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BUSINESS REORGANIZATION & RESTRUCTURING DIGEST

Business Reorganization & Restructuring Digest focuses on exploring recent legal developments, trends and emerging issues in notable North American, European and cross-border restructurings.

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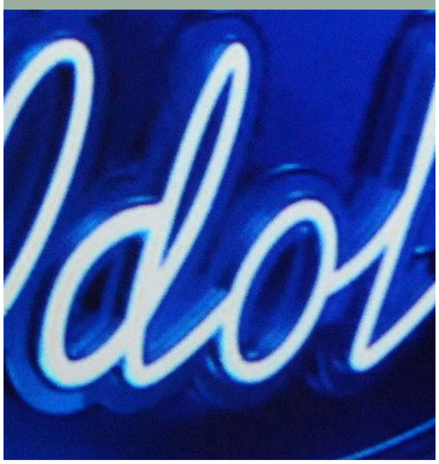
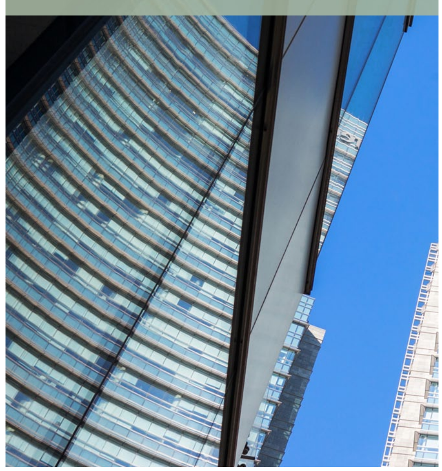
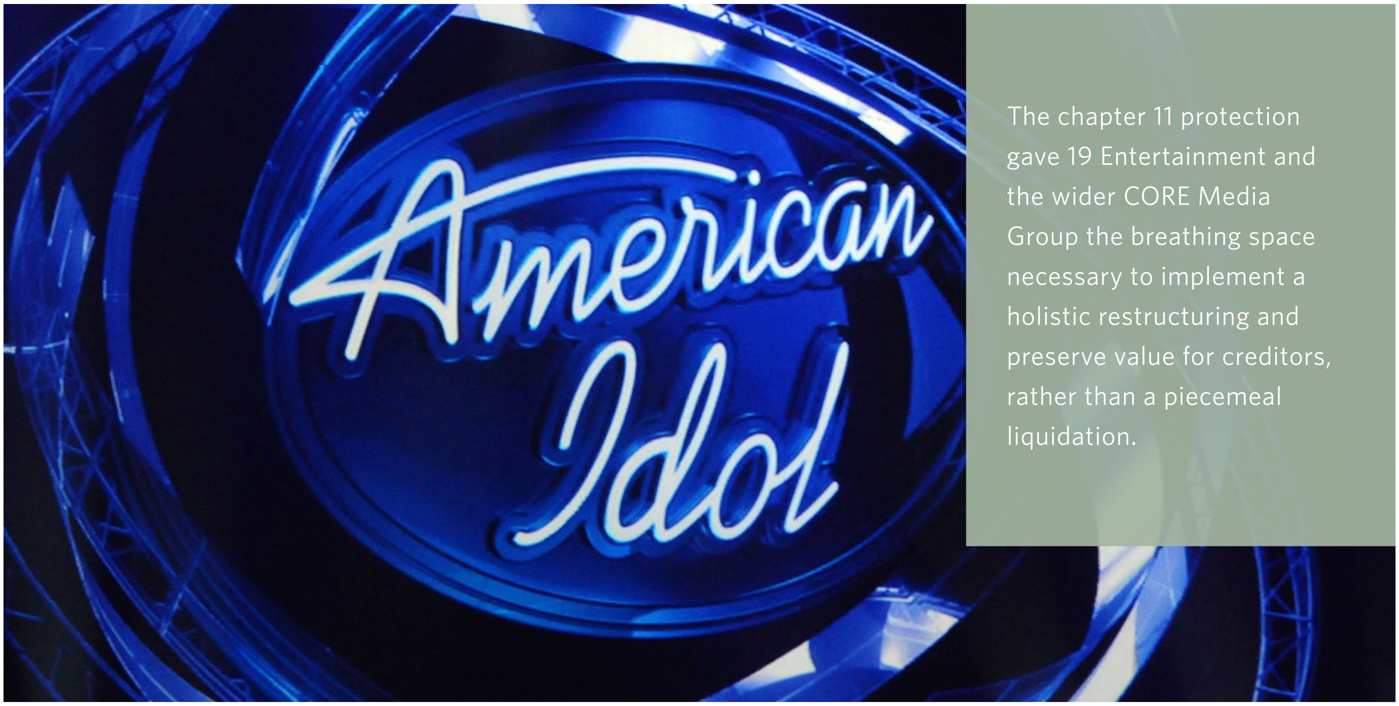






The chapter 11 protection gave 19 Entertainment and the wider CORE Media Group the breathing space necessary to implement a holistic restructuring and preserve value for creditors, rather than a piecemeal liquidation.

NORTH AMERICA/EUROPE

Precedent-Setting Restructuring of CORE Media Group

On April 29, 2016, 19 Entertainment Limited ("19 Entertainment"), a subsidiary of the CORE Media Group, is believed to have become the first English company to obtain recognition under the Cross-Border Insolvency Regulations 2006 (the "CBIRs") of its U.S. chapter 11 filing as a foreign main proceeding. The CBIRs implement the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain.

19 Entertainment obtained the recognition from the English court on the basis that its center of main interests ("COMI") is located in the United States. Under the CBIRs, a foreign main proceeding must take place in the jurisdiction in which the debtor has its COMI, and there is a rebuttable presumption that the debtor's registered office is the location of its COMI. Because 19 Entertainment's registered office is located in England, Jeremy Cousins QC, sitting as Deputy Judge of the English High Court of Justice, had to be presented with substantial evidence that the company's COMI is nevertheless in the United States. Furthermore, that COMI evidence had to be objectively ascertainable by third parties (in essence, the evidence had to constitute information that was publicly available to 19 Entertainment Limited's creditors).

