to our comments below for detailed explanations on the LGPD legislative process.

- **LGPD Legislative Process**

The LGPD was approved on August 14, 2018, but it was not effective as of such date. The ANPD Provisions entered into force on December 28, 2018. The Substantive and Penalty Provisions were originally intended to come into force in August, 2020.

However, in the COVID-19 context, (i) Law No. 14,010/2020 established that the Penalty Provisions would come into force on August 1, 2021; and (ii) provisional ruling MP (Provisional Measure) No. 959/2020 was enacted by the Brazilian President, postponing the effects of the Substantive Provisions to May 3, 2021.

With respect to MP No. 959/2020, note that, in order to have permanent effects, a provisional ruling must be converted into law by the Legislative branch (Chamber of Representatives and the Senate) within 60 days, extendable by another 60-day period. Otherwise, it will lapse and be rendered ineffective. Also, if the original text of a Provisional Measure is changed by the legislators, the changes must be approved or vetoed by the Brazilian President before the Provisional Measure is finally converted into law. The deadline for MP No. 959/2020 to either lapse or be converted into law ended on August 26, 2020.

On August 25, the Chamber of Representatives deliberated the conversion of MP No. 959/2020 into law, modifying it to establish that the Substantive Provisions should be effective on December 31, 2020. On August 26, the Senate excluded from MP No. 959/2020 any provisions regarding the effectiveness of the Substantive Provisions, which led to a debate on whether the Substantive Provisions should become immediately effective or not.

By means of a note published on its official website, the Senate clarified that the Substantive Provisions are not yet effective. They will come into effect once the Brazilian President approves or vetoes the changes to MP No. 959/2020. As MP No. 959/2020 no longer rules about the effective date of the Substantive Provisions, the matter is settled, to the extent it is beyond the approval/veto authority of the Brazilian President. Considering that the deadline for the Brazilian President to present his approval/veto is of 15 business days, it is correct to state that the Substantive Provisions will come into upon the approval/veto of the changes to MP No. 959/2020 or September 17, 2020, whichever occurs earlier.

- **ANPD**

Decree No. 10,474/2020 (Decree) was published on August 27, 2020, approving, among others the internal structure and the regulatory framework of the ANPD.

Pursuant to the LGPD, ANPD will be part of the Federal administration and bound to the Executive Office of the Brazilian President. The two main bodies of ANPD are:

1. The Board of Directors (Board), the top executive body, composed of 5 members, including the Chairman, with normative, investigatory and corrective powers;
2. The National Data Protection and Privacy Council (Council), a consulting body, composed of 23 members chosen among representatives of different bodies of the public administration, the Legislative Branch, the Judicial Branch, and entities representing civil society organizations.

As per the Decree, the first ANPD officials will be appointed based on a reapportionment of the budget of the Ministry of the Economy, and the Brazilian President will have authority to appoint the Board and

Council members. As already provided in the LGPD, the term in office of the Board members will be of 4 years (provided that the first Board members will have a term in office of 2, 3, 4, 5 and 6 years), and the term in office of the Council members will be of 2 years, reelection being permitted once. As three Council members have already been appointed (the representatives of the Ministry of the Public Prosecution, the Chamber of Representatives and the Senate), an open point is whether or not the appointment of these members shall be ratified by the Brazilian President in order to remain effective. Except for such three Council members, no other ANPD official has been appointed so far.

The Decree will come into force together with the publication of the appointment of the Chairman of the Board by the Brazilian President. According to the LGPD, during the 2 years following the beginning of the ANPD activities, it may be converted by the Executive Branch in an independent regulator.

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BLOG

Ontario Government Seeks Input for Private Sector Privacy Legislation

September 01, 2020

Written by Stephen Burns, Michael Whitt, Ruth Promislow and Kees de Ridder

Ontario's Ministry of Government and Consumer Services recently announced that it is contemplating new private sector privacy legislation (PSPL) to govern how businesses collect, use and disclose customers' data. The Ministry is seeking feedback from Ontarians to address key issues in this new privacy framework. The deadline for public commentary is October 1, 2020.

Background

Ontario already has privacy legislation that applies to government institutions and specific health care providers. Currently, Ontario does not have its own PSPL applicable to commercial organizations. For the time being, Ontario relies on the federal *Personal Information Protection and Electronic Documents Act*, which applies provincially where there is no substantially similar provincial PSPL. Alberta, Quebec and British Columbia have their own PSPLs. In addition to these provincial and federal counterparts, Ontario will be looking to the European Union's General Data Protection Regulation (GDPR) for guidance.

The Ministry has identified eight key areas for the new legislation to address:

Posted on: August 19, 2020

B.C. COURT OF APPEAL WEIGHS IN ON LEGAL REPRESENTATION IN CRT PROCEEDINGS

By: C. Nicole Mangan

A recent Court of Appeal decision, *The Owners, Strata Plan NW 2572 v. Booth*, 2020 BCCA 153 ("*Booth*") illuminates the tension between the exclusive jurisdiction of British Columbia's Civil Resolution Tribunal ("CRT") over certain disputes and an insurer's duty to defend.

The Facts:

Strata council members are tasked with helping maintain a strata corporation's common assets and property for the benefit of all owners. These duties can cause conflicts between council members and residents or owners of a strata. Most strata corporations carry directors' and officers' liability insurance policies that often respond to provide a defence to council members or the strata corporation when disputes escalate to litigation.

The CRT is a unique forum that has been operating in BC since July 13, 2016 with exclusive jurisdiction over a variety of strata matters. Its process relies on an electronic communication model that delivers online dispute resolution services. The CRT's governing legislation creates a tension between an insurer's duty to defend and the CRT process because s. 20 of the *Civil Resolution Tribunal Act* (the "*Act*") requires parties to represent themselves unless they meet the requirements of specific exceptions to this rule. Two exceptions are where the other party has legal representation or the parties agree a lawyer can represent a party.

In *Booth*, owners Verna and George Booth commenced a CRT claim against The Owners, Strata Plan NW 2572 (the "Strata") over $700 in repairs to a sun room which they claimed the Strata was obligated to pay. Another $300 for CRT related costs was also sought along with $25,000 for six years of "loss of enjoyment of life, threats, abuse and stress." The Strata's D&O policy responded, counsel was appointed to defend the claim, and the lawyer filed a "Representation Request" seeking to represent the Strata in the CRT proceedings.

The Ruling:

The CRT denied the Representation Request ("the Decision") for a variety of reasons, including: the Booths refused to agree to the representation and did not have counsel; there was "nothing exceptionally unusual

1. **Transparency**: How much detail organizations must provide to individuals about how their information is being used.
2. **Consent**: How individuals can give and revoke consent for the handling of their data.
3. **Right to be forgotten**: How individuals can request for their information to be deleted or de-indexed.
4. **Portability**: How individuals can migrate their data between organizations.
5. **Enforcement**: How the new PSPL can be enforced, such as by orders and fines.
6. **De-identification**: How personal information can be de-identified, and how such de-identified data may be used.
7. **Scope**: Whether, in addition to commercial organizations, the new PSPL should apply to non-commercial organizations, such as not-for-profits, charities, trade unions and political parties.
8. **Data trusts**: How data can be shared between organizations, unlocking the value of such data for new purposes in the public interest.

What We Know So Far

Ontario's new PSPL will not be a one-size-fits-all solution. The Ministry has suggested that it will develop different strategies for small, medium and large organizations. In other words, tech industry giants may be subject to different rules than a small local business with an online shop. This is good news for small- and medium-sized enterprises, many of which were forced by COVID-19 to offer services online for the first time.

Ontario's Information and Privacy Commissioner will likely be responsible for administering the new PSPL, as it already does for other privacy legislation in Ontario. This is consistent with the approach taken in other provinces.

The Ministry's request for feedback emphasizes that the new PSPL is to be a "made-in-Ontario solution for today's privacy challenges, one that suits Ontario's size and complexion, and will nurture innovation for Ontario businesses, associations and other organizations." This suggests that the new PSPL may depart from similar legislation in Alberta, B.C. and Quebec. Entities operating in multiple jurisdictions should carefully consider how they can concurrently abide by all applicable PSPL.

Bennett Jones would be pleased to help you navigate Canada's complex framework of privacy legislation. If you would like to learn more, please contact the authors of this post.

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or complex about the subject-matter", the purposes of the *Act* should not be "gutted" by routinely granting requests; and the terms of private insurance contracts could not be relied on to contract out of legislative requirements. The Decision noted that nothing prevented counsel from providing advice and assistance by: giving legal advice on the issues in dispute; organizing the Strata's evidence; and, preparing its submissions.

The Strata applied to the British Columbia Supreme Court for judicial review of the Decision. The application was dismissed. The Court noted the $25,000 sought involved issues that could make it "particularly important" to have counsel defend the claim, however, it accepted that assistance could be provided without formal legal representation in the CRT proceedings. The ability to access legal advice caused the Court to conclude the Strata was not deprived "of counsel's assistance or the benefits of its insurance policy in any significant way." The Strata appealed.

The Court of Appeal allowed the appeal. In doing so, the Court focused on the Decision's reasoning and concluded it failed to recognize that the most significant portion of the claim involved damages for tort claims as opposed to a simple claim for strata related repairs. This raised potential jurisdiction issues, along with issues of tort law and vicarious liability, which could make legal representation very appropriate. The Court, in its analysis, was also critical of the suggestion that a "limited retainer" format was sufficient for two reasons. First, it gave the appearance of the CRT circumventing the *Act* in what was described as "a wink and a nod" to the issue of whether a party was truly represented by counsel and, further, resulted in a lawyer's work product being provided without any recognition of the source. Second, it created the illusion that the delivery of a submission, as opposed to the preparation and content of it, was what ultimately influenced decision makers. This false illusion meant parties were not, in fact, on a level playing field if one was "represented" in the background while the other was not. Finally, the Court noted it had not, in the context of this appeal, been asked to "address the constitutionality" of the *Act* imposing limits on a party's right to legal representation. The Representation Request was sent back to the CRT for re-consideration.

Practical Considerations:

While the issues raised in *Booth* are ripe for further litigation, insurers need to balance how to fulfill any duty to defend within the constraints of the current law in BC. Submitting Representation Requests remains critical, but the permitted scope of any "limited retainer" if the request is denied is now in doubt. Careful consideration of these issues will be important when handling any CRT claim. Underwriters are well advised to consider whether policies covering claims that are potentially within CRT jurisdiction need to clearly account for restrictions imposed by law on the insurer's ability to provide a defence.

If you have any questions or would like further information, please contact C. Nicole Mangan at nmangan@rbs.ca.

September, 2020

LAW ON FINANCIAL PORTABILITY COMES INTO FORCE

The Rule of the Law No. 21,236, on Financial Portability (the "Rule"), was published today in the Official Gazette, which sets the beginning of the validity of the latter.

The Rule's main provisions can be summarized as follows:

1. The "financial products or services" definition is specified, excluding savings or investments products or services (term deposits, savings accounts, etc.);

2. The financial portability request can be made either on a physical or digital manner, and the initial required providers (the current providers) shall both verify the identity of the requestor and to keep backups for at least as long the financial portability process is in place;

3. The providers shall keep financial portability forms at their clients' disposal, pursuant to the minimum content set forth in the Rule;

4. The providers shall also make available a section in their websites, informing the channels by means of which other providers (the prospective new creditors) may request them the issuance of both liquidation and stamp tax payment certificates, for purposes of the portability process;

5. It is regulated the initial providers' obligation to provide digital copies of the appraisals and title deed due diligences that may have been performed on the collateral, if any, and the obligation to keep at least digital copies of the same for as long as the security remains granted in their favor;

6. The portability offer's content is determined, which among other things, allows the client to make an expedite comparison between its current products' conditions and the conditions of the new offered products. The format of this offer is set forth in the Rule;

7. It is set that the minimum validity of the portability offer is 7 banking business days as from its issuance;

8. It is specified that the prospective new providers can, at all times, reject the contracting, even after the offer is accepted, based on an objective reason, pursuant to Law No. 19.496 and its rules;

9. It is set that the mandate for products termination, granted by the client to the new provider by its sole acceptance of the portability offer, is gratuitous and shall have a 3 month-validity, although it will expire if the assignment has been fulfilled before expiring such term;

10. It is set a whole special procedure related to block and termination of products, delivery of balances in favor of clients and others;

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

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11. Regarding portability with subrogation (i) it is set a maximum term of 6 banking business days for the new provider to make the relevant payment to the initial provider; (ii) it is specified that it is solely applicable to loans that may be terminated by its mere payment; (iii) it is specified that is solely applicable to securities, not guarantees; (iv) special rules are established for contracts with a general security clause, and (v) the evidence of special credit subrogation is regulated in detail, for the purposes of the relevant registries.