The recognition of 19 Entertainment's chapter 11 case became necessary as a matter of urgency after one of its unsecured creditors, Simon Fuller, served a statutory demand for unpaid debts due and owing and threatened to place the company into winding-up proceedings in England unless those debts were paid. In England, a creditor who is undisputedly owed £750 or more can serve a statutory demand on a debtor and, if the statutory demand remains unpaid after 21 days, it constitutes *prima facie* evidence that the company is insolvent and may be wound-up (i.e., liquidated) by the court. Serving a statutory demand is therefore a tactic commonly deployed by creditors in England to extract payment from a company that wishes to avoid entering into formal insolvency proceedings.

19 Entertainment and its English subsidiaries were originally established by Mr. Fuller and are engaged in the business of owning, producing, developing, and commercially exploiting entertainment content, including the *American Idol* and *So You Think You Can Dance* television series. Although Mr. Fuller retired as CEO and director in 2010, he continued to provide services to 19 Entertainment under a consultancy agreement, and it was in respect of unpaid consultancy fees that Mr. Fuller served the statutory demand.

Once the 21 days had started to tick on the statutory demand, it was vital for the CORE Media Group, including 19 Entertainment, to file for chapter 11 protection. The chapter 11 filing took place on April 28, 2016. 19 Entertainment then applied for relief under the CBIRs to recognize its chapter 11 case as a foreign main proceeding and to obtain additional relief equivalent to the automatic stay in chapter 11, so that Mr. Fuller could not use his unpaid fees as leverage to disrupt the group's chapter 11 proceedings or place 19 Entertainment into liquidation in the UK. The discretionary relief granted by the English court pursuant to the CBIRs therefore included stays on:

- the enforcement of security over 19 Entertainment's property
- repossession of goods in 19 Entertainment's possession under a hire-purchase agreement
- instituting or continuing any legal process (including arbitrations, other legal proceedings, execution, distress, diligence and other forms of legal process) against 19 Entertainment
- appointing an administrative receiver or administrator in respect of 19 Entertainment
- presenting or proceeding with any winding-up petition in respect of 19 Entertainment

The chapter 11 protection gave 19 Entertainment and the wider CORE Media Group the breathing space necessary to implement a holistic restructuring and preserve value for creditors, rather than a piecemeal liquidation. On October 17, 2016, a chapter 11 plan of reorganization was successfully implemented, pursuant to which the CORE Media Group was significantly de-levered and its lenders took control of the equity.

EUROPE

Q&A: Arnaud Joubert of Rothschild and Lionel Spizzichino of Willkie Discuss the French Restructuring Market

Arnaud Joubert
Managing Director -
Debt Advisory & Restructuring,
Rothschild

Lionel Spizzichino
Partner, Willkie

Q: How would you describe the French restructuring market over the past 10 years?

Arnaud Joubert (AJ): Since significant French insolvency law reforms were introduced in 2005, the restructuring market has become more efficient. Indeed, before 2005, the legal framework for restructurings in France was very unpredictable: neither debtors nor creditors were willing to face the French judicial system. Most restructuring matters were dealt with on an out-of-court basis.

Since 2005 (and subsequent French insolvency law reforms in 2008, 2010, 2014 and 2015), participants in the restructuring market have enjoyed a legal framework that is now very efficient.

All of these reforms were designed to give effect to the reality of common market practice (both Lionel and

I implemented "pre-packs" before a specific law was enacted and legalized such practice).

From now on, all practitioners are willing to reach an agreement on debt restructuring as a common goal. The legal arsenal provides for a specific framework in which such negotiations have to take place on a consensual basis.

This is mainly due to the fact that debtors and shareholders have a higher degree of acceptance of distressed situations. The debtor is no longer ashamed of being subject to a restructuring situation, and this enables better anticipation of, and an earlier resolution to, the restructuring arrangement.

More broadly, the restructuring legal framework on a European level has become more standardized over the past decade as a result of the EU Insolvency Regulation no. 1346-2000. A new, recast EU Insolvency Regulation is expected to come into force on June 26, 2017, and I know that Lionel has been working on it to provide French recommendations to the European Commission.

Even though differences in insolvency laws still exist between European countries (especially Spain, Portugal, Germany and Eastern Europe), the EU Insolvency Regulation has made dealing with a distressed group more predictable.

Lionel Spizzichino (LS): I totally agree with Arnaud. Not only has French restructuring practice started to regulate itself after the first safeguard proceedings *(procédure de sauvegarde)*, but the most recent reforms also contributed to the establishment of a more effective monitoring system for the use of these new restructuring mechanisms. For example, since a 2014 ordinance (*"Ordonnance du 12 mars 2014"*) was enacted, it is now possible for any creditor that is a member of a committee (except a bondholder at this stage) to present an alternative draft safeguard plan to the one presented by the debtor itself.

Even though this option has not yet been used by a creditor, it provides creditors with strong bargaining power during negotiations.

What is essential is that whatever side (debtor vs. creditors) we advise, the idea for legal and financial advisers to work urgently and closely together is clearly understood by all practitioners, and especially by Willkie and Rothschild.

Q: Would you say that the French legal system is now efficient?

LS: The French legal system is certainly efficient, and I would underline as evidence of this, that the UK scheme of arrangement (which is very popular with UK, as well as non-UK registered companies), has, as far as I am aware, never been implemented to the benefit of a French insolvent company, even for big companies with a large and international pool of lenders. This shows the efficiency of French proceedings even though some foreign creditors remain skeptical of their efficacy.

On the contrary, many foreign debtors have chosen to use the UK scheme of arrangement to reach an agreement with their creditors because no sufficient mechanism is provided by their local laws.

By contrast, French proceedings are arguably successful without the need to resort to the scheme of arrangement.

By way of illustration, agreements were reached within a very short time frame with the creditors in proceedings such as *Vivarte* in 2014 and *Latecoère* in 2015.

AJ: I agree, and I would also add my opinion that the expedited financial safeguard procedure in France (to a greater extent than the "common" safeguard procedure) is actually the major legal innovation of the recent French insolvency law reforms. Such proceedings are more powerful than the scheme of arrangement because an agreement can often be reached faster. In addition, the costs of the safeguard procedure can be less significant than those of a UK scheme of arrangement.

However, the scheme of arrangement is still more popular than the expedited financial safeguard procedure perhaps due to the close relationship between the U.S. and the UK and the fact that most of the creditors in major restructurings are based in those two jurisdictions.

Q: What about drawbacks?

AJ: I would say that what prevents the expedited financial safeguard procedure from being successful and popular abroad is the narrow-minded opinion of French commercial courts about COMI (Center of Main Interest) shifts. A COMI shift is one mechanism by which non-UK incorporated companies can benefit from the UK scheme of arrangement.

LS: This may change with the recent creation in France of specialized insolvency courts by the so-called Macron Law of 2015 (a new law named after the French Minister of Economy, Emmanuel Macron). According to the new law, a specialized French insolvency court may have jurisdiction to deal with the insolvency proceedings of not only the French holding company but also of its affiliates.

Another downside of the French restructuring framework for foreign creditors is the inability for them to understand why creditors' committees are set up according to the type of claim instead of the degree of seniority.

During pre-insolvency proceedings (*mandat ad hoc/ conciliation*), agreements that are ascertained by courts always take into account the degree of seniority of the debts. It must be the same for the safeguard procedure or insolvency proceedings.

French law now provides that the receiver should take into account intercreditor agreements, if any, to organize the voting rights of the members of creditor committees.

LS: What could also be improved are the criteria used by commercial courts to approve a sale of business plan. Even if the French Commercial Code provides for several criteria, the only one that is truly taken into account by French judges is the number of employees transferred to the purchaser, and thus even if the business plan itself is not feasible, it can still be waved through.

This is why it should be mandatory for the bidders to produce a revised IBR. It would not only help the court to analyze the feasibility of the plan, but it would also prevent certain deals from failing within a few months of completion. Obviously, it would have a cost, so thresholds should be forecasted.

Q: What sectors are particularly affected by restructuring at the moment?

LS: Construction industries, including all production workers from the subcontractor to the commissioner. Retail is also affected due to the economic crisis and climate change. The oil and gas sector is also touched by the crisis.

AJ: Retail is obviously concerned by the crisis, but the lack of adjustment by retailers to new consumption patterns is also a key factor. With respect to oil and gas, currently the barrel price is rising but not quite enough to ensure recovery. Steel and mining activities are also affected.

More generally, I think that any company that did not manage strategic challenges, or that loses market share, will ultimately face difficulties.

Q: How are current deals different from past matters?

AJ: Past deals were linked to unhealthy balance sheets related to past LBO structures, which generated long restructuring cycles. The last one of this kind was *Vivarte* in 2014.

Today, restructurings are more corporate and more often about listed companies, which is even more complicated. Usually, negotiations are conducted among three types of entities: the debtor company, creditors and shareholders. With listed companies, the shareholders' chair is often empty. Conducting negotiations without the shareholders becomes tricky and requires experience and professional ability.

I believe we have a unique practice over such matters. As far as I know, very few corporate and investment banks have experience of this. Rothschild advised the first expedited financial safeguard procedure opened for the benefit of a listed company, *Solocal* (*Pages Jaunes*) in 2014.

LS: This is the same for Willkie with matters such as *Latécoère*.

I think we will soon face LBO restructurings again. Some of the last LBOs were structured with an oversized leverage and "covenant-lite" documentation.

Recently, we have faced new types of restructuring matters including uni-tranche loans. The advantage of dealing with a uni-tranche loan is that there is only one representative to negotiate with, but the main drawback is that this single creditor will be the only one to decide the entire content of the agreement.

Q: What about Brexit?

AJ: Brexit may trigger, in the long term, the end of the preeminence of UK law in financing contracts, as well as a slowdown in UK schemes of arrangement as a means of implementing a restructuring. Other alternatives in European countries now exist and may end up being preferred by European companies.

LS: The result of the UK's vote in favor of Brexit was unexpected and, unfortunately, something for which the market had not sufficiently prepared. From a pure restructuring market perspective, I agree with Arnaud's view that UK schemes of arrangement may become less attractive. Currently English judges often rely on the recognition provisions of the EU Judgments Regulation, which the UK is party to as a member of the EU. The UK may cease to be a party to this Regulation upon leaving the EU. To the extent this occurs and no equivalent recognition arrangements are agreed to by the UK and the EU, this may make the recognition of UK schemes of arrangement in EU Member State jurisdictions more complex and difficult. "COMI shifting," by which European corporations move their center of main interests to the UK in order to take advantage of UK insolvency regimes such as administration/company voluntary arrangements could also cease. And finally, the UK would cease to have any involvement on the progress and content of the upcoming European insolvency law reform.

Q: Please tell us a bit about Rothschild's Restructuring Practice.

AJ: The Rothschild restructuring practice was established 15-20 years ago in London and Paris.

Our first major deal in Paris, which really kicked off the franchise, was the restructuring of Vivendi in 2002. This deal was a triggering event in the development of our restructuring practice, as our ability to independently advise on financing issues the same clients that we advise on mergers and acquisitions became fully recognized.

Between 2001 and 2007, our restructuring clients were mainly corporations, generally large and listed.

After 2009 and until 2012/2013, as the leveraged finance bubble burst, most of our clients were in the private equity space. From that period on, we also developed a unique franchise in restructuring high-yield bonds. (Rothschild has advised on almost all French bond restructurings since 2009.)

Our restructuring practice is an inherent part of our Financing Advisory team, which develops independent advice to our clients in relation to their financing liabilities. The scope of our practice ranges from acquisition finance advisory to debt advisory, rating advisory and restructuring, as well as equity advisory with IPO advisory and more generally capital markets (debt and equity) advisory.

Our team represents by far the largest restructuring team in EMEA with offices in London, Paris, Frankfurt, Milan and Madrid. The Paris office restructuring franchise is led by Vincent Danjoux and myself.

We are consistently ranked no. 1 by volume and value of transactions in EMEA by the only independent restructuring league tables, prepared by *Thomson Reuters*.

Rothschild's restructuring team in EMEA has closed approximately 30 restructuring transactions each year over the past years.

In 2016, Rothschild was nominated "Best Bank for Restructuring" in the "Leaders de la Finance" Awards for the fifth year in a row.

Q: Please tell us a bit about Willkie's Restructuring Practice in Paris.

LS: The Parisian restructuring practice of Willkie is one of the biggest teams in France, co-headed by Alexandra Bigot and myself, and includes a special European counsel, Vincent Pellier, and four associates.