12. The situation of the insurances related to credits subject to portability is specified, and

13. The financial portability with the same provider is regulated.

Both the Law of Financial Portability and its Rule come into force on this date.

2. First Unconditional Approval Granted to Merger Filing Involving VIE Structure-related Concentration of Undertakings

Authors: Chen MA | Da SHI | Xiao GUO

On July 16, 2020, the Anti-Monopoly Bureau of the State Administration for Market Regulation ("**SAMR**") granted **unconditional approval** for the concentration of undertakings arising from a joint venture established between Shanghai Mingcha Zhegang Management Consulting Co., Ltd. and Huansheng Information Technology (Shanghai) Co., Ltd. (the "**Mingcha Zhegang case**"). The approval decision was published on SAMR's website on July 22. SAMR, in granting unconditional approval, is seen as having indicated its position that concentrations of undertakings which involve variable interest entity ("**VIE**") structures can also be reviewed and cleared. In the future, merger filings involving VIE structures may become a "new normal"; so far, however, leading Internet companies in China, which typically have VIE structures, have not been seen making merger filings.

Han Kun has received many inquiries from enterprises since the Mingcha Zhegang case was accepted for merger review on April 20, 2020. Below, we will share our observations in response to five common questions.

What makes transactions involving VIE structures so special? Why was widespread interest aroused when the case was accepted for merger review and approval granted?

As is widely known, VIE structures represent a legal gray area under Chinese foreign investment law. Before the institutional reform in 2018, rumors circulated that the Ministry of Commerce, then the competent review and approval authority for merger filings, was unwilling to approve transactions involving VIE structures, thus indirectly recognizing the legitimacy of VIE structures. The rumors seemed to be verified by several cases, for example: Sina's proposed acquisition of Focus Media[2] was aborted because it failed to pass antitrust review; and Wal-Mart's acquisition of Yihaodian[3] was granted conditional approval which prohibited Wal-Mart from engaging in value-added telecommunications services through a VIE structure operated by Yihaodian.

Following the 2018 institutional reform, it is generally believed that SAMR is relatively more motivated and capable of resolving issues related to antitrust reviews of VIE structure-related transactions. In the Mingcha Zhegang case, SAMR clearly disclosed in a simple case publicity form that the transaction involved a VIE structure, signaling to the public that enterprises may file VIE structure-related transactions with SAMR.

[2] According to reports, in 2009, Sina finally abandoned the plan to acquire Focus Media because it failed to obtain approval from the Ministry of Commerce for the transaction. Insiders speculated that the reason the Ministry of Commerce delayed acceptance of the declaration of concentration of undertakings was because the transaction involved VIE-structured parties. See: http://companies.caixin.com/2009-06-10/100052619.html; http://tech.163.com/09/0929/16/5KD1LO69000915BF.html.

[3] In 2012, the Ministry of Commerce conditionally approved Wal-Mart's acquisition of 33.6% equity in Niuhai Holdings (i.e. Wal-Mart's acquisition of Yihaodian). According to the Ministry of Commerce's decision for this case, Walmart would obtain control over online direct sales (without involving a VIE structure) to Yihaodian after the transaction was completed, but would be prohibited from engaging in value-added telecommunications services operated by Yishiduo through the VIE structure.

What does the approval of the Mingcha Zhegang case imply? What factors need to be considered going forward when evaluating whether to make a merger filing for a VIE structure-related transaction?

The approval of the Mingcha Zhegang case increases certainty when making a merger filing for VIE structure-related concentrations of undertakings.

It was popularly believed that transactions involving VIE structures would be subject to a high degree of uncertainty if submitted for antitrust review. Thus, in practice, parties to a VIE structure-related concentration of undertakings transaction would adopt various methods to circumvent antitrust review by preventing the transaction from constituting a notifiable transaction, such as by making a concession in control rights to avoid the transfer of control or by other methods. However, regardless of the method, this approach could increase transaction costs or cause the transaction parties not to fully realize their original transaction objectives.

SAMR, in granting approval for the Mingcha Zhegang case, will undoubtedly bring major benefits to prospective parties to VIE structure-related transactions, because the parties can consider retaining transaction structures which permit the transfer of control and obtain antitrust clearance. Despite the convenience the Mingcha Zhegang case may bring, transaction parties should still keep in mind that the filing process, once initiated, could require considerable time and effort and could also delay the transaction, depending on the circumstances. Thus, transaction parties should account for the time required for the merger filing and review process when designing their transaction timelines.

After the Mingcha Zhegang case, will SAMR only focus on competition aspects of a concentration of undertakings and not other compliance aspects? How should such uncertainties be resolved?

In our understanding, SAMR will focus on competition aspects when reviewing concentrations of undertakings, but this does not mean that SAMR will forgo reviewing other compliance aspects of the transaction. According to the *Notification Form for Anti-trust Review of Concentration of Undertakings*, the filer must still explain “the compliance information of the transaction and of the parties to the concentration in China.” Specifically, “the compliance information of the transaction” means “information regarding whether the transaction complies with PRC laws, regulations, rules, and relevant regulations and policies,” and “compliance information of the parties to the concentration in China” means “information regarding whether the parties to the concentration and their affiliates have any pending issues or compliance issues related to entity establishment, operation management, foreign investment approval and industry admittance supervision in China.”

It can thus be seen that filers need to make truthful disclosures to SAMR, regardless of whether the proposed transaction itself or an undertaking to the concentration involves a VIE structure. Among the two, SAMR will more likely challenge a proposed transaction which itself involves a VIE structure as opposed to transactions such as the Mingcha Zhegang case, which involved a VIE-structured undertaking. This is because a VIE-structured transaction could be used to bypass foreign investment restrictions. Note that this conclusion is merely theoretical in nature and remains to be confirmed in practice.

Regarding the uncertainty of compliance issues arising from a transaction itself, when designing a transaction involving a VIE structure, the following factors can be comprehensively considered in determining the final transaction structure and filing with SAMR where the circumstances constitute a notifiable transaction:

1. whether a transfer of control is necessary to realize the purpose of the transaction;
2. whether the transaction meets the merger filing thresholds;
3. the transaction schedule;
4. the competition implications of the transaction;
5. the impact of potential penalties on the validity of the transaction and the reputation and economic interests of the transaction parties, such as fines and revoking of the transaction;
6. the willingness of other transaction parties, etc.

If a transaction encounters insurmountable obstacles during the antitrust review, the filers may consider withdrawing the filing and altering the transaction structure to an extent that no longer requires a filing (for example, the relevant party abandons control), so as to complete the transaction as originally planned.

The Mingcha Zhegang case, a simple procedure filing, took 88 days to complete, why did it take so much longer than the average for simple procedure filings?

The Mingcha Zhegang case took 88 days from case acceptance until SAMR granted unconditional approval, which is far longer than the average review time for simple procedure filings of about 15 days. Does this mean that the review of concentrations of undertakings that involve VIE structures will not be treated normally?

It is understood that the delay in the case review process was mainly due to competition issues, rather than VIE issues. According to the case publicity form, two relevant markets were defined in the case, the "Chinese catering industry information technology application product and service market" and "Chinese catering service market." However, it seems that both these relevant markets could be further segmented, considering the fairly ambiguous boundaries of the "Chinese catering industry information technology application product and service market" and the scope of the "Chinese catering services market" exceeds that defined in case precedents[4]. Furthermore, a third party may have raised objections during the publicity period, which would have caused the simple case to enter a second phase of review.

What future changes will Mingcha Zhegang case bring to the transactions market?

After the Mingcha Zhegang case was placed on file and publicized, we observed that companies have closely watched the development of the case. Besides traditional merger and acquisition transactions,

[4] For example, in the case of "Yum China Holdings Co., Ltd.'s acquisition of equity in three companies including Huang Jihuang Group (Hong Kong) Co., Ltd." publicized in 2019, the relevant market was defined as "hot pot catering services," a segment further divided from "catering services."

investors participating in the financing of emerging companies, which rarely involved filings in the past, are also raising requests for antitrust transaction terms. Another reason for companies to attach greater importance to antitrust filings is due to a proposed increase in penalties for failure to file notifiable transactions, which are raised to 10% of an undertaking's prior year revenue in a draft amendment to the Anti-Monopoly Law.

Although no new concentrations involving VIE structures have been filed for merger review within the last 88 days after the filing of the Mingcha Zhegang case, we expect that there will be increased and increasingly diverse filings involving VIE structures, to the extent that VIE structure-related filings may even in the near future become a "new normal." However, it remains unclear and to be further observed how SAMR will handle cases where transaction parties fail to file notifiable transactions due to VIE issues, especially those which have been reported and are under investigation.

As mentioned above, we expect the SAMR's unconditional approval of the Mingcha Zhegang case to soon bring significant and positive changes to the transactions market, considering the Anti-Monopoly Bureau has achieved remarkable results in accelerating the review of concentrations of undertakings in recent years and because normal review and clearance of VIE structure-related filings will assist enterprises in reducing transaction costs and better realizing their transaction objectives.

Brigard Urrutia

Differential criteria for awarding small-scale miners' concessions

The new draft decree sets differential requirements for the granting of concession contracts to small-scale miners.

07 September of 2020

Following to the mandate of the constitutional court judgment C-389 of 2016, the Ministry of Mines published for comments a draft decree that aims to add a section to Chapter 4 "Mining Formalization" of Title V of Part 2 of Book 2 of Decree 1073 of 2015 - Single Regulatory Decree of the Administrative Sector of Mines and Energy , establishing the differential requirements for the award of concession contracts to small-scale miners and beneficiaries of return of areas for mining formalization.

Thus, the decree contains provisions that directly impact:

a. Natural or legal persons who are Small-Scale Miners and do not have a mining title;
b. Beneficiaries of Return areas for mining formalization;
c. Interested parties with requests in process of proposals for concession contracts, legalization or formalization of traditional mining and special reserve areas; and
d. Beneficiaries of special reserve areas delimited or declared, who opt for the conversion of their applications.

Small-scale Miners will be understood as those: (i) carrying out mining works in an area of no more than 100 hectares; and (ii) with maximum annual production within the following parameters:

Mineral	Underground mining	Open Pit Mining
Coal (Ton/year)	Up to 20,000	N/A
Construction Materials (M3/year)	N/A	Up to 10,000
Metallic minerals (Ton/year)	Up to 22,000	Up to 35,000
Non-Metallic minerals (Ton/ year)	Up to 16,000	Up to 20,000
Precious metals (gold, silver and platinum) (Ton/year) or (M3/ year)	Up to 10,000 Ton/ year	Up to 165,000 M3/ year
Precious and semi-precious stones (m3/ year)	Up to 6,000	N/A *

This classification will also apply to beneficiaries of return areas for formalization.

With regard to the procedures for: (i) proposals for a concession contract; (ii) legalization or formalization of traditional mining; (iii) special reserve area; and (iv) beneficiaries of delimited or declared special reserve areas, interested parties may choose to continue the procedure under which such requests were submitted, or to benefit from the provisions of the decree (conversion procedure). The conversion will involve submitting a new proposal for a differential concession contract.

Among the requirements to apply for a differentiated concession contract by Small Scale Miners and Area Return Beneficiaries for formalization, we find:

1. Technical Annex, which should include (i) the minimum exploratory program, (ii) labor and environmental suitability; and (iii) the estimate of the minimum investment required for exploration (contracts commencing at the operating stage shall submit the investment estimate based on the financial flows of the current operation).

2. Accreditation of economic capacity, in accordance with the differential criteria issued by the National Mining Agency in development as provided for in article 22 of Law 1753 of 2015.

The differential concession contract shall be granted in the exploration stage with advance operation, with a term of 3 years, which may be extended for 2 years, and for one time only, provided that the request for extension is duly justified, and is made with no less than 3 months before the expiry of the initial period, on the understanding that to carry out construction and assembly and exploitation activities, the titleholder must obtain approval of the technical annex and the small-scale environmental license.

The benefits derived from the subscription of differentiated concession contracts under this new regime are:

(a) Comprehensive technical accompaniment by the mining authority; and

(b) Differential control and surveillance.

Please refer to the following link to consult the draft decree
https://www.minenergia.gov.co/documents/10192/24231815/030920_170920_Decreto+Requisitos+Diferenciales+versi%C3%B3n+Agosto+25+2020.pdf/2eceedf4-2e47-4086-81f3-818d2bcca079

For more information contact our team info@bu.com.co

COSTA RICA

REGULATION TO TITLE II OF THE CORPORATE CRIMINAL LIABILITY ACT, NO. 9699

Sep/2020

On June 04, 2020, the President Costa Rica, Carlos Alvarado, signed the Regulation to Title II of the Corporate Criminal Liability Act, No. 9699 of June 10 of 2019, called "Optional Model of Organization, Crime Prevention, Management and Control".

This became official on August 26, 2020, with its publication in the Official Journal La Gaceta. The Regulation promotes and provides guidance for the establishment by legal entities of the "Optional model of organization, crime prevention, management and control" to mitigate their criminal liability. This Regulation will be applicable to the legal entities indicated in article 2 of Law 9699.

The Regulation addresses important aspects such as:

● Items that the legal entity should consider in the risk assessment.
●Due diligence of business partners that are related with the legal entity.
●Crime prevention policy.
●Tasks of the person in charge of the Model.
●Sanctions.
●Monitoring and evaluation of the Model.
●Necessary aspects for the elaboration of the Model.

At Arias we remain at your disposal in case you have any questions on this subject. Do not hesitate to contact our specialized team at German.Rojas@ariaslaw.com and Felipe.Oreamuno@ariaslaw.com.

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GIDE
GIDE LOYRETTE NOUEL

New rules governing the posting of workers in France

7 August 2020

In Community law, the rules on the posting of workers within the scope of service provisions, governed by Regulations (EC) no. 883/2004 of April 29, 2004 and (EC) no. 987/2009 of September 16, 2009, and Directive 96/71 of December 16, 1996, were last amended by the Posted Workers Directive (EU) no. 957 of June 28, 2018, the provisions of which were to be transposed into national law by July 30, 2020 at the latest. As regards French law, this transposition was carried out by way of a Government Ordinance no. 2019-116 of February 20, 2019, with an entry into force on July 30, 2020, and was completed by Decree no. 2020-916 of July 28, 2020 relative to posted workers and the fight against unfair competition, also effective on July 30, 2020.

It must be noted that the provisions resulting from the transposition ordinance do not apply to road transport companies, which shall continue to be governed by the former provisions of the French Labor Code while awaiting the entry into force of the reform of the European road transport sector (known as the "*Mobility Package*") adopted by the European Parliament on July 8, 2020.

- Clarification of temporary worker posting situations in France

Henceforth, the following case scenarios are governed by Article L.1262-2 of the French Labor Code on posting rules: (i) the situation where a company that carries out a temporary work activity established outside national territory temporarily seconds employees to a user company established on national territory; and (ii) the situation where this same company temporarily seconds employees **to a user company that is established outside national territory and temporarily carries out an activity on national territory**.

In application of the amended Article L.1262-2-1 of the French Labor Code, with effect from July 30, 2020 this second category of user company is now required to inform, prior to the posting, the temporary work company (*i.e.*, the employer of the employee(s) posted to the former) "*of its intention to second these posted employees to France*", as well as "*the rules that apply to these employees*" –these rules were listed and defined by Decree on July 28, 2020. In particular, this list comprises the information relative to the expected duration of the temporary workers' posting in France, to the formalities to be fulfilled prior to the posting, and to the list of documents to be kept in France, as well as the content of the "*core provisions*" to be complied with throughout the posting, including the reference to the collective agreements and collective bargaining agreements applicable during the posting.

- Reinforced "*core provisions*" of law, collective bargaining agreements and collective agreements applicable to posted workers in France

Article L.1262-4 of the French Labor Code already provides for "***core provisions***" for which the rules of the host State –legal rules, as well as those of the collective bargaining agreement and the collective agreements applicable to the industry concerned– must be applied to the posted workers in the same conditions as for local workers.

This principle has been maintained and extended through the transposition of the June 28, 2018 Directive to:

- **remuneration, in the broad sense**, as defined by Article L.3221-3 of the French Labor Code, which not only includes minimum salary set forth by law or collective agreement (already stipulated in the core provisions), but also salary-related items also set forth by law or collective agreement. Equitable remuneration set forth by law or collective agreement thus includes salary, bonuses of all sorts, allowances and any other benefit paid, in cash or kind, based on the job position held;
- **professional expenses**, as the employer is henceforth required to ensure that the posted worker benefits from the same treatment as workers regularly employed in France in terms of "*reimbursement of professional expenses incurred by the posted worker and corresponding to specific costs inherent to his/her duties or job, during the performance of his/her mission, in relation to travel, meals and accommodation*". Such reimbursement of professional expenses cannot be taken into account to determine if equality of remuneration is complied with, unlike lump-sum secondment allowances.

In order to avoid a circumvention of the distinction made between lump-sum secondment allowances taken into account as part of remuneration and expense refunds not taken into account as part of remuneration, the July 28, 2020 Decree specifies that when the employer does not substantiate the payment of all or part of the specific secondment allowance or of expenses effectively incurred as a result of the posting, the entire allowance must be considered a reimbursement of professional expenses and therefore be excluded from remuneration.

- Limitation of posting in time, with exclusive application of "*core provisions*"

The June 28, 2018 Directive created **a new category of "*long-term*" posted workers**: if the posting lasts **more than 12 months**, as of the 13th month not only are the posted workers subject to the core provisions, but also to **all the provisions of the French Labor Code** applicable to companies established in France, with the exception of those regulating the performance, transfer and amendment of the employment contracts (except as regards rules on telework, which remain applicable) and the termination of indefinite-term and fixed-term employment contracts, as well as cheques and simplified working papers (*chèques et titres simplifiés de travail*).

The 12-month duration of the posting is assessed:

- on the basis of a given job position, and not per posted worker. Hence, in the event that a posted worker replaces another on a same job position, the duration of the posting will be calculated by adding together the duration of the posted workers having held the same job position;
- by taking into account the posting periods already carried out on the date of the Directive's transposition, i.e. on July 30, 2020.

The last paragraph of amended Article L.1262-4 of the French Labor Code provides for the possibility of requesting **an extension of the "*short-term*" posting period**, with the application only of the core provisions up to 18 months (*i.e.*, six months more), "*where justified by the performance of the service*" and "*upon submitting a well-reasoned declaration to the administrative authority prior to expiry of the 12-month period*". This request must be filed via the SIPSI online service and must mention the length of the requested extension, together with the reason therefor.

As a transition, it is provided that where the length of the posting reached 12 months before July 30, 2020 or in the fifteen days thereafter, the extension can be sent up to **August 30, 2020**, knowing that the employer is considered as benefitting from this extension during that time frame.

- Mitigation of previously increased sanctions with notion of bona fide of the person having committed the breach

The June 4, 2019 Decree passed in application of the law no. 2018-771 of September 5, 2018 for the freedom to choose one's professional future had notably increased the amount of the administrative fines in case of breaches of posting obligations (set at €4,000 per posted worker concerned and €8,000 in case of repeated offences within a period of two months) and had broadened the causes for sanction by way of fines as a result of the enactment (including, since July 30, 2020, non-compliance with the obligation to submit a well-reasoned declaration to request a posting extension over and above 12 months).

The Ordinance for the transposition of the June 28, 2018 Directive mitigates the increasingly heavy sanctions, by integrating the notion of **bona fide of the person having committed the breach**, in order to determine and individualize the amount of the administrative fines that can be applied pursuant to Article L.1264-3 of the French Labor Code.

- Adjustment of posting formalities

Various articles mentioned in the regulatory section of the French Labor Code relative to posting formalities were adjusted by the July 28, 2020 Decree, in order to take into account the evolutions resulting from the Ordinance for the transposition of the June 28, 2018 Directive and those linked to the SIPSI online service.

The main modifications include:

- replacing the obligation to provide a copy of the posting declaration to the prime contractor or the user company with the obligation to provide the **posting declaration's acknowledgment of receipt**;
- adding the posting declaration acknowledgments of receipt to the host company's staff register instead of copies of said declarations;
- giving the employer the possibility to cancel the posting declaration or to modify the posting dates directly via the SIPSI online service.

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Hong Kong's new Limited Partnership Fund regime

28 August 2020

Through the unveiling of the Limited Partnership Fund (LPF) regime, Hong Kong makes clear its intention to join the Cayman Islands and Luxembourg as a viable alternative for Asia-focused asset managers seeking fund domicile.

The Hong Kong Government passed the Limited Partnership Fund Bill on July 9, 2020, with the new LPF regime set to take effect on August 31, 2020. The LPF regime is the product of collaboration by asset managers in Hong Kong and the Hong Kong Government, and it has been designed with the goal of cementing Hong Kong as Asia's leading private equity hub.

While much fanfare has been made by certain industry voices about the new fund regime, it should probably be tempered until more is known, especially in light of the global economic conditions brought on by the COVID-19 pandemic and the regional civic uncertainty. In the short term, it is anticipated that the Cayman Islands and Luxembourg will remain as the "gold standard" for fund managers valuing the certainty and stability commensurate of robust and well-established investment funds laws and courts.

That being said, it is hard to ignore the key incentives aimed at Hong Kong-based fund managers who are willing to bring their funds onshore – especially in light of the increased regulatory and registration requirements introduced by the Cayman Islands and other offshore jurisdictions in 2019 and early 2020. Perhaps most notably, there is speculation surrounding imminent changes to the tax treatment of carried interest. In a 2020-21 budgetary speech, the Financial Secretary of Hong Kong announced the government's intention to provide tax concessions on carried interest. Currently, performance fees or carried interest attributable to fund managers are treated as taxable profits, since the disposition of fund assets generally constitutes a transaction in the nature of trade, though this is a facts and circumstances standard. A two-tier tax regime applies to taxable profits: 8.25% for partners in a partnership on their respective *pro rata* shares of the first HKD 2 million of assessable tax and 16.5% on any amounts thereafter.

Furthermore, Hong Kong does not currently tax capital gains. While there has been speculation over whether carried interest will be treated as capital gains for tax purposes, it is too early to draw conclusions with certainty. The Hong Kong Government may institute a reduction in rates present under the existing two-tiered tax rate structure or limit the scope of the tax exemptions to certain qualifying transactions. Nevertheless, the future tax concession remains the single most compelling economic reason to-date for a Hong Kong-domiciled investment vehicle and could spur a frenzy of fundraising activity in Hong Kong, depending on the degree of the concession.

The terms of the carried interest tax concession are currently in the consultation stage, which is set to end September 4, 2020. We will publish a separate client alert outlining the final details of the concession once it has been passed into law.

Below are some high-level takeaways from the LPF regime, as currently constructed:

Structure and Governance:

- *Structure:* LPFs will be traditional limited partnerships with a General Partner and a minimum of one Limited Partner, whereby the General Partner will assume unlimited liability for the debts and obligations of the partnership (nothing new here compared with other regimes globally). The General Partner must appoint an Investment Manager, and may appoint itself as Investment Manager if it meets certain criteria (more on the Investment Manager registration requirements below). The LPF will not have a legal personality, and the General Partner and Limited Partners will be afforded freedom to contract (e.g., negotiate partnership agreement terms and side letters).
- *Legal Statute and Registration:* The legal statute governing the LPFs will be the Limited Partnership Fund Ordinance (LPFO). LPFs will be required to register with the Registrar of Companies (RoC), an application to which must be submitted in person by a Hong Kong law firm or Hong Kong-qualified solicitor.
- *Accounting Treatment:* There will be no limitations on the use of certain accounting methods, which will promote continuity across funds for sponsors and streamline investor reporting.
- *Dissolution:* LPFs may be dissolved voluntarily. If the General Partner declares bankruptcy, dissolves, or otherwise ceases to be the General Partner of the LPF, if there is not a replacement designated within 30 days, the LPF will automatically dissolve. In each of the foregoing cases, the General Partner must provide notice to the RoC within 15 days of dissolution.

Key Constituents and Duties:

- *Investment Manager:* Any person or entity, whether the General Partner or otherwise, deemed to be the Investment Manager must obtain a license to conduct Type 9 asset management activity from the Hong Kong Securities and Futures Commission (SFC), as specified under Section 114 of the Securities and Futures Ordinance.
- *AML/CFT Appointee:* The General Partner must appoint a “responsible person” to carry out Anti-Money Laundering (AML) and counter-terrorist financing measures, which is a requirement established by the LPFO. This role may be occupied by a variety of institutions

and professionals, including SFC-registered entities, banks, and legal professionals.

- *Key Operational Obligations:* The fund sponsor must maintain compliance with the LPFO and comply with RoC inquiries. The RoC has broad regulatory authority over LPFs and their operations. The LPF must also maintain a registered office in Hong Kong and a Hong Kong business registration, as specified under the Business Registration Ordinance. Additionally, the LPF must appoint a third-party fund administrator to oversee NAV calculations and certain other investor services.