Often ranked among the best restructuring teams in France, Willkie is highly renowned. Indeed, we are ranked "Band One" in *Chambers*. French Magazine *Décideurs* ranked Willkie's restructuring practice as *"incontournable"* (unrivalled). The leading French magazine *Option Droit & Affaires* ranked the team as five stars in the field of restructuring. *IFLR* and *Legal 500* recognized our restructuring practice as a Tier One Firm. *Legal 500* stated that our *"great practice is routinely involved in the market's most high-profile cases on behalf of sponsors and investors."*

Our practice is recognized worldwide. We often work with the firm's other offices located in the United States, the UK, Italy, Germany and Belgium in order to satisfy our clients' needs.

Our team is known for its ability to quickly assess the restructuring challenges and issues faced by distressed companies and their creditors.

We have extensive experience in business reorganization and restructuring, and advising debtors, shareholders, hedge funds and investors, whether in debt or equity (loan-to-own strategy, distressed M&A, asset deals). The team has worked on some of the most significant French loan-to-own cases such as: *SGD, SAUR, Frans Bonhomme, Vivarte, Latecoere,* (representing Oaktree, Attestor, Centrebridge, Angelo Gordon, Golden Tree, Apollo and Monarch) as well as significant insolvency proceedings including: *Kem One, Fly, Petroplus, Coeur Defense, SNCM, Gérard Darel* and *Cauval*).

As an alternative to initiating formal insolvency proceedings, we also assist large groups in transferring under-performing subsidiaries as well as advise bidders when they are acquiring assets or shares of companies facing difficulties, either under formal insolvency or out-of-court proceedings.

Q: Why should restructuring clients choose to be advised by Rothschild and Willkie rather than by other firms?

LS: Willkie is among the very few firms to offer a combination of (i) our many years of experience in the restructuring business, (ii) our close relationship with the various professionals involved in this field in France – which is key – and (iii) the interaction between the various practices of Willkie in France and abroad.

In addition, certain team members have a finance background, enabling them to assess more accurately the risks and challenges faced by distressed businesses, while others are seasoned litigators with a vast knowledge of judicial mechanisms.

AJ: This is quite similar to the kind of assistance that our team at Rothschild can provide. Our debt and restructuring specialists cover all global markets and are experienced in assisting every type of client. We advise on an unrivalled volume of transactions in our core markets, greater than any single financing counterparty. Our track record includes many of the world's most complex, demanding and transformational restructurings (for example (and these are just in France): *Theolia, Solocal, Novasep, Belvédère, Orco, Latécoère, Frans Bonhomme, Vivarte)*.

But above all, Rothschild's restructuring practice works closely with our highly active M&A advisers, facilitating the transactions they work on and leveraging their sector insight. This scale and expertise give us unique access to the performance and strategy of the full spectrum of capital providers.

If enacted, these proposed reforms would represent the first significant change to the UK insolvency regime in over a decade. Some of them are radical in their novelty.

EUROPE

Shaking Things Up: UK Government's Proposals for New Corporate Insolvency Toolkit

OUTLINE OF THE REFORMS PROPOSED BY THE UK GOVERNMENT

On May 25, 2016, the Insolvency Service published a consultation on options for reform of the UK corporate insolvency framework. The four main proposals for reform put forward by the Government are to:

- create a new, optional moratorium procedure in restructurings
- develop a new cram-down mechanism to force dissenting creditors to accept a restructuring plan as well as the ability to bind secured creditors to a plan approved by a majority of creditors and by the court
- develop the availability of rescue financing by awarding it super-priority status in a restructuring or insolvency process
- expand the existing range of contracts deemed essential to businesses facing financial difficulties by limiting the ability of key suppliers to terminate their contracts (on "ipso facto" grounds) in an insolvency scenario

If enacted, these proposed reforms would represent the first significant change to the UK insolvency regime in over a decade. Some of them are radical in their novelty. The stated intention of the Government's consultation is to "enable more corporate rescues of viable businesses and ensure that the [UK] insolvency regime delivers the best outcomes." The deadline for responses to the consultation was on July 6, 2016; the Insolvency Service recently published a summary of the responses and recommendations received.

This article provides a summary of the key features of each of the four proposals, as well as the responses to them received to date.

A NEW PRE-INSOLVENCY MORATORIUM PROCEDURE

The first proposal is a new restructuring moratorium to give companies breathing space by staying certain creditor actions while stakeholders assess their options and devise a rescue plan. The essential features of this new moratorium would be as follows:

- Entry into the standstill procedure would be optional at the discretion of the company's directors, acting as a gateway for the company's entry into a scheme of arrangement, administration, company voluntary arrangement (CVA), or a contractual compromise/consensual workout with creditors.
- The moratorium would prevent enforcement of security and the appointment of an administrator. Arrears owed to creditors would be frozen, but the debtor would be obliged to meet ongoing trading costs.
- The moratorium would take effect through the filing of papers at court. No court hearing and no creditor consent would be required. Creditors (secured and unsecured) would have the right to apply to court within 28 days of the filing to challenge it.
- The moratorium would last three months, subject to agreement by 100% of secured creditors plus over 50% of unsecured creditors to extend it. It would end sooner if the company successfully reached an informal agreement with creditors or entered formal insolvency proceedings.
- The moratorium would be overseen by a supervisor (an insolvency practitioner/solicitor/accountant) proposed by the directors but directors would remain in control of the company.
- Not all companies would be eligible to take advantage of the new moratorium; only those which are on the cusp of financial difficulties or insolvent could use it. Banks, insurance companies/certain other financial companies would not be eligible, but otherwise the new moratorium would be available to all debtors regardless of size.
- Costs and debts incurred in running the business during the moratorium period, including the supervisor's costs, would be paid in priority to creditors as an expense of the process (similar to the treatment of professional fees/expenses in an administration) and would be characterised as a first charge in the event of the company's entering a formal insolvency process.

RESPONSES TO THE PROPOSAL

As part of the responses received from a range of interested organisations and individuals, over two thirds of respondents agreed in principle that the introduction of a pre-insolvency temporary moratorium would facilitate business rescue. However, the vast majority of respondents disagreed with the proposed length, extension and cessation mechanics of the moratorium, with most responses taking the view that the moratorium period should be shorter than three months. Several alternatives have been put forward, such as a 21-day period (subject to extension), or a variable period depending on the size of the company. Most respondents disagreed with a requirement for 100% secured creditor consent to an extension and were in favor of a majority consent requirement (for example, 75% in value and over 50% in number).