While a great deal of uncertainty remains, there are reasons for cautious optimism surrounding the new LPF regime, which is due in no small part to the Hong Kong Government's clear willingness to heed advice from Hong Kong fund sponsors and other stakeholders. It remains to be seen whether global alternative asset managers and investors will embrace Hong Kong funds or stick to what they know. Only time will tell if Hong Kong will gain global prominence or go the way of other ambitious, regionally-focused jurisdictions.

As always, we will continue to monitor global fund formation trends and developments, and provide updates in real time.

In particular, look out for our next alert when the Limited Partnership Fund Ordinance comes into force on 31 August 2020. We will be looking at the LPF regime in more detail with commentary focusing on efforts being made to enhance Hong Kong's position as a family office/private wealth hub.

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16th August 2020

Subject: <u>Scheme for Faceless Income Tax assessment and appeals</u>

Prime Minister's announcement of 13th August 2020 comprises of reforms in respect of following four broad areas of work of Income Tax department:

1. Taxpayer's Charter,
2. Faceless Assessment Scheme,
3. Expansion of scope of reporting of transactions (SFT), and
4. Faceless Appeals Scheme.

Key features and highlights of these are being given below.

2. <u>Taxpayer's Charter:</u>

2.1 A Taxpayer Charter has been announced which was promised in the budget speech of 2020. It makes following commitments to taxpayers and expectations from the taxpayers-

2.2 Income Tax Department's commitment to taxpayers:

- To provide fair, courteous, and reasonable treatment,
- To treat taxpayers as honest,
- To provide mechanism for appeal and review,
- To provide complete and accurate information,
- To provide timely decisions,
- To collect correct amount of tax,
- To respect privacy of taxpayers,
- To maintain confidentiality,
- To hold its authorities accountable,

- To enable representative of choice,
- To provide mechanism to lodge complaint,
- To provide a fair & just system,
- To publish service standards & report periodically, and
- To reduce cost of compliance.

2.3 Income Tax Department's expectations from taxpayers:

- **Be honest and compliant –** Taxpayers are expected to honestly disclose full information and fulfil his compliance obligations.
- **Be informed –** Taxpayers are expected to be aware of their compliance obligations under tax law and seek help of department if needed.
- **Keep accurate records** - Taxpayers are expected to keep accurate records required as per law.
- **Know what the representative does on his behalf –** Taxpayers are expected to know what information and submissions are made by his authorised representative.
- **Respond in time –** Taxpayers are expected to make submissions as per tax law in timely manner.
- **Pay in time –** Taxpayers are expected to pay amounts due as per law in a timely manner.

3. <u>Faceless Assessment Scheme:</u>

3.1 Objectives of the Scheme:

- Introducing team-based assessments,
- Eliminating physical interface between the taxpayer and tax officers, and
- Imparting greater efficiency, transparency, and accountability.

3.2 Key features of the Scheme:

Two notifications bearing Numbers 60 and 61 of 2020 have been issued by CBDT on 13th August 2020 in this regard. The key features of the Scheme are -

- All territorial jurisdictions of the assessing authorities have been abolished.
- Instead a National E-Assessment Centre (NEAC) and 30 Regional E-Assessment Centres (REACs) have been set up each headed by a Chief Commissioners and comprising of various Principal Commissioners and other officers. The NEAC and each REAC will have jurisdiction across the country.

- Each REAC will have four units: Assessment Unit (AU), Verification Unit (VU), Review Unit (RU) and Technical Unit (TU). Each of these will be headed by a Principal Commissioner.
- Returns of income will be selected for scrutiny only through Computerised system using Data Analytics and Artificial Intelligence.
- NEAC shall issue notices electronically to the taxpayers whose returns are selected for scrutiny specifying the issues for selection of the return.
- All notices to taxpayers shall be issued centrally online through NEAC only. These will carry a unique Document Identification Number (DIN). No physical notice will be issued by any officer otherwise than through NEAC.
- The NEAC shall assign the selected returns for e-assessment under this Scheme to an Assessment Unit in any REAC through an automated allocation system.
- Assessment notices/ questionnaires for obtaining further information, documents or evidence from the taxpayer or from any other person in respect of the returns so selected will be sent by the Assessment Units of the concerned REAC online to NEAC for issue to the taxpayer or the concerned third party.
- Taxpayers will be required to provide replies to notices/ questionnaires online to NEAC. There will be no physical interface with taxpayer and no requirement to visit income tax offices.
- Replies provided by taxpayers will be examined by the concerned Assessment Unit. Wherever necessary it may request the NEAC for obtaining additional document or information. NEAC will in turn issue notice online to the taxpayer calling for the same and provide it to the Assessment Unit.
- Wherever any enquiry or verification by Verification Unit, and/ or technical assistance from the Technical Unit becomes necessary the NEAC will assign the enquiry to Verification Unit or Technical Unit of any REAC across the country through an automated allocation system and provide its report to the concerned Assessment Unit.
- Assessment orders will be drafted by teams of officers of the Assessment Unit of the concerned REAC based on the material so coming on record and will be sent online to NEAC.
- The NEAC will examine the draft assessment order in accordance with the risk management strategy of the Board. It may either accept the draft and send it to taxpayer, *OR* send it to the taxpayer with a notice proposing modification

and providing opportunity to him to counter the proposed modification, *OR* assign the draft assessment order to a Review Unit in any other REAC through an automated allocation system for reviewing the draft order.

- The draft orders so referred will thereafter be reviewed by Review Unit in a different REAC. Where the Review Unit proposes modification of the draft assessment order a further opportunity will be granted to the taxpayer by the NEAC online and the assessment order will be finalised taking into account the response of the taxpayer.
- In a case where a modification is proposed in the draft assessment order, the taxpayer may seek personal hearing before an Income Tax authority in any Unit under this Scheme. The Chief Commissioner of the concerned REAC may permit oral hearing. The hearing will take place exclusively through video conferencing, including use of any telecommunication application software in accordance with the procedure laid down by the Board.
- All final assessment orders demand notices/ refunds, and penalty notices will be issued to the taxpayers online by NEAC only.
- In cases where the taxpayer fails to comply with any of the notices issued by NEAC it will refer the matter to the Assessment Unit for completing the assessment the best of its judgment under section 144 of the Income Tax Act based on material available on record.
- Penalty proceedings wherever initiated as part of the assessment orders will also be completed in the same manner.
- Thus, the assessment notices, draft assessment orders, and final orders in the same case will be prepared by officers in different REACs, which may be even in different cities.
- Online information relating to high value transactions coming to the Department via Statements of Financial Transaction (SFT) will be assigned to Verification Unit (VU) of different REACs through computerised systems for verifications.
- Powers of conducting surveys at business premises under section 133A of Income Tax Act have been withdrawn from all officers and have been assigned exclusively to Director Generals (Investigation) and Chief Commissioners (TDS).

3.3 Exceptions:

The Scheme will not apply to cases of -

- Search and seizure, major tax frauds/evasion assigned to Central Circles,

- Cases of International Tax Division, and
- Cases under the Foreign Black Money Act & the Benami Property Act.

4. <u>Expansion of scope of reporting of financial transactions:</u>

Section 285 BA of Income Tax Act requires certain entities to file Statements of Financial Transactions (SFT) above certain amounts online with Income Tax department. The existing list of these transactions is proposed to be expanded to include the following types of transactions/ expenses:

- Payment of educational fee /donations above INR 1 lakh per annum,
- Payments relating to electricity consumption above INR 1 lakh per annum,
- Expenses on domestic business class /foreign air travel above certain amount,
- Payment to hotels above INR 20,000/-,
- Purchase of jewellery, white goods, paintings, marble, etc. above INR 1 lakh,
- Deposit or credits in current account with banks above INR 50 lakh,
- Deposits or credits in other bank accounts above INR 25 lakh,
- Payment of property tax above INR 20,000/- per annum,
- Payment of Life Insurance premium above INR 50,000/-,
- Payment of Health insurance premium above INR 20,000/- and
- Sale of foreign exchange above INR 10 lakh.

Besides the above, the existing reporting requirements for transactions of investments in mutual funds, credit card transactions, immovable properties, etc. are also being rationalised.

A formal notification in this regard is yet to be issued.

5. <u>Faceless Appeals:</u>

Under the Income Tax Act first appeals against the Assessment Orders can be filed before the concerned Commissioner (Appeals). The procedure for disposal of these appeals is being changed under the Faceless Appeal Scheme which will be implemented from 25th September 2020.

5.1 Key features of the Scheme:

- The territorial jurisdictions of Commissioner (Appeals) will be abolished. Instead they will have country-wide jurisdiction in respect of appeals falling under the Faceless Appeals Scheme.

- Pending as well as new appeals will be randomly allotted by a computerised process to any Commissioner (Appeals) anywhere in the country.
- The identity of the Commissioners deciding an appeal will remain unknown.
- Appeal documents as well as submissions will be filed by Appellants online. There will be no need to visit the Income Tax Office or the Commissioner deciding the appeal.
- In appropriate cases oral hearing may be permitted on the request of the Appellant. Such hearings will take place exclusively through video conferencing in accordance with the procedure that may be laid down by the Board.
- The appellate decisions will also be team-based & will be reviewed by a different Commissioner before issue of appeal orders.

Full particulars of the appeal procedure under this Scheme are yet to be notified.

5.2 Exceptions:

The Scheme will not apply to cases of:

- Search and seizure, major tax frauds/evasion assigned to Central Circles,
- Cases of International Tax Division, and
- Cases under the Foreign Black Money Act & Benami Property Act.

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SKRINE

High Court considers the powers of a corporate representative to remove directors of companies

11 September 2020

In **Low Thiam Hoe & Anor v Sri Serdang Sdn Bhd & Ors [2020] 10 MLJ 137**, **[2020] 4 CLJ 618**, the Hight Court dismissed an originating summons whereby the plaintiffs had challenged the validity of board meetings and extraordinary general meetings ("**EGM**") which were held by the defendant companies to remove the plaintiffs as directors. In doing so, the Court gave guidance on the powers of a corporate representative under Section 147(3) of the ***Companies Act 1965*** and indirectly the new replacement Section 333 of the Malaysian ***Companies Act 2016***.

Key points

- A corporate representative's power is not limited to attending and voting in meetings.
- After reviewing previous Malaysian court decisions, and a 2019 Hong Kong Court of Appeal case, the Court observed that shareholders had an unfettered discretion to remove directors.

Background

On 16 July 2019, the board of directors of the holding company passed a resolution to, amongst others, remove the 1st and 2nd plaintiffs as directors of the subsidiary companies. In order to effectuate the removals, the resolution also stated that the holding company's corporate representative was "*…authorised and empowered to do all acts and things and take all such steps as may be considered necessary to give full effect to the removal and appointment in the abovementioned companies and in all matters relating thereto.*" As such, the 6th defendant, who is the corporate representative of the holding company, signed four (4) requisitions (i.e. one for each of the subsidiary companies) to convene EGMs to, amongst others, remove the plaintiffs as directors of the subsidiary companies.

On 8 August 2019, an EGM was held for the 1st subsidiary company. The 6th defendant attended the EGM on behalf of the holding company. The resolution removing the plaintiffs as directors of the 1st subsidiary company was passed at the EGM. As for the 2nd, 3rd and 4th subsidiary companies, EGMs were convened on 26 August 2019. The 6th defendant attended these EGMs and resolutions were passed to remove the 1st plaintiff as a director of these subsidiary companies.

Decision

In dismissing the originating summons, the High Court held that a corporate representative was not restricted from requisitioning EGMs. The plaintiffs argued that as the certificate of authority, through which the 6th defendant was appointed as the corporate representative of the holding company, was granted pursuant to Section 147(3) of the ***Companies Act 1965***, and that the extent of the corporate representative's powers were therefore, confined solely to this provision.

Section 147(3) of the ***Companies Act 1965*** states: "*A corporation may by resolution of its directors or other governing body – (a) if it is a member of a company, authorize such person as it thinks fit to act as its representative, either at a particular meeting or at all meetings of the company or of any class of members; or (b) if it is a creditor (including a holding of debentures) of a company, authorize such person as it thinks fit to act as its representative either at a particular meeting or at all meetings of any creditors of the company, and a person so authorized shall, in accordance with his authority and until his authority is revoked by the corporation be entitled to exercise the same powers on behalf of the corporation as the corporation could exercise if it were an individual member, creditor or holder of debentures of the company.*"

Section 333 of the Malaysian ***Companies Act 2016*** reads as follows:

"*(1) If a corporation is a member of a company, the corporation may by resolution of its Board or other governing body authorize a person or persons to act as its representative or representatives at any meeting of members of the company.*

(2) If the corporation authorizes only one person, the person shall be entitled to exercise the same powers on behalf of the corporation as the corporation could exercise if he was an individual member of the company.

(3) If the corporation authorizes more than one person as its representative, every one of the representative is entitled to exercise the same powers on behalf of the corporation as the corporation could exercise if every one of the representative was an individual member of the company.

(4) If the corporation authorizes more than one person and more than one of the representatives purport to exercise the power under subsection (3)-

(a) if the representatives purport to exercise the power in the same way, the power is treated as exercised in that way; or

(b) if the representatives do not purport to exercise the power in the same way, the power is treated as not exercised.

(5) A certificate of authorization by the corporation shall be prima facie evidence of the appointment or the revocation of the appointment, as the case may be, of a representative under this section."

The High Court rejected this argument as the 6th defendant acted pursuant to a resolution by the holding company, authorising and empowering him to carry out the necessary steps to give effect to the removal of the plaintiffs as directors of the subsidiary companies. In this regard, the High Court distinguished the earlier Court of Appeal case of ***Kwang Hung Cheong & Anor v Zung Zang Trading Sdn Bhd [2018] 10 CLJ 517***, where the corporate representative in that case did not receive such authorisation, and was therefore held to only be able to act within the authority conferred by Section 147 of the ***Companies Act 1965***.

Importantly, the High Court held that "*[e]qually important is that Section 147 does not proscribe a corporate representative from doing any other act which the company may authorise him to perform. Therefore, s.147 does not preclude a corporate representative from performing any act that is not within the powers or authority prescribed by that Section.*"

In addition, the High Court also rejected the plaintiffs' contention that the defendants had not exercised their powers for a bona fide purpose. The High Court held that the plaintiffs' allegation of lack of bona fide, predicated in the main, upon the bases given for the alleged invalidity of the convening of the EGMs and the resolutions passed, were not made.

Furthermore, the High Court opined that the "expedited process and the alacrity in which the plaintiffs were removed as directors" do not alone show a lack of bona fide. However, most importantly, the High Court rejected the argument of lack of bona fide on the ground that powers conferred to shareholders are unfettered, and are permitted, by resolution, to remove any or all of the directors from office without having to assign a reason for so doing.

In coming to its judgment, the High Court followed the recent Hong Kong Court of Appeal case of ***Yeung Bing Kwong Kenneth v Mount Oscar Ltd [2019] HKCU 2413***, which held:-

'*The power given to the shareholders is unfettered and may be used for a number of aims. It allows shareholders to remove directors who are performing poorly, as well as those acting competently and within their powers but in a way that may be contrary to the wishes of the shareholders. This is an apparently "tough mandatory rule" that allows the shareholders by ordinary resolution at any time to remove any or all of the directors from office without having to assign a reason for so doing*'.

Comment

The High Court's decision is useful on two (2) counts. Firstly, it gave guidance on the powers of a corporate representative under the Malaysian ***Companies Act 1965*** and ***Companies Act 2016***. Secondly, the Learned High Court Judge, Darryl Goon JCA, after reviewing a series of High Court decisions, gave guidance on the power of shareholders to remove directors, and whether such removal must be in the interest of the company.

In this regard, Darryl Goon JCA citing the recent Hong Kong Court of Appeal case of ***Yeung Bing Kwong Kenneth v Mount Oscar Ltd [2019] HKCU 2413***, opined as follows:-

"*The Hong Kong Court of Appeal also observed that as the statutory right to remove a director was unqualified, there was no requirement that reasons be provided for a director's removal or the director to be given a right to be heard.*"

Our Leong Wai Hong, Anita Natalia and Alya Hazira acted as counsel for the 1st to 7th Defendants.

www.skrine.com

August, 2020

Termination of the suspension of legal terms and periods before the Ministry of Environment and Natural Resources

On August 24th, 2020, the Ministry of Environment and Natural Resources ("SEMARNAT") published, in the Official Gazette of the Federation, a Resolution ending the suspension of the legal terms and periods before SEMARNAT, implemented as a preventive measure due to the COVID-19 pandemic.

In virtue of the above, as of August 24, 2020, all of the legal terms and periods will be resumed for the purposes of administrative proceedings filed before SEMARNAT and its decentralized entities, subject to the following dates and hours:

I. The Department of Wildlife and the Department of the Federal Maritime Terrestrial Zone will be open for filings from 9:30 hours to 14:00 hours on Mondays and Wednesdays in SEMARNAT's central offices, located at Av. Ejército Nacional No. 223, Col. Anáhuac, Demarcación Territorial Miguel Hidalgo, C.P. 11320, in Mexico City (the "Information's Office").

II. Filings before the following Departments shall be submitted from 9:30 hours to 14:00 hours on Tuesdays and Thursdays at the Information's Office:
   a. General Direction of Environmental Impact and Risk Impact;
   b. General Direction of Comprehensive Management of Risky Activities and Materials;
   c. General Direction of Air Quality Management and Registry of Emission and Transfer of Pollutants; and
   d. General Direction of Forestry and Soil Management.

III. Filings before SEMARNAT's Representative Offices in each of the states of Mexico shall be submitted from 9:30 hours to 14:00 hours on Tuesdays, Wednesdays and Thursdays.

IV. Filings before the General Attorney's Office of Environment Protection shall be submitted from 9:00 hours to 16:00 hours from Monday to Friday, with respect to the following administrative proceedings:

a. PROFEPA-03-010. Approval of testing laboratories and certification units.
b. PROFEPA-03-005. Review, evaluation, and as the case may be, certification of new vehicles at plant, related to the compliance with Mexican official standards: NOM-042-SEMARNAT-2003, NOM-044-SEMARNAT-2017, NOM-076-SEMARNAT-2012, NOM-079-SEMARNAT-1994 and NOM-082-SEMARNAT-1994, respectively.
c. PROFEPA-02-001-A. Obtainment of an Environmental Certificate. Modality A. Environmental Audit, without having an action plan.
d. PROFEPA-02-001-C. Obtainment of an Environmental Certificate. Modality C. Environmental Audit, having an action plan.
e. PROFEPA-02-002-A. Renewal of an Environmental Certificate. Modality A. Renewal for filing an Environmental Assessment.
f. PROFEPA-02-002-B. Renewal of an Environmental Certificate, Modality B. Renewal for filing an Environmental Assessments, with respect to the compliance with the Mexican Standard NMX-AA-162-SCFI-2012.
g. Regarding inspections, surveillance and verification actions in connection with works and activities considered as essential by the health authority, all legal terms shall be counted up to the issuance of the final award, provided that social distancing measures are observed.
h. Proceedings on appeals, replacements of sanctions, amendment and revocation requests are resumed.

V. Filings before the National Commission of Natural Protected Areas shall be submitted from 9:30 hours to 14:00 hours on Tuesdays and Thursdays at SEMARNAT'S central offices.

VI. Filings before the National Water Commission shall be submitted from 10:00 hours to 15:00 hours from Monday to Friday at its central office located in Mexico City and at the corresponding regional Basin Authority or at the corresponding Local Direction.

VII. Filings before the National Agency of Industrial Safety and Environmental Protection of the Hydrocarbons Sectors (ASEA) shall be submitted from 10:00 hours to 14:00 hours on Tuesdays, Wednesdays and Thursdays, with respect to filings to be handled by the Industrial

Management Unit, Industrial Supervision, Inspection and Surveillance Unit and ASEA's Legal Unit.

Notwithstanding the above, with respect to all of the administrative proceedings that were filed electronically, the applicant may choose to continue monitoring it electronically or in person, as they deem appropriate.

This Resolution entered into effect on August 24^{th} and will remain valid until September 30, 2020.

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

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Simpson Grierson

September 14, 2020 | 4 min read

A High Court decision, released last week (*Coromandel Watchdog of Hauraki v Minister of Finance & Others* - see here [PDF]**) illustrates how an important aspect of NZ's overseas investment regime works – the "benefit to NZ" test.**

This case was a judicial review proceeding, brought in relation to the consent given to Oceana Gold (under the Overseas Investment Act 2005) to acquire land in Waihi, for use as a tailings dam.

The Overseas Investment Act stipulates that an overseas person cannot acquire "sensitive land" without consent given under the terms of that Act. The overseas person seeking consent must, among other things, satisfy the benefit to NZ test. The requirements for that test are set out in the Overseas Investment Act and Regulations, and are presented as a series of potential benefits that might be shown – there is no concept of countervailing negative factors to balance against the identified benefits. Decision-makers (whether the OIO or the Minister of Finance) must stick strictly to what is set out in that statute, and cannot introduce other considerations.

The Coromandel Watchdog of Hauraki argued that the Minister of Finance should have considered the potential environmental impact of the proposed use of the land in question, as a tailings dam, as a "dis-benefit" to NZ, and then off-set this factor against the other positive factors presented in support of the benefit to NZ test.

The statute does not permit that approach. Whether or not the benefit to NZ test is satisfied involves "a search for benefits", according to the prescribed list. It is not a process of weighing up what might otherwise feel like the relevant pros and cons of the wider issue. So while a dis-benefit might be said to exist, consideration of that matter is not part of the statutory test, and so cannot be considered by those considering a consent application (unless it directly impacts on one of the listed factors, ie is part of the measure of the "benefit" claimed). This principle of the overseas investment regime is generally well understood, but now reiterated by the High Court.

Same outcome under upcoming reforms to the Overseas Investment Act

Upcoming reforms to the Overseas Investment Act, if passed, would not change the outcome of the Coromandel Watchdog's case.

The reforms (set out in the Overseas Investment Bill No. 3) include some changes to the benefit to NZ test, but the fundamentals will remain. There will still be a prescribed set of factors for decision-makers to consider, but the list will be shorter and the factors will need to be considered proportionately to the sensitivity of the land. There will still be a limited ability to consider a dis-benefit but only insofar as that matter directly affects one of the listed factors. There will not be a general ability to introduce a wholly new negative factor to balance against the positive factors, as was sought by the Coromandel Watchdog.

The Overseas Investment Bill No. 3, which includes these changes, is mid-way through the enactment process. Its future will depend on the outcome of the October general election.

Supreme Court Interim Rules on Remote Notarization of Paper Documents **August 2020**

This is a briefing on *Supreme Court Administrative Matter No. 20-07-04-SC (2020 Interim Rules on Remote Notarization of Paper Documents)* dated July 14, 2020[1] *("RON Rules")*, a COVID-19 related issuance. In general, signatories of documents to be notarized have to appear before the notary generally at the latter's place of business. Quarantine rules, however, have made this difficult, and the contacts that take place in the notarization process can expose participants to added infection risk. The RON Rules seek to address these concerns.

A. Scope and Application

The RON Rules govern the notarization of paper documents and instruments with handwritten signatures or marks through the use of video conferencing facilities in cases where the notary public or at least one of the principals resides, holds office, or is otherwise situated in a locality that is under "community quarantine"[2] due to COVID-19. Notarial wills are excluded from the application of the RON Rules.[3]

The RON Rules will take effect on August 16, 2020, 15 days after their publication in the Philippine Daily Inquirer and the Philippine Star, two newspapers of national circulation, on August 1.[4]

B. Procedure for Notarization

The RON Rules sets out the procedure for the performance by notaries public of notarial acts by videoconferencing facilities.

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[1] *Supreme Court Administrative Matter (A.M.) No. 20-07-04-SC (2020 Interim Rules on Remote Notarization of Paper Documents)* dated July 14, 2020; http://sc.judiciary.gov.ph/12490/; *last accessed at 4:50 PM on August 4, 2020.*

[2] *RON Rules,* Rule I, Section 6(h). The term "community quarantine" may refer to "General Community Quarantine, Modified General Community Quarantine, Enhanced Community Quarantine, and Modified Enhanced Community Quarantine."

[3] *RON Rules,* Rule I, Section 2.

[4] *RON Rules,* Rule X, Section 1.

- *Place of Remote Notarization* – All notarial acts under the RON Rules shall be performed by the notary public within the territorial jurisdiction of the court which issued the notary public's commission.[5]

Notarial Act	Presence within Territorial Jurisdiction of Commission
Acknowledgement	The notary public, as well as the principals and the witnesses (as defined below), if any, must be located within the territorial jurisdiction of the notary public's commission during the videoconference required.
Affirmation, Oath, or Jurat	
Witnesses Appearing in the Instrument or Document	
Thumbmark or Other Mark Affixed in Lieu of Signature	
Notary Public Signs on Behalf of Principal	
Copy Certification	The presence of the notary within the territorial jurisdiction of the court which issued his or her notarial commission during the videoconference shall suffice.