In practice, if the proposals came into effect, many companies seeking a restructure would continue (as now) to negotiate a consensual "standstill" agreement with creditors and to consult with significant creditors in advance of any application for a moratorium.

A NEW 12-MONTH RESTRUCTURING PROCEDURE AND CRAM-DOWN MECHANISM

A statutory, 12-month restructuring procedure has been proposed, to provide companies with the ability to bind secured creditors and cram down any dissenting classes of creditors. As with the proposed new moratorium, the option to introduce a restructuring plan would be available to all companies, regardless of size, other than banks, insurance companies and certain other financial companies. Key features of the restructuring plan would include:

- The company dividing its creditors into separate classes to vote on the plan (not unlike in a scheme of arrangement procedure), based on the similarity of creditors' rights against the company or their treatment under the plan.
- The company would then apply to court for approval of the class composition. Provided the court agrees with the class constituencies, creditors would then vote on the plan by class, with over 50% in number and 75% in value of all creditors of each class required to vote in favor to approve the plan.
- As with a scheme, the company would then apply for a second court hearing to confirm the plan but also, where appropriate, to cram down and impose the plan on any dissenting creditor classes. The court would only have power to cram down creditors if it was satisfied that:
  - at least 75% in value and more than 50% of each remaining class of creditors have agreed to the restructuring plan; and
  - the plan is in the best interests of creditors as a whole, in that it recognises/evidences that all creditors would be in no worse a position than they would be in a liquidation and junior creditors do not receive a distribution in excess of that available to more senior creditors.

If approved by the court, the restructuring plan would be binding on all creditors.

The proposals envisage that this new restructuring procedure could either form a new type of plan within the existing CVA regime, or it would be a separate process available to debtors.

RESPONSES TO THE PROPOSAL

The responses received to date supported a new cram-down mechanism and restructuring plan procedure, as well as the proposed voting thresholds for approval (which mirror those applicable in schemes of arrangement). The chief concerns which have been raised relate to the need to guard against any unnecessary infringement of junior creditor rights and whether the plan should operate as a standalone procedure (the favored approach amongst respondents), as opposed to being bolted onto an existing process such as a CVA. Concerns have also been voiced around the most prudent valuation test to determine the fairness of a plan being crammed down on dissenting creditors, with the current proposal favoring a liquidation valuation as a minimum requirement. The Government has promised to consider these issues further.

SUPER-PRIORITY RESCUE FINANCING

The review sets out some possible options for lending to distressed companies:

- Loans provided to companies in administration proceedings would enjoy super-priority status, ranking ahead of other administration expenses in the insolvency waterfall.
- The Government is particularly concerned that negative pledge clauses discourage rescue finance and has proposed a mechanism for such clauses to be overridden in circumstances where a secured lender unreasonably refuses to consent to new security which would not (objectively speaking) adversely affect it.
- Granting security to new lenders over property of the company which is subject to existing security, with the new security ranking as either a subordinate charge, or where the existing charge holder does not object or if the court permits, a first or equal first charge. Where the secured assets are insufficient to discharge the company's debts, the shortfall would rank above preferential creditors and floating charge holders.

RESPONSES TO THE ABOVE PROPOSALS

The majority of responses received by the Government disagree with its proposals for rescue financing. In the view of several respondents, it is misleading to suggest that a lack of debtor finance is inimical to the rescue of businesses and there is little market evidence to suggest that there is a shortage of willing lenders to provide funding to distressed companies. A concern has also been raised that borrowing costs may increase if lenders perceive there to be a risk of their securities being compromised by a rescue lender being awarded priority creditor status. Though it remains a commendable goal, if such financing comes at the expense of altering the existing creditor waterfall (and therefore creditor recoveries) it will be difficult for the Government to strike the right balance between these competing interests.

EXPANDING THE RANGE OF CONTRACTS ESSENTIAL TO A DISTRESSED COMPANY'S BUSINESS

Under existing UK insolvency law, certain suppliers of essential goods and services, such as IT services, can be required to continue supplying a company notwithstanding its insolvency. The Government is proposing to widen the scope of those contracts that can be deemed "essential" by enabling a distressed business to file a court application to prevent the use of "ipso facto" insolvency termination clauses in certain designated contracts. Responsibility for deciding which contracts are essential would lie with the officeholder (or the company if used in conjunction with the proposed new moratorium, summarised above).

The requirement for a relevant supplier to continue supplying its services to the company would remain in place (provided the company continues to pay for those supplies) until a restructuring plan was agreed upon or, if the company entered into a formal insolvency process, for as long as the officeholder deemed necessary. To provide some protection for suppliers, a contractor would have the right to challenge its designation as an essential supplier by applying to court.

RESPONSES TO THE PROPOSAL

Although ensuring the continuity of essential contract supplies to distressed businesses is likely to be the least controversial of the Government's proposals, opinion has been split amongst respondents over the preferred criteria for determining whether a contract is essential or not. Some have suggested that the proposal as currently drafted is too debtor-friendly whilst others question how such a provision would be enforceable on international suppliers. As a result of these concerns, the Government has undertaken to refine this proposal.

COMMENT

Despite the recent case law, which has helped to bolster the UK scheme of arrangement as an effective restructuring tool, many of the UK's insolvency procedures have remained generally unchanged since 2004. Other European jurisdictions (including France, Germany and Italy) have recently reformed, or are in the process of updating, their insolvency regimes and the Government's reform proposals should therefore be welcomed for their potential to maintain the UK's standing as a leading jurisdiction for creditors and debtors alike.

The introduction of a cram-down restructuring plan for the UK would represent a radical new development in English law, bringing it closer to resembling the restructuring tools available in the United States under chapter 11 of the U.S. Bankruptcy Code. However, two important aspects of the Government's proposals remain unclear in terms of their implementation in practice:

- First, the Government has yet to make clear how the new restructuring plan would slot into or sit alongside existing UK insolvency procedures.
- Secondly, unlike the United States, the UK does not have a sophisticated or tried-and-tested method developed by the courts for assessing competing valuations when determining the fairness of a plan (which is particularly important when junior creditors raise objections). There are a mere handful of English cases on this topic and the courts may therefore look to the content of any new legislation for detailed guidance.

To the extent the moratorium proposal is implemented, it will be important for the Government to ensure that it is harmonized with existing UK legislation concerning the enforcement of security. For example, the Financial Collateral Arrangements (No. 2) Regulations 2003 currently allow a lender which has taken security over a company's shares to enforce that security notwithstanding the moratorium that would otherwise be in place on that company's entry into administration proceedings. Any new legislation would need to take this into account as well as any other enforcement "loopholes" which would need to sit alongside, but which could also impede the effectiveness of, the new moratorium.

A final point to bear in mind on the proposals is a recurring concern raised in a number of responses received by the Government: court overload. Many of the reforms propose introducing new court applications for debtors and creditors, such as opposing essential supplier status and the right to challenge a debtor's application for a moratorium. At a time when UK judges are already voicing concerns over court workloads and funding, it is questionable whether the introduction of additional inroads into the court system will be viable.

The next step will be for the Government to consider in detail the responses it has received and to consult further with key stakeholders, with a view to eventually setting out final proposals for possible inclusion in primary legislation.

NORTH AMERICA

AHMSA Successfully Completes Protracted Cross-Border Restructuring

Altos Hornos de México, S.A.B. de C.V. ("AHMSA"), one of Mexico's largest integrated steel producers, manufactures and distributes a variety of steel, steam coal, plate and tin products. The company is headquartered in Monclova, Coahuila, Mexico and owns valuable operating and financial assets situated throughout Mexico and the United States.

In the late 1990s, AHMSA suffered financial distress primarily due to a decline in steel prices, and it filed for protection under the SP Law on May 24, 1999 (the "SP Proceeding"). AHMSA's restructuring, which entailed $1.7 billion in unsecured debt (principally financial debt), has been one of the largest and most complicated in Mexican history.

On May 16, 2016, AHMSA received approval of its reorganization plan (the "SP Plan") from the Mexican Court (the "SP Court") overseeing its restructuring. AHMSA subsequently filed for protection under chapter 15 of the United States Bankruptcy Code (the "Code"). On September 30, 2016, the U.S. Bankruptcy Court for the District of Delaware (the "U.S. Court") entered an order (a) recognizing AHMSA's Mexican reorganization case as a "foreign main proceeding," (b) enforcing the terms of the SP Plan and the SP Court's order approving the SP Plan (the "Lifting Order") in the United States, and (c) granting related relief.

The U.S. Court's "recognition order" is the final chapter in AHMSA's extraordinary 17-year restructuring. Willkie acted as corporate and restructuring counsel to AHMSA in both its Mexican and chapter 15 proceedings.

OVERVIEW OF AHMSA'S RESTRUCTURING PROCESS

As an initial matter, a significant amount of AHMSA's debt was held by creditors that are organized or domiciled in, or a citizen of, the United States under U.S.-issued indentures and syndicated loans, that, pursuant to the SP Law, are not entitled to post-petition interest during the SP Proceeding. As a result of this dynamic, while not required to do so under the SP Law, Willkie recommended actions to ensure that U.S. creditors received adequate information about AHMSA's restructuring so that those creditors could participate in such a process.

Specifically, Willkie assisted in the preparation of an English language disclosure statement, which provided all required information about the SP Plan, AHMSA's business, notice of significant dates and deadlines in the SP Proceeding, and a plan support agreement AHMSA reached with major creditor constituents who, among other things, agreed to support the SP Plan (the "Conditional Agreement"). AHMSA, at Willkie's recommendation, convinced the SP Court to modify standard procedures under the SP Law to facilitate U.S.-based creditors' participation in the SP Proceeding, such as implementing special procedures enabling beneficial holders of debt to vote on the SP Plan and to make certain equity elections and by enhancing creditors' procedural and substantive due process protections. In addition, AHMSA caused the parties to the Conditional Agreement to fully disclose such agreement to the SP Court and to creditors generally. These actions were taken in order to replicate a process that one would expect in a U.S.-based chapter 11 restructuring process.

The 17-year duration of the SP Proceeding, while not unique, only added to the complexity of the chapter 15 case. One of the primary reasons for the lengthy case was that over 900 creditors sought to be "recognized creditors," requiring substantial litigation over numerous claims. Under the SP Law, all claims must be fully resolved before a plan can be proposed. Additionally, under the SP Law, if a debtor company proposes a plan, but fails to achieve the requisite voting threshold, the reorganization case is immediately converted to a liquidation. Accordingly, AHMSA carefully negotiated with its creditors over a long period of time in order to ensure that the SP Plan would be feasible and well supported by its multilateral diverse creditor body. Additionally, AHMSA's restructuring efforts were often met with significant opposition. For example, creditors filed numerous unsuccessful motions to convert the case to a liquidation.

Furthermore, the SP Law was replaced by the *Ley de Concurso Mercantiles* (the "Concurso") in 2000, but reorganization cases commenced under the SP Law were continued under the SP Law notwithstanding the enactment of the Concurso because retroactive application of a law is forbidden by Mexico's Federal Constitution. This required Willkie (along with Mexican counsel to AHMSA) to carefully navigate the SP Proceeding so that it complied with all requirements of the repealed SP Law, while implementing measures to promote transparency and active participation of all creditors so that the SP Proceeding and SP Plan would earn recognition in the U.S. bankruptcy court.

For example, at Willkie's recommendation, AHMSA requested a "supplemental order" from the SP Court appointing the SP Court-appointed trustee as a "foreign representative" to commence the chapter 15 proceeding in the United States, and also worked with the trustee to ensure that he understood the requirements of being a foreign representative. AHMSA also provided substantial information to the SP Court to properly explain the purpose of a chapter 15 process in the United States and to ensure that the SP Court and the U.S. Court could work together to effectuate the SP Plan and the Lifting Order in the United States. Lastly, in order to familiarize the U.S. Court with the intricacies of the SP Law, an expert declaration was submitted with the more traditional "first-day" pleadings.[1]

The primary terms of AHMSA's SP Plan include: (a) AHMSA's paying all its "recognized" claims in full cash within three years pursuant to non-interest bearing payment rights distributed to creditors (the "SP Payment

[1] The expert declaration is viewable at https://cases.primeclerk.com/ahmsa15/Home-DownloadPDF?id1=NDE5MzE2&id2=0.