- *Evidence of Videoconference* – The notary public must take a photograph or a screenshot of the videoconference clearly showing all parties who participated in the notarial act. The notary public must hold the instrument or document showing the first page of the notarized document. The photograph or screenshot must also have a time and date stamp.[6]

1. Acknowledgement[7]

a. *Submission of Documents* – The person appearing before the notary public whose act is the subject of notarization under the RON Rules (the "*principal*") must deliver the instrument or document to the notary public through personal or courier service. The instrument or document to be notarized will be placed in an envelope sealed with the initials of the principal ("*sealed envelope*"). If the delivery is via courier service, the principal must provide the notary public "with the details necessary to track its delivery," such as the tracking number or air waybill number.

b. *Competent Evidence of Identity* – If the principal is not personally known to the notary public, he or she must provide two copies of any competent evidence of identity[8] to the notary public. These will be placed in the sealed envelope referred to above. If the principal is signing in a representative capacity, the RON Rules specify the documents that the principal will submit in lieu of his or her own competent evidence of identity.

[5] *RON Rules,* Rule VIII, Section 1.
[6] *RON Rules*, Rule VIII, Section 2.
[7] *RON Rules,* Rule II.
[8] *RON Rules,* Rule I, Section 6(b).

c. *Submission of Video Clip* – The principal will submit a video clip showing that he or she signed the instrument or document delivered for acknowledgment to the notary public by storing it in a CD or USB which shall be placed in the sealed envelope referred to above, or by email or any other means of digital communication.

d. *Holding of Videoconference* – Upon receipt of the sealed envelope and video clip referred to above, the notary public will schedule a videoconference with the principal for acknowledgment. During the videoconference, the notary public will, among others:

i. require the principal to confirm his or her location by showing the geolocation through an application with GPS capabilities or identifiable landmarks within the vicinity;

ii. require the principal to affix his or her handwritten signature on a blank piece of paper within the full view of the notary public for comparison with the signature appearing on the instrument or document;

iii. review the video clip submitted by the principal to verify that he or she actually signed the instrument or document; and

iv. require the principal to declare that he or she has executed the instrument or document as his or her free and voluntary act and deed, and if acting in a particular representative capacity, that he or she has authority to sign in that capacity. If there are other persons within the immediate vicinity of the principal, the notary public shall ask them the reasons for their presence and require them to leave if the notary public is not satisfied with the given reasons.

2. Affirmation, Oath, and Jurat[9]

a. *Submission of Documents* – The principal delivers the instrument or document to the notary public through personal or courier service in a sealed envelope, similar to the procedure for acknowledgment as discussed in part B.1.

b. *Competent Evidence of Identity* – If the principal is not personally known to the notary public, he or she must provide two copies of any competent evidence of identity[10] which will be placed together with the instrument or document, in the sealed envelope.

c. *Submission of Video Clip* – The principal will also submit a video clip showing that he or she signed the instrument or document delivered for affirmation, oath, and jurat to the notary public, similar to the procedure for acknowledgment as discussed in part B.1.

d. *Holding of Videoconference* – Upon receipt of the sealed envelope and video clip referred to above, the notary public will schedule a videoconference with the principal for the affirmation, oath, or jurat. The procedure is similar to that for acknowledgement, except that during the videoconference, the notary public will:

i. require the principal to confirm that he or she has read the instrument or document in its entirety and has understood all its contents;

[9] *RON Rules*, Rule III.
[10] *RON Rules,* Rule I, Section 6(b).

ii. require the principal to confirm that the signature appearing at the end of the instrument belongs to him or her and that it was voluntarily affixed for the purposes stated therein; and

iii. require the principal to avow to the whole truth of the contents of the instrument or document under penalty of law.

3. Copy Certification[11]

a. *Mode of Delivery of Instrument or Document* – The principal must deliver the instrument or document to the notary public through personal or courier service in a sealed envelope, or send a photograph or scanned copy of the instrument or document via email.

b. *Procedure* – Upon receipt of the instrument or document, the notary public must determine if it can be copy certified. If so, the notary public will schedule a videoconference with the principal to perform the copy certification in accordance with Rule VI of the RON Rules.

4. Other Procedures

a. *Witnesses* – In addition to the procedures set out for acknowledgement, affirmation, oath, or jurat of instruments or documents, as discussed in parts B.1. and B.2., instruments or documents which bear the signatures of parties who acted as witnesses to the execution thereof shall also comply with Rule IV of the RON Rules.

b. *Thumbmark or Other Marks in Lieu of Handwritten Signature* – The principal may affix a thumbmark or other marks in lieu of a handwritten signature by following the procedure set out in Sections 1 and 2 of Rule V of the RON Rules.

c. *Notary Public Signs on Behalf of Principal* – The notary public may sign on the principal's behalf under the circumstances set out in Section 3 of Rule V of the RON Rules.

C. <u>Other Matters</u>

1. Costs and Fees[12]

The principal will shoulder all expenses in connection with the remote notarization. The principal may pay the notarial fee through electronic remittance, bank transfer, or any other means agreed upon by the parties. The notary public may waive the fee in whole or in part.

2. Retrieval of Documents[13]

After the notary public performs a notarial act under the RON Rules and the corresponding fees have been paid, the principal will retrieve the notarized documents either personally or by courier service.

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[11] *RON Rules,* Rule VI.
[12] *RON Rules,* Rule VII.
[13] *RON Rules,* Rule VII, Section 2.

SyCipLaw's Litigation and Arbitration Department

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SyCipLaw's Litigation and Arbitration Department has a wide-ranging litigation practice in virtually all court levels — from the municipal trial courts and the regional trial courts, to the Court of Appeals and the Supreme Court, as well as in various administrative agencies. The department also has a very extensive arbitration practice, being involved in foreign arbitration, international commercial and other domestic arbitration, and construction arbitration.

SyCipLaw is ranked by Chambers Asia-Pacific, Asia Pacific Legal 500, and Asialaw Profiles as a top-tier and highly recommended law firm for dispute resolution, arbitration, and litigation.

Other COVID-19 related bulletins

The links to our earlier bulletins can be found at the SyCipLaw information hub, https://syciplawresources.com/.

Please note that there are other COVID-19 related government issuances which are not covered by our bulletins. For more information about other regulations, please contact your account partner or sshg@syciplaw.com or info@syciplaw.com.

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5 Things You Need to Know About the Draft Amendments to the PDPA

DENTONS RODYK

September 2, 2020

Earlier this year, the Ministry of Communications and Information and the Personal Data Protection Commission (PDPC) issued the draft Personal Data Protection (Amendment) Bill 2020 which seeks to amend the Personal Data Protection Act (PDPA) (Act 26 of 2012). If passed, this would be the first amendment to the PDPA since it was passed in 2012. Further amendments may be sought to be included in the final Bill which is expected to be presented to Parliament soon.

The proposed amendments include:

1. New: Mandatory Data Breach Notification Requirement

To strengthen protection for individuals and make organisations more transparent when a data breach occurs:

- If the amendments are passed, organisations will now have to notify the PDPC of any data breach which results in or is likely to result in significant harm caused to the individual(s), or if it affects more than a prescribed number of individuals. There is no such requirement at the moment.
- The draft bill defines “Data Breach”, as “the unauthorised access, collection, use, disclosure, copying, modification, disposal of personal data, or the loss of any storage medium or device on which personal data is stored”.
- Notification must be made but no later than 72 hours after the organisation has determined that a notifiable data breach has occurred.
- Organisations would also be required to notify each affected individual who may suffer significant harm as a result of the data breach. There are exceptions to this requirement.

Organisations should institutionalise policies and processes to address scenarios of data breach occurrence (whether suspected or actual). Where possible, organisations should also conduct tabletop exercises during “peacetime” to test an organisation’s familiarity with identifying, detecting, responding and remediating the data breach.

2. New: Liability for Individuals Relating to Egregious Mishandling of Personal Data and Increased Penalties for Non-compliance with the PDPA

To make individuals and organisations who handle or have access to personal data more accountable:

- It is proposed to make individuals liable for egregious mishandling of personal data (e.g. unauthorized disclosure of personal data under the control of an organisation, or unauthorized re-identification of anonymized data). Individuals found guilty of each offence will be liable to a fine not exceeding S$5,000 or to imprisonment for a term not exceeding 2 years, or both.

- However, individuals would not be liable if they are able to prove that the data was publicly available at the time of disclosure, or if the re-identification was for a permitted purpose and the individual had notified the PDPC or the organisation of the re-identification.
- Currently, the maximum financial penalty that may be levied under the PDPA is S$1 million. With the proposed amendments, the maximum financial penalty for data breaches is up to 10% of annual gross turnover, or S$1 million, whichever is higher.

Organisations should review their Personal Data policies and practices and ensure that clear policies and guidelines are provided to every employee. Organisations should ensure that employees understand, internalize and comply with these policies. Policies should also be updated from time to time to reflect changes in the PDPA or the business environment.

Additionally, organisations should strengthen the security of their information systems so as to prevent any unauthorised disclosure of data and/or re-identification of anonymized data by employees.

Organisations need to take a proactive stance in protecting personal data given the heavier penalties that can be imposed.

3. New: Data Portability Obligation

To provide consumers greater autonomy over their personal data, and to allow individuals to switch to new service providers more easily:

- Under the new Data Portability Obligation, an organisation must, at the request of an individual, transmit his/her personal data to another organisation (i.e. data porting).
- An individual may exercise this right if she has an ongoing relationship with the individual, the data is in electronic form, and the data was collected or created by the porting organisation within a specified period before the individual’s request was made.
- The right to have one’s personal data ported is not absolute. There are circumstances under which an organisation may decline to carry out data porting.
- The PDPC can review an organisation's refusal to transmit the individual’s data despite having received a data porting request, the organisation’s failure to transmit the data within a reasonable time, and the fees charged by the organisation to transmit the data.

Organisations should start exploring ways to safely and efficiently transmit an individual's personal data (e.g. in a machine-readable format) and equip itself with the ability to perform data porting.

4. Updated: Meaningful Consent by Individuals

The framework for the collection, use and disclosure of personal data under the PDPA is being enhanced to ensure meaningful consent by individuals:

- The proposed amendments will expand the situations where an individual would be deemed to have given their consent under the PDPA (e.g. consent to disclose an individual's personal data to a third party may be deemed given if disclosure was reasonably necessary to conclude or perform a contract between the individual and organization).

- Individuals could also be deemed to have consented if they have been notified of the purpose for which their personal data will be collected, used or disclosed, but failed to opt-out within a reasonable period.
- Organisations would also be able to collect, use and disclose individuals' personal data without their consent in certain prescribed circumstances. For example, where it is in the legitimate interests of the organisation or if it is for business improvement purposes.

Whilst the proposed amendments would be a boon for organisations, obtaining consent from individuals for the collection, use and disclosure should remain as the default since these proposed amendments do not cover all use cases.

5. Updated: Do-Not-Call (DNC) Provisions and Spam Control Act (SCA)

The goal? To address consumer annoyance and provide consumers with greater control over unsolicited marketing messages:

- The updated SCA will now cover commercial text messages sent to Instant Messaging accounts (e.g. Telegram and WeChat).
- The DNC Provisions will be updated to prohibit unsolicited messages from being sent to telephone numbers obtained through the use of dictionary attacks or address-harvesting software.
- Further, the PDPA will also introduce obligations on third-party checkers who are engaged by organisations to check the DNC Register(s) on their behalf.

Organisations who do marketing through instant messaging must now abide by the SCA provisions, and failure to do so may result in financial penalties.

If you have any questions regarding this article, please contact Gilbert Leong.

Dentons Rodyk thanks and acknowledges Senior Associate Desmond Chew, Associate Sherman Poon, and Intern Darryl Lo for their contributions to this article.

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Newsletter

Family Business Succession Planning and Family Matters Series - The critical role played by guardians in family succession planning in light of the “adult guardianship by agreement” amendments to the Civil Code and the Family Act

08/31/2020

Michael T. H. Yang/ Audrey Liao

I. Foreword

When founders or top executives of family businesses are found to have mental disability,

different factions within the family tend to compete with each other for guardianship in order to take control of the family business or property management rights. This type of family succession dispute comes along once in a while, which fully demonstrates the significance of guardianship appointment.

In the middle of 2019, the Legislative Yuan passed the third reading of the “adult guardianship by agreement” amendments to the Civil Code and the Family Act to resolve such practical issues as family members fighting over guardianship or refusing guardianship altogether, or serious delays to guardianship appointment owing to the fact that even courts find family disputes difficult to resolve.

With the most recent amendments as a starting point, this article introduces and reviews the development of Taiwan’s guardianship system, as well as the newly amended articles, relevant procedures and additional measures for adult guardianship by agreement.