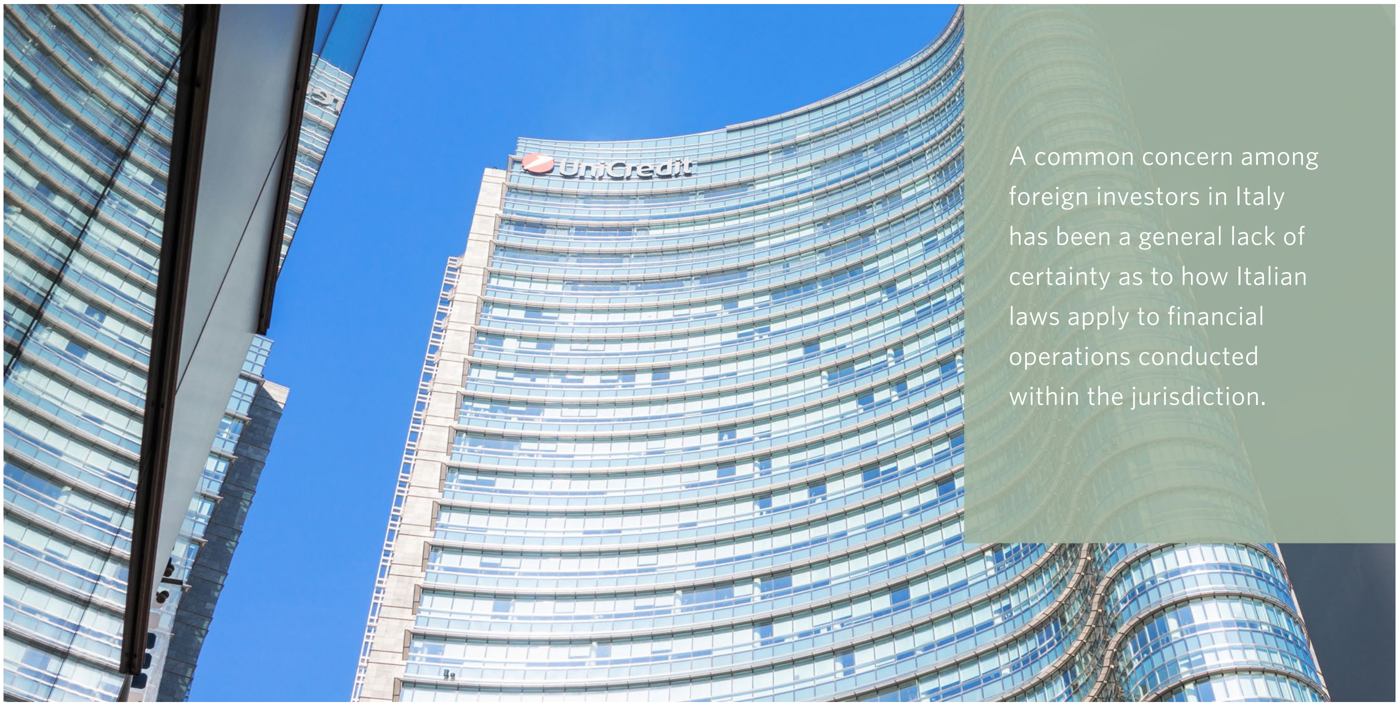
Rights"), (b) each creditor entitled to receive the SP Payment Rights receiving the option to exchange 69.15% of its SP Payment Rights for stock in reorganized AHMSA, and (c) the SP Court's issuing an injunction preventing creditors from attempting to collect on their claims unless AHMSA failed to make the cash payments under the SP Plan.

KEY OBSERVATIONS

Despite significant differences between the SP Law and chapter 11 of the Code, the U.S. Court granted recognition of the SP Proceeding as a "foreign main proceeding pursuant to chapter 15." Major differences between the SP Law and chapter 11 included: (a) under the SP Law, no interest is paid on claims where the debtor is solvent; (b) the SP Law does not have its version of the "absolute priority rule"; equity is allowed to retain an interest even though unsecured creditors may not be paid in full; and (c) the valuation of the debtor company under the SP Law is to ensure that it is likely to be able to make payments under the plan (no formal enterprise valuation is conducted).

Pursuant to chapter 15, orders from foreign courts can be approved even if the foreign law differs materially from chapter 11, so long as approval of such foreign orders would not be "manifestly contrary to the public policy of the United States." An exacting comparative law analysis is not required or warranted. AHMSA's restructuring is another instance of the "public policy" exception of chapter 15 being construed very narrowly; even when there are material differences, a foreign court's order may be recognized as long as it furthers the objectives of international cooperation and assistance and does not contravene the core principles of U.S. restructuring law.

In order to help U.S. bankruptcy courts gain comfort with a foreign restructuring law, counsel for foreign debtors would be well served to make the foreign process as transparent, streamlined and equitable as possible, including by taking necessary steps to disseminate adequate information to and to otherwise facilitate participation by all creditors.



EUROPE

The Italian Financial Sector: Recent Regulatory Developments

The Italian Government and Parliament have recently taken further steps as part of their commitment to pass new laws aimed at simplifying and modernizing the general framework of the Italian legal system, particularly in the financial sector, in order to provide greater efficiency with respect to investments made by banks and investment funds.

A common concern among foreign investors in Italy has been a general lack of certainty as to how Italian laws apply to financial operations conducted within the jurisdiction.

Another serious problem has been the lack of certainty and understanding with regard to the legal mechanism for the enforcement of receivables, a problem which is, in large part, due to the complexity of Italian civil procedure and the large amount of litigation resulting from it.

As a result, enforcing a debt in Italy can turn out to be both an expensive and time-consuming activity, discouraging many investments from being made in the jurisdiction.

One of the most striking reforms to be instituted by the Italian legislature in response to these and other concerns is the Non-Performing Loans Securitization Guarantee (hereafter, the "Guarantee", or "GACS" – an Italian acronym that stands for "Garanzia Cartolarizzazione Sofferenze"), which was enacted by Decree – Law on February 14, 2016, nr. 18 (hereinafter, the "Decree"), as modified on April 8, 2016.

In Italy, the use of non-performing loans ("NPLs") has increased dramatically within the last few years, due principally to two factors: (i) the long-lasting economic crisis starting in 2008, the effects of which are ongoing; and (ii) the central role played by banks in the Italian financial system. According to the latest available data, NPLs in Italy are currently equal to more than €200 billion.[1]

1 See article *NPL, al via la cartolarizzazione "garantita"*, in "Il Sole 24 – Ore", February 11, 2016.

The purpose of the Decree is to support the development of the Italian market of NPLs by: (i) encouraging the access to market of medium-long period investors; and (ii) reducing the price spread between sellers and buyers of NPLs.