II. Adult guardianship by agreement in the Civil Code

1. Definition

“Adult guardianship by agreement” is an agreement whereby a person secures an agreement with his/her appointee that, in the event of the appointer being subject to the order of commencement of guardianship, the appointee agrees to act in the capacity of his/her guardian (Article 1113-2 of the Civil Code), thus replacing guardianship appointment by the *ex officio* order of the court (i.e. the former legal guardianship system). **When the appointer is no longer able to make a declaration of intention, his/her voluntary wishes regarding guardianship appointment, previously made clear, will be respected by the court.**

2. Can an adult guardianship agreement be withdrawn or terminated by the appointer?

To protect the rights of a person subject to the order of the commencement of guardianship, and to prevent situations where the appointed guardian is unfit or the guardianship appointment is not in the best interests of the appointer, the amendments specifically provide that, “before” the court orders the commencement of guardianship, the adult guardianship agreement made by and between the appointer and the appointee may be “withdrawn” by either party at any time. It is explained in the legislative reasons that, as the withdrawal by one party affects the interaction between the signatories as well as the content of the agreement, such withdrawal shall be construed as being undertaken by all signatories.

Additionally, “after” the court orders the commencement of guardianship, the appointer may, with good cause, apply for a court order to “terminate” the adult guardianship agreement. Therefore, after such order, if the appointer temporarily regains the ability to make a declaration of intention, he/she at this point still have the capacity to represent himself/herself in the proceedings, in accordance with Article 14-3 of the Family Act, and accordingly may apply for termination of the adult guardianship agreement. However, to protect the rights and interests of the person subject to the order of the commencement of guardianship, such person shall have good cause if he/she wishes to terminate the adult guardianship agreement (Articles 1113-5(1) and 1113-5(3) of the Civil Code).

3. **The court, in ordering the commencement of guardianship, shall in principle appoint the appointee set forth in the existing adult guardianship agreement as the guardian.**

In the future, when the court orders the commencement of guardianship, and the person subject to such order has an adult guardianship agreement, then the appointee specified in the agreement shall serve in the capacity of the appointer's guardian (Article 1113-4(1) of the Civil Code). However, when the court issues such an order, should there be facts sufficiently showing that the appointed guardian does not serve the interest of the appointer or is unfit for the role, the court may *ex officio* appoint another person for the position (Article 1113-4(2) of the Civil Code).

4. **The conclusion, modification, and withdrawal of an adult guardianship agreement shall be notarized by the notary public.**

It is stipulated that the conclusion, modification, and withdrawal of an adult guardianship agreement shall be notarized by the notary public, who shall give a written notice to the court for the domicile of the appointer within the statutory time frame for it to take effect (Articles 1113-3(1) and 1113-5(2) of the Civil Code).

III. Most recent amendments to the Family Act

The following matters concerning the adult guardianship by agreement have been added to the Civil Code: "After the declaration of the commencement of guardianship of the appointer, he/she may apply for **termination of the guardianship agreement**." (Articles 1113-5(3) of the Civil Code) and "The court may, upon application or *ex officio*, **dismiss the appointee's guardianship**." (Articles 1113-6(4) of the Civil Code). Accordingly, additions have been made to Articles 164 and 165 of the Family Act regarding matters concerning the declaration of commencement of guardianship, including giving permission to terminate the adult guardianship agreement and dismissing the appointed guardian in such an agreement. It is further stipulated that, in the matters of separately appointing or changing the appointment of an guardian and giving permission to terminate the adult guardianship agreement, the appointer subject to a guardianship commencement order shall have the capacity to represent himself/herself in the proceedings so as to safeguard his/her right to proceedings as a subject and right to attend court hearings.

IV. Conclusion: The role of adult guardianship agreement in planning family succession

Regarding family business succession, where a person has no capacity to make juridical acts and has become subject to an order of guardianship commencement, this person shall be represented by his/her guardian & statutory agent in all juridical acts, pursuant to Articles 76 and 1098 of the Civil Code.

If it is the founder or responsible person that has become subject to the order of guardianship commencement, the question of guardianship will have a serious impact on the power balance within and property management of the family. With the Civil Code amendment of adult guardianship by agreement, the founder or responsible person can now prevent future disputes and conflicts between their children and family members by following the foregoing regulations: Voluntarily appoint a guardian in advance, and proceed to conclude an adult

guardianship agreement with notarization. It is noteworthy that, according to the aforesaid regulations, the appointer can have several appointees, each carrying out their designated task. That is to say, the appointer can appoint different persons to carry out different tasks, such as asset management and day-to-day care. The availability of such an option shows respect to the appointer's free will in that he/she gets to make choices and envisage life under guardianship, prevents conflict in the family, and safeguards the appointer's personal rights and interests as well as human dignity to the greatest extent. These advantages reflect the legislative intent of instituting adult guardianship by agreement. Family business leaders are encouraged to make full use of this system.

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BAKER BOTTS

Thought Leadership

SSGA Announces Expectations for Diversity Disclosures

September 1, 2020

Client Updates

As an update to the ever-evolving standards in ESG disclosure, on Aug. 27, State Street Global Advisors ("SSGA") released a letter announcing its expectations for additional disclosures regarding “risks, goals and strategy as related to racial and ethnic diversity” from the companies in which it invests. Its letter lists five target areas for disclosure, as well as a request to describe impediments to recruitment and retention of diverse talent, especially at senior levels of the organization. In setting this standard, SSGA writes, “our primary tool is engagement with management and the board with the objective of understanding a company’s plan and how the board is carrying out its oversight role. However, if required, we are prepared to use our proxy voting authority to hold companies accountable for meeting our expectations.”

These disclosures are already included in ESG reporting at many companies, but may be relevant for companies looking to prepare new ESG disclosures or those taking a fresh look at how they communicate their ESG goals and achievements to investors. SSGA’s disclosure expectations provide a helpful framework not only for discussing racial and ethnic diversity but also for other material ESG factors.

Below is an excerpt of the relevant portions of the letter addressing SSGA’s expected disclosure:

> "**1. Strategy**: Articulate what role diversity plays in the firm’s broader human capital management practices and long-term strategy.
>
> **2. Goals**: Describe what diversity goals exist, how these goals contribute to the firm’s overall strategy, and how these goals are managed and progressing.
>
> **3. Metrics**: Provide measures of the diversity of the firm’s global employee base and board. For example:
>
> - *Workforce* - Employee diversity by race, ethnicity and gender, broken down by industry-relevant employment categories or levels of seniority, for all full-time employees. In the US, companies can use the disclosure framework set forth by the United States Equal Employment Opportunity Commission’s EEO-1 Survey. Non-US companies are encouraged to disclose this information in alignment with SASB’s guidance and nationally appropriate frameworks.
> - *Board Level* - Diversity characteristics, including racial and ethnic makeup, of the board of directors.
>
> **4. Board**: Articulate goals and strategy related to racial and ethnic representation at the board level, including how the board reflects the diversity of the company’s workforce, community, customers and other key stakeholders.

5. **Board oversight**: Describe how the board executes its oversight role in diversity and inclusion.

Further, we ask companies to assess the barriers to entry and impediments to recruitment and retention of diverse talent, especially at senior levels of the organization. We encourage companies to take steps that ensure that diverse talent pools are sourced, supported and developed."

If you have any questions regarding the foregoing or would like to discuss your own ESG disclosures or strategy, please contact the attorneys below or your regular Baker Botts contact.

BLOG POST / PRIVACY & SECURITY LAW BLOG

Technology + Privacy & Security

What Is the Worst Type of Online Privacy Policy ... and Why Does it Matter?

By Christopher Avery

09.09.20

Even if the title is click-bait, this is not a trick question. There is one type of online privacy policy that is objectively worse than all of the others. It does not relate to when it was created, whether it was crafted internally or by an outside expert, or even how much (if anything) you paid to prepare the privacy statement used on your startup's website or mobile app.

The number one worst type of online privacy policy is one that a startup copies and pastes from another online service. Does this really happen? Yes – all the time. Imitation may be the sincerest form of flattery, but some copiers are so egregious that they do not carefully check and remove the references to the other company before posting it to their website.

The biggest problem—and why you should care—about copying someone else's privacy policy is that the commitments and representations made in your privacy policy create a legally enforceable obligation for your company. If the policy you copied says something that you didn't intend or doesn't match with your actual practices, then your startup could still be on the hook for those commitments.

If you fail to abide by the commitments you've made, then you may face potential lawsuits from the Federal Trade Commission, state attorneys general and, in some cases, by plaintiffs' class action lawyers. While you may have copied the policy to save time and money, it may cost you more in the end.

I get it—"they all say the same thing"—so why do I really need my own custom privacy policy? Here's why you need a custom privacy policy.

1. **Your privacy policy represents your values –** What you tell your customers about how you collect, use, and share their personal information reflects the ethos of your company. If you can't take the time to tell your unique privacy story, some customers may rightly be suspect about whether you value their privacy at all.

2. **It is necessary in order to use many third-party online services –** You know those terms and conditions that you clicked through quickly without reading for the analytics service, social media platform, and demand-side advertising platform that you integrated into your website or app? Buried in the fine print of those terms and conditions is likely an obligation that requires your company to post a privacy statement that accurately describes your data collection and use practices.

   Some may even require you to include a disclosure in your policy that is specific to that third-party service provider and include a hyperlink back to their privacy policy or a consumer choice mechanism. If you breach the terms of the agreements you have with these third-party service providers, you run the risk of being suspended or even prohibited from using their services in the future.

3. It is necessary to comply with privacy laws – Depending on the industry you're in, what types of information you collect, and where you do business, there are a variety of different legal requirements that may require your company to publish and maintain an accurate privacy policy. Copying someone else's policy may not account for state law or other obligations. Complying with applicable law is a prerequisite to running a business.

4. People are paying more attention to their privacy – Consumers are growing more interested in how companies collect and use their personal information, especially when their data is shared with third parties for reasons unrelated to providing the requested product or service. A poorly formulated or missing privacy policy tells consumers that your startup isn't paying attention to privacy. Class action lawyers are also paying attention and are willing to take on claims when a consumer contacts them with a privacy issue. Plus some courts are even allowing suits to proceed without any measurable harm to a consumer – just an apparent violation of applicable law. Savvy investors are also paying more attention to privacy, and you don't want a bad privacy policy to stand out in any due diligence.

While it may be tempting to Ctrl+C and then Ctrl+V your startup's privacy policy, you should take care to make sure your policy accurately reflects your company's legal oblications as well as privacy practices and commitments.

The next runner-up to copying someone else's privacy policy is allowing your privacy policy to go stale and drift away from your actual privacy practices or not remain up to date with existing or changing legal obligations. Learn more about the things you should consider when preparing or updating your privacy policy.

ABOUT THE AUTHOR – Christopher Avery is a practicing privacy and data security *attorney who works with companies big and small to elevate their privacy programs and solve their data security challenges. Christopher is also the founder of his own startup, LastLtr.com.*

This article was originally featured as a startup law advisory on DWT.com on September 08, 2020. Our editors have chosen to feature this article here for its coinciding subject matter.

Hogan Lovells

SEC Update

September 11, 2020

This is a commercial communication from Hogan Lovells. See note below.

More investors to be accredited under amended SEC rules

On August 26, the SEC amended its rules under the Securities Act of 1933 to expand the definition of "accredited investor" used for determining eligibility to invest in certain securities offerings exempt from Securities Act registration. The amendments represent some of the most extensive changes to the definition since the SEC adopted the accreditation rule in 1982 as part of Regulation D under the Securities Act.

The amendments add new categories of natural persons and entities to the accredited investor definition and modestly enlarge the scope of some of the existing categories. Notably, the SEC has supplemented the income and net worth tests for accreditation of natural persons with a test for financial sophistication based on a person's professional certifications, designations, or other credentials, or the person's status as a "knowledgeable employee" of a private fund. The SEC also has expanded the list of entities that qualify as accredited investors to encompass entities owning in excess of US$5 million in "investments" and family offices having more than US$5 million in assets under management and their family clients. In addition, the SEC has expanded the definition of "qualified institutional buyer" in Rule 144A under the Securities Act to line up with the expanded accredited investor categories.

The amendments will become effective 60 days after they are published in the Federal Register.

The amended rules are discussed in the SEC's adopting release (No. 33-10824), which is available here.

Significance of accredited investor status

The accredited investor standards are set forth in Securities Act Rule 501(a) for private and limited securities offerings conducted in reliance on Rule 504 or Rule 506 of Regulation D and in Securities Act Rule 215 for exempt offerings made under Section 4(a)(5) of the Securities Act.