Pursuant to paragraph 3 of the Decree, the Ministry of Finance is entitled, for a period of 18 months from the date the Decree is effective,[2] to grant the State a guarantee for securities issued under the previous securitization law, upon the assignment by Italian banks of NPL portfolios to securitization vehicles, which will issue different tranches of notes in return.

THE STRUCTURE OF THE SECURITIZATION:

Pursuant to paragraph 4 of the Decree:

(a) an NPL portfolio is assigned to a securitization vehicle for a value not lower than its net book value;

(b) at least two kinds of securities must be issued: junior securities and senior securities;

(c) junior securities (being the most risky) cannot be reimbursed for their principal amount, interest or any other form of return until the principal of the more senior classes of security has been reimbursed in full;

(d) mezzanine securities can also be issued with regard to the payment of interest. Mezzanine securities:

   (i) are postponed to the payment of interest on senior securities; and

   (ii) rank senior to the repayment of principal on senior securities; and

   (iii) can also provide for the entry into derivatives' contracts (typically, interest rate swaps) to hedge interest rate risk.

THE GUARANTEE

The Italian government will guarantee only senior tranches, and only after the securities therein have received a credit rating of investment grade or higher from at least one rating agency recognized by the European Central Bank on a stand-alone basis.

The Italian banks will be required to appoint external independent servicers to collect the NPL portfolios and carry out loan recovery, to reduce any possible conflicts of interest.

Pursuant to paragraph 8 of the Decree, the state guarantee shall be effective only when a bank assigns, for valuable consideration, at least 50% +1 of the junior securities and, in any case, whenever it assigns a number of junior securities (and mezzanine securities, if any) that allow the securitized loans to be written off and cancelled on the bank's books.

The state guarantee is not mandatory and may be requested by banks in the context of NPL securitizations. It is granted for a consideration at market value and the EU Commission has acknowledged that the Decree is in compliance with State Aids rules.

The Republic of Italy, public bodies and companies directly or indirectly controlled by public bodies cannot purchase junior or mezzanine securities.

The fee for the GACS is payable to the Italian Treasury and calculated based on a basket of credit default swaps ("CDS") issued by Italian companies whose underlying debt instrument is rated by a credit rating agency as being equal to the rating of the senior securities to be guaranteed. The GACS price increases depending on the maturity of the underlying securities.

Pursuant to paragraph 11 of the Decree, in case of default, or in case of part payment, the holder of the GACS is entitled to the enforcement of the Guarantee within nine months after the maturity of the senior security.

Where there is a default of payment continuing for 60 days from maturity of the senior securities, the security holders, acting by their Agent, send the assignee company a formal request for payment.

[2] This term can be extended by a period of no more than 18 additional months.

After 30 days, and within six months from the receipt of the request of payment, if the assignee company fails to make payment, the Agent is entitled to the enforcement of the Guarantee by filing a petition with the Italian Minister of Finance.

Within 30 days from the date of filing of this petition, the Minister of Finance pays the due amount to the senior securities holders, without any further fees or costs.

In return for making this payment, the Minister of Finance acquires the right of subrogation and is entitled to claim any amount paid, including accrued interest and legal costs.

The reforms enacted by the Decree have been recently clarified by a further decree issued by the Ministry of Finance on August 3, 2016 (the "MF Decree").

In summary, the MF Decree has made the following clarifications:

(1) Consap S.p.A., a government-owned entity, is the only body entitled to be an independent servicer responsible for collecting the NPL portfolios;

(2) the securities must be classified as NPL before their assignment to the special securitization vehicle;

(3) the value of the assigned NPL at the moment of its transfer is to be calculated on the basis of the legal effect of the assignment. This means that every payment received from the moment the credits are valued to the time at which they are assigned is owed to the securitization vehicle;

(4) for the purposes of the rating process, senior securities will rank senior to "any other class of securities, junior and mezzanine" and the State guarantee can be requested with regard to one or more senior tranches;

(5) a strict order of seniority of payments is provided for, to ensure that the senior securities are protected/respected and, in turn, to protect the Italian Republic, which issues the State guarantee;

(6) in the case of a securitization carried out by more than one bank, all the assignors can jointly apply for the State guarantee;

(7) the State guarantee is null and void in the following cases:

    (a) in the case of a downgrade of the senior securities; or

    (b) if any securities are issued in breach of any provisions of the Decree and/or of the MF Decree.

In late August 2016, the first GACS under the Decree was successfully utilized by the Banca Popolare di Bari with respect to (i) the assignment of a €500 million NPLs and (ii) the issue of a senior tranche of securities with a BBB rating (investment grade), granted by a GACS.

The reforms introduced by the Decree have been positively received by national and international markets and have already facilitated the attraction of many investors.

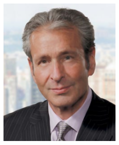
In short, the GACS allows: (i) the Italian banks to clean their books by means of a more efficient and quick credit risk management; and (ii) investors to rely upon securities guaranteed by the Republic of Italy.

Now that Banca Popolare di Bari has led the way with the first GACS, it is predicted that many other GACS could very soon be requested by other major Italian banks, such as Banca Monte dei Paschi di Siena.

In light of the above, it is reasonable to predict that a higher level of NPL securitizations is going to be realized over the next few months in the Italian markets, not least because of the huge amount of NPL still sitting on the books of the Italian banks.

Many opportunities are therefore available to foreign investors, who can now purchase securities relying on a clear and certain procedure enabling the recovery of their receivables, and without the risk of becoming embroiled in costly and uncertain litigation in the Italian courts.

Contacts



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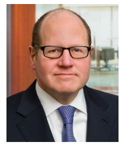

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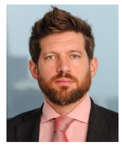

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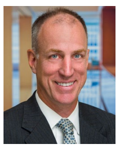

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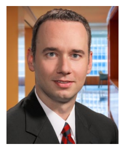

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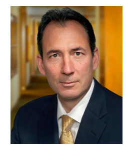

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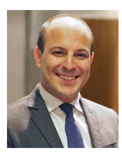

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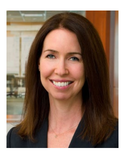

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If you have any questions regarding this newsletter, please contact any of the above attorneys or the Willkie attorney with whom you regularly work.

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