Under Rule 504(b)(1), where permitted by applicable state law, limited offerings to accredited investors are exempted from registration and also from the prohibition on general solicitation otherwise applicable under that rule. Sales of securities made solely to accredited investors under Rule 506 are not subject to the information requirements of Rule 502(b), and do not count toward the 35-purchaser limit under Rule 506(b). Private offerings pursuant to Rule 506(c), which allows general solicitation, permit only accredited investors to participate. In addition, an accredited investor in a Rule 506 offering is not subject to the rule's requirement that the investor, either alone or with a purchaser representative, have financial sophistication sufficient to evaluate the merits and risks of the prospective investment.

In its release adopting the amendments, the SEC states that in 2019 issuers raised an estimated US$1.56 trillion of new capital in offerings under Rules 506(b) and 506(c).

Summary of changes to accredited investor definition

The rule changes add new categories to the accredited investor definition and modify some of the existing categories.

New accredited investor categories

New accreditation categories for natural persons. The amendments add two new categories of natural persons who will qualify as accredited investors irrespective of personal wealth or income.

A natural person is accredited under the current rules if the individual has either (1) a net worth (or joint net worth with a spouse) in excess of US$1 million, excluding the value of a primary residence (Rule 501(a)(5)), or (2) an annual income in excess of US$200,000 in each of the two most recent years (or a joint annual income of US$300,000 with a spouse), with the reasonable expectation of reaching the same income level in the current year (Rule 501(a)(6)). In adding the new accreditation tests, the SEC indicates that "relying solely on financial thresholds as an indication of financial sophistication is suboptimal" because it may unduly restrict access to investment opportunities for individuals whose knowledge and experience render them capable of fending for themselves in private offerings.

Under the new rules, natural persons may qualify for accreditation if they fall within either of the following categories:

- *Natural persons holding professional certifications, designations, or other credentials*. The first category, added in a new paragraph (10) to Rule 501(a), permits a natural person to qualify as an accredited investor based on holding in good standing one or more professional certifications, designations, or credentials which the SEC may designate by order from time to time (and will post on the SEC's website), and that demonstrate knowledge and experience in the areas of securities and investing. In making such a designation, the SEC will consider all of the pertinent facts, including in particular a non-exclusive list of attributes with respect to the applicable certification, designation, or credential, such as whether it arises out of an examination or series of examinations administered by a self-regulatory organization or other industry body or is issued by an accredited educational institution.

  In connection with its adoption of the amendments, the SEC initially has designated holders in good standing of the following certifications or designations issued by the Financial Industry Regulatory Authority (FINRA) upon successful completion of qualification examinations identified by series number:

  — licensed general securities representatives (Series 7);

  — licensed investment adviser representatives (Series 65); and

  — licensed private securities offering representatives (Series 82).

  The SEC considered comments on the rule proposal advocating accreditation of holders of a variety of other professional designations, such as certified public accountant (CPA), chartered financial analyst (CFA), and certified financial planner (CFP), as well as certain educational degrees, such as legal or business administration degrees, but concluded that these designations and degrees do not reliably demonstrate an individual's comprehension and sophistication in securities and investing, or have other shortcomings. The SEC also decided not to permit a natural person to self-certify that the person possesses the required financial sophistication to be an accredited investor, citing "the lack of standards applicable to such an approach."

- *Natural persons who are knowledgeable employees*. The second category, added in a new paragraph (11) to Rule 501(a), permits "knowledgeable employees" of a private fund to qualify as accredited investors for purposes of investments in the fund. For purposes of new paragraph (11), private funds, such as hedge funds, venture capital funds, and private equity funds, are those issuers that would be an "investment company," as defined in Section 3 of the Investment Company Act of 1940, but for the exclusion provided by either Section 3(c)(1) or Section 3(c)(7) of that statute. The amendment defines "knowledgeable employee" by reference to Rule 3c-5(a)(4) under the Investment Company Act. That definition includes, among other persons:

  — executive officers, directors, trustees, general partners, advisory board members, or persons serving in a similar capacity of a private fund, or an affiliated person of the fund that oversees the fund's investments; and

  — employees or affiliated management persons of the fund who, in connection with such persons' regular functions or duties, have participated in the investment activities of the fund (or certain other funds or investment companies) for at least 12 months.

The definition expressly excludes employees performing solely clerical, secretarial, or administrative functions. The SEC notes that this category will be similar to the existing category, contained in Rule 501(a)(4), for directors, executive officers, or general partners of the issuer, and reflects the SEC's belief that these persons, by reason of their position with the fund, are likely to have meaningful investing experience and sufficient access to the information necessary to make informed investment decisions with respect to the fund.

New categories of entities. The rule amendments add the following new categories of entities to the accredited investor definition.

- *Entities owning over US$5 million of investments*: A new paragraph (9) of Rule 501(a) adds as an accredited investor any entity (not otherwise expressly included in the definition of accredited investor) that is not formed for the specific purpose of acquiring the securities offered and that owns "investments" in excess of US$5 million. "Investments" for purposes of this catch-all category is defined by reference to Rule 2a51-1(b) under the Investment Company Act. That definition includes, among other items, securities; real estate, commodity interests, physical commodities, and non-security financial contracts held for investment purposes; and cash and cash equivalents. The SEC indicates that new Rule 501(a)(9) is intended to extend accredited investor status to certain federal, state, and local governmental entities and American Indian tribes, as well as to entities organized under the laws of foreign countries. The category also will extend accreditation to forms or types of entities that may be created in the future.
- *Family offices and family clients*: A new paragraph (12) of Rule 501(a) adds as an accredited investor any "family office" as defined in Rule 202(a)(11)(G)-1 under the Investment Advisers Act of 1940 which (1) has assets under management in excess of US$5 million, (2) is not formed for the specific purpose of acquiring the securities offered, and (3) has prospective investments directed by a person with sufficient knowledge and experience in financial and business matters that the family office is capable of evaluating the merits and risks of the prospective investment. Family offices are entities established by families to manage their assets, plan for their families' financial future, and provide other services to family members. A new paragraph (13) of Rule 501(a) accredits any "family client" (as defined in the same rule under the Investment Advisers Act) of such a family office. Family clients generally are family members, former family members, and certain key employees of the family office, as well as certain of their charitable organizations, trusts, and other types of entities.
- *SEC- and state-registered investment advisers*: Expanded Rule 501(a)(1) adds as an accredited investor any investment adviser registered pursuant to Section 203 of the Investment Advisers Act or registered pursuant to the laws of a state, and any investment adviser relying on the exemption from registration with the SEC afforded by Section 203(l) or (m) of the Investment Advisers Act.
- *RBICs*: Expanded Rule 501(a)(1) adds as an accredited investor any rural business investment company (RBIC), as defined in Section 384A of the Consolidated Farm and Rural Development Act. RBICs are companies that have entered into a participation agreement with the Secretary of Agriculture and are intended to promote economic development and the creation of wealth and job opportunities in rural areas. The SEC determined that RBICs should be treated in the same manner as small business investment companies, which share the purpose of promoting capital formation and already qualify as accredited investors under Rule 501(a)(1).
- *Limited liability companies*: Codifying a long-standing SEC staff position, amended Rule 501(a)(3) provides that limited liability companies with total assets in excess of US$5 million are entities that qualify as accredited investors under that paragraph, so long as such entities are not formed for the specific purpose of acquiring the securities offered. Current Rule 501(a)(3) expressly extends accreditation to corporations, Massachusetts or similar business trusts, partnerships, and organizations described in Section 501(c)(3) of the Internal Revenue Code.

Modifications of existing accredited investor categories

The rule amendments also make the following changes to existing accredited investor categories:

- *Spousal equivalents*: Amended Rules 501(a)(5) and (6) provide that, in calculating net worth and income for purposes of evaluating accredited investor status, an investor may aggregate the investor's net worth or income with that of the investor's "spousal equivalent" as well as spouse. A new paragraph (j) of Rule 501(a) defines "spousal equivalent" to mean "a cohabitant occupying a relationship generally equivalent to that of a spouse."
- *Joint net worth*: A new Note 1 to Rule 501(a)(5) states that, for purposes of calculating an individual's "joint net worth" with a spouse or spousal equivalent, assets need not be jointly held to be included in the calculation. The Note also clarifies that reliance on

the joint net worth standard of Rule 501(a)(5) does not require that the securities acquired in the offering be purchased jointly.

- *Look-through*: Under Rule 501(a)(8), an entity qualifies as an accredited investor if all of the equity owners of that entity are accredited investors. A new Note 1 to Rule 501(a)(8) states that, in determining accredited investor status under this paragraph, it is permissible to look through various forms of equity ownership to owners who are natural persons, and that if the natural persons themselves are accredited investors (so long as all other equity owners of the entity seeking accredited investor status are also accredited investors), the entity will be deemed an accredited investor.

Amendment to Rule 215

Rule 215 defines the term "accredited investor" under Section 2(a)(15) of the Securities Act for purposes of Section 4(a)(5) of the Securities Act, which provides what the SEC notes is an infrequently used alternative to Regulation D to exempt from registration the offer and sale of securities to accredited investors. The accredited investor definition in Rule 215 historically has been substantially consistent with, but not identical to, the definition in Rule 501(a). To ensure uniformity in the definition in both rules, the SEC has replaced the existing definition in Rule 215 with a cross-reference to the accredited investor definition in Rule 501(a).

Potential rule changes not adopted

After considering comments on the rule proposal, the SEC expressly declined to modify for inflation the existing financial thresholds for accreditation of natural persons, incorporate geographic-based specific financial thresholds, or extend the definition of accredited investor to all investors advised by a registered investment adviser or a registered broker-dealer.

- *Inflation-adjusted financial thresholds*: The SEC concluded that raising financial thresholds for accreditation to account for inflation could have disruptive effects on the Regulation D market, resulting in a higher cost of capital for some companies. The SEC also highlights developments in addition to inflation—such as increased access to issuer information by a wide range of market participants—which it said should be considered in evaluating the effectiveness of the current net worth- and income-based accreditation criteria.
- *Geographic-specific financial thresholds*: The SEC did not adopt geographic-specific financial thresholds for accreditation of natural persons because of the complexities inherent in implementing such a framework. The SEC speculates that the new accreditation standards might help to mitigate the disparate geographic effects of the long-standing net worth and income criteria.
- *Investors advised by sophisticated third parties*: The SEC decided not to approve accreditation of all investors advised by a registered investment adviser or a registered broker-dealer. The SEC was not convinced that such a standard would be effective to identify investors who possess a level of financial sophistication sufficient to participate in investment opportunities not afforded the additional protections of Securities Act registration.

Changes to "qualified institutional buyer" definition

The SEC has adopted changes to the definition of "qualified institutional investor" in Rule 144A to align it more closely with the revised accredited investor definition.

The definition of "qualified institutional buyer" in Rule 144A(a)(1)(i) is intended to identify investors that, like accredited investors, are sufficiently sophisticated and knowledgeable to fend for themselves in exempt offerings. Rule 144A provides an exemption from the registration requirements of the Securities Act for offers and sales of qualifying securities to qualified institutional buyers, or "QIBs," by certain persons other than the issuer of the securities. With the exception of registered dealers, a qualified institutional buyer must own in the aggregate and invest on a discretionary basis at least US$100 million in securities of issuers that are not affiliated with the investor.

The rule amendments expand the definition of "qualified institutional buyer" to include RBICs and limited liability companies if such entities meet the US$100 million threshold for securities owned and invested. These changes correspond in part to the amendments to Rules 501(a)(1) and 501(a)(3) discussed above. The amendments also add to the list of enumerated qualified institutional buyers any institutional investors included in the accredited investor definition so long as such investors satisfy the US$100 million threshold. These changes are intended to avoid inconsistencies between the types of entities eligible for qualified institutional buyer status and entities that qualify as accredited investors. A new note to Rule 144A(a)(1)(i)(J), however, clarifies that an entity seeking qualified institutional buyer status under that paragraph—unlike an accredited investor seeking qualification as an accredited investor—may be formed for the purpose of acquiring the securities being offered.

Conclusion

As reflected in most of the comment letters described in the adopting release, the expanded scope of the accredited investor definition will be welcomed by many participants in the private capital markets. The SEC does not expect, however, that the rule changes will significantly increase the number of investors eligible to participate in private offerings or the amount of new capital invested by newly eligible investors.

Issuers and financial intermediaries placing exempt offerings will have to take the rule changes into account in updating due diligence procedures and documents they use to verify eligibility of prospective investors as accredited investors or qualified institutional buyers. Market participants that use questionnaires to screen participants in their exempt offerings should revise those questionnaires to reflect the rule amendments. They also should update their forms of subscription agreement and securities purchase agreement, and similar investment contracts, to ensure that representations, warranties, and certifications regarding investor status accurately reflect the new definitions.

This SEC Update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed on the following page of this update.

